UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN ACADEMY OF RELIGION, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, PEN AMERICAN CENTER, and TARIQ RAMADAN,	
Plaintiffs,	**ECF CASE**
- v.-	06 Civ. 588 (PAC)
MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Security; CONDOLEEZZA RICE, in her official capacity as Secretary of State,	
Defendants.	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Defendant Michael Chertoff, in his official capacity as Secretary of Homeland Security, and Condoleezza Rice, in her official capacity as Secretary of State, by their counsel, Michael J. Garcia, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in opposition to plaintiffs' motion for a preliminary injunction.

PRELIMINARY STATEMENT

In this suit, plaintiffs challenge the constitutionality of one provision of the statutory scheme defining aliens' eligibility for admission to the United States, § 212(a)(3)(B)(i)(VII) of the Immigration and Nationality Act (the "INA"), 8 U.S.C. § 1182(a)(3)(B)(i)(VII), which renders ineligible any alien who "endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization." Plaintiffs wish to confer in the United States with Muslim scholar Tariq Ramadan, an alien who resides abroad. While not pressing their facial challenge to § 212(a)(3)(B)(i)(VII) in this motion, plaintiffs make an "as applied" challenge to the asserted exclusion of Mr. Ramadan pursuant to that provision, and seek a preliminary injunction (a) requiring the immediate resolution of Mr. Ramadan's pending visa application and (b) barring the United States from excluding Mr. Ramadan based on § 1182(a)(3)(B)(i)(VII).

Plaintiffs' motion should be denied for a number of reasons. First, the central premise of plaintiffs' motion is factually incorrect: contrary to plaintiffs' assertions, Mr. Ramadan has never had a visa revoked on the basis they allege, and the Government does not presently anticipate that he will be excluded on that basis. Accordingly, plaintiffs are not entitled to a preliminary injunction because they have suffered no injury and so lack standing to obtain the relief they seek; Mr. Ramadan's visa application is pending and plaintiffs' claims regarding that application are therefore unripe for judicial review; and plaintiffs cannot demonstrate that they will suffer "irreparable harm" absent the requested injunction. See infra at 11-18.

Plaintiffs' motion also should be denied because they are not likely to succeed on the merits. The Supreme Court has repeatedly confirmed that, under the Constitution, Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden," Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)), and that Congress is constitutionally empowered "'to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention.'" Id. (quoting Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895)). This is so because "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." Id. at 766-67 (quoting Galvan v. Press, 347 U.S. 522, 531-32 (1954)).

In light of this plenary power, courts' lack of constitutional authority to hear disputes relating to the visa-issuing process is overwhelmingly established and subject to scarce, if any, exception. Under the doctrine of "consular nonreviewability," courts refuse to hear claims that the Government violated procedural or substantive law in denying or failing to act on visa applications, under virtually any theory, even where the complaining party is a United States citizen. See infra at 19-23. This doctrine precludes the relief sought by plaintiffs here.

Even First Amendment claims by Americans who assert that their right to receive ideas from an alien has been violated by an improper refusal to issue the alien a visa receive narrow, if any, judicial review. In Kleindienst, 408 U.S. at 768, the Supreme Court held that ordinary First Amendment principles do not apply in the context of exclusion of aliens, lest "the plenary discretionary authority Congress granted the Executive [over the admission of aliens] becomes a nullity," and therefore held that courts will not entertain even First Amendment challenges if the

Government articulates a "facially legitimate and bona fide" reason for the exclusion under challenge. Id. at 768-69. While holding that courts could not look behind or disturb exclusions of aliens so long as the Government articulated such a justification, the Court declined to reach the question of whether courts could exercise any review even in the absence of such a justification. Id. at 769-770.

Kleindienst does not aid plaintiffs here for two reasons, even assuming, arguendo, that review of claims relating to the exclusion of an alien is ever authorized.[1] First, Kleindienst cannot sensibly be applied where, as here, the Government has not in fact rejected a visa application on the basis under constitutional challenge, because the Government can hardly be expected to "justify" a purported decision to exclude an alien on a basis that it has not in fact applied. Moreover, the explanation provided herein by the Government is facially legitimate and bona fide such that any judicial review would be barred by Kleindienst. See infra at 24-33.

Accordingly, the Court should deny plaintiffs' motion for a preliminary injunction.

RELEVANT STATUTORY FRAMEWORK

Immigration and visa-related matters are largely controlled by the Immigration and Nationality Act of 1952, Pub. L. 82-414 of June 27, 1952, as amended.

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[1] Kleindienst did not reach the Government's contention that Americans' First Amendment interests could not be considered even if the Executive gave no explanation whatsoever for its exclusion decision, ruling instead on the narrower ground that, because in Kleindienst the Government had advanced a "facially legitimate and bona fide" justification for exclusion, that explanation was sufficient, and the Court did not need to resolve the Government's broader contention of absolute unreviewability. 408 U.S. at 769-770. Likewise here the Court need not reach the question left open by the Supreme Court, because its standard is both inapplicable to, and satisfied by, the circumstances of this case.

Nonimmigrant aliens ordinarily may not enter the United States unless in possession of a valid nonimmigrant visa. See 8 U.S.C. § 1182(a)(7)(B)(i)(II). Authority for granting nonimmigrant visas is vested in consular officers and is governed by INA § 221(g), 8 U.S.C. § 1201(g). Section 221(g) provides, in relevant part:

> No visa or other documentation shall be issued to an alien if (1) it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law, (2) the application fails to comply with the provisions of this chapter, or the regulations issued thereunder, or (3) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law. . . .

8 U.S.C. § 1201(g); see also INA § 104(a), 8 U.S.C. § 1104(a) (authority of consular officials to grant or refuse visas).

Section 212 of the INA sets forth numerous bases for which visa applicants may be found ineligible for admission to the United States, only one of which, INA § 212(a)(3)(B)(i)(VII), 8 U.S.C. § 1182(a)(3)(B)(i)(VII), is under constitutional challenge here. That subsection provides:

> (3) Security and related grounds
>
> (B) Terrorist activities
>
> (i) In general. --Any alien who— . . .
>
> (VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization . . . is inadmissible.[2]

Once a visa is issued, it can be revoked by nonreviewable order of a consular official pursuant to INA § 221(i), 8 U.S.C. § 1201(i), which provides:

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[2] The REAL ID Act of 2005, which took effect on May 11, 2005, amended this provision. See REAL ID Act of 2005, § 103, Pub. L. No. 109-13, 119 Stat. 231, 308 (2005).

> After the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. Notice of such revocation shall be communicated to the Attorney General, and such revocation shall invalidate the visa or other documentation from the date of issuance. . . . There shall be no means of judicial review (including review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title) of a revocation under this subsection, except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 237(a)(1)(B).

8 U.S.C. § 1201(i).

Finally, section 212 of the INA establishes a waiver provision under which some categories of aliens who are ineligible for a visa may nevertheless obtain permission to enter the United States. 8 U.S.C. § 1182(d)(3). Responsibility for the waiver process has been transferred from the Attorney General to the Secretary of Homeland Security. See 8 U.S.C. §§ 1103(a), 1182(d)(3)(B).

FACTUAL BACKGROUND

A. Prior Visa Applications Involving Tariq Ramadan

On May 5, 2004, Tariq Ramadan was issued an H-1B visa to work as a professor at the University of Notre Dame.[3] See Declaration of Christopher R. Dilworth ("Dilworth Decl."), ¶ 3. Following the issuance of that visa, the State Department received information, in the ordinary course of business, that might have led to a determination that Mr. Ramadan was inadmissible and, therefore, not entitled to a visa. See id. Accordingly, on July 28, 2004, the State Department

[3] An H-1B visa is a nonimmigrant classification used by an alien who will be employed temporarily in a specialty occupation. H-1B status requires a sponsoring United States employer to file a labor condition application with the Department of Labor. Once the Department of Homeland Security has approved a petition, the alien may apply for the H-1B visa. See "H-1B Frequently Asked Questions," United States Citizenship and Immigration Services, available at <www.uscis.gov/graphics/howdoi/h1b.htm#what> (last visited March 31, 2006).

prudentially revoked Mr. Ramadan's H-1B visa pursuant to 8 U.S.C. § 1201(i) based on the information it had received. See id. ¶ 6.

The Department of State's "prudential revocation" authority is discussed in the Foreign Affairs Manual ("FAM") in Volume 9, § 41.122 Procedural Notes 12.3, a copy of which is attached to the Dilworth Declaration as Exhibit A. As the FAM explains, "prudential revocations . . . do not constitute permanent finding[s] of ineligibility. They simply reflect that, after visa issuance, information surfaced that has called into question the subject's continued eligibility for a visa. Subjects of prudential revocations are free to reapply and reestablish their eligibilities." 9 FAM § 41.122 Procedural Note 12.3(b).

The purpose of a prudential revocation is to allow a consular officer to see the applicant again and elicit further information that either confirms the ineligibility and leads to a firm visa refusal, or discounts it and clears the applicant for a solid issuance. See Dilworth Decl. ¶ 4. A prudential revocation of a visa is a safety precaution that, in security cases, is issued with a relatively low threshold of information to ensure that all relevant or potentially relevant facts about an alien are thoroughly explored before the Department of State admits the alien to the United States. See id. In some instances, the information can be explained by the applicant in a way that clarifies the question at hand and eliminates the potential concern. In such cases, the visa is simply re-issued and the subject's name is purged from the lookout system. See id..

Consistent with its policies regarding prudential revocation, the State Department did not make any permanent finding in 2004 that Mr. Ramadan was ineligible for a visa under any provision of 8 U.S.C. § 1182(a)(3). See id. ¶ 6. Mr. Ramadan was provided with oral notice of the prudential revocation by a consular officer. See id. ¶ 7.

Mr. Ramadan reapplied for a visa on October 4, 2004. See id. ¶ 8; see also Declaration of Tariq Ramadan, submitted in support of Plaintiffs' Motion for a Preliminary Injunction ("Ramadan Decl.") ¶ 24 (confirming date of application while stating that application was submitted by University of Notre Dame with his cooperation). At that time, the visa was refused pursuant to the provisions of INA § 221(g), 8 U.S.C. § 1201(g). See Dilworth Decl. ¶ 8. Section 221(g) is primarily an administrative refusal used to close a case pending the receipt of further information, which typically consists of additional documentation from an applicant or a Security Advisory Opinion ("SAO") from Washington. See id. Once the required information is obtained, the case is reopened, and a final adjudication is made. See id. In Mr. Ramadan's case, an SAO was sent and it was expected that, at the conclusion of this review, a final decision would be made by the consular officer regarding Mr. Ramadan's admissibility. See id.

However, in December 2004, before that review could be completed, Mr. Ramadan withdrew his acceptance of Notre Dame's job offer. See id. ¶ 9. Because the H-1B visa application was based on that employment, the Department of Homeland Security revoked the validity of the H-1B petition on January 28, 2005. See id.; see also Ramadan Decl. Ex. V (copy of DHS notice dated December 21, 2004 informing applicant that, in light of reported resignation of Mr. Ramadan, DHS intended to revoke approval of the petition, with a final decision to follow after 30 days). Once there was no longer a valid petition on which to base the visa application, that application was rendered moot. See id.

Plaintiffs allege that the July 2004 revocation of Mr. Ramadan's visa was based on 8 U.S.C. § 1182(a)(3)(B)(i)(VII). See, e.g., Complaint ("Compl.") ¶¶ 2, 23. That allegation is incorrect. Mr. Ramadan has never had a visa revoked, a visa application denied, or any other adverse action taken

against him, pursuant to that provision. See Dilworth Decl. ¶ 14. Accordingly, any statement to the contrary that may have appeared in the media or may have been made by any government spokesperson was erroneous.

B. Ramadan's Pending Visa Application

On September 16, 2005, Mr. Ramadan submitted a visa application to the United States Embassy in Bern, Switzerland. See id. ¶ 10. That application presented an opportunity for a consular officer to ensure that all relevant or potentially relevant facts about Mr. Ramadan were thoroughly explored before he would be issued a visa to the United States. See id. ¶ 11. In furtherance of that objective, two interviews were conducted of Mr. Ramadan. See id. The first, held in September 2005, followed up on the information underlying the prudential revocation. See id. After the results of the first interview were analyzed, and certain gaps identified, a second interview was scheduled and held in December 2005. See id.

In the course of these interviews, Mr. Ramadan made statements that raised serious questions concerning his eligibility for a visa under provisions under the INA. See id. ¶ 12. The investigation, analysis, and deliberations related to those statements account for the delay associated with the pending visa application, which remains under active consideration. See id. While processing of that application is not completed, based on information available to the Government as of March 31, 2006, the relevant Government officials have not determined, and do not at this time intend to determine, for purposes of the pending visa application, that Mr. Ramadan is ineligible under INA § 212(a)(3)(B)(i)(VII), the provision plaintiffs challenge here. See id. ¶ 13.

The Government cannot predict the additional time required to complete processing of Mr. Ramadan's pending visa application. See id. ¶ 15. As noted on the website of the United States

Embassy in Bern, "[r]ecent changes in U.S. visa laws and regulations have increased the amount of time it can take to get a visa. Stricter security measures require more thorough checks and lengthen the visa application process but ensure the safety of visitors and U.S. citizens alike." "Non-Immigrant Visas," United States Embassy, Bern, Switzerland, available at <http://bern.usembassy.gov/non-immigrant_visas.html> (last visited March 30, 2006). Relevant national security-related provisions are set forth, inter alia, at 8 U.S.C. § 1182(a)(3).

No alien may be admitted to the United States until an informed determination can be made as to the alien's admissibility under the INA. See Dilworth Decl. ¶ 15.

C. Plaintiffs' Allegations Concerning Ramadan's Background and Views on Terrorism

In support of their contention that Mr. Ramadan's visa could not legitimately be revoked or denied on the basis of § 1182(a)(3)(B)(i)(VII), which applies to those who endorse or espouse terrorism, plaintiffs extensively discuss Mr. Ramadan's background and statements and views on terrorism. See Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("Pl. Br.") at 11-18; Ramadan Decl. ¶¶ 9-11, 17-22. In light of the fact that the United States Government has never determined and does not now anticipate determining that Mr. Ramadan is ineligible on the basis of espousing or supporting terrorism within the meaning of § 1182(a)(3)(B)(i)(VII), all such discussion has no bearing on the pending motion.

ARGUMENT

PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

A. Standards for Entry of Preliminary Injunction

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original) (citation omitted). "First, the party must demonstrate that it will suffer irreparable harm in the absence of the requested relief." Latino Officers Ass'n v. Safir, 170 F.3d 167, 171 (2d Cir. 1999). Ordinarily, even if the moving party establishes irreparable harm, the Court may not grant the requested injunction unless the moving party also demonstrates either (a) that it is likely to succeed on the merits or (b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships that tips decidedly in favor of the moving party. Charette v. Town of Oyster Bay, 159 F.3d 749, 754 (2d Cir. 1998).

"But when, as here, the moving party seeks a preliminary injunction that will affect 'government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.'" Wright v. Guiliani, 230 F.3d 543, 547 (2d Cir. 2000) (citation omitted); see also Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 424 (2d Cir. 2004) (because "government action[s] taken in furtherance of a regulatory or statutory scheme [are] presumed to be in the public interest[,] in such situations, a plaintiff must meet a 'more rigorous likelihood-of-success standard'" to obtain preliminary injunctive relief) (internal citation omitted). Moreover, "an even higher standard of proof comes into play when the injunction sought will alter rather than maintain the status quo[: i]n

such case, the movant must show a 'clear' or 'substantial' likelihood of success." Wright, 230 F.3d at 547.

In this case, therefore, plaintiffs must establish both irreparable harm, and a "clear or substantial" likelihood of success on the merits. Tunick v. Safir, 209 F.3d 67, 70 (2d Cir. 2000). They have not established either.

B. Plaintiffs Have Not Shown They Will Suffer Irreparable Harm Absent an Injunction

Plaintiffs have not made the required "clear showing" that they will suffer irreparable harm absent the requested injunction. Plaintiffs rely heavily on the familiar notion that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Pl. Br. at 9 (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). However, the mere "assertion of First Amendment rights does not automatically require a finding of irreparable injury[.]" Hohe v. Casey, 868 F.2d 69, 72-73 (3d Cir. 1989); see also Bronx Household of Faith v. Bd. of Educ. of City of New York, 331 F.3d 342, 350 (2d Cir. 2003) ("in instances where a plaintiff alleges injury from a rule or regulation that may only potentially affect speech, the plaintiff . . . must demonstrate that the injunction will prevent the feared deprivation of free speech rights"); Lore v. City of Syracuse, No. 00-CV–1833 (HGM) (DEP), 2001 WL 263051, at *6-7 (N.D.N.Y. Mar. 9, 2001) (citing cases). Rather, as the Second Circuit has indicated, "it [is] often [] more appropriate to determine irreparable injury by considering what adverse factual consequences the plaintiff apprehends if an injunction is not issued, and then considering whether the infliction of those consequences is likely to violate any of the plaintiff's rights." Time Warner Cable of N.Y.C. v. Bloomberg, L.P., 118 F.3d 917, 924 (2d Cir. 1997); see also Charette, 159 F.3d at 755. Further, to constitute "irreparable harm" the asserted injury must be "neither remote nor speculative, but actual

and imminent." Rodriguez ex rel. Rodriguez v. DeBuono, 175 F.3d 227, 234 (2d Cir. 1999) (quoting Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 332 (2d Cir. 1995)).

Here, plaintiffs' application hinges entirely on a false premise, and a purported First Amendment violation that plaintiffs assert would flow from that premise – namely, that Mr. Ramadan's prior visa revocation was based on § 1182(a)(3)(B)(i)(VII), and that his pending application is apt to be rejected on that same basis, which in turn would improperly deprive plaintiffs of face-to-face interaction with him.[4] See Pl. Br. at 12-18. The State Department, however, has never denied a visa application by or on behalf of Mr. Ramadan or revoked a visa of Mr. Ramadan's based on a finding of inadmissibility under § 1182(a)(3)(B)(i)(VII) and does not now contemplate denying his pending application on that basis. Accordingly, even assuming arguendo that any visa denial to Mr. Ramadan could constitute a constitutionally cognizable injury to plaintiffs, but see infra at 16-17, plaintiffs cannot establish that the complained-of "harm" – a denial based on § 1182(a)(3)(B)(i)(VII) depriving them of the ability to meet here with Mr. Ramadan – would occur in the absence of an injunction.

The same is true of plaintiffs' further request for an order enjoining the Government from excluding Mr. Ramadan "on the basis of speech that United States residents have a constitutional right to hear," Pl. Br. at 2 n.2. Plaintiffs have presented no factual basis – as opposed to mere speculation – to conclude that Mr. Ramadan will be excluded on that basis, and thus have not made the required "clear showing" that they will suffer the harm of being unconstitutionally deprived of

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[4] The First Amendment does not afford plaintiffs any broad right to secure the admission of aliens with whom they wish to confer. See infra at 24-27. Accordingly, for irreparable harm analysis, the Court should consider only those "factual consequences" that would be "likely to violate any of the plaintiff's rights." Time Warner Cable, 118 F.3d at 924.

Mr. Ramadan's presence due to the Government's expectation of what Mr. Ramadan would say if granted entry to the United States.

Likewise, plaintiffs have not clearly shown that they will be irreparably harmed absent an order requiring "defendants immediately to adjudicate Ramadan's pending visa application." Pl. Br. at 2 n.2. Because plaintiffs do not – and cannot – attack the constitutionality of all applicable immigration law, the relevant harm must be only any unconstitutional or unlawful exclusion under the provision under attack – not broadly an exclusion on any basis. But plaintiffs have not shown any likelihood beyond pure conjecture that Mr. Ramadan will be excluded on any allegedly improper basis, and, accordingly, they have not shown that the "factual consequences" that would flow from non-issuance of an injunction would be "likely to violate any of the plaintiff's rights." Time Warner Cable, 118 F.3d at 924. This showing is insufficient. See Rodriguez, 175 F.3d at 234 (harm must be "neither remote nor speculative").

While plaintiffs cite a number of landmark cases holding that prior restraints on speech and other alleged First Amendment violations constitute paradigmatic irreparable harm, those cases are distinguishable in important respects. See Pl. Br. at 9-10 (citing, e.g., Elrod, 427 U.S. at 373; Bronx Household of Faith, 97 F.3d at 693). Most of the cases plaintiffs cite did not involve the exclusion of aliens, and presented questions as to whether the direct consequences of a governmental action or legal requirement impermissibly infringed on a plaintiff's First Amendment rights. Such cases necessarily were procedurally simple; if the governmental acts or laws sought to be enjoined were unconstitutional, then harm would directly flow from those acts or regulations, and a preliminary injunction unquestionably would prevent that harm. This relatively straightforward procedural posture simply does not apply in the exclusion context, which the Supreme Court has recognized

differs markedly from other First Amendment jurisprudence and is subject to uniquely circumscribed judicial review. See Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (so long as Executive exercises power to exclude alien "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against . . . First Amendment interests. . . .").

The few cases cited by plaintiffs that involve the exclusion of aliens are inapposite. First, plaintiffs cite no case – and the Government is aware of none – in which a court enjoined an exclusion or other travel restriction of an alien where the Government's basis for the exclusion or restriction had not previously been applied to the alien or was not imminently threatened. For example, in Mandel v. Mitchell, 325 F. Supp. 620 (E.D.N.Y. 1971), rev'd on other grounds sub nom. Kleindienst v. Mandel, 408 U.S. 753 (1972), which concerned the constitutionality of excluding an alien based on a statute rendering ineligible for admission adherents of "world communism," the Government "oppose[d] the [preliminary injunction] motion on the ground, not challenged, that [the alien] is an advocate of . . . world communism and therefore ineligible to receive a visa under" the provision under constitutional attack. Mandel, 305 F. Supp. at 624-25. Thus, plaintiffs' application was aimed at the "actual or imminent" harm of the alien's exclusion based on the allegedly unconstitutional provision. Similarly, in Harvard Law School Forum v. Shultz, 633 F. Supp. 525, 526-27 (D. Mass.), vacated, 852 F.2d 563 (1st Cir. 1986),[5] the State Department had undisputedly refused to allow the PLO's observer to the United Nations to travel to Massachusetts to participate

[5] Plaintiffs characterize the district court's decision in Harvard Law School Forum as having been "vacated as moot." Pl. Br. at 9. However, the only published reference to the Court of Appeals's resolution found by this Office indicates that the First Circuit simply states without elaboration that the decision was "vacated." See 852 F.2d 525 (1st Cir. 1986) (table).

in a program at Harvard Law School, consistent with a condition on his entry to the United States that he remain within 25 miles of Manhattan. Plaintiffs sought to enjoin the travel prohibition as violating Americans' right to hear the observer at the proposed event. Thus, an order enjoining the travel restriction under constitutional attack would have permitted the observer to participate in the forum, thereby eliminating the alleged constitutional harm, and, accordingly, the court found that plaintiffs met the irreparable injury requirement. See id.[6]

Finally, plaintiffs cannot establish that they will suffer irreparable harm absent an order requiring "defendants immediately to restore . . . Ramadan's eligibility to rely on the visa waiver program described in 8 U.S.C. § 1187(a)." Pl. Br. at 2 n.2. Again, under Time Warner, the relevant question is whether the "infliction of [the] consequences" that plaintiffs foresee will violate their rights. Here those consequences will not violate plaintiffs' rights because, as explained below, plaintiffs have no rights whatsoever to have Mr. Ramadan's eligibility to rely on a visa waiver program adjusted, so that the lack of the requested injunction will not deprive them of any rights they enjoy. See infra at 22.

C. Plaintiffs Cannot Establish a Likelihood of Success on the Merits

Nor have plaintiffs made the required "clear showing" of a likelihood of success on the merits on any of the relief they seek.

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[6] Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985), cited in the section of plaintiffs' brief addressing irreparable injury, was not a preliminary injunction decision at all, but a denial of the Government's motion to dismiss, or, in the alternative, for summary judgment.

1. Plaintiffs Lack Standing to Bring Their Claims Concerning Ramadan's Pending Visa Application

Plaintiffs lack standing to bring their claims concerning Mr. Ramadan's pending visa application for at least two reasons. First, plaintiffs cannot show that they have suffered or will imminently suffer an actual injury due to the exercise of § 1182(a)(3)(B)(i)(VII). See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (Article III standing requires "an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural."). Simply put, and as noted above, see supra at 7-8, Mr. Ramadan's visa has never been revoked pursuant to § 1182(a)(3)(B)(i)(VII), and defendants do not now contemplate denying his pending application on that basis. Thus, the purported harm that plaintiffs seek to avoid through their motion is wholly speculative, and does not satisfy Lujan's injury-in-fact requirement. See Animal Legal Defense Fund v. Espy, 23 F.3d 496, 500 (D.C. Cir. 1994) (Article III standing requires "that the plaintiff's injury be presently suffered or imminently threatened"); Lujan, 504 U.S. at 564 n.2 (requirement "ensure[s] that the alleged injury is not too speculative for Article III purposes – that the injury is certainly impending."); City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983).

Second, plaintiffs lack standing because the alleged injury is not likely to be redressed by the requested relief. While plaintiffs seek an order enjoining the Government from "relying on [§ 1182(a)(3)(B)(i)(VII)] to exclude" Mr. Ramadan from the United States, so that he may attend various upcoming conferences, Mr. Ramadan's visa application, like all visa applications, is governed by extensive statutory and regulatory requirements – not merely by the one narrow provision singled out by plaintiffs. Because his application is subject to denial on any of a number

of grounds, the relief requested by plaintiffs – an injunction against the use of § 1182(a)(3)(B)(i)(VII) – cannot guarantee Mr. Ramadan's admission to the United States and is therefore unlikely to fully redress the claimed harm. See Baur v. Veneman, 352 F.3d 625, 632 (2d Cir. 2003) (standing requires a plaintiff to "allege, and ultimately prove, that he has suffered an injury-in-fact that . . . is likely to be redressed by the requested relief"); Leibowitz v. New York Transit Auth., 252 F.3d 179, 184 (2d Cir. 2001) ("the court may hear only suits that may be redressed through a judgment of the court") (citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979)).

2. Plaintiffs' Claims Are Not Ripe for This Court's Review

For similar reasons, plaintiffs' request for injunctive relief does not present a live case or controversy ripe for resolution by this Court. The "central concern" of the ripeness doctrine "is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." 13A Wright & Miller, Federal Practice & Procedure Juris. 2d § 3532 (2004); accord AMSAT Cable Ltd. v. Cablevision of Conn. Ltd. P'ship, 6 F.3d 867, 872 (2d Cir. 1993). The rationale for the ripeness requirement "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99 (1977); see also Alabama State Federation of Labor, Local Union No. 103, United Bhd. of Carpenters & Joiners of Am. v. McAdory, 325 U.S. 450, 461 (1945) ("It has long been [the Supreme Court's] considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional questions in advance of the necessity for its decision.") (citations omitted); Simmonds v. Immigration & Naturalization Serv., 326 F.3d 351, 357 (2d Cir. 2003) (constitutional ripeness doctrine "prevents courts from declaring the meaning of the law in a vacuum and from constructing

generalized legal rules unless the resolution of an actual dispute requires it."). The ripeness requirement is particularly applicable to requests for injunctive relief concerning administrative action because "[t]he injunction and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." Abbott Laboratories, 387 U.S. at 148. In considering a case's ripeness for resolution, courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs., 387 U.S. at 149; accord AMSAT Cable Ltd., 6 F.3d at 872 (citing Abbott Labs., 387 U.S. at 149).

Plaintiffs here have not presented an issue fit for judicial review at this time. "This fitness inquiry is concerned with whether the issues sought to be adjudicated are contingent on future events or may never occur." Isaacs v. Bowen, 865 F.2d 468, 478 (2d Cir. 1989). Here, plaintiffs' request for injunctive relief relies exclusively upon an event that very well may not occur – the exclusion of Mr. Ramadan on a basis which the Government has said it does not presently intend to apply.

The second ripeness consideration – the hardship inquiry – also suggests that plaintiffs' preliminary injunction application is unripe for review. This test requires assessment of whether the plaintiffs would suffer an impact that "is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage," Abbott Laboratories, 387 U.S. at 152, or "whether the challenged action creates a direct and immediate dilemma for the parties." Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 478 (2d Cir. 1999). Plaintiffs will suffer no "direct and immediate" impact absent immediate judicial relief, because, as discussed above, the alleged injury (i.e., exclusion based on § 1182(a)(3)(b)(i)(VII)) has never occurred before and there is no non-speculative basis to believe that it will occur in the future absent the requested relief.

3. The Doctrine of Consular Nonreviewability Precludes the Relief That Plaintiffs Seek

Beyond the issues of standing and ripeness, plaintiffs are unlikely to succeed on the merits because the doctrine of "consular nonreviewability" precludes the relief they seek. See Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999) ("In view of the political nature of visa determinations and of the lack of any statute expressly authorizing judicial review of consular officers' actions, courts have applied what has become known as the doctrine of consular nonreviewability. The doctrine holds that a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise.").

In its 1972 Kleindienst decision, the Supreme Court reviewed relevant constitutional provisions, more than a century of the political branches' unfettered discretion over immigration (including restrictions based on ideology),[7] and courts' repeated recognition of the plenary power held by the political branches in this area. The Court reaffirmed that federal courts lack jurisdiction to overturn or otherwise review the decision of the Government to exclude an alien:

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

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[7] As the Supreme Court noted, alien migration to the United States was "unrestricted" until 1875, with Congress barring immigration of convicts and prostitutes in that year, and with the first "general immigration statute" passed in 1882. Kleindienst, 408 U.S. at 761. In 1903, Congress rendered ineligible for admission "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law." Id. In 1918, that exclusion was expanded to cover "subversive aliens," and in 1940 to aliens who, "at any time, had advocated or were members of or affiliated with organizations that advocated violent overthrow of the United States Government." Id. Thus, for substantial periods since 1903, the immigration laws have devoted "particular attention . . . first to anarchists and then to those with communist affiliation or views." Id. at 762.

Kleindienst, 408 U.S. at 766 (quoting Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895)); accord, e.g., Hsieh v. Kiley, 569 F.2d 1179, 1181 (2d Cir. 1978) ("[N]o jurisdictional basis exi[s]ts for review of the action of the American Consul in Taiwan suspending or denying the issuance of immigration visas. . . . It is settled that the judiciary will not interfere with the visa-issuing process.") (emphasis added); Rivera De Gomez v. Kissinger, 534 F.2d 518, 519 (2d Cir. 1976) (Judicial review of a consular decision not to issue a visa to plaintiff's husband is precluded; Supreme Court's Kleindienst decision and prior Second Circuit decisions "preclude any judicial review of the consular decision not to issue a visa in this case."); Burrafato v. United States Dep't of State, 523 F.2d 554, 556-57 (2d Cir.1975) (no subject matter jurisdiction to entertain claim by United States citizen wife that exclusion of husband was effected in violation of State Department procedural regulations, and therefore violated citizen wife's rights); Dong v. Ridge, No. 02 Civ. 7178, 2005 WL 1994090, at *3, 5 (S.D.N.Y. Aug. 18, 2005) ("As a general rule, courts lack subject matter jurisdiction to review the visa-issuing process. . . . The Court's inability to review consular decisions is 'essentially without exception.'") (citing cases); Al Makaaseb Gen. Trading Co. v. Christopher, No. 94 Civ. 1179, 1995 WL 110117, at *1 (S.D.N.Y. Mar. 13, 1995) ("It is beyond dispute that courts have no jurisdiction to review the denial of visas by consular officials.") (citing cases).

The doctrine of consular nonreviewability has withstood efforts to distinguish or overcome it on many grounds, including that the relevant consular official acted unlawfully. Indeed, courts lack jurisdiction to overturn a consular officer's visa decision even when the consulate's decision was contrary to law, otherwise erroneous, or arbitrary and capricious. See Dong, 2005 WL 1994090, at *3-5 (Apparent "violation of law," "[w]hile reprehensible, . . . cannot be a basis for judicial review";

"'[w]hether the consul has acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal to vise a passport . . . is beyond the jurisdiction of the court.'") (quoting United States ex rel. London v. Phelps, 22 F.2d 288, 290 (2d Cir. 1927)); Grullon v. Kissinger, 417 F. Supp. 337, 338-40 (E.D.N.Y. 1976), aff'd mem., 559 F.2d 1203 (2d Cir.1977); Al Makaaseb Gen. Trading Co., 1995 WL 110117, at *2 ("The reach of the doctrine of nonreviewability is broad. It precludes review of denials of visa applications even where, as here, the decision is alleged to have been contrary to law.").

Nor is the doctrine of consular nonreviewability rendered inapplicable by plaintiffs' invocation of the Administrative Procedure Act ("APA") or the Declaratory Judgment Act ("DJA"). See Compl. ¶ 5. Courts in the Second Circuit have consistently rejected the argument that either the APA or the DJA vests a court with jurisdiction to review the decision to grant or deny a visa. See, e.g., Hsieh, 569 F.2d at 1181-82 ("The [DJA] is remedial, not jurisdictional, and the [APA] . . . does not provide subject matter jurisdiction.") (citations omitted); Al Makaaseb General Trading Co., 1995 WL 110117, at *4 n.2 ("Nor can plaintiffs avoid the doctrine of [consular] nonreviewability by challenging the [consular official's] decision . . . under the [APA]"); Dinsey v. Dep't of Homeland Sec.-U.S. Citizenship & Immigration Servs., No. 03 Civ. 10081, 2004 WL 1698630, at *3 (S.D.N.Y. July 28, 2004) (finding that neither the APA nor the DJA provided court with jurisdiction to review decision concerning visa petition); Zheng v. Reno, 166 F. Supp. 2d 875, 878-81 (S.D.N.Y. 2001) (finding no subject matter jurisdiction under APA or DJA). Thus, plaintiffs may not rely on these statutes to obtain review of their contentions regarding Mr. Ramadan's visa application.

Indeed, the Second Circuit's decision in Hsieh, is in and of itself fatal to plaintiffs' claim to a right to an APA review of consular officer decisions relative to Mr. Ramadan. The Second Circuit

in Hsieh rejected exactly such an attempt to secure APA review of a visa denial, reaffirming that the consular nonreviewability doctrine precluded such an argument. Hsieh, 569 F.2d at 1181 (there exists "no jurisdictional basis . . . for review of the action of the American Consul . . . suspending or denying the issuance of immigration visas" (citing Kleindienst, 408 F.2d at 766)).

Likewise, plaintiffs may not circumvent the consular nonreviewability doctrine by asking this Court for an order – which in substance would be a writ of mandamus – compelling the Government to complete review of Mr. Ramadan's visa application or "immediately to restore Professor Ramadan's eligibility to rely on the visa waiver program. . .," Pl. Br. 2 n.2, because the visa process is discretionary, and the Government has no legal duty to complete its review of Mr. Ramadan's application within any specified time or in any particular way. The "extraordinary" remedy of mandamus relief is only available where a defendant owes a plaintiff a clear and peremptory duty. See, e.g., Pittson Coal Group v. Sebben, 488 U.S. 105, 121 (1988); Heckler v. Ringer, 466 U.S. 602, 616-17 (1984). The Second Circuit has cautioned that "a writ of mandamus [is] appropriate solely 'to compel officials to comply with the law when no judgment [or discretion] is involved with the compliance.'" Leonhard v. Mitchell, 473 F.2d 709, 712-13 (2d Cir. 1973) (citation omitted) (alterations in original). Because visa issuance is completely discretionary, see 8 U.S.C. §§ 1101(a)(9), 1101(a)(16), 1201, mandamus is not available as a remedy or as a basis of jurisdiction. See Espin v. Ganter, 381 F. Supp. 2d 261, 265 (S.D.N.Y. 2005); Martinez v. Bell, 468 F. Supp. 719, 724-25 (S.D.N.Y. 1979) ("The decision to issue a visa . . . is that type of discretionary conduct not within the scope of mandamus jurisdiction"); see also Kent v. United States, 8 F.3d 27 (9th Cir. 1993) (table) (because "the statutes and regulations provide the consular official considerable discretion in granting or denying a visa . . . mandamus is not an appropriate remedy and is not

available as a basis of district court jurisdiction")[8]; Hsieh, 569 F.2d at 1182 (holding that mandamus relief not available to compel INS to complete investigation regarding issuance of visas given lack of duty on part of INS to conduct such investigations, and noting, "[a]side from our powerlessness to intervene, the judicial creation of such a duty would have the potential for mischievous interference with the functioning of already overburdened administrative agencies.").

For the same reasons, this Court lacks jurisdiction to consider plaintiffs' contentions that defendants have violated the APA by engaging in "unreasonable delay" on Ramadan's application or should be enjoined to decide Ramadan's visa application by a date certain. See Pl. Br. at 11 n.6; Kent, 8 F.3d at 27 (court lacked jurisdiction to compel State Department to adjudicate visa application despite plaintiff's claim that State Department had "delayed unreasonably" in reaching a decision); cf. Hsieh, 569 F.2d at 1181-82 (in case where plaintiff claimed unreasonable delay in INS investigation into visa fraud, court lacked jurisdiction to compel INS to complete investigation within a certain period of time); see also supra at 21-22 (no APA exception to consular nonreviewability). Plaintiffs' claims are thus jurisdictionally barred.

4. Plaintiffs Cannot Demonstrate a Likelihood of Success Under Kleindienst and Its Progeny

Plaintiffs rely heavily, but ultimately unsuccessfully, on cases addressing claims by Americans that a visa denial has deprived them of their First Amendment rights to meet in the United States with an excluded alien. Kleindienst is the seminal and controlling decision in this area, and, although plaintiffs stress its recognition that First Amendment interests can be "implicated" by the exclusion of aliens with whom Americans wish to meet, 408 U.S. at 765, Kleindienst is striking for

[8] The Ninth Circuit does not prohibit citation of its unpublished decision outside of the Ninth Circuit. See 9th Cir. R. 36-3.

its reaffirmation that the authority of the Executive to exclude aliens may generally not be balanced against the alleged First Amendment rights of United States citizens desiring to confer with the excluded alien. As set forth below, Kleindienst and its progeny do not save plaintiffs' claim here.

a. Kleindienst Bars the Balancing of Citizens' Alleged First Amendment Rights Against the Executive's Authority to Exclude Aliens, Where the Exclusion Is Supported by a Facially Legitimate and Bona Fide Reason

In Kleindienst, the Supreme Court considered Americans' claims that the ideology-based exclusion of an alien violated their First Amendment rights to hear from and speak with that alien. The Supreme Court held that courts will not disturb Executive action by "balancing [the Executive's] justification against the First Amendment interests of those who seek personal communication with the applicant." Kleindienst, 408 U.S. at 770. Contrary to plaintiffs' contention and the analysis of some lower courts since Kleindienst, the Supreme Court did not hold that the Government is required to advance a "facially legitimate and bona fide justification" for the challenged exclusion. Rather, the Court held that when the Government did advance such a justification, courts were not to "look behind the exercise of that discretion," and deemed the question of whether First Amendment or other grounds could ever be employed to attack an alien's exclusion – that is, in the absence of any facially legitimate and bona fide justification – "a question we neither address nor decide in this case." Id.

Plaintiffs here press a number of arguments and themes expressly rejected by the Supreme Court in Kleindienst – generally, that because case law in other contexts recognizes Americans' right to receive ideas as a core First Amendment right, the inevitable deprivation of their ability to meet with an alien who is excluded from entry to the United States must violate the First Amendment and be amenable to judicial review. The Supreme Court rejected this contention, stating – as remains

true here – that it would "prove too much." Id. at 768. As the Court observed, creating an exception to the Executive's plenary authority to waive a ground of excludability would swallow the doctrine whole, and would plunge courts into a vast body of disputes that is constitutionally vested in the political branches, beyond court review:

> In almost every instance of an alien excludable under [the provision at issue], there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of [the excluded alien], nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well known, and the popular. Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under section 212(a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular applicant, according to some as yet undetermined standard. The dangers and the undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious. Indeed, it is for precisely this reason that the waiver decision has, properly, been placed in the hands of the Executive.

Id. at 768-769.

The Kleindienst court noted that the appellees sought to "soften the impact of this analysis by arguing . . . that the First Amendment claim should prevail, at least where no justification is advanced for denial of a waiver." Id. at 769. Meanwhile, the Government sought "a broad decision that Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion." Id. However, the Court held: "This record . . . does not require that we [reach that issue], for the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver. And that reason was facially legitimate and bona fide." Id. (The reason was that previous abuses and violations of visa conditions by Mandel "made it inappropriate to grant a waiver again." Id.). The

Court concluded: "With this, we think the Attorney General validly exercised the plenary power that Congress delegated to the Executive." Id.

Thus, the Supreme Court summarized:

> [P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under section 212(a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Id. at 769-70. In sum, Kleindienst never affirmatively imposed a burden of justification on the Government, as plaintiffs maintain; rather, it held that, because a justification had been provided in that case, the Court would not "look behind" that justification or weigh it against competing First Amendment interests.

Moreover, while the plaintiffs in Kleindienst challenged the Executive's authority to exercise a discretionary waiver, the instant motion differs to the extent it challenges Congress's prerogative to establish a ground of exclusion. In that area, Congress's authority is absolute. See Landon v. Plasencia, 459 U.S. 21, 34-35 (1982) ("The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy"); Galvan, 347 U.S. at 530-31 ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our

government."). In other words, for purposes of a Kliendienst analysis, if Congress establishes a ground of inadmissibility, a denial of admission based on that ground is made for a facially legitimate and bona fide reason.

Finally, the Supreme Court took Kleindienst a step further in Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). While the Court in Kleindienst barred consideration of First Amendment interests of the Government's waiver decision that was supported by a facially legitimate and bona fide reason – the alien's prior visa violation – in American-Arab Anti-Discrimination Committee, the Court expressly assumed that the basis for the Attorney General's action was protected First Amendment activity. See id. at 488. The Court assumed for purposes of analysis that deportation proceedings had been commenced because of the aliens' political associations with a terrorist organization, and that the proceedings, in fact, had a "'chilling effect' upon their First Amendment rights." Id. at 488.[9] The Court expressed a greater concern, however, for the chilling effect on law enforcement, and held that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." Id. (emphasis added). The Court made clear that selective prosecution was not a defense because the Government's authority over foreign affairs, national security matters, and the enforcement of the immigration laws barred judicial intervention even if the aliens' acknowledged First Amendment rights formed the basis for the Government's action. See id. at 490-91. If anything the Congressional and Executive authority at issue in this case is even broader because it concerns the admission of an alien, which, as discussed, involves the apogee of Congressional power.

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[9] The Court stated that what we have here is "an admission by the Government that the alleged First Amendment activity was the basis for selecting the individuals for adverse action." American-Arab Anti-Discrimination Committee, 525 U.S. at 488 n.10.

b. Kleindienst's Limited Consideration of the Government's Justification for a Prior Denial Does Not Authorize Judicial Review of Incomplete Consular Consideration of a Visa Application

Kleindienst is procedurally distinguishable from the instant case in important respects that preclude review. Whereas Kleindienst involved an undisputed finding that an alien was excludable on the very grounds that were under constitutional challenge – that the alien was a proponent of "world communism," Kleindienst, 408 U.S. at 756 – here plaintiffs seek to enjoin the exclusion of Mr. Ramadan on a ground that the Government has never excluded him for, and for which it is entirely speculative to surmise that he may be excluded in the future. Plaintiffs thus ask the Court to require the Government to justify a decision it has not made. The Kleindienst holding reaffirmed the political branches' plenary authority over visa decisions and declined to review their determination, while providing, at most, strictly limited review for a narrow class of fully ripe First Amendment claims by American plaintiffs where the Government declined to waive ineligibility. That simply does not apply in the present posture, in which plaintiffs seek to enjoin the Government from doing something that it has not done, or said it intends to do, or even is reasonably likely to do – i.e., exclude Mr. Ramadan on the basis of section 1182(a)(3)(B)(i)(VII).

To extend Kleindienst to require the Government to justify its potential denial of a visa application on a basis it has said it does not contemplate strays far from the narrow inquiry recognized to provide limited yet sufficient protection for First Amendment values, would open the entire visa application process to judicial scrutiny and micromanagement at any stage of the process, and would potentially subject the courts to an avalanche of claims that delays or denials of visa applications violate the First Amendment rights of anyone within the United States who might wish to interact with an alien. This result would be contrary to the cautions voiced in Kleindienst itself,

see id. at 768-69, and would also be directly contrary to the vast body of law – including the Second Circuit's holding in Hsieh – that courts will not engage in mandamus review of the visa application "process." And, as a practical matter, applying Kleindienst in this posture would make no sense, as the Executive Branch can hardly be expected to voice a "facially legitimate and bona fide justification" in support of an exclusion that it has never in fact done and does not contemplate doing.[10]

c. Kleindienst's Progeny Is Inapplicable and Does Not Authorize Judicial Review Here

As plaintiffs note, a number of lower courts have relied on Kleindienst to adjudicate challenges brought by Americans who assert a First Amendment right or other interest in meeting in person with an excluded alien. See Pl. Br. at 19-22 (citing cases).

Most fundamentally for purposes of this motion, these cases involve actual denials of visas.[11] Abourezk v. Reagan, 592 F. Supp. 880, 882 (D.D.C. 1984) ("Each of the invited aliens applied for a visa," the visa applications were denied by consular officials pursuant to [then-] 8 U.S.C. § 1182(a)(27) as prejudicial to the conduct of U.S. foreign affairs, and the "alien applicants were informed accordingly"), vacated, 785 F.2d 1043 (D.C. Cir. 1986), aff'd without opinion by an

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[10] It bears emphasizing that the courts have found the "facially legitimate" standard to provide only extremely circumscribed review. The courts cannot look into the wisdom or basis of the Government's decision. See Azzouka v. Sava, 777 F.2d 68, 72 (2d Cir. 1985) (under Kleindienst, court finding that Government articulated facially legitimate and bona fide justification ends inquiry); El-Werfalli v. Smith, 547 F. Supp. 152, 153 (S.D.N.Y. 1982) ("Th[e] governing standard permits the Court to inquire as to the Government's reasons, but proscribes its probing into their wisdom or basis. If the Court finds that the Government acted on a facially legitimate and bona fide reason, its inquiry is complete.").

[11] In one case, Harvard Law School Forum, 633 F. Supp. at 631, the adverse action was a refusal to waive a domestic travel restriction on the PLO's observer to the United Nations.

equally divided court, 484 U.S. 1 (1987); Allende v. Shultz, 605 F. Supp. 1220, 1222 (D. Mass. 1985) (challenge to "determin[ation] that, under [then-] § 212(a)(28)(c) of the [INA], Mrs. Allende was ineligible to receive a visa), aff'd, 845 F. 2d 1111 (1st Cir. 1988); Harvard Law School Forum v. Shultz, 633 F. Supp. 525, 531 (D. Mass.) (challenge to denial of request by the PLO's observer to the United Nations for "authorization to travel to Massachusetts to participate in [] debate at the Harvard Law School" notwithstanding ordinary requirement that he remain within 25 miles of Manhattan), vacated, 852 F.2d 563 (1st Cir. 1986) (table); Lesbian/Gay Freedom Day Comm., Inc. v. I.N.S., 541 F. Supp. 569, 571 (N.D. Cal. 1982) (U.S. groups' First Amendment challenge to exclusion of alien that frustrated alien's participation in event sponsored by groups).

Here, by contrast, Mr. Ramadan has never been excluded on the grounds to which plaintiffs object, and there is no basis other than pure speculation to believe that he will be excluded on that basis. Thus, the predicate of the limited review that lower courts have undertaken pursuant to Kleindienst – that there had been a governmental action raising meaningful First Amendment issues relating to the exclusion of an alien – does not exist here. To open up for judicial review every determination that an alien was ineligible for admission or even, as here, any visa application that remains unresolved – whether or not such an exclusion was on a basis that itself raised meaningful constitutional issues – would be to eviscerate the long-established rule that consular visa determinations are not subject to judicial review.

Other cases applying Kleindienst are further distinguishable because they turn on statutory, not constitutional, analysis. For example, the Abourezk cases[12] turned on whether the explanation

[12] The Abourezk litigation resulted in at least two district court and three D.C. Circuit decisions, one of which was affirmed by an equally divided Supreme Court.

for the exclusion at issue was consistent with the statutory basis for exclusion identified by the Government, and therefore "facially legitimate and bona fide" within the meaning of Kleindienst. See Abourezk, 785 F.2d at 1047, 1053-54 (remanding district court decision to develop further issues of fact on "statutory construction issue" in applying the former 8 U.S.C. § 1182(a)(27); identifying "three issues of statutory interpretation" at issue on appeal in assessing whether exclusion was for facially legitimate and bona fide reason). This analysis is obviously a far cry from the proposition that a person's First Amendment right to hear someone's speech may outweigh the Government's reasons for denying that individual a visa to enter the country – a proposition which Justice Douglas urged in his Kleindienst dissent, but which the Supreme Court majority in Kleindienst expressly held was not available. See Kleindienst, 408 U.S. at 770 ("courts will [not] balanc[e Executive's] justification against the First Amendment interests of those who seek personal communication with the applicant"); contrast id. at 771-72 (Douglas, J., dissenting) ("The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know. . . . We should construe the Act generously by that First Amendment standard").[13]

Finally, Zadvydas v. Davis, 533 U.S. 678, 695 (2001), cited by plaintiffs as holding that the political branches' plenary power "is subject to important constitutional limitations," Pl. Br. at 19, is inapposite because it addressed the availability of habeas review for challenges to lengthy INS

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[13] The Abourezk cases also confirm that, even where review is undertaken in a challenge that relates to exclusion of an alien, in no circumstance can a court compel the issuance of a visa. In its decision on appeal following remand of Abourezk, the D.C. Circuit held that courts cannot and will not order the State Department to issue a visa. See City of New York v. Baker, 878 F.2d 507, 512 (D.C. Cir. 1989) ("As a court has no power to serve as a proxy consular officer, that part of the district court's order that purports to direct the issuance of visas is without force and effect. . . . [W]e vacate that portion of the district court's order requiring that 'appropriate entry visas' be issued.").

detentions brought by aliens who were already in the United States. The Zadvydas court stressed that "[a]liens who have not yet gained initial admission to this country would present a very different question," Zadvydas, 533 U.S. at 682, and that due process requirements, which attach to "all 'persons' within the United States, including aliens," confer rights and distinguished the case from a case authorizing indefinite detention of an alien detained at the border after being refused admission. Id. at 693.

d. The Government Has Provided a Facially Legitimate and Bona Fide Explanation

To the extent the Court concludes that Kleindienst analysis could be applied in the present setting, the Government's explanation places Mr. Ramadan's visa application beyond judicial review. The State Department has explained that in 2004 it prudentially revoked Mr. Ramadan's previous visa pending further investigation, because new information became available suggesting that he might be ineligible for entry, and then, when Mr. Ramadan resigned the academic appointment that formed the basis of his then-pending H-1B visa application, the State Department treated the application as moot because the prospective employment that justified the visa application no longer existed. See Dilworth Decl. ¶¶ 6-9. This explanation clearly is a "facially legitimate and bona fide justification" for the Government's actions to date with respect to Mr. Ramadan's prior visa applications.

Further, the Government has explained that it is continuing to review Mr. Ramadan's pending September 2005 application, and that it does not anticipate excluding him on the basis of the provision subject to constitutional attack here. See id. ¶¶10, 13. Again, this explanation more than satisfies Kleindienst's description of matters beyond the scope of judicial review, to the extent

Kleindienst could ever be applied to an incomplete governmental review of a visa application. It would be nonsensical to ask the Government to justify the application of a provision that it in fact does not anticipate will be applied to Mr. Ramadan's application. To require more would violate the cautions of Kleindienst and the rule that "the judiciary will not interfere with the visa-issuing process." Hsieh, 569 F.2d at 1181. No prior case identified by plaintiffs or known to the Government has exercised such review under Kleindienst in like circumstances.

e. Kleindienst Aside, Plaintiffs' APA Claims Are Not Likely to Succeed

Plaintiffs devote substantial portions of their preliminary injunction papers arguing that the Government arbitrarily and capriciously excluded Mr. Ramadan pursuant to section 1182(a)(3)(B)(i)(VII), because in fact Mr. Ramadan does not espouse or endorse terrorism. See Pl. Br. at 4-6, 11-19. As discussed above, such claims are jurisdictionally barred. Even setting that aside, plaintiffs will not be able to establish such an APA claim because, as shown above and in the Dilworth Declaration, the United States has not relied on that provision to exclude Mr. Ramadan, and does not contemplate doing so. Whether or not his exclusion on that basis might violate the APA is therefore irrelevant; there is no such injury in fact giving rise to a case or controversy, and plaintiffs have not established and cannot establish the factual predicate of their claim on the merits.

f. Reservation of Rights and Request for Leave to Submit Supplemental Briefing If Facial Constitutionality of Section 1182(a)(3)(B)(i)(VII) Comes Into Dispute on This Motion

Plaintiffs appear not to seek a ruling at this stage of the litigation concerning the facial constitutionality of § 1182(a)(3)(B)(i)(VII); they seek a preliminary injunction only on the ground that § 1182(a)(3)(B)(i)(VII) is unlawful as applied to Mr. Ramadan's pending visa application. See Pl. Br. at 1 (while the complaint "seeks, among other things, a declaration that [section

1182(a)(3)(B)(i)(VII)] violates the First and Fifth Amendments on its face," the "instant motion . . . seeks preliminary relief only with respect to the Government's exclusion of Professor Ramadan."). The Government therefore does not include in this opposition brief its contentions as to why § 1182(a)(3)(B)(i)(VII) is constitutional. The Government of course will do so at the appropriate time, and, if it becomes clear that plaintiffs do seek a ruling on that question in connection with their present motion, the Government respectfully requests leave to submit additional briefing on that issue.

CONCLUSION

For the reasons stated above, plaintiffs' motion for a preliminary injunction should be denied.

Dated: New York, New York
March 31, 2006

Respectfully submitted,

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By: /s/ David S. Jones

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