13-1402

IN THE

Supreme Court of the United States

JOHN F. KERRY, SECRETARY OF STATE, *et al.*,

Petitioners,

—v.—

FAUZIA DIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I. In the intervening eight decades, the ACLU has frequently appeared before this Court during other periods of national crisis when concerns about security have been used by the government as a justification for abridging individual rights. The ACLU and its state affiliates have litigated and engaged in advocacy on behalf of American citizens and organizations whose constitutional rights have been affected by visa denials, including representing before this Court the members of Congress, university professors, journalists and religious leaders who were the respondents in *Reagan v. Abourezk*, 484 U.S. 1 (1987).

SUMMARY OF ARGUMENT

In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), this Court recognized that in certain contexts the government's exclusion of foreign citizens from the United States can implicate the First Amendment rights of U.S. citizens, and it established that in such

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No counsel for a party has authored this brief in whole or in part and no one other than *amicus curiae*, its members or its counsel has made a monetary contribution to fund the preparation or submission of this brief.

contexts U.S. citizens can call on the federal courts to review the lawfulness of the exclusions. In this case, the government contends that *Mandel* does not require judicial review of exclusions; that, to the extent it does, it authorizes review only of discretionary waiver decisions, and not of determinations relating to statutory inadmissibility; and that in any event it should not be read to have sanctioned judicial review of inadmissibility determinations in the national security context. To accept these propositions would be to depart from decades of case law in which the lower courts have capably and carefully applied the *Mandel* standard, and would render meaningless the First Amendment rights this Court recognized in *Mandel* and many other cases. *Amicus* respectfully submits this brief to explain why limited judicial review of exclusions that implicate the constitutional rights of U.S. citizens is both workable and necessary, and to illustrate the dangers of the position that the government has advanced in this case by highlighting the history of ideological exclusions.[2]

Since at least the Second World War, administrations of both parties have engaged in the practice of "ideological exclusion," denying visas to foreign citizens with disfavored political viewpoints. These exclusions have deprived U.S. citizens of the opportunity to engage with some of the world's leading writers and artists. Where exclusions implicate U.S. citizens' constitutional rights, judicial review is necessary to safeguard those

[2] *Amicus* agrees with Respondent that government interference with spousal cohabitation implicates the protections of the Due Process Clause, but this brief does not address this issue.

rights. It is also necessary to ensure that the executive does not disregard Congress's decisions as to which classes of noncitizens should be permitted to enter. The experience of lower courts since *Mandel* has shown that the judiciary is capable of reviewing the lawfulness of exclusions without encroaching on authority committed by the Constitution to the executive and legislative branches. It has also shown that the judiciary is capable of reviewing security-based exclusions without compromising the confidentiality of properly classified information.

ARGUMENT

I. JUDICIAL REVIEW UNDER *MANDEL* HAS BEEN CRITICAL TO PRESERVING THE SEPARATION OF POWERS AND ENSURING THAT THE GOVERNMENT DOES NOT USE THE IMMIGRATION LAWS AS INSTRUMENTS OF CENSORSHIP.

This Court has recognized that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982). In a decision that is essential to protecting this right, over forty years ago this Court unanimously rejected the government's argument that the exclusion of a foreign speaker "involves no restriction on [the] First Amendment rights" of American citizens who have invited the speaker and seek face-to-face interaction. *Kleindienst*

v. Mandel, 408 U.S. 753, 764 (1972).[3] Unwilling to leave U.S. citizens' First Amendment rights to the mercy of the executive branch, the *Mandel* Court held that U.S. citizens may seek judicial review of exclusions that implicate their First Amendment rights. *Mandel*, 408 U.S. at 769–70.

The *Mandel* Court expressly recognized Congress's plenary power "to make policies and rules for exclusion of aliens," and accordingly it did not contemplate that the judiciary would apply traditional First Amendment scrutiny to the government's visa decisions. Instead, it instructed that judicial review would be limited to determining whether the Executive's justification for excluding the noncitizen is "facially legitimate and bona fide," *id.* at 770. This limited review accommodated Congress's constitutional authority over immigration as well as the Executive's constitutional authority over foreign affairs and national security. It did so, however, without abdicating the Judiciary's role in protecting both the First Amendment and the constitutional separation of powers. Lower courts

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[3] The State Department has acknowledged its understanding that exclusion decisions carry significant implications for the First Amendment rights of U.S. citizens. *See* Letter from Harold Hongju Koh, Legal Advisor to the State Department, to Joanne Lin, Legislative Counsel for the ACLU (December 22, 2010), *available at* https://www.aclu.org/files/assets/KMBT20020110106134304.pdf (stating that the State Department will, in exercising its discretionary waiver authority, "give significant and sympathetic weight to the fact that the primary purpose of the visa applicant's travel will be to assume a university teaching post, to fulfill speaking engagements, to attend academic conferences, or for similar expressive or educational activities").

have carefully respected the balance that this Court struck in *Mandel*. *See, e.g., Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 126 (2d Cir. 2009) (reading *Mandel* to require only "the identification of . . . a properly construed statute that provides a ground of exclusion and the consular officer's assurance that he or she 'knows or has reason to believe' that the visa applicant has done something fitting within the proscribed category"); *cf. T-Mobile South, LLC v. City of Roswell*, 2015 WL 159278 (U.S. Jan. 14, 2015) (meaningful judicial review requires administrative decisionmakers to explain the reasons for their action).

In its brief, the government relies heavily on the fact that Congress has plenary power over immigration, and it contends that this power requires deference to the political branches in the circumstances presented here. Accordingly, it bears emphasis that the Executive has no authority to deny visas except in accordance with Congressional will. Nor may the Executive claim for itself the judicial deference accorded to Congress's plenary power to make rules for admission when the Executive acts in contravention of congressional enactment. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring); *see also Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[T]he central judgment of the Framers of the Constitution [was] that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (the judiciary plays a key role in "maintain[ing] the 'delicate balance of governance' that is itself the surest safeguard of

liberty" (citation omitted)). *See also Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (observing that the Executive's power over admission and exclusion "extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations," and stating that it remains "the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie") (Ginsberg, J.), *aff'd by an equally divided court*, 484 U.S. 1 (1987) (per curiam).

Judicial review of exclusions that implicate Americans' First Amendment rights is crucial to protecting both the First Amendment and the separation of powers. As discussed below, the experience of the lower courts since *Mandel* confirms that the balance struck in *Mandel* was the correct one.

A. The McGovern Amendment Cases

In 1952, Congress overrode President Truman's veto and passed the Immigration and Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, 66 Stat. 163 (1952), which sought to protect Americans from, *inter alia*, the subversive influence of foreigners alleged to advocate communist, anarchist, or totalitarian doctrines.[4] The McCarran-Walter Act included a provision, former INA § 212(a)(28), that denied admission to any

[4] President Truman's veto was rooted in his deep misgiving about the law. President Truman characterized aspects of the bill as "thought control" and observed that "'[s]eldom has a bill exhibited the distrust evidenced here for citizens and aliens alike . . . ." 98 Cong. Rec. 8082, 8084 (1952).

foreigner who believed in communism or anarchism, wrote about those doctrines, or had ever belonged to an organization that promoted those doctrines directly or indirectly. Once a foreigner was deemed to fall within the scope of this ideological-exclusion provision, admission was available only if the Attorney General granted a discretionary waiver.

The consequence of the provision was that Americans were hindered in receiving ideas from many of the world's leading thinkers. Applying the McCarran-Walter Act, the State Department excluded foreign speakers including British author Graham Greene; Pierre Trudeau, who later became Prime Minister of Canada; Palestinian poet Mahmood Darwish; British writer and Nobel Laureate Doris Lessing; Mexican writer and Nobel Laureate Carlos Fuentes; Colombian novelist and Nobel Laureate Gabriel Garcia Marquez; Italian playwright and Nobel Laureate Dario Fo; and Chilean poet and Nobel Laureate Pablo Neruda. *See* ACLU, The Excluded: Ideological Exclusion and the War on Ideas (2007), *available at* http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf. Notably, the use of the provision was a constant across administrations: both Democratic and Republican administrations made use of the Act to prevent Americans from meeting with and hearing from foreign speakers with disfavored political viewpoints.

As the number of McCarran-Walter Act exclusions mounted, the United States' barring of speakers became a source of embarrassment and gave rise to broad concern about the implications of these exclusions for the rights of Americans. *See, e.g.*, Editorial, *The Fuentes Incident*, N.Y. Times, Mar. 5,

1969 ("One sure way to tarnish the United States is for some bureaucrat to decide that a writer, painter or other artist is an 'undesirable alien' because of his work or beliefs."); Editorial, *The Age of Suspicion, Still Ticking*, N.Y. Times, Feb. 24, 1977 ("The clear implication [of the McCarran-Walter Act] was and is that the United States, bulwark of free government and free expression, fears contagious ideas as much as it fears contagious diseases."). Moreover, by 1977 it was clear to Congress that the broad grounds for ideological exclusion in the McCarran-Walter Act could not be reconciled with the United States' commitment in the recently-signed Helsinki Human Rights Accords to reduce "barriers to the free movement of people and ideas." S. Rep. No. 95-194, at 13, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N. 1625, 1635; H.R. Conf. Rep. No. 95-537, at 31-32, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N. 1658, 1661-62.

Seeking to stem the tide of ideological exclusions, Congress passed the "McGovern Amendment," which amended the waiver provision for exclusions based upon membership in, or affiliation with, a "subversive" organization. The McGovern Amendment instructed that the Secretary of State should recommend to the Attorney General that this ground of exclusion, then-INA § 212(a)(28), be waived unless the Secretary certified to Congress that such a waiver would implicate the security interests of the United States. *See* Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105, sec. 112, § 21, 91 Stat. 844, 848 (1977). The McGovern Amendment tightly curtailed the broad discretion over ideological exclusion that Congress had previously granted to the Executive—the

exercise of which had been at issue in *Mandel*. Congress now required that the Executive could refuse entry to a non-citizen under then-INA § 212(a)(28) only if the Secretary of State was willing to attest that the noncitizen presented a threat to the nation's security.

In several cases where personal certification to Congress would have proven embarrassing to the United States, the Executive attempted to sidestep the McGovern Amendment by basing exclusions on an inapplicable provision of the INA that did not permit waiver. Specifically, the Executive shifted its asserted justification for ideological exclusions from then-INA § 212(a)(28), which triggered the McGovern Amendment's requirement of waiver or certification, to then-INA § 212(a)(27), a provision that categorically barred admission to noncitizens who were believed to be seeking entry to the United States in order "to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." Multiple cases were brought by American citizens in response to the Executive's misuse of subsection 212(a)(27). Collectively, these cases demonstrate that judicial review in the visa denial context is both workable and necessary.

In *Abourezk v. Reagan*, the D.C. Circuit considered consolidated cases in which the Executive had relied on subsection 212(a)(27) to stymie numerous American citizens and nonprofit groups — including "members of Congress, university professors, journalists, and religious leaders"—from meeting with, among others, Nino Pasti, NATO's former top nuclear strategist, a four star general in

the Italian Air Force who had served as a member of the Italian Senate and the Vice-Supreme Commander in Europe for Nuclear Affairs. 785 F.2d at 1048. Mr. Pasti, who had visited the U.S. on numerous occasions and spoken frequently on nuclear disarmament, sought a visa at the invitation of American citizen groups interested in hearing him speak on nuclear policy. His invitation coincided with a significant debate within the United States as to whether Pershing II nuclear missiles should be deployed in Europe. Mr. Pasti was initially informed by the consular officer in Rome that he was subject to exclusion under subsection 212(a)(28) on the grounds of his affiliation with an allegedly subversive organization, the "World Peace Council, an organization which the State Department believe[d] to be controlled by the Soviet Communist Party." *Id.* at 1048. However, when he sought a waiver of this ground, which would have been subject to a near-automatic grant under the McGovern Amendment, *see id.* at 1060 n.23, he was informed—without explanation—that his visa had instead been denied under subsection 212(a)(27), *see id.* at 1048, the non-waivable, security-based provision.

The D.C. Circuit rejected the argument that the government's actions were beyond review, and it rejected the government's reliance on subsection 212(a)(27) to evade the restrictions imposed in subsection 212(a)(28). [5] It wrote: "If the State

[5] Although Judge Bork dissented from the majority's statutory analysis, his dissent recognized that the judiciary had a role to play in reviewing visa denials that implicated the rights of U.S. citizens. *Abourezk*, 785 F.2d at 1062 n.1 (noting that the government "concede[d] that the Supreme Court has already implicitly decided the issue of whether plaintiffs who wish to

Department's current policy entails the power to achieve precisely the same results as under subsection (28) before the McGovern Amendment, then it is small virtue that those results now can be achieved without explicitly reviving a policy of ideological exclusion" that Congress had rejected. *Id.* at 1058 n.20. The court noted that its review of the Executive's decision was not an intrusion into the province of the political branches; rather, review was necessary to ensure that the executive "respect[ed] the restraints [that] Congress imposed." *Id.* at 1061; *see also id.* at 1057 ("The Executive may not use subsection (27) to evade the limitations Congress appended to subsection (28).").[6]

The First Circuit evaluated a similar State Department action in *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988). That case concerned the rights of various U.S. citizens and community groups to meet with and hear from Hortensia de Allende, the widow of Dr. Salvador Allende, who had been ousted as Chile's president in a military coup. Mrs. Allende had received "numerous requests for speaking

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meet with excluded aliens have standing to raise a constitutional (first amendment) claim") (Bork, J. dissenting).

[6] On remand, the district court granted summary judgment to plaintiffs, finding that the State Department's interpretation of subsection 212(a)(27) was erroneous and could not support a visa denial. *City of New York v. Baker*, 878 F.2d 507, 509 (D.C. Cir. 1989). The D.C. Circuit concluded that the court could not order that a visa be granted to Mr. Pasti, but ordered that, "should Pasti reapply for a nonimmigrant visa, the State Department will process his application subject to applicable law as interpreted in the district court's decision." *Id.* at 512.

engagements from both religious and educational institutions in California," which sought to receive Mrs. Allende's ideas "on various issues raised by the contemporary political and social situation in Latin America, including the role of women in the struggle for human rights, the plight of women in exile, and the different options available to the United States in its policies toward the nations of Latin America." *Allende*, 845 F.2d at 1113. As in the case of Mr. Pasti, the State Department first informed Mrs. Allende that her affiliation with ideological organizations (the World Peace Council and the Women's International Democratic Federation) rendered her ineligible for a visa under subsection 212(a)(28), a statutory ground that would have triggered a near-automatic waiver grant under the McGovern Amendment. *Id.* Before a waiver could be granted, however, the agency informed Mrs. Allende that her visa was instead denied under non-waiveable subsection 212(a)(27). *Id.* at 1114.

The First Circuit considered and rejected the government's proposed construction of subsection 212(a)(27), emphasizing the consequences of the interpretation of the INA that the government advanced: "By reading subsection 27 to permit status-based exclusions where the State Department determines that entry would harm the foreign policy interests of the United States, we would reinsert the very discretion which the McGovern Amendment sought to diminish." *Id.* at 1118 n.14. After evaluating the government's interpretation of the statutory ground of exclusion, as well as classified and unclassified evidence submitted by the government in support of the visa denial, the First Circuit concluded that "the government ha[d] failed

to advance a sound basis for exclusion under subsection 27." *Id.* at 1116. Mrs. Allende was eventually admitted to the United States and entered without incident.[7]

In *Abourezk* and *Allende*, the Executive sought to exclude speakers who could authoritatively advance positions that were contrary to the government's favored policies. In both cases, the courts of appeal refused to accept the government's attempts to evade Congress's limitation on the Executive's ability to exclude individuals on the basis of their political viewpoints. In both cases, the courts rejected the Executive's insistence that its actions were too sensitive for judicial review. The resulting judicial scrutiny, although carefully limited in accordance with the *Mandel* standard, was vital to maintaining the balance of powers. The judiciary's limited review also guarded against arbitrary deprivation of the First Amendment rights of Americans who sought to receive information from Mr. Pasti and Mrs. Allende, but who were barred from doing so without legitimate reason grounded in the statute.

The McGovern Amendment cases belie the government's argument here that it is "outside the judiciary's realm" to "examine the 'facial[] legitima[cy]' of a statutorily grounded determination

[7] Then-Judge Breyer concurred in the opinion, finding the case moot in light of an intervening change in law and the ability of plaintiffs to obtain "speedy review" if Mrs. Allende were denied a visa in the future, but noting "agree[ment] with the panel's opinion in respect to the merits." *Allende*, 845 F.2d at 1122 (Breyer J., concurring).

by a consular officer." Pet. Br. at 39. Far from "put[ting] courts in the untenable position of second-guessing Congress's choices about which aliens abroad should and should not be granted visas," *id.*, the availability of carefully-limited judicial review has proven essential to safeguarding Americans' constitutional rights and ensuring that the Executive does not disregard Congress's decisions as to which classes of noncitizens should be permitted to enter the United States.

B. The Moynihan-Frank Amendment and Subsequent Litigation

In 1987, Congress acted to further curtail the Executive's ability to exclude foreign speakers. Stating in the legislative history that "[f]or many years, the United States has embarrassed itself by excluding prominent foreigners from visiting the United States solely because of their political beliefs," Congress amended the INA "to take away the executive branch's authority to deny visas to foreigners solely because of the foreigner's political beliefs or because of his anticipated speech in the United States." S. Rep. No. 100-75 at 11, 100th Cong., 1st Sess. (1987), *reprinted in* 133 Cong. Rec. S2326 (1987). The Senate Committee on Foreign Relations characterized the resulting "Moynihan-Frank Amendment" as an "affirmation of the principles of the First Amendment." *Id.* The House Conference Committee noted that, as a result of decades of ideological exclusion, "the citizens of the United States have been denied the opportunity to have access to the full spectrum of international opinion, and the reputation of the United States as an open society, tolerant of divergent ideas, has

suffered." H.R. Conf. Rep No. 100-475, 100th Cong., 1st Sess. 163 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2314, 2424, *and in* 133 Cong. Rec. 11,343 (1987).

Through the Moynihan-Frank Amendment, Congress proscribed denial of a visa to any alien "because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States," subject to certain limited exceptions. Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1400 (1987), *amended by* Foreign Relations Authorization Act, Fiscal Years 1990 and 1991; H.R. Conf. Rep. No. 343, § 128(b) 101st Cong., 1st Sess. (1989). Although the Moynihan-Frank Amendment contained a sunset provision, it was extended by Congress for an additional two years. *See* FY 1989 Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 100-461, 102 Stat. 2268 (1988).

Congress subsequently made the Moynihan-Frank changes permanent with passage of the Immigration Act of 1990. Pub. L. 101-649, 104 Stat. 4978 (1990). Following passage of the 1990 Act, noncitizens could not be excluded on the basis of beliefs, statements, or associations unless the Secretary of State personally certified to Congress that admission would compromise a compelling United States foreign policy interest. 8 U.S.C. § 1182(a)(3)(C). The legislative history explained that Congress intended that "exclusions not be based merely on, for example, the possible content of an alien's speech in this country"; that the Secretary of

State's authority to determine that entry would compromise foreign policy interests be used "sparingly and not merely because there is a likelihood that an alien will make critical remarks about the Unites States or its policies"; and that the "compelling foreign policy interest" standard be applied stringently. H.R. Conf. Rep. No. 101-955, 101st Cong., 2nd Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6794.

Although Congress had repeatedly curtailed the State Department's policies of ideological exclusion, foreign speakers were again targeted for exclusion following the September 2001 terrorist attacks. The litigation that arose from these exclusions confirms once again the crucial importance of judicial review where the government's visa denials implicate U.S. citizens' First Amendment rights.

In a case that garnered significant media attention, the government barred Tariq Ramadan, a Swiss national and world-renowned scholar who had frequently lectured in the United States, from entering this country to accept a tenured position with the University of Notre Dame. Mr. Ramadan's visa was approved in May 2004, but on July 28, 2004, the United States Embassy in Bern revoked his visa without providing him an explanation. In response to press inquiries, "a DHS spokesperson stated that the basis for the revocation was a provision of the INA that then permitted exclusion of prominent individuals who endorse or espouse terrorist activity." *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 119-20 (2d Cir. 2009). In 2005, Prof. Ramadan sought a short-term visa to enter the

United States so as to speak at conferences, but no action was taken on his application. *Id.* at 120. Three American organizations—the American Academy of Religion, the American Association of University Professors, and PEN American Center—sued to vindicate their First Amendment rights to receive information from Mr. Ramadan.

After the district court ordered the government to issue a formal decision on the visa application, the government informed Prof. Ramadan in September 2006 that his short-term visa had been denied under 8 U.S.C. § 1182(a)(3)(B)(iv)(VI), a provision rendering inadmissible individuals who have engaged in terrorist activity by providing material support to a terrorist organization. *Id.* Specifically, the government alleged that Prof. Ramadan had knowingly supported terrorism by donating approximately $1,336 to a charity that the Treasury Department later determined was providing financial support to Hamas. *Id.* at 118, 120–21. It was undisputed that, at the time of Prof. Ramadan's donations, the Treasury Department had not designated the charity as providing funds to a proscribed terrorist organization. [8] *Id.* at 120. Accepting the government's representation that the exclusion of Prof. Ramadan was not based (or no longer based) on a determination that he had "endorse[d] or esouse[d] terrorist activity," the district court upheld the visa denial on the material support ground. *Id.* at 132.

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[8] The record also contained evidence that "at the time of Ramadan's donations, ASP was 'a verified and legitimate charity according to the Swiss Government.'" *Am. Acad. of Religion*, 573 F.3d at 122.

The Second Circuit reversed. Rejecting the State Department's argument that judicial review should be limited to whether it had merely "articulated a statutorily permissible basis" for exclusion, *see* Br. for Defendants–Appellees at 22, *Am. Acad. of Religion*, *supra* (No. 08-0826), 2008 WL 7985710 (July 11, 2008), the Second Circuit considered whether the government's construction of the security-based ground of exclusion actually comported with the requirements of the statute. The court noted that in enacting the material support provision, Congress had expressly provided that individuals who would otherwise be inadmissible should be admitted if they lacked requisite knowledge that their donations were being used to fund a terrorist organization. It also observed that Executive adherence to Congress's enactment of the lack-of-knowledge exception to the material support provision was particularly important in light of the context of Prof. Ramadan's case: the Treasury Department itself declared—when designating as a funder of Hamas the charity Prof. Ramadan had supported—that "too many innocent donors who intend for their money to be used to provide humanitarian services here or abroad, are unwittingly funding acts of violence when these funds are diverted to terrorist causes." *Am. Acad. of Religion v. Napolitano*, 573 F.3d at 133 (quotation marks omitted). Yet the record before the court provided no indication that Prof. Ramadan had been provided any opportunity to demonstrate his lack of knowledge. *See id.* The Second Circuit rejected the government's contention that it was required to acquiesce to a construction of the material support provision that would have effectively nullified the

knowledge requirement that Congress had imposed. *See id.* at 131–133.

After remand, the Secretary of State issued an order certifying that Prof. Ramadan would no longer be excluded on the basis of the material support ground that the government had previously claimed. *See* Press Release, ACLU, *State Department Ends Unconstitutional Exclusion of Blacklisted Scholars from U.S.* (Jan. 20, 2010), *available at* https://www.aclu.org/national-security/state-department-ends-unconstitutional-exclusion-blacklisted-scholars-us. Prof. Ramadan, who is now a Professor of Contemporary Islamic Studies at Oxford University, has subsequently entered the United States without incident.

In the case involving Prof. Ramadan, judicial review proved necessary to enforce congressionally imposed limits on the Executive's exclusion authority and to prevent the Executive from interfering unlawfully with U.S. citizens' right to meet with and hear from a leading foreign thinker. Judicial review proved necessary for the same reasons in other recent cases. In 2006, for example, the government without explanation revoked the visa of Adam Habib, then-Deputy Vice Chancellor of Research, Innovation and Advancement at the University of Johannesburg, a respected political analyst, and a frequent traveler to the United States. When denying a subsequent visa request in 2007, the State Department cited 8 U.S.C. § 1182(a)(3)(B)(i)(I), which renders excludable an individual who "has engaged in a terrorist activity," and provided no other explanation for the denial. *Am. Sociological Ass'n v. Chertoff*, 588 F. Supp. 2d 166, 168 (D. Mass. 2008).

U.S. citizen groups including the American Sociological Association and the American Association of University Professors, who had invited Mr. Habib to speak, brought suit to contest the visa denial. The government argued once again that no jurisdiction existed to review the security-based denial. *See id.* at 168–173. After the district court rejected this argument and denied the government's motion to dismiss the challenge, *see id.* at 174, the Secretary of State certified that Mr. Habib would no longer be excluded from the U.S. on this ground, *see* ACLU, *State Department Ends Unconstitutional Exclusion Of Blacklisted Scholars From U.S.* (Jan. 20, 2010), *available at* https://www.aclu.org/national-security/state-department-ends-unconstitutional-exclusion-blacklisted-scholars-us. Mr. Habib, who is currently the Vice-Chancellor and Principal of the University of the Witwatersrand in Johannesburg, has since been granted a visa and has entered the United States without incident.

In some cases, like those involving Prof. Ramadan and Mr. Habib, the government unlawfully excluded foreign thinkers until U.S. organizations brought suit and defeated motions to dismiss the litigation. In other cases, however, the government reconsidered exclusions after U.S. citizens merely filed suit or raised the possibility of judicial review—perhaps indicating that the government concluded that those exclusions would not withstand the limited judicial scrutiny provided for in *Mandel*. *See, e.g.*, Elizabeth Redden, "*Ideological Exclusion" Again?*, Inside Higher Ed, Oct. 28, 2013, *available at* http://shar.es/1H2v09 ("A Colombian journalist, Hollman Morris, and an Afghan women's rights activist, Malalai Joya, both received visas after the

ACLU brought attention to their cases."); Kirk Semple, *Advocate's Visa Delay Stirs Questions*, N.Y. Times, Sept. 29, 2011, *available at* http://nyti.ms/o6VAce (discussing excessive and unexplained delay in granting a visa to Kerim Yildiz, "a leading human rights advocate for the Kurdish people" who had "regularly lectured at American Universities"); Kirk Semple, *After Mysterious Delay, Mysterious Approval of Kurdish Advocate's Visa*, N.Y. Times, Oct. 3, 2011, *available at* http://nyti.ms/1x5oK6P (describing grant of visa to Mr. Yildiz following media attention drawn to his case); Melissa Lee, *Bolivian Professor Coming to UNL*, Lincoln Journal Star, July 18, 2007, *available at* http://bit.ly/14bvzN0 (describing end to years of exclusion for scholar Waskar Ari shortly after the University of Nebraska-Lincoln initiated a lawsuit seeking either adjudication of Mr. Ari's visa or an explanation for the delay).

Mandel review is crucial, in other words, not only because it allows U.S. citizens to challenge unlawful exclusions that implicate their constitutional rights, but because it reduces the likelihood that the government will unlawfully exclude invited speakers in the first place.

* * *

Thirty-seven years ago, the government claimed to this Court that if the D.C. Circuit's decision in *Abourezk* "were allowed to stand, it would . . . not only enmesh the courts in questions outside the bounds of judicial competence, it would cast a chill over Executive decisionmaking and impair the conduct of foreign policy," forcing "unseemly inquiry

by plaintiffs and courts into the Executive's foreign affairs decisionmaking, and substantial hindrance of its conduct of foreign affairs." Pet. Br. at 36, *Reagan v. Abourezk*, 484 U.S. 1 (1987) (No. 86-656). Six years ago, the government told the Second Circuit that if it reviewed the American citizens' claims in *Am. Acad. of Religion v. Napolitano*, there would be a flood of First Amendment cases, "potentially allow[ing] judicial review of every visa denial." Br. for Defendants-Appellees at 20, *Am. Acad. of Religion*, *supra*, (No. 08-0826), 2008 WL 7985710 (July 11, 2008). Those concerns have never materialized.

In the handful of cases in which U.S. citizens have sought limited judicial review of visa denials that have affected their constitutional rights, the courts have carefully applied the *Mandel* standard to questions that lie well within the core judicial function. Far from upending the constitutional separation of powers, *Mandel* review has proven essential to safeguard Americans' rights and ensure the Executive's adherence to Congress's decisions as to which noncitizens may be excluded, and on what grounds. Without review over whether the Executive is abiding by statutory requirements, the government would be able to resume the long-discredited practice of ideological exclusions whenever it chooses. History suggests that the more significant danger is not that judicial review under *Mandel* will lead to a flood of new lawsuits, but that the absence of review will lead to unauthorized but unexamined visa denials that abridge the constitutional rights of U.S. citizens.

II. THE JUDICIARY IS COMPETENT TO EVALUATE CLAIMS IMPLICATING NATIONAL SECURITY AND FOREIGN AFFAIRS, INCLUDING IN THE VISA DENIAL CONTEXT.

The government urges that judicial review of security-based visa denials is particularly inappropriate. Pet. Br. at 46. If review is available at all in this context, the government contends, the review must be entirely conclusory: the government's mere citation of an inadmissibility provision must end the court's inquiry, because whatever precautions the federal courts may take to maintain the confidentiality of sensitive information, the risks created by judicial review are "too great to be countenanced." Pet. Br. at 52. There is no merit to this argument. To the contrary, decades of history establish beyond any doubt that the federal judiciary is competent to adjudicate the kinds of disputes at issue here.

All of the ideological exclusion cases cited above involved exclusions that were based on security grounds. In none of the cases did the courts' consideration of sensitive or classified information lead to any discernible harm to legitimate government interests. In *Abourezk*, for example, the State Department provided its reasons for denying visas on foreign policy and security grounds to the lower courts in classified declarations submitted *in camera* and *ex parte*. Both the district court and appellate court relied on the declarations in determining whether the government had complied with the statute. *See, e.g.*, 785 F.2d 1043, 1052 n.7 ("This court has also examined the reasons offered in

the *in camera* affidavits; they do not decrease our concern over the inaccuracy of the State Department's public representations . . . ."). The D.C. Circuit expressed concern about the government's overuse of classified declarations and the "entirely conclusory" public statements that had been provided to the plaintiffs. *Id.* at 1060. Nevertheless, it instructed that the plaintiffs be provided with evidence only to the extent possible "without jeopardizing legitimately raised national security interests." *Id.* When it petitioned for certiorari, the government itself determined that the declarations could be filed publicly with only minimal redactions. *See* Pet. Br. at 6 n.3, *Abourezk*, *supra* (No. 86-656) (stating that "[o]nly one paragraph and part of one sentence in one of the affidavits" remained classified).

Similarly in *Allende*, the government initially sought to rely on a wholly classified affidavit submitted *in camera* before deciding that it could submit a "partially declassified affidavit contain[ing] the same information . . . with the exception of one sentence which was partially excised in the public document." *Allende*, 845 F.2d at 1116 n.8. The government's initial claims of secrecy in both cases proved as ultimately unnecessary as its visa denials. Throughout the litigations, however, classified information was never placed at risk through the judicial process. If anything, lower courts' experience with ideological exclusion cases serves as a caution that the government may use secrecy as a means of insulating unlawful decisions from judicial review.

The cases involving Prof. Ramdan and Mr. Habib likewise demonstrate that review of security-

based visa denials is well within the realm of judicial competence. In both cases, the government justified its conduct by invoking security-related provisions of the INA. In both cases, courts carefully evaluated whether the government had provided a legitimate reason to restrict the First Amendment rights of American citizens who sought to meet with the scholars. In neither case did the courts place classified information in jeopardy or intrude into a realm beyond judicial competence. In both cases, American citizens seeking to meet with foreign speakers were provided a forum in which they could ensure that the limitations that Congress had placed on the security-based exclusion provisions were not ignored by an Executive official acting as censor. In both cases, the State Department ultimately determined that the scholars should, in fact, be admitted.

The courts' experience outside the visa-denial context confirms the competence of the judiciary to resolve disputes touching on national security and foreign affairs. Federal courts routinely handle classified information in the context of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1805, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(B) & (b)(1), as well as in national-security prosecutions and in habeas litigation, including the litigation arising out of habeas petitions filed by prisoners held by the United States at Guantanamo Bay. In all of these contexts, district courts are required to make judgments regarding the disclosure and handling of national security information, and *in camera* review of classified materials is a standard procedure.

More broadly, this Court has expressly rejected the idea that national security matters are "too subtle and complex for judicial evaluation." *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 320 (1972); *see also, e.g.*, *Boumediene*, 553 U.S. at 796 (emphasizing judges' "expertise and competence" to address sensitive national security matters while vindicating constitutional rights). In addition, this Court has instructed that "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986) (citation omitted). "Under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes," and courts "cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* at 230. *See also* *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Resolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do."); *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."). Courts regularly review matters implicating national security and foreign affairs, and they safeguard sensitive information while doing so.

Indeed, the federal courts have a diversity of tools to ensure that the government's legitimate secrets are not disseminated inappropriately. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 604 (1988) ("[T]he District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."). The tools available to judges include protective orders, closed proceedings, and *in camera* review.[9] If there are cases in which even these safeguards are insufficient to protect sensitive information, the correct response is not a blanket denial of access to the courts for U.S. citizens whose constitutional rights are at risk. Even in the

[9] In our adversary system, *in camera, ex parte* review should always be a last resort. *See, e.g.*, *Weil v. Markowitz*, 829 F.2d 166, 175 (D.C. Cir. 1987) ("[T]he conduct of most judicial actions *ex parte* are generally disfavored in American jurisprudence."); *In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir.1986) ("*Ex parte* communications generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing requires 'a reasonable opportunity to know the claims of the opposing party and to meet them.'" (quoting *Morgan v. United States*, 304 U.S. 1, 18 (1938))). This Court has also held, in the criminal context, that judicial proceedings in this country should be closed only when absolutely necessary and to the limited extent required to preserve an overriding need for confidentiality. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980). This Court noted that "historically both civil and criminal trials have been presumptively open," *id.* at 580 n.17, and the courts of appeal have recognized a similar right of access to civil trials, s*ee, e.g.*, *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012) (collecting cases).

extraordinary context of litigation involving state secrets, *see United States v. Reynolds*, 345 U.S. 1 (1953), courts are entirely competent to take appropriate steps once the government invokes the privilege.[10] As former federal judge, FBI Director and CIA Director William Webster testified to Congress: "I can . . . confirm that judges can and should be trusted with sensitive information and that they are fully competent to perform an independent review of executive branch assertions of the state secrets privilege." Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability, Hearing before the S. Comm. on the Judiciary, 110th Cong. (Jan. 29, 2008) (prepared statement of William Webster).

Over the course of decades and in a wide variety of contexts, the federal courts have proven themselves entirely capable of managing litigation that involves legitimately secret information and politically sensitive topics. There is no basis to believe that the judiciary is not competent to adjudicate disputes concerning the lawfulness of exclusions that implicate U.S. citizens' constitutional rights.

[10] The government did not assert the privilege in this case, and no cabinet-level official has put his or her name and reputation behind an affidavit swearing that the disclosure of the information at issue in this case would jeopardize national security.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully Submitted,

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