

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

ECF CASE

Plaintiffs,

06-cv-0588 (PAC)

against

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.

MEMORANDUM OF LAW OF *AMICI CURIAE*

**AMERICAN ANTHROPOLOGICAL ASSOCIATION, COLLEGE ART ASSOCIATION,
LATIN AMERICAN STUDIES ASSOCIATION, MIDDLE EAST STUDIES ASSOCIATION,
ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, AMERICAN STUDIES
ASSOCIATION, HISTORY OF SCIENCE SOCIETY, ASSOCIATION OF AMERICAN
LAW SCHOOLS, NATIONAL COALITION AGAINST CENSORSHIP, AMERICAN
BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN ASSOCIATION
FOR THE ADVANCEMENT OF SLAVIC STUDIES, AND AMERICAN FOLKLORE
SOCIETY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Charles S. Sims (CS0624)
Jennifer A. O'Brien (JO7801)
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036-8299
Phone: (212) 969-3000
Attorneys for *Amici Curiae*

Dated: March 2, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTERESTS OF AMICI CURIAE.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
I. IDEOLOGICAL EXCLUSION AMOUNTS TO AN IMPERMISSIBLE INFRINGEMENT OF A FUNDAMENTAL FIRST AMENDMENT RIGHT	3
A. The First Amendment Guarantees The Right to Receive Information and Ideas from Speakers In Person	3
B. The Ideological Exclusion Provision Cannot Withstand Strict Scrutiny	5
C. The Ideological Exclusion Provision Violates the <i>Kleindienst</i> Standard.....	10
D. The Ideological Exclusion Provision Is Unconstitutionally Vague	12
II. HISTORY REFLECTS THE GOVERNMENT’S TENDENCY TO EXCLUDE SPEAKERS ON IDEOLOGICAL GROUNDS ANTITHETICAL TO THE FIRST AMENDMENT.....	14
CONCLUSION.....	22
ADDENDUM 1	A-1
<i>DESCRIPTION OF INDIVIDUAL AMICI CURIAE</i>	A-2
ADDENDUM 2	A-9
<i>TEXT OF 8 U.S.C. § 1182(a)(3)(B)(i)(VII)</i>	A-10

TABLE OF AUTHORITIES

CASES

<i>Abourezk v. Reagan</i> , 592 F. Supp. 880 (D.D.C. 1984).....	7, 11
<i>American Academy of Religion v. Chertoff</i> , 463 F. Supp. 2d 400 (S.D.N.Y. 2006).....	2, 11
<i>Ashcroft v. ACLU</i> , 542 U.S. 656 (2004).....	10
<i>Ashcroft v. Free Speech Coalition</i> , 535 U.S. 234 (2002).....	6, 9
<i>First Nat’l Bank v. Bellotti</i> , 435 U.S. 765	8
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972).....	13
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004).....	7
<i>Harvard Law School Forum v. Shultz</i> , 633 F. Supp. 525 (D. Mass. 1986).....	11, 12
<i>Keyishian v. Bd. of Regents</i> , 385 U.S. 589 (1967).....	13
<i>Kleindienst v. Mandel</i> , 408 U.S. 753 (1972).....	4, 5, 10, 11, 12
<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1943).....	3, 4
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	6, 7
<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969).....	4, 5
<i>Regan v. Time, Inc.</i> , 468 U.S. 641 (1984).....	6
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	9, 13

<i>Rosenberger v. Rector & Visitors of the Univ. of Va.</i> , 515 U.S. 819 (1995).....	7
<i>Roth v. United States</i> , 354 U.S. 476 (1957).....	4
<i>Sable Communications of California, Inc. v. FCC</i> , 492 U.S. 115 (1989).....	9
<i>Simon & Schuster, Inc. v. Members of the N. Y. State Crime Victims Bd.</i> , 502 U.S. 105 (1991).....	8
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969).....	4
<i>Turner Broadcasting Sys., Inc. v. FCC</i> , 512 U.S. 622 (1994).....	5, 6
<i>United States v. Playboy Entm't Group, Inc.</i> , 529 U.S. 803 (2000).....	6
<i>United States v. Robel</i> , 389 U.S. 258 (1967).....	7

STATUTES

U.S. Const. art. I, § 8.....	11
8 U.S.C. § 1182(a)(3)(B)(i)(VII)	2
8 U.S.C § 1182(a)(3)(B)(iii)	2
8 U.S.C. § 1182(a)(3)(B)(vi).....	2
8 U.S.C. § 1189(b)(1)	2
9 F. A. M. § 40.32 N6.2	2
Act of Oct. 1, 1988, Pub. L. No. 100-461, 102 Stat. 2268.....	16
Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105, sec. 112, § 21, 91 Stat. 844, 848 (1977) (Codified as amended at 22 U.S.C. § 2691(1981)).....	15
Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1400 (1987), <i>amended by</i> Foreign relations Authorization Act, Fiscal Years 1990 and 1991, H.R. Conf. Rep. No. 343, 101st Cong., 1st Sess. § 128(b) (1989).....	16

H.R. Rep. No. 95-537, 1st Sess. 31-32 (1977) (Conf. Rep.), <i>reprinted in 1977</i> U.S.C.C.A.N. 1658	15
House Conf. Rep. No. 100-475, 100th Cong., 1st Sess. (Dec. 14, 1987), <i>reprinted in 133</i> Cong. Rec. H2424 (1987)	15
Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).....	16
Pub. L. No. 107-56, § 411, 115 Stat. 272 (Oct. 26, 2001) (codified at 8 U.S.C. §1182(a)(3)(B)(i)(VI) (2004))	1
REAL ID Act of 2005, Pub. L. 109-13, Division B, Title I, 119 Stat. 231 (May 11, 2005)	1
S. Rep. No. 100-75, 100th Cong., 1st Sess. (June 18,), <i>reprinted in 133 Cong. Rec. S2326</i> (1987).....	16
S. Rep. No. 95-194, 1st Sess. 13 (1977), <i>reprinted in 1977 U.S.C.C.A.N. 1625</i>	15

OTHER AUTHORITIES

Academic Freedom and National Security in a Time of Crisis, Report of the AAUP Special Committee on Academic Freedom and National Security in a Time of Crisis (Oct. 2003), <i>available at</i> http://www.aaup.org/AAUP/About/committees/committee+repts/crisistime.htm	15
Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, Dep't of State Pub. No. 8826 (Gen. For. Pol. Ser. 298), <i>reprinted in 14 I.L.M. 1292 (1975)</i>	15
Ian Thomas & Jason Shuffler, <i>Professor Returns to Class After Long Visa Ordeal</i> , The Golden Gate [X]Press (San Francisco Univ. Sept. 20, 2006), <i>available at</i> http://xpress.sfsu.edu/archives/news/006906.html	20
Information on the exclusion of members of the African National Congress, <i>available at</i> http://www.aclu.org/safefree/general/26213res20060724.html	17
Information on the exclusion of members of the African National Congress, <i>available at</i> http://www.aclu.org/safefree/general/26213res20060712.html	19
John A. Scanlan, <i>Symposium on Academic Freedom: Aliens in the Marketplace of Ideas: The Government, the Academy and the McCarran-Walter Act</i> , 66 Tex. L. Rev. 1481, 1496 n. 67 (1988).....	15
Larry McMurty, Testimony before the Subcommittee on Courts, Intellectual Property, and Administrative Justice of the House Judiciary Committee (May 3, 1989), <i>available at</i> http://www.pen.org/viewmedia.php/prmMID/41/prmID/341	15

Michael Isikoff & Mark Hosenball, *Terror Watch: Muslim Leader Barred From U.S.*,
 Newsweek (Oct. 18, 2006), available at
<http://www.msnbc.msn.com/id/15320752/site/newsweek>.....19

Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*,
 100 Harv. L. Rev. 930, 930 (1987).....14

Tim Dowling, *Real Lives: They Shall Not Pass: The Homeland Security Hall of Fame*,
 The Guardian 6 (Mar. 23, 2005).....21

Tellez’s Story, highlighted by NPR (Mar. 2005), available at
<http://www.npr.org/templates/story/story.php?storyID=4554643&sc=emaf>.....19

University of Nebraska-Lincoln, available at
http://www.unl.edu/history/news_events/ari/ari.html.....18

INTERESTS OF AMICI CURIAE

This brief is filed on behalf of numerous scholarly and other organizations dedicated to encouraging the free-flow of information and ideas across our nation's borders that has been and will continue to be circumscribed and threatened should the ideological exclusion provision of the USA Patriot Act be upheld. A list of *amici*, and description of each organization and their specific interest, is attached as an Addendum 1 *infra*.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the history of immigration law in the United States reminds us all, since 1903 perceived threats to national security have been used to justify sweeping legislation excluding foreign speakers from the country on ideological grounds. While with the decline and fall of Communism Congress recognized that such ideological exclusions are antithetical to our nation's commitment to granting both people and ideas free access across America's borders, the post-9/11 landscape has seen a renewed assertion of power to bar speakers from the United States based on their statements or beliefs.

In the rush to fight terrorism in response to the attacks of September 11, 2001, Congress significantly expanded the government's authority to bar individuals from entering the United States.¹ The USA Patriot Act (the "Patriot Act") authorizes the Executive Branch to exclude from the United States an individual on the grounds that he or she

¹ As originally enacted, the ideological exclusion provision of the Patriot Act provided that aliens would be ineligible to receive visas if they had used their "position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, in a way that the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities." Pub. L. No. 107-56, § 411, 115 Stat. 272 (Oct. 26, 2001) (codified at 8 U.S.C. §1182(a)(3)(B)(i)(VI) (2004)). The ideological exclusion provision was expanded to its current form by the REAL ID Act of 2005, Pub. L. 109-13, Division B, Title I, 119 Stat. 231 (May 11, 2005).

endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization

8 U.S.C. § 1182(a)(3)(B)(i)(VII) (the “ideological exclusion provision”). The measure of what this means to the present Administration is the contention, in the State Department’s Foreign Affairs Manual, that the provision “is directed at irresponsible expressions of opinion by prominent aliens who are able to influence the actions of others.” 9 F.A.M. § 40.32 N6.2.² Importantly, the government contends that its exercise of this authority is subject to only the most limited judicial review.³ Further, neither an excluded visitor nor those who have invited that visitor to speak and seek to challenge that exclusion are granted the power to invoke a judicial review of the government’s designation of foreign terrorist organizations.⁴ Both “terrorist activity” and “terrorist organization” are broadly defined in the statute, but of course if the government’s say-so that a prospective visitor has “endorse[d or] espouse[d] terrorist activity” is conclusive, the breadth of the definitions are irrelevant in any event.⁵

As the Supreme Court has long recognized, the First Amendment protects both the right to disseminate information, as well as the right to hear speech from multifarious sources, in person, even when that speech is unpopular with either public opinion or government officials. By passing

² In addition to the facial challenge to the ideological exclusion provision, *amici curiae* also support the ACLU’s challenge to the ideological exclusion as it has been applied in the case of Professor Tariq Ramadan.

³ While the government originally maintained the position in this litigation that the doctrine of consular nonreviewability completely insulates its determination from judicial review, it later conceded that there may be “very limited judicial review of fully ripe First Amendment claims by United States nationals.” *See American Academy of Religion v. Chertoff*, 463 F. Supp. 2d 400, 422 (S.D.N.Y. 2006). Such concession, however, offers no meaningful guidance as to the contours or extent of such “very limited” review in actual application.

⁴ Pursuant to 8 U.S.C. § 1189(b)(1), judicial review of the government’s designation of an entity as a foreign terrorist organization is limited to challenges brought by the organization itself within 30 days of the publication of the designation in the Federal Register.

⁵ *See* 8 U.S.C. § 1182(a)(3)(B)(iii) and 8 U.S.C. § 1182(a)(3)(B)(vi). The relevant portion of the statute is Addendum 2, below.

the ideological exclusion provision, Congress went too far and authorized the government to circumscribe the ability of Americans to hear, in person, speech that the government dislikes. The ideological exclusion provision is both unconstitutionally vague and incapable of withstanding the scrutiny applied to regulations suppressing speech because of its message, ideas, subject matter or content.⁶ The ideological exclusion provision is but the latest in a long line of immigration laws that have been, or are so loosely drafted and overbroad that they can be, used by the government to manipulate political debate in the United States by banning speakers based on their views, all in violation of the First Amendment.

Accordingly, *amici curiae* respectfully request that plaintiffs' motion for summary judgment declaring the ideological exclusion provision of the Patriot Act unconstitutional be granted.

I.

IDEOLOGICAL EXCLUSION AMOUNTS TO AN IMPERMISSIBLE INFRINGEMENT OF A FUNDAMENTAL FIRST AMENDMENT RIGHT

A. The First Amendment Guarantees The Right to Receive Information and Ideas from Speakers In Person

The Supreme Court held nearly seventy years ago that the First Amendment protects not only the right to speak and listen, but the right to exchange ideas face-to-face, in settings where persuasion can most readily be accomplished. In *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943), in the height of wartime, the Supreme Court struck down an ordinance forbidding speakers from knocking on doors and ringing doorbells. "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a

⁶ *Amici* further concur in the ACLU's position that the ideological exclusion provision amounts to an unconstitutional licensing scheme investing Executive officers with unrestrained discretion in repressing speech.

freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.” *Id.* at 143. Freedom of speech was held to embrace the right to express ideas directly to others, even at their homes, and “necessarily protects the right to receive it” as well. *Id.* Such protection is necessary, the Court has held, to “assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957).

The right to receive information has been recognized in a variety of settings, and with regard to all kinds of speech, high and low. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Kleindienst v. Mandel*, 408 U.S. 753 (1972). In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Court highlighted the importance of ensuring such access to information, recognizing that it is the very purpose of the First Amendment

to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged [by] Congress

Id. at 390.

In a nation committed to an “uninhibited marketplace of ideas,” as each *amici* organization knows from its own experience, freedom of speech cannot be limited to the discourse and exchange of ideas between American citizens, or even those residing in our nation. The world is larger than that; the success of our nation, and of each of us, depends as never before on interactions of all sorts – political, economic, intellectual, scientific – with those from other nations. A society in which Americans could not speak face-to-face with persons from abroad, whose views are antithetical to the views of the present administration (whatever that happens to be at any given time) is not a free society, and not an open society. Permitting the Executive Branch to decide who Ameri-

