08-0826-cv

IN THE UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

BRIEF FOR THE PLAINTIFFS-APPELLANTS

JAMEEL JAFFER
MELISSA GOODMAN
NASRINA BARGZIE
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
212 549-2500

JUDY RABINOVITZ
LUCAS GUTTENTAG
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

ARTHUR N. EISENBERG
New York Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY, 10004

CLAUDIA SLOVINSKY
396 Broadway, Suite 601
New York, NY 10013

Of Counsel:

LEON FRIEDMAN
148 East 78th Street
New York, NY 10021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of the Plaintiffs-Appellants certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Treatises

Other Authorities

PRELIMINARY STATEMENT

Plaintiffs American Academy of Religion ("AAR"), American Association of University Professors ("AAUP"), and PEN American Center ("PEN") appeal from a final judgment of the District Court for the Southern District of New York (Crotty, J.) entered on December 20, 2007. The judgment was entered in accordance with the district court's Opinion and Order of December 20, 2007, which is available at 2007 WL 4527504.

STATEMENT OF JURISDICTION

This case arises under the Constitution and the Administrative Procedure Act, 5 U.S.C. § 702. The district court had jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 702. The district court issued its decision and entered final judgment on December 20, 2007. Plaintiffs filed a timely notice of appeal on January 23, 2008. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the government has supplied a facially legitimate and bona fide reason for barring Professor Tariq Ramadan from the U.S. and thereby preventing plaintiffs from meeting with him, hearing him speak, and engaging him in debate.

2. Whether the plaintiffs have standing to challenge the facial validity of 8 U.S.C. § 1182(a)(3)(B)(i)(VII), the "ideological exclusion" provision, and whether that provision violates the First and Fifth Amendments.

STATEMENT OF THE CASE

In this action, plaintiffs AAR, AAUP, and PEN challenge the government's exclusion from the U.S. of Professor Tariq Ramadan, a Swiss scholar of Islam who is now affiliated with the University of Oxford.[1] Plaintiffs have invited Professor Ramadan to speak to their members and the general public inside the U.S. The government's refusal to grant Professor Ramadan a visa forecloses him from accepting plaintiffs' invitations. The government's stated basis for excluding Professor Ramadan has shifted since the commencement of this litigation, but the government defended the exclusion in the court below by contending that Professor Ramadan's small donations to a European charity – donations made between 1998 and 2002 – rendered him inadmissible under 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd) (hereinafter the "material support" provision). While the government concedes that Professor Ramadan's donations were not grounds for inadmissibility at the time they were made, it argues that amendments made to the material support provision in 2005 should be given retroactive effect.

[1] This suit asserts the rights of the organizational plaintiffs and not those of Professor Ramadan, who is "made a plaintiff because he is symbolic of the problem." *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

Plaintiffs also challenge the constitutionality of 8 U.S.C. § 1182(a)(3)(B)(i)(VII) (hereinafter the "ideological exclusion" provision), which renders inadmissible any alien who "endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization." It was the ideological exclusion provision that the government initially invoked to explain Professor Ramadan's exclusion; the government abandoned its reliance on the provision only after plaintiffs commenced this lawsuit. While the government is no longer relying on this provision to bar Professor Ramadan, the statute continues to restrict plaintiffs' ability to invite foreign scholars, writers, and intellectuals to speak in the U.S. In the court below, plaintiffs sought, in addition to relief with respect to the exclusion of Professor Ramadan, a declaration that the ideological exclusion provision is unconstitutional under the First and Fifth Amendments.

The district court denied plaintiffs' motion for summary judgment and granted summary judgment in the government's favor. The court agreed with plaintiffs that the government could not bar Professor Ramadan without a "facially legitimate and bona fide" reason for doing so, but it found that Professor Ramadan's donations furnished such a reason. The court found that plaintiffs did not have standing to challenge the ideological exclusion provision. Plaintiffs now appeal.

STATEMENT OF FACTS

The Ongoing Exclusion of Professor Tariq Ramadan

Professor Tariq Ramadan is a prominent Swiss scholar of Islam who is now affiliated with the University of Oxford. SPA-37. He has published more than 20 books, approximately 700 articles, and approximately 170 audio tapes on subjects including Muslim identity, democracy and Islam, human rights and Islam, Islamic feminism, and Islamic law. SPA-37. His scholarship focuses on "the situation of Muslims living in the West, and in particular on the situation of Muslims who live in Europe." A-40. He has encouraged Muslims living in Europe to reject both isolation and assimilation, and to find a way to be "both fully European and fully Muslim." A-41.

Professor Ramadan is arguably the most prominent European scholar of the Muslim world. A-194, 235, 277. In December 2000, *Time* magazine labeled him "the leading Islamic thinker among Europe's second- and third-generation Muslim immigrants." SPA-38; A-200. In 2003, Professor Ramadan debated a proposed law banning the display of Islamic headscarves in state schools with France's then-Interior Minister and now-President, Nicolas Sarkozy, on French national television. SPA-39; A-194, 200. In September 2004, Jonathan Laurence wrote in *The Forward* that Professor Ramadan "may be the most well-known Muslim public figure in all of Europe" and that he "ha[d] used his prominence to urge

young Muslims in the West to choose integration over disaffection." SPA-38; A-194, 200. Paul Donnelly, in an op-ed in the *Washington Post*, described one of Professor Ramadan's recent books as "perhaps the most hopeful work of Muslim theology in the past thousand years." A-195, 213-14.

Until August 2004, Professor Ramadan visited the U.S. frequently to lecture, attend conferences, and meet with other scholars. SPA-4; A-44-45. In January 2004, Professor Ramadan accepted a tenured position at the University of Notre Dame. SPA-3; A-45. The University sought and obtained an H-1B visa to allow him to work in the U.S. SPA-3; A-45. Just nine days before he and his family were to move to Indiana, however, the U.S. Embassy in Bern, Switzerland, informed him by telephone that his visa had been revoked. SPA-3; A-45. Neither Professor Ramadan nor the University ever received a verbal or written explanation for the revocation. SPA-3; A-45. At a press conference, however, a spokesman for the Department of Homeland Security stated that the visa had been revoked "because of a section in federal law that applies to aliens who have used a position of prominence within any country to endorse or espouse terrorist activity." SPA-3; A-45.

In October 2004, the University of Notre Dame submitted a second H-1B petition on Professor Ramadan's behalf. SPA-41; A-50. When the government failed to act on this petition by December 2004, Professor Ramadan resigned his

position at the University and canceled plans to meet with and speak to academics in the U.S. SPA-41; A-50-51.

In September 2005, at the encouragement of individuals and organizations in the U.S., Professor Ramadan submitted an application for a B visa, a nonimmigrant visa that would allow him to enter the U.S. to speak at various upcoming conferences. SPA-4; A-51-52. At a December 2005 visa interview, representatives of the Departments of State and Homeland Security asked Professor Ramadan numerous questions about his political views and associations. A-50-51. He answered all of these questions to the best of his ability. A-50-51.

Plaintiffs commenced this lawsuit in January 2006, after Professor Ramadan's visa application had been pending without decision for approximately 4 months. A-11. In March 2006, plaintiffs moved for a preliminary injunction. SPA-5-6. In an Opinion dated June 23, 2006, the district court found that plaintiffs' First Amendment rights were implicated by Professor Ramadan's exclusion and that plaintiffs had standing to challenge his exclusion. SPA-50-52. Where the constitutional rights of U.S. citizens are implicated, the court held, the First Amendment forecloses the government from excluding an alien except on the basis of "a facially legitimate and bona fide" reason. SPA-54-55. The court found, however, that it did not have sufficient information to determine whether the government had a facially legitimate and bona fide reason for excluding Professor

Ramadan, because the government had not offered any reason at all for its failure to adjudicate the visa application that was then pending. The court ordered the government to adjudicate the application within 90 days. SPA-67.

On September 19, 2006, Professor Ramadan received a telephone call from the U.S. Embassy in Bern, informing him that his application for a B visa had been denied – not on the basis of the ideological exclusion provision but on a wholly new basis. SPA-6; A-446-47. The following day, counsel for the government sent a copy of the visa denial letter to plaintiffs' counsel. The letter, dated September 19, 2006, and signed by John O. Kinder, Consul, U.S. Embassy, Bern, stated that Professor Ramadan's visa application "ha[d] been refused" and that Professor Ramadan had been "found inadmissible to the United States for engaging in terrorist activity by providing material support to a terrorist organization." SPA-7; A-447, 468. The letter further stated:

> The basis for this determination includes the fact that during your two interviews with consular officials, you stated that you had made donations to the Comité de Bienfaisance et de Secours aux Palestiniens and the Association de Secours Palestinien. 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 INA § 212(a)(3)(B)(i)(I).

SPA-7; A-468.[2]

---

[2] Counsel for the government later informed plaintiffs that the denial was based on 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd), which relates to the provision of material support to undesignated terrorist organizations. A-653-54.

The government's continuing exclusion of Professor Ramadan effectively forecloses plaintiffs from inviting Professor Ramadan to speak to audiences in the U.S. and prevents plaintiffs' members from engaging Professor Ramadan in face-to-face discussion and debate. A-450, 661-63, 700-01, 776-78. Among the events Professor Ramadan has had to decline (or speak at only by videoconference) are the AAR's 2004, 2006, and 2007 Annual Meetings, A-662-63; the AAUP's 2005 Annual Meeting, A-700-01; and PEN's 2006 and 2007 World Voices Festivals, A-776-79. Plaintiffs have invited Professor Ramadan to speak at future events; for example, the AAUP has invited Professor Ramadan to present the Alexander Meiklejohn Awards for Academic Freedom at AAUP's June 2008 Annual Meeting. A-701-02. Plaintiffs anticipate inviting Professor Ramadan to speak at other events as well. A-663, 779. The government's actions, unless enjoined, will prevent plaintiffs' members from meeting with Professor Ramadan inside the U.S., hearing his views, and engaging him in debate.

The Effect of the Ideological Exclusion Provision

While the government initially explained its exclusion of Professor Ramadan by invoking the ideological exclusion provision, it abandoned its reliance on that provision after plaintiffs commenced this suit. The ideological exclusion provision continues, however, to restrict the foreign scholars whom plaintiffs can invite to speak to their members inside the U.S.

Plaintiffs AAR, AAUP, and PEN are organizations committed to the free exchange of ideas among scholars and writers of different nationalities, backgrounds, and viewpoints. To fulfill their organizational mandates, they often sponsor conferences and meetings to which foreign scholars and writers are invited, sometimes as featured speakers. A-658-59, 663, 667-68, 694-95, 700, 763, 769-771. Since September 2001, plaintiffs have dedicated substantial resources to programming about the "war on terror" and related issues. A-657, 659-60, 776-77. Plaintiffs are "especially committed to convening conversations and debates that question existing orthodoxies and provide new and critical perspectives on important current issues and events." A-770. They make a special effort to seek out foreign scholars and writers who can provide perspectives that are underrepresented or absent in the U.S. A-667, 702.

The ideological exclusion provision presents a direct threat to plaintiffs' work and their ability to fulfill their organizational mandates. The provision's operative terms – "endorse," "espouse," and "persuade" – are vague, sweeping, and manipulable. An entry from the State Department's Foreign Affairs Manual states that the provision is directed at those who have voiced "irresponsible expressions of opinion." A-703, 712. That the government invoked the provision to explain its revocation of Professor Ramadan's visa in 2004 only deepens plaintiffs' concerns, because Professor Ramadan can be said to have endorsed or

espoused terrorism only if that phrase is construed so broadly as to encompass reasoned criticism of U.S. foreign policy. A-661-62, 700, 776. The government concedes that it has used the provision multiple times. A-813-14, 817-18.

The ideological exclusion provision imposes costs beyond those associated with specific exclusions. Some foreign scholars and writers are reluctant to accept invitations because they will be subjected to ideological scrutiny and possibly denied entry. A-668, 781-82, 790. Moreover, uncertainty about whether invited scholars will be permitted to enter the country undermines plaintiffs' ability to plan and publicize events in the U.S. Travel arrangements must be made and facilities secured without knowing if foreign scholars will be able to attend. A-666-67, 707-08. These costs and uncertainties are deterrents to inviting foreign scholars and writers – particularly controversial ones – in the first place. A-666-67, 707-08. Notably, the revocation of Professor Ramadan's visa in 2004, in addition to preventing Professor Ramadan from traveling to the U.S. to speak at plaintiffs' events, resulted in plaintiffs incurring substantial financial and administrative costs. A-662-63, 700-01, 776-78.

The District Court's Order and Opinion of December 20, 2007

Plaintiffs amended their complaint on February 2, 2007, and moved for summary judgment on February 23, 2007. The government cross-moved on May

21, 2007. On December 20, 2007, the district court denied plaintiffs' motion and granted summary judgment in the government's favor. SPA-32.

The court found that it had jurisdiction to consider plaintiffs' First Amendment challenge to Professor Ramadan's exclusion. Citing the Supreme Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the court agreed with plaintiffs that it was the government's burden to supply a "facially legitimate and bona fide" reason for its actions. SPA-19. The court expressly rejected the government's argument that the doctrine of consular non-reviewability barred judicial review. That doctrine, the court held, could not apply with full force to a decision that was not made solely by consular officers, SPA-22, and in any event did not strip the courts of jurisdiction to hear constitutional claims, SPA-16.

The court found, however, that the government had offered a facially legitimate and bona fide reason for Professor Ramadan's exclusion. The court held that that the government had "given a reason for the visa denial unrelated to Professor Ramadan's speech, linked the reason to a statutory provision providing the basis for exclusion, and demonstrated that the statute applies to Professor Ramadan." SPA-29. The court rejected plaintiffs' argument that amendments made in 2005 to the material support provision – amendments made by the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 308, Div. B (May 11, 2005) (hereinafter "REAL ID Act") – should not be applied to donations that were made as many as 7

years before their enactment. SPA-24-26. The court also rejected plaintiffs' argument that the government had not shown that Professor Ramadan knew or reasonably should have known that his donations were benefiting a terrorist organization, a showing that the material support statute requires the government to make. SPA-26-29. The court found that the government had met its burden under the statute because Professor Ramadan acknowledged that he had made donations to the Association de Secours Palestinien ("ASP"). SPA-27. Finally, although plaintiffs had submitted substantial and uncontroverted evidence on this point, the court found that plaintiffs had not carried their burden under the material support statute's affirmative defense – that they had not demonstrated clear and convincing evidence that Professor Ramadan did not know, and should not reasonably have known, that ASP was a terrorist organization. SPA-27-29.[3]

With respect to plaintiffs' challenge to the ideological exclusion statute, the court found that plaintiffs did not have standing because they had "not identified anyone whom they wished to bring to the United States who has been excluded under the [ideological exclusion] provision." SPA-31. Because the court held that

[3] The Consul's September 2006 letter stated that Professor Ramadan gave money not only to ASP but to the Comité de Bienfaisance et de Secours aux Palestiniens ("CBSP") as well. A-811. Professor Ramadan has never given money to CBSP. A-449. In any event, all of plaintiffs' arguments apply with equal force even if it is assumed that Professor Ramadan gave money to CBSP.

plaintiffs did not have standing, it did not address plaintiffs' facial challenge. SPA-31-32.

SUMMARY OF ARGUMENT

The district court correctly held that the government's exclusion of Professor Ramadan implicates plaintiffs' First Amendment rights, that plaintiffs have standing to challenge the exclusion, and that the First Amendment bars the government from excluding Professor Ramadan without a facially legitimate and bona fide reason for doing so. The court erred, however, in finding that the government had provided a facially legitimate and bona fide reason for its actions.

The 2005 REAL ID Act's amendments to the material support provision should not be applied to donations that Professor Ramadan made between 1998 and 2002, because Congress has not provided an unambiguous directive that the amendments should be applied retroactively to conduct that was not a ground for inadmissibility at the time it occurred. Even if the 2005 amendments apply retroactively to such conduct, the court erred in finding that the amendments render Professor Ramadan inadmissible. The current incarnation of the material support provision applies only to those who knew or should have known that their donations were benefiting a terrorist organization, but the government provided *no evidence whatsoever* that Professor Ramadan knew that ASP was a terrorist organization. Plaintiffs, by contrast, submitted uncontroverted evidence – "clear

and convincing" evidence – that Professor Ramadan lacked the requisite knowledge. Accordingly, the district court erred in holding that Professor Ramadan's small donations to ASP supplied a facially legitimate and bona fide reason for his exclusion.

The court also erred in holding that plaintiffs do not have standing to challenge the ideological exclusion provision. Plaintiffs have standing because they have suffered concrete injury as a result of the provision; because the provision has had – and continues to have – a chilling effect on plaintiffs' and others' willingness to engage in First Amendment activity; and because there exists a credible threat that the provision will be used to bar plaintiffs' invitees in the future. Although the district court did not address the merits of plaintiffs' challenge to the ideological exclusion provision, it is plain that the provision is unconstitutional. The provision invests executive officers with the authority to bar foreign nationals from the U.S. on the basis of speech that U.S. citizens and residents have a right to hear, and its terms are sweeping, elastic, and vague. The provision is unconstitutional under the First and Fifth Amendments.

STANDARD OF REVIEW

The Second Circuit reviews a "district court's grant of summary judgment [] *de novo*." *Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co.*, 472 F.3d 33, 41 (2d Cir. 2006) (internal citation omitted). Thus the Court

"utilizes the same standard as the district court: summary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *Id.* (quoting *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998)).

ARGUMENT

I. AS THE DISTRICT COURT RECOGNIZED, THE FIRST AMENDMENT REQUIRES THE GOVERNMENT TO PROVIDE A FACIALLY LEGITIMATE AND BONA FIDE REASON FOR PROFESSOR RAMADAN'S EXCLUSION.

"It is a well-settled principle of constitutional law that the First Amendment includes not only a right to speak, but also a right to receive information and ideas." SPA-53. As the Supreme Court has explained, "[t]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982); *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965).

This "broad right to receive information includes a right by citizens of the United States 'to have an alien enter and to hear him explain and seek to defend his views.'" SPA-53 (quoting *Mandel*, 408 U.S. at 764). Thus, courts exercise jurisdiction over U.S. citizens' First Amendment challenges to the exclusion of invited scholars. In *Mandel*, the Supreme Court considered a challenge brought by

U.S. citizens to the government's exclusion of Ernst Mandel, a Belgian journalist and scholar. 408 U.S. at 756-60. While the Court ultimately upheld Mandel's exclusion, it categorically rejected the proposition that the exclusion of an invited foreign scholar "involves no restriction on First Amendment rights," and it decided the case on the merits. *Id.*

Since *Mandel*, the courts have uniformly accepted the view that they have jurisdiction to hear U.S. citizens' First Amendment challenges to the exclusion of invited foreign scholars. *See, e.g.*, *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990); *Abourezk v. Reagan*, 785 F.2d 1043, 1050-51 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987); *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988); *Harvard Law Sch. Forum v. Shultz*, 633 F. Supp. 525, 530 (D. Mass. 1986), *vacated as moot*, 852 F.2d 563 (1st Cir. 1986); *NGO Comm. on Disarmament v. Haig*, No. 82 Civ. 3636, 1982 U.S. Dist. LEXIS 13583 at *4 (S.D.N.Y. June 10, 1982), *aff'd mem.*, 697 F.2d 294 (2d Cir. 1982); *see also Burrafato v. Dep't of State*, 523 F.2d 554, 556 (2d Cir. 1975). The cases recognize that the courts have the responsibility of ensuring that the immigration laws are not used as tools of censorship. *See, e.g.*, *Abourezk v. Reagan*, 592 F. Supp. 880, at 888 (D.D.C. 1984) ("judicial scrutiny of the specific reasons for denials of entry" is necessary to prevent "a mushrooming of content based denials"). As the district court wrote in *Abourezk*:

> [A]n alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded [under a now-repealed provision of the Immigration and Nationality Act] solely on account of the content of his proposed message. For although the government may deny entry to aliens altogether, or for any number of specific reasons, it may not, consistent with the First Amendment, deny entry solely on account of the content of speech.

Abourezk, 592 F. Supp. at 887; *see also Abourezk*, 785 F.2d at 1061 (stating that the executive's discretion over exclusion of aliens "extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations," and that it is the "duty of the courts" to say where the constitutional limitations are); *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (stating that plenary power is "subject to important constitutional limitations").

Because the exclusion of invited scholars implicates the First Amendment rights of U.S. residents, the government cannot exclude invited scholars without justification. As the district court recognized, the standard the courts have applied "is clear": "when a consular official denies a visa which implicates a United States citizen's First Amendment rights, he or she must have a facially legitimate and bona fide reason for doing so." SPA-19; *see also Mandel*, 408 U.S. at 762-64; *Adams*, 909 F.2d at 647; *Abourezk*, 592 F. Supp. at 886; *Harvard Law Sch. Forum*, 633 F. Supp. at 531; *Allende v. Shultz*, 605 F. Supp. 1220, 1224 (D. Mass. 1985).

The "facially legitimate and bona fide" test is not analogous to strict scrutiny; it is a lower standard that reflects an accommodation to the authority of

the political branches over immigration. SPA-53-54. However, the test requires the government to do more than point to a statutory provision. To carry its burden under the First Amendment, the government must both identify a statutory basis for its action and show that the statute *actually applies*. In *Adams*, the First Circuit characterized the district court's application of the "facially legitimate and bona fide" standard as a "mixed question of law and fact" and it noted that the application of *Mandel* required a "determination of whether there was sufficient evidence to form a 'reasonable ground to believe' that the alien engaged in terrorist activity." 909 F.2d at 647. The relevant question, it wrote, was whether there was "evidence . . . sufficient to justify a reasonable person in the belief that the alien falls within the proscribed category." *Id.* at 649.

Other courts have characterized the government's obligation in similar terms; they have required the government both to point to statutory authority for its actions and to show – based on actual evidence – that the statute applies. *See, e.g.*, *Allende*, 845 F.2d at 1116 (rejecting government's justification for excluding Allende because it had "misapplied" the invoked provision to her); *Allende*, 605 F. Supp. at 1224 (stating that the reason given to justify an exclusion "must be 'facially legitimate and bona fide' not only in the general sense, but also within the context of the specific statutory provision on which the exclusion is based"); *id.* at 1225 (rejecting government's justification for exclusion as "entirely conclusory"

where government had failed to "present [or] describe any set of facts which could be construed to fall specifically within the meaning of [the relied upon] provision"); *Abourezk*, 592 F. Supp. at 886 (rejecting justification as "entirely conclusory"); *El-Werfalli v. Smith*, 547 F. Supp. 152, 154 (S.D.N.Y. 1982) (refusing to "engage in unsupported inference and speculative supposition[]" and requiring the government to point to statutory authority and a "reasoned basis for [its] action").

The district court properly recognized that the First Amendment required the government to supply (i) "a reason" for its exclusion of Professor Ramadan, (ii) a statutory basis for the exclusion, and (iii) evidence that the statute actually applied to Professor Ramadan. SPA-23-24. The court erred not in stating the law, which is well-settled, but in applying it.[4]

II. THE DISTRICT COURT ERRED IN FINDING THAT THE GOVERNMENT HAD SUPPLIED A FACIALLY LEGITIMATE AND BONA FIDE REASON FOR PROFESSOR RAMADAN'S EXCLUSION.

The district court found that the government had supplied a facially legitimate and bona fide reason for Professor Ramadan's exclusion. The court

[4] There is a serious question whether *Mandel*'s "facially legitimate and bona fide" test remains the appropriate standard for review here. The Supreme Court has recently eschewed more deferential standards of review when presented with constitutional challenges to immigration laws. *See, e.g., Nguyen v. I.N.S.*, 533 U.S. 53, 61 (2001); *Zadvydas*, 533 U.S. at 695. This Court need not consider whether a more stringent standard should apply, however, because the government's actions cannot be sustained even under the *Mandel* standard.

found that Professor Ramadan's acknowledged donations to ASP constituted "a reason" for the exclusion; that the material support provision supplied a statutory basis for the government's action; and that the government had demonstrated that the statute actually applied to Professor Ramadan. SPA-27. As discussed below, however, the material support provision does not render Professor Ramadan inadmissible. First, contrary to the district court's conclusion, the 2005 REAL ID Act's amendments do not apply retroactively to donations that were made between 1998 and 2002 and that were not grounds for inadmissibility at the time they were made. Second, even if the 2005 amendments could properly be applied to such donations, Professor Ramadan's donations do not render him inadmissible because they were not made with the requisite knowledge. There is no evidence in the record suggesting that Professor Ramadan knew nor should have known that his donations to ASP were benefiting Hamas. Indeed, plaintiffs submitted clear and convincing evidence to the contrary.

A. The district court erred in finding that the amendments made by the 2005 REAL ID Act apply retroactively to donations that Professor Ramadan made between 1998 and 2002.

The district court found that the 2005 REAL ID Act's amendments to the material support provision rendered Professor Ramadan inadmissible for donations that he made to ASP between 1998 and 2002. SPA-27-29. This finding was in error. It is well settled that statutes are not to be given retroactive effect unless the

legislature has spoken in language "so clear that it could sustain only one interpretation." *I.N.S. v. St. Cyr*, 533 U.S. 289, 317 (2001). The relevant language of the REAL ID Act, however, is anything but clear. Moreover, retroactive application of the REAL ID Act's amendments to conduct that was not grounds for inadmissibility at the time it occurred would attach new and severe legal consequences to prior conduct and also give rise to serious due process concerns.[5]

1. The district court erred in finding that Congress had unambiguously directed that the REAL ID Act's amendments should be applied retroactively to conduct that was not grounds for inadmissibility at the time it occurred.

"The presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994); *see also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) ("[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."); *Reynolds v. McArthur*, 27 U.S. 417, 434

[5] The government has never contended that Professor Ramadan's donations were grounds for inadmissibility at the time they were made, nor (as the district court recognized) could it contend that they were. SPA-24 n.22. The government asserts that Professor Ramadan is barred under the material support provision because he gave money to ASP (a charitable organization) and ASP in turn gave money to Hamas. However, such "indirect" donations – that is, donations two or more steps removed from the entity that actually conducts "terrorist activity" – were not made grounds for inadmissibility until 2005, three years after Professor Ramadan's last donation to ASP. Prior to 2005, the Immigration and Nationality Act required a direct link between the provider of support and the entity actually carrying out terrorist activity.

(1829). The presumption against retroactive legislation reflects a recognition that "retrospective laws are . . . generally unjust." 2 J. Story, Commentaries on the Constitution, §1398 (5th ed. 1891); *see also Landgraf*, 511 U.S. at 265, 270.

Because "retroactive statutes raise particular concerns," statutes "will not be construed to have retroactive effect unless their language *requires this result*." *St. Cyr*, 533 at 315 (internal quotation marks omitted and emphasis added); *see also Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997) (stating that statutes not to be given retroactive effect unless legislature has spoken in language "so clear that it could sustain only one interpretation"); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764-65 (2006); *Landgraf*, 511 U.S. at 263 (requiring "unambiguous directive" from the legislature); *Chew Heong v. United States*, 112 U.S. 536, 559 (1884) (invoking "uniformly" accepted rule that courts are not to apply statutes retroactively "unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature").

The REAL ID Act does not contain an "unambiguous directive" that the amended and radically expanded material support provisions should apply retroactively to conduct that did not constitute a ground for inadmissibility at the time it occurred. The REAL ID Act's "Effective Date" provision reads, in relevant part:

> EFFECTIVE DATE. The amendments made by [Section 103 of the REAL ID Act] shall take effect on the date of the enactment of this

> division, 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 § 103(d) (hereinafter "section 103(d)" or "REAL ID effective date provision"). In construing this language, the district court erred in treating the phrase "before, on, or after such date" as a kind of talisman that signals retroactive intent irrespective of the context in which the phrase appears. SPA-25-26. As discussed below, the court's construction of the REAL ID effective date provision takes that phrase out of context and fails to give meaning to other language in the provision. The court's construction also renders section 103(d)(1) entirely superfluous.

Had Congress wanted the REAL ID Act's material support amendments to apply retroactively to conduct that was not grounds for inadmissibility at the time it occurred, Congress need not have looked further than the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) (hereinafter, the "Patriot Act"), to find language that would have clearly manifested its intent. The Patriot Act was Congress's last major overhaul of the material support inadmissibility law prior to the REAL ID Act. Its retroactivity provision reads, in relevant part:

RETROACTIVE APPLICATION OF AMENDMENTS
(1) IN GENERAL - Except as otherwise provided in this subsection, the amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to –
(A) actions taken by an alien before, on, or after such date; and
(B) all aliens, without regard to the date of entry or attempted entry into the United States –
(i) in removal proceedings on or after such date (except for proceedings in which there has been a final administrative decision before such date); or
(ii) seeking admission to the United States on or after such date.

Patriot Act § 411(c).

Several things about this subsection are worth noting. The subsection is titled "Retroactive Application of Amendments," which leaves no doubt about its intent. The language of the provision is consistent with that title; the statement that "the amendments . . . shall apply to . . . actions taken by an alien before, on, or after such date" leaves no room for doubt that Congress intended the amendments (with a few stated exceptions) to apply retroactively to conduct that predated the Patriot Act's effective date. Moreover, the subsection includes a complex retroactivity scheme – a scheme that includes four lengthy subparts, general rules, and specific exceptions. Patriot Act § 411(c). The retroactivity scheme, by virtue of its detail and specificity, makes clear that Congress seriously considered the consequences of retroactive application and made carefully calibrated judgments about which provisions should apply retroactively and which should not. (In fact

the Patriot Act retroactivity scheme was the product of extensive debate within Congress and of negotiations between Congress and the executive branch.[6])

In enacting the REAL ID effective date provision, Congress departed from the language of the Patriot Act in several significant respects. First, rather than enact a provision titled "Retroactive Application of Amendments," it enacted one called "Effective Date." *Cf. Landgraf*, 511 U.S. at 257 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date."); *Hamdan*, 126 S. Ct. at 2766 n.9.

Second, Congress chose not to make the amendments applicable to "actions *taken* by an alien before, on, or after such date" (as it had done with the Patriot Act amendments) but to "acts and conditions *constituting a ground for inadmissibility, excludability, deportation, or removal* occurring or existing before, on, or after such date." This language suggests that Congress's concern was not with when the relevant conduct occurred – which could have been "before, on, or after" the date of enactment – but rather with whether the conduct constituted a basis for inadmissibility, excludability, deportation, or removal at the time it occurred. To reach the conclusion that the REAL ID Act's "effective date" provision manifests

---

[6] *See, e.g.*, 147 Cong. Rec. S10547-01, S10557 (Oct. 11, 2007); 147 Cong. Rec. S10365-02, S10376 (Oct. 9, 2001) (statements of Sen. Leahy); 147 Cong. Rec. H7159-03, H7198 (Oct. 23, 2001) (statement of Rep. Conyers).

retroactive intent, the district court was forced to excise an entire phrase, but this phrase – "constituting a ground for inadmissibility, excludability, deportation, or removal occurring or existing" – cannot simply be ignored. It is axiomatic that courts must endeavor to give meaning and effect to every word of a statute. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).[7]

There is an even more fundamental problem with the district court's construction of section 103(d)(2): It renders section 103(d)(1) entirely redundant. In the court below, the government proposed that section 103(d)(2) applies to *all* foreign nationals – whether inside the U.S. or not, whether in removal proceedings or not. If this were true, however, Congress would not have had to enact section 103(d)(1). The only way of giving meaning to all of section 103(d) is to read section 103(d)(1) as limiting the application of 103(d)(2) to those in removal proceedings. On this reading, section 103(d)(1) and (2) are not parallel provisions; rather, section 103(d)(2) *elaborates on* section 103(d)(1); section 103(d)(2) makes clear that, *with respect to individuals in removal proceedings*, the REAL ID Act's

[7] That Congress used the outdated terms "excludability" and "deportation" – words that have since been replaced by "inadmissibility" and "removal," *see Clark v. Martinez*, 543 U.S. 371, 376 n.2 (2005) – provides further evidence that it was concerned with conduct that constituted a basis for inadmissibility, excludability, deportation, or removal *at the time it occurred*. If Congress had intended the REAL ID Act's amendments to apply to *all* past conduct, regardless of whether it was a basis for excludability or deportation at the time it occurred, Congress would not have needed the outdated terms at all.

amendments apply to " acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal occurring or existing before, on, or after [the Act's effective] date." Together, sections 103(d)(1) and (d)(2) address individuals who are in removal proceedings, but as to everyone else they are silent. Silence does not signal retroactive intent. *See, e.g.*, *Landgraf*, 511 U.S. at 286.

The district court erred in finding that section 103(d) constitutes an unambiguous directive that the REAL ID Act's amendments should be applied retroactively to conduct that was not grounds for inadmissibility at the time it took place. Accordingly, it erred in finding that the material support provision supplied a facially legitimate and bona fide reason for Professor Ramadan's exclusion.

2. Application of the REAL ID Act's amendments to conduct that would not have been a ground for inadmissibility at the time it occurred would have an impermissible retroactive effect while also raising serious constitutional problems.

Because the district court held that Congress had given a "clear indication" that the REAL ID Act amendments apply retroactively to conduct such as Professor Ramadan's, the district court did not address the second question in the *Landgraf* analysis – whether retroactive application of the amendments would have a "retroactive effect." *Landgraf*, 511 U.S. at 280 ("[If] the statute contains no . . . express command" that the statute be applied retroactively, "the court must determine whether the new statute would have retroactive effect."). It is plain that

applying the REAL ID Act amendments to such conduct would have a retroactive effect.[8]

The question whether a statute "would have a retroactive effect," *United States v. Luna-Reynoso*, 258 F.3d 111, 115 (2d Cir. 2001), requires a "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment," *St. Cyr*, 533 U.S. at 321 (internal quotation marks omitted). The inquiry "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Martin v. Hadix*, 527 U.S. 343, 358 (1999) (internal quotation marks omitted). In *Landgraf*, the Supreme Court stated that a statute has a retroactive effect where it would, *inter alia*, "increase a party's liability for past conduct[] or impose new duties with respect to transactions already completed." 511 U.S. at 280.

Retrospective application of the REAL ID Act's amendments would plainly have such a retroactive effect. If the amendments were applied retroactively, charitable donations that were permissible at the time they were made would become a basis for inadmissibility. Thus, retroactive application would "attach[] a

---

[8] This is one of several questions that the district court did not reach below. As these questions are purely legal, this Court can address them in the first instance. *See, e.g.*, *Booking v. Gen. Star Mgmt. Co.*, 254 F.3d 414, 418-19 (2d Cir. 2001) ("[W]e have discretion to consider issues that were raised, briefed, and argued in the District Court, but that were not reached there.").

new disability in respect to transactions or considerations already past," *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 948 (1997), and "create liabilities that had no legal existence before the Act was passed," *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 (1994). That is, applying the amendments retroactively would attach "new legal consequences to events completed before . . . enactment." *Landgraf*, 511 U.S. at 270.

The analysis above supplies ample reason to reject the district court's conclusion that the REAL ID Act's amendments should be applied retroactively to conduct that was not a ground for inadmissibility at the time it occurred. However, the doctrine of constitutional avoidance provides an additional argument against retroactive application. *See, e.g., Jones v. United States*, 526 U.S. 227, 239 (1999); *United States v. Gonzalez*, 420 F.3d 111, 124 (2d Cir. 2005). Plaintiffs recognize that Professor Ramadan does not have any constitutional rights with respect to admission that are implicated by the district court's construction of section 103(d), but the same material support and effective date language that the court construed below applies not only to individuals like Professor Ramadan who are seeking admission from outside the country, but also to persons living in the U.S. – including asylees and lawful permanent residents – who are indisputably protected by the due process clause. *See* REAL ID Act § 105(a), codified at 8 U.S.C. § 1227(a)(4)(B) (making terrorism inadmissibility and removal grounds co-

extensive); *id.* § 105(b) (providing substantively identical effective date language for removal amendments as for inadmissibility amendments); *Zadvydas*, 533 U.S. at 693 ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Because the REAL ID Act's inadmissibility and removal amendments are subject to the same effective date language, and because the same statutory language cannot be construed differently for the different classes of people to whom it applies, *see, e.g.*, *Clark*, 543 U.S. at 380, and because retroactive application of the amendments to resident noncitizens would raise serious constitutional problems, the statute must be construed to avoid this result, *see, e.g.*, *id.* ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." (internal citations omitted)).

Under the government's theory of the statute, a lawful permanent resident who was admitted to the country twenty years ago could be subject to removal based on donations made before entry, even if the government granted the individual lawful permanent resident status with full knowledge of his conduct.

While the ex post facto clause does not protect against retroactive immigration legislation, such legislation must still comply with due process. *Landgraf*, 511 U.S. at 266; *St. Cyr*, 533 U.S. at 316. Under the Due Process clause, retroactive legislation is invalid unless "supported by a legitimate purpose furthered by rational means." *Pension Benefit Guar. Corp. v. R.A. Gray and Co.*, 467 U.S. 717, 729 (1984); *see also Brown v. Ashcroft*, 360 F.3d 346, 353-54 (2d Cir. 2004). "A justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Landgraf*, 511 U.S. at 266 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)).

The legislative history does not offer any rationale for applying the REAL ID Act's amendments retroactively; indeed, the legislative history does not make clear (or even suggest) that Congress wanted the amendments to apply retroactively at all. *Cf. Mojica v. Reno*, 970 F. Supp. 130, 170 (E.D.N.Y. 1997) (stating that the court should not be expected to "guess at what purpose could be served by applying [the legislation] retroactively"). No majority member even raised the possibility that the amendments would be applied retroactively to foreign nationals already living inside the U.S. *See* SPA-25-26 (noting that the only references to retroactivity in the legislative history were by minority members). And certainly no majority member (or minority member, for that matter) suggested any justification for applying amendments to U.S. residents who made charitable

donations many years ago – charitable donations that were not grounds for inadmissibility at the time they were made.

The district court erred in finding that the 2005 amendments should be applied retroactively to conduct that was not a ground for inadmissibility at the time it occurred.

B. The district court erred in holding that Professor Ramadan is inadmissible under the material support provision.

Even if the REAL ID Act's amendments apply retroactively to the donations that Professor Ramadan made between 1998 and 2002, these donations do not render him inadmissible because they were made without the requisite knowledge. The government failed to come forward with any evidence whatsoever that Professor Ramadan knew or reasonably should have known that ASP was providing funds to Hamas. Plaintiffs, by contrast, introduced clear and convincing evidence that he neither possessed nor should have possessed the requisite knowledge. Because the material support inadmissibility statute does not properly apply to Professor Ramadan (even if the REAL ID Act's amendments are applied retroactively), it does not supply a facially legitimate and bona fide reason for his exclusion.

1. The district court erred in holding that the government could rely on the material support provision in the absence of evidence that Professor Ramadan knew or should have known that ASP was providing support to Hamas.

The district court erred in holding that the government could rely on the material support provision in the absence of evidence that Professor Ramadan knew or should have known that ASP was providing support to Hamas. The current incarnation of the material support provision renders inadmissible any alien who:

> commit[s] an act [he] *knows, or reasonably should know*, affords material support . . . to a terrorist organization . . . unless [he] 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.

8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd) (emphases added). Notably, other subsections of 8 U.S.C. § 1182(a)(3)(B)(iv) (the section that defines "engage in terrorism") do not reference a knowledge requirement. *See, e.g.*, 8 U.S.C. § 1182(a)(3)(B)(iv)(II) (relating to the planning of terrorist activities); *id.* § 1182(a)(3)(B)(iv)(III) (relating to the gathering of information on potential targets for terrorist activity); *id.* § 1182(a)(3)(B)(iv)(V) (relating to the soliciting of funds for terrorist activity). The subsection relating to material support, however, references knowledge twice.

The material support provision's first reference to knowledge indicates that the provision cannot be invoked at all unless the executive has some evidence that the foreign citizen knew or should have known that he was providing material support to an organization engaged in terrorist activity. The district court

misinterpreted this knowledge requirement. The court found that the "first reference to knowledge in the statute" required a showing that "Ramadan must have known, or reasonably should have known, that he was giving money *to the ASP itself*." SPA-27 (emphasis added). This reading of the statute, however, fails to give effect to all of the statute's words. The statute requires more than a showing that the actor knew or should have known that he was supporting "an [] organization." It requires a showing that he knew or should have known that he was supporting "a *terrorist* organization." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd) (emphasis added).

Prior to this litigation, even the State Department interpreted the statute in this way. The State Department's Foreign Affairs Manual indicates that consular officers considering inadmissibility under the material support provision must "determine whether an alien knows or should have known that an organization *is a terrorist organization.*" 9 F.A.M. § 40.32 n.2.3 (emphasis added). The manual recognizes, in other words, that it is not sufficient for the government to find that the donor knew or should have known that he was supporting an organization. The government must find that the donor knew or should have known that he was supporting a *terrorist* organization.[9] In Professor Ramadan's case, this means that

[9] The statute that criminalizes material support *expressly* defines knowledge in the same way: it requires a showing that the donor knew that the organization

– contrary to the district court's reasoning – the government should have been required to show that Professor Ramadan knew or should have known that ASP was supporting Hamas, since it was ASP's alleged support for Hamas that made ASP a terrorist organization. The district court's construction of the statute simply ignores the most critical word. *Cf. Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 106 (2d Cir. 2004) (recognizing statutes "should be construed, if possible, to give effect to every clause and word" (internal quotation marks omitted)); *Duncan*, 533 U.S. at 174.

The district court's construction of the statute is also untenable as a matter of common sense, because it makes the statute's first reference to knowledge altogether meaningless. When a foreign national like Professor Ramadan writes a check to a charitable organization, he will *always* know that he is supporting that organization. What he may *not* know – especially if the organization is operating openly and has not been blacklisted by any government – is that the organization is engaged in activity that renders it a terrorist organization under U.S. law. In limiting the reach of the material support statute to donors who "know[] or reasonably should [have] know[n]" that their donations are going to a "terrorist organization," Congress was plainly trying to sift donors with nefarious intent from

---

was a designated organization or that the organization engaged in terrorism. 18 U.S.C. § 2339B(a)(1).

those with innocent intent. The district court's construction of the statute, however, lumps all donors together.

The government did not submit evidence that Professor Ramadan knew or should have known that ASP was supporting Hamas. The consular officer who denied Professor Ramadan's visa stated that he "believed that the facts supported an affirmative finding on each of the elements of the statute," A-854, and the consul stated that a "determination of Ramadan's ineligibility . . . was based on findings that Ramadan in fact satisfied each of the statutory requirements," A-809. These statements, however, simply elide the question of what the government actually believed the elements of the statute to be, and in any event the statements are entirely conclusory. The only declaration statement that provides more specificity is the consular officer's statement that he concluded that "Mr. Ramadan knew, or reasonably should have known, that providing funds directly to a group would afford material support *to that group*." A-854 (emphasis added). Again, however, this is not the question that the statute requires the government to ask. The proper question was whether Professor Ramadan knew that his donations to ASP would support *Hamas*, because (according to the government) it is ASP's support to Hamas that rendered ASP an undesignated terrorist organization.

The consular officer stated that his determination was based on three things: "information provided by Dr. Ramadan during the visa application process," a

Security Advisory Opinion supplied by officials in Washington, and "additional information provided by Washington." A-853-54. But information supplied by Professor Ramadan certainly provided no basis for the consular officer's conclusion, A-449-50 ("I did not know of any connection between ASP and Hamas and I did not know of any connection between ASP and terrorism."), and neither the SAO nor the mysterious "additional information" from Washington was ever submitted to the court.[10] Thus, the government relied not on evidence but on the bare assertion that it *possessed* evidence. That conclusory assertion should not have been found sufficient to support the government's motion for summary judgment or to defeat plaintiffs' motion. *See, e.g., ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 151 (2d Cir. 2007) (rejecting motion for summary judgment where "no evidence was adduced to support [plaintiffs'] conclusory assertion[s]" and record evidence was "to the contrary"); *Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir. 1996) ("conclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment"); *Donnelly v. Guion*, 467 F.2d 290, 294 (2d Cir. 1972) ("[P]arty opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility

[10] Pursuant to 8 U.S.C. § 1202(f), the district court affirmatively requested the administrative file relating to Professor Ramadan's exclusion. A-377. The government refused to release the file. A-896.

that there will be no trial. A summary judgment motion is intended to 'smoke out' the facts so that the judge can decide if anything remains to be tried.").

The district court erred in finding that the government could exclude Professor Ramadan under the material support provision in the absence of evidence that he knew or should have known that ASP was supporting Hamas.[11]

2. The district court erred in holding that plaintiffs had not submitted clear and convincing evidence that Professor Ramadan neither knew nor should have known that ASP was supporting Hamas.

The material support provision's second reference to knowledge makes lack of knowledge an affirmative defense. Once the government has come forward with evidence tending to show that the donor knew or should have known that the organization he was supporting was engaged in activity that rendered it a terrorist organization, it becomes the donor's burden to show, by "clear and convincing evidence," that he "did not know, and should not reasonably have known, that the organization was a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd). The district court erred in finding that plaintiffs had not made this showing.

Plaintiffs submitted copious evidence that Professor Ramadan neither knew nor should have known that ASP was providing funds to Hamas. To establish

[11] As discussed above, *see* Section II.A.2, *supra*, applying the material support provision to conduct that was not grounds for inadmissibility at the time it took place would raises serious due process concerns. These concerns are made even more serious if the statute is read to apply to individuals who made donations to organizations that they did not know were engaged in unlawful activity.

what he actually knew when he gave money to ASP, Professor Ramadan submitted a declaration in which he described the donations he made to ASP, his reasons for donating to ASP, and his knowledge about ASP at the time he made his donations. A-447-50. Professor Ramadan explained that he gave ASP a total of 1670 Swiss francs (approximately $1,336 dollars) between December 1998 and July 2002. A-449, 477-79. No single donation was for more than 250 francs, and most were for 100 francs or less. A-449, 477-79. Professor Ramadan explained his donations as follows:

> I donated to ASP for the same reason that countless Europeans – and Americans, for that matter – donate to Palestinian causes: because I wanted to provide humanitarian aid to people who desperately needed it. On more than one occasion, ASP sent me literature stating that the organization was supporting Palestinian schools. I have always been sympathetic to the plight of Palestinians, but ASP's literature was especially compelling to me because I have had a special interest in children's education for many years. In the early 1990s, I founded an organization called "Cooperation Coup de Main" which focused on building schools in developing countries. With the support of the Swiss Ministry of Education, we built an educational center in Senegal. In 1990, the city of Geneva named me one of ten "citizens of the year" for my work with Cooperation Coup de Main. I have always had a special commitment to education and my charitable donations to ASP, like my work with Cooperation Coup de Main, reflected that commitment.

A-448-49; *see also* A-447-48. Professor Ramadan stated unequivocally that he did not know of any connection at all between ASP and Hamas. A-449-50.

To establish what Professor Ramadan *should* have known when he gave money to ASP, plaintiffs submitted an affidavit from Jonathan Benthall, an expert on Muslim charities. Mr. Benthall stated that ASP is (and was during the relevant time period) an officially-recognized and registered charity in Switzerland. A-499-501, 515-39; *see also* A-447-48. He stated that ASP has been officially registered as an "Association" in the Swiss Department of Justice's Commercial Registry and the Swiss Official Gazette of Commerce since at least 2000. A-449-500, 515-20. He stated that ASP is described in the Swiss Department of Justice's Commercial Registry as an organization that provides

> aid to the poor, sick, orphans, disaster and famine victims among the Palestinian populations; carrying out benevolent and related works; [engaged in] the installation and management of medical, education, social and cultural centers for those in need in the West Bank, in the Gaza strip and in Palestinian refugee camps; [engaged in] development and restoration projects; [and] preservation of the Palestinian cultural heritage.

A-500, 515-20; *see also* A-521-23. Mr. Benthall also stated that, as a registered association, ASP is (and was during the relevant time period) directly regulated at the national level by Swiss tax and cantonal authorities and monitored for compliance with the criminal laws. A-491-92.

In his affidavit, Mr. Benthall explained that there is no reliable public evidence linking ASP with Hamas or terrorist activity. A-501-02. He explained that ASP has been operating since 1993, A-500-01, 525-30, soliciting donations

through the mail, A-500-01; *see also* A-447-48, and inviting donors to deduct their donations on their tax forms, A-500-01; *see also* A-447-48. ASP remains a registered entity in Switzerland, which suggests it is still permitted to operate by the Swiss government. A-500-01. Between 1998 and 2002, when Professor Ramadan made his donations, ASP was not considered a terrorist organization by the Swiss government or any European government. A-500-01. Nor was ASP considered a terrorist organization by any component of the U.S. government. A-501.[12] Mr. Benthall states unequivocally that an individual who donated funds to ASP between 1998 and 2002 cannot reasonably be expected to have known that ASP was supporting Hamas, if indeed it was. Mr. Benthall states:

> [A]n individual who donated funds to ASP or CBSP between 1998 and 2002 could reasonably have concluded that the charities were legitimate charities providing humanitarian aid to Palestinians and not supporting terrorism or Hamas. Indeed, I am not aware of information from the relevant time period that would have led a reasonable person to a different conclusion.

A-499; *see also* A-482-83, 499-502.

In finding that the evidence submitted by plaintiffs did not amount to clear and convincing evidence that Professor Ramadan neither knew nor should have known that ASP was providing funds to Hamas, the district court made two serious

[12] The U.S. Treasury Department designated ASP a "Specially Designated Global Terrorist," but not until 2003, a year after Professor Ramadan's last donation. A-501, 531-42. ASP has vigorously denied the allegation that it provides funds to Hamas or supports terrorism. A-501-02.

errors. First, the court improperly rejected Professor Ramadan's affidavit as "self-serving." In fact, the affidavit provided a detailed explanation of Professor Ramadan's knowledge at the time he donated to ASP, his motivations for making the donations, and his views about terrorism. While the affidavit was "self-serving" in the sense that it supported plaintiffs' broader contention that the government acted unlawfully when it denied Professor Ramadan's visa, that is hardly surprising given that the affidavit was introduced by plaintiffs in support of their own motion. Plaintiffs' obligation under the statute was to provide evidence of Professor Ramadan's subjective knowledge. They did so in the only way possible: by submitting an affidavit from Professor Ramadan himself. *Cf. Cullen v. United States*, 194 F.3d 401, 407 (2d Cir. 1999) (remarking that "[t]hough a claim that [defendant] would have accepted [a] plea would be self-serving (like most testimony by witnesses who are parties), it ought not to be rejected solely on this account"); *In re Thomas*, 324 F. Supp. 1205, 1207 (N.D. Ga. 1971) (finding that a single witness's statement was sufficient in itself to provide clear and convincing evidence); *Broida v. Travelers' Ins. Co.*, 175 A. 492, 494 (Pa. 1934) (same). The government's obligation was to introduce countervailing evidence, but it failed to do so.

Second, the court misunderstood the relevance of the expert affidavit. The court appears to have found that the expert affidavit was relevant only to the

question of *objective* knowledge. SPA-28 (stating that the expert affidavit, "while objectively illuminating, provides little comfort to the Court that Ramadan, subjectively, lacked the requisite knowledge"). The expert affidavit was relevant to the question of *subjective* knowledge, however, insofar as it corroborated Professor Ramadan's own affidavit. *See, e.g.*, *Thomas v. Seaman*, 304 A.2d 134, 137 (Pa. 1973) (finding that clear and convincing standard had been met where statement "colored by self-interest" was corroborated by other evidence). The expert affidavit was fully consistent with Professor Ramadan's affidavit and in fact concluded that, at the time Professor Ramadan donated to ASP, there was no evidence in the public domain that would have led a reasonable person to the conclusion that ASP was supporting Hamas. A-499. The government could have tried to find inconsistencies between the two affidavits. It could have introduced an expert affidavit of its own, or at least had the consular officer produce the evidence, if any, that he relied on in determining that Professor Ramadan should reasonably have known that ASP was supporting Hamas. The government did none of these things.

The effect of the district court's reasoning was to negate altogether the material support statute's affirmative defense. In enacting the statute, however, Congress obviously envisioned that some individuals who would otherwise be inadmissible under the material support provision would be admitted because they

lacked the requisite knowledge. Congress may have meant the bar to be high, but it plainly did not mean it to be insuperable. Am. Jur. Evidence § 157 ("'[c]lear and convincing evidence standard' does not mean that the evidence must negate all reasonable doubt or that the evidence must be uncontroverted"). In this case, plaintiffs submitted the detailed declaration of Professor Ramadan and the detailed (and corroborating) declaration of an expert witness, and the government failed to introduce any countervailing evidence at all – not even a "scintilla," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).[13]

The government's conclusory assertions about Professor Ramadan's knowledge were not sufficient to create a genuine issue of material fact. *See* Section II.B.1, *supra*; *see also Salahuddin v. Goord*, 467 F.3d 263, 272 (2d Cir. 2006); *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005). Uncontroverted record evidence shows that the material support provision simply

[13] Quite apart from issues relating to the retroactive application of the material support statute and Professor Ramadan's knowledge (or lack of knowledge) about ASP's activities, there is the question whether Professor Ramadan's small donations to ASP constituted "material support." It is material support, not support *simpliciter*, that the statute makes a ground for inadmissibility. There is no indication in the record that the government considered whether Professor Ramadan's small donations met this threshold. Nor is there any indication that the government considered whether Professor Ramadan *knew* that his support to ASP was "material."

does not apply to Professor Ramadan. Accordingly, the provision cannot supply a facially legitimate and bona fide basis for his exclusion.[14]

III. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFFS LACKED STANDING TO CHALLENGE THE IDEOLOGICAL EXCLUSION PROVISION.

The district court erred in concluding that plaintiffs lacked standing to challenge the ideological exclusion provision. In reaching this conclusion, the court repeatedly emphasized plaintiffs' "failure" to identify any specific foreign scholar with whom they wanted to meet but who had been excluded under the provision. (By the time that the court considered plaintiffs' challenge to the provision, the government had abandoned its earlier reliance on the provision to explain the exclusion of Professor Ramadan.) However, plaintiffs' standing to challenge the provision does not turn on their ability to point to a specific invitee

---

[14] Even if the district court was correct to deny plaintiffs' motion for summary judgment, it erred by granting the government's cross-motion. Accepting all of plaintiffs' allegations as true, a reasonable fact-finder could have determined that Professor Ramadan neither knew nor should have known that ASP was providing funding for Hamas. Thus, there was a genuine issue of fact for trial. *See Anderson*, 477 U.S. at 252; *McClellan v. Smith*, 439 F.3d 137, 144 (2d Cir. 2006). To the extent the court simply chose between conflicting versions of events or rejected Professor Ramadan's evidence based on an unstated credibility determination, the district court erred. *See St. Pierre v. Dyer*, 208 F.3d 394, 405 (2d Cir. 2000) (weighing purportedly "self-serving" evidence "is a matter for the finder of fact at trial; it was not the prerogative of the court on a motion for summary judgment"); *McClellan*, 439 F.3d at 144 ("[i]t is a settled rule that credibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment" (internal quotation marks omitted)).

who has been excluded under the provision. Plaintiffs have standing to challenge the provision's constitutionality because the provision is causing them concrete injury; because the provision has a chilling effect on their and others' First Amendment rights; and because there is a credible threat that the provision will be used to bar their invitees in the future.[15]

1. Concrete injury. Plaintiffs have suffered concrete injury as a result of the ideological exclusion provision. As discussed above, uncertainty about whether invited scholars will be permitted to enter the country – uncertainty that stems from the ideological exclusion provision's vague and manipulable terms – undermines plaintiffs' ability to plan and publicize events in the U.S. A-660-61, 666-67, 699-700, 706-08. Travel arrangements must be made and facilities secured at the last minute, and hotel reservations must be confirmed in advance without knowing if foreign scholars will be able to attend. A-666-67, 707-08. Thus the challenged provision has imposed, and continues to impose, administrative and financial costs – costs that plaintiffs must take into account in determining which scholars to

[15] Plaintiffs also have standing because the ideological exclusion provision operates as an unconstitutional licensing scheme. The provision is unique among immigration exclusion grounds because it is specifically directed at speech. *See* 8 U.S.C. § 1182. It invests executive officers with unbridled discretion to determine, *on the basis of speech*, which foreign nationals U.S. citizens and residents can meet with and, consequently, which ideas U.S. citizens and residents can hear. *Cf. Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 149-50 (1969). Licensing schemes are susceptible to challenge on their face without regard to their application in particular instances. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992).

invite in the first place. A-666-67, 706-08. Plaintiffs have standing to challenge the ideological exclusion provision because the provision is causing them concrete injury. *Cf. Clinton v. City of New York*, 524 U.S. 417, 421 (1998); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344-45 (1977).

2. Chilling effect. Plaintiffs also have standing because the provision has a chilling effect on plaintiffs' First Amendment activity and is likely to have a chilling effect on the activity of others. In the First Amendment context the courts have recognized that a statute's "chilling effect" – its effect of discouraging constitutionally protected activity – is sufficient in itself to confer standing. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965); *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 824 (2d Cir. 1967); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996); *Presbyterian Church U.S.A. v. United States*, 870 F.2d 518, 521-22 (9th Cir. 1989); *Nat'l Student Ass'n, Inc. v. Hershey*, 412 F.2d 1103, 1119-21 (D.C. Cir. 1969).

The district court acknowledged that "chilling effect may provide the basis for standing under certain circumstances," SPA-30, but it found the chilling effect doctrine inapposite here because the ideological exclusion provision does not impose criminal penalties and because other chilling effect cases "did not occur in the immigration context, with its accompanying deference to Congress and

concerns about separation of powers." SPA-30-31. This Court, however, has expressly rejected the view that the chilling effect doctrine applies only with respect to statutes that impose criminal penalties. *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (as amended) (noting that the fact that the plaintiff faces civil rather than criminal penalties "is of no moment"). Other courts, moreover, have expressly recognized the chilling effect that the ideological misuse of immigration laws can have on the First Amendment rights of citizens. In *Abourezk*, then-Judge Ginsburg wrote:

> [P]laintiffs assert that they are suffering a present and continuing harm in the form of the "chill" that the challenged State Department policy places on their first amendment interest in hearing foreign speakers. United States audiences are reluctant to extend invitations to foreign speakers, plaintiffs urge, for fear that the aliens may be subjected to the embarrassment of being denied a visa on the ground that they pose a danger to the public welfare. Similarly, the alien invitees may be unwilling to accept invitations when the price is to submit to such "ideological scrutiny." . . . In the first amendment area, such "chill" has long been recognized by the courts as a harm independent from the actual application of the challenged statute.

Abourezk, 785 F.2d at 1052 n.8 (internal citations omitted). Plaintiffs have suffered similar harms here. A-661, 666-68, 699-700, 706-08, 781-82, 790. For example, some of plaintiffs' invitees have declined invitations in part because they are unwilling to be subjected to ideological scrutiny. A-668 (discussing case of Fatima Mernissi); A-781-82 (discussing case of J.M. Coetzee); A-706-07.

3. Credible threat. Plaintiffs also have standing because it is likely that the provision will be applied to bar their invitees in the future. The district court noted plaintiffs' "failure" to point to any specific invitee who had been denied admission under the ideological exclusion provision, but FOIA documents show that the provision is being used, A-813-14, 817-18, and in any event the Supreme Court has recognized that even *pre*-enforcement challenges to statutes are permissible where plaintiffs can establish a credible threat of sanctions, *see, e.g.*, *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979); *Steffel v. Thompson*, 415 U.S. 452, 459-60 (1974); *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8 (1st Cir. 1996).

The "credible threat" standard is not a stringent one. *See, e.g.*, *N.H. Right to Life Political Action Comm.*, 99 F.3d at 15 ("courts will assume a credible threat of prosecution in the absence of compelling contrary evidence"). To establish standing, plaintiffs need only demonstrate "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298; *Am. Booksellers Found.*, 342 F.2d at 101. In the First Amendment context, the test is applied leniently in light of the fact that "free expression [is] of transcendent value to all society, and not merely to those exercising their rights."

Dombrowski, 380 U.S. at 486; *Am. Booksellers Found.*, 342 F.2d at 101 (internal quotation marks omitted).

There is a realistic danger that the provision will be used to bar plaintiffs' invitees in the future. As discussed above, plaintiffs are organizations that regularly invite foreign scholars to speak in the U.S. A-658-59, 663-64, 694-95, 701, 763, 769-71. In recent years, a great deal of plaintiffs' programming has focused on issues relating to the "war on terror." A-657, 659-60, 776-77. Many of the foreign scholars and writers whom they have invited to speak in the U.S. come from the Muslim world – where the "war on terror" is being waged – and many are individuals who have written and spoken extensively about terrorism and counterterrorism in the past. A-668, 694-95, 770-72. Moreover, plaintiffs often invite prominent scholars and writers from abroad specifically because their views are controversial in the U.S. A-667-68. For these reasons plaintiffs have "an actual and well-founded fear that the law will be enforced against them." *Am. Booksellers Found.*, 342 F.2d at 101 (internal quotation marks omitted). Here, plaintiffs' fear about the potential use of the ideological exclusion provision is heightened because the government invoked the provision to explain the exclusion of Professor Ramadan, a scholar who has criticized U.S. foreign policy but has never endorsed, espoused or persuaded others to support terrorism. A-776; *cf. N.H. Right to Life Political Action Comm.*, 99 F.3d at 17 (taking statute's past

application into consideration in evaluating likely future application); *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987) (same).

The district court's finding that plaintiffs could not challenge the statute without showing a specific invitee who had been denied entry under is inconsistent with settled First Amendment law. The finding is particularly problematic here, however, because it effectively insulates the statute from judicial review. Under 8 U.S.C. § 1182(b), those found inadmissible on security grounds are not entitled to notice of the reasons for their exclusion. Thus it is unlikely that plaintiffs (or anyone else) will *ever* be able to point to a specific invitee who has been denied entry under the provision. (And even if the government publicly announces that it has relied on the provision to exclude a specific individual, the government may shift its position, as it did in this case, after U.S. citizens bring suit.)

The district court erred in finding that plaintiffs do not have standing to challenge the ideological exclusion provision.

IV. THE IDEOLOGICAL EXCLUSION PROVISION VIOLATES THE FIRST AMENDMENT.

A. The ideological exclusion provision is unconstitutional because it is a content and viewpoint-based restriction on the right to hear.

The ideological exclusion provision violates the First Amendment rights of U.S. citizens and residents by preventing them from engaging in face-to-face dialogue and debate with foreign scholars whose speech the government disfavors.

Indeed, alone among the inadmissibility provisions of the Immigration and Nationality Act, the ideological exclusion provision is directed at protected speech. It renders foreign citizens inadmissible not because of their actions but because of their expression of ideas that U.S. citizens and residents have a constitutional right to hear.

As discussed above, it is well-settled that the First Amendment protects not only the right to speak but also the right to receive or hear information and ideas. *See* Section I, *supra.* It is also well-established that the First Amendment generally does not permit regulation of speech on the basis of content or viewpoint. To the contrary, it is black letter law that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Suppression of speech on the basis of content "pose[s] the inherent risk that the Government seeks . . . to suppress unpopular ideas or information or manipulate the public debate." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (internal citations omitted).

Suppression of speech on the basis of its content is not made lawful simply because the government uses the immigration law, rather than some other mechanism, as the instrument of censorship. To the contrary, every court to have confronted the issue has held that the content of an alien's speech cannot by itself supply a constitutionally permissible reason for exclusion. *See, e.g.*, *Abourezk*, 592

F. Supp. at 887 ("an alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded [under a now-repealed provision of the Immigration and Nationality Act] solely on account of the content of his proposed message"); *Harvard Law Sch. Forum*, 633 F. Supp. at 531 (exclusion "is not facially legitimate [if] it is related to the suppression of protected political discussion"); *Allende*, 605 F. Supp. at 1225.

There is no question that the speech targeted by the ideological exclusion provision – speech that "endorses," "espouses" or "persuades" – is protected by the First Amendment. The provision could readily be used to exclude foreign scholars who study the concept of "jihad" in Islam, who study the religious motives of suicide bombers, or who study and teach about institutions, such as madrasas, from which terrorists are alleged to be recruited. A-660-61. It could readily be used to exclude foreign scholars who have argued that terrorism is a predictable consequence of U.S. foreign policy, who have argued that the insurgency in Iraq is legitimate, or who have argued that organizations such as Hamas and Hezbollah, which the U.S. government has designated as terrorist organizations, should be engaged rather than isolated. A-699-700. It could readily be used, in other words, to stifle and suppress speech that is a legitimate and indeed critically necessary part of political and academic debate.

While some speech targeted by the provision may be controversial and even abhorrent, the Supreme Court has long recognized a constitutionally significant difference between mere advocacy of violent, controversial, or offensive ideas, which is fully protected by the First Amendment, and speech that incites others to take imminent, violent action, which is unprotected. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (government cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Noto v. United States*, 367 U.S. 290, 297-98 (1961). A statute that "fails to draw [a] distinction" between mere advocacy of unpopular ideas and incitement to immediate unlawful action "impermissibly intrudes upon the freedoms guaranteed" by the First Amendment. *Brandenburg*, 395 U.S. at 448.

By its own terms, the ideological exclusion provision is directed at protected speech that falls short of inciting others to engage in terrorist acts. Indeed, in the lower court the government conceded as much. Gov't Br. at 50 n.22, *Am. Acad. of Religion v. Chertoff*, No. 06-cv-588, docket no. 41 (S.D.N.Y. May 21, 2007) ("the endorse or espouse provision applies to speech that falls short of incitement"). The Foreign Affairs Manual explicitly recognizes that the ideological exclusion provision is aimed at speech that falls short of incitement. The State Department's guidance with respect to the incitement inadmissibility provision carefully hews

the constitutional line in that it warns that "Advocacy of Terrorism not Always Exclusionary," 9 F.A.M. § 40.32, n.6, and explains:

> 'Incitement' in the context of INA 212(a)(3)(B) is speech that induces or otherwise moves another person to undertake a terrorist activity. Normally speech will not rise to the level of 'inciting' unless there is a clear link between the speech and an actual effort to undertake the terrorist activity.

Id. at n.6.1.a. The guidance admonishes officials "to carefully consider the relevant circumstances in determining whether there is reasonable ground to believe that the applicant incited terrorist activity, and, if so, whether he or she did so with the requisite intent to cause death or serious bodily harm." *Id.* at n.6.1.b. By contrast, guidance with respect to the ideological exclusion provision is entitled "Public Endorsement," explains that the "provision does not require a finding of specific intent . . . rather it is directed at irresponsible expressions of opinion," and provides an example of supportive speech that is offensive but not incitement. *Id.* at n.6.1; *id.* at n.6.2.3. Because the ideological exclusion provision "sweeps within its condemnation speech which our Constitution has immunized from government control," *Brandenburg*, 395 U.S. at 447-48, it is invalid under the First Amendment.

A statute aimed at excluding aliens based on the content of constitutionally protected speech is no more "facially legitimate and bona fide" than an executive official's decision to exclude an alien on that basis. Thus, in *Rafeedie v. I.N.S.*,

795 F. Supp. 13 (D.D.C. 1992), the court found facially invalid an immigration statute that permitted the government to exclude or deport aliens for advocating or teaching, among other things, overthrow of the government. Looking to *Brandenburg*, the court remarked that "[a]dvocacy of a philosophy of violence and disruption is an insufficient ground on which to restrict First Amendment liberties." *Id.* at 22 (internal quotation marks omitted); *see also Adams*, 909 F.2d. at 648, *id.* at 648 n.4 (stating that Adams' statements that "armed struggle is a necessary and morally correct form of resistance" would not be a legitimate basis for exclusion because *Noto* "governs the reliance upon speech-related activities as a basis for the exclusion of aliens into the United States"). Like the statute that was at issue in *Rafeedie*, the ideological exclusion provision violates the First Amendment because it is aimed at constitutionally permissible advocacy. The government does not have the authority to bar foreign scholars from the country on the basis of speech that U.S. citizens and residents have a constitutional right to hear.

B. The ideological exclusion provision violates the Fifth Amendment.

The ideological exclusion is unconstitutionally vague. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also United States v. Cabot*, 325 F.3d 384, 385 (2d Cir. 2003). Vagueness is a

special concern where, as here, a statute implicates First Amendment freedoms, because in this context "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned*, 408 U.S. at 109 (internal quotations marks omitted); *Chatin v. Coombe*, 186 F.3d 82, 86 (2d Cir. 1999). Thus, the Supreme Court has held that, "[w]here a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

The Second Circuit has held that a statute is void for vagueness if it fails to "give[] the person of ordinary intelligence a reasonable opportunity to know what is prohibited," *Chatin*, 186 F.3d at 87 (quoting *United States v. Strauss*, 999 F.2d 692, 697 (2d Cir. 1993)), or if it fails to "provide[] explicit standards for those who apply it," *Grayned*, 408 U.S. at 108-09. The ideological exclusion provision fails on both counts. The terms "endorse," "espouse," and "persuade" are elastic and manipulable. They are nowhere defined in the Immigration and Nationality Act. *Cf. Chatin*, 186 F.3d at 87 (in sustaining vagueness challenge, noting that statute failed to define the challenged terms); *Rafeedie*, 795 F. Supp. at 23 (same);

Massieu v. Reno, 915 F. Supp. 681, 701 (D. N.J.), *rev'd on other grounds*, 91 F.3d 416 (3d Cir. 1996) (same). They are nowhere defined in the statute's legislative history. *Cf. Boutilier v. I.N.S.*, 387 U.S. 118, 121-22 (1967); *Massieu*, 915 F. Supp. at 701. And the relevant agency regulations render the terms only more susceptible to abuse. A-703, 712. The terms neither provide fair notice of what speech is proscribed nor provide executive officers with explicit standards for enforcement.[16]

CONCLUSION

For the reasons set forth above, the Court should vacate the district court's judgment and direct the court to enter summary judgment in plaintiffs' favor.

Respectfully submitted,

JAMEEL JAFFER
MELISSA GOODMAN
NASRINA BARGZIE
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

JUDY RABINOVITZ
LUCAS GUTTENTAG
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

[16] Nor is the provision's vagueness mitigated by a scienter requirement. *Cf. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

ARTHUR N. EISENBERG
New York Civil Liberties Union Foundation
125 Broad St., 18th Floor
New York, NY 10004

CLAUDIA SLOVINSKY
396 Broadway, Suite 601
New York, NY 10013

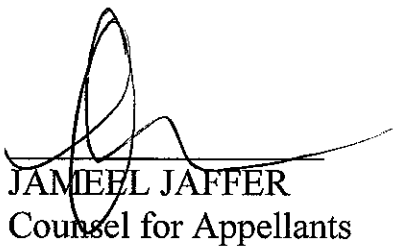
Of Counsel:

LEON FRIEDMAN
148 East 78th Street
New York, NY 10021

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13, 982 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.



JAMEEL JAFFER
Counsel for Appellants
April 28, 2008

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2008, I filed and served the foregoing BRIEF FOR THE PLAINTIFFS-APPELLANTS by causing ten copies to be delivered to the Clerk of the Court by hand and by causing two copies to be sent by overnight courier to:

David S. Jones
Kristen L. Vassallo
Assistant United States Attorneys
Southern District of New York
86 Chambers Street
New York, NY 10007

Furthermore, I certify that I filed and served the foregoing BRIEF FOR THE PLAINTIFFS-APPELLANTS by electronic mail with the Clerk of Court (briefs@ca.2.uscourts.gov) and with opposing counsel (Kristin.Vassallo@usdoj.gov and David.Jones6@usdoj.gov).

Reid Rowe
April 28, 2008

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: American Academy of Religion v. Chertoff

DOCKET NUMBER: 08-cv-0826

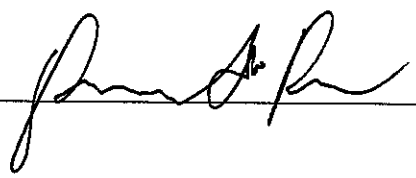
I, (please print your name) Reid Rowe, certify that I have scanned for viruses the PDF version of the

- [x] Appellant's Brief
- [ ] Appellee's Brief
- [ ] Reply Brief
- [ ] Amicus Brief

that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used Symantec Enterprise AntiVirus 10.2

If you know, please print the version of revision and/or the anti-virus signature files Version 3/4/2008 rev. 16

(Your Signature) 

Date: 4/27/08