UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

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INTRODUCTION

Plaintiffs the American Sociological Association ("ASA"), the American Association of University Professors ("AAUP"), the American-Arab Anti-Discrimination Committee ("ADC"), and the Boston Coalition for Palestinian Rights ("BCPR") challenge the exclusion of renowned South African scholar Adam Habib, in an effort to vindicate their First Amendment right to hear Professor Habib's ideas and to engage him in debate. Professor Habib holds a PhD from a U.S. university and is a Deputy Vice Chancellor at the University of Johannesburg, and he routinely travels to attend conferences and meet with scholars in other countries. However, because defendants revoked Professor Habib's visa in October 2006 and have since denied his application for a new visa, Professor Habib is foreclosed from speaking at conferences or meeting with scholars in the U.S. Among the conferences that Professor Habib will be prevented from attending, if defendants' actions are not enjoined, are events that plaintiffs are hosting in June and August. To justify their refusal to issue Professor Habib a visa, defendants have cited, without explanation or factual basis of any kind, a statute that bars foreign nationals who have engaged in terrorist activity. The statute has no application whatsoever to Professor Habib and circumstances suggest that defendants are excluding Professor Habib because he is a prominent critic of some U.S. policies.[1]

The exclusion of Professor Habib violates plaintiffs' First Amendment rights. As the Supreme Court, the First Circuit, and every other court to have addressed the issue has made clear, the First Amendment prohibits the government from excluding an invited foreign scholar unless it provides a facially legitimate and bona fide basis for its actions. The government has

[1] The Second Amended Complaint asserts the rights of the U.S. plaintiffs and not those of Professor Habib. Professor Habib is "made a plaintiff because he is symbolic of the problem." *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *see also Adams v. Baker*, 909 F.2d 643, 647 n.3 (1st Cir. 1990); *Allende v. Shultz*, 845 F.2d 1111, 1114 n.4 (1st Cir. 1988).

provided no basis at all, however, let alone a facially legitimate or bona fide one, for its allegation that Professor Habib has engaged in terrorist activity. In fact, as the record shows, Professor Habib unequivocally condemns terrorism and his scholarly work reflects a lifelong commitment to peaceful advocacy for social justice. Although Professor Habib has criticized some U.S. policies, including the war in Iraq, the government cannot constitutionally prevent U.S. citizens from engaging a foreign scholar they have invited to speak inside the U.S. simply because the government disapproves of his views.

Defendants have moved to dismiss plaintiffs' suit, asserting that its actions in this context are unreviewable by the Court. The doctrine of consular non-reviewability, however, does not bar review of U.S. citizens' First Amendment challenges to the exclusion of invited foreign scholars. In fact, while one would not glean this information from reading the government's brief, *every court to have addressed the issue, including the First Circuit*, has found that, when confronted with such challenges, courts have not only the authority but the obligation to affirmatively examine whether the government's reasons for excluding the scholar are facially legitimate and bona fide.

The government's motion to dismiss should be denied because the Court has jurisdiction and plaintiffs have stated cognizable First Amendment and Administrative Procedures Act ("APA") claims. Summary judgment should be entered in plaintiffs' favor because defendants have failed to provide a facially legitimate and bona fide reason for Professor Habib's exclusion and there is no genuine issue as to any material fact. Plaintiffs respectfully request that the Court declare that Professor Habib's exclusion violates the First Amendment and the APA, and enjoin defendants from excluding Professor Habib on the basis of 8 U.S.C. § 1182(a)(3)(B)(i)(I).

FACTUAL BACKGROUND

Professor Habib is one of South Africa's leading scholars and political commentators. Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment ("SUF") § I.E (Declaration of Sally T. Hillsman ("Hillsman Decl.") ¶ 16; Declaration of Merrie Najimy ("Najimy Decl.") ¶ 11; Declaration of Sherif Fam ("Fam Decl.") ¶ 12). He currently serves as the Deputy Vice-Chancellor of Research, Innovation and Advancement at the University of Johannesburg. SUF § I.B (Declaration of Adam Habib ("Habib Decl.") ¶ 3). Prior to assuming that post, he was the Executive Director of the Democracy and Governance Program at the Human Sciences Research Council ("HSRC"), a quasi-governmental research organization. SUF § I.C (Habib Decl. ¶ 3). Professor Habib has edited or authored more than 60 books, book chapters, and journal articles on subjects including democracy, governance, race, South African politics, public policy, and social movements. SUF § I.D (Habib Decl. ¶¶ 4-7).

Professor Habib is considered an authoritative voice on South African policy matters, both domestic and foreign, and a staunch advocate for human rights and equality. Because of his expertise in democracy-building and public policy, Professor Habib has worked closely with government officials and institutions throughout the world. SUF § I.F (Habib Decl. ¶¶ 7-8). His views and analyses are regularly sought by members of the press, SUF § I.E (Habib Decl. ¶ 10, Exh. A) and he is a regular editorial contributor to South African newspapers and magazines, SUF § I.E. (Habib Decl. ¶ 11, Exh. B-C).

Professor Habib frequently travels outside of South Africa to speak with scholars, researchers, and government officials. SUF § II.C (Habib Decl. ¶ 12). Until 2006, Professor Habib visited the U.S. frequently to give speeches and to attend meetings and conferences. SUF § II.D (Habib Decl. ¶¶ 13-14). Indeed, Professor Habib lived in New York City while pursing

his PhD in Political Science at the City University of New York. SUF § II.B (Habib Decl. ¶¶ 2, 13). The U.S. has issued him numerous visas for these purposes. SUF § II.A (Habib Decl. ¶¶ 13-14, 36). Professor Habib's ability to travel to the U.S. to collaborate with scholars is vital to his professional endeavors. SUF §§ II.E-F (Habib Decl. ¶¶ 9, 14-15, 44-46; Hillsman Decl. ¶17).

On October 21, 2006, Professor Habib, with a valid 10-year, multiple-entry U.S. visa, arrived at John F. Kennedy ("JFK") airport from South Africa. SUF § III.A (Habib Decl. ¶¶ 14, 16-17). Professor Habib, accompanied by his wife, was traveling as part of an HSRC delegation to attend a week-long series of meetings with representatives from institutions including the United Nations Democracy Fund, the World Bank, the State Department's Office of the U.S. Global AIDS Coordinator, the National Institutes of Health, the Centers for Disease Control and Prevention, the Social Science Research Council, the Carnegie Foundation, the Henry J. Kaiser Family Foundation, the Open Society Institute, Columbia University, George Washington University, and Spelman College. *Id.* (Habib Decl. ¶ 16).

Professor Habib's wife and other members of the HSRC delegation entered the U.S. without incident. Professor Habib, however, was detained for seven hours, questioned about his political associations and links to terrorism, and then informed by border officials, without explanation, that his visa had been revoked at the direction of the Deputy Assistant Secretary of State for Visa Affairs. SUF §§ III.A-B (Habib Decl. ¶¶ 17-18). Given the choice between detention pending deportation and "voluntary" withdrawal of his application for admission, Professor Habib chose to withdraw his application and was escorted by armed guards to a return flight to South Africa. SUF § III.A (Habib Decl. ¶ 17). Three months later, the U.S. revoked the visas of Professor Habib's wife and two small children. SUF § III.C (Habib Decl. ¶¶ 23-24, Exh. J-K). Once again, no explanation was offered. The revocation of Professor Habib's twelve-

year-old son Irfan's visa prevented Irfan from participating in the Junior Ambassadors' Program – a program created by President Eisenhower to encourage international understanding and peace. *Id.* (Habib Decl. ¶ 23).

Numerous organizations and individuals, both American and South African, tried to obtain from the U.S. an explanation for its actions, but to no avail. SUF § III.D (Habib Decl. ¶¶ 19-21, 25, Exh. D-F, L; Hillsman Decl. ¶ 20, Exh. B; Declaration of Cary Nelson ("Nelson Decl.") ¶ 7, Exh. A-B). Professor Habib 's own efforts were equally unavailing. *Id.* (Habib Decl. ¶¶ 21, 24, Exh. G-K). On February 22, 2007, Professor Habib received the first response to his many inquiries: a letter from the Assistant Secretary for Consular Affairs stating that his visa had been "prudentially revoked . . . as a result of information the [U.S.] received, indicating [he] may not be eligible for the visa." *Id.* (Habib Decl. ¶ 24, Exh. K). The letter did not explain the nature of the "information" but it indicated that Professor Habib could apply for another visa. *Id.*[2]

Despite the revocation of his visa, Professor Habib continued to receive invitations to speak in the U.S.; most urgently, he had agreed to speak at the ASA's August 2007 Annual Meeting in New York. SUF § III.E (Habib Decl. ¶¶ 21, 26, 32). On May 11, 2007, Professor Habib submitted to the U.S. consulate an application for a new visa that would allow him to attend the ASA event as well as future U.S. speaking engagements. SUF § III.F (Habib Decl. ¶¶ 27, 29).[3] That same day, he conducted the required visa interview with Charles Luoma-

[2] While no official explanation from the U.S. government was forthcoming, some South African officials suggested to Professor Habib that the revocation was related to his involvement in anti-Iraq war demonstrations. SUF III.D (Habib Decl. ¶ 22).

[3] This should have allowed plenty of time to obtain a visa before the ASA event because according to the State Department website, visas were typically processed in 2 days, and even those which required special processing or clearance were "resolved within 30 days." SUF III.F (Habib Decl. ¶ 28).

Overstreet, the U.S. Senior Consul for South Africa. SUF § III.G (Habib Decl. ¶¶ 29-30). At the interview, Mr. Luoma-Overstreet asked Professor Habib about his political views and associations and whether he had any ties to terrorism. *Id.* (Habib Decl. ¶ 29). Professor Habib answered all questions put to him honestly and in good faith, and he denied any involvement with groups engaged in or supportive of terrorism. *Id.* At the end of the interview, Professor Habib was presented with a pre-prepared letter that stated that his application would require "administrative processing and additional clearance/review in Washington" and that further action was suspended "pending the receipt and review" of information from Washington. SUF § III.H (Habib Decl. ¶ 30, Exh. M).

The government failed to process Professor Habib's application in time for him to attend the ASA event. SUF § III.J (Habib Decl. ¶¶ 31-32; Hillsman Decl. ¶¶ 18-23). After repeated inquiries, 48 hours before his scheduled departure for New York, consular officials informed Professor Habib that officials in Washington were still processing his application. SUF § III.J (Habib Decl. ¶ 32). Thereafter, Professor Habib's application continued to languish even though he had informed the consulate of his invitations to speak at other upcoming events hosted by the ASA, the AAUP, the ADC's Massachusetts Chapter, the BCPR, and the Association for Research on Nonprofit Organizations and Voluntary Action. Professor Habib also informed the consulate of a preliminary invitation to speak at an event hosted by the Ash Institute at Harvard University's Kennedy School of Government. SUF § III.E (Habib Decl. ¶ 32).

Plaintiffs commenced this action on September 25, 2007. Seeking to vindicate their First Amendment right to engage Professor Habib in face-to-face dialogue, U.S. plaintiffs challenged the government's exclusion of Professor Habib and its failure to act on his visa application.

On October 26, 2007, Mr. Luoma-Overstreet informed Professor Habib by telephone that the State Department had denied his visa application. SUF § III.K (Habib Decl. ¶ 34). Mr. Luoma-Overstreet faxed to Professor Habib the visa denial letter, which stated that the State Department had "concluded an interagency review of the prudential revocation of [Professor Habib's] nonimmigrant visa" and had "upheld a finding of [his] inadmissibility under section 212(a)(3)(B)(i)(I) of the United States Immigration and Nationality Act." SUF §§ III.K-L (Habib Decl. ¶ 35, Exh. N). The statute referenced in the letter applies to individuals who have engaged in terrorist activity. The letter also stated that the State Department had considered a waiver of Professor Habib's inadmissibility but "ha[d] determined that it [would] not recommend a waiver of ineligibility in [his] case." *Id.*

Defendants did not provide any evidentiary basis or explanation for their allegation that Professor Habib had engaged in terrorist activity, and plaintiffs believe the allegation to be wholly unfounded. SUF § III.M (Habib Decl. ¶¶ 35-36, 43). While Professor Habib has been a vocal critic of some U.S. terrorism policies and the war in Iraq, he has never engaged in or supported terrorism and his scholarly work reflects a lifelong commitment to peaceful advocacy. SUF § V (Habib Decl.¶¶ 36-43, Exh. A-B, O, L, Q).

On November 14, 2007, plaintiffs filed an Amended Complaint, challenging the government's denial of a visa and waiver of inadmissibility to Professor Habib on the grounds that these actions violated the U.S. plaintiffs' rights under the First Amendment and the APA.[4] The AAUP has invited Professor Habib to deliver a plenary address at the association's Annual Meeting, which will be held in Washington, D.C. in June 2008. SUF § IV.C (Nelson Decl. ¶ 7). The ASA has invited Professor Habib to speak at the association's Annual Meeting, which will

[4] On December 3, 2007, plaintiffs filed a Second Amended Complaint which stated plaintiffs' causes of action in greater detail. Plaintiffs did so after defendants requested it, in order to avoid delay and to avoid burdening the Court with unnecessary motion practice.

be held in Boston in August 2008. *Id.* (Hillsman Decl. ¶ 24). The ADC-MA and the BCPR have invited Professor Habib to speak at a public event which will take place in Boston in August 2008. *Id.* (Fam Decl. ¶¶ 11-12; Najimy Decl. ¶¶ 10-11). Plaintiffs have invited Professor Habib because of his expertise and unique perspective on matters of importance to plaintiffs and their members. *Id.* (Hillsman Decl. ¶ 24; Fam Decl. ¶ 12; Najimy Decl. ¶ 11; Nelson Decl. ¶ 7). Defendants' actions, if not enjoined, will prevent Professor Habib from speaking at plaintiffs' upcoming events this summer. SUF §§ IV.D-F (Hillsman Decl. ¶¶ 24-29; Fam Decl. ¶¶ 13-15; Najimy Decl. ¶¶ 13-16; Nelson Decl. ¶¶ 9-12).

ARGUMENT

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *United States v. 6 Fox St.*, 480 F.3d 38, 41-42 (1st Cir. 2007). Under this standard, plaintiffs are entitled to summary judgment and the government's motion to dismiss should be denied.

I. THE GOVERNMENT'S DENIAL OF A VISA TO PROFESSOR HABIB VIOLATES THE FIRST AMENDMENT.

A. Professor Habib's Exclusion Implicates Plaintiffs' First Amendment Rights.

The exclusion of invited foreign scholars implicates the First Amendment rights of U.S. citizens and residents because "the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). It is often said that the right to speak and the right to hear are "two sides of the same coin." *Mandel*, 408 U.S. at 775 (1972) (Marshall, J., dissenting). Indeed, the right of U.S. citizens to hear and debate the ideas of others is a central tenet of the First Amendment. *See Stanley*, 394 U.S. at 564 ("th[e] right to receive information and ideas . . . is fundamental to our free society"); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367,

390 (1969) ("It is the right of the public to receive suitable access to . . . ideas and experiences"). The First Amendment protects the right to hear because "[i]t would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

The right to hear and engage in political speech, particularly speech critical of government, is paramount. *See, e.g., Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 187 (1999); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) ("there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs"). This is because "the 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., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982).[5]

The Supreme Court has recognized that the exclusion of foreign scholars impairs the First Amendment rights of U.S. citizens and residents to hear and debate that scholar's ideas; accordingly, it has expressly held that when an invited foreign scholar is barred from entry, the U.S. inviters may come to court to challenge the basis for the exclusion. *Mandel* involved a First Amendment challenge brought by U.S. citizens to the government's exclusion of Ernst Mandel, a Belgian scholar. Although the Court ultimately upheld the government's exclusion of Mandel because the government had provided a "facially legitimate and bona fide reason" for the exclusion, 480 U.S. at 770, it held that the right to hear and receive ideas includes the right "to

[5] It is black letter law that the First Amendment protects the right to hear even controversial speech. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 716 (2000); *Whitehill v. Elkins*, 389 U.S. 54, 57 (1967). Even inflammatory speech is protected unless it incites others to immediate unlawful activity. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

have an alien enter and to hear him explain and seek to defend his views," *id.* at 764, and it decided the case on the merits.

The First Circuit repeatedly has affirmed the First Amendment principle enshrined by *Mandel* and has permitted U.S. inviters to challenge the exclusion of foreign scholars. *See Adams*, 909 F.2d 643 (permitting First Amendment challenge to exclusion of Sinn Fein leader Gerry Adams); *Allende*, 845 F.2d 1111 (permitting First Amendment challenge to exclusion of Hortensia de Allende); *see also Harvard Law Sch. Forum v. Shultz*, 633 F. Supp. 525, 530 (D. Mass. 1986), *vacating as moot*, 852 F.2d 563 (1st Cir. 1986) (permitting First Amendment challenge to government's refusal to allow PLO leader to travel to Harvard for a debate).

Other courts have done the same. *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); *cf. Burrafato v. Dept. of State*, 523 F.2d 554, 556 (2d Cir. 1975). More recently, in a case quite similar to this one, a district court judge has twice affirmed that "the exclusion of an alien on the basis of his speech implicates the First Amendment rights of those U.S. citizens who desire to hear the alien speak," and has permitted U.S. organizations to challenge the government's basis for excluding Professor Tariq Ramadan, a prominent European scholar of Islam. *Am. Acad. of Religion v. Chertoff*, 463 F. Supp. 2d 400, 410, 412 (S.D.N.Y. 2006) (hereinafter "*AAR I*"); *Am. Acad. of Religion v. Chertoff*, 2007 WL 4527504, *7 (S.D.N.Y. Dec. 20, 2007) (hereinafter "*AAR II*").[6]

These cases rest on the fundamental premise that the First Amendment precludes the government from using the immigration laws as a tool of censorship. Above all, the First

[6] The government's cramped reading of *Mandel* as permitting only review of waiver denials, but not visa denials, is incorrect, as discussed in Section II. Indeed, the vast majority of courts have interpreted *Mandel* to permit review of First Amendment challenges to both visa and waiver denials. In grappling with these cases, the government either wholly ignores them (as it does with the *Allende* litigation) or it argues that they are wrongly decided or distinguishable. These arguments are similarly unpersuasive. *See infra* Section II.

Amendment was meant to "foreclose public authority from assuming a guardianship of the public mind . . . . because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). The government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("discrimination against speech because of its message is presumed to be unconstitutional"). Censorship does not become constitutionally permissible simply because the government uses the immigration laws, rather than some other mechanism, to achieve its ends.

For this reason, courts have an important role in overseeing the government's exclusion of invited foreign scholars. While "the Executive has broad discretion over the admission and exclusion of aliens . . . that discretion is not boundless." *Abourezk*, 785 F.2d at 1061. The Executive's discretion "extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie." *Id.*; *see also Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (plenary power is "subject to important constitutional limitations"); *I.N.S. v. Chadha*, 462 U.S. 919, 940-41 (1983) (Congress must implement its plenary power through "constitutionally permissible means"). Judicial scrutiny is "particularly appropriate in cases . . . which involve fundamental rights of United States citizens." *Allende v. Shultz*, 605 F. Supp. 1220, 1223 (D. Mass. 1985); *see also Harvard Law Sch. Forum*, 633 F. Supp. at 529 (courts "have some role in enforcing constitutional restraints on the executive's implementation of the [immigration] statutory scheme").

B. The First Amendment Requires the Government to Provide a Facially Legitimate and Bona Fide Reason for the Denial of a Visa to an Invited Foreign Scholar.

Where the constitutional rights of U.S. citizens are implicated, the First Amendment precludes the government from excluding an invited scholar unless it has a facially legitimate and bona fide reason for doing so. The government's burden to supply a facially legitimate and bona fide reason for its actions derives from the Supreme Court's ruling in *Mandel.* Again, in *Mandel*, the Court upheld the government's exclusion of Mr. Mandel only after determining that it had a facially legitimate and bona fide reason for its actions – that Mr. Mandel had, in fact, violated the terms of previous visas. *See Mandel*, 408 U.S. at 769; *see also Mandel v. Mitchell*, 325 F. Supp. 620, 622 (E.D.N.Y. 1971) (noting that consular officer had found past abuses to be "flagrant").[7]

The First Circuit has twice held, relying on *Mandel,* that the government must provide a facially legitimate and bona fide reason for excluding a foreign scholar invited to speak to U.S. audiences. *See Adams*, 909 F.2d at 647 (denial of a visa and waiver to invited alien would be upheld so long as it was "based on a 'facially legitimate and bona fide' reason"); *Allende*, 845 F.2d at 1116 (the government must provide a "sound basis" for denial of visa to an invited alien). Lower courts in this circuit have done the same. *Harvard Law Sch. Forum*, 633 F. Supp. at 531 (the government "is obliged to justify the denial of [PLO member's] travel request with a facially legitimate and bona fide reason" where plaintiffs assert "their First Amendment rights to participate in a debate" with that member); *Allende*, 605 F. Supp. at 1224 (the "courts have

[7] 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; Peter J. Spiro, *Explaining the End of Plenary Power*, 16 Geo. Immigr. L.J. 339 (2002). The Court need not reach this question here, however, because it is clear that defendants' actions cannot be sustained even under the *Mandel* standard.

interpreted *Mandel* to require the government to provide a justification for an alien's exclusion when that exclusion is challenged by United States citizens asserting constitutional claims").

In fact, *every court* to have been presented with a First Amendment challenge to the exclusion of a foreign scholar has required the government to demonstrate that its actions are facially legitimate and bona fide. *Abourezk*, 785 F.2d at 1062 (assessing the government's statutory and factual basis for denying visas to invited foreign scholars); *Abourezk v. Reagan*, 592 F. Supp. 880, 881 (D.D.C. 1984), *vacated on other grounds*, 785 F.2d 1043 (D.C. Cir. 1986) (stating that the judiciary must "inquire whether the government has provided a facially legitimate explanation for its refusal to permit an alien to enter") (internal quotation marks omitted); *see also Burrafato*, 523 F.2d at 556 ("the courts of this Circuit have interpreted *Mandel* to require justification for an alien's exclusion"). More recently, in *AAR I* and *AAR II*, a district court twice held that *Mandel* and its progeny "require the Government to justify the exclusion of an alien when the First Amendment rights of citizens are implicated" and to provide a "facially legitimate and bona fide reason." *AAR I*, 463 F. Supp. 2d at 400, 416-17; *AAR II*, 2007 WL 4527504 at *9 ("[t]he standard is clear: when a consular official denies a visa which implicates a United States citizens's First Amendment rights, he or she must have a facially legitimate and bona fide reason for doing so").[8]

The purpose of placing the burden of justification on the government and providing for some modicum of judicial review where First Amendment rights are at stake is to ensure that the government is not excluding invited foreign scholars because of speech that U.S. audiences have a right to hear. *AAR I*, 463 F. Supp. 2d at 417 (the review required by *Mandel* "is necessary to

[8] To the extent the government argues that *Mandel* and its progeny do not require the government to provide a facially legitimate and bona fide reason for the denial of a visa, as opposed to a waiver, the government is incorrect, as discussed more fully in Section II.

ensure compliance with the First Amendment, a duty that has been expressly delegated to the federal courts"); *Abourezk*, 592 F. Supp. at 888 ("judicial scrutiny of the specific reasons for denials of entry" is necessary to prevent "a mushrooming of . . . content based denials").[9]

To determine whether the government has provided a facially legitimate and bona fide reason for denying a visa to an invited foreign scholar, the court must assess whether the government has supplied a specific reason for the denial and whether the proffered reason has an evidentiary basis. If the government's basis for excluding an invited foreign scholar is insufficiently specific, lacks a basis in fact, is unsupported by evidence, or is based on the content of the invited scholar's speech, it is not facially legitimate and bona fide.

Merely asserting a general or conclusory justification for a visa denial, without supplying any evidentiary basis for it, is insufficient to establish a facially legitimate and bona fide reason. *See, e.g.*, *Allende*, 605 F. Supp. at 1225 (rejecting justification for excluding Mrs. Allende as "entirely conclusory"); *Allende v. Shultz*, 1987 WL 9764, *5 (D. Mass. 1987) (rejecting new justification because still "conclusory"); *El-Werfalli v. Smith*, 547 F. Supp. 152, 154 (S.D.N.Y. 1982) (rejecting justification for exclusion that was "so general" it "fail[ed] to establish a reasoned basis for action"); *Abourezk*, 592 F. Supp. at 886 (rejecting public justification for exclusion as "entirely conclusory"); *id.* at 888 (stating that "[t]o find the conclusory statement that the entry of a particular individual would be contrary to [U.S.] foreign policy objectives to be a 'facially legitimate' reason would be to surrender to the executive total discretion").

The government must do more than merely point to a particular inadmissibility provision to exclude an invited foreign scholar; it must demonstrate that the statute relied upon actually

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[9] Courts uniformly have held that excluding an invited alien on the basis of the content of her speech is never facially legitimate and bona fide. *Abourezk*, 592 F. Supp. at 887; *Allende*, 605 F. Supp. at 1225; *Harvard Law Sch. Forum*, 633 F. Supp. at 531 (exclusion was "not facially legitimate because it [was] directly related to the suppression of a protected political discussion").

applies to the excluded scholar. *See, e.g.*, *Allende*, 605 F. Supp. at 1224 (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"); *Harvard Law Sch. Forum*, 633 F. Supp. at 531 (same). For example, in *Adams*, the First Circuit held that determining whether the government had a facially legitimate and bona fide reason for excluding Gerry Adams for "engaging in terrorist activities" required an assessment of whether there was "evidence . . . sufficient to justify a reasonable person in the belief that [he fell] within the proscribed category." 909 F.2d at 648-49. Characterizing the application of the "facially legitimate and bona fide" standard as a "mixed question of law and fact," the court reviewed the government's evidence and upheld the exclusion only after finding that there was "evidence of Adams' involvement in the violent activities of the IRA," and thus, "sufficient evidence to form a 'reasonable ground to believe' that [Mr. Adams] had engaged in terrorist activity." *Id.* at 649; *id.* at 648 n.4 (noting that the State Department "had competent evidence upon which it could reasonably find that Adams participated in terrorist activities").

In *Allende*, the First Circuit assessed whether the government had "a sound basis" for applying a particular statute to bar Mrs. Allende, 845 F.2d at 1116, and concluded that the government had "misapplied" the particular provision to her because it had failed to demonstrate any factual basis for its determination that Mrs. Allende sought to enter the U.S. "to engage in harmful activities," *id.* at 1111-12; *see also Abourezk*, 785 F.2d at 1062 (assessing whether specific inadmissibility grounds properly applied to invited scholars and remanding "for reexamination of the visa denials . . . to insure that [they were] within the statutory and constitutional authority of the State Department"); *Allende*, 605 F. Supp. at 1225 (rejecting government's justification for visa denial where it 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."); *Allende v. Shultz*, 624 F. Supp. 1063, 1063-64 (D. Mass. 1985) (reaffirming earlier ruling that government "must provide some factual basis for its conclusion" that a statute applied to an invited alien); *see also Harvard Law Sch. Forum*, 633 F. Supp. at 527, 531 (rejecting the justifications provided in two government declarations).

Thus, the First Circuit has applied the facially legitimate and bona fide test with particular rigor, not only demanding that the government supply a legitimate basis for its actions but also carefully assessing whether its justification is based on some demonstrable evidence. In fact, in applying facially legitimate and bona fide review, the First Circuit has demanded some factual basis for the government's actions even where First Amendment rights of U.S. citizens are not at issue. *See, e.g.*, *Amanullah v. Nelson*, 811 F.2d 1, 11, 18 (1st Cir. 1987) (concluding that the government's immigration parole decision was facially legitimate and bona fide only after "scrutiniz[ing]" and "scrupulously inspect[ing]" for "record support" for the decision). Thus, it is not enough that application of a particular statute may by facially legitimate in the abstract; rather, its application *to a particular individual* must be factually supported.

More recently, the *AAR II* court reaffirmed that facially legitimate and bona fide review requires determining whether the government's reliance on a particular inadmissibility ground has a basis in fact. In *AAR II*, the government had denied Professor Ramadan a visa on the grounds that he had provided material support to an undesignated terrorist organization and was thus inadmissible under 8 U.S.C. § 1182(a)(3)(B)(iv)(VI), a specific ground of "engag[ing] in terrorist activity." In applying the facially legitimate and bona fide test, the court stated that it had to "determine whether the cited provision [was] properly applied to Professor Ramadan." *AAR II*, 2007 WL 4527504 at *11. The court then evaluated the evidence to determine whether

Professor Ramadan had ever donated to a terrorist organization and whether he possessed the requisite knowledge that the organization was, in fact, a terrorist organization. After evaluating the evidence, the court held that the government had satisfied the "burden imposed by *Mandel*" because it had "linked the reason given to a statutory provision providing the basis for exclusion, and demonstrated that the statute applie[d] to Professor Ramadan." *Id.* at *14.[10]

Even courts that have applied the "facially legitimate and bona fide" test *outside* of the First Amendment context have required the government to supply a factual basis for its actions. As the Tenth Circuit explained in *Marczak v. Greene*:

> It is tempting to conclude from the broad language of the test that a court applying the "facially legitimate and bona fide" standard would not even look to the record to determine whether the agency's statement of reasons was in any way supported by the facts. On this interpretation, merely asserting a legally permissible justification would support a denial of parole (or other discretionary immigration decision), regardless of whether the justification *factually applied to the individual in question.* This has not, however, been the practice of any of the courts that have adopted the standard in immigration matters.

971 F.2d 510, 517 (10th Cir. 1992) (emphasis added); *id.* (decision must "at least [be] reasonably supported by the record"); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1083 (9th Cir. 2006) (rejecting immigration detention determination that was "based on facially implausible evidence" and "ignore[d]" contrary evidence); *El-Werfalli*, 547 F. Supp. at 154 (requiring government to provide a "reasoned basis" for invoking a particular statute to justify exclusion, and refusing to "engage in unsupported inference and speculative supposition[ ]"); *Gutierrez v. Ilchert*, 702 F.

[10] To be clear, plaintiffs believe the *AAR II* court gave insufficient weight to the evidence the *AAR II* plaintiffs presented and that the court ultimately reached the wrong conclusion with respect to whether Professor Ramadan possessed the requisite knowledge. (An appeal is now pending before the Second Circuit.) For present purposes, however, the important point is that the *AAR II* court assessed whether the government had a factual basis for applying the material support inadmissibility provision to Professor Ramadan.

Supp. 787, 794 (N.D. Cal. 1988) (rejecting immigration parole decision that lacked "credibility in view of the particular facts of [the] case").[11]

That the government must demonstrate *some* basis for applying an inadmissibility provision to an invited scholar also comports with the INA and its implementing regulations. An inadmissibility finding cannot be based on mere conjecture but rather on actual evidence. *See* 8 U.S.C. § 1201(g) (visa shall be denied if "the consular officer *knows or has reason to believe* . . . alien is ineligible to receive a visa") (emphasis added); 22 C.F.R. § 40.6 ("reason to believe" requires "a determination *based upon facts or circumstances* which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa") (emphasis added).

In sum, if the government's reason for excluding an invited scholar is insufficiently specific, unsubstantiated, or lacks any basis in fact, it is not facially legitimate and bona fide.

C. The Government Has Not Provided a Facially Legitimate and Bona Fide Reason for Professor Habib's Visa Denial.

The law that the government has invoked to exclude Professor Habib is 8 U.S.C. § 1182(a)(3)(B)(i)(I), which renders inadmissible any alien who has engaged in terrorist activity. Whereas 8 U.S.C. § 1182(a)(3)(B)(i)(I) is a general umbrella provision, the term "engage in terrorist activity" is defined in intricate detail at 8 U.S.C. § 1182(a)(3)(B)(iv) to encompass a multitude of different acts ranging from direct participation in violent terrorist acts to indirectly supporting terrorism by providing support to those who, in turn, support terrorism. Specifically, to "engage in terrorist activity" means:

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[11] The government argues, almost as an afterthought, that it need not "provide evidence in support of a visa denial." Govt. Br. 34 n.11. But this claim is directly contradicted by every case discussed above – including binding precedent. Even the government acknowledges, Govt. Br. 16, that the *Adams* court evaluated the factual basis for the government's claim that Adams was inadmissible for engaging in terrorist activity. That the evidence comprised only "publicly available" sources is irrelevant. Govt. Br. 34 n.11. The First Circuit's decision in *Allende* – binding precedent the government fails to even acknowledge – also demonstrates that the Court must examine whether the statute the government invokes *actually applies*.

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
(II) to prepare or plan a terrorist activity;
(III) to gather information on potential targets for terrorist activity;
(IV) to solicit funds or other things of value for -
(aa) a terrorist activity;
(bb) a [designated] terrorist organization . . .; or
(cc) a[n undesignated] terrorist organization . . ., unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;
(V) to solicit any individual--
(aa) to engage in [terrorist activity];
(bb) for membership in a [designated] terrorist organization described . . .; or
(cc) for membership in a[n undesignated] terrorist organization unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or
(VI) to commit an act that the actor knows, or reasonably should know, affords material support . . .
(aa) for the commission of a terrorist activity;
(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;
(cc) to a [designated] terrorist organization . . . or to any member of such an organization; or
(dd) to a[n undesignated] terrorist organization . . . or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

8 U.S.C. § 1182(a)(3)(B)(iv).[12]

In denying Professor Habib's visa application, the government has merely cited to 8 U.S.C. § 1182(a)(3)(B)(i)(I), without further specification. SUF § III.M (Habib Decl. ¶ 35, Exh. N). The government has not pointed to which part of the "engage in terrorist activity" definition purportedly applies to Professor Habib. As a result, it is unclear whether the government is accusing Professor Habib of committing terrorist acts, of inciting terrorist acts, or of soliciting

[12] The terms "terrorist activity" and "engage in terrorist activity" have very different meanings under the INA. The term "terrorist activity" is defined to encompass certain violent acts such as highjacking, hostage-taking, and assassination, or the use of weapons to cause injury or substantial property damage.

things for or providing material support to terrorists or terrorist organizations. Thus, the government has not only failed to point to its specific legal basis for denying Professor Habib's visa, it also has not *explained* its reason for invoking 8 U.S.C. § 1182(a)(3)(B)(i)(I) to bar him. All that can be gleaned from the government's "explanation" for the visa denial is that the government seems to be accusing Professor Habib of engaging in some unspecified form of direct or indirect support to some unspecified terrorist or terrorist organization at some unspecified point of time. Indeed, the government has refused to disclose the basis for its decision in spite of numerous requests, from Professor Habib and many others, that it do so. SUF § III.M (Habib Decl. ¶¶ 35-36, 43). Merely pointing to the umbrella engage in terrorist activity statute, without more, does not meet the government's First Amendment burden, and is precisely the kind of general and conclusory justification courts repeatedly have rejected in the face of a First Amendment challenge. *See supra* Section I.B.

Even if the government's citation to the general engage in terrorist activity statute could fairly be characterized as providing a sufficient "reason" for Professor Habib's exclusion, it does not constitute a facially legitimate or bona fide one because the government has failed to provide any reason to believe – or any evidence to suggest – that the statute actually *applies* to Professor Habib. *See supra* Section I.B. Again, the First Amendment burden is on the government to demonstrate that its accusation has some basis in fact and that the statute it invokes actually applies to Professor Habib. *See id.* In merely citing to the general statute and stating in a conclusory fashion that it has a "reasonable belief" that Professor Habib has engaged in terrorist activity, Govt. Br. 34, the government has not met this burden.

While it is nearly impossible for plaintiffs to rebut the government's conclusory, unexplained, and unsubstantiated accusation, plaintiffs nevertheless know of no evidence that

Professor Habib has ever engaged in terrorist activity. SUF § V (Habib Decl.¶¶ 36-39, 43, Exh. L, Q). To the contrary, Professor Habib has repeatedly condemned terrorism publicly, in speeches and radio interviews, and privately. SUF § V.A (Habib Decl. ¶¶ 37-39, 43). In his own words, he finds terrorism "morally reprehensible," and would never support it, let alone engage in it. *Id.* (Habib Decl. ¶ 38).

Terrorism is fundamentally inconsistent with Professor Habib's scholarship and the model of social change for which he advocates. As a democracy proponent who believes citizens should force political change by asserting their rights *within* the political system, Professor Habib believes in "peaceful political transitions" that result from a strong and vibrant civil society. SUF §§ V.B-C (Habib Decl. ¶¶ 38-39, 47; Fam Decl. ¶ 12; Najimy Decl. ¶ 11). He advances the political transition in South Africa as a laudable model for change primarily because it largely was achieved through peaceful means. SUF § V.C (Habib Decl. ¶ 39). Indeed, Professor Habib believes that terrorism is an entirely ineffective vehicle for change. *Id.* Habib Decl. ¶ 38). Terrorism in the name of religion is also incompatible with his belief that just societies must be egalitarian and diverse. *Id.* (Habib Decl. ¶ 39).

In fact, the notion that Professor Habib is a terrorist or a supporter of terrorism is entirely inconsistent with his entire life's work. Professor Habib is a widely-respected scholar and political commentator, with an expertise in democracy-building and social movements. He has held important posts at prestigious academic institutions, as well as non-profit and quasi-governmental organizations. SUF § I.C (Habib Decl. ¶ 3). Throughout his career, Professor Habib has worked with many governments and international bodies to find practical solutions to specific policy problems: those partners have included, among others, the South African Office of the Presidency, the South African Departments of Foreign Affairs, Public Service and

Administration and Treasury, the South African Parliament, the African Union, the United Nations, the European Union, the World Bank, USAID, and the U.S.-South Africa Bi-National Commission on Civil Society. SUF §§ I.F, II.E, V.D (Habib Decl. ¶¶ 7-8, 15). In short, he has consistently sought to effect political change by working peacefully with internationally known and respected institutions, including institutions affiliated with the U.S. government.

Professor Habib's research collaborations with U.S. institutions and scholars are motivated by the same principles: to encourage democracy, build strong civil societies, and solve policy problems within existing frameworks. He regularly works with U.S.-based institutions and scholars, and his work has been funded by USAID, as well as U.S.-based philanthropic institutions. SUF § II.E (Habib Decl. ¶¶ 8-9, 14-15, 44-45). Among other projects, he has worked on a multinational study on peace and conflict resolution organizations in Israel/Palestine, Northern Ireland, and South Africa in collaboration with scholars from Princeton and the Ben Gurion University in Israel; he is working on a study on inequality in the developing world with scholars from Brown University; and he has even worked with the U.S.-South Africa Commission, headed by a former U.S. Ambassador to South Africa. *Id.* (Habib Decl. ¶ 15).

Notably, South African government officials have questioned the U.S. government's claim that Professor Habib has ties to terrorism. For example, the South African Minister for Intelligence Services questioned Professor Habib's exclusion at a public forum attended by American and African terrorism experts. SUF § V.F (Habib Decl. ¶ 43, Exh. Q). South Africa's Deputy Minister of Foreign Affairs has publicly stated that there was no indication that Professor Habib was involved in terrorism. *Id.* (Habib Decl. ¶ 43, Exh. L).

It is true that Professor Habib has been a vocal critic of certain U.S. terrorism policies, the war in Iraq, and certain U.S. policies in Africa. SUF § V.G (Habib Decl. ¶¶ 40-42). He has also urged governments, including the U.S. government, to respond to the threat of terrorism in a manner consistent with human rights norms and the rule of law. *Id.* (Habib Decl. ¶ 40). Professor Habib's views, however, are shared by countless others, Americans included, and they certainly cannot transform Professor Habib into a terrorist or terrorist supporter. To plaintiffs, Professor Habib's exclusion seems to be part of a troubling pattern. Since 2001, numerous foreign scholars, writers, and activists have found themselves suddenly barred from the U.S. SUF §§ VI.A-B (Nelson Decl. ¶¶ 13-23, Exh. A-L). Many, like Professor Habib, have been excluded on vague or unspecified national security grounds, under circumstances that suggest they are being barred for ideological, not legitimate security, reasons. *Id.* Plaintiffs believe that the government is barring Professor Habib not because of his actions but because of his political views.

The government has not offered a facially legitimate and bona fide reason for denying Professor Habib a visa. Plaintiffs are entitled to summary judgment on this ground alone. [13]

II. THE DOCTRINE OF CONSULAR NON-REVIEWABILITY DOES NOT POSE A BAR TO JUDICIAL REVIEW.

A. The Doctrine of Consular Non-Reviewability Does Not Bar First Amendment Challenges to Visa Denials Brought by U.S. Citizens and Residents.

The government is correct that the doctrine of consular non-reviewability typically

[13] Plaintiffs' believe they are entitled to summary judgment because the government has failed to provide a facially legitimate and bona fide reason for Professor Habib's visa denial. However, should the Court believe it needs more information, it should demand that the government disclose to the Court and to plaintiffs: (1) which part of the "engage in terrorist activity" definition it is relying upon and (2) its factual basis for applying 8 U.S.C. § 1182(a)(3)(B)(i)(I) to bar Professor Habib. *See Allende*, 605 F. Supp. at 1226 (denying defendants' motion for summary judgment without prejudice so that the government could provide more evidence to establish a facially legitimate and bona fide reason).

precludes review of consular visa determinations. Govt. Br. 13. However, there is no question that courts have jurisdiction to hear a U.S. citizen's First Amendment challenge to the exclusion of a foreign national who has been invited to speak inside the U.S.

Plaintiffs know of no court that has found the consular nonreviewability doctrine to bar U.S. citizens' First Amendment and accompanying statutory challenges to visa denials. To the contrary, courts *uniformly* have recognized jurisdiction over claims like those presented here and have found judicial review not only permitted *but required* where visa denials impair First Amendment rights. *See supra* Section I.A-B. As the *AAR II* court recently explained in finding jurisdiction: "While the doctrine of consular nonreviewability bars a court from hearing an aliens' challenge to a consular decision, a court has jurisdiction over a United States citizen's constitutional claim directly related to a consular decision." 2007 WL 54527504 at *7. This is because "[t]he court does not exercise jurisdiction over the consular decision denying the alien entry . . . but rather, over the citizen's constitutional claim, which is an exercise of jurisdiction squarely within the court's Article III powers." *Id.*[14] This reasoning has been echoed in other cases as well. *See Abourezk*, 785 F.2d at 1051 n.6 (asserting jurisdiction because the "case involve[d] claims by [U.S.] citizens rather than by aliens" and noting that "defendants ha[d] not produced a single case, and the court is aware of none, in which this kind of claim was found to be outside the province of the federal courts"); *AAR I*, 463 F. Supp. 2d at 417 (consular non-reviewability doctrine "does not apply in cases brought by U.S. citizens raising constitutional,

[14] The argument that the *AAR II* court's ruling was based solely on "unique factors," like the fact that the Department of Homeland Security ("DHS") was involved in the decision-making, Govt. Br. 11, ignores entirely this portion of the court's analysis. Indeed, the very first so-called "factor" the court cited as to why the consular determination was reviewable was "the presence of the plaintiffs' First Amendment rights." *AAR II*, 2007 WL 4527504 at *10. In addition, every other "factor" the court cited applies with full force here: that "the decision at issue . . . was not made solely by consular officials," the "unexplained . . . 'prudential' revocation," and the inexplicable "foot dragging" in processing the visa application. *Id.* at *10-11.

rather than statutory, claims"); *cf. Burrafato*, 523 F.2d at 556 (explaining that review of visa denial challenges was proper where "the claim was grounded on an alleged violation of First Amendment rights of American citizens over which the federal courts clearly had jurisdiction"). Notably, *none* of the non-reviewability cases cited by the government involved First Amendment claims brought by U.S. citizens.

The First Circuit itself has entertained two challenges to visa denials brought by U.S. citizens asserting their First Amendment rights. In *Allende* (a case the government fails to mention), the court did not even *question* its jurisdiction and, in fact, decided the case on the merits. 845 F.2d 1111. The court's silence on the matter is particularly striking given that the *Allende* district court had explicitly rejected the government's argument that jurisdiction was lacking; surely had the First Circuit any jurisdictional doubts, it would have raised the issue. In *Adams*, the court suggested that the doctrine of consular nonreviewability would have barred review if the challenge had been brought by the excluded alien himself, citing to many of the same cases relied upon by the government, but it expressly stated that it could consider "the possibility of impairment of United States citizens' First Amendment rights through the exclusion of the alien." 909 F.2d at 647 n.3; *see also Allende*, 605 F. Supp. at 1223 (ruling that court had "jurisdiction over" plaintiffs' First Amendment challenge and noting that immigration power "is not entirely immune from judicial scrutiny"); *Harvard Law Sch. Forum*, 633 F. Supp. at 529 (noting *Mandel* and its progeny "strongly indicate[d]" that case was "judicially reviewable").

The government's jurisdictional argument dangerously conflates the fact that judicial review is *limited* in this context with the erroneous notion that its actions are shielded altogether from judicial scrutiny. As the First Circuit found in *Adams*, although the typical "searching

judicial review" is not required even where "challenges to immigration . . . decisions are made based upon [a citizen's] constitutional rights," some review is appropriate. 909 F.2d at 647. A U.S. inviter's First Amendment challenge to a visa denial "provides an opportunity" – albeit a "limited one" – "to examine the consular determination" wherein "the Court neither declines to review the consular decision entirely (as it would under the doctrine of consular non-reviewability), nor does the Court conduct a full-blown First Amendment review (as it would in an ordinary First Amendment case)." *AAR II*, 2007 WL 4527504 at *7. While the "facially legitimate and bona fide" standard is deferential, it does not provide immunity.[15]

The government suggests that plaintiffs' First Amendment challenge to Professor Habib's visa denial is somehow "foreclosed" by *Mandel*, Govt. Br. 13, but its reading of *Mandel* is fundamentally flawed. First, the Supreme Court did not "decline[ ] to review" Mandel's visa denial because review was barred by the consular non-reviewability doctrine. Govt. Br. 6. Rather, the Court reviewed only the waiver denial because the court found that plaintiffs were *not challenging* the visa denial itself. *Mandel*, 408 U.S. at 767. Second, while the Supreme Court in *Mandel* "endorsed the doctrine of consular non-reviewability," Govt. Br. 13, it did not *actually apply* the doctrine to the First Amendment challenge before it; to the contrary, it reached the merits. That the Supreme Court recognized the doctrine of consular non-reviewablity in *Mandel* but actually engaged in review only *strengthens* plaintiffs' argument that the Supreme Court did not mean to apply the doctrine to First Amendment challenges brought by citizens. *See Abourezk*, 785 F.2d at 1050 (in finding jurisdiction, noting that "[p]resumably, had the Court

[15] To the extent the government invokes the plenary power doctrine to support its jurisdictional arguments, Govt. Br. 32-33, it is well-established that both Congress' plenary power over the admission and exclusion of aliens, as well as the executive's *implementation* of that power, is subject to constitutional limitation and scrutiny by the courts. *See supra* Section I.A.

harbored doubts concerning federal court subject matter jurisdiction in *Mandel*, it would have raised the issue on its own motion").

Moreover, the government's effort to argue that the review permitted by *Mandel* is limited to waiver denials ignores virtually the entire body of case law interpreting *Mandel.* The vast majority of courts that have exercised jurisdiction over First Amendment challenges like this one have done so in the context of visa denials, not just waivers. *Adams*, 909 F.2d at 647; *Allende*, 845 F.2d 1114; *Abourezk*, 785 F.2d at 1048-49; *AAR II*, 2007 WL 4527504 at *7. The extension of *Mandel* to visa denials is rooted in the recognition that it is the *exclusion* of an invited foreign scholar that causes First Amendment harm, and is thus reviewable, whether that exclusion is effected by the denial of a visa, the denial of a waiver, or some other mechanism.[16]

By arguing that the consular nonreviewablity doctrine strips this Court of jurisdiction to hear plaintiffs' claims, the government is asking this Court to ignore, distinguish, or find wrongly-decided *virtually every case* in which a court has exercised jurisdiction over a case like this one, *including binding precedent.* The government ignores the First Circuit's ruling in *Allende*, where, again, the court did not even *question* its jurisdiction over U.S. plaintiffs' First Amendment and statutory challenge to Mrs. Allende's visa denial. The government asks the Court to find *Adams* – another binding precedent that is, in all material respects, on all fours with this case – wrongly decided because it "overextend[ed] *Mandel*," to permit review of a consular visa denial. Govt. Br. 14. But, again, the principle of judicial review enshrined by *Mandel*

[16] The government's argument that the review authorized by *Mandel* is limited to waiver denials is also nonsensical. As the government itself argues, waivers are largely discretionary decisions (subject, of course, to constitutional limitations) of the sort that typically receive less scrutiny, not more. The executive's authority to deem aliens inadmissible, by contrast, is limited not only by the constitution, but by a complex statutory scheme as well. Courts have a role to play in ensuring the executive branch is using its immigration power within the bounds of the statute. *Abourezk*, 785 F.2d at 1051. If anything, statutorily limited findings of inadmissibility should receive *more* scrutiny than waiver denials.

properly applies to review of visa denials, not just waiver denials, that impair First Amendment rights.

The government's argument that *Adams* is distinguishable fares no better. Govt. Br. 16-20. The government essentially argues that the *Adams* court exercised jurisdiction *solely* because of the existence of a statute that has since been repealed: Section 901, a statute that barred the government from excluding otherwise inadmissible aliens based on their speech and associations unless, among other things, they had engaged in terrorist activity. Govt. Br. 16-20. But the government misses the point entirely. The *Adams* court engaged in the "facially legitimate and bona fide" review required by *Mandel*, review that is mandated by the *constitution*, not any particular statute. 909 F.2d at 645, 647, 650. In *applying* facially legitimate and bona fide review, the court did precisely what *Mandel* requires: it looked to the relevant statutory provisions at issue, asked whether they did or did not apply to Mr. Adams, and assessed whether the government's decision was factually supported. Ultimately, the court concluded that Mr. Adams was properly excluded because of his personal involvement in the violent activities of the Irish Republican Army, and that the Section 901 exception did not apply because there were reasonable grounds to believe that Adams had engaged in terrorist activity. This is all plaintiffs are asking the Court to do here: to determine whether the government has demonstrated any basis for, or presented any evidence to support, its determination that the statute barring those who have engaged in terrorist activity properly applies to Professor Habib. Unlike in *Adams*, the government has not done so. That the court will do so by reference to the limits imposed by 8 U.S.C. § 1182(a)(3)(B)(iv) (which sets the statutory boundaries for excluding someone for engaging in terrorist activity) or 8 U.S.C. § 1201(g) and 22 C.F.R. § 40.6 (which permit visa denials only where there is "reason to believe" based on "facts or circumstances" that an alien is

ineligible for a visa), rather than now repealed 8 U.S.C. § 1182(28)(F) or Section 901, makes no difference whatsoever with respect to this Court's jurisdiction.[17]

Finally, the government also asks the court to ignore the D.C. Circuit's decision in *Abourezk* because, among other things, it based its jurisdiction on a now-repealed INA jurisdictional statute. Govt. Br. 20-21. But the government reads the *Abourezk* jurisdictional holding too narrowly: the court relied upon the federal question statute, not solely the INA statute. *See Abourezk*, 785 F.2d at 1050 ("[t]he district court had subject matter competence in this case under both its general federal question jurisdiction, and its specific jurisdiction over claims arising under the [INA]") (internal citations omitted). More importantly, the *Abourezk* court acknowledged jurisdiction (and rejected application of the consular non-reviewability doctrine) because the case "involve[d] claims by United States citizens rather than by aliens . . . and statutory claims that [were] accompanied by constitutional ones." *See id.* at 1051 n.6.[18]

The consular non-reviewability doctrine does not bar review of plaintiffs' First Amendment challenge to the visa denial and the government's motion to dismiss on this basis should be denied.

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[17] The government also implies that the *Adams* court assessed only whether the denial of a *waiver* to Mr. Adams was facially legitimate and bona fide. Govt. Br. 16-20. As a threshold matter, the government is inconsistent on this point, arguing elsewhere that the court was wrong to extend *Mandel* to review of visa denials. Govt. Br. 15. More to the point, however, the fact that the *Adams* court focused on Section 901 (characterized more appropriately as an exception to inadmissibility than a waiver) is because *plaintiffs themselves* focused their argument on whether Section 901 entitled Mr. Adams to entry despite application of (28)(F), not on whether (28)(F) itself was properly applied. In any event, it matters little because the *Adams* court was simply assessing the applicability of the pertinent statutes as part of its constitutionally-based facially legitimate and bona fide review.

[18] Even the case cited by the government to support its interpretation of *Abourezk* distinguished between a court's *ability* to review a U.S. citizen's First Amendment and statutory challenge to a visa denial and its *inability* to review non-constitutional claims brought by the alien herself. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999).

B. The Doctrine of Consular Non-Reviewability Does Not Apply if the Visa Determination Was Not Made by Consular Officials.

The doctrine of consular non-reviewability does not preclude review here for the additional reason that State Department officials in Washington, not consular officials, made the inadmissibility determination. The consular nonreviewability doctrine insulates decisions made by consular officials abroad, not decisions made by officials in Washington. *See, e.g.*, *Abourezk*, 785 F.2d at 1051 n.6 (recognizing jurisdiction because "claims concern[ed] the decisions of State Department officials rather than consular officials abroad"); *Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988) (rejecting doctrine's application where plaintiffs were "not challenging the discretion of consuls" but rather "the authority of the Secretary of State"); *AAR I*, 463 F. Supp. 2d at 418 (rejecting doctrine's application "to the decisions of non-consular officials"); *AAR II*, 2007 WL 4527504 at *10 (holding doctrine did not bar review where "decision to deny the visa was not made solely by consular officials"). The doctrine was intended to recognize consular officials' historic independence from the State Department itself, not insulate Washington-based decision-making. *Id.*[19]

Every significant decision relating to Professor Habib's exclusion has been made by a government official in Washington, not a consular official. Professor Habib's visa was revoked at the direction of officials in Washington. SUF § III.B (Habib Decl. ¶¶ 17, 24, 29, Exh. K). At the conclusion of his visa interview, Professor Habib was presented with a letter stating that his

[19] The government's suggestion that the *AAR II* court found the consular non-reviewability doctrine inapplicable only because the DHS, as opposed to State Department, was the ultimate decision-maker is patently mistaken. Govt. Br. 22. What mattered to the court's analysis was that the visa determination "was not made solely by consular officials," regardless of whether those officials were with DHS or with State. *AAR II*, 2007 WL 4527504 at *10; *see also id.* ("Consular nonreviewability is premised, at least in part, on Congress' decision to commit the visa authority exclusively into consular hands. Where other agencies and other officials become involved in the decision to grant or deny a visa, it is not clear that Congress intended the same result to apply").

application would be processed in Washington and that, because Washington officials would be making the decision, the consulate could not provide a time estimate. SUF § III.H (Habib Decl. ¶ 30, Exh. M). Each time Professor Habib inquired with consular officials about the status of his application, he was told that officials in Washington were still processing it and that the consulate knew nothing more. SUF § III.I (Habib Decl. ¶¶ 31-32). Finally, the visa denial letter, although signed by the Senior Consul, clearly indicated that the "State Department" found him inadmissible after an "interagency review" in Washington. SUF § III.N (Habib Decl. ¶¶ 34-35, Exh. N). Perhaps most importantly, Professor Habib's visa denial determination *had* to be made by officials in Washington, not consular officials, because consular officials must seek a Security Advisory Opinion from officials in Washington whenever an applicant might be inadmissible on terrorism grounds. Foreign Affairs Manual § 40.32 n.1.2, 3. In fact, consular officers are *precluded* from acting on such visa applications without direction from Washington. Foreign Affairs Manual § 40.6. Each of these facts suggest that the consular role was ministerial at best. Accordingly, the doctrine of consular nonreviewability simply has no application here.[20]

In sum, the government's efforts to distinguish away an entire body of case law supporting this Court's jurisdiction to hear plaintiffs' First Amendment challenges to Professor Habib's visa denial must fail and its motion to dismiss should be denied. Accepting the government's jurisdictional arguments would gut *Mandel* of any real meaning, and would grant executive officers carte blanche to ignore Congressionally-created inadmissibility standards or to exclude non-citizens for illegal or unconstitutional reasons – or for no reason at all – with impunity, even where those decisions harm the First Amendment rights of citizens.

[20] Because Professor Habib's visa denial was the result of an "interagency review," which likely included the DHS, Secretary Chertoff should not be "dismissed as a party." Govt. Br. 34 n.10.

III. THE GOVERNMENT'S DENIAL OF A WAIVER TO PROFESSOR HABIB VIOLATES THE FIRST AMENDMENT AND THE COURT HAS JURISDICTION TO HEAR THIS CLAIM.

Inadmissibility based on terrorism-related grounds, including 8 U.S.C. § 1182(a)(3)(B)(i)(I), may be waived. *See* 8 U.S.C. § 1182(d)(3). Waivers allow even those who are inadmissible to enter the country for various purposes, including to fulfill speaking engagements. The First Amendment obligates the government to provide a facially legitimate and bona fide reason not only for finding invited foreign scholars inadmissible, but for denying them waivers of inadmissibility as well. *See supra* Section I.B; *Mandel*, 408 U.S. at 769 (searching record for facially legitimate and bona fide reason for waiver denial); *Adams*, 909 F.2d at 648, 648 n.4; *Allende*, 845 F.2d at 1116; *Harvard Law Sch. Forum*, 633 F. Supp. at 531 (requiring facially legitimate and bona fide basis for waiver denial).

Defendants' denial of a waiver of inadmissibility to Professor Habib violates plaintiffs' First Amendment rights because the government has not provided a facially legitimate and bona fide reason for the denial. Indeed, the State Department has denied Professor Habib a waiver *without any explanation whatsoever.* SUF § III.M (Habib Decl. ¶ 35, Exh. N). The failure to provide any reason at all is plainly insufficient to meet the government's First Amendment burden. *See supra* Section I.B.

Once again, in order to avoid any scrutiny of its actions, the government suggests that under *Mandel*, it need not supply *any* justification for the denial of a waiver. Govt. Br. 23-25. While it is true that the Court in *Mandel* did not address a situation quite like this – where the government advances no justification for its actions at all – had the Court believed that the government was not required to provide *any* reason for denying Mandel a waiver, it would not have scoured the record looking for a *facially legitimate and bona fide reason* for the

government's actions. If the government were correct, the Supreme Court would not have engaged in any review at all. Here, if the government had no obligation to provide a justification for denying Professor Habib a waiver – a waiver that the government may well grant to many other people it deems inadmissible under 8 U.S.C. § 1182(a)(3)(B)(i)(I) – there would be no way of evaluating whether it has denied the waiver based on impermissible grounds such as his criticism of the Iraq war or because of what he might say to U.S. audiences. This is, of course, the entire purpose of the review required by *Mandel* and its progeny. *See supra* Section I.A-B. As *Mandel* itself makes clear, even if the government has a facially legitimate and bona fide reason for its inadmissibility determination, it must also supply a facially legitimate and bona fide reason for denying a *waiver* of inadmissibility.[21]

IV. THE GOVERNMENT'S DENIAL OF A VISA TO PROFESSOR HABIB VIOLATES THE APA AND THE COURT HAS JURISDICTION TO HEAR THIS CLAIM.

The APA provides that a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary [and] capricious . . . contrary to constitutional right . . . [or] in excess of statutory . . . authority, or limitations." 5 U.S.C. § 706(2)(A)-(C). Defendants' denial of a visa to Professor Habib pursuant to 8 U.S.C. § 1182(a)(3)(B)(i)(I) should be set aside on each of these bases.[22]

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[21] The government's contention that there is no *statutory* requirement to explain a waiver denial, that waiver determinations are wholly discretionary decisions that are unreviewable *under the APA*, as well as its general invocation of plenary power, are red herrings. Govt. Br. 24-26, 34. Plaintiffs need not demonstrate a *statutory* right to a justification or a *statutory* standard of review. It is the First Amendment that supplies the government's burden (as well as the constitutional restraint on its exercise of Congress' immigration power) and the standard to be applied: whether the government has a facially legitimate and bona fide reason for denying the waiver – one that is unrelated to the suppression of speech or debate, is specific, has a factual basis.

[22] Plaintiffs pursue an APA challenge only to the visa denial, not the waiver denial.

Defendants' denial of a visa to Professor Habib on the unsubstantiated ground that he is inadmissible under 8 U.S.C. § 1182(a)(3)(B)(i)(I) is "contrary to constitutional right" for the reasons discussed in Section I. The government's determination also exceeds defendants' statutory authority because there is no evidence that the inadmissibility statute invoked *applies* to Professor Habib. *See supra* Section I.C. Although its authority to exclude non-citizens is broad, the executive cannot bar a non-citizen unless one of the congressionally-created inadmissibility grounds applies; if no ground actually applies, the executive lacks authority to exclude that particular individual. *See, e.g., Abourezk*, 785 F.2d at 1061-62.[23] For the same reasons, the government's inadmissibility determination is arbitrary and capricious. Agency action is arbitrary and capricious if the agency's "explanation for its decision . . . runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Penobscot Air Servs., Ltd. v. Fed. Aviation Admin.*, 164 F.3d 713, 719 (1st Cir.1999) (agency action arbitrary and capricious if there is no "rational connection between the facts found and the choice made"). The determination that Professor Habib had engaged in terrorist activity runs counter to the available evidence.

Finally, defendants' contention that the APA does not apply to exclusion decisions, Govt. Br. 27-28, is not supported by the case law. Although the Supreme Court has held that the APA's *hearing* provisions do not apply to deportation proceedings because they were supplanted by the INA's detailed framework for the conduct of deportation proceedings, *see Ardestani v.*

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[23] Contrary to the government's suggestion, Govt. Br. 29-30, inadmissibility determinations are by no means standardless. *Abourezk*, 785 F.2d at 1051. The detailed and complicated inadmissibility grounds that limit executive discretion provide a "meaningful standard . . . against which" the Court can judge the defendants' actions. *Taylor v. Dept. of Labor*, 440 F.3d 1, 10 (1st Cir. 2005). The Court can assess, by reference to the statute itself, whether the government properly applied 8 U.S.C. § 1182(a)(3)(B)(i)(I) to bar Professor Habib. *See, e.g., Haoud v. Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2003) (judging Board of Immigration Appeal's actions against the terms of regulation). If Professor Habib has not engaged in terrorist activity, the government has no discretion to exclude him on that basis.

I.N.S., 502 U.S. 129 (1991), the Court has also held that, as a general matter, other APA provisions apply in the immigration context. *See I.N.S. v. Yang*, 519 U.S. 26, 32 (1996) (suggesting arbitrary and capricious review would apply to I.N.S. action); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955) (applying other APA provisions to deportation order); *Bangura v. Hansen*, 434 F.3d 487, 500-03 (6th Cir. 2006) (applying APA judicial review provisions to the denial of a spousal visa petition); *Smriko v. Ashcroft*, 387 F.3d 279, 292 n.7 (3d Cir. 2004).[24]

CONCLUSION

For the reasons stated above, plaintiffs respectfully urge the Court to enter summary judgment in their favor and deny the government's motion to dismiss.

Respectfully submitted,

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[24] The D.C. Circuit's decision in *Saavedra Bruno* is not to the contrary. Govt. Br. 28. The *Saavedra Bruno* court declined to apply APA review where *an alien* challenged a visa denial, but expressly distinguished its ability to review a U.S. citizen's First Amendment and accompanying *statutory* challenge to a visa denial. 197 F.3d at 1162 (citing *Abourezk,* 785 F.2d at 1050-51).

CERTIFICATE OF SERVICE

In accordance with Local Rule 5.2(b) and Section E.2 of the Electronic Case Filing Administrative Procedures of the United States District Court for the District of Massachusetts, I, Melissa Goodman, hereby certify that on February 13, 2008, the within Plaintiffs' Memorandum in Support of Motion For Summary Judgment and in Opposition to Defendants' Motion to Dismiss Complaint and Statement of Undisputed Facts filed through the ECF system will be sent electronically to registered participants as identified on the Notice of Electronic Filing.

Respectfully submitted,

/s/ Melissa Goodman
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