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, Plaintiffs, v. MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Security; CONDOLEEZZA RICE, in her official capacity as Secretary of State, Defendants.	Case No. 06-588 (PAC)

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs the American Academy of Religion ("AAR"), the American Association of University Professors ("AAUP"), and PEN American Center ("PEN") have filed this lawsuit to challenge the government's violation of their First Amendment and statutory rights by its continuing exclusion of Tariq Ramadan, a Swiss scholar who is now affiliated with the University of Oxford, the Lokahi Foundation in London, and Erasmus University in Rotterdam. Plaintiffs also challenge the facial validity of section 411(a)(1)(A)(iii) of the USA Patriot Act, as amended and codified in 8 U.S.C. § 1182(a)(3)(B)(i)(VII) (hereinafter, the "ideological exclusion provision").

The overarching issue in this case can be stated simply: Does our government have the authority to bar foreign scholars and writers from our shores to prevent U.S. citizens and residents from hearing ideas that they have a constitutionally protected right to hear? Professor Ramadan, who is perhaps Europe's most prominent Muslim reformist, has now been barred from the United States for more than two years, first because the government revoked the visa that would have permitted him to teach at the University of Notre Dame; then because the government unlawfully refused to adjudicate his subsequent visa petition; and now on the wholly new basis that Professor Ramadan gave small amounts of money to charities that were operating openly and lawfully in Europe at the time and that continue to operate openly and lawfully there today. It is plain to everyone that Professor Ramadan does not present a threat to the nation's security. It is not Professor Ramadan whom the government fears, but his ideas.

The problem is unfortunately a broader one. The ideological exclusion provision gives the executive branch more general authority to exclude otherwise admissible foreign

nationals solely because of their speech. Because it invests executive officers with the power to regulate, stigmatize, and suppress ideas, the provision is an affront not only to plaintiffs – associations that have a special commitment to the free exchange of ideas across borders – but to all who cherish the constitutional guarantee of free expression. The First Amendment was meant above all to "foreclose public authority from assuming a guardianship of the public mind," *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring), and yet it is precisely this that the challenged provision allows.

For the reasons below, plaintiffs respectfully urge the Court to enter summary judgment in their favor.

BACKGROUND

The Ongoing Exclusion of Professor Ramadan

This Court discussed much of the relevant factual background in its June 2006 Opinion. *See Am. Acad. of Religion v. Chertoff*, 463 F. Supp. 2d. 400, 403-09 (S.D.N.Y. 2006). Tariq Ramadan is a prominent Swiss intellectual who is now affiliated with the University of Oxford, the Lokahi Foundation, and Erasmus University in Rotterdam. *AAR*, 463 F. Supp. 2d at 404; Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment ("SUF") § I (Second Declaration of Tariq Ramadan (hereinafter "Second Ramadan Decl.") ¶¶ 1-2). Professor Ramadan has been barred from the United States since August 2004, when the government revoked an H-1B visa that would have permitted him to teach at the University of Notre Dame. *AAR*, 463 F. Supp. 2d at 406; SUF § III.A (Second Ramadan Decl. ¶ 6). The government's revocation of his visa required Professor Ramadan to break a residential lease in South Bend, Indiana; to ship his family's personal effects back to the U.K.; to re-enroll his children in U.K. schools; to

search for a teaching position outside the U.S.; and, most relevant to the instant lawsuit, to cancel numerous speaking engagements in the U.S. *AAR*, 463 F. Supp. 2d at 406; SUF §§ III.B, IV.A-C (Second Ramadan Decl. ¶¶ 6, 15). A spokesperson for the Department of Homeland Security stated to the press on August 25, 2004, that Professor Ramadan's visa had been revoked "because of a section in federal law that applies to aliens who have used a position of prominence within any country to endorse or espouse terrorist activity." *AAR*, 463 F. Supp. 2d at 406; SUF § III.A (Second Ramadan Decl. ¶ 6).

On September 16, 2005, at the encouragement of individuals and organizations in the United States, Professor Ramadan submitted an application for a B visa, a nonimmigrant visa that would allow him to enter the United States to attend and participate in various conferences. *AAR*, 463 F. Supp. 2d at 407; SUF § III.D (Second Ramadan Decl. ¶ 8). The application, which Professor Ramadan submitted to the United States Embassy in Bern, appended invitations including an invitation from the Center for Global Studies to speak at George Mason University in Fairfax Virginia in October or November 2005; an invitation from the Archbishop of Canterbury to participate in a seminar to be held at Georgetown University in Washington, D.C., from March 27-30, 2006; and an invitation to speak at plaintiff AAUP's annual meeting in Washington, D.C., on June 10, 2006. *AAR*, 463 F. Supp. 2d at 407; SUF § III.D (Declaration of Tariq Ramadan (hereinafter "Ramadan Decl.") ¶ 28 & Exh. W).

Plaintiffs commenced this action in January 2006, after Professor Ramadan's visa application had been pending without decision for approximately 4 months. The Complaint sought, principally, a declaration that defendants' continuing exclusion of Professor Ramadan violated the Administrative Procedure Act and the First Amendment; a

declaration that the ideological exclusion provision violated the First and Fifth Amendments on its face; and an injunction prohibiting defendants from using the ideological exclusion provision to exclude Professor Ramadan or any other foreign national. *AAR*, 463 F. Supp. 2d at 404. In March 2006, defendants still not having acted on the pending visa application, plaintiffs moved for a preliminary injunction on issues relating to Professor Ramadan's exclusion. *Id.* at 409.

In an Opinion dated June 23, 2006, this Court found that plaintiffs had standing to challenge the government's inaction because they were injured by Professor Ramadan's exclusion. *AAR,* 463 F. Supp. 2d at 412 ("Regardless of the government's reason for excluding Ramadan, the fact remains that Ramadan is unable to enter the United States to share his views with a willing American audience, to Plaintiffs' detriment and in potential violation of their First Amendment rights."). The Court also held that defendants could not lawfully exclude Professor Ramadan – or any other alien – on the basis of speech that U.S. citizens have a constitutional right to hear. *Id.* at 415 ("while the Executive may exclude an alien for almost any reason, it cannot do so solely because the Executive disagrees with the content of the alien's speech and therefore wants to prevent the alien from sharing this speech with a willing American audience."). Where the constitutional rights of U.S. citizens are implicated, the Court noted, the First Amendment forecloses the government from excluding an alien except on the basis of "a facially legitimate and bona fide" reason. *Id.* at 416 n.17 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972)).[1]

[1] The Court rejected the government's reliance on the doctrine of consular non-reviewability, finding that, notwithstanding the doctrine, well-settled case law "require[s] the Government to justify the exclusion of an alien when the First Amendment rights of American citizens are implicated," *AAR, 463* F. Supp. 2d at 416; that the doctrine "does not apply in cases brought by U.S. citizens raising constitutional, rather than statutory, claims," *id.* at 417; and that in

In the same Opinion, however, the Court found that it did not have sufficient information to determine whether defendants had a facially legitimate and bona fide reason for excluding Professor Ramadan, because defendants had not offered any reason for the exclusion at all. The Court wrote, "[r]ather than speculate at this juncture as to the reasons why the Government has acted as it has with regard to Ramadan's visa applications, or assume from the absence of an explanation that the Government lacks a facially legitimate and bona fide reason for its conduct, it is distinctly preferable for the Government to explain itself." *AAR*, 463 F. Supp. 2d at 419. On this basis, and finding that defendants had "failed to adjudicate Ramadan's pending B-visa application within a reasonable period of time, as dictated by the Administrative Procedures Act," the Court ordered defendants to adjudicate Professor Ramadan's visa application within 90 days. *Id.* at 422-23.[2]

On Sept. 19, 2006, just before the 90-day period was to expire, Professor Ramadan received a telephone call from the United States Embassy in Bern, informing him that his B-visa application had been denied on a wholly new ground. SUF § III.G (Second Ramadan Decl. ¶ 9). The following day, defendants' counsel sent a copy of the visa denial letter to plaintiffs' counsel. The letter, dated Sept. 19, 2006, and signed by John O. Kinder, Consul, United States Embassy, Bern, stated that Professor Ramadan's B visa application "ha[d] been refused" and that Professor Ramadan had been "found inadmissible to the United States for engaging in terrorist activity by providing material support to a terrorist organization." *Id.* (Second Ramadan Decl. ¶ 9, Exh. F). The letter further stated:

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any event the doctrine could not be used to insulate decisions made by non-consular officials, *id.* at 418.

[2] The Court denied the plaintiffs' other prayers for relief with leave to renew those requests once the government had adjudicated the visa application. *AAR*, 463 F. Supp. 2d at 423. It found that "the ability to engage Ramadan in debate by way of videoconferencing is sufficient to satisfy Plaintiffs' First Amendment rights prior to a final adjudication on the merits." *Id.* at 411.

> The basis for this determination includes the fact that during your two interviews with consular officials, you stated that you had made donations to the Comité de Bienfaisance et de Secours aux Palestiniens and the Association de Secours Palestinien. Donations to these organizations, which you knew, or reasonably should have known, provided funds to Hamas, a designated Foreign Terrorist Organization, made you inadmissible under INA § 212(a)(3)(B)(i)(I).

Id. (Second Ramadan Decl. ¶ 9, Exh. F). On Jan. 3, 2007, counsel for defendants informed plaintiffs that the specific provision on the basis of which the State Department denied Professor Ramadan's visa application is 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd), which relates to the provision of material support to undesignated terrorist organizations; that the government's decision to exclude Professor Ramadan was based solely on information that Professor Ramadan had provided to the government during his visa interviews; and that the government does not regard Professor Ramadan to be inadmissible on any basis other than the one described in the Consul's Sept. 2006 letter. SUF § III.G-I (Declaration of Jameel Jaffer (hereinafter "Jaffer Decl.") ¶¶ 4-5).

Defendants' continuing exclusion of Professor Ramadan effectively forecloses plaintiffs from inviting Professor Ramadan to speak to audiences in the United States and prevents plaintiffs' members from engaging Professor Ramadan in face-to-face discussion and debate. SUF § IV.C (Second Ramadan Decl. ¶¶ 15-16; Declaration of John R. Fitzmier (hereinafter "Fitzmier Decl.") ¶¶ 18-22; Declaration of Cary Nelson (hereinafter "Nelson Decl.") ¶¶ 21-23; Second Declaration of Michael Roberts (hereinafter "Second Roberts Decl.") ¶¶ 26-29). Among the events Professor Ramadan has had to decline (or speak at only by videoconference) are the AAR's 2004 Annual Meeting, SUF § IV.A, C (Fitzmier Decl. ¶ 19); the AAUP's 2005 Annual Meeting, *id.* (Nelson Decl. ¶ 21); and PEN's 2006 World Voices Festival, *id.* (Second Roberts Decl. ¶ 27). Plaintiffs have

invited Professor Ramadan to speak at several future events, including the AAR's November 2007 Annual Meeting, SUF § IV.E (Fitzmier Decl. ¶ 22); the AAUP's June 2008 Annual Meeting, at which Professor Ramadan has been invited to present the Alexander Meiklejohn Awards for Academic Freedom, *id.* (Nelson Decl. ¶ 24); and PEN's 2007 World Voices Festival, *id.* (Second Roberts Decl. ¶ 30). Defendants' actions, if not enjoined, will prevent Professor Ramadan from attending these events and prevent plaintiffs' members from meeting with Professor Ramadan, hearing his views, and engaging him in debate, all in violation of their statutory and First Amendment rights.

The Effect of the Ideological Exclusion Provision

In addition to relief relating to the exclusion of Professor Ramadan, plaintiffs' Amended Complaint seeks a declaration that the ideological exclusion provision is unconstitutional on its face. The provision, which renders inadmissible to the U.S. any foreign national who "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), impermissibly invests executive officers with the authority to bar foreign nationals from the United States because of the content of their speech.

Plaintiffs the AAR, the AAUP, and PEN are organizations committed to the free exchange of ideas among scholars and writers of different nationalities, backgrounds, and viewpoints. To fulfill their organizational mandates, they routinely sponsor conferences, meetings, and symposia to which foreign scholars and writers are invited, often as featured speakers. SUF § XIII.A (Fitzmier Decl. ¶¶ 12, 21, 29; Nelson Decl. ¶¶ 9, 19; Second Roberts Decl. ¶¶ 8, 17, 18). Since September 2001, the plaintiff organizations have dedicated substantial resources to programming about the "war on terror" and related

issues. For example, the AAR has sought to increase the coverage of Islam and the Muslim world through its journal and events, including a session at its 2006 Annual Meeting entitled "Religion after September 11." SUF § XI.D (Fitzmier Decl. ¶¶ 10, 13). PEN's 2006 World Voices Festival explored the increasing estrangement of faith and reason. Participants in the Festival included Ayaan Hirsi Ali (Somalia/Netherlands); David Grossman (Israel); Elias Khoury (Egypt); Orhan Pamuk (Turkey) and more than 50 other writers from around the world. SUF § XI.D (Second Roberts Decl. ¶ 27).

Plaintiffs are "especially committed to convening conversations and debates that question existing orthodoxies and provide new and critical perspectives on important current issues and events." SUF § XI.D (Second Roberts Decl. ¶ 18). Plaintiffs make a special effort to seek out foreign scholars and writers who can provide perspectives that are underrepresented or absent in the U.S. Indeed, plaintiffs often "invite prominent scholars from abroad specifically because their views are contested in the United States." SUF § XIII.D-E (Fitzmier Decl. ¶ 29).

Because plaintiffs regularly invite foreign scholars and writers to speak in the U.S., organize programming around issues relating to terrorism, and often invite foreign nationals precisely because their views are controversial in the U.S., the ideological exclusion provision presents a direct threat to plaintiffs' work and their ability to fulfill their respective organizational mandates. The provision's operative terms – "endorse," "espouse," and "persuade" – are vague, sweeping, and manipulable and accordingly the provision could readily be used to exclude foreign scholars who study the concept of "jihad" in Islam, who study the religious motives of suicide bombers, or who study and teach about institutions, such as madrasas, from which terrorists are alleged to be recruited.

SUF § XIII.B (Fitzmier Decl. ¶ 16). It could readily be used to exclude foreign scholars who have argued that terrorism is a predictable consequence of U.S. foreign policy, who have argued that the insurgency in Iraq is legitimate, or who have argued that organizations such as Hamas and Hezbollah, which the U.S. government has designated as terrorist organizations, should be engaged rather than isolated. *Id.* (Nelson Decl. ¶ 18). It could readily be used, in other words, to stifle and suppress speech that is a legitimate and indeed critically necessary part of political and academic debate.

Plaintiffs' concerns about the ideological exclusion provision are not speculative. An entry from the State Department's Foreign Affairs Manual – obtained by plaintiffs under the Freedom of Information Act (FOIA) – states that the provision is directed at those who have voiced "irresponsible expressions of opinion." SUF § IX.A (Nelson Decl. ¶ 26, Exh. A). Other documents obtained through the FOIA indicate that the government has formally relied on the ideological exclusion provision to bar a foreign national from the country on at least one occasion and has deemed others to be inadmissible under the provision in multiple instances. *Id.* (Nelson Decl. ¶ 26, Exh. B).[3] That the government invoked the provision to explain its revocation of Professor Ramadan's visa in 2004 only deepens plaintiffs' concerns, because Professor Ramadan can be said to have endorsed or espoused terrorism only if that phrase is construed so broadly as to encompass reasoned

[3] The FOIA documents indicate (i) that the government actively scrutinizes whether individuals seeking entry to the United States are inadmissible under the ideological exclusion provision; (ii) that the government has deemed multiple foreign nationals to be inadmissible under the provision; (iii) that the government has given many of these individuals an opportunity to withdraw their applications in order to avoid a formal finding of inadmissibility – a finding that would carry consequences that a withdrawal does not; and (iv) that multiple individuals have withdrawn their applications for entry after being informed that they have been deemed inadmissible. SUF § IX.A (Nelson Decl. ¶ 26, Exh. B). It is not clear from the FOIA documents whether those deemed inadmissible under the provision were told of the grounds on which they had been deemed inadmissible.

criticism of U.S. foreign policy. SUF § IX.B (Fitzmier Decl. ¶ 18; Nelson Decl. ¶ 20; Second Roberts Decl. ¶ 26).[4]

Since 2001, numerous foreign scholars, human rights activists, and writers have been barred from the U.S. on apparently ideological grounds. SUF § X.A (Fitzmier Decl. ¶ 25; Nelson Decl. ¶ 27-31; Second Roberts Decl. ¶ 31-32). Those who have been barred without explanation or on unspecified national security grounds include:

- Yoannis Milios, a Greek professor of Marxist economic thought who had been invited to deliver a paper at the University of New York at Stonybrook. Professor Milios was detained at JFK, interrogated about his political views, and ultimately denied entry to the country. Despite the AAUP's written request, the government has not provided any public explanation of its action. Professor Milios submitted a new visa application in July 2006 but the government has thus far failed to adjudicate it. *Id.* (Nelson Decl. ¶ 28 & Exh. D).

- Adam Habib, a prominent South African human rights and anti-war activist who had been invited to the U.S. to meet with officials from the World Bank and National Institute of Health. Although he had a valid visa and had visited the U.S. on many previous occasions, Professor Habib was denied entry after a detention of several hours. Despite the AAUP's written requests, the government has not provided any substantive explanation of its action; it has said only that the revocation of Professor Habib's visa was "prudential." *Id.* (Nelson Decl. ¶ 29 & Exhs. E, F & G).

- Waskar Ari, a Bolivian historian of Aymara Indian descent, who had accepted a tenure-track professorship at the University of Nebraska. In addition to refusing to issue Professor Ari a work visa (a refusal that continues today), the State Department also cancelled (or prudentially revoked) Professor Ari's student visa. According to a State Department spokesperson, the student visa was cancelled pursuant to a "terrorism-related section of U.S. legislation on the granting of visas." Despite the AAUP's written request the government has not provided any public explanation of its action. *Id.* (Nelson Decl. ¶ 30 & Exhs. H-I).

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[4] Plaintiffs do not know how many times the government has "prudentially" revoked a visa on the basis of the ideological exclusion provision, as it seems to have done with Professor Ramadan. The government did not release such information in response to plaintiffs' FOIA request. Plaintiffs note, however, that the government has prudentially revoked the visa of at least one other prominent Muslim – Professor Adam Habib of South Africa. SUF § X.A (Nelson Decl. ¶ 29 & Exh. G). Despite plaintiffs' requests, the government has not offered a public explanation for this revocation.

- Inaki Egaña, a Basque historian who traveled to the U.S. to conduct research on Basques in the U.S., including Mario Salegi, a Basque-born political activist, journalist, and writer who later became a U.S. citizen and was a target of McCarthyism in the 1950s. Egaña was interrogated about his research, detained overnight, and ultimately returned to Spain. Despite PEN's written request, the government has not provided any public explanation of its action. *Id.* (Second Roberts Decl. ¶ 31 & Exh. A).

- Haluk Gerger, a Turkish sociologist and journalist who in the 1990s had been jailed in his own country for his writing about Turkey's Kurdish minority. Twice in the 1990s, the U.S. State Department criticized Gerger's treatment as an example of the misuse of antiterrorism legislation to stifle free expression. In October 2002, however, officials at Newark airport barred Gerger from entering and returned him to Germany, where he resides. Despite PEN's written request, the government has not provided any public explanation of its action. *Id.* (Second Roberts Decl. ¶ 32 & Exh. B).

- Kamal Helbawy, the 80-year-old founder of the Muslim Association of Britain, who had been invited to speak at a conference about the Muslim Brotherhood hosted by New York University's Center on Law and Security. Helbawy was removed from his New York-bound flight, questioned about his connections to the Muslim Brotherhood and about the views he intended to present at the NYU conference, and told that he would not be permitted to re-board the flight. The U.S. government has not provided any public explanation of its action; an unnamed "senior U.S. government official," however," told a reporter that "he was puzzled by the incident because there appeared to be no intelligence reporting linking Helbawy to terrorism." *Id.* (Fitzmier Decl. ¶ 25 & Exh. C).

These and other similar cases, taken collectively, show a pattern that is profoundly troubling to plaintiffs. SUF § X.A-B (Nelson Decl. ¶ 32). It is increasingly evident that scholars, human rights activists, and writers are being barred not for legitimate security reasons but rather because the government disfavors their politics. That the government believes that foreign nationals can and should be excluded from the U.S. because of their political views only deepens plaintiffs' concern about the way the ideological exclusion provision is being used and the way it may be used in the future.

The ideological exclusion provision imposes very real costs on plaintiffs beyond those associated with specific exclusions. Some foreign scholars and writers are reluctant

to accept invitations because they will be subjected to ideological scrutiny and possibly denied entry. One prominent Moroccan scholar, Fatima Mernissi, recently declined an invitation from the AAR in part because of these concerns. SUF § XII.B (Fitzmier Decl. ¶ 30). J.M. Coetzee, the South African novelist and Nobel laureate, expressed related concerns in declining an invitation from PEN. *Id.* (Second Roberts Decl. ¶ 34 & Exh. C). Moreover, uncertainty about whether invited scholars will be permitted to enter the country undermines plaintiffs' ability to plan conferences and events in the U.S. and to publicize those events before they take place. Travel arrangements must be made and facilities secured without knowing if foreign scholars will be able to attend. SUF § XII.C (Fitzmier Decl. ¶ 27; Nelson Decl. ¶ 35). Because plaintiffs have limited resources, the uncertainty created by the ideological exclusion provision, and the associated administrative and financial costs, are deterrents to inviting foreign scholars and writers – particularly controversial ones – in the first place. SUF § XII.C (Fitzmier Decl. ¶ 27; Nelson Decl. ¶ 35).[5]

SUMMARY OF ARGUMENT

As this Court has recognized, the government cannot exclude an invited foreign scholar from the country unless it has a "facially legitimate and bona fide" reason for doing so. *AAR*, 463 F. Supp. 2d at 416 n.17. Defendants' justification for denying Professor Ramadan's visa – that Professor Ramadan gave small amounts of money to ASP and CBSP and that those charities were undesignated "terrorist organizations" because they in

[5] The revocation of Professor Ramadan's visa in 2004, in addition to preventing Professor Ramadan from traveling to the U.S. to speak at plaintiffs' events, resulted in plaintiffs incurring substantial financial and administrative costs. SUF § IV.C-D (Fitzmier Decl. ¶¶ 19-20 (videoconferencing resulted in unanticipated cost of $10,000); Nelson Decl. ¶¶ 21-22 (videoconferencing resulted in cost of $2,000); *see also* Fitzmier Decl. ¶¶ 21-22 (describing more recent costs associated with Professor Ramadan's exclusion); Nelson Decl. ¶ 23 (same); Second Roberts Decl. ¶¶ 27-29 (same)).

turn gave money to Hamas – is neither facially legitimate nor bona fide. Professor Ramadan has never given money to CBSP.[6] While he made small donations to ASP for legitimate humanitarian purposes – donations that amounted to the equivalent of approximately $1,336 over a period of three-and-a-half years – those donations do not render him inadmissible to the United States.

First, Professors Ramadan's donations to ASP were not a basis for inadmissibility at the time they were made and defendants may not lawfully apply the current material support provision retroactively. Second, even if retroactive application of the material support laws were permissible, their application here would be illegitimate because Professor Ramadan neither knew nor should have known that ASP was providing funds to Hamas, if indeed it was. At the time Professor Ramadan made his donations, ASP was a lawful organization in Switzerland and it was registered as a charity with the Swiss government. It operated openly and sent solicitations through the mail. Because the statutory provision on which defendants rely is simply not applicable here, defendants have not carried their burden under the APA or the First Amendment.

In addition, the ideological exclusion provision is unconstitutional on its face. First, the provision invests executive officials with the authority to bar foreign nationals from the United States on the basis of speech that U.S. citizens and residents have a right to hear. A law that permits the government to discriminate on the basis of the content of the message is unconstitutional under the First Amendment. Second, the provision constitutes an unconstitutional licensing scheme because it invests executive officers with

[6] The Consul's Sept. 2006 letter states that Professor Ramadan gave money not only to ASP but to CBSP as well. In fact Professor Ramadan has never given money to CBSP. Because Professor Ramadan was confused about the relationship between CBSP and ASP, he may have stated – incorrectly – in his visa interview that he gave money to both organizations. SUF § V.C-D (Second Ramadan Decl. ¶ 13).

unbridled discretion to suppress speech. The provision's terms do not cabin executive discretion with narrow, objective, and definite standards. Third, the provision's terms are unconstitutionally vague. They are nowhere defined in the statute; they are nowhere defined in the legislative history; and agency guidance renders the terms only more susceptible to abuse. Plaintiffs have standing to challenge the provision's constitutionality because they have suffered concrete injury because of the provision; because the provision has a chilling effect on their and others' First Amendment rights; because there is a credible threat that the provision will be used to bar their invitees in the future; and because licensing schemes are susceptible to facial challenge without respect to their application in particular instances.

ARGUMENT

I. DEFENDANTS HAVE NOT SUPPLIED A FACIALLY LEGITIMATE AND BONA FIDE REASON FOR THEIR REFUSAL TO GRANT PROFESSOR RAMADAN A VISA.

As this Court has recognized, where the constitutional rights of U.S. citizens are implicated, the First Amendment forecloses the government from excluding an alien except on the basis of a reason that is "facially legitimate and bona fide." *AAR*, 463 F. Supp. 2d. at 414; *see also Abourezk v. Reagan,* 592 F. Supp. 880, 886 (D.C. Cir. 1984), *aff'd by an equally divided court*, 484 U.S. 1 (1987); *Harvard Law Sch. Forum v. Shultz*, 633 F. Supp. 525, 531 (D. Mass. 1986); *Allende v. Shultz*, 605 F. Supp. 1220, 1224 (D.C.Mass. 1985). The reason given "must be 'facially legitimate and bona fide' not only in the general sense, but also within the context of the specific statutory provision on which the exclusion is based." *Allende*, 605 F. Supp. at 1224. In other words, to satisfy its constitutional burden the government must do more than point to a statutory ground for

inadmissibility; it must show that the statutory ground actually applies. *See Abourezk*, 592 F. Supp. at 886 (rejecting State Department's public affidavit as "entirely conclusory"); *id.* at 888 ("[t]o find the conclusory statement that the entry of a particular individual would be contrary to United States foreign policy objectives to be a 'facially legitimate' reason would be to surrender to the Executive total discretion even in cases such as these where it is claimed – and the claim is not implausible – that entry is being denied solely on account of the content of the alien's proposed speech"); *Reagan v. Abourezk,* 785 F.2d 1043, 1061 (D.C. Cir. 1986).[7] Defendants have not met their burden here.

a. Professor Ramadan's donations to ASP do not supply a facially legitimate and bona fide reason for exclusion because the donations were not grounds for inadmissibility at the time they were made.

i. Professor Ramadan's donations were not grounds for inadmissibility at the time they were made.

The government contends that Professor Ramadan is inadmissible because of his past donations to ASP. Those donations, however, were made between 1998 and 2002, when the inadmissibility grounds were much narrower than they are now. At the time Professor Ramadan donated money to ASP, the donations were not grounds for inadmissibility.

At all relevant times, aliens have been inadmissible to the U.S. if they have "engaged in terrorist activity." That phrase, however, was defined more narrowly between

[7] It is appropriate and necessary for the Court to consider the validity of the government's new basis for exclusion not only because the First Amendment requires the government to provide a basis that is "facially legitimate and bona fide" but also because the Administrative Procedures Act requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706. The APA provides plaintiffs with a right of action because they have been aggrieved by the government's actions and because they are within the "zone of interests" protected by the INA. *See Abourezk*, 785 F.2d at 1050-51; *Baur v. Veneman,* 352 F.3d 625, 636 (2d Cir. 2003).

1998 and 2002 than it is now. Between 1998 and October 2001 (when Congress enacted the USA PATRIOT Act, Pub. L. No. 107-56 (2001) (hereinafter, "Patriot Act"), "engag[ing] in terrorist activity" included the provision of "material support," but an alien was inadmissible on "material support" grounds only if he had provided "material support to any individual, organization, or government *in conducting* a terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(iii) (1998) (emphasis added). "Terrorist activity" was defined to encompass certain violent acts – such as highjacking, hostage-taking, and assassination – and threats and conspiracies to carry out such acts. *Id.* § 1182(a)(3)(B)(ii) (1998).[8] The government does not contend that ASP has ever carried out terrorist activity in this sense, and it certainly does not contend that Professor Ramadan provided money to ASP "in conducting a terrorist activity." Nor does the government contend that Professor Ramadan provided funds directly to Hamas, an organization that *has* carried out "terrorist activity" in the relevant sense. The government contends, instead, that Professor Ramadan gave money to ASP and that ASP in turn gave money to Hamas. However, such "indirect" donations – that is, donations two or more steps removed from the entity that actually conducts "terrorist activity" – were not inadmissibility grounds under the INA as it existed in 1998.

Indeed, such indirect donations were not inadmissibility grounds even after Congress enacted the Patriot Act in 2001. The Patriot Act defined "material support" more broadly, rendering inadmissible any alien who had "committ[ed] an act that the actor knows, or reasonably should know, affords material support" for (aa) the commission of a terrorist activity; (bb) to any individual who the actor knows, or reasonably should know,

[8] The INA distinguishes between "terrorist activity" and "engag[ing] in terrorist activity," and this distinction is important to understanding the material support provisions.

had committed or plans to commit a terrorist activity; (cc) to any of a list of terrorist organizations designated as such by the Secretary of State; or (dd) to any *undesignated* terrorist organization, "unless the actor [could] demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2002). An organization was deemed to be an undesignated terrorist organization if it was a group of two or more individuals that committed or incited terrorist activity, prepared or planned terrorist activity, or gathered information on potential targets for terrorist activity. 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (2002).[9]

These changes significantly expanded the class of aliens inadmissible on material support grounds. However, the Patriot Act generally retained the requirement of a direct link between the provider of support and the entity actually carrying out terrorist activity. Thus, even after the Patriot Act, the executive did not have the authority to exclude aliens who were two or more steps removed from the entity actually carrying out terrorist activity. A donation to ASP would have been grounds for inadmissibility only if the Secretary of State had designated ASP as a terrorist organization (in which case ASP would have been a designated terrorist organization) or if ASP was *itself* committing, inciting, preparing, planning or gathering information on potential targets for violent terrorist activity (in which case ASP would have been an undesignated terrorist organization). The government does not suggest that either of these things was true.

In fact, indirect donations were not made grounds for inadmissibility until 2005, three years after Professor Ramadan's last donation to ASP, when Congress enacted the

[9] The concept of "terrorist activity," while broadened by the Patriot Act, still encompassed only direct involvement in certain violent acts.

REAL ID Act, Pub. L. 109-13, 119 Stat. 308, Div. B (May 11, 2005). Through the REAL ID Act, Congress dramatically expanded the concept of undesignated terrorist organizations to include not only organizations that had committed or incited terrorist activity, prepared or planned terrorist activity, or gathered information on potential targets for terrorist activity, but also organizations that had solicited funds for terrorist activities or terrorist organizations, solicited individuals for membership in terrorist organizations, solicited individuals to participate in terrorist activity, or (most relevant here) provided material support to other terrorist organizations, whether designated or undesignated. 8 U.S.C. § 1182(a)(3)(B)(vi) (2006) (definition of "terrorist organization); *id.* § 1182(a)(3)(b)(iv) (2006) (material support). By expanding the concept of undesignated terrorist organization in this way, Congress abandoned the requirement of a direct link between the provider of support and the entity actually carrying out terrorist activity. In other words, it made it possible for an alien to be excluded for material support – assuming requisite knowledge – even if the alien was two or more steps removed from the entity actually carrying out terrorist activity.[10] Under current law, ASP becomes an undesignated terrorist organization by virtue of the fact that (according to the government) it has given money to Hamas, even if the purpose of ASP's donations to Hamas are purely humanitarian. Any person who gives money to ASP is inadmissible – again, assuming requisite knowledge – on the basis that he has given money to an undesignated terrorist organization, even though ASP does not itself carry out terrorist activity.

[10] *See, e.g.*, Michael John Garcia and Ruth Ellen Wasem, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, Congressional Research Service, Sept. 5, 2006 at 8 ("The REAL ID Act expanded the INA's definition of 'terrorist organization' to include a broader range of groups that provide indirect assistance to other groups involved in terrorist activity.").

Again, however, the REAL ID Act was not enacted until 2005, three years after Professor Ramadan's last donation to ASP. At the time Professor Ramadan made the donations to ASP they did not render him inadmissible.

ii. Legislation may not be applied retroactively absent an "unambiguous directive" from the legislature.

"The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994); *see also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) ("[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."). As Chief Justice Marshall wrote in 1829,

> [the principle that laws should not operate retroactively] is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively *unless the language of the act shall render such construction indispensable.*

Reynolds v. McArthur, 27 U.S. 417, 434 (1829) (emphasis added).

The presumption against retroactive legislation reflects a recognition that "retrospective laws are . . . generally unjust." 2 J. Story, Commentaries on the Constitution, §1398 (5th ed. 1891). In particular, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to confirm their conduct accordingly." *Landgraf*, 511 U.S. at 265; *see also id.* at 270 ("[t]he presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact"); Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 471 (1982). The presumption also reflects a

recognition that the "[l]egislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration," and that the legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266; *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 316 n.39 (2001) (rejecting government's skepticism that immigrants are an unpopular group that might be unfairly targeted by retroactive legislation).

Because "retroactive statutes raise special concerns," statutes "will not be construed to have retroactive effect unless their language *requires this result*." *Id.* at 315 (internal quotation marks omitted and emphasis added). Indeed, the Supreme Court has emphasized repeatedly that statutes are not to be given retroactive effect unless the legislature has spoken in language "so clear that it could sustain only one interpretation." *Id.* at 316 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1977)); *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764-65 (2006); *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2429 (2006); *Hughes Aircraft Co. v. United States, ex. rel. Schumer*, 520 U.S. 939, 946 (1997); *Landgraf*, 511 U.S. at 263 (stating that legislation should not be applied retroactively absent an "unambiguous directive" from the legislature); *Martin v. Hadix*, 527 U.S. 343, 354 (1998) (stating that legislation should not be applied retroactively absent "unambiguous directive" or "express command"); *Kessler v. Strecker*, 307 U.S. 22, 30 (1939) (requiring "clear and definite expression"); *Chew Heong v. United States*, 112 U.S. 536, 559 (1884) (invoking "uniformly" accepted rule that courts are not to apply statutes retroactively "unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature").

Requiring Congress to be clear in its intent "assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *St. Cyr*, 533 U.S. at 316 (quoting *Landgraf*, 511 U.S. at 272-73). Requiring clarity "allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes," *Landgraf*, 511 U.S. at 273, "and [it] has the additional virtue of giving legislators a predictable background rule against which to legislate," *id.* Accordingly, a court considering whether a statute should be applied retroactively must first consider whether the legislature has supplied an unambiguous directive – an "express command" – that the statute be so applied. *Id.* at 280. If "the statute contains no such express command, the court must determine whether the new statute would have retroactive effect." *Id.* "If the statute would operate retroactively, [the] traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

iii. Congress has not provided an "unambiguous directive" that the REAL ID amendments should be given retroactive effect.

The REAL ID Act does not include an "unambiguous directive" – an "express command" – that the amended and radically expanded material support provisions should apply retroactively to conduct that took place before the REAL ID Act was enacted. Plaintiffs assume that the government's contrary view is based on the REAL ID Act's "Effective Date" provision, which reads in relevant part:

> EFFECTIVE DATE. The amendments made by [Section 103 of the REAL ID Act] shall take effect on the date of the enactment of this division, and these amendments, and section 212(a)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)), as amended by this section, shall apply to (1) removal proceedings instituted before, on, or after the date of the enactment of this division; and (2) acts and conditions constituting a

> ground for inadmissibility, excludability, deportation, or removal occurring or existing before, on, or after such date.

REAL ID § 103(d) (hereinafter "section 103(d)" or "REAL ID effective date provision"). But this provision does not supply an unambiguous directive that the material support amendments should be given retroactive effect. To the contrary, the provision's text – particularly when compared with the corresponding Patriot Act provisions – suggests that Congress intended the REAL ID amendments to apply only *prospectively*, except as to conduct that constituted a ground for inadmissibility, excludability, deportation, or removal at the time it occurred.

The text of section 103's effective date provision is best understood in comparison to the corresponding provision of the Patriot Act, a provision that clearly indicates Congress's intent to apply amendments retroactively. As discussed above, *see* section I.a.i., *supra*, the Patriot Act was Congress's last major overhaul of the material support inadmissibility law prior to the REAL ID Act. The Patriot Act retroactivity provision reads, in relevant part,

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

Patriot Act § 411(c)(1).

Three features of this subsection make clear that Congress knew how to apply amendments to the inadmissibility grounds retroactively when it wanted to do so. First,

the subsection is expressly titled "Retroactive Application of Amendments," which leaves no doubt about its intent. Second, the language of the provision is consistent with that title; the statement that "the amendments . . . shall apply to . . . actions taken by an alien before, on, or after such date" leaves no room for doubt that Congress intended the amendments (with a few stated exceptions) to apply retroactively to conduct that predated the Act's effective date. Third, the subsection includes a complex retroactivity scheme – a scheme that includes four lengthy subparts that set out both general rules and specific exceptions. Patriot Act § 411(c). The retroactivity scheme, by virtue of its detail and specificity, makes clear that Congress seriously considered the consequences of retroactive application and made carefully calibrated judgments about which provisions should apply retroactively and which should not. (In fact, the Patriot Act retroactivity scheme was the product of both extensive debate within Congress and of serious negotiations between Congress and the executive branch.[11])

Had Congress wanted the REAL ID Act's material support amendments to apply retroactively, Congress need not have looked further than the Patriot Act to find language that would have clearly manifested its intent. However, Congress departed from the language of the Patriot Act in several respects. First, rather than enact a provision titled "Retroactive Application of Amendments," it enacted one called "Effective Date." Notably, it did this against the background of Supreme Court precedent holding that "effective date" language does not in itself indicate retroactive intent. *See, e.g., Landgraf*,

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[11] *See, e.g.* 147 Cong. Rec. S10547-01, S10557 (Oct. 11, 2007); 147 Cong. Rec. S10365-02, S10376 (Oct. 9, 2001) (statements of Sen. Leahy describing retroactivity debate); 147 Cong. Rec. H7159-03, H7198 (Oct. 23, 2001) (statement of Rep. Conyers describing retroactivity debate); *see also Protecting Constitutional Freedoms in the Face of Terrorism, Hearing before the Subcomm. on the Constitution, Civil Rights and Property of the Senate Comm. on the Judiciary*, 107th Cong (Oct. 3, 2001).

511 U.S. at 257-58 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date."); *see also Hamdan,* 126 S. Ct. at 2766 n.9. Second, Congress chose not to make the amendments applicable to "actions *taken* by an alien before, on, or after such date" (as it had done with the Patriot Act amendments) but to "acts and conditions *constituting a ground for inadmissibility, excludability, deportation, or removal* occurring or existing before, on, or after such date." While plaintiffs do not propose that this language is a model of clarity, the language does show that Congress's concern was not with when the relevant conduct occurred – which could have been "before, on, or after" the date of enactment – but rather with whether the conduct constituted a basis for inadmissibility, excludability, deportation, or removal at the time it occurred.

That Congress used the terms "excludability" and "deportation" supports this interpretation of the provision. The terms "excludability" and "deportation" were once used widely in the Immigration and Nationality Act, but Congress generally replaced them with "inadmissibility" and "removal" when it enacted the Immigration Reform and Immigrant Responsibility Act of 1996.[12] Congress's use of the outdated terms provides further evidence that it intended the relevant question to be whether conduct constituted a basis for inadmissibility, excludability, deportation, or removal *at the time it occurred.* If Congress had intended the REAL ID amendments to apply to past conduct that was not a basis for excludability or deportation at the time it occurred, Congress would have had no

[12] As the Supreme Court noted in *Clark v. Martinez*, 543 U.S. 371, 376 n.2 (2005), "[b]efore the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546, aliens ineligible to enter the country were denominated 'excludable' and ordered 'deported.' 8 U.S.C. §§ 1182(a), 1251(a)(1)(A) (1994 ed.) . . . . Post-IIRIRA, such aliens are said to be 'inadmissible' and held to be 'removable.' 8 U.S.C. §§ 1182(a), 1229a(e)(2) (2000 ed.)."

need to use those two terms at all; it would simply have provided that pre-enactment conduct could now be a basis for inadmissibility or removal. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) (remarking that it is the court's "duty to give effect, if possible, to every clause and word of a statute," and noting reluctance "to treat statutory terms as surplusage") (internal quotation marks omitted); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Congress's addition of the terms "excludability" and "deportation" provides additional evidence that its intent was to focus on whether conduct *constituted a basis for inadmissibility, excludability, deportation, or removal* at the time it occurred.[13]

When read as a whole, the phrase "acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal occurring or existing before, on, or after such date" does not suggest (let alone unambiguously establish) intent to apply to conduct that did not render an individual ineligible to enter the country at the time the conduct took place.

Nothing in the REAL ID Act's legislative history suggests that Congress "affirmatively considered the potential unfairness of retroactive application and determined that it [was] an acceptable price to pay for the countervailing benefits." *St. Cyr*, 533 U.S. at 315. To the contrary, the legislative history makes clear that Congress barely considered the REAL ID inadmissibility and removal amendments at all. The text that would later become the REAL ID Act's material support removal provisions was originally introduced by Rep. Green as an amendment to the House bill implementing the 9/11 Commission's

[13] It is completely understandable that Congress would have wanted to limit the retroactive reach of the REAL ID amendments. As discussed above, *see* section I.a.i., *supra*, the REAL ID Act radically expanded the material support inadmissibility provisions, rendering inadmissible even those who provided support to organizations that were not themselves directly engaged in any terrorist activity, who provided support intended only for humanitarian purposes, and who may in fact have been many steps removed from actual terrorist activity. Limiting the retroactive reach of the amendments mitigates the amendments' severe effect.

recommendations. It passed after only 10 minutes of debate.[14] After Senate conferees stripped controversial immigration provisions from the final bill, 150 Cong. Rec. H11044-03 (Dec. 7, 2004) (statement of Rep. Jackson-Lee), House members resurrected the Green Amendment in the next Congress. The Amendment – now part of what was called READ ID – was once again pushed through the House with extraordinary dispatch.[15] One month later, in a maneuver apparently designed to force the Senate's acquiescence to the legislation with minimal debate, House leadership attached the REAL ID bill to an emergency appropriations bill meant to provide emergency funds for the troops and for tsunami victims; the bill was quickly passed and sent to the Senate.[16] In the Senate, most comments on the floor focused not on the substance of the legislation but on the inadequate time that had been afforded for consideration of it. *See, e.g.,* 151 Cong. Rec. S3513-02, S3540-41 (Apr. 13, 2005) (Sen. Feinstein complaining that REAL ID would become law "without a hearing, without any committee consideration" in the House, "with no consideration by [the Senate] whatsoever"); 151 Cong. Rec. S4815 (May 10, 2005)

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[14] *See* H.R. Rep. No. 108-751, at 4, 172-174 (Oct. 7, 2004); 150 Cong. Rec. H8874-02, H8885 (Oct. 8, 2004) (text of Green amendment); H.R. Rep. No. 108-751, 4 (Oct. 7, 2004)(indicating 10 minutes provided for debate of Green amendment); 150 Cong. Rec. H8874-02, H8893-94 (Oct. 8, 2004) (vote to pass Green amendment).

[15] *See* 151 Cong. Rec. H437-02 (Feb. 9, 2005) (resolution providing for floor consideration of REAL ID); H.R. 418, § 103(d), 109th Cong (pertinent text of original REAL ID bill included language identical to Green Amendment); 151 Cong. Rec. H437-02 (Feb. 9, 2005) (providing one hour and 40 minutes of debate on REAL ID); *see also* 151 Cong. Rec. H527-03 (Feb. 10, 2005) (H. Res. 75 further restricting debate and amendment of REAL ID); 151 Cong. Rec. H443-02, H443 (Feb. 9, 2005) (Rep. Hastings remarking that debate on REAL ID was "stifle[d]"); 151 Cong. Rec. H536-03, H559 (Feb. 10, 2005) (Rep. Jackson-Lee noting that the REAL ID Act "was passed without any Committee hearings or markups").

[16] *See* 151 Cong. Rec. H1427-06 (Mar. 15, 2005) (H. Res. 151, providing for attachment of REAL ID Act to the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief); 151 Cong. Rec. H1427-06, H1447 (Mar. 15, 2005) (Rep. Jackson-Lee stating "The bill is being attached here in an effort to force the Senate to pass these ill-conceived policies. We have had no hearings on this REAL ID legislation . . . ."); 151 Cong. Rec. S3965-02, S3977 (Apr. 20, 2005) (Sen. Conhran remarking that the House "chose this bill [to attach REAL ID] because they know we need this bill").

(Senator Clinton explaining that "[w]e haven't had hearings about it in the Senate. We have not even had debate about it in the Senate"). No majority member – in the House or Senate – argued in favor of retroactive application. Indeed, no majority member – either in 2004 or 2005 – even mentioned the possibility that the legislation would be so applied.[17]

iv. The REAL ID amendments cannot be applied retroactively because retroactive application would attach new legal consequences to events completed before enactment.

The REAL ID amendments should not be applied retroactively because retroactive application would attach "new legal consequences to events completed before . . . enactment." *Landgraf*, 511 U.S. at 270. The question whether a statute "would have a retroactive effect," *United States v. Luna-Reynoso*, 258 F.3d 111, 115 (2d Cir. 2001), requires a "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment," *St. Cyr*, 533 U.S. at 321. The inquiry "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Martin*, 527 U.S. at 358 (internal quotation marks omitted).

In *Landgraf*, the Supreme Court stated that a statute has a retroactive effect where "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." 511 U.S. at 280. Thus, in *Hughes Aircraft*, 520 U.S. 939, the Supreme Court held that legislation had a retroactive effect where it eliminated a defense to *qui tam* suits brought under the

[17] In the House, the only mention of possible retroactive application came from Rep. Jackson-Lee, a minority member, who dedicated less than one sentence to the topic. 150 Cong. Rec. H8874-02, H8885 (Oct. 8, 2004). In the Senate, the only mention of possible retroactive application came from Sen. Kennedy, who expressed concern that the amendments "could be applied retroactively." 151 Cong. Rec. S3965-02, S4001-02 (Apr. 20, 2005). Again, no majority member even mentioned the possibility that the amendments would be given retroactive effect.

False Claims Act. The effect of the legislation, the Court noted, was "to create a new cause of action" and thereby to "attach[] a new disability in respect to transactions or considerations already past." *Id.* at 948. Similarly, in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), the Supreme Court held that legislation had a retroactive effect where it expanded the meaning of the phrase "make and enforce contracts" as used in the Civil Rights Act of 1866. The Court noted that the legislation "enlarged the category of conduct that is subject to . . . liability," *id.* at 303, and "create[d] liabilities that had no legal existence before the Act was passed," *id.* at 313.

Retrospective application of the REAL ID amendments would plainly have a retroactive effect. Charitable donations that were previously permissible would become, if the REAL ID amendments were retroactively applied, a basis for inadmissibility. When the REAL ID Act was enacted, those who had made such donations in the past could not, of course, unmake the donations they had already made. Accordingly, applying the relevant REAL ID amendments retroactively would "attach[] a new disability in respect to transactions or considerations already past," *Hughes Aircraft*, 520 U.S. at 948, and "create liabilities that had no legal existence before the Act was passed," *Rivers,* 511 U.S. at 313. That is, applying the amendments retroactively would attach "new legal consequences to events completed before . . . enactment." *Landgraf*, 511 U.S. at 270. Because retroactive application of the REAL ID amendments would have this effect, and because Congress has not mandated this effect in language "so clear that it could sustain only one interpretation," *St. Cyr*, 533 U.S. at 317, the REAL ID amendments should not be applied retroactively. Indeed, retroactive application of the REAL ID amendments would be completely

inconsistent with the "familiar considerations of fair notice, reasonable reliance, and settled expectations" that the Supreme Court referred to in *Martin*.

v. According the REAL ID amendments retroactive effect would raise serious constitutional concerns.

The analysis above supplies ample reason why the REAL ID amendments should not be applied retroactively. The doctrine of constitutional avoidance, however, provides an additional argument in support of this conclusion. *See, e.g., Jones v. United States,* 526 U.S. 227, 239 (1999) ("[w]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter" (internal quotation marks omitted)); *United States v. Gonzalez,* 420 F.3d 111, 124 (2d Cir. 2005); *Allstate Ins. Co. v. Serio,* 261 F.3d 143, 149-50 (2d Cir. 2001).

Construing the REAL ID amendments to apply retroactively would give rise to a serious constitutional question. As the Supreme Court has noted, Congress's ability to legislate retroactively is limited by the due process clause of the Fifth Amendment. *Landgraf*, 511 U.S. at 266; *St. Cyr*, 533 U.S. at 316. Under the Due Process clause, retroactive legislation is invalid unless "supported by a legitimate purpose furthered by rational means." *Pension Benefit Guar. Corp. v. R.A. Gray and Co.*, 467 U.S. 717, 729 (1984); *see also Brown v. Ashcroft*, 360 F.3d 346, 353-54 (2d Cir. 2004); *Kuhali v. Reno*, 266 F.3d 93, 111 (2d Cir. 2001). "A justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Landgraf*, 511 U.S. at 266 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)). That is, an interest that "supports prospective application will not

necessarily also sustain its application to past events." *Id.* at 268 n.21 (citing *Pension Benefit*, 467 U.S. at 730).

Due process concerns arise here because REAL ID's inadmissibility and removability amendments have identical "Effective Date" provisions. *See* REAL ID § 105(b) (effective date provision for removal amendments); *id.* § 105(a), codified at 8 U.S.C. § 1227(a)(4)(B) (amending removal law to make terrorism inadmissibility and removal grounds co-extensive). Thus, any reading of the "Effective Date" provision that permits retroactive application affects not only aliens outside of the country but foreign nationals *inside* the country – even long-time permanent legal residents. In construing the "Effective Date" provision, the Court must take into account that the construction would apply to both categories of foreign nationals. *See Clark*, 543 U.S. at 380 ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.") (internal citations omitted); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076-78 (9th Cir. 2006). The Court must take into account that the REAL ID amendments apply to people with a substantial connection to the U.S. *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly"). Because removal can have such devastating effects, courts "construe any lingering ambiguities in deportation statutes in favor of the alien." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *United States v. Errico*, 385 U.S. 214, 225 (1966).

The legislative history does not offer any rationale for applying the REAL ID amendments retroactively; indeed, as noted above, the legislative history does not make clear (or even suggest) that Congress wanted the amendments to apply retroactively at all. *Cf. Mojica v. Reno*, 970 F. Supp. 130, 170 (E.D.N.Y. 1997) (stating that the court should not be expected to "guess at what purpose could be served by applying [the legislation] retroactively"). No majority member even raised the possibility that the amendments would be applied retroactively to foreign nationals already living inside the U.S. And certainly no majority member (or minority member, for that matter) suggested any justification for applying amendments to U.S. residents who made charitable donations many years ago – charitable donations that were not grounds for inadmissibility at the time they were made.

Retroactive application of the REAL ID amendments would raise particularly serious constitutional concerns because the amendments' temporal reach would be unlimited. In cases in which the courts have upheld retroactive laws against constitutional challenge, they have emphasized the laws' limited retroactive reach. *See, e.g., E. Enter. v. Apfel*, 524 U.S. 498, 526 (1998) (endorsing Congress's practice of "encompass[ing] only that retroactive time period that Congress believed would be necessary to accomplish its purposes") (internal citations and quotation marks omitted); *id.* at 549 (Kennedy, J., concurring) (noting that "the degree of retroactive effect is a significant determinant in the constitutionality of a statute"); *United States v. Carlton*, 512 U.S. 26, 33 (1994) (noting that "the actual retroactive effect of the 1987 amendment extended for a period only slightly greater than one year"); *United States v. Darusmont*, 449 U.S. 292, 297-98 (1981); *Welch v. Henry*, 305 U.S. 134, 150-51 (1938). If this Court were to hold that the REAL ID

amendments apply retroactively, however, there would be no obvious limit to the amendments' retroactive reach.

b. Professor Ramadan's donations to ASP do not supply a facially legitimate and bona fide reason for exclusion because Professor Ramadan neither knew nor should have known that ASP was providing money to Hamas.

i. The government cannot rely on the material support provision to exclude Professor Ramadan in the absence of evidence that Professor Ramadan knew or should have known that ASP was providing money to Hamas.

Even if the REAL ID amendments apply retroactively, the government cannot rely on the material support provision to exclude Professor Ramadan in the absence of evidence that Professor Ramadan knew or should have known that ASP was providing money to Hamas (and thus that ASP was an undesignated terrorist organization). The government has not even suggested that such evidence exists; to the contrary, it has made clear that its current position relies solely on information provided by Professor Ramadan in his visa interviews. SUF § III.G-H (Second Ramadan Decl.¶ 9, Exh. F (Letter from Consul John O. Kinder to Professor Ramadan dated September 19, 2006) (stating that basis for visa denial "includes" information Professor Ramadan provided in visa interviews); Jaffer Decl. ¶ 4 (noting government counsel's statement that the government is relying solely on information provided by Professor Ramadan)). Professor Ramadan certainly did not tell consular officials that he knew that ASP was providing funds to Hamas. SUF § III.D (Second Ramadan Decl. ¶ 14 ("I did not know of any connection between ASP and Hamas and I did not know of any connection between ASP and terrorism.")).

The government cannot rely on the material support provision in the absence of evidence that Professor Ramadan knew or should have known that ASP was providing money to Hamas. The INA's definition of "engage in terrorist activity" includes

subsections relating to, among other things: "prepar[ing] or plan[ning] a terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(iv)(II); "gather[ing] information on potential targets for terrorist activity," *id.* § 1182(a)(3)(B)(iv)(III); and "solicit[ing] funds or other things of value for . . . a terrorist activity," *id.* § 1182(a)(3)(B)(iv)(IV)(aa). None of these subsections expressly references a knowledge requirement. By contrast, the material support subsection references knowledge twice. The first reference makes clear that the provision applies only where the "the actor *knows*, or *reasonably should know*," that his act affords material support. *id.* § 1182(a)(3)(B)(iv)(VI) (emphases added).[18]

The material support provision's first reference to knowledge underscores that the provision cannot be invoked at all unless the executive has some evidence that the foreign citizen knew or should have known that he was providing material support to a terrorist organization. The State Department's Foreign Affairs Manual appears to acknowledge this. *See* 9 Foreign Affairs Manual § 40.32 n.2.3 (acknowledging that consular officers must "determine whether an alien knows or should have known that an organization is a terrorist organization" and explaining how the consular official might go about making that determination). More generally, an inadmissibility finding cannot be based on mere conjecture – in this case conjecture about Professor Ramadan's knowledge – but must be based on actual evidence. Thus, the INA states that a visa shall be denied if "the consular officer *knows or has reason to believe* that such alien is ineligible to receive a visa," 8 U.S.C. § 1201(g) (emphasis added), and the regulation that implements that provision states that "reason to believe" requires "a determination *based upon facts or circumstances* which would lead a reasonable person to conclude that the applicant is ineligible to receive

[18] The second reference to knowledge, discussed further below, makes the lack of knowledge an affirmative defense.

a visa . . . ." 22 C.F.R. § 40.6 (emphasis added). The executive does not have the authority to rely on the material support provision in the absence of evidence about Professor Ramadan's actual or constructive knowledge. The government has not pointed to any such evidence here.

ii. There is clear and convincing evidence that Professor Ramadan neither knew nor should have known that ASP was a "terrorist organization."

The material support provision references knowledge a second time, stating that a foreign national who would otherwise be inadmissible for having provided material support to an undesignated terrorist organization is not inadmissible if "the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd). Plaintiffs have carried that burden here because they have submitted clear and convincing evidence that Professor Ramadan did not know, and should not reasonably have known, that ASP was providing money to Hamas (the alleged act that rendered ASP an undesignated terrorist organization).

In his Second Declaration, Professor Ramadan describes the donations he made to ASP, his reasons for donating to ASP, and his knowledge about ASP at the time he made his donations. SUF §§ V-VI (Second Ramadan Decl. ¶¶ 10-14). As he explains, he gave ASP a total of 1670 Swiss francs (approximately $1,336 dollars at current exchange rates) between December 1998 and July 2002. SUF § V.B (Second Ramadan Decl. ¶ 14 & Exh. G). No single donation was for more than 250 francs, and most were for 100 francs or less. *Id.* (Second Ramadan Decl. ¶ 14 & Exh. G). Professor Ramadan explains his donations as follows:

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

SUF §§ V.B, VI.A (Second Ramadan Decl. ¶ 12); *see also* SUF § VI.B-C (Second Ramadan Decl. ¶ 10).

Professor Ramadan did not know that ASP was providing funds to Hamas, if indeed it was. SUF § VI.D (Second Ramadan Decl. ¶ 14 ("I gave money to ASP because I believed that it was a legitimate humanitarian organization engaged in legitimate humanitarian projects."); ("I did not know of any connection between ASP and Hamas and I did not know of any connection between ASP and terrorism.")). Moreover, he would not have given money to ASP if he had thought his money would be used for terrorism or any other illegal purpose. SUF § VI.E (Second Ramadan Decl. ¶ 11). Indeed, as plaintiffs have emphasized since the outset of this litigation, Professor Ramadan has been a vocal and consistent critic of terrorism. SUF § II (Second Ramadan Decl. ¶¶ 10-11; Ramadan Decl. ¶¶ 12, 15-22, 33 & Exhs. C-F, K-U; Fitzmier Decl. ¶ 18; Nelson Decl. ¶ 20; Second Roberts Decl. ¶ 26). As Professor Ramadan notes:

> Over the last fifteen years, I have spent a great deal of my energy working to discourage extremism of all kinds and terrorism in particular. . . . [T]his is to say that I have opposed terrorism not only through my words but also through my actions. To knowingly support terrorism, as the U.S. government now accuses me of having done, would have been completely

inconsistent with everything I was trying to do.

SUF § II (Second Ramadan Decl. ¶ 11).

Professor Jonathan Benthall, an expert on Muslim charities, confirms the reasonableness of Professor Ramadan's belief that ASP was a legitimate humanitarian organization engaged in legitimate humanitarian work. ASP is (and was during the relevant time period) an officially-recognized and registered charity in Switzerland. SUF § VII.F.i-ii (Declaration of Jonathan Benthall (hereinafter "Benthall Decl.") ¶¶ 48-51, Exh. B-D; Second Ramadan Decl. ¶ 10). It has been officially registered as an "Association" in the Swiss Department of Justice's Commercial Registry and the Swiss Official Gazette of Commerce since at least 2000, and it is in possession of a federal ID number. SUF § VII.F.ii (Benthall Decl. ¶ 49 & Exh. B). ASP is currently described in its registry documents as an organization that provides

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

SUF § VII.F.i (Benthall Decl. ¶ 50, Exh. B; *see also* Benthall Decl. ¶ 50, Exh. C). Official registry documents describe the sources of ASP's funds. *Id.* (Benthall Decl. ¶ 50, Exh. B). As a registered association, ASP is (and was during the relevant time period) directly regulated at the national level by tax and cantonal authorities and it was monitored for compliance with the criminal laws. SUF § VII.B (Benthall Decl. ¶ 30).

According to publicly available information, ASP has been operating since 1993, SUF § VII.F.iii (Benthall Decl. ¶ 51 & Exh. D), soliciting donations through the mail, SUF §§ VII.F.i, V.B (Benthall Decl. ¶ 51; Second Ramadan Decl. ¶ 10), and inviting donors to

deduct their donations on their tax forms, SUF §§ VII.F.iii, VI.C (Benthall Decl. ¶ 51; Second Ramadan Decl. ¶ 10). ASP remains a registered entity in Switzerland, which suggests it is still permitted to act by the Commercial Registry Office of the Swiss Department of Justice. SUF § VII.F.i (Benthall Decl. ¶ 51).

During the relevant time period, there was no reliable public evidence linking ASP with Hamas or terrorist activity. SUF § VII.F.iv (Benthall Decl. ¶ 52, 54). ASP was not considered a terrorist organization by the Swiss government or any European government. SUF § VII.F.ii, vi (Benthall Decl. ¶ 51-52). Nor was ASP considered a terrorist organization by any component of the United States government. SUF § VII.F.iv., v.ii (Benthall Decl. ¶ 52). At the time Professor Ramadan donated money to ASP, there was nothing that would have led a reasonable donor to believe that ASP was anything other than one of the many legitimate European charities providing aid to Palestinians. SUF § VII.F (Benthall Decl. ¶¶ 5, 47-54). It is true that the United States Treasury Department later designated ASP a "Specially Designated Global Terrorist," but it did not do so until 2003, a year after Professor Ramadan's last donation. SUF § VII.F.viii (Benthall Decl. ¶ 52 & Exhs. E-F). The State Department has not designated ASP even today. Even if it is true that ASP gave money to Hamas, Professor Ramadan cannot reasonably be expected to have known about ASP's activities before the U.S. government knew.[19]

As Professor Benthall explains, there was nothing unusual about Professor Ramadan's donations. Many Europeans – Muslim and non-Muslim – donate to European charities that provide aid to Palestinians. SUF § III.A (Benthall Decl. ¶¶ 19-20, 24-27). These charities are officially-recognized, regulated, and subject to government scrutiny,

[19] ASP has vigorously denied the allegation that it provides funds to Hamas or otherwise supports terrorism. SUF § VII.F.ix (Benthall Decl. ¶ 53, Exh. D).

and they have numerous incentives to ensure that their funds do not end up supporting terrorism. SUF § VII.B (Benthall Decl. ¶¶ 28-34). Donors reasonably assume that charities that are operating openly and registered with and regulated by the government are legitimate humanitarian enterprises not providing support to terrorism. SUF § VII.C (Benthall Decl. ¶ 35).[20]

Professor Ramadan's belief that ASP was a legitimate charity not connected to Hamas was entirely reasonable. As Professor Benthall states:

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

SUF § VII.F-G (Benthall Decl. ¶ 47).

There is clear and convincing evidence that Professor Ramadan neither knew nor should have known that ASP was providing funds to Hamas. Accordingly, Professor Ramadan is not inadmissible under the material support provision and the government's reliance on that provision to exclude him is not facially legitimate and bona fide.

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[20] The mere fact that ASP was providing humanitarian aid to Palestinians does not mean that it was providing funds to Hamas or working with or through that organization. While Hamas does deliver social services in the Palestinian territories, most European charities work with Palestinian non-governmental organizations and "zakat" committees – charitable giving committees – that are not connected to Hamas. SUF § VII.D-E (Benthall Decl.¶¶ 36-38, 43, 45-46). Many such NGOs and *zakat* committees exist, *id.* (Benthall Decl. ¶¶ 38-45), and a great deal of humanitarian aid is provided through NGOs and *zakat* committees unaffiliated with Hamas, *id.* (Benthall Decl. ¶ 46).

II. THE IDEOLOGICAL EXCLUSION PROVISION IS UNCONSTITUTIONAL ON ITS FACE.

a. Plaintiffs have standing to challenge the validity of the ideological exclusion provision.

Plaintiffs seek, in addition to relief relating to Professor Ramadan's exclusion, a ruling that the ideological exclusion provision is unconstitutional on its face. To satisfy the standing requirements of Article III, plaintiffs must show that they have suffered an injury in fact, that their injury is traceable to the ideological exclusion provision, and that their injury is likely to be redressed by a favorable decision. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The injury requirement is satisfied if plaintiffs can demonstrate that they have suffered concrete and particularized harm that is actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). Here, plaintiffs have standing to challenge the provision's constitutionality because they have suffered concrete injury because of the provision; because the provision has a chilling effect on their and others' First Amendment rights; because there is a credible threat that the provision will be used to bar their invitees in the future; and because licensing schemes are susceptible to facial challenge without respect to their application in particular instances.

Plaintiffs have suffered particularized harm as a result of the provision. As discussed above, uncertainty about whether invited scholars will be permitted to enter the country – uncertainty that stems from the ideological exclusion provision's vague and manipulable terms – undermines plaintiffs' ability to plan conferences and events in the U.S. and to publicize those events before they take place. SUF §§ XIII.B, XII.C (Fitzmier Decl. ¶¶ 16, 27; Nelson Decl. ¶¶ 18, 33, 35). Travel arrangements must be made and

facilities secured at the last minute, and hotel reservations must be confirmed in advance without knowing if foreign scholars will be able to attend. SUF § XII.C (Fitzmier Decl. ¶ 27; Nelson Decl. ¶ 35). Thus the challenged provision has imposed administrative and financial costs – costs that plaintiffs must take into account in determining which scholars to invite in the first place. *Id.* (Fitzmier Decl. ¶ 27; Nelson Decl. ¶¶ 33, 35). In addition, some of plaintiffs' invitees have declined invitations in part because they are unwilling to be subjected to ideological scrutiny. SUF § XII.B (Fitzmier Decl. ¶ 30 (discussing case of Fatima Mernissi); Second Roberts Decl. ¶ 34 (discussing case of J.M. Coetzee)).

In the First Amendment context the courts have recognized that a statute's "chilling effect" – its effect of discouraging constitutionally protected activity – can be enough *in itself* to confer standing. *See, e.g.*, *Dombrowski v. Pfister,* 380 U.S. 479, 494 (1965); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) (noting that, in the First Amendment context, a plaintiff has standing "when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences"); *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 824 (2d Cir. 1967) ("It has been held repeatedly that the mere threat of the imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise of rights as fragile and sensitive to suppression as the freedoms of speech and assembly . . . ."); *id.* ("Since it is the mere threat of unconstitutional sanctions which precipitates the injury, the courts must intervene at once to vindicate the threatened liberties."). In *Abourezk*, then-Judge Ginsburg addressed the chilling effect of the practice of ideological exclusion in particular:

> [P]laintiffs assert that they are suffering a present and continuing harm in the form of the "chill" that the challenged State Department policy places

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

Abourezk, 785 F.2d at 1052 n.8 (internal citations omitted). Plaintiffs have suffered similar harms here, SUF § XII.A-F (Fitzmier Decl. ¶¶ 17, 27-28, 31, 33; Nelson Decl. ¶¶ 17, 19, 32-35; Second Roberts Decl. ¶ 34 & Exh. C), and then-Judge Ginsburg's analysis applies with equal force.

Plaintiffs also have standing because it is likely that the provision will be applied to bar their invitees in the future. The Supreme Court has recognized that pre-enforcement challenges to statutes are permissible where plaintiffs can establish a credible threat of sanctions. *See, e.g., Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979) (plaintiffs had standing to bring pre-enforcement challenge to restrictions on deceptive statements); *Steffel v. Thompson*, 415 U.S. 452, 459-60 (1974) (plaintiff who distributed anti-war handbills had standing to bring pre-enforcement challenge to trespass statute); *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973) (doctors had standing to bring pre-enforcement challenge to abortion restrictions). The "credible threat" standard is not a stringent one. *See, e.g., Babbitt*, 442 U.S. at 300-301; *Doe*, 410 U.S. at 188; *N.H. Right to Life Political Action Comm.*, 99 F.3d at 15 ("courts will assume a credible threat of prosecution in the absence of compelling contrary evidence"). Plaintiffs need only demonstrate "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298; *Am. Booksellers Found. v. Dean*, 342 F.2d 96, 101 (2d Cir. 2003). In the First Amendment context, the test is applied leniently

in light of the fact that "free expression [is] of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski*, 380 U.S. at 486. The Second Circuit has said that plaintiffs establish standing for a First Amendment claim "by demonstrating an actual and well-founded fear that the law will be enforced against them." *Am. Booksellers Found.*, 342 F.2d at 101 (internal quotation marks omitted) (citing *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)).

There is a realistic danger that the ideological exclusion provision will be used to bar plaintiffs' invitees in the future. As discussed above, plaintiffs are organizations that regularly invite foreign scholars to speak in the United States. SUF §§ XIII.A, XI.C (Fitzmier Decl. ¶¶ 12, 21, 24; Nelson Decl. ¶¶ 9, 19; Second Roberts Decl. ¶¶ 8, 17-18). In recent years, a great deal of plaintiffs' programming has focused on issues relating to the "war on terror." Many of the foreign scholars and writers whom they have invited to speak in the U.S. come from the Muslim world – where the "war on terror" is being waged – and many are individuals who have written and spoken extensively about terrorism and counterterrorism in the past. SUF §§ XII.B, XI.C (Fitzmier Decl. ¶ 30; Nelson Decl. ¶ 9; Second Roberts Decl. ¶¶ 18, 27). Moreover, plaintiffs often invite prominent scholars and writers from abroad specifically because their views are controversial in the United States. SUF § XIII.E (Fitzmier Decl. ¶ 29). Because plaintiffs regularly invite foreign scholars and writers to speak in the U.S., organize programming around issues relating to terrorism, and often invite foreign nationals precisely because their views are controversial in the U.S., plaintiffs have "an actual and well-founded fear that the law will be enforced against them." *Am. Booksellers Found.*, 342 F.2d at 101 (internal quotation marks omitted).

Here, plaintiffs' fear about the potential use of the ideological exclusion provision is heightened because of the manner in which the government has implemented the provision, SUF § IX.A (Nelson Decl. ¶ 26 & Exh. A (State Department Foreign Affairs Manual)), and because in August 2004 the government invoked the provision to explain the exclusion of Professor Ramadan, a scholar who has criticized U.S. foreign policy but has never endorsed terrorism. SUF § II.A (Second Roberts Decl. ¶ 26); *cf. N.H. Right to Life Political Action Comm.*, 99 F.3d at 17 (taking statute's past application into consideration in evaluating likely future application); *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987) (same); *Vanaso v. Schwartz*, 401 F. Supp. 87, 96 (E.D.N.Y. 1976) (same). Another factor contributing to plaintiffs' concern about the potential use of the provision is the fact that the government has deemed multiple foreign nationals to be inadmissible under the provision. SUF § IX.A (Nelson Decl. ¶ 26 & Exh. B); *cf. Babbitt*, 442 U.S. at 302 (recognizing standing though challenged statute had never been used). Still another factor contributing to plaintiffs' concern is that the government has refused to explain its recent exclusion of numerous foreign scholars on grounds that appear to be ideological. SUF § X.A (Fitzmier Decl. ¶¶ 25-26 & Exhs. A-F; Nelson Decl. ¶¶ 27-31 & Exhs. C-G; Second Roberts Decl. ¶¶ 31-32 & Exhs. A-B). Especially in light of these factors, plaintiffs' concern that the ideological exclusion provision will be used to bar their invitees is plainly well-founded.

Plaintiffs have standing here for still another reason. As discussed below, *see* section II.c., *infra*, the challenged provision operates as a licensing scheme because it allows executive officers to decide in advance which ideas U.S. citizens and residents may hear. It is well-settled that licensing schemes are susceptible to challenge on their face

without regard to their application in particular instances. *See, e,g., Forsyth County, Georgia v. Nationalist Movement,* 505 U.S. 123, 133 n.10 (1992) ("the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner but whether there is anything in the ordinance preventing him from doing so"); *Beal v. Stern*, 184 F.3d 117, 125 (2d Cir. 1999) ("Although facial challenges are generally disfavored, they are more readily accepted in the First Amendment context .... This exception is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court.") (internal citations omitted); *Thornhill v. State of Alabama*, 310 U.S. 88, 97 (1940) ("Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas."). It is enough, in a case such as this one, that plaintiffs and their invitees engage in constitutionally protected activity that could readily be deemed to fall within the scope of the challenged statute.[21]

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

The ideological exclusion provision violates the First Amendment rights of U.S. citizens and residents by preventing them from engaging in face-to-face dialogue and debate with foreign scholars whose speech the government disfavors. Indeed, alone among the inadmissibility provisions of the Immigration and Naturalization Act, the ideological

[21] Plaintiffs clearly satisfy the other standing requirements. As noted above, plaintiffs' complained-of injuries are (i) the costs and administrative burdens that the ideological exclusion provision requires them to incur; (ii) the current chilling effect of the provision on their and others' First Amendment rights; and (iii) the potential use of the ideological exclusion provision to bar their invitees in the future. These injuries are traceable to the ideological exclusion provision and would be remedied by a favorable decision.

exclusion provision is directed at protected speech. It renders foreign citizens inadmissible not because of their actions but because of their expression of ideas that U.S. citizens and residents have a constitutional right to hear.

As this Court has recognized, "[i]t is a well-settled principle of constitutional law that the First Amendment includes not only a right to speak, but also a right to receive information and ideas." *AAR*, 463 F Supp 2d at 414 (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *Dow Jones & Co. v. Simon*, 842 F.2d 603, 607 (2d Cir. 1988). "The right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (italics omitted); *see also Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) ("[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers") (Brennan, J., concurring); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). "This broad right to receive information includes a right by citizens of the United States 'to have an alien enter and to hear him explain and seek to defend his views.'" *AAR*, 463 F. Supp. 2d at 414 (quoting *Mandel*, 408 U.S. at 762-64); *accord Abourezk*, 785 F.2d at 1050-51; *Allende*, 605 F. Supp. at 1223.[22]

The First Amendment generally does not permit regulation of speech on the basis of content or viewpoint. To the contrary, a bedrock principle of the First Amendment

[22] This Court's prior ruling in this litigation, which addressed (among other issues) standing, the applicability of the First Amendment to the exclusion of invited scholars, and the doctrine of consular nonreviewability, constitutes the law of the case and therefore governs this motion. *See, e.g., In re PCH Assoc.*, 949 F.2d 585, 592 (2d Cir. 1991); *In re Ski Train Fire*, 224 F.R.D. 543, 545-46 (S.D.N.Y. 2004); *Egghead.com Inc. v. Brookhaven Capital Mgmt., Co. Ltd.*, 194 F. Supp. 2d 232, 237 (S.D.N.Y. 2002); *Natural Res. Def. Counsel v. Fox*, 30 F. Supp. 2d 369, 374-75 (S.D.N.Y. 1998).

jurisprudence is that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *see also Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("[d]iscrimination against speech because of its message is presumed to be unconstitutional"); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); *Thomas v. Collins*, 323 U.S. at 545 (1945) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."). Suppression of speech on the basis of content "pose[s] the inherent risk that the Government seeks . . . to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). Such suppression "rais[es] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* (internal citations omitted).

As plaintiffs have previously argued, Pl. Prelim. Inj. Mem. 21-22, suppression of speech on the basis of its content is not made lawful simply because the government uses the immigration law, rather than some other mechanism, as the instrument of censorship. To the contrary, every court to have confronted the issue has held that the content of an alien's speech cannot by itself supply a constitutionally permissible reason for exclusion. In *Abourezk v. Reagan*, for example, the United States District Court for the District of Columbia addressed a challenge by United States citizens to the government's refusal to

grant visas to individuals including Nino Pasti, a former member of the Italian Senate and a prominent advocate of nuclear disarmament. In considering the plaintiffs' claim, the court wrote:

> [A]n alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded [under a now-repealed provision of the I.N.A.] solely on account of the content of his proposed message. For although the government may deny entry to aliens altogether, or for any number of specific reasons, it may not, consistent with the First Amendment, deny entry solely on account of the content of speech. . . . [T]he government's theory would allow it to exercise its foreign relations power so as to keep the content of speech from American citizens.

Abourezk, 592 F. Supp. at 887; *see also Harvard Law Sch. Forum*, 633 F. Supp. at 531 (stating that government's reason for exclusion "is not facially legitimate [if] it is related to the suppression of protected political discussion"); *Allende*, 605 F. Supp. at 1225 ("an alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded . . . solely on account of the content of his proposed message") (internal quotation marks and citations omitted); *Abourezk v. Reagan*, 1988 WL 59640, *2 n.8 (D.D.C. 1988) (reaffirming First Amendment holding after intervening appeal).

There is no question that the speech targeted by the ideological exclusion provision – speech that "endorses," "espouses" or "persuades" – is protected by the First Amendment. While some speech targeted by the provision may be controversial and even abhorrent, the Supreme Court has long recognized a constitutionally significant difference between mere advocacy of violent, controversial, or offensive ideas, which is fully protected by the First Amendment, and speech that incites others to take imminent, violent action, which is unprotected. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that First Amendment does not permit the government "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to

inciting or producing imminent lawless action and is likely to incite or produce such action"); *Noto v. United States*, 367 U.S. 290, 297-98 (1961) ("the mere abstract teaching of [a] theory," or "the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action"). A statute that "fails to draw [a] distinction" between mere advocacy of unpopular ideas and incitement to immediate unlawful action "impermissibly intrudes upon the freedoms guaranteed" by the First Amendment. *Brandenburg*, 395 U.S. at 448.

By its own terms, the ideological exclusion provision is directed at protected speech that falls short of inciting others to engage in terrorist acts. The statute is directed at "endorse[ment]," "espous[al]," and "persua[sion]" regardless of context and without any requirement that the advocacy compel others to imminent action. Indeed, the Foreign Affairs Manual explicitly recognizes that the ideological exclusion provision is aimed at speech that falls short of incitement. The State Department's guidance with respect to the incitement inadmissibility provision carefully hews the constitutional line in that it warns that "Advocacy of Terrorism not Always Exclusionary," 9 F.A.M. 40.32, n.6, and explains:

> 'To incite' is variously defined as to urge to action; to provoke and urge on; or to arouse; it connotes speech that is not merely an expression of views but that directs or induces action, typically in a volatile situation. 'Incitement' in the context of INA 212(a)(3)(B) is speech that induces or otherwise moves another person to undertake a terrorist activity. Normally speech will not rise to the level of 'inciting' unless there is a clear link between the speech and an actual effort to undertake the terrorist activity.

Id. at n.6.1.a. The guidance admonishes officials "to carefully consider the relevant circumstances in determining whether there is reasonable ground to believe that the applicant incited terrorist activity, and, if so, whether he or she did so with the requisite

intent to cause death or serious bodily harm." *Id.* at n.6.1.b. By contrast, guidance with respect to the ideological exclusion provision is entitled "Public Endorsement," explains that the "provision does not require a finding of specific intent (as is the case in the incitement provisions) . . . rather it is directed at irresponsible expressions of opinion," and provides an example of supportive speech that is offensive but not incitement. *Id.* at n.6.1; *id.* at n.6.2.3.

A statute aimed at excluding aliens based on the content of constitutionally protected speech is no more "facially legitimate and bona fide" than an executive official's decision to exclude an alien on that basis.[23] Thus, in *Rafeedie v. I.N.S.*, 795 F. Supp. 13 (D.D.C. 1992), the court found facially invalid an immigration statute that permitted the government to exclude or deport aliens for advocating or teaching, among other things, overthrow of the government. Looking to *Brandenburg*, the court remarked that "[a]dvocacy of a philosophy of violence and disruption is an insufficient ground on which to restrict First Amendment liberties." *Id.* at 22 (internal quotation marks omitted); *see also Adams v. Baker*, 909 F.2d. 643, 648 & n.4 (1st Cir. 1990) (stating that mere abstract advocacy of resort to violence "cannot form the basis for exclusion" and noting that *Noto v. United States* "governs the reliance upon speech-related activities as a basis for the exclusion of aliens into the United States"). Like the statute that was at issue in *Rafeedie*,

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[23] It remains open to serious question whether *Mandel*'s "facially legitimate bona fide" test is the appropriate constitutional yardstick. In recent years, the Supreme Court has eschewed more deferential standards of review when presented with constitutional challenges to immigration laws brought by United States citizens or legal permanent residents. *See, e.g., Nguyen v. I.N.S.*, 533 U.S. 53, 61 (2001) (applying intermediate scrutiny to equal protection challenge to immigration statute and expressly refusing to decide "whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power"); *Zadvydus v. I.N.S.*, 533 U.S. 678, 695 (2001); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 Geo. Immigr. L.J. 339 (2002). Plaintiffs do not press the point here because the ideological exclusion provision cannot survive scrutiny even under *Mandel*.

the ideological exclusion provision violates the First Amendment because it is aimed at constitutionally permissible advocacy that merely expresses opinion and does not incite any listener to action, let alone imminent lawless action. The government does not have the authority to bar foreign scholars from the country simply because they have expressed ideas that U.S. citizens and residents have a constitutional right to hear.

c. The ideological exclusion provision constitutes a prior restraint and an unconstitutional licensing scheme.

The ideological exclusion provision is unlawful for the additional reason that it operates as a licensing scheme that invests executive officers with unbridled discretion to suppress speech. By investing executive officers with the authority to exclude foreign scholars who (in their determination) have "endorsed or espoused terrorism," the provision permits executive officers sweeping power to determine which foreign citizens U.S. citizens and residents can meet with and which speech they can hear. A law that permits executive officers such authority is a licensing scheme and properly evaluated as a prior restraint. *See, e.g., Alexander v. United States*, 509 U.S. 544 (1993) ("the term prior restraint describes orders forbidding certain communications that are issued before the communications occur") (internal quotation marks omitted); *MacDonald v. Safir*, 206 F.3d 183, 194 (2d Cir. 2000) ("if rules condition the exercise of expressive activity on official permission . . . they . . . constitute a prior restraint on speech") (internal quotation marks omitted); *Beal*, 184 F.3d at 124; *In re G. & A. Books, Inc.*, 770 F.2d 288 (2d Cir. 1985); *see also* Erwin Chemerinsky, Constitutional Law Principles and Policies § 11.2.3.4 (2d ed. 2002) (characterizing licensing schemes as "the classic type of prior restraint").

The Supreme Court's seminal case in this area is *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 149-50 (1969), which concerned the constitutionality of a

Birmingham, Alabama ordinance that allowed city officials to refuse a parade permit if, in their judgment, "the public welfare, peace, safety, health, decency, good order, morals or convenience require[d] that [the permit] be refused." The Supreme Court found the ordinance unconstitutional because it "conferred upon [city officials] virtually unbridled and absolute power to prohibit any parade, procession, or demonstration on the city's streets or public ways." *Id.* at 150. The Court wrote,

> [A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without *narrow, objective, and definite standards* to guide the licensing authority, is unconstitutional. It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Id. at 150-151 (emphasis added); *cf. Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (finding that a statute authorizing Secretary of State to deny passports for travel to Cuba could not be read to "grant the Executive totally unrestricted freedom of choice"); *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (finding that the Secretary of State's authority to deny passports to citizens could not constitutionally be construed "to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose"). As the Supreme Court wrote in *Cox v. Louisiana*, 379 U.S. 536, 557 (1965), "[i]t is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among person or groups . . . by use of a statute providing a system of broad discretionary licensing power."

In *Shuttlesworth*, the Court determined that the challenged law allowed excessive discretion because it allowed prior restraints to be issued upon executive officers'

consideration of such things as "decency," "good order," and "morals." *Shuttlesworth*, 394 U.S. at 156-58. Since *Shuttlesworth*, the courts have consistently invalidated licensing schemes that invest executive agents with unfettered discretion. *See, e.g., City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 769 (1988) (finding discretion to be impermissibly unfettered where ordinance allowed Mayor to deny license for "such other terms and conditions deemed necessary" by him); *MacDonald*, 206 F.3d at 192 (finding constitutionally problematic a regulation that allowed city official to deny parade permit if he believed parade would be "disorderly in character or tend to disturb the public peace"). In a recent case, the Supreme Court wrote that "[I]f [a] permit scheme involves *appraisal of facts, the exercise of judgment, and the formation of an opinion* . . . by the licensing authority, the danger of censorship and of abridgement of our precious First Amendment freedoms is too great to be permitted." *Forsyth County*, 505 U.S. at 131 (internal quotations omitted and emphasis added).

The ideological exclusion provision is plainly unconstitutional under *Shuttlesworth* and its progeny. It invests executive officers with the authority to determine, *on the basis of the content of speech*, which foreign nationals U.S. citizens and residents can meet with and, consequently, which ideas U.S. citizens and residents can hear. Yet, it does not cabin executive discretion with narrow, objective, and definite standards. Instead, it asks them to consider whether any given foreign national has "endorsed" or "espoused" terrorism or "persuaded" others to do so. Those words do not have clear meanings, they are nowhere defined in the statute, and their application will inevitably be contentious in particular cases. Has a Canadian legislator endorsed or espoused terrorism if she has argued that the war in Iraq is illegal? *Cf.* SUF § XIII.B-D (Nelson Decl. ¶ 18). Has an Israeli professor

endorsed or espoused terrorism if her scholarship attempts to understand the motives of suicide bombers or betrays sympathy for their political complaints? *Id.* (Fitzmier Decl. ¶ 16). Agency regulations only compound the problem. SUF § IX.A (Nelson Decl. ¶ 26 & Exh. A). That the government invoked the ideological exclusion provision to explain the revocation of Professor Ramadan's visa in 2004 provides still further evidence, if any were needed, that the provision's terms are broad, vague, and manipulable. *Cf. Forsyth County*, 505 U.S. at 133 ("Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees."); *Cox*, 379 U.S. at 557 ("[T]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor.").

The ideological exclusion provision, in other words, "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will" of executive officials. *Shuttlesworth*, 394 U.S. at 151. The First Amendment does not permit executive officials to be invested with such authority.

d. The ideological exclusion provision is unconstitutionally vague.

For similar reasons, the ideological exclusion is unconstitutionally vague. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see United States v. Cabot*, 325 F.3d 384, 385 (2d Cir. 2003); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Vagueness is a special concern where, as here, a statute implicates First Amendment freedoms, because in this context "[u]ncertain meanings inevitably lead

citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned*, 408 U.S. at 109 (internal quotations marks omitted); *Chatin v. Coombe*, 186 F.3d 82, 86 (2d Cir. 1999). Thus, the Supreme Court has held that, "[w]here a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Vill. of Hoffman Estates Inc. v. Flipside*, 455 U.S. 489, 499 (1982); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

The Second Circuit has held that a statute is void for vagueness if it fails to "give[] the person of ordinary intelligence a reasonable opportunity to know what is prohibited," *Chatin*, 186 F.3d at 87 (quoting *United States v. Strauss*, 999 F.2d 692, 697 (2d Cir. 1993)), or if it fails to "provide[] explicit standards for those who apply it," *Grayned*, 408 U.S. at 108-09 ("if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them"); *Kolender v. Lawson*, 461 U.S. 352, 357-58, 361 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). The ideological exclusion provision fails on both counts. As noted above, the terms "endorse," "espouse," and "persuade" are elastic and manipulable. They are nowhere defined in the Immigration and Nationality Act. *Cf. Chatin*, 186 F.3d at 87 (in sustaining vagueness challenge, noting that statute failed to defined the challenged terms); *Rafeedie*, 795 F. Supp. at 23 (same); *Massieu v. Reno*, 915 F. Supp. 681, 701 (D. N.J.), *rev'd on other grounds*, 91 F.3d 416 (3d Cir. 1996) (same). They are nowhere defined in statute's legislative history. *Cf. Boutilier v. I.N.S.*, 387 U.S. 118, 121-22 (1967) (in sustaining

vagueness challenge, noting that legislative history failed to define the challenged terms); *Massieu*, 915 F. Supp. at 701 (same). And the relevant agency regulations render the terms only more susceptible to abuse. Nelson Decl. ¶ 26 & Exh. A. The terms neither provide fair notice of what speech is proscribed nor provide executive officers with explicit standards for enforcement.[24]

Unsurprisingly, the courts have invalidated similarly vague terms in a diversity of contexts. *See, e.g., Connally*, 269 U.S. at 393-95 (minimum wage statute); *Papachristou*, 405 U.S. at 156 (vagrancy statute); *Humanitarian Law Project v. Reno*, 380 F. Supp. 2d 1134, 1149-53 (C.D.Cal. 2005) (statute criminalizing material support); *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1203-04 (C.D.Cal. 1998), *affirmed* 205 F.3d 1130 (9th Cir. 2000) (statute criminalizing material support); *Massieu*, 915 F. Supp. at 689-90 (deportation provision); *Rafeedie*, 795 F. Supp. at 23 (deportation provision); *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 597-605 (1967) (statute rendering teachers ineligible for employment if they advocated Communism or forceful overthrow of government); *Smith*, 415 U.S. at 571, 581-82 (statute criminalizing contemptuous treatment of the U.S. flag); *Kolender*, 461 U.S. at 352, 358 (statute requiring "loiterers" to provide police with "credible and reliable" identification); *Cox*, 379 U.S. at 551-52 (statute that criminalized "breach[ing] the peace").

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that the Court enter summary judgment in their favor and (i) declare that defendants' reliance on the material

[24] Nor is the provision's vagueness mitigated by a scienter requirement. *Cf. Vill. of Hoffman Estates Inc.*, 455 U.S. at 499 (noting that a scienter requirement may mitigate a law's vagueness). *See* section II.b., *supra*. SUF § IX (Nelson Decl. ¶ 26 & Exhs. A-B).

support provision to exclude Professor Ramadan violates the APA and the First Amendment; (ii) declare that the ideological exclusion provision, as written and as construed by defendants, violates the First and Fifth Amendments on its face; (iii) enjoin defendants from relying on the material support provision to exclude Professor Ramadan; and (iv) enjoin defendants from relying on the ideological exclusion provision to exclude Professor Ramadan or any other individual.

Respectfully submitted,

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Feb. 23, 2007

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2007 I served the following documents: (1) Plaintiffs' Motion for Summary Judgment; (2) Plaintiffs' Memorandum in Support of Motion for Summary Judgment; (3) Statement of Undisputed Facts; and (4) six affidavits submitted in support of Plaintiffs' Motion for Summary Judgment, by causing one copy to be delivered via electronic mail and overnight courier to each of:

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