UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN SOCIOLOGICAL ASSOCIATION; AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; AMERICAN-ARAB ANTIDISCRIMINATION COMMITTEE; BOSTON COALITION FOR PALESTINIAN RIGHTS; and ADAM HABIB, Plaintiffs, v. MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Security; CONDOLEEZZA RICE, in her official capacity as Secretary of State, Defendants.	Case No. 07-11796 (GAO) **DEFENDANTS' MEMORANDUM OF REASONS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT**

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AMERICAN SOCIOLOGICAL ASSOCIATION; AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; AMERICAN-ARAB ANTIDISCRIMINATION COMMITTEE; BOSTON COALITION FOR PALESTINIAN RIGHTS; and ADAM HABIB, Plaintiffs, v. MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Security; CONDOLEEZZA RICE, in her official capacity as Secretary of State, Defendants.	Case No. 07-11796 (GAO) **Oral Argument Requested**

DEFENDANTS' MEMORANDUM OF REASONS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT

INTRODUCTION

After September 11, 2001, provisions enacted as part of the USA PATRIOT Act (2001) and the REAL ID Act (2005) substantially expanded terrorism-related definitions found in section 212(a)(3)(B) of the Immigration and Nationality Act (INA), thereby broadening the bases on which visa applicants may be found inadmissible to the United States. When Adam Habib, a resident and national of South Africa, applied for a visa in May 2007, a Consular Officer of the Department of State found Mr. Habib inadmissible under these provisions.

Plaintiffs, representing various groups in the United States, and Mr. Habib as a "symbolic" plaintiff,[1] challenge the Consular Officer's denial of a nonimmigrant visa based on the Consular Officer's determination that Mr. Habib was inadmissible under section 212(a)(3)(B) of the INA. *See* INA § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I). Plaintiffs also challenge the Department of State's determination not to recommend a waiver of Mr. Habib's inadmissibility. *See* INA § 212(d)(3)(A)(i), 8 U.S.C. § 1182(d)(3)(A)(i). Plaintiffs seek to enjoin Defendants from denying a visa to Mr. Habib on the theory that his exclusion violates the Administrative Procedure Act and the First Amendment of the Constitution.

For the reasons expressed below, this case should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim. The well-established doctrine of consular non-reviewability precludes judicial review of visa denial decisions, including the discretionary decision to recommend or decline to recommend a waiver. Even in the context of a First Amendment claim by U.S. citizens, judicial review of a visa denial generally is not available. This is particularly so where the Government has offered a facially legitimate and bona fide reason for the visa denial which, in this case, is Defendants' reasonable belief in Mr. Habib's engagement in terrorist activity within the meaning of INA section (a)(3)(B). Moreover, Defendants have no obligation to provide a justification for declining to recommend a waiver since waiver decisions are discretionary and no standard exists for judicial review of such decisions.

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[1] As an unadmitted, nonresident alien, Mr. Habib has neither constitutional right of entry to the United States nor standing to challenge administratively or judicially a consular officer's decision denying him a visa. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *Adams v. Baker*, 909 F.2d 643, 647 n.3 (1st Cir. 1990).

BACKGROUND AND FACTS

I. Consular Adjudication of Visa Applications

Generally, aliens seeking to visit the United States for non-immigration purposes must apply for a nonimmigrant visa at a U.S. embassy or consulate.[2] *See* INA § 212(a)(7)(B)(i)(II), 8 U.S.C. § 1182(a)(7)(B)(i)(II); 22 C.F.R. § 41.101. Visa applicants bear the burden of establishing they are eligible to receive a visa or that they are admissible under the INA. *See* INA § 291, 8 U.S.C. § 1361. When a visa application has been properly completed and executed before a Consular Officer, State Department regulations place on the Consular Officer the duty to either issue or refuse the visa. *See* 22 C.F.R. § 42.81(a).

A visa refusal decision must be based on a ground specifically set out in law or implementing regulations. 22 C.F.R. § 40.6. Grounds for proper refusal of a nonimmigrant visa include the following: INA § 212(a), 8 U.S.C. § 1182(a); INA § 221(g), 8 U.S.C. § 1201(g); INA § 214(b), 8 U.S.C. § 1184(b); and other applicable laws. *See* 22 C.F.R. §§ 41.121(a), 42.81(a).

INA section 212(a)(3)(B) sets out the terrorism-related grounds for inadmissibility. *See* INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B). If a nonimmigrant visa applicant is determined inadmissible under the terrorism-related provisions of INA section 212(a)(3)(B), then the Secretary of State or the Consular Officer, at his discretion, may request that the Secretary of Homeland Security exercise his discretion and grant a waiver of that inadmissibility. If the waiver issues, then the applicant may be issued a visa. *See* INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A).

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[2] This requirement may be waived in the context of a visa application of a national from a country participating in the visa waiver program. *See* INA § 217, 8 U.S.C. § 1187.

II. The Doctrine of Consular Nonreviewability

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[.]" *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). Because decisions in this area implicate fundamental political interests, including the Nation's conduct of its foreign policy, the authority to make such policy decisions is exclusively committed to the political branches, which enjoy extraordinarily wide discretion in its exercise. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens . . . are peculiarly concerned with the political conduct of government[;] that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded . . . as any aspect of our government."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) ("the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"). Indeed, "over no conceivable subject is the legislative power of Congress more complete" than the admission of aliens. *Mandel*, 408 U.S. at 766 (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

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. United States 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) (finding that, "[t]he action of the executive officer [to admit or exclude an alien] is final and conclusive . . . [I]t is not within the province of any court,

unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien"). 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, e.g., Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158-60 (D.C. Cir. 1999); *Chi Doan v. INS*, 160 F.3d 508, 509 (8th Cir. 1998); *Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987) (per curiam); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986); *Rivera de Gomez v. Kissinger*, 534 F.2d 518, 519 (2d Cir. 1976) (per curiam); *Romero v. Consulate of the United States, Barranquilla, Colombia*, 860 F. Supp. 319, 322-24 (E.D. Va. 1994).

The doctrine of consular nonreviewability has withstood efforts to distinguish or overcome it on many grounds, including allegations that a consular visa decision was erroneous, contrary to law, or arbitrary and capricious. *See Centeno*, 817 F.2d at 1213 (doctrine bars judicial review when claim based on procedural irregularities); *Burrafato*, 523 F.2d at 556 (doctrine bars judicial review when claim based on State Department's failure to follow its own regulations); *Doan v. Ins,* 160 F.3d 508, 509 (8th Cir. 1998) (finding no judicial review for decisions of an INS District Director who the court determined to be the "functional equivalent" of a consular official, because he is an Executive Branch official, located outside the United States, deciding questions of admissibility brought before him by aliens who are also located outside the United States); *Romero*, 860 F. Supp. at 322 (doctrine "is essentially without exception," even when visa denial rests on allegedly erroneous information, or was unauthorized by statute); *Grullon v. Kissinger*, 417 F. Supp. 337, 338-40 (E.D.N.Y. 1976) (doctrine bars judicial review of claim that consular decision was contrary to law), *aff'd* 559 F.2d 1203 (2d Cir.

1977).

Recognizing the plenary power of the Government's political departments over alien admissions – and the resulting doctrine of consular nonreviewability applicable to consular decisions concerning alien admissions – the Supreme Court has declined to review Consular Officer decisions denying visas. *Mandel*, 408 U.S. at 765-67 (emphasizing deference given to congressional policies regarding alien admission and exclusion; the role of the Executive Branch in enforcing these policies without judicial intervention; and that judicial review of such enforcement determinations is "narrow" and implicated when First Amendment rights of U.S. citizens are affected by visa waiver determinations of the Attorney General, rather than visa determinations by Consular Officers); *United States ex rel. Knauff*, 338 U.S. 537; *Rivera de Gomez*, 534 F.2d 518; *Centeno*, 817 F.2d 1212; *U.S. ex rel. Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir. 1929); *see also Saavedra Bruno*, 197 F.3d at 1163 (recognizing *Mandel* and the doctrine of consular nonreviewability as precluding judicial review of claims based on visa denials).

III. Statement of Facts

Adam Habib is a national of South Africa who prior to 2006 had traveled to the United States on a B-1/B-2 tourist/business visitor visa. Amended Compl. at ¶¶ 2, 29. Prior to unsuccessfully seeking admission to the United States at John F. Kennedy Airport in New York on October 21, 2006, Mr. Habib's visa was revoked by the State Department pursuant to its plenary authority under INA § 221(i), 8 U.S.C. § 1201(i). *Id.* at ¶¶ 30-32, 38. After meeting with various United States Border Patrol officials upon arrival in New York on October 21, 2006, and being informed that his entry was denied based on revocation of his visa due to information the State Department possessed demonstrating that he may not be eligible for the

visa, Mr. Habib voluntarily withdrew his application for admission and returned to South Africa. *Id.* at ¶¶ 31-32, 38.

The visa revocation was "prudential" in nature, based on the possibility that Mr. Habib was ineligible for the visa and admission. *Id.* at ¶ 38. As the subject of a prudential revocation, Mr. Habib was free to reapply for a visa so that a final determination as to his visa eligibility could be made. *Id.* On May 11, 2007, Mr. Habib filed a new visa application at the U.S. Embassy in Johannesburg, South Africa. *Id.* at ¶¶ 41-43.

On October 26, 2007, the review was completed and the adjudicating Consular Officer determined that Mr. Habib was ineligible for the visa pursuant to section 212(a)(3)(B)(i)(I) of the INA, which renders inadmissible visa applicants believed to have "engaged in a terrorist activity." *Id.* at ¶ 50. The adjudicating Consular Officer also informed Mr. Habib that the State Department had determined it would not recommend a waiver of inadmissibility in his case under section 212(d)(3)(A) of the INA. *Id.* Since the State Department did not provide a recommendation, the Secretary of Homeland Security never opined on whether to waive inadmissibility for Mr. Habib.

Plaintiffs, consisting of various organizations who wish to hear Mr. Habib speak in the United States, and Mr. Habib as a "symbolic" plaintiff, challenge Defendants' exclusion of Mr. Habib from the United States as a violation of the Administrative Procedure Act and the First Amendment. *Id.* at ¶¶ 89-90. Plaintiffs allege that Defendants' exclusion of Mr. Habib on the ground that he is believed to have engaged in terrorist activity is "baseless," and seek an injunction barring Defendants from excluding Mr. Habib on this basis. *Id.* at ¶¶ 5-6. Plaintiffs allege that Mr. Habib "has never engaged in terrorist activities," but the Amended Complaint

does not provide a cognizable basis for overcoming the Consular Officer's determination that Mr. Habib is ineligible for a visa pursuant to section 212(a)(3)(B)(i)(I) of the INA.[3] *Id.* at ¶¶ 5, 50.

ARGUMENT

Plaintiffs assert jurisdiction under 28 U.S.C. § 1331 (Federal question statute), 5 U.S.C. §§ 701-706 (Administrative Procedure Act), and the First Amendment to the Constitution. Amended Compl. at ¶ 7. Plaintiffs cite the following two causes of action in their Amended Complaint:

> 89. Defendants' denial of a visa and a waiver of inadmissibility to Professor Habib violate the Administrative Procedures [sic] Act because
> defendants' actions are contrary to U.S. plaintiffs' constitutional rights,
> in excess of statutory limitation or authority, and arbitrary and capricious.
>
> 90. Defendants' denial of a visa and a waiver of inadmissibility to Professor Habib violate the First Amendment.

Second Amended Complaint at ¶¶ 89, 90.

This Court lacks subject matter jurisdiction to consider either of Plaintiffs' causes of action. Accordingly, a motion to dismiss under Fed. R. Civ. P. 12 is appropriate.

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[3] Plaintiffs clarified to Defendants that they do not challenge the revocation of Mr. Habib's visa in October 2006 and indicated as such when they amended their complaint. *See* Amended Compl. at ¶¶ 89-90. Plaintiffs' Amended Complaint only challenges the Consular Officer's denial of Mr. Habib's visa in October 2007 and the decision by the Department of State that there would be no recommendation of a waiver of inadmissibility in Mr. Habib's case.

I. Legal Standards under Fed. R. Civ. P. 12

Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow the movant to challenge the district court's subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The plaintiff bears the burden of proving jurisdiction when a defendant challenges a claim under Rule 12(b)(1). *Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996); *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995). The party invoking the court's jurisdiction must clearly indicate the grounds upon which the court may properly exercise jurisdiction over the matter presented. *PCS 2000LP v. Romulus Telecomms., Inc.*, 148 F.3d 32, 35 (1st Cir. 1998) (quoting *Viquiera v. First Bank*, 140 F.3d 12, 18 (1st Cir. 1998)). In ruling on a motion to dismiss for lack of jurisdiction, "the district court must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff." *Aversa*, 99 F.3d at 1210; *Murphy*, 45 F.3d at 522. However, a plaintiff cannot assert a proper jurisdictional basis "merely on 'unsupported conclusions or interpretations of law.'" *Murphy*, 45 F.3d at 422 (quoting *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 971 (1st Cir. 1993)).

Rule 12(b)(6) of the Federal Rules of Civil Procedure requires dismissal when the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In reviewing a complaint, a court must "assume the truth of all well-pleaded facts and indulge all reasonable inferences that fit the plaintiff's stated theory of liability." *Redondo-Borges v. U.S. Dept. of Housing and Urban Development*, 421 F.3d 1, 5 (1st Cir. 2005) (citing *In re. Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003)). However, the court "need not credit 'bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.'" *Id.*

(citing *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996)). The complaint does not need detailed factual allegations, but its factual allegations, when assumed to be true, must raise a right to relief above the speculative level. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007).

II. Recent Opinion of Note in *American Academy of Religion II v. Chertoff*

On December 20, 2007, the United States District Court for the Southern District of New York issued a decision addressing circumstances very similar to those of Plaintiffs in the instant matter. In *American Academy of Religion v. Chertoff*, 2007 WL 4527504 (S.D.N.Y. 2007) (*American Academy II*), Tariq Ramadan, a Swiss national Muslim scholar, along with several academic organizations, challenged the Government's exclusion of Mr. Ramadan. The Government had revoked Mr. Ramadan's nonimmigrant visa and denied his subsequent visa application under 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) based on Mr. Ramadan's provision of material support to a terrorist organization. Plaintiffs in *American Academy II* were represented by the same counsel for the American Civil Liberties Union as in the instant case.

The district court's opinion in *American Academy II* considered similar facts to those present in Mr. Habib's case. First, as with Mr. Habib, Mr. Ramadan sought nonimmigrant entry to the United States for the purpose of academic discussion. Likewise, as is the case here, plaintiffs in *American Academy II* claimed the Government's exclusion of Mr. Ramadan violated their First Amendment rights as United States citizens to hear Mr. Ramadan speak. Moreover, the terrorist-related provisions of the INA formed the basis for the exclusion actions in both *American Academy II* and the instant matter.

The court in *American Academy II* held that not every denial of an alien's visa application results in a First Amendment claim reviewable by Federal courts. *Id.* at *10. The court found that a limited First Amendment review was appropriate in the case at bar because of the "unique circumstances of the case." *Id.* at *11. Those unique factors include, as found by the court, that the Department of Homeland Security (DHS) "conducted the December 2005 visa interview in which [plaintiff] Ramadan revealed his donations to [an organization designated as a terrorist organization]" and that "DHS was clearly involved," noting that "DHS officials made statements to the media regarding Ramadan's exclusion in August 2004, statements now disavowed by the Government." *Id.* at *10. Furthermore, citing *Mandel*, the court refused to balance the First Amendment rights of United States citizens against the Government's "compelling interest to exclude aliens" once the Government came forth with a facially legitimate and bona fide reason to exclude an alien. *Id.* at *9. The court stated that the "Executive's decisions cannot be overturned by courts balancing the consular decision against First Amendment values." *Id.* The court in *American Academy II* justified its decision to allow limited scrutiny of the exclusion decision based on the "additional factors" it identified as detailed *supra*.

Offering its interpretation of *Mandel* scrutiny, the district court in *American Academy II* pointed out that where there was a basis for reviewing an exclusionary action alleged to violate citizens' First Amendment rights, the applicable standard is "not ordinary First Amendment review" but, instead, is "'a very low standard.'" *Id.* at *9 (quoting transcript of oral argument). The court reiterated that *Mandel* does not require striking a balance between citizens' First Amendment rights and Executive branch admissibility determinations. *Id.* (citing *Mandel* 408 U.S. at 769). Clarifying its approach to determining whether the Government had a "facially

legitimate and bona fide" basis for excluding Mr. Ramadan, the district court articulated the following three-part inquiry: first, the court inquired whether the Government provided a reason for denying Mr. Ramadan's visa; second, the court asked whether there existed a statutory basis for the decision; finally, the court determined whether the cited provision was properly applied to Mr. Ramadan. *Id.* at *11.

Following this approach, the district court found that the Government had a "facially legitimate and bona fide" basis for excluding Mr. Ramadan. *Id.* at *12-14. On summary judgment, the district court upheld Mr. Ramadan's exclusion under 8 U.S.C. § 1182(a)(3)(B)(iv)(VI), finding that the Government met the test of having a "facially legitimate and bona fide" reason for excluding Mr. Ramadan, which test applied to the case because of the "unique circumstances" of Mr. Ramadan's case. *Id.* at *11; 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). For reasons explained herein, this Court should find that no judicial review is warranted here because this case lacks the "unique circumstances" present in *American Academy II.* However, even if the Court were to find that unique circumstances exist with the present case, it should find that Defendants presented a "facially legitimate and bona fide" reason for excluding Mr. Habib.

III. Subject Matter Jurisdiction

A. The Court Lacks Subject Matter Jurisdiction Over the Visa Denial

To obtain subject matter jurisdiction under the Federal question statute in a district court, the claim must turn on the laws or Constitution of the United States. 28 U.S.C. § 1331. The proper test for a Federal court's subject matter jurisdiction under the Federal question statute is whether the cause of action is "so patently without merit as to justify . . . the court's dismissal

for want of jurisdiction." *Hagans v. Lavine*, 415 U.S. 528, 542-43 (1974) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). Federal question jurisdiction is foreclosed if the right claimed is "so insubstantial, implausible, *foreclosed by prior decisions of this Court*, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974) (emphasis added). As explained herein, Plaintiffs' challenge to Mr. Habib's visa denial fails because the possibility of judicial review of the denial is foreclosed by the Supreme Court's decision in *Mandel* and other case precedent. *See Mandel*, 408 U.S. at 766; *United States ex rel. Knauff*, 338 U.S. 537; *Rivera de Gomez*, 534 F.2d 518; *Centeno*, 817 F.2d 1212; *U.S. ex rel. Ulrich*, 30 F.2d 984.

B. The Doctrine of Consular Nonreviewability Precludes Judicial Review of Mr. Habib's Visa Denial

The Supreme Court endorses the doctrine of consular nonreviewability. This doctrine precludes the Court's accepting subject matter jurisdiction over review of Mr. Habib's visa denial. *See Mandel*, 408 U.S. at 766. In *Mandel*, the Attorney General denied waiver of the alien plaintiff's inadmissibility and cited as justification for this denial plaintiff's abuse of a waiver granted to him on a previous visit to the United States, during which visit Mandel engaged in activities beyond his stated purposes. *Id.* at 759. The *Mandel* plaintiffs were professors who had invited Marxist scholar Ernest Mandel to speak at various events. *See id.* at 759. Mandel sought a non-immigrant visa to attend some of these events, but the United States consulate in Belgium denied Mandel's application on the ground that he advocated world communism and was thus inadmissible under then-section 212(a)(28) of the INA. *See id.* at 756.

Although the Court in *Mandel* examined whether the Attorney General supported his decision denying a waiver of plaintiff's inadmissibility with a "facially legitimate and bona fide" reason, the Court explicitly recognized the doctrine of consular nonreviewability as a bar to judicial review of consular visa determinations:

> The 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, and to have its declared policy in that regard enforced exclusively through executive officers, *without judicial intervention*, is settled by our previous adjudications.

Id. at 766 (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)) (emphasis added).

While *Mandel* recognized the prominence of the doctrine of consular nonreviewability with regard to *visa determinations generally*, the *Mandel* Court nevertheless found occasion to review an Attorney General *waiver determination* when the resulting denial potentially implicated the First Amendment rights of United States citizens. *Id.* at 769. Based on *Mandel*, and with its waiver-specific holding in mind, however, a consulate denial of a visa – even if such denial is challenged by United States citizens on First Amendment grounds – remains judicially unreviewable, although even the *Mandel* Court refused to look behind the exercise of discretion to deny the waiver. *Id.*; *Centeno*, 817 F.2d at 1213-14.

As discussed *infra*, although some courts have held that *Mandel* authorizes judicial review of Consular Officers' visa denials despite the doctrine of consular nonreviewability, these holdings overextend *Mandel*. *See Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990) (extending *Mandel's* 'facially legitimate and bona fide reason' standard to cover review of visa denials in United States citizens' First Amendment challenges to visa denials and denials of waivers of

inadmissibility, both of which denials were based on reasonable belief of applicant's advocacy of and personal involvement with terrorist violence); *Abourezk v. Schultz*, 785 F.2d 1043 (D.C. Cir. 1986) (extending *Mandel's* 'facially legitimate and bona fide reason' standard to cover review of visa denials in United States citizens' First Amendment challenges to four visa denials based on a reasonable belief that applicants sought entry into the United States to engage in activities prejudicial to the public interest); *American Academy II*, 2007 WL 4527504 (extending *Mandel's* 'facially legitimate and bona fide reason' standard to cover review of visa denials in United States citizens' First Amendment challenges to visa denials where the court found "unique circumstances" justifying the limited review); *American Academy of Religion v. Chertoff*, 463 F. Supp. 2d 400 (S.D.N.Y. 2006) (same).

In extending *Mandel's* review of waiver denials to include review of visa denials, these holdings obstruct the doctrine of consular nonreviewability, a result that *Mandel* made distinct efforts to avoid when it expressly affirmed Congress's plenary power over alien admission as manifest in the nonreviewability of consular decisions. *Mandel*, 408 U.S. at 765-68. By including visa denials and waiver denials within a single analysis, these holdings conflate two distinct issues. The former arise based on Consular Officer decisions, *see* INA § 221, 8 U.S.C. § 1201, and the latter based on decisions by the Attorney General or, now, the Secretary of Homeland Security, *see* INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A). In any event, these cases generally support the Defendants' position in this case. But, to the extent those courts have found bases for reviewing visa-related decisions, they are distinguishable.

1. The First Circuit's opinion in *Adams v. Baker*

The facts of the First Circuit's opinion in *Adams v. Baker* support Defendants' position in the instant matter. Plaintiffs in *Adams v. Baker* sought review of a visa denial based on then-section 212(a)(28)(F) of the INA under circumstances very similar to Plaintiffs' here, to the extent that the denial basis was linked to the INA's terrorism-related provisions. *See Adams*, 909 F.2d at 645. Mr. Adams also challenged the denial of a waiver of his inadmissibility. *Id.* at 646. Mr. Adams was found ineligible for admission based on advocacy of and personal involvement with terrorist violence. INA § 212(a)(28)(F), 8 U.S.C. § 1182(a)(28)(F); *Adams*, 909 F.2d at 645. With the court ultimately deferring to the Consular Officer's denying issuance of a nonimmigrant visa, the decision in *Adams* resulted in the prevention of entry into the United States of a known terrorism advocate. *Id.* at 647.

The *Adams* court found that the Government had articulated a facially legitimate and bona fide reason to sustain denial of waiver of Adams's inadmissibility – evidence of applicant Adams's advocacy of and personal involvement with terrorism. *See Adams*, 909 F.2d at 649. In testing the sufficiency of the evidence upon which the Consular Officer relied to sustain the officer's reasonable belief that Adams advocated and was personally involved with terrorism, the court noted that such sufficiency of evidence is "subject only to very narrow review." *Id.* The court emphasized its deference to the factual determinations and final judgment of Consular Officers in the visa issuance process, highlighting the absence of statutory authorization or mandate from Congress to the contrary. *Id.* at 649.

While the *Adams* case is similar to the present case to the extent that it involved a First Amendment claim by U.S. citizens seeking to require the Executive to admit an alien

notwithstanding the denial of his visa for engaging in terrorist activity, the decision doesn't constitute binding or relevant precedent for the present case. This is because *Adams* was based on two statutes that have since been repealed: the McGovern Amendment to former INA §§ 212(a)(28)(F) [8 U.S.C. §1182(a)(28)(F)] and Sec. 901 of Public Law 100-204.

In *Adams*, the Consular Officer found Adams ineligible for a visa because of alleged advocacy of terrorist activities, as well as his personal involvement in terrorist activities. The denial of a waiver of inadmissibility was based on Adams's personal involvement in terrorist activities. In analyzing the Government's actions, the district court noted that under INA § 212(a)(28)(F), these were proper bases for finding Adams ineligible for a visa, but noted that such findings were not necessarily dispositive because of the possibility of waiver under the McGovern Amendment, 22 U.S.C. § 2691 [8 U.S.C. § 1182(d)(3)(A)] (which has since been amended). Under then applicable law, the court noted:

> The [McGovern] amendment provides standards for the Secretary of State's determination of whether to recommend a waiver of subsection 28. It essentially requires the granting of a waiver, because such a waiver can only be avoided if the Secretary can certify to the Speaker of the House of Representatives that admission of the alien would be contrary to the security interests of the United States.

Adams, 909 F.2d at 646. The *Adams* court concluded, however, that the McGovern Amendment applied only if the sole basis for excluding the alien is his membership or affiliation with a terrorist group. Because the district court found that Adams was excluded (*i.e.*, both found inadmissible and denied a waiver) because of his involvement with terrorist activity, "the McGovern Amendment [did] not provide independent authorization for his admittance into this

country." *Id.*

The district court went on to note that the McGovern Amendment was not the only source of exception allowing for the admission of an alien found ineligible under INA section 1182. The court also turned to Sec. 901 of P.L. 100-204. Under Sec. 901(a), a provision in effect for visa applications submitted during limited timeframes only, *see* § 901(d)(1), an alien could not be denied a visa based on his beliefs, statements, and associations. Sec. 901(b) provided, however, that Sec. 901(a) could not be construed to affect Executive authority to deny a visa to an alien excluded for reasons of foreign policy or national security, provided that determination was not based on the beliefs, statements or associations of the alien, if those would be protected under the Constitution for a U.S. citizen. Notwithstanding that limitation, however, an alien could be excluded if the alien "engaged in terrorist activity" under Sec. 901(b)(2). *See Adams*, 909 F.2d at 646.

Thus, both the McGovern Amendment and Sec. 901, provisions that are no longer in effect, established supplemental conditions – effectively a second hoop – that the Executive was required to meet before it could exclude aliens that had been found inadmissible in certain situations. That condition applied both in adjudicating a visa application and in deciding on a waiver of inadmissibility because an adverse decision at either stage would lead to visa denial. These standards compelled the court to scrutinize the reason for the Government's failure to exercise waiver authority at the time of Adams's application but have no bearing on visa applications filed since their repeal.

In *Adams*, the plaintiff argued that Sec. 901 *entitled* Adams to a waiver of the exclusionary provisions of Sec. 212, because of the standards in Sec. 901. *Adams*, 909 F.2d at 648. Under the McGovern Amendment, the Executive was required to establish that the adverse visa-related decision was not made on the basis of the alien's beliefs, statements, or associations. Consequently, the *Adams* court was bound to scrutinize the bases for denying the visa and the basis for denying the waiver of ineligibility.

This case differs markedly for *Adams* because the current waiver authority, INA §212(d)(3)(A)(i), has no such condition or standard. Under current law, the Executive is obligated to find inadmissible any alien covered by the INA inadmissibility provisions and the Executive has unconditional discretion in waiver decisions. There was no law in effect at the time of Mr. Habib's visa application that could entitle him to the reasons for the denial of his waiver or for this Court to examine the reasons as it did in *Adams*.

Defendants also note a factual distinction between the *Adams* decision and the Habib case. In *Adams*, the State Department recommended a waiver of the inadmissibility determination and the Attorney General declined to exercise his discretion to grant the waiver. The Attorney General thus affirmatively denied the waiver in *Adams*. Here, the Department of State determined not to recommend waiver of Mr. Habib's inadmissibility to the Secretary of Homeland Security; unlike *Adams*, there was no need here for any post-consulate, Attorney General or Secretary of Homeland Security waiver approval. *See* Ex. A, October 26, 2007, Letter to Mr. Habib; INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A) (an alien . . . may, after approval by the [Secretary of Homeland Security] of a recommendation by the Secretary of State or by the consular officer . . . be granted such a visa"). There is thus no need here for the *Mandel* scrutiny

that was applicable to the Attorney General waiver decisions at issue in *Adams*. Rather, the doctrine of consular nonreviewability applies in the instant matter to preclude judicial review of the waiver determination.

2. Other recent cases implicating *Mandel* while examining consular nonreviewability

There are three other cases of particular note relative to the facts of Mr. Habib's visa denial and the Department of State's decision not to recommend a waiver of Mr. Habib's inadmissibility. These cases are *Abourezk v. Schultz*, 785 F.2d 1043, and *American Academy I*[4] and *II*.

As with the Plaintiffs here, the *Abourezk* plaintiffs consisted of United States citizens challenging the denial of visas to aliens who the plaintiffs had invited to the United States to speak. *See Abourezk*, 785 F.2d at 1048. Finding that the INA provided the plaintiffs with no right of action, the District of Columbia Circuit Court of Appeals in *Abourezk* instead relied on the Administrative Procedure Act (APA) as a basis for plaintiffs' relief. *Id.* at 1050. Significantly, *Abourezk* mentioned *Mandel* but, in granting jurisdiction based on the APA, glossed over the actual holding of *Mandel*. *Abourezk* compressed the issue at bar into one of exclusion generally, *see id.*, and failed to note that *Mandel* explicitly addressed a visa waiver denial only, rather than a visa denial. In so doing, *Abourezk* conflated the two distinct actions of

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[4] Earlier in the *American Academy II* litigation that resulted in the grant of summary judgment in favor of the Government, plaintiffs in that case brought a mandamus action to compel the Department of State to adjudicate Mr. Ramadan's visa application that had been pending for several months. *See American Academy of Religion v. Chertoff*, 463 F. Supp. 2d 400 (S.D.N.Y. 2006) (*American Academy I*). The district court ordered the Department of State to adjudicate Mr. Ramadan's visa within ninety days. *Id.*

visa denial and denial of waiver of inadmissibility. Based on this flawed analysis, the *Abourezk* Court incorrectly assumed that *Mandel's* holding raised no bar to a federal court's subject matter jurisdiction over Consular Officer visa denials. *Id.* In fact, this assumption is wholly inaccurate in consideration of the fact that *Mandel* examined the Attorney General's decision declining a waiver of inadmissibility, rather than a Consular Officer's decision denying a visa. *Mandel*, 408 U.S. at 754.

In addition to its flawed analysis of *Mandel*, *Abourezk* is distinguishable from the instant matter on several bases. First is the fact that the court in *Abourezk* had no reason to, and in fact did not, reach plaintiffs' First Amendment claims. *See Abourezk*, 785 F.2d at 1060. Indeed, the court's analysis of the plaintiffs' First Amendment claims was unnecessary in *Abourezk* because it interpreted the statute in effect at the time and on which it based jurisdiction as providing the "broad grant of jurisdiction" necessary to review the visa denial under the APA rather than the First Amendment. *Id.* at 1050. Omission in *Abourezk* of a well-reasoned *Mandel* analysis and its failure to recognize the doctrine of consular nonreviewability as determinative of visa-related decisions, as well as *Abourezk's* lack of First Amendment analysis – all within a case supported by a no-longer applicable statutory grant of jurisdiction – cannot serve as persuasive authority for the extension of *Mandel's* facially legitimate and bona fide reason standard to cover review of visa-related decisions such as Plaintiffs seek here. *See Saavedra Bruno*, 197 F.3d at 1162.

In *American Academy II*, the district court properly granted summary judgment in favor of the Government by dismissing the ACLU's challenge to the denial of applicant Ramadan's visa. As compared with the case here, however, there are some important factual distinctions – termed by the *American Academy II* court as "unique circumstances" – that led the court in

American Academy II to conduct a limited review of the visa-related matter at issue in that case. The court in *American Academy I* and *II* found that the Consular Officer responsible for adjudicating the visa in Bern, Switzerland, did not maintain control over the visa determination. Noting, among other things, that DHS conducted the relevant visa interview, that a DHS official made the sole public statements about why an adverse visa decision was made (*i.e.*, on the basis of the endorse or espouse provision), and that the Government never retracted this statement prior to the litigation, both decisions highlighted these unique circumstances. *American Academy I*, 463 F. Supp. 2d at 417-418; *American Academy II*, 2007 WL 4527504 *9-10.

In fact, the court in *American Academy II* used these circumstances as a justification for reviewing the visa determination and whether a facially legitimate and bona fide reason existed for the visa denial. *American Academy II*, 2007 WL 4527504 *11. The participation of entities outside the Department of State in the decision, then, made it difficult for the court to apply the doctrine of consular nonreviewability with "full force." *American Academy I*, 463 F. Supp. 2d at 417; *American Academy II*, 2007 WL 4527504 *9. Here, Plaintiffs' own allegations show that the Consular Officer in charge of Mr. Habib's visa determination made the visa denial determination and informed Mr. Habib that the Department of State had determined it would not recommend a waiver of inadmissibility. Amended Comp. at ¶ 50. Thus, unlike other reported precedent, all decisions in this matter remained within the Department of State. No reason exists, therefore, to conduct even a limited review of the visa-related decisions here.[5]

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[5] Subsequent to their respective holdings in *Adams* and *Abourezk*, both the First Circuit and the District of Columbia Circuit Court of Appeals unequivocally reaffirmed the plenary power of the Government's political branches over alien admissions. *See Enwonwu v. Gonzales*, 438 F.3d 22, 30-31 (reaffirming the sovereign's power to exclude aliens as a "fundamental

C. The Court lacks jurisdiction to review the Department of State's decision not to recommend a waiver of inadmissibility

In *Mandel*, the Supreme Court determined that the Attorney General "validly exercised" his plenary power that Congress had delegated to him when the Attorney General determined not to grant a waiver of inadmissibility to an alien on the basis of a facially legitimate and bona fide reason. *Mandel* at 770. Thus, the Court would not look behind the exercise of discretion, nor test it by balancing the Attorney General's reasons against the First Amendment interests of the groups wishing to hear the applicant speak. *Id.* However, the *Mandel* Court did not determine whether a First Amendment challenge could be available in the event that no justification whatsoever were provided by the agency. *Id.* (holding that "[w]hat First Amendment or other grounds may be available for attacking exercise of discretion for which no justification is advanced is a question we neither address or decide in this case").

Plaintiffs in this case seek a resolution of an issue the Court specifically left undecided in *Mandel*: the extent of the Department of State's discretion in denying a waiver of inadmissibility. Defendants show below that 1) the Government has no obligation to provide a justification for declining to recommend a waiver in Mr. Habib's case; and 2) such waiver decisions are discretionary decisions wherein no standard exists for judicial review.

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sovereign attribute . . . largely immune from judicial control"); *Saavedra Bruno*, 197 F.3d at 1163. Indeed, the D.C. Circuit's decision in *Saavedra Bruno* sharply limits *Abourezk* by characterizing its holding as "narrow" and refusing extension of the *Abourezk* holding outside its specific factual circumstances. *See Saavedra Bruno*, 197 F.3d at 1163-64. Significantly, *Saavedra Bruno* explicitly reaffirmed the vitality of the doctrine of consular nonreviewability. *Id.*

1. Plaintiffs have no statutory right to know the reason or reasons Mr. Habib was not recommended for a waiver

In this case, the Consular Officer informed Mr. Habib that denial was based on INA section 212(a)(3)(B)(i)(I) (engaging in terrorist activity); but, he did not explain the reason or reasons that the Department of State declined to exercise its discretion to pursue a waiver of Mr. Habib's inadmissibility. *See* Ex. A, October 26, 2007, Letter to Mr. Habib (indicating only that the Department of State completed consideration of Mr. Habib's application for waiver, and "based upon that review," the Department determined it would not recommend a waiver in his case). Neither Mr. Habib, nor any of the plaintiff groups has a right to know the reason or reasons why an applicant is not recommended for a discretionary waiver. Plaintiffs can point to no statute that requires Defendants to divulge this information, particularly where a visa denial decision was founded on the basis of an alien's engaging in terrorist activity, and in the area of alien admissions where the Government's authority is at its zenith.

Indeed, as the Supreme Court has "repeatedly emphasized[,] . . . over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *see also Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (explaining that, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens"). In part, this is because "any policy towards aliens is vitally and inextricably interwoven with contemporaneous policies in regard to the conduct of foreign relations." *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952); *Galvan v. Press*, 347 U.S. 522, 530 (1954) (finding that the power "over the admission of

aliens and their right to remain . . . touch[es] [on] basic aspects of national sovereignty, more particularly our foreign relations and the national security").

In addition, the courts have no constitutional authority to make the policy judgments essential to regulating foreign commerce and conducting foreign affairs. *Barclays Bank PLC v. Franchise Tax Board of Calif.* 512 U.S. 298, 327-28 (1994). Thus, "[m]atters relating 'to the conduct of foreign relations" have been traditionally viewed as "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Regan v. Wald*, 468 U.S. 222, 242 (1984) (quoting *Harisiades*, 342 U.S. at 589); *accord Haig v. Agee*, 453 U.S. 280, 292 (1981). Moreover, "because of the changeable and explosive nature of contemporary international relations . . . Congress – in giving the Executive authority over matters of foreign affairs – must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Haig*, 453 U.S. at 292 (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)).

2. There are no standards against which to judge the discretionary decision

Another reason why Defendants need not provide reasons for the decision not to recommend a waiver is because there is no standard against which to judge the agency's exercise of discretion for this purely discretionary waiver.[6] In *Heckler v. Chaney,* 470 U.S. 821 (1985), the Supreme Court considered the question of the extent an administrative agency's decision to

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[6] The process for obtaining a waiver of inadmissibility is explained at 8 U.S.C. § 1182(d)(3)(A), and in the regulations at 8 C.F.R. § 212.4 ("Applications for the exercise of discretion under [INA] section 212 (d)(1) and 212 (d)(3)."). The statute clarifies that the Secretary of Homeland Security may, after a recommendation of the Secretary of State or by a Consular Officer, temporarily admit an alien into the United States *in the discretion of the [Secretary of Homeland Security]*. 8 U.S.C. § 1182(d)(3)(A) (emphasis added). Thus, in the event the Secretary of State or a Consular Officer determines to recommend a waiver, the final decision rests in the discretion of the Secretary of Homeland Security.

negatively exercise its discretion is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 501 *et seq.* (APA). The Court noted that, while the APA generally allows some judicial review of agency actions, in order to determine whether judicial review applies, the first step is to determine under § 701(a) of the APA whether the statute precludes judicial review, or if the agency action is committed to agency discretion by law. *Id.* at 828. In this case, as explained above, the agency action is committed to agency discretion by law and is not subject to judicial review under the APA.[7] *See also Roberts v. Gonzales*, 422 F.3d 33, 37 n.2 (1st Cir. 2005) (citing principle from *Heckler* that the court would lack judicial review over "issues committed to the agency's unfettered discretion," but not deciding the issue on that ground).

Also, the *Heckler* Court noted that, "where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830. In such cases, the Court reasoned that the statute "can be taken to have 'committed' the decision-making to the agency's judgment absolutely." *Id.* Finally, the Court noted that its construction avoids conflict with the "abuse of discretion" standard normally applicable to APA decision-making because the lack of judicially manageable standards for "judging how and when an agency should exercise its discretion" makes it impossible to evaluate whether an agency action is an abuse of discretion. *Id.*

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[7] As Defendants argue *infra*, there is no judicial review under the APA in any event because Congress intended the INA to supplant the APA for immigration proceedings.

IV. Failure to State a Claim

A. APA Review is Unavailable under the INA

Even if this Court finds the doctrine of consular nonreviewability does not preclude subject matter jurisdiction over Plaintiffs' challenge of the denial of Mr. Habib's visa application, Plaintiffs' APA cause of action nevertheless fails to state a claim.

The APA requires a reviewing court to hold an agency's actions unlawful and to set them aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 23 (1st Cir. 1999); 5 U.S.C. § 706(2)(A). Even when a plaintiff challenges agency action under more specific APA provisions, such as the "contrary to constitutional right" provision at section 706(2)(A), the applicable standard of review under the APA nevertheless remains the arbitrary or capricious standard. *Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d at 23; *Bradley v. Weinberger*, 483 F.2d 410, 414 (1st Cir. 1973).

However, significant precedent interpreting the INA holds that APA review is unavailable for alien admissibility determinations. *See Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 133 (1991); *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *Saavedra Bruno*, 197 F.3d at 1161-62. In *Ardestani*, the Supreme Court reviewed plaintiff's attempted recovery under the Equal Access to Justice Act (EAJA) of attorney's fees incurred during plaintiff's deportation proceedings. Finding that immigration proceedings did not qualify as an "adversary adjudication" within the meaning of the APA's section 554 as required for EAJA recovery, the Court reiterated its holding in *Marcello* that Congress intended the INA "to supplant the APA in immigration proceedings." *Id.* at 132-34 (citing *Marcello*, 349 U.S. at 310). Likewise, the

Marcello court referred to the INA and emphasized "the background of the 1952 immigration legislation" as a basis for the following decidedly explicit holding:

> Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present [INA] statute expressly supersedes the hearing provisions of that Act.

Marcello, 349 U.S. at 310. More recently, the District of Columbia Circuit Court of Appeals held that both the legislative and judicial history behind the INA cautioned against extending judicial review under the APA to decisions to exclude aliens. *See Saavedra Bruno*, 197 F.3d at 1161-62 (holding that, in addition to arguments relying on Executive discretion to preclude APA review of plaintiff's visa denial and revocation, the "immigration laws" themselves preclude judicial review under the APA). These decisions and the very language of the INA offer a sufficient basis to conclude that the INA provides "the sole and exclusive procedure" regarding alien admission decisions, thus barring review of such decisions under the APA. *See* INA § 242(b), 8 U.S. § 1252(b).

As explained *supra*, the language of the APA itself further precludes judicial review of visa determinations. Section 701(a), while defining the applicability of the APA, places the first limitation on such applicability by stating that the APA "applies . . . except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency *discretion* by law. 5 U.S.C. § 701(a) (emphasis added). The APA's second self-limiting provision states in section 702 that, "Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702(1).

These congressionally-engineered self-limiting APA provisions are significant when coupled with the knowledge that Congress legislates with regard to aliens in "accord[] with the ancient principle of international law that a nation state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions." *See Saavedra Bruno*, 197 F.3d at 1159. The Supreme Court has unequivocally and repeatedly recognized this principle and the longstanding power of a sovereign nation to exclude aliens without providing judicial review of such exclusionary determinations. *Id.* (citing *Mandel*, 408 U.S. at 765); *United States ex rel. Mezei*, 345 U.S. at 210; *see also United States ex rel. Knauff*, 338 U.S. at 543. Whether fashioned under the term "consular nonreviewability" or not, the principle remains unassailable that determinations of alien admissibility remain the sole province of the political branches of government – one with which the judiciary should not interfere. *United States ex rel. Knauff*, 338 U.S. 537; *Rivera de Gomez*, 534 F.2d 518; *Centeno*, 817 F.2d 1212; *U.S. ex rel. Ulrich*, 30 F.2d 984; *Saavedra Bruno*, 197 F.3d at 1159; *Gebre v. Rice*, 462 F. Supp. 2d 186, 190 (citing *Iddir v. INS.*, 301 F.3d 492, 499-500 (7th Cir. 2002)). Furthermore, this principle is one committed by law to agency discretion and thus qualifies as an exception to APA review as defined in sections 701(a) and 702. *See Saavedra Bruno*, 197 F.3d at 1160.

Statutory law other than the APA further reflects the principle that admissibility determinations by the Executive remain unassailable. Consular Officers have nearly complete discretion over the issuance of visas. *See* INA § 104(a), 8 U.S.C. § 1104(a); INA § 221(i), 8 U.S.C. § 1201(i); *Mandel*, 408 U.S. 753; *Saavedra Bruno*, 197 F.3d at 1158 n. 2; *Centeno*, 817 F.2d 1212. This plenary discretion is equally applicable to waivers of inadmissibility after approval by the Secretary of Homeland Security, which waivers at most receive very limited

review. INA § 212(d)(3), 8 U.S.C. § 1182(d)(3); *Mandel*, 408 U.S. at 768-69 (analyzing waiver of inadmissibility provisions under then-subsections 1182(a)(28)(D), (G)(v), and subsection 1182(d)(3)(A)). The discretionary nature of the agency action at issue here, as shown by the language of the INA, precludes judicial review under the APA since, as outlined *supra*, the APA specifically exempts from its jurisdiction review of any "agency action . . . committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

Finally, even if this Court finds that Plaintiffs state a claim for review under the APA, Defendants' basis for the challenge of the visa denial – reasonable belief that Mr. Habib has engaged in terrorist activity – is by no means arbitrary and capricious. Defendants' justification for their actions to exclude Mr. Habib is clearly based on a statute that is unchallenged by Plaintiffs. *See* INA § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I).

Controlling precedent and the language of both the INA and APA, as well as judicial deference to agency admissibility determinations and relevant statutes, all point toward preclusion of APA review here and away from Plaintiffs' ability to state a claim under the APA. This Court therefore should dismiss Plaintiffs' APA claims on these bases.

B. Plaintiffs' First Amendment Arguments Fail to State a Claim

Congress's power to exclude aliens is firmly established and, subject to extremely limited conditions, remains plenary even in the face of First Amendment challenges. The denial of Mr. Habib's visa application and recommendation against a waiver of his inadmissibility do not violate Plaintiffs' First Amendment rights for the same reasons such denials violate neither the INA nor the APA as discussed *supra* – because Defendants' actions are justified by the plenary

nature of Congress's power over the admission of aliens.[8]

The Supreme Court in *Mandel* considered the reach of Congress's power in weighing United States citizens' right to listen to speech against the United States' sovereign power to control the admission of aliens. *Mandel*, 408 U.S. 753. More specifically, *Mandel* weighed the Attorney General's refusal to exercise his statutory discretion to waive an alien's inadmissibility against the First Amendment rights of United States citizens to receive speech from that alien.[9] *See id.* at 762-63. As indicated *supra*, the Court held that, when the Attorney General acts under INA § 212(d)(3) by declining 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 [the Executive's discretionary power to exclude aliens], nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770.

Also, the *Mandel* Court explicitly recognized the exemption of consular decisions from judicial review by reiterating in its holding the prominence of the doctrine of consular nonreviewability:

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[8] As the district court in *American Academy II* noted, when a Consular Officer determines to deny a visa, "it is not the Court's role – sitting without the benefit of the subject matter expertise or detailed information on the applicant available to the consular official – to second guess the result." *American Academy II*, 2007 WL 4527504, *14.

[9] The right to receive speech includes the right to receive information. *Mandel*, 408 U.S. at 762-63. In light of technological advancements subsequent to *Mandel*, such as modern video conference abilities, United States citizen receivers of information located in the United States can now engage in real-time discussion and debate with speakers physically located across the world, thus limiting the extent to which the physical location of a speaker necessarily precludes the right of United States citizens to receive information from that speaker.

> The 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, and to have its declared policy in that regard enforced exclusively through executive officers, *without judicial intervention*, is settled by our previous adjudications.

Mandel, 408 U.S. at 766 (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)) (emphasis supplied). As such, while the *Mandel* Court found the Government met its burden in the specific context of a denial of waiver of inadmissibility when the Attorney General articulated a facially legitimate and bona fide reason for denying the waiver, the Court's holding nevertheless emphasized the longstanding recognition of congressional power in dealing with aliens. *Id.* at 767 (citing *Galvan v. Press*, 347 U.S. 522, 531-32 (1954)). The *Mandel* court continued by stating that, proceeding under the doctrine of consular nonreviewability, Congress could go so far as overriding *any* First Amendment rights of United States citizens by enacting "a blanket prohibition against entry of all aliens falling into the class defined by" then-sections 212(a)(28)(D) and (G)(v) of the INA. *Id.* The *Mandel* Court summarized by contrasting the *plenary* power of Congress to exclude aliens with the *conditional* power of the Executive – in the specific context of waiver denial – to decline application of such waiver upon articulation of a facially legitimate and bona fide reason. *Id.* at 769-70. Significantly, Mandel did not *require* the Executive to come forth with a facially legitimate and bona fide reason; rather, the Court held that review was inappropriate since the Executive volunteered a facially legitimate and bona fide reason for its waiver denial. *Id.* at 769.

Numerous courts subsequent to *Mandel*, including the District of Massachusetts and the First Circuit Court of Appeals, as outlined *supra*, recognize the plenary nature of congressional power over the admission of aliens and the immunity from judicial control enjoyed by the

political departments in executing this power. *Enwonwu v. Gonzales*, 438 F.3d 22, 30-31 (quoting explanation in *Fiallo v. Bell*, 430 U.S. 787, that political departments' power to exclude aliens is "largely immune from judicial control") ; *Saavedra Bruno*, 197 F.3d at 1163 (citing *Mandel* and recognizing the doctrine of consular nonreviewability as precluding judicial review of claims based on visa denials); *Gebre*, 462 F. Supp. 2d at 190 (citing *Enwonwu* and emphasizing the First Circuit's reluctance to interfere with the visa-issuing process even when the Department of State failed to carry out the intent of Congress by issuing Diversity Lottery visa before end of fiscal year); *see also United States ex rel. Knauff*, 338 U.S. 537; *Rivera de Gomez*, 534 F.2d 518; *Centeno*, 817 F.2d 1212; *U.S. ex rel. Ulrich*, 30 F.2d 984. In view of these decisions, the United States Consulate in South Africa lawfully denied Mr. Habib's visa on October 26, 2007, based on knowledge or reasonable ground to believe that Mr. Habib has engaged in terrorist activity. In accordance with the doctrine of consular nonreviewability, the visa denial decision thus is not judicially reviewable, and Plaintiffs' First Amendment claims concerning the visa denial therefore must fail.

Concerning the Department of State's decision not to pursue a waiver of inadmissibility after the Consular Officer adjudicated Mr. Habib inadmissible, Plaintiffs further fail to make a First Amendment claim on which relief can be granted. Neither the Consulate Officer nor the Department of State recommended a waiver of Mr. Habib's inadmissibility to the Secretary of Homeland Security. *See* Ex. A, October 26, 2007, Letter to Mr. Habib. The Department of State is not obligated to, and did not, specifically provide any reason for its decision not to recommend to DHS a waiver of Mr. Habib's inadmissibility after finding Mr. Habib inadmissible on the basis

of knowledge or reasonable belief that Mr. Habib has engaged in terrorist activity.[10] *See id.*; INA § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I).

Other courts have addressed similar circumstances and reached this conclusion. In *Adams*, the Court applied *Mandel's* legitimate and bona fide reason standard in upholding the denial of Adams's visa application and waiver of inadmissibility based on belief in his advocacy of and personal involvement with terrorist violence. *Adams*, 909 F.2d at 650. The court found that, to support the Government's decision to exclude Adams, "there need only have been a reasonable belief that Adams was involved in terrorist activity."[11] *Id.* at 649. As in *Adams*, the finding of Mr. Habib's inadmissibility is based on Defendants' reasonable belief that he engaged in terrorist activity. *See* Ex. A, October 26, 2007, Letter to Mr. Habib; INA § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I). Defendants have no obligation to present any specific explanation for declining to pursue a waiver of his terrorism-based inadmissibility. Accordingly, Plaintiffs' First Amendment claims fail and therefore should be dismissed.

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[10] Importantly, the causes of action Plaintiffs allege and the relief they seek relate solely to visa-related decisions. *See* Amended Compl. at ¶¶ 89-95. Consular Officers and the Department of State are responsible for visa-related decisions and were responsible for all actions alleged in the Amended Complaint with respect to Mr. Habib. *See* INA § 221, 8 U.S.C. § 1201. The Complaint therefore incorrectly names as a defendant the Department of Homeland Security. Defendants accordingly move this Court to dismiss the Department of Homeland Security as a party to this suit.

[11] It is significant that, in upholding the Government's decision to exclude Adams despite United States citizens' claims that his exclusion violated their First Amendment rights, the *Adams* court did not rely extensively on evidentiary findings. To the extent that the *Adams* court weighed evidence supporting Adams's involvement with terrorist activity, it relied on publicly available printed media sources in finding that such sources provided sufficient basis for a reasonable belief of Adams's involvement in terrorist activity. *Adams*, 909 F.2d at 649-50. No requirement exists, however, for the United States Department of State to provide evidence in support of a visa denial decision.

CONCLUSION

For the foregoing reasons, the Court should dismiss this Amended Complaint for lack of subject matter jurisdiction and for failure to state a claim.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Defendants believe that oral argument may assist the Court and therefore wish to be heard. Defendants hereby request oral argument pursuant to Local Rule 7.1(d).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Defendants' Memorandum of Reasons and Authorities in Support of Defendants' Motion to Dismiss was served on this 14th day of January 2008 via electronic filing system to all applicable counsel, and additionally by first class mail to all counsel below:

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U.S. DEPARTMENT OF JUSTICE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN SOCIOLOGICAL ASSOCIATION; AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; AMERICAN-ARAB ANTIDISCRIMINATION COMMITTEE; BOSTON COALITION FOR PALESTINIAN RIGHTS; and ADAM HABIB, Plaintiffs, v. MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Security; CONDOLEEZZA RICE, in her official capacity as Secretary of State, Defendants.	Case No. 07-11796 (GAO) **ORDER**

THE COURT having reviewed Defendants' motion to dismiss the Complaint and all oppositions and replies GRANTS Defendants' motion. The Complaint is hereby DISMISSED.

It is SO ORDERED.

Signed this the ____ day of January 2008.

GEORGE A. O'TOOLE, JR.
United States District Judge