UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN ACADEMY OF RELIGION, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, PEN AMERICAN CENTER, and TARIQ RAMADAN,	:	**ECF CASE**
Plaintiffs,	:	06 Civ. 588 (PAC)
- 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.	:	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendants respectfully submit this memorandum of law in opposition to plaintiffs' motion for summary judgment, and in support of defendants' cross-motion for summary judgment.

PRELIMINARY STATEMENT

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

This suit was originally brought as a dual attack, presenting "as applied" and facial constitutional challenges to 8 U.S.C. § 1182(a)(3)(B)(i)(VII) (along with its predecessor statute, the "endorse or espouse provision"). Because Tariq Ramadan was never actually excluded pursuant to the endorse or espouse provision, plaintiffs have divided their focus, pursuing a challenge to his exclusion under 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) for providing material support to terrorist groups, while still seeking facial invalidation of the endorse or espouse provision. The Court should award summary judgment for defendants on both questions.

First, plaintiffs' challenge to the consular determination that Ramadan was inadmissible under § 1182(a)(3)(B)(iv)(VI) is barred from review by the doctrine of consular nonreviewability, see infra Point I.A. Were any judicial review permissible, the consular determination could in no event be subjected to the de novo adjudication that plaintiffs seek; rather, the Court could only inquire, at most, as to whether the Government has articulated a "facially legitimate and bona fide" reason for the visa denial. See Point I.B.3, infra, Because the Government has done so, no further

inquiry is permissible. Nor is Ramadan's exclusion improper on the grounds that his disqualifying conduct was not a grounds for inadmissibility at the time it occurred, see Plaintiffs' Memorandum of Law in Support of Summary Judgment Motion ("Pl. Mem."), Point I.a., as Congress expressly made the controlling statute applicable to pre-enactment conduct. See Point I.B.4, infra.

Plaintiffs' facial challenge to § 1182(a)(3)(B)(i)(VII) also should be denied, and summary judgment awarded to defendants. Plaintiffs have never identified a single instance in which the endorse or espouse provision has prevented them from interacting with a particular alien, and, accordingly, they have identified no injury sufficient to confer standing. Even if plaintiffs had standing to sue, the statute is a valid exercise of Congress's plenary power to define which categories of aliens may, or may not, enter the United States. See Point II, infra.

FACTUAL AND PROCEDURAL BACKGROUND

A. Revocation of Ramadan's H-1B Visa and His October 4, 2004 Visa Application

On May 5, 2004, Tariq Ramadan was issued an H-1B non-immigrant visa to work as a professor at the University of Notre Dame. See Declaration of John O. Kinder ("Kinder Decl."), ¶ 4. Following the issuance of that visa, the State Department received information, in the ordinary course of business, that might have led to a determination that Ramadan was inadmissible to the United States, and therefore, not entitled to a visa.[1] See id. On July 28, 2004, the State Department prudentially revoked Ramadan's H-1B visa pursuant to 8 U.S.C. § 1201(i), based on the information it had received. See id. ¶ 7. No determination was made as to Ramadan's actual inadmissibility under any provision of 8 U.S.C. § 1182(a)(3). See id.

[1] A prudential visa revocation under 8 U.S.C. § 1201(i) is not a finding of inadmissibility. See Kinder Decl. ¶ 6. The standards governing prudential revocations are set forth more fully in the Kinder Declaration at paragraphs 5 and 6.

Ramadan reapplied for an H-1B visa on October 4, 2004. See id. ¶ 8. The visa was refused on the same date pursuant to 8 U.S.C. § 1201(g), an administrative refusal used to close a case pending the receipt of further information. See id.

In December 2004, before the consulate could complete a review of the application, Ramadan withdrew his acceptance of Notre Dame's job offer. See id. ¶ 9. Accordingly, the Department of Homeland Security ("DHS") revoked the validity of the petition for non-immigrant worker Notre Dame had filed on Ramadan's behalf. See id. Because there was no longer a valid petition on which to base Ramadan's visa application, the application was rendered moot. See id.

B. Ramadan's September 16, 2005 Visa Application and Commencement of This Action

On September 16, 2005, Ramadan submitted an application for a B-1/B-2 non-immigrant visa at the United States Embassy in Bern, Switzerland. See id. ¶ 10. Thereafter, two interviews of Ramadan were conducted: an initial interview in September 2005, and a follow-up interview in December 2005. See id. During these interviews, Ramadan stated, inter alia, that he had made donations to the Comité de Bienfaisance et de Secours aux Palestiniens ("CBSP") and the Association de Secours Palestinien ("ASP"). See id. ¶ 11; see also Second Declaration of Tariq Ramadan ("Ramadan Suppl. Decl.") ¶ 10, 13 (admitting financial donations to ASP between 1998 and 2002 and disclosing these donations in visa interview, and acknowledging that he "may have stated in [his] visa interview" that he also gave money to CBSP).

While Ramadan's September 2005 visa application was pending, plaintiffs filed the instant suit, asserting both a facial challenge to the endorse or espouse provision and an "as applied" challenge to the exclusion of Ramadan allegedly pursuant to that provision. In March 2006, plaintiffs moved for a preliminary injunction seeking a variety of relief specific to Ramadan. On

June 23, 2006, the Court denied plaintiffs' motion to the extent they sought an order barring the United States from excluding Ramadan based on speech or 8 U.S.C. § 1182(a)(3)(B)(i)(VII), or restoring his visa waiver program eligibility. See American Acad. of Religion v. Chertoff, 463 F. Supp. 2d 400, 422 (S.D.N.Y. 2006). The Court did, however, direct the Government "to issue a formal decision on Ramadan's pending nonimmigrant visa application within ninety (90) days from the date of this Order." Id. at 423.

Thereafter, based on statements Ramadan provided during his interviews and other available information, including a Security Advisory Opinion provided by the Department of State in accordance with applicable law and standard State Department procedures,[2] Aaron Martz, a consular officer working in the Consular Section of the United States Embassy in Bern, exercised his authority under 8 U.S.C. § 1201(g), and denied Ramadan's application for a visa on the basis of 8 U.S.C. §§ 1182(a)(3)(B)(i)(I) and 1182(a)(3)(B)(iv)(VI), concerning Ramadan's provision of material support to undesignated terrorist organizations. See Kinder Decl. ¶ 12. Ramadan was notified by telephone on September 19, 2006, and in a letter of that same date, that his application had been refused. See id. ¶ 14, Ex. A; Ramadan Suppl. Decl. ¶ 9, Ex. E.

The determination of Ramadan's inadmissibility under 8 U.S.C. §§ 1182(a)(3)(B)(i)(I) and 1182(a)(3)(B)(vi)(VI) was based on findings that Ramadan in fact satisfied each of the statutory requirements establishing inadmissibility under those provisions. See Kinder Decl. ¶ 13.[3] While the

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[2] Pursuant to the Foreign Affairs Manual, a consular official must submit all visa applications involving possible inadmissibility under 8 U.S.C. § 1182(a)(3)(B) for a Security Advisory Opinion. See 9 F.A.M. § 40.32 N1.2

[3] Plaintiffs' description of a January 2007 conversation with defendants' litigation counsel, see Declaration of Jameel Jaffer ¶¶ 2-5, does not constitute admissible or competent evidence of the basis for or the nature of the consular officer's determination.

specific evidence considered by the consular officer and the thought processes leading to his determination are not subject to judicial review, see Point I, infra, and accordingly are not detailed herein, independent sources are consistent with the consular determination of inadmissibility. First, in his visa interviews, Ramadan admitted providing financial contributions – and thus, necessarily, material support – to CBSP and ASP. See Ramadan Decl. ¶ 10, 13 (conceding he acknowledged contributions to ASP and "may have" told consular officer he also contributed to CBSP), Ex. F (consular officer's letter stating that Ramadan acknowledged donating funds to both groups).

Furthermore, while CBSP and ASP were not designated by the United States as terrorist organizations at the time Ramadan made the donations, they subsequently were listed by the United States Department of the Treasury, on August 21, 2003, pursuant to Executive Order 13224, as entities that support terrorism. Specifically, the Department of Treasury identified them as "charities that provide support to Hamas and form part of its funding network in Europe." See http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf. These designations, which occurred the year after Ramadan's last donation in 2002, see Ramadan Decl. ¶¶ 13-14, and which can only have resulted from findings about the organizations' prior conduct, are consistent with the consular officer's determination that, at the time of Ramadan's donations, CBSP and ASP in fact were undesignated terrorist organizations pursuant to 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

C. The Amended Complaint

On February 2, 2007, plaintiffs filed an amended complaint challenging the consular official's denial of Ramadan's visa and seeking a ruling that the endorse or espouse provision violates the First and Fifth Amendments on its face.

ARGUMENT

POINT ONE

THIS COURT MAY NOT OVERTURN THE CONSULAR OFFICER'S DENIAL OF A VISA TO TARIQ RAMADAN

A. The Doctrine of Consular Nonreviewability Bars Review of the Visa Denial

1. The Doctrine of Consular Nonreviewability

Ramadan's visa application was denied by a consular officer who found Ramadan inadmissible pursuant to 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) based on material support Ramadan provided to undesignated terrorist organizations. Plaintiffs, through voluminous evidentiary submissions, ask this Court to do something it may not do: entertain a fact-based challenge to the consular determination of Ramadan's visa application. Such an undertaking is foreclosed by the doctrine of consular nonreviewability.

The power to exclude aliens is "an attribute of sovereignty essential to the preservation of any nation," United States v. Valenzuela-Bernal, 458 U.S. 858, 864 (1982), "necessary for maintaining normal international relations and defending the country[.]" Kleindienst v. Mandel, 408 U.S. 753, 765 (1972). Because decisions in this area implicate fundamentally political interests, including the nation's conduct of its foreign policy, the authority to make such decisions is exclusively committed to the legislative branch, which enjoys extraordinarily wide discretion in its exercise. See Galvan v. Press, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens . . . are peculiarly concerned with the political conduct of government[;] that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded . . . as any aspect of our government"); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) ("the

power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"). Indeed, "over no conceivable subject is the legislative power of Congress more complete" than the admission of aliens. Kleindienst, 408 U.S. at 766 (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

In recognition of the political branches' sovereign authority over this inherently political area, courts have long held that "[t]he judicial branch should not intervene in the executive's carrying out the policy of Congress with respect to exclusion of aliens." Burrafato v. United States Dep't of State, 523 F.2d 554, 556 (2d Cir. 1975); see also United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) ("The action of the executive officer [to admit or exclude an alien] is final and conclusive. . . . [I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien"). This long-standing principle, known as the doctrine of consular nonreviewability, bars courts from exercising jurisdiction over suits challenging the decision of a consular officer to grant or deny a visa. See Hsieh v. Kiley, 569 F.2d 1179, 1181 (2d Cir. 1978) (courts lack jurisdiction to review consular officer's decision to suspend or deny visas); Rivera de Gomez v. Kissinger, 534 F.2d 518, 519 (2d Cir. 1976) (same); Burrafato, 523 F.2d at 555-57 (same); United States ex rel. London v. Phelps, 22 F.2d 288, 290 (2d Cir. 1927) (consular officer's refusal to vise a passport is "beyond the jurisdiction of the court"); see also Saavedra Bruno v. Albright, 197 F.3d 1153, 1158 (D.C. Cir. 1999).

The doctrine of consular nonreviewability has withstood efforts to distinguish or overcome it on many grounds, including even that a consular visa decision was erroneous, contrary to law, or

arbitrary and capricious. See Grullon v. Kissinger, 417 F. Supp. 337, 338-40 (E.D.N.Y. 1976) (no jurisdiction to review claim that consular decision was contrary to law), aff'd, 559 F.2d 1203 (2d Cir. 1977); Zhang v. United States Citizenship and Immigration Serv., No. 05 Civ. 4086 (RJH) (AJP), 2005 WL 3046440, at *6 (S.D.N.Y. Nov. 8, 2005) (doctrine of consular nonreviewability insulates arbitrary, erroneous, or unlawful consular decisions from judicial review); Dong v. Ridge, No. 02 Civ. 7178 (HB), 2005 WL 1994090, at *3, 5 (S.D.N.Y. Aug. 18, 2005) (doctrine bars challenge to consular decisions based on inaccurate information or interpretation of law); Al Makaaseb Gen. Trading Co. v. Christopher, No. 94 Civ. 1179 (CSH), 1995 WL 110117, at *2 (S.D.N.Y. Mar. 13, 1995) (doctrine bars claims that consular decision was not authorized by statute or that consul failed to follow regulations); Romero v. Consulate of United States, Barranquilla, Colombia, 860 F. Supp. 319, 322 (E.D. Va. 1994) (doctrine "is essentially without exception," even when visa denial rests on allegedly erroneous information, or was unauthorized by statute). Thus, a court lacks jurisdiction over any challenge to a consular officer's decision, regardless of the basis for the challenge.[4]

2. Kleindienst Did Not Abrogate the Doctrine of Consular Nonreviewability

The principle exempting consular decisions from review fully applies in the First Amendment context. In Kleindienst, 408 U.S. at 766, the Supreme Court considered United States citizens' claims that an alien's allegedly ideology-based exclusion violated their First Amendment rights to hear from and speak with that alien. The Kleindienst plaintiffs were professors who had invited Marxist scholar Ernest Mandel to speak at various events. See id. at 759. Mandel sought

[4] Although some courts, including this one, have found jurisdiction under the Administrative Procedure Act ("APA") to order a consular officer to adjudicate a visa under certain circumstances, see, e.g., American Acad. of Religion, 463 F. Supp. 2d at 420-22, such orders concern only the timing of the adjudication, and do not abrogate the doctrine of consular nonreviewability by examining the merits of the consular officer's determination.

a non-immigrant visa to attend some of these events, but the United States consul in Belgium denied Mandel's application on the ground that he advocated world communism and was thus inadmissible under then-section 212(a)(28) of the Immigration and Nationality Act (the "INA"). See id. at 756. At issue in Kleindeinst, however, was not the consul's visa denial but rather the Attorney General's refusal to exercise his statutory discretion under INA § 212(d)(3) to waive Mandel's inadmissibility. See id. at 762. As the Court stated:

> The case, therefore, comes down to the narrow issue whether the First Amendment confers upon the appellee professors, because they wish to hear, speak, and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country or, in other words, to compel the Attorney General to allow Mandel's admission.

Id.

The Court noted that while an alien has no constitutional or statutory right to enter the United States, exclusion of the alien could "implicate[]" the First Amendment rights of American citizens who wish to confer with him. See id. at 762-65. Nonetheless, the Court held that if the Attorney General, acting pursuant to his statutory authority, declines to waive an alien's inadmissibility on the basis of a "facially legitimate and bona fide" reason, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the [alien]." Id. at 770.

In so deciding, Kleindienst also held that the rights of United States citizens to receive ideas do not outweigh the Executive's plenary power to exclude aliens by declining to grant a waiver of inadmissibility. As the Court observed, creating a "First Amendment" exception to this authority would plunge courts into a vast body of disputes that is constitutionally vested in the political branches, beyond judicial review:

> Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under § 212(a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular applicant, according to some as yet undetermined standard. The dangers and the undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious. Indeed, it is for precisely this reason that the waiver decision has, properly, been placed in the hands of the Executive.

Id. at 768-69. To avoid such "dangers," the Court held that, when the Government proffered a facially legitimate and bona fide reason for refusing to grant a waiver, a court could not engage in further review.[5] See id. at 769-70.

In limiting judicial review of the Attorney General's denial of a waiver, the Supreme Court did not abrogate the doctrine of consular nonreviewability, but instead explicitly recognized the doctrine:

> The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.

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[5] Contrary to the analysis of some courts since Kleindienst, see, e.g., Burrafato, 523 F.2d at 556 (stating, in dicta, that two district courts in the Second Circuit had "interpreted [Kleindienst] to require justification for an alien's exclusion"), the Supreme Court did not hold that the Government is required to advance a "facially legitimate and bona fide justification" for a challenged exclusion. Rather, the Court held that, because the Government had proffered a facially legitimate and bona fide justification, no judicial review was permitted. The Court expressly declined to reach whether the Government was required to proffer a rationale, deeming the question of whether First Amendment or other grounds could ever be used to overturn an alien's exclusion in the absence of a proffered facially legitimate and bona fide justification "a question we neither address or decide in this case." Kleindienst, 408 U.S. at 770.

Kleindienst, 408 U.S. at 766 (quoting Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895)) (emphasis supplied); see also Hsieh, 569 F.2d at 1181 (noting that Kleindienst stated the "basic principle" of consular nonreviewability). The Court in fact relied on these principles in holding that courts may not balance First Amendment interests against the Attorney General's rationale for not waiving inadmissibility. See Kleindienst, 408 U.S. at 769-70 (given Congress's plenary power to make rules for excluding aliens, which "has long been firmly established," courts may not look behind Attorney General's denial of waiver based on a facially legitimate and bona fide reason).

This latter point highlights a critical, but oft-overlooked, aspect of Kleindienst: the decision under review was not a consular officer's determination of an alien's admissibility under INA standards, but rather the Attorney General's discretionary decision to deny a waiver of inadmissibility. See Kleindienst, 408 U.S. at 759 (relevant action was denial of waiver on authority of Attorney General); 769 (Attorney General validly exercised plenary power delegated by Congress). Because Kleindienst neither addressed nor permitted review of a consular decision, any argument that Kleindienst requires the Government to proffer a facially legitimate and bona fide reason for its action should be limited to cases involving waiver denials, rather than challenges to consular officers' admissibility determinations, such as the Court faces here. See Centeno v. Shultz, 817 F.2d 1212, 1213 (5th Cir. 1987) (review authorized by Kleindienst is "limited solely to . . . whether a facially legitimate and bona fide reason exists for the denial of the waiver"; Kleindienst did not apply to denial of a visa); Encuentro del Canto Popular v. Christopher, 930 F. Supp. 1360, 1370 (N.D. Cal. 1996) (Kleindienst does not apply to visa denial made by consular officer, and court "lacks jurisdiction to review or alter that decision in any way"); Romero, 860 F. Supp. at 323 n.7 (Kleindienst did not involve challenge to consular officer's visa determination, and"while federal

courts may have 'minimal review' over the narrow issue of whether a facially legitimate and bona fide reason exists for the denial of a waiver of exclusion, this cannot be construed as implying a right to seek review of a consular officer's initial visa determination").

Any courts implying or holding to the contrary misconstrue Kleindienst, and should not be followed. Notably, both Adams v. Baker, 909 F.2d 643 (1st Cir. 1990), and Allende v. Shultz, 845 F.2d 1111 (1st Cir. 1988), cited by plaintiffs, failed to consider consular nonreviewability or to recognize that Kleindienst involved a discretionary waiver decision rather than a consular officer's determination. See Adams, 909 F.2d at 647 (stating that Kleindienst involved "same issue as that now faced by this court" even though challenged action was consular officer's visa denial); Allende, 845 F.2d at 1116-21 (failing to address question of jurisdiction).

Moreover, Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986), aff'd without opinion by an equally divided Court, 484 U.S. 1 (1987), also cited by plaintiffs, is distinguishable because there the D.C. Circuit relied on a jurisdiction-conferring statute that is no longer in effect. See id. at 1050.[6] Indeed, Abourezk discussed Kleindienst only cursorily, noting only (without considering the differences between a consular visa decision and the Attorney General's discretionary waiver denial) that the Supreme Court reached a "disposition on the merits" and stating that, "[p]resumably, had the Court harbored doubts concerning federal court subject matter jurisdiction. . . , it would have raised the issue on its own motion." Id. This bare mention of Kleindienst, without further analysis, in a case supported by a no-longer applicable statutory grant of jurisdiction, cannot serve as

[6] Specifically, Abourezk relied upon 8 U.S.C. § 1329 (1982), which granted federal courts jurisdiction over "all causes, civil and criminal, arising under" immigration statutes. See Abourezk, 785 F.2d at 1050. This provision has since been amended to restrict jurisdiction to immigration cases "brought by the United States." Saavedra Bruno, 197 F.3d at 1162, 1164.

persuasive authority extending Kleindienst to visa denials by consular officials in the absence of that jurisdiction-conferring statute. See Saavedra Bruno, 197 F.3d at 1162; Abourezk, 785 F.2d at 1050. Abourezk is also inapplicable here because it hinged on the scope of the authority Congress accorded to the Secretary of State to determine how to interpret a statutory provision, and expressly distinguished cases involving the authority to decide visa applications accorded a consular officer.[7] See id. at 1051 n.6 (noting that case involved "claims concerning the decisions of State Department officials rather than consular officers abroad"); Aggarwal v. Sec'y of State of United States, 951 F. Supp. 642, 647 n.7 (S.D. Tex. 1996) ("Abourezk expressly states that though it permitted limited agency review, claims concerning decisions by consular officers are not reviewable").

The Second Circuit's decision in Burrafato, 523 F.2d at 556, is not to the contrary. Burrafato held that Kleindienst did not permit judicial review of an alien's claim that a consular officer's visa denial violated his constitutional rights. See id. at 556-57. Although the Second Circuit noted that Kleindienst, unlike Burrafato, involved First Amendment claims, it did not have occasion to address the situation presented here – United States citizens challenging a visa denial on First Amendment grounds. Burrafato thus did not hold that Kleindienst – which, as noted, dealt with a discretionary Attorney General action, not a consular determination – would allow review in such a case. See id.

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[7] Indeed, the D.C. Circuit's decision in Saavedra Bruno, 197 F.3d at 1153, sharply limits Abourezk. In Saavedra Bruno, a panel of the D.C. Circuit, which was bound by the Abourezk decision, see id. at 1163 n.13, characterized Abourezk's holding as "narrow," refused to extend that holding outside its specific factual circumstances, and reaffirmed the continuing vitality of doctrine of consular nonreviewability. See id. at 1163-64. Saavedra Bruno also recognized the limits of Abourezk's holding, including its reliance on the now-repealed INA provision as a basis for jurisdiction, and emphasized that Kleindienst did not arise from the decision of a consular officer applying the INA, but rather the discretionary denial of a waiver by the Attorney General. See id. at 1163.

In sum, the highly circumscribed review conducted in Kleindienst does not extend to the decision of a consular officer to deny a visa, even if the plaintiffs seeking review of that decision raise a First Amendment claim. Indeed, as Kleindienst recognized, if this Court were to review the consular determination here, it is difficult to see any logical stopping point – every decision by a consular official to deny a visa would be subject to judicial review whenever even just one person in this country asserted a deprivation of a right to hear the visa applicant speak. See Kleindienst, 408 U.S. at 768-69. Because plaintiffs seek review of the denial of Ramadan's visa by a consular officer - rather than the denial of a waiver by the Attorney General or the Department of Homeland Security - this suit does not qualify for the very limited review undertaken in Kleindienst.

B. The Denial of Ramadan's Visa Was Supported by a Facially Legitimate and Bona Fide Reason

Even if the court did have jurisdiction to review the action of a consular official, it should afford no less deference to the executive branch than the limited "facially legitimate and bona fide" standard referenced in Kleindienst. In fact, the Supreme Court's concerns in that case about judicial interference in the exercise of judgment, wisdom, and expertise by the Attorney General in denying a waiver are magnified exponentially in the context of the fact-specific, high-volume decision-making of hundreds of consular officers in the field. The court should, if anything, engage in even more limited review of the consular officer's determination than that employed by Kleindienst. Even so, the consular official's decision here satisfies the standard that Kleindienst held precluded judicial review of a waiver determination, and, accordingly, the Court here may not look behind the consular officers' visa denial.

Put simply, even if Kleindienst established a standard of review applicable here, the Court should uphold the visa denial because the Government has provided a facially legitimate and bona fide justification for its actions. Specifically, the consular officer found Ramadan inadmissible pursuant to 8 U.S.C. §§ 1182(a)(3)(B)(i)(I) and 1182(a)(3)(B)(iv)(VI) for material support of terrorism because, as Ramadan admitted, he donated funds to ASP and CBSP, and, the consular officer determined, Ramadan could not establish by clear and convincing evidence that he neither knew nor reasonably should have known that these organizations provided funds to Hamas, as Ramadan was required to show by the governing statute. See Point I.B.1, infra.

1. Inadmissibility Based on Material Support of Terrorism

Section 212 of the INA, 8 U.S.C. §1182, sets forth numerous grounds for finding an alien inadmissible to the United States. Section 1182(a)(3)(B)(i)(I) bars from admission any alien who "has engaged in terrorist activity," which includes "commit[ting] an act that the actor knows, or reasonably should know, affords material support" to certain individuals or organizations involved in terrorism. See 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006).

Prior to 2001, section 1182(a)(3)(B) defined "engag[ing] in terrorist activity" to mean:

> commit[ting] . . an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity, including . . .providing . . . any type of material support, including . . . funds . . . to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.

8 U.S.C. § 1182(a)(3)(B)(iii) (2000). The provision, in turn, defined "terrorist activity" as any unlawful activity involving one of six enumerated categories of violent acts, including hijacking and assassination. See 8 U.S.C. § 1182(a)(3)(B)(ii)(I)-(VI) (2000).

The USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), which went into effect on October 25, 2001, amended § 1182(a)(3)(B), including the "material support" provisions. The "material support" ground for inadmissibility was extended to aliens who committed acts that the alien knew, or reasonably should have known, afforded material support – whether through funds, transportation, training, or other enumerated means – (1) for the commission of a terrorist activity; (2) to any individual the alien knew, or reasonably should have known, committed a terrorist activity; (3) to an organization designated as a terrorist organization by the Secretary of State; or (4) to a group of two or more individuals that committed, incited, prepared, planned, or gathered information on potential targets for, terrorist activity, unless the alien could demonstrate that he did not know, and should not reasonably have known, that the acts would further the group's terrorist activity. See 8 U.S.C. §§ 1182(a)(3)(B)(iv)(VI)(aa)-(dd); 1182(a)(3)(B)(vi)(I)-(III); 1182(a)(3)(B)(iv)(I)-(III) (2002).

The "material support" provisions were again amended in May 2005, with the passage of the REAL ID Act, Pub. L. 109-13, 119 Stat. 231 (2005). Although the REAL ID Act maintained the first two categories of "material support" conduct enumerated in the Patriot Act, it amended the final two to bar aliens who provided material support – including funds – to a designated or undesignated organization that engaged in enumerated activities including proving material support to other designated or undesignated terrorist organizations. See 8 U.S.C. §§ 1182(a)(3)(B)(iv)(VI)(cc)-(dd); 1182(a)(3)(B)(iv)(I)-(VI); 1182(a)(3)(B)(vi)(I)-(III) (2006). With respect to material support given to an undesignated terrorist organization, the REAL ID Act raised the burden of proof required for an alien to overcome inadmissibility:

> As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization – . . . to commit an act that the actor knows, or reasonably should know, affords material support, including . . . funds, . . . to a[n undesigated terrorist organization] or to any member of such an organization, unless the [alien] can demonstrate by clear and convincing evidence that the [alien] did not know, and should not reasonably have known, that the organization was a terrorist organization.

8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd) (2006) (emphasis added).

Here, the consular official, applying these provisions, found Ramadan inadmissible pursuant to 8 U.S.C. §§ 1182(a)(3)(B)(i)(I) and 1182(a)(3)(B)(iv)(VI) on the ground that he engaged in terrorist activity by providing material support to ASP and CBSP. The consular official concluded that Ramadan knew or should have known his financial contributions constituted "material support" to ASP and CBSP, and further concluded that Ramadan could not avoid inadmissibility by demonstrating by "clear and convincing evidence that [he] did not know, and should not reasonably have known" that the organizations provided funds to Hamas, a designated Foreign Terrorist Organization. 8 U.S.C. §1182(a)(3)(B)(iv)(VI)(dd); Kinder Decl. ¶ 13.

2. The "Facially Legitimate and Bona Fide" Standard

Even assuming arguendo that any judicial review of the consular decision were permissible under Kleindienst, as the Court recognized in its decision on the preliminary injunction motion, so long as the Government provides a facially legitimate and bona fide reason for the denial of Ramadan's visa, "the Executive's broad power to exclude aliens [] prevail[s] over Plaintiffs' First Amendment rights, thereby precluding further review by this Court." American Acad. of Religion, 463 F. Supp. 2d at 413 n.16.

As noted above, Kleindienst held that when the Executive exercises discretionary authority to deny a waiver of inadmissibility on the basis of a facially legitimate and bona fide reason, courts

may not look behind the exercise of that discretion. See Kleindienst, 408 U.S. at 769-70. Even if this were construed as a "standard of review," it would be an exceptionally narrow one.[8] See Centeno, 817 F.2d at 1213 (review under Kleindienst as "minimal"); Lesbian/Gay Freedom Day Comm., Inc. v. United States Immigration and Naturalization Serv., 541 F. Supp. 569, 585 (N.D. Cal. 1982) (Kleindienst provides for only "limited standard of review"), aff'd, 714 F.2d 1470 (9th Cir. 1983); cf. Kleindienst, 408 U.S. at 777-78 & n. 3 (Marshall, J., dissenting) (objecting that the standard adopted by the majority "demands only 'facial' legitimacy" and shows "unprecedented deference to the Executive"). "This governing standard permits the Court to inquire as to the Government's reasons, but proscribes its probing into their wisdom or basis." El-Werfalli v. Smith, 547 F. Supp. 152, 153 (S.D.N.Y. 1982); NGO Committee v. Haig, No. 82 Civ. 3636 (PNL), 1982 U.S. Dist. LEXIS 13583, at *9 (S.D.N.Y. June 10, 1982) (under Kleindienst, "[t]he Court has no power to inquire into the wisdom or basis of the Government's reasons"). Thus, as the term "facial" indicates, a court may not look behind the factual or discretionary determinations reflected in the Government's asserted justification.

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[8] Although the Second Circuit has held in another context that a statute creating distinctions among aliens is "facially legitimate and bona fide" if it survives rational basis review, see Azizi v. Thornburgh, 908 F.2d 1130, 1133 (2d Cir. 1990), the Azizi holding could not, consistent with Kleindienst, be applied to the visa context. Given the Supreme Court's long-standing adherence to the doctrine of consular nonreviewability, as well as its refusal to look behind the reasoning or factual basis even of the Attorney General's discretionary justification, see Kleindienst, 408 U.S. at 770, this Court may not look behind the Government's facially legitimate justification for the consular officer's denial of Ramadan's visa. In any event, even if a rational basis review were employed, the consul's decision easily passes muster; under this "exceedingly narrow" standard, see Cato v. INS, 84 F.3d 597, 602 (2d Cir. 1996) (quotation omitted), it was certainly rational for the consul to conclude, based on Ramadan's admissions, that he made the donations in question, and based on the circumstances, that Ramadan could not prove, by clear and convincing evidence, that he lacked the requisite knowledge that ASP and CBSP met the INA definition of undesignated terrorist organizations.

Although Kleindienst did not define the phrase "facially legitimate and bona fide," its discussion demonstrates the narrowness of any judicial inquiry. In Kleindienst, the Attorney General declined to waive Mandel's inadmissibility because the Attorney General determined that on a previous trip to the United States, Mandel had violated the conditions of his visa, and that given this "flagrant abuse," Mandel should not be granted a waiver. See Kleindienst, 408 U.S. at 759. Although the Government had not relied on this justification during the litigation, the Supreme Court nonetheless held that the justification constituted a "facially legitimate and bona fide" reason for refusing a waiver, and that the waiver denial accordingly would be upheld. See id. at 769. The Supreme Court refused to "look behind" the factual basis of the reason – Mandel's activities beyond the stated purpose of an earlier visit to the United States – even though Mandel claimed he was not aware of the prior visa limitations, and denied participating in political fundraising. See id. at 758 n.5. Nor did the Supreme Court evaluate the Attorney General's conclusion that "previous abuses by Mandel made it inappropriate to grant a waiver again." Id. at 769. Instead, having searched the record to find a justification for the denial (on which the Government had never relied in the litigation), the Supreme Court deemed the justification "facially legitimate and bona fide," and therefore a valid exercise of the Attorney General's plenary power that was not subject to judicial review. See id. Given this extraordinary solicitude to the Executive's determination, courts applying Kleindienst should neither engage in any factual inquiry nor second-guess the deciding official's conclusions, and the Court should decline plaintiffs' invitation to do so in this case.

3. Ramadan's Donations to ASP and CBSP Constituted a Facially Legitimate and Bona Fide Justification for the Visa Denial Because They Fall Within 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)

Here, the Government has provided a facially legitimate and bona fide reason for Ramadan's visa denial, and the consular officer's decision that Ramadan's donations to ASP and CBSP rendered him statutorily inadmissible may not be disturbed.

As a threshold matter, it is undisputed that the consular officer's finding that Ramadan's contributions to ASP and CBSP constituted "material support" is fully consistent with the statute, as donations fall squarely within the list of activities that qualify as "material support" to terrorist organizations.[9] See 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (defining "material support" as providing, inter alia, "funds, transfer of funds or other material financial benefit"); Singh v. Gonzales, _ Fed. Appx. _, 2007 WL 870357, at *1 (9th Cir. Mar. 22, 2007) (same); see also Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000) (noting that Congress has explicitly found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct").

Although plaintiffs argue that Ramadan "neither knew nor should have known" that his donations provided material support to an undesignated terrorist organization, their attack on the factual basis of the consular officer's decision is exactly the type of inquiry that Kleindienst forbids.

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[9] Although Ramadan now contends that he never gave money to CBSP, this after-the-fact disavowal of his interview statements has no bearing on whether the consular officer had a facially legitimate and bona fide reason for applying §1182(a)(3)(B)(iv)(VI). The consular officer plainly is entitled to act based on what Ramadan told him in his interviews. Ramadan does not deny telling the consular officer that he made donations to CBSP; indeed, he concedes that he "may have stated in [his] visa interview that [he] gave money to both organizations." Ramadan Suppl. Decl. ¶ 13. Moreover, it is of no moment whether Ramadan actually gave money to CBSP, for he concededly made donations to ASP and those contributions, standing alone, are sufficient to render him inadmissible under § 1182(a)(3)(B)(iv)(VI).

As noted supra, Kleindienst refused to evaluate both (a) Mandel's claims that he did not know about the conditions on his 1968 visa and did not participate in political fundraising; and (b) the Attorney General's conclusion that the asserted visa violations failed to warrant a waiver. See Kleindienst, 408 U.S. at 770. These aspects of Kleindienst, and the sweeping doctrine of consular nonreviewability as a whole, preclude this Court from "looking behind" the consular officer's factual determination that Ramadan (as is undisputed) made the donations, and failed to establish, by clear and convincing evidence, that he did not have the requisite knowledge.

Rather, this Court's inquiry must end once the Government presents a bona fide and facially legitimate basis for denying Ramadan's visa. Here, that standard was clearly met by the consular officer's determination that Ramadan provided material support to terrorist organizations. Indeed, in most cases finding that a proffered reason was not facially legitimate, the courts have merely assessed the stated reason for exclusion on its face, and held that the asserted reason did not satisfy the requirements of the cited statutory provision. See Allende, 845 F.2d at 1117 (alien's exclusion on ground that her mere entry into the United States would be prejudicial to country's interests held not to be supported by asserted statutory basis of exclusion, which only applied if alien's "activities" would cause prejudice or danger); Abourezk, 785 F.2d at 1056-57 (same); Lesbian/Gay Freedom Day Comm., Inc., 541 F. Supp. at 586 (asserted justification not facially legitimate because statutory basis invoked required medical finding yet no such finding had been made).[10]

[10] To the extent that other courts applying the "facially legitimate" standard have engaged in a more substantive factual or discretionary inquiry, see Adams, 909 F.2d at 648-50; El-Werfalli, 547 F. Supp. at 153, they have misapprehended Kleindienst, and should not be followed by this Court.

Judge Leval's decision in NGO Committee, 1982 U.S. Dist. LEXIS, at *1, is particularly instructive. There, the Attorney General indicated by letter that he declined to waive excludability for a number of aliens because they were members of various Communist Party-affiliated organizations, they were not invited by the United Nations, and "there were no special circumstances warranting favorable treatment." Id. at *4-5. Although plaintiffs argued that the letters were insufficient under Kleindienst, the court disagreed, holding that the reasons were "within the scope of [Kleindienst]'s requirements" and that the court had "no power to inquire into the wisdom or basis of the Government's reasons." Id. at *9. Further, the court declined to consider a classified affidavit containing additional information, stating that the Government's mere confirmation that the reasons stated in the letters were in fact the reasons for denying waivers satisfied the Kleindienst standard. See id. at *7-9. Just as Judge Leval declined to look behind the factual and discretionary determinations in NGO Committee, so too should this Court decline to intrude on the consular officer's decision-making in this case.

4. The Material Support Provisions Apply to Ramadan's Conduct Even If the Donations Occurred Prior to Enactment of the REAL ID Act

The Court should also reject plaintiff's contention that Ramadan's donations to ASP and CBSP "do not provide a facially legitimate and bona fide reason for [denying him a visa] because they were not grounds for inadmissibility at the time they were made." See Pl. Mem. at 15. The REAL ID Act amendments expressly apply to acts pre-dating the statute's effective date. Furthermore, even if the statute did not evidence such clear intent, application of the amendments would not be impermissibly retroactive because they did not impair any rights or disrupt any

reasonable expectations that Ramadan had when he made the donations. Accordingly, the timing of Ramadan's donations does not undermine the propriety of his exclusion.

a. The REAL ID Act Amendments Expressly Apply to Conduct Occurring Before, On, or After the Effective Date of the Statute

In Landgraf v. USI Film Prods., 511 U.S. 244 (1994), the Supreme Court established a two-part test to determine the temporal reach of civil legislation. Under Landgraf, a court first ascertains whether Congress has clearly prescribed whether the statute should be applied prospectively or retrospectively. See INS v. St. Cyr, 533 U.S. 289, 316 (2001); Landgraf, 511 U.S. at 280. If the statute contains such an express command, courts look no further, but rather apply the statute as Congress directed. See id.; Restrepo v. McElroy, 369 F.3d 627, 631 (2d Cir. 2004). If the statute is ambiguous, however, courts must proceed to the second step and determine whether the statute's application would have an impermissible retroactive effect – that is, "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf, 511 U.S. at 280. If so, the court will decline to apply the statute retroactively. See id. Here, Congress unambiguously provided that the REAL ID amendments would apply retrospectively.

First, Congress unquestionably has the power to make past activity a new ground for deportation or inadmissibility. See St. Cyr, 533 U.S. at 325 n. 55 (2001) (recognizing that "Congress has the power to act retrospectively in the immigration context"); Lehmann v. United States ex rel. Carson, 353 U.S. 685, 690 (1957) ("It seems to us indisputable, therefore, that [by enacting section 241(a) of the INA] Congress was legislating retrospectively, as it may do"); Galvan, 347 U.S. at 530-531 (upholding application of statute requiring deportation of aliens who were Communist Party

members after entering the United States to alien who had been a Communist only before the statute's enactment). Indeed, Landgraf recognizes this general authority in holding that courts must give effect to a clear expression of Congressional intent to apply statues retroactively. See Landgraf, 511 U.S. at 280.

As noted supra at 16-17, section 103 of the REAL ID Act amended the terrorism grounds for inadmissibility set forth in 8 U.S.C. § 1182(a)(3)(B). See REAL ID Act of 2005, Pub.L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005). Applicability of these amendments is governed by subsection 103(d), which provides:

> (d) EFFECTIVE DATE.--The amendments made by this section 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 Act § 103(d), 119 Stat. 231 (May 11, 2005) (emphasis added).

In this case, the Landgraf inquiry begins and ends with the unambiguous language of § 103(d), which is "so clear that it [can] sustain only one interpretation." St. Cyr, 533 U.S. at 317. Courts have repeatedly held that when Congress uses language applying a statute to events "before, on, or after" an effective date, it has clearly indicated that a statute should have retroactive effect. See St. Cyr, 533 U.S. at 318-19 (new immigration legislation stating that amendments applied to convictions and sentences "entered before, on, or after" date of enactment evinced unambiguous intent to apply retroactively); Vargas-Sarmiento v. United States Dept. of Justice, 448 F.3d 159, 164 (2d Cir. 2006) (by enacting REAL ID Act provision stating that law applied where final administrative order "was issued before, on, or after" effective date, Congress expressly made law

retroactive); Drax v. Reno, 338 F.3d 98, 109 (2d Cir. 2003) (provision stating that law applied to "convictions occurring before, on, or after" enactment date was clear expression of retroactivity); Rojas-Reyes v. INS, 235 F.3d 115, 121 n.1 (2d Cir. 2000) (section stating that amendment applied to "orders to show cause issued before, on, or after" effective date was clear expression of retroactivity). Thus, by expressly stating that the REAL ID amendments apply to removal proceedings instituted – and acts or conditions occurring – "before, on, or after" the REAL ID Act's effective date, Congress unambiguously provided that the amendments should apply retroactively.

In addition to the plain language evincing clear retroactive intent and decisions confirming this reading of the same words in other statutes, the case law, legislative history, and secondary authority specifically addressing § 103(d), though sparse, all support giving the statute retrospective effect. The only reported case to have addressed the issue has applied the amendments to § 1182(a)(3)(B) retroactively. See Alafyouny v. Chertoff, No. 3: 06-CV-0204-M, 2006 WL 1581959, at *3 n.3 (N.D. Tex. May 19, 2006), aff'd, 187 Fed. Appx. 389, 391 (5th Cir. 2006).[11] Likewise, a number of articles and treatises have recognized that Congress intended these amendments to be retroactive. See Anna Marie Gallagher, 1 Immigration Law Service 2d § 1.88 (updated May 2007); Austin T. Fragomen, Jr., Steven C. Bell, and Thomas E. Moseley, Immigr. Legis Handbook § 1.6 (updated May 2006); Victor White, U.S. Asylum Law Out of Sync with International Obligations: REAL ID Act, 8 San Diego Int'l L. J. 209, 247-48 (Fall 2006); Lori A. Nessel, Forced to Choose: Torture, Family Reunification, and United States Immigration Policy, 78 Temp. L. Rev. 897, 936 n. 241 (Winter 2005); see also Practising Law Institute, Asylum and

[11] The Fifth Circuit does not prohibit citation to unpublished decisions. See 5th Cir. R. 47.5.4.

Withholding of Removal – A Brief Overview of the Substantive Law, 158 PLI/NY 289, 319 (March 2006) (noting "extreme facial retroactivity" of amendments to § 1182(a)(3)(B)).

Further, while the legislative history of the REAL ID Act does not contain extensive discussion of § 103(d), each member of Congress to address the issue understood the amendments to apply retroactively. See 151 Cong. Rec. S4614-01, S4629, 2005 WL 1083283 (May 9, 2005) (remarks of Sen. Kennedy) ("A major additional problem in the REAL ID provisions is that it could result in the deportation even of long-time legal permanent residents, for lawful speech or associations that occurred 20 years ago or more . . . The provision could be applied retroactively"); 151 Cong. Rec. H536-03, H561, 2005 WL 320845 (Feb. 10, 2005) (comments of Rep. Stark) ("The bill would also retroactively make legal donations, even donations made decades ago, grounds for deportation . . . if the organization to which a donation was made was later added to a government terrorist list"); 150 Cong. Rec. H8874-02, 2004 WL 2269105 (Oct. 8, 2004) (comments of Rep. Jackson-Lee during consideration of 2004 predecessor bill) ("the changes that this amendment would make would apply retroactively").[12] Taken together, these authorities confirm that Congress intended the REAL ID Act amendments to have retroactive effect.

This unambiguous directive of retroactivity compels rejection of plaintiffs' arguments suggesting ambiguity where none exists. First, plaintiffs assert that the use of the phrase "effective date" as a title for § 103(d), rather than the Patriot Act's use of the section title "retroactive application," militates against a finding of retroactivity. See Pl. Mem. at 23-24. This contention is without merit. Although the Supreme Court has held that "[a] statement that a statute will become

[12] The fact that these legislators spoke out against the bill does not undermine this conclusion – rather, it shows that even those who opposed the bill understood that it would apply retroactively.

effective on a certain date" does not indicate retrospective intent, Landgraf, 511 U.S. at 257, section 103(d) does far more than merely announce an effective date: it specifies that the amendments apply to all proceedings initiated, and all acts or conditions constituting grounds for removal or inadmissibility occurring, "before, on, or after" the effective date – language that, as explained above, clearly denotes retroactivity. Further, "while the title of a statute is a "tool[ ] available for the resolution of a doubt about the meaning of a statute, . . . [it] cannot limit the plain meaning of the text." Drax, 338 F.3d at 109 (internal citations and quotation marks omitted). Given the plain language of § 103(d) establishing retroactive effect, the mere use of "effective date" as a title does not suggest otherwise.

Second, plaintiffs argue that differences between the language of the REAL ID Act and the concededly retroactive Patriot Act must mean that the REAL ID Act amendments are not retroactive. Specifically, plaintiffs contend that, by including the phrase "acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal," Congress intended the REAL ID Act amendments to "apply only prospectively, except as to conduct that constituted a ground for inadmissibility, excludability, deportation, or removal at the time it occurred." Pl. Mem. at 22 (emphasis added). The mere fact that § 411(c)(1) of the Patriot Act uses different words to convey legislative intent of retroactivity in no way casts doubt on the clarity of the REAL ID Act. Congress is not limited to using identical "magic words" to make its intent clear; so long as the statute's language shows that Congress intended retroactive effect, the statute applies retroactively.

Further, plaintiffs' interpretation of § 103(d)(2) contravenes the plain language of the statute, creates significant inconsistency between the two subsections, and is belied by common sense. Indeed, plaintiffs' characterization of § 103(d)(2) as providing only limited retroactivity would

deprive the provision of any effect. By definition, an act or condition constituting a ground for inadmissibility as a result of the REAL ID Act amendments could not have constituted a ground for inadmissibility before the statute was amended. Accordingly, under plaintiffs' interpretation – which grafts the phrase "at the time it occurred" to § 103(d)(2) – the provision could never apply retroactively. This is easily seen with reference to Ramadan's own conduct: the REAL ID Act made inadmissible, for the first time, any person who provided material support to organizations that in turn provided material support to designated or undesignated terrorist organizations. Because this was a new ground for inadmissibility, it could not have constituted a ground of inadmissibility at any time before the REAL ID Act was enacted. Thus, plaintiffs' reading would effectively render subsection (b) entirely prospective.

Yet Congress plainly intended otherwise. Given all of the caselaw characterizing "before, on, or after" as a clear expression of retroactivity, see, e.g. Drax, 338 F.3d at 109; Rojas-Reyes, 235 F.3d at 121 n.1, Congress can only have adopted this language to unmistakably indicate that it intended the REAL ID Act amendments to apply retrospectively. This is all the more true given the statutory presumption in favor of prospective application. See Landgraf, 511 U.S. at 265. Had Congress wished the amendments to apply only to acts taken on or after the effective date, it could easily have stated, "the amendments shall apply only to acts taken on or after the effective date." Alternatively, it could have said nothing, and, pursuant to the presumption, the statute would have applied only to conduct taking place after the effective date. That Congress affirmatively chose language repeatedly recognized as a hallmark of retroactivity defeats any suggestion that it intended the amendments to apply only prospectively.

Plaintiffs' interpretation also fails because it is inconsistent with the first part of 103(d). Section 103(d)(1) provides that the REAL ID Act amendments apply to all removal proceedings instituted "before, on, or after" the statute's effective date. Because removal proceedings have been conducted since April 1997,[13] this provision necessarily applies the REAL ID Act amendments to proceedings initiated at least as far back as that date. Plaintiffs' interpretation, however, would apply the amendments only to acts and conditions occurring after May 11, 2005, which would nonsensically read the amendments as applying the REAL ID Act to proceedings going back to at least April 1997 while simultaneously restricting application to post-May 2005 acts and conditions. Because plaintiffs' construction of § 103(d)(2) fundamentally contradicts the first subsection, it is not viable.

Indeed, despite plaintiffs' claim that the statute's use of "excludability" and "deportation" suggests prospective application, Congress most likely included the terms for the opposite reason: to reach all acts, regardless of when they occurred. As plaintiffs concede, the terms"excludability" and "deportation" generally refer to pre-1996 immigration law. It would therefore be nonsensical for Congress to employ terms relating to pre-1996 immigration law if it intended the statute to apply only to post-2005 conduct. Thus, plaintiffs' tortured interpretation of § 103(d) cannot stand, and the statute should be given the retrospective application that Congress clearly intended.

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[13] Prior to 1996, aliens who faced return to their original countries were placed in either deportation or exclusion proceedings. See Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 349 (2005) . In September 1996, Congress enacted legislation providing that, as of April 1997, there would be only one such type of action, called "removal proceedings." See Zhang v. Immigration and Naturalization Serv., 274 F.3d 103, 106 (2d Cir. 2001).

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

Because the clear language of the REAL ID Act establishes Congress's intent for the statute to apply retroactively, there is no need to proceed to the second step of the Landgraf inquiry, which requires a court to determine whether a statute is impermissibly retroactive only if Congress has not provided an unambiguous directive. See Restrepo, 369 F.3d at 631 (if "Congress has expressly prescribed the statute's proper reach, . . . the inquiry is over and the court must implement Congress's intent") (internal quotation marks and citation omitted).

Nonetheless, even if there were any ambiguity as to whether the amendments apply retroactively, denying Ramadan admission based on donations made before the statute was enacted would not constitute an impermissibly retroactive effect. Most fundamentally, this is so because Ramadan, as a non-resident alien outside the United States, had no First Amendment rights or settled expectations. We are unaware of any case holding that a retroactive statute was impermissible on the ground that it disturbed the rights or expectations of a non-resident alien outside the United States.

Under the second prong of the Landgraf test, a court must determine "whether, in view of the 'familiar considerations of fair notice, reasonable reliance, and settled expectations,' the application of the statute to the case at hand would have a 'retroactive effect[.]'" Id. (internal citations omitted). In undertaking this determination, a court must bear in mind that "[a] statute is not made retrospective merely because it draws upon antecedent facts for its operation." Landgraf, 511 U.S. at 269 n.24 (quoting Cox v. Hart, 260 U.S. 427, 435 (1922)). As the Landgraf court explained:

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Id. at 269-70 (internal citation and quotation marks omitted). A statute satisfies this criteria if it "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, ... impose[s] new duties with respect to transactions already completed," id. at 280, or upsets a party's settled expectations after he has acted in reliance on the prior state of the law. See St. Cyr, 533 U.S. at 321-22. "The aim of the presumption [against retroactivity] is to avoid unnecessary post hoc changes to legal rules on which parties relied in shaping their primary conduct." Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004).

Since Landgraf, courts have consistently emphasized the importance of a party's reasonable reliance on the prior state of the law in determining whether a statute will have impermissibly retroactive effect. See, e.g., St. Cyr, 533 U.S. at 321-24 (repeal of discretionary relief from deportation was impermissibly retroactive to aliens who pleaded guilty before the statute was enacted; "elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly attaches a new disability, in respect to transactions or considerations already past"); Wilson v. Gonzales, 471 F.3d 111, 122 (2d Cir. 2006) (alien convicted at trial before repeal of § 212(c) relief did not fall within St. Cyr's holding; repeal would only have impermissibly retroactive effect if the alien "reasonably relied on the continued availability of § 212(c) relief and, based on that reasonable reliance, intentionally forwent filing an application for § 212(c) relief until a later date in the hopes of

presenting a stronger application"); Khan v. Ashcroft, 352 F.3d 521, 523-24 (2d Cir. 2004) (statute barring § 212(c) relief was not impermissibly retroactive to an alien who committed crime before – but pleaded guilty after – statute's enactment, because alien did not plead guilty in reliance on the availability of such relief).

Given the foregoing, the REAL ID amendments are not impermissibly retroactive as applied to Ramadan. It is undisputed that Ramadan, a non-resident alien outside this country's borders, does not have and has never had any right to enter the United States. See Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."); Kleindienst, 408 U.S. at 762 ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise"). Accordingly, enactment of the REAL ID amendments could not affect any right Ramadan possessed at the time he donated money to ASP and CBSP, or at any time he was not within the United States. Because impairment of a "vested right" is a "telltale characteristic" of retroactive effect, Morgan Guar. Trust Co. of New York v. Republic of Palau, 971 F.2d 917, 921 (2d Cir. 1992), the absence of any such impairment prevents Ramadan from establishing that the REAL ID Act is impermissibly retroactive. See Karageorgious v. Ashcroft, 374 F.3d 152, 156 (2d Cir. 2004) (upholding repeal of suspension of deportation, which attached no new legal consequences to petitioners' pre-repeal conduct because they had no right to live undetected illegally in the United States and gave up no rights by filing petitions for suspension); Knauff, 338 U.S. at 544 ("Petitioner had no vested right of entry which could be the subject of a prohibition against retroactive operation of regulations affecting her status").

Nor are the amendments impermissibly retrospective under any other criteria. The REAL ID Act provisions certainly do not increase Ramadan's liability for past conduct or impose new duties with respect to completed transactions. See Landgraf, 511 U.S. at 280. Furthermore, Ramadan does not claim that he relied on pre-REAL ID Act law when he made the donations at issue. See Arenas-Yepes v. Gonzales, 421 F.3d 111, 117 (2d Cir. 2005) ("because petitioner has not suggested to us. . . that he would have acted differently but for the enactment. . . his argument that § 1229b is impermissibly retroactive . . . must fail"); Boatswain v. Gonzales, 414 F.3d 413, 418-19 (2d Cir. 2005) (statute amending naturalization requirements did not have impermissibly retroactive effect because petitioner had no settled expectation in prior state of law).

Even if Ramadan alleged reliance on prior law, this still would not demonstrate an impermissibly retroactive effect, because such reliance "must be reasonable." Wilson, 471 F.3d at 122. Unlike an alien pleading guilty in reliance on the existence of § 212(c) relief, Ramadan cannot plausibly contend that he would not have provided material support to terrorist organizations had he known his conduct could bar his possible future entry into the United States – an entry to which he had no right in the first place. See Boatswain, 414 F.3d at 419 ("Boatswain cannot plausibly contend that he entered military service in 1975 with the expectation that following his discharge he could commit an aggravated felony (short of murder) and still be permitted to become a U.S. citizen"); Domond v. United States Immigration & Naturalization Serv., 244 F.3d 81, 86 (2d Cir. 2001) ("it cannot reasonably be argued that aliens committed crimes in reliance on a hearing that might possibly waive their deportation"). Indeed, it is implausible that any alien giving money or otherwise providing material support to terrorist organizations abroad structures his conduct in reasonable reliance that his actions will not disqualify him from admission to the United States. And even if

an alien did claim to have acted based on pre-REAL ID Act law, such reliance would not be reasonable, as unadmitted aliens have no right - and thus, no expectation - to enter the United States at all.

In sum, because the REAL ID Act amendments did not impair any of Ramadan's rights or disrupt his settled expectations, they do not attach new legal consequences to his past conduct and thus do not have impermissible retroactive effect. Therefore, even if the statute were not unambiguous, it still can and should be found permissibly retroactive under Landgraf.

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

Finally, citing the doctrine of constitutional avoidance, plaintiffs contend that this Court should not construe the REAL ID amendments to apply retrospectively because doing so would "give rise to a serious constitutional question," namely, whether the statute would violate due process when applied to aliens inside the United States. See Pl. Mem. at 29-30. This argument is patently meritless.

First, the issue of whether retrospective application of the REAL ID amendments to aliens in the United States complies with due process is simply not presented in this case, and plaintiffs lack standing to raise it. Ramadan, the only individual to whom plaintffs are challenging application of the REAL ID Act, is an unadmitted alien outside the United States. Because he has no constitutional rights to enter the United States, see Kleindienst, 408 U.S. at 762, there is no basis for this Court to conduct a due process inquiry.

Even if plaintiffs could properly raise a due process claim with respect to aliens in the United States who are deportable, retroactive application easily surpasses constitutional requirements. In

civil cases, retroactive application of a statute complies with due process so long as it is "justified by a rational legislative purpose." Pension Benefit Guar. Corp. v. R.A. Gray and Co., 467 U.S. 717, 730 (1984). Under this deferential standard of review, courts may "not pass judgment upon the wisdom, fairness, or logic of legislative decisions; [their inquiry] turns on whether there are 'plausible' reasons for Congress's choices." Weinstein v. Albright, 261 F.3d 127, 140 (2d Cir. 2001) (quotation omitted). Furthermore, when the statute at issue involves immigration or naturalization, a court must bear in mind the special deference owed to Congress in this area. Rojas-Reyes, 235 F.3d at 121-22. A legislature need not articulate its reasons for enacting a statute, and "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [law] actually motivated the legislature." Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).

Here, retroactive application of the REAL ID amendments is manifestly supported by a rational basis, namely, to protect society from the promotion and commission of terrorism. Given the critical national security and foreign affairs concerns presented by terrorist activity, it is unquestionably rational for Congress to enact legislation making aliens inadmissible or deportable for terrorist activities that occurred either before or after the legislation was enacted. See Kuhali v. Reno, 266 F.3d 93, 111 (2d Cir. 2001) ("Congress has a legitimate interest in protecting society from the commission of aggravated felonies . . . and legislation that deports aliens who presently commit or who have committed those acts in the past is a rational means of furthering that interest"). Therefore, setting aside the fact that the question is not presented on the facts of this case, retroactive application of the REAL ID amendments to deportable aliens would not violate their due process rights in any way.

C. If the Court Concludes Ramadan Was Improperly Excluded, It Should Not Award the Relief Plaintiffs Seek

Plaintiffs seek, inter alia, an order enjoining defendants "from relying on the material support provision to exclude Professor Ramadan," and "from relying on the ideological exclusion provision to exclude Professor Ramadan or any other individual." Pl. Mem. at 56. Such relief would be improper, however, even if the Court were to hold for plaintiffs on the merits. Rather, the Court should follow the analysis of the D.C. Circuit, which held that the district court upon remand from prior appeals in the Abourezk litigation "exceeded its authority" by ordering issuance of a visa to an alien whom the district court found was wrongly excluded under Kleindienst principles, and instead should have provided that the alien "may not be denied entry to the United States under [the statutory provision at issue] on grounds inconsistent with the court's interpretation of the statute." City of New York v. Baker, 878 F.2d 507, 512 (D.C. Cir. 1989). In so holding, the D.C. Circuit correctly observed that the "authority to issue visas belongs solely to the consular officers of the United States," and that "courts are without authority to displace the consular function in the issuance of visas." Id. While the order at issue there required issuance of visas, the same reasons preclude an injunction barring a visa denial on any ground other than the specific basis found inappropriate by the Court. Rather, the only appropriate relief in the event of a ruling for plaintiffs should be an order barring denial of Ramadan's visa on the grounds specifically rejected by the Court, upon which the relevant consular official would consider Ramadan's visa application in light of the Court's ruling.

POINT TWO

THE COURT SHOULD REJECT PLAINTIFFS' FACIAL CHALLENGE TO THE ENDORSE OR ESPOUSE PROVISION

A. Plaintiffs Lack Standing to Challenge the Constitutionality of the Endorse or Espouse Provision

The requirements for standing arise out of a "single basic idea -- the idea of separation of powers," Allen v. Wright, 468 U.S. 737, 752 (1984), because they demarcate fundamental limits on the role of the federal courts in our tripartite system of government. Here, because plaintiffs have suffered no legally cognizable injury resulting from the endorse or espouse provision, plaintiffs' complaint does not present a case or controversy, and this Court should not entertain their challenge to that statute.[14] See Lance v. Coffman, _ U.S. _, 127 S. Ct. 1194, 1196 (2007) ("a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy") (quotation omitted).

To establish standing, plaintiffs must demonstrate that they have suffered an injury in fact traceable to the conduct at issue in the litigation and likely to be redressed by a favorable decision on the merits. See Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); see also Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (plaintiff must have a "personal stake in the outcome of the controversy"). The complained-of injury must be concrete and particularized, and actual or imminent, not merely conjectural or hypothetical. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Further,

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[14] Because Ramadan has no constitutional rights, see supra at 32, and has never been excluded on the basis of the endorse or espouse provision, see Kinder Decl. ¶ 15, he lacks standing to bring this challenge as well.

the injury must be "legally cognizable." United States v. Hays, 515 U.S. 737, 752 (1995) (Stevens, J., concurring) ("Because these appellees have not alleged any legally cognizable injury, . . . they lack standing."); DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 (2d Cir. 1975) (a "person who has suffered injury to some legally cognizable interest . . . . has standing to sue").

In addition to these constitutional requirements, the standing doctrine embraces certain prudential limitations on the exercise of federal jurisdiction, including "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." Allen, 468 U.S. at 751. This aspect of the standing inquiry asks "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Warth, 422 U.S. at 500.

1. Plaintiffs Have Alleged No Cognizable Injury As They Have Not Identified Any Alien Whom They Were Prevented From Hosting in the United States Pursuant to the Endorse or Espouse Provision

Plaintiffs lack constitutional standing because they have not suffered the requisite legally cognizable injury traceable to the endorse or espouse provision, nor would any injury they have identified necessarily be redressed by an invalidation of that provision. Rather, their purported showing of injury is entirely "conjectural and speculative" – and, accordingly, insufficient.

Plaintiffs have identified no alien with whom they wished to meet in the United States, but who was excluded pursuant to the endorse or espouse provision.[15] While courts have recognized the standing of litigants in certain limited circumstances to challenge the exclusion of aliens as violative of the litigants' First Amendment rights, every such case, unlike this one, involved a domestic host

[15] As discussed above, Ramadan was never excluded pursuant to the endorse or espouse provision, and instead has been excluded for providing material support to terrorist organizations.

who was prevented from carrying out a specific planned meeting or interaction with a specific excluded alien. See, e.g., Kleindienst, 408 U.S. at 765 (entertaining suit where denial of visa waiver barred alien invitee from entering United States); Abourezk, 785 F.2d at 1048-49 (visa denials of four aliens under INA provision), 1050-51 (plaintiffs have standing because "they are 'aggrieved' by the State Department's resort to section 1182(a)(27) to keep out" their alien invitees); Allende v. Shultz, 605 F. Supp. 1220, 1221-22 (D. Mass. 1985) (standing to challenge alien's exclusion under provision also at issue in Abourezk); Harvard Law School Forum v. Shultz, 633 F. Supp. 525, 527 (D. Mass.) (denial of request for waiver of travel restriction to allow PLO UN observer to attend event organized by plaintiff), vacated, 852 F.2d 563 (1st Cir. 1986). In each instance, the challenged denial prevented the domestic plaintiff from carrying out plans to host or meet with a specific alien.

Here, by contrast, plaintiffs challenge a provision excluding a class of aliens, but they have not shown that the provision has been applied to bar plaintiffs from meeting with any specific person; under Kleindienst, however, the mere existence of a classification of inadmissible aliens cannot constitute a "legally cognizable" interest sufficient to confer standing. Legislation excluding an entire category of aliens could only effect a "legally cognizable" injury had the Supreme Court authorized the broad review that Justice Douglas in dissent advocated. See Kleindienst, 408 U.S. at 770 (Douglas, J., dissenting) (advocating rule in which no "ideological test" for admission would be "permissible"). Instead, Kleindienst sharply curtailed the availability of any review, even of discretionary determinations not to waive ineligibility, and expressly reaffirmed Congress's "plenary power" to decide which categories of aliens are admissible to the United States. See id. Kleindienst

accordingly precludes any contention that Congress's mere adoption of the endorse or espouse provision gives rise to a legally cognizable injury.[16]

For the same reasons, the prudential standing doctrine also is not satisfied here. See supra at 38. As Kleindienst recognizes, claims like plaintiffs' risk plunging the courts into an impossible and standardless task of balancing United States citizens' asserted interests in meeting with aliens against the Government's interest in setting and administering standards governing who may enter this country. Accordingly, the Court has demarcated the narrowest possible exception – only in the waiver denial context – to the rule that courts will not entertain challenges to the exclusions of aliens. Because plaintiffs' facial challenge does not derive from the exclusion of any particular alien, it runs afoul of "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches," Allen, 468 U.S. at 751, and thus plaintiffs lack standing.

2. Plaintiffs' Argument That They Are Chilled From Inviting Potentially Inadmissible Aliens or That Such Aliens May Be Chilled From Accepting Invitations Does Not Confer Standing

Nor do plaintiffs obtain standing by asserting that they are "chilled" from inviting aliens because those aliens might be denied a visa under the endorse or espouse provision. See Pl. Mem. at 39. Mere assertion of a chill does not establish a litigant's standing to bring First Amendment claims:

> Because a chilled plaintiff's injury arises not from actual harm that has already occurred, but from the plaintiff's fear of future prosecution, the Court must ascertain that that fear is sufficiently concrete and immediate to constitute a present injury to

[16] While the holding of Kleindienst goes to the merits of any claim, because it also goes to the very existence of any "legally cognizable" injury that plaintiffs seek to vindicate, the Court's analysis also is pertinent to the question of plaintiffs' standing. See City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 243 n.5 (1983) (joint consideration of merits and standing issues appropriate where issues were "inextricably intertwined").

> plaintiff's First Amendment rights, rather than a speculative or illusory allegation of future harm.

Nitke v. Ashcroft, 253 F. Supp. 2d 587, 596 (S.D.N.Y. 2003) (citations omitted; emphasis added). Moreover, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific objective harm or a threat of specific future harm. . . . Thus, plaintiffs must proffer some objective evidence to substantiate [their] claim that the challenged conduct has deterred [them] from engaging in protected activity.'" Id. (quoting Laird v. Tatum, 408 U.S. 1, 13-14 (1972), Bordell v. Gen. Elec. Co., 922 F.2d 1057, 1060-61 (2d Cir. 1991)) (internal quotation marks and citations omitted).

Plaintiffs adduce no evidence to show any "threat of specific future harm" sufficient to confer standing. While they complain that the endorse or espouse provision's terms leave them uncertain whether they will be able to host particular aliens and therefore whether they can plan and publicize particular conferences, see Pl. Mem. at 39-40, that purported "chill" categorically differs from the "chill" in the cases plaintiffs cite. See Pl. Mem. at 40. These cases do not support plaintiffs' assertion of standing based on alleged indirect effects on them, namely, that they may be reluctant to invite certain aliens to speak to them for fear that the aliens will not be admitted to this country. Rather, the cases plaintiffs cite protect domestic speakers' First Amendment rights from possible direct sanctions for their own speech. See, e.g., New Hampshire Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996) (plaintiff has standing "when the plaintiff is chilled from" speech "in order to avoid enforcement consequences"); Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817, 824 (2d Cir. 1967) ("mere threat of the imposition of unconstitutional sanctions" warrants judicial intervention). While then-Judge Ginsburg did state that a risk of future exclusions of aliens would, "[i]n the first amendment area," constitute an actionable "chill," Abourezk, 785 F.2d

at 1052 n.8, that observation did not form a basis for relief ordered by the court, and instead was dicta immediately following the court's principal holding that the issue before it was not moot, notwithstanding the Government's grant of visas to the aliens at issue, see Abourezk, 785 F.2d at 1052. This isolated statement in a footnote, unsupported by any other authority recognizing a First Amendment "chill" doctrine in cases relating to the exclusion of aliens, is too cursory and ambiguous to support the novel and sweeping ruling that plaintiffs seek here – i.e., that American would-be audiences have standing to sue seeking to invalidate statutes defining the admissibility of aliens, based on a fear that unspecified future alien invitees may be denied visas.[17]

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

Plaintiffs also allege that, because they regularly host speakers from abroad, it is "likely that the provision will be applied to bar their invitees in the future." Pl. Mem. at 41. This assertion is too remote and speculative to support their standing to bring a facial constitutional challenge, especially because – unlike the cases on which they rely, see Pl. Mem. at 41 – their rights will be affected, if at all, only as the indirect consequence of a refusal to admit an alien invitee, not by direct sanction of plaintiffs. Contrast, e.g., Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (standing exists where there is "realistic danger of sustaining a direct injury as a result

[17] Moreover, plaintiffs' "uncertainty" whether alien invitees will be admitted to the United States results not only from the endorse or espouse provision, but from the full body of immigration law, which includes numerous grounds that may well also apply to aliens who endorse or espouse terrorism. Thus, to the extent plaintiffs base their assertion of standing on this "uncertainty," the relief they seek – invalidation of one statutory provision – will not remedy the harm they allege. This reality undermines their standing, as the asserted injury is not likely to be redressed by a favorable decision on the merits. See Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

of the statute's operation or enforcement"); Steffel v. Thompson, 415 U.S. 452, 459-60 (1974) (plaintiff leafletter at risk of prosecution had standing to challenge trespass statute).

While plaintiffs allege (and the Government assumes arguendo) that they often invite foreign speakers to discuss the "war on terror," see Pl. Mem. at 42, it does not follow that the law "will be enforced against [such speakers]." They have never identified any individual with whom they wished to meet, but who was excluded under the endorse or espouse provision. The provision has been applied sparingly, with the Government waiving inadmissibility for the only person denied a visa by the State Department under the provision, see Declaration of Andrew C. Kotval ¶ 3, and with DHS deeming only ten people inadmissible under the endorse or espouse provision. See Declaration of Paul M. Morris ¶¶ 9-11. And, to the Government's knowledge, none of the aliens whom DHS deemed inadmissible under the provision was a scholar or academic, or intended to give speeches or conferences while in the United States. See id. ¶ 12. Given these circumstances, plaintiffs' asserted possible future injury is simply too speculative and remote to confer standing.

Moreover, to secure standing, plaintiffs must establish not only that an alien they wish to host likely would be excluded under the endorse or espouse provision, but also that such an exclusion would give rise to a legally cognizable injury to plaintiffs. This question is best addressed not through a facial challenge, but through an "as applied" challenge, should one ever arise. Kleindienst permits, at most, judicial consideration of whether the Government articulates a facially legitimate and bona fide reason for a specific alien's exclusion, an inquiry that cannot be undertaken in the facial challenge context.

Accordingly, plaintiffs lack standing to bring their facial challenge, and summary judgment should be entered for defendants.[18]

B. The Endorse or Espouse Provision Is Constitutional

Even assuming arguendo plaintiffs' standing, their facial constitutional challenge to the endorse or espouse provision should be rejected as meritless. Congress has plenary power to define categories of aliens who are, or are not, eligible for admission into the United States. This authority has long been recognized as lying at the heart of the nation's sovereign political power, and as raising sensitive questions of foreign affairs and national security that lie wholly beyond the authority of the courts. Any decision granting plaintiffs' motion would represent an unprecedented and misguided judicial usurpation of a power that the Constitution has vested exclusively in Congress, and it would profoundly harm the nation's ability to discharge its sensitive and critical duties in this area. Plaintiffs' challenge – which relies almost entirely on First Amendment authority barring domestic restrictions on speech or listening – disregards Congress's plenary authority over the eligibility of aliens for admission, and the century of unvarying case law recognizing the absence of limitations on that authority.

As noted in Point I.A, Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden," and Congress is constitutionally empowered "'to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention." Kleindienst, 408 U.S. at 766 (internal

[18] Plaintiffs also lack standing to challenge the statute on the ground that it allegedly is an unconstitutional scheme for the licensing of speech, for the simple reason that the statute is not a licensing scheme, see infra Point II.B.3, and therefore does not cause plaintiffs any injury sufficient to confer standing.

citations and quotation marks omitted). This is so because "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." Id. at 766-67 (quoting Galvan, 347 U.S. at 531-32). The political branches' power to control immigration is subject only to extremely narrow judicial review, see Fiallo v. Bell, 430 U.S. 787, 793 n.5 (1977), which is available only when specifically authorized by statute or required by the paramount law of the Constitution. Hampton v. Mow Sun Wong, 426 U.S. 88, 101-02 n.21 (1976). Plaintiffs' arguments simply cannot be squared with the sharp limitations on judicial authority recognized even in Kleindienst, which opened, at most, a very small window permitting strictly limited judicial review of discretionary Executive applications of laws passed by Congress, and which did not grant courts the power to displace Congress's exclusive authority to define what categories of aliens may be excluded from – or admitted to – the United States.

1. Congress's Plenary Power to Define Categories of Inadmissible Aliens Includes the Power to Exclude Persons Based on Their Associations, Memberships, Beliefs, and Speech

The Court should reject plaintiffs' argument that Congress may not constitutionally define a category of aliens as inadmissible based on their speech or viewpoint – that is, their espousal or endorsement of terrorism. See Pl. Mem. at 44-50.

First, the endorse or espouse provision in no way restricts speech. Rather, it merely defines a class of aliens as ineligible for admission to the United States. Nothing in the statute bars anyone, within or without the United States, from endorsing or espousing terrorism. Nothing in the statute bars anyone from hearing or receiving information from those who endorse or espouse terrorism.

Second, Congress has long defined – with universal acceptance by the courts – categories of aliens as inadmissible for reasons that would be unconstitutional if applied directly to citizens or

residents of the United States. Congress first restricted immigration in 1875, see Act of March 3, 1875, 18 Stat. 477, and in 1903 amended the immigration laws to bar, among others, "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government. . . ." Act of March 3, 1903, Section 2, 32 Stat. 1213, 1214 (emphasis added). In 1918, Congress further barred "aliens who advocate or teach the assassination of public officials; aliens who advocate or teach the unlawful destruction of property; aliens who are members of or affiliated with any organization that entertains a belief in, teaches or advocates the overthrow . . . of the Government of the United States. . . ." Act of October 16, 1918, 40 Stat. 1012 (emphasis added). In 1940, Congress expanded a prior bar to apply to aliens who at any time had advocated the violent overthrow of the United States government or belonged to organizations that so advocated. See Alien Registration Act of 1940, 54 Stat. 670, 673. Similar legislation barring advocates of communism was passed in the early 1950s, see, e.g., the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U.S.C. § 1182 (1952).

The political branches' authority over admission of aliens has repeatedly, and uniformly, been upheld by the Supreme Court. Soon after Congress imposed the initial restrictions on immigration, the Supreme Court confirmed that the power to exclude aliens is inherent in sovereignty and necessary for maintaining normal international relations and defending the country against encroachments and dangers – and is a power to be exercised exclusively by the political branches, and not "granted away or restrained on behalf of any one." The Chinese Exclusion Case, 130 U.S. 581, 609 (1889); see also Oceanic Navigation Co., 214 U.S. at 339 ("over no conceivable subject is the legislative power of Congress more complete"). Thus, the Court has repeatedly and without exception recognized Congress's "plenary power to make rules for the admission of aliens and to

exclude those who possess those characteristics which Congress has forbidden." Boutilier v. INS, 387 U.S. 118, 123 (1967); see also Kleindienst, 408 U.S. at 766 (reaffirming Congress's "plenary power . . . to exclude aliens" with characteristics Congress determines, and to have those determinations enforced by Executive "without judicial intervention"); Mezei, 345 U.S. at 210.[19]

The Supreme Court likewise has consistently upheld statutes rendering aliens inadmissible even on bases that would have violated the First Amendment if applied to United States citizens. For example, the Supreme Court upheld the Alien Registration Act of 1940, 54 Stat. 670, 673, in the face of a constitutional challenge to that statute's bar on entry of aliens who at any time had advocated the violent overthrow of the United States government or belonged to organizations that so advocated.[20] See Harisiades v. Shaughnessy, 342 U.S. 580, 585-92 (1952). In rejecting a claim that deporting a resident alien on the grounds of his former Communist Party membership violated his First Amendment rights, the Court declined to intrude on the political branches' authority over the treatment of aliens:

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[19] Even the scholarly work cited by plaintiffs to suggest that the "plenary power" doctrine may erode, see Pl. Mem. at 49 n. 23 (citing Peter J. Spiro, Explaining the End of Plenary Power, 16 Geo. Immigr. L.J. 339 (2002), which concerns two 2001 Supreme Court cases that the author argues may open a door toward eventual limitations on Congress's "plenary power" over alien admissions), concedes that the cases discussed did not hold that that power is diminished, and indeed left "open the possibility that the Court will reaffirm those statements [that Congress enjoys plenary power in this area] at some later date." Id. at 342. Moreover, the two cases involved, Nguyen v. INS, 533 U.S. 53 (2001) and Zadvydas v. Davis, 533 U.S. 678 (2001), are inapposite because they involve rights of aliens already in the United States; indeed, the Court in Zadvydas expressly held that "[a]liens who have not yet gained initial admission to this country would present a very different question," 533 U.S. at 682, and, further, noted that the case before it did not "require us to consider the political branches' authority to control entry into the United States," id. at 695.

[20] The grounds for deportation under the statute were essentially the same as those for barring initial entry. Compare Section 20, 54 Stat. 671, with Section 23, 54 Stat. 673.

> However desirable worldwide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of Government in control of our international relations and treaty-making powers.

Id. at 591; see also id. at 596 (Frankfurter, J., concurring) ("[e]ver since national States have come into being, the right of people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State" and, in the United States, is "wholly outside the concern and the competence of the Judiciary.").[21]

Indeed, the Supreme Court rejected arguments essentially identical to plaintiffs' over a century ago, rejecting a First Amendment challenge by an alien who had entered the nation illegally, and who was excluded as an anarchist under the Act of March 3, 1903, supra. See United States ex rel. Turner v. Williams, 194 U.S. 279, 294 (1904). The Court held that the alien, Turner, fell within a category of aliens whom Congress had found "undesirable," id. at 291, and held that whether to exclude or set conditions for permitting such aliens to enter are matters entrusted exclusively to Congress. Id. at 290-91. The Court rejected Turner's First Amendment challenge to his exclusion,

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[21] From 1951 to 1963, the Supreme Court repeatedly upheld Communist Party membership and affiliation deportation provisions, and clearly viewed them as fully constitutional. See Gastellum-Quinones v. Kennedy, 374 U.S. 469 (1963); Niukkanen v. McAlexander, 362 U.S. 390 (1960); Rowoldt v. Perfetto, 355 U.S. 115 (1957); Galvan, 347 U.S. at 530-31; Harisiades, 342 U.S. at 585-92; Carlson v. Landon, 342 U.S. 524, 535-536 (1952). These decisions have never been limited or overruled. Although the majority opinions in these decisions did not expressly address the First Amendment claims that would later color the debate, the dissent in Galvan did to no avail, and the Court even crafted and repeatedly applied an evidentiary standard for use in such cases. See Rowoldt, 355 U.S. at 120. The Court's repeated upholding and application of the deportation provisions based on aliens' association should be understood as an implicit rejection of the First Amendment challenge raised here.

notwithstanding the Court's recognition that "if an alien is not permitted to enter this country . . . he is in fact cut off from worshipping or speaking or publishing or petitioning in the country." Id. at 292. While Turner was brought by the alien seeking to vindicate his own rights, rather than a domestic plaintiff, the Court cannot have failed to recognize that its decision – and the statute it enforced – would prevent American audiences from hearing the alien. Indeed, the Court noted that Turner had delivered at least one lecture while in the United States, see id. at 283, thus making it inescapable that the statute and the Court's ruling would limit what Americans could hear.

The Supreme Court also has rejected constitutional challenges to immigration statutes that, while not basing aliens' inadmissibility based on their speech or beliefs, impinged upon fundamental rights of persons in the United States in a manner that would be unconstitutional had the statute not involved alien admissibility. See Mathews v. Diaz, 426 U.S. 67, 80 (1976) (in exercising its powers over immigration, "Congress regularly makes rules that would be unacceptable if applied to citizens."). For example, in Fiallo, the Supreme Court considered a challenge by alien fathers who were statutorily ineligible for entry to the United States to be reunited with their out-of-wedlock children residing in the United States, notwithstanding that similarly situated alien mothers were statutorily eligible for entry, as were married alien fathers of children in the United States. The plaintiffs alleged that this provision unconstitutionally discriminated against them (and their United States resident relatives) based on sex and legitimacy, and, further, violated fundamental associational rights both of the alien fathers and their children in the United States. Citing Kleindienst, the Court rejected this challenge, noting, "[T]his Court has resolved similar challenges . . . and has rejected the suggestion that more searching judicial scrutiny is required. . . . We can see

no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in [Kleindienst], a First Amendment case." Fiallo, 430 U.S. at 794-795.

Finally, Kleindienst itself precludes plaintiffs' facial challenge to the endorse or espouse here. In the face of that First Amendment challenge to a viewpoint-based exclusion, the Supreme Court reaffirmed "[t]he power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country," and to have its enactments "enforced exclusively through executive officers, without judicial intervention." Kleindienst, 408 U.S. at 766. This holding is incompatible with plaintiffs' contention that Congress may not exclude a category of aliens defined by the views those aliens have expressed. To the contrary, Kleindienst makes abundantly clear that – even where a statute defines aliens as inadmissible by virtue of their beliefs – courts may not so much as "balanc[e]" or weigh the competing interests of American litigants to hear an excluded alien as against the Government's interests, whatever those may be, in deeming an alien inadmissible. Id. at 770. That remains true even where, as was true in Kleindienst and is true here, the statutory basis of inadmissibility is defined by the content of the alien's views or prior speech.[22]

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[22] Because Congress's plenary authority to control the admissibility of aliens may be exercised even in a content-based manner, there is no legal significance to plaintiffs' objection that the Foreign Affairs Manual at one point characterizes the statute at issue as authorizing the exclusion of aliens for "irresponsible expressions of opinion," see Pl. Mem. at 49 (quoting F.A.M. n. 6.1), or to the fact that the F.A.M. acknowledges that the endorse or espouse provision applies to speech that falls short of incitement, id. at 48. Moreover, the isolated statement quoted out of context by plaintiffs does not purport to be a complete statement of the grounds for inadmissibility under the endorse or espouse provision. Rather, the manual describes the general aim of the statute as applying to "irresponsible expressions" endorsing or espousing terrorism, and must be read along with the further explanation and examples in the F.A.M. and the statute's requirements.

2. Plaintiffs' Arguments and Authority Do Not Overcome the Sound and Well-Established Precedent Establishing That Congress May Exclude Aliens Based on Their Speech or Views

Nor do the arguments and authorities advanced by plaintiffs alter the well-established principle that this Court may not usurp Congress's role in defining categories of inadmissible aliens. Plaintiffs recite bedrock case law establishing that, within the United States, the First Amendment confers a fundamental right to "receive ideas," see Pl. Mem. at 45, and that the Government ordinarily may not "restrict expression because of its message." Id. at 46. None of this law addresses the separate well-established principles that aliens abroad enjoy no First Amendment or other constitutional rights, see Kleindienst, 408 U.S. at 762, and that Congress enjoys plenary authority to determine what categories of aliens are inadmissible, including by reference to their views.

The few cases cited by plaintiffs that involve the admissibility of aliens, see Pl. Mem. at 46-47, are readily distinguishable, and in some instances are not even good law. For example, while one district court has held that the Government may not "deny entry solely on account of the content of speech," Pl. Mem. at 47 (quoting Abourezk v. Reagan, 592 F. Supp. 880, 887 (D.D.C. 1984), vacated and remanded, 785 F.2d 1043 (D.C. Cir. 1986)), that decision was vacated on appeal, and the D.C. Circuit decided the appeal on statutory grounds, expressly declining to reach the constitutional claims presented, see id. at 1060 n. 24.

Moreover, even if it were good law, the district court decision in Abourezk would not aid plaintiffs' facial challenge, because it made no holding as to whether Congress had the power to exclude categories of aliens based on their views or speech; indeed, the court acknowledged Congress's "plenary power over the admission of aliens." Abourezk, 592 F. Supp. at 883. Rather,

the court was considering a challenge to the Executive Branch's application of a statute rendering inadmissible (and ineligible for a waiver) "[a]liens who the consular officer . . . knows or has reason to believe seek to enter the United States . . . to engage in activities which would be prejudicial to the public interest. . . ." 8 U.S.C. § 1182(a)(27) (1982) ("subsection (27)") (emphasis added); see Abourezk, 592 F. Supp. at 884. Plaintiffs challenged the Government's application of subsection (27) to exclude aliens who were not anticipated to harm "the public interest" while within the United States in any way other than by being present. 592 F. Supp. at 884. The court held that subsection (27) could be read to authorize the Government to exclude such aliens. Id. at 886.

Having so read subsection (27), the district court turned to the Kleindienst question of whether the Government had articulated a "facially legitimate, bona fide basis for refusing entry" to the four aliens at issue. Id. at 886. The district court found the State Department's affidavit explaining the reasons for those aliens' exclusion to be "entirely conclusory," and insufficient. Id. The district court found particularly objectionable invocation of subsection (27) to exclude aliens whose only contemplated "activities" in the United States were "protected speech and association" that was to occur during their stay here, id. at 887, especially as it could "reasonably be concluded" that the State Department "did not agree with or feared the content of whatever communication [the excluded aliens] might make while in this country." Id. Accordingly, the court held, such aliens "may not be excluded under subsection (27) solely on account of the content of" their "proposed message." Id. (emphasis added). Immediately following this observation, the district court held, in the sentence quoted by plaintiffs, that the Government "may not, consistent with the First Amendment, deny entry solely on account of the content of speech." Id.

In context, the sentence relied on by plaintiffs is best understood to go to the narrow question of whether the Government could apply then-subsection (27) to refuse entry to an alien under the broad statutory authority to exclude aliens whose "activities" – consisting of nothing more than speech to U.S. audiences the Executive Branch deemed likely to be contrary to the "public interest." The district court's since-vacated decision held that the First Amendment did not permit the Executive Branch's application of the statute. Importantly, however, the district court decision did not hold that Congress lacked power to exclude people based on their speech or views, nor that subsection (27) violated the First Amendment or should be struck down. Nor did it hold even that the Executive could not, pursuant to an applicable statute, exclude aliens based on their speech, views or associations that they had previously made or formed abroad, as opposed to based on the expected content of their statements to U.S. audiences. Thus, the district court decision in Abourezk - even had it not been vacated on appeal – would not support any restriction on Congress's authority to exclude aliens based on their prior views, speech or associations.[23]

Nor does it support plaintiffs' facial challenge to point out, as plaintiffs do, see Pl. Mem. at 47, that the Abourezk district court "reaffirm[ed]" its First Amendment ruling when the case was remanded from the D.C. Circuit. Rather, in response to the Abourezk plaintiffs' request that it "reaffirm" its prior First Amendment ruling, the court stated that it remained "obvious" to the Court that "an alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded under subsection (27) solely on account of his proposed message."

[23] Indeed, the district court in Abourezk opined that, at least in some circumstances, there could be an "exception" to its ruling that the Government could not exclude aliens based on their anticipated speech. See Abourezk, 592 F. Supp. at 887 n.23 ("an alien could probably validly be excluded" if he were a high level official the Executive viewed as persona non grata).

Abourezk v. Reagan, Nos. 83-3739, 83-2741 and 83-3895, 1988 WL 59640, at *2 n.8 (D.D.C. June 7, 1988). This statement, which at any rate appears to be dicta on an issue the appellate court expressly refused to reach, by its terms was limited to the "circumstances" before the court – which, as explained above, do not support plaintiffs' facial challenge here.

Plaintiffs also rely on the district court decision in Harvard Law School Forum, 633 F. Supp. at 531 (refusal to waive travel restriction to allow PLO official to travel to debate not "facially legitimate" because that refusal was aimed at barring "participation in a political debate with American citizens"), but that decision was also vacated on appeal, a fact that plaintiffs' brief fails to acknowledge. See Harvard Law School Forum v. Shultz, 852 F.2d 563 (table), 1986 U.S. App. LEXIS 37325 (1st Cir. June 18, 1986). While the district court opinion was not reversed on the merits, the First Circuit did initially stay the district court's order, holding that "the government had shown a likelihood of prevailing on the merits[.]" Id. at *1. The First Circuit noted that its stay order did not "rule conclusively one way or the other on the merits of the government's restricted travel policy," but it stayed an injunction that would have barred the Government from preventing the PLO's UN observer from traveling to participate in a debate. Id. Because the PLO observer subsequently declined to attend the debate, the matter became moot, and the First Circuit ruled that neither the district court's original ruling nor the Circuit's stay order had "precedential weight concerning the merits." Id. at *3.

Even had the Harvard Law School Forum district court decision not been vacated, it would fail to support plaintiffs' contention that the endorse or espouse provision is unconstitutional on its face. Harvard Law School Forum did not involve a challenge to Congress's plenary authority to exclude any category of aliens; rather, the plaintiffs challenged a governmental determination not

to waive a travel restriction uniquely imposed on the PLO's UN observer, who was required to remain within 25 miles of "the center of New York City" while in the United States. See Harvard Law School Forum, 633 F. Supp. at 527. Indeed, the district court, in holding that the political question doctrine did not render the dispute nonjusticiable, characterized the question before it as whether "the federal courts have some role in enforcing constitutional restraints on the executive's implementation of the statutory scheme enacted by Congress," id. at 529 (emphasis added) – not whether Congress itself had the power to adopt a viewpoint-based category of inadmissible aliens. Further, the district court observed that courts "have a limited role in determining whether the denial of a waiver of excludability was constitutional," id. at 530 – again, a far cry from ruling that the First Amendment limits Congress's authority to define categories of inadmissible aliens.[24]

The third case relied on by plaintiffs, Allende, 605 F. Supp. at 1220, also fails to support plaintiffs' facial constitutional challenge, because it hinged on whether the Executive's justification for excluding the alien comported with the statutory provision invoked by the Executive. As in Abourezk, the Government had determined that the alien was ineligible under subsection (27), 8 U.S.C. § 1182(a)(27) (1982), which excluded and made ineligible for a waiver aliens likely "to engage in activities which would be prejudicial to the public interest[.]" Id. at 1221. The district court held that, because another more specific provision applied more directly to the excluded alien, the Government's stated rationale did not fall within the terms of subsection (27) under ordinary

[24] Indeed, there was no dispute in Harvard Law School Forum that the PLO's UN observer was "an excludable alien under federal immigration law," Harvard Law School Forum, 633 F. Supp. at 526, solely by virtue of his membership in the PLO, without any required "demonstration by the State Department that admission of the individual to this country would pose a security threat." Id. Thus, the case's unquestioned backdrop was that Congress can, and did, define categories of aliens as ineligible by virtue of their membership in an organization.

principles of statutory construction, and thus was not "facially legitimate" within the meaning of Kleindienst. See id. at 1224-25. Nothing in Allende called into question Congress's authority to enact viewpoint- or affiliation-based categories of inadmissible aliens, and, in fact, Allende hinged on the court's determination that the alien fell more properly within then-subsection (28), 8 U.S.C. § 1182(a)(28) (1982), which "established the ineligibility of foreigners who are associated with communist or totalitarian organizations," id. at 1225. Allende thus implicitly recognized that Congress may exclude aliens based on their views or associations, just as Congress has now done with respect to persons who endorse or espouse terrorism.

Finally, plaintiffs are not aided by Rafeedie v. INS, 795 F. Supp. 13 (D.D.C. 1992), for the fundamental reason that Rafeedie concerned a lawful resident alien whom the court held enjoyed full First Amendment rights, see id. at 22 (lawful resident aliens, such as plaintiff, are "invested with the rights guaranteed by the Constitution to all people within our borders," including those protected by the First Amendment") (quoting Bridges v. Wixon, 326 U.S. 135, 148 (1945)). In Rafeedie, a longstanding lawful United States resident alien who briefly left the United States was placed in exclusion proceedings upon his return when the Government alleged he had was an active Palestinian militant. See id. at 16, 20. The court entertained Rafeedie's facial overbreadth and vagueness challenges to the statute under which his exclusion proceeding was brought, 8 U.S.C. § 1182(a)(28)(F), which "plainly reache[d] a substantial amount of expression protected by the First Amendment." Id. The court held that the statute was unconstitutionally overbroad and vague because it deprived Rafeedie of existing rights based on his First Amendment-protected speech or association. See id. at 22-24.

While the analysis in Rafeedie would aid plaintiffs if it applied to non-resident aliens, it does not. Rather, Rafeedie is expressly based on a finding that the affected alien enjoyed the same First Amendment rights as United States citizens, by virtue of his lawful permanent residence here. See id. at 22. Such a holding, accordingly, has no bearing on plaintiffs' challenge to a statute that determines which non-resident aliens may or may not enter the United States. As even plaintiffs acknowledge, such aliens enjoy no First Amendment rights whatsoever. See, e.g., Kleindienst, 408 U.S. at 762.

3. The Provision at Issue Neither Restrains Speech Nor Requires a License to Speak

The Court should flatly reject plaintiffs' attempt to superimpose onto the border control context domestic First Amendment limitations on the prior restraint of speech or the imposition of standardless licensing schemes. See Pl. Mem. at 50-53. Most fundamentally, the endorse or espouse provision in no way restrains or requires any license for speech. Rather, it defines a class of aliens as inadmissible by virtue of their prior speech endorsing terrorism.

The case law on which plaintiffs rely derives entirely from the domestic context, and limits the ability of the Government to impose prior restraints or discretionary licensing requirements on First Amendment-protected speech that has not yet occurred.[25] See, e.g., Alexander v. United States,

[25] While plaintiffs cite two cases concerning the issuance of passports or travel documents to Americans, see Pl. Mem. at 51, those cases concern the irrelevant question of whether Americans' undisputed First Amendment or other rights could overcome the Government's interest in controlling the international travel rights of its own citizens. Even in this context, where the plaintiffs undisputedly possessed some constitutional interest that was restricted by governmental action, courts imposed only limited restrictions, and only proceeded in the context of as applied challenges by individuals to specific adverse government actions. Indeed, Zemel v. Rusk, 381 U.S. 1, 17 (1965), quoted by plaintiffs as holding that the statute at issue could not be read to give the Executive "totally unrestricted freedom of choice" in granting or withholding passports for United States citizens, in fact upheld a broad ban on travel to Cuba

509 U.S. 544 (1993) ("the term prior restraint describes orders forbidding certain communications that are issued before the communications occur"); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (discretionary license requirement that conditions speech on "uncontrolled will of an official . . . is an unconstitutional censorship."). These landmark holdings in the domestic First Amendment arena, which protect domestic discourse from untrammeled interference, simply have no bearing on Congress's authority to exclude nonresident aliens who have no First Amendment rights.

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

The Court also should reject plaintiffs' argument that the endorse or espouse provision should be declared "void for vagueness." See Pl. Mem. at 53. In considering a vagueness challenge to a statute establishing a basis for inadmissibility, the Supreme Court rejected just such an argument in Boutilier, for reasons that apply with equal force here:

> [T]he exaction of obedience to a rule or standard . . . must strip a participant of his rights to come within the principle of the [void for vagueness] cases. But the "exaction" of [the challenged INA provision] never applied to petitioner's conduct after entry. The section imposes neither regulation of nor sanction for conduct. In this situation, therefore, no necessity exists for guidance so that one may avoid the applicability of the law.

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notwithstanding a First Amendment challenge arguing that the ban restricted an American citizen's right to receive ideas from persons in Cuba. It would be ironic indeed if, notwithstanding the Government's entitlement to restrict its own citizens' conceded rights to obtain information through travel abroad, the identical First Amendment right of American audiences nevertheless could suffice to invalidate legislation pursuant to Congress's plenary power to control the borders by compelling the admission of an inadmissible alien. Similarly, while as plaintiffs note the Secretary of State's broad authority to deny passports to citizens could not constitutionally be construed to give the Secretary "unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose," see Pl. Mem. at 51 (citing Kent v. Dulles, 357 U.S. 116, 128 (1958)), the existence of some constitutional limitation on governmental action toward citizens has no bearing on the plenary power of Congress to define what categories of aliens may, or may not, gain admittance to the United States.

Boutilier, 387 U.S. at 123-24. As the Court further explained, "The constitutional requirement of fair warning has no applicability to standards such as are laid down in [the INA] for admission of aliens to the United States." Id. Accordingly, the Court found the challenged exclusion to result from a valid exercise of Congress's "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." Id.

The same is true here: the endorse or espouse provision renders inadmissible aliens who previously have endorsed or espoused terrorism. The provision does not impose sanctions for future conduct; it defines a category of aliens who, by virtue of prior conduct, are inadmissible. Thus, neither the rationale nor the express holdings of the vagueness doctrine apply. See Beslic v. INS, 265 F.3d 568, 571 (7th Cir. 2001) ("Although the Supreme Court has made it clear that an alien may bring a vagueness challenge to a deportation statute, it is doubtful that an alien has a right to bring such a challenge to an admissibility statute" (emphasis added); under Boutilier, "[t]he constitutional requirement of fair warning has no applicability to standards ... for admission of aliens to the United States.... Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.").

The vagueness cases on which plaintiffs rely all are distinguishable for the dispositive reason that each applies to statutes that would curtail future exercise of actual First Amendment rights, because otherwise speech will be chilled as speakers "steer far wider of the unlawful zone . . . than if the . . . forbidden area were clearly marked." Pl. Mem. at 53-54 (citing Grayned v. City of Rockford, 408 U.S. 104, 109 (1972)). Even the few vagueness challenges cited by plaintiffs in the immigration context involve provisions, unlike the one here, that define sanctions on aliens already within the United States for their conduct once lawfully here. See, e.g., Rafeedie, 795 F. Supp. at

23 (striking as unconstitutionally vague the exclusion of a permanent resident alien based on statute permitting deportation of aliens who "advocate" or "teach" proscribed doctrines). Here, by contrast, the provision under attack defines a category of inadmissible aliens who have no First Amendment rights whatsoever, and who are statutorily inadmissible by virtue of their prior speech, thereby rendering inapplicable the rationale of the void for vagueness doctrine as a whole.

CONCLUSION

For the reasons stated above, plaintiffs' motion for summary judgment should be denied, and defendants' cross-motion for summary judgment should be granted.

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Respectfully submitted,

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