UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN SOCIOLOGICAL ASSOCIATION; AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, and BOSTON COALITION FOR PALESTINIAN RIGHTS, Plaintiffs, v. HILLARY RODHAM CLINTON, in her official capacity as Secretary of State, Defendant.	Case No. 07-11796 (GAO)

PLAINTIFFS' SUPPLEMENTAL REPLY MEMORANDUM REGARDING STANDING AND IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The government advances two arguments to support its purported need for discovery, neither of which has any merit. First, the government argues that plaintiffs lack standing because they have no right to communicate with Professor Habib in person and because advanced communication technologies like videoconferencing might erase their injury. But every court to address this issue has held that citizens *do* have a right to communicate with an invited speaker *in person*; that the inability to engage *in person* with an invited speaker is a First Amendment injury that confers standing; and that alternative means of communication, including videoconferencing, do not erase that injury. No court has ever permitted the kind of standing discovery the government seeks here. This is because nothing the government seeks to discover could undermine plaintiffs' legal basis for standing. Videoconferencing is a *different form of access* than in-person communication and cannot enable all of the formal, informal, and private communication that occurs over the course of an entire academic conference.

Second, the government argues that discovery is necessary for the new "balancing" analysis it invents to replace traditional *Mandel* review. But the government's only rationale for radically re-writing the law here is the untenable assertion that the facially legitimate and bona fide reason analysis does not apply if the government refuses to advance any reason at all. Binding precedent requires the government to demonstrate a facially legitimate and bona fide reason for blocking all in person engagement with an invited speaker. This constitutional requirement does not disappear simply because the government refuses to acknowledge or abide by it. In any event, this Court has already rejected this particular argument, and for good reason: permitting the government to avoid the facially legitimate and bona fide requirement simply because it refuses to provide *any* reason defeats the whole point of *Mandel* review.

Supreme Court and First Circuit law compels the Court to find that plaintiffs have standing, to reject the government's discovery request, and to assess whether the government has a facially legitimate and bona fide reason for barring Professor Habib. Pointing to the "engage in terrorist activity" provision without any explanation or substantiation does not supply a facially legitimate and bona fide reason for barring Professor Habib; indeed, it does not supply any reason at all. For this reason, plaintiffs are entitled to summary judgment.

ARGUMENT

I. NOTHING THE GOVERNMENT SEEKS TO DISCOVER CAN UNDERMINE PLAINTIFFS' LEGAL BASIS FOR STANDING.

A. Plaintiffs have met the injury-in-fact standing requirement.

The government does not (and cannot) dispute the only fact necessary to establish plaintiffs' First Amendment injury-in-fact: plaintiffs are unable to communicate with Professor Habib *in person* at their U.S. events. Instead, the government erroneously argues that plaintiffs suffer no injury because they could communicate with Professor Habib through other means.

The government's standing argument ignores the law. The government insists that citizens have no "right . . . to hear a speaker in person." Defendant's Supplemental Memorandum Regarding Standing ("Govt. Supp. Br.") 8; *see also id.* at 4 (arguing no "right to sit face to face to...exchange" ideas). But a uniform body of case law, Supreme Court and First Circuit law included, holds that citizens have a right to communicate with invited speakers *in person,* and that where citizens are deprived of this "particular form of access" to an invited speaker, they suffer a First Amendment injury that gives rise to standing. Plaintiffs' Supplemental Memorandum Regarding Standing and In Further Support of Their Motion For Summary Judgment ("Pl. Supp. Br.") 4-6. Remarkably, the *only* case the government cites in support of its argument that no "right to in-person speech exists," Govt. Supp. Br. 8, is a case in which the court reached exactly the opposite conclusion. *See Am. Acad. of Religion v. Chertoff*, 463 F. Supp. 2d 400, 411 (S.D.N.Y. 2006) ("*AAR I*") (recognizing plaintiffs' "constitutionally protected interest in hearing [invited scholar] speak in person"); *id.* at 412 (finding injury because invited speaker was "unable to enter the United States to share his views"); *id.* at 414 (recognizing right "to have an alien enter and to hear him explain and seek to defend his views"). Every court to have considered the question has held that the inability to meet in person with an invited speaker is a First Amendment injury that confers standing.[1]

The government insists that plaintiffs' ability to videoconference with Professor Habib matters to the standing analysis, even though it is manifest that videoconferencing is a *different form of access* than in person communication, and even though courts uniformly have held that

[1] The government's use of the words "*per se* right," Govt. Supp. Br. 4, 8, suggests plaintiffs believe the right to in person communication is inviolable. This is not true. Although plaintiffs suffer a *per se injury* by virtue of Professor Habib's inability to attend their events, that injury is a *constitutional violation* only where the government lacks a facially legitimate and bona fide reason for its actions.

alternative means of communication are irrelevant to the standing analysis. Pl. Supp. Br. 7-8. Not only does the government fail to cite any legal support for this argument, it *does not even mention,* let alone address, the many cases plaintiffs cited on this point. Nor does the government cite any case that suggests discovery on this issue is appropriate. Instead, turning a blind eye to the relevant law, the government argues that videoconferencing is such an advanced technology that it requires a significant departure from the established standing and constitutional analysis that applies in cases like these. Once again, however, the only case it cites is one which held that videoconferencing *does not deprive plaintiffs of standing and does not alter the Mandel review analysis. See AAR I,* 463 F. Supp. 2d at 411 n.11 (videoconferencing "not a long-term substitute for in-person interaction"); *id.* at 411 n.13 (videoconferencing not "sufficient to satisfy Plaintiffs' First Amendment right to interact with [invited speaker] on a permanent basis"); *id.* (government could not exclude invited speaker without a facially legitimate and bona fide reason "by arguing that technological alternatives readily supplant [his] physical presence").[2] Videoconferencing does not change the *nature* of the right implicated by an exclusion any more than airplanes or telephones changed the nature of the right impaired in *Mandel.* Nor does videoconferencing render the standing question here one of "first impression." Govt. Supp. Br. 5. Plaintiffs suffer the same cognizable injury recognized in *Allende*, *Adams*, *AAR*, and every other First Amendment exclusion case: they cannot engage in

[2] The only reason the *AAR* court discussed videoconferencing was because the preliminary injunction analysis required the court to determine whether plaintiffs would be *irreparably* injured by their inability to meet in person with Professor Ramadan *pending the court's adjudication of the merits.* The court found that the availability of videoconferencing was relevant to *that* factual question but did *not* find videoconferencing relevant to the standing question; the Court concluded that plaintiffs suffered an injury-in-fact because they could not meet in person with Professor Ramadan. *See AAR I,* 463 F. Supp. 2d. at 412. Nor did the *AAR* court find videoconferencing relevant to the merits analysis; it simply applied facially legitimate and bona fide reason review. *Am. Acad. of Religion* v. *Chertoff,* 2007 WL 4527504, *7 (S.D.N.Y. Dec. 20, 2007) *("AAR II").*

person with their invited speaker. And as in those cases, plaintiffs suffer that injury even though they can communicate with Professor Habib through other means.[3]

The government also argues that plaintiffs lack standing because the inadmissibility provision it has invoked to bar Professor Habib is not overtly speech-related and that this distinguishes this case from all the others. Govt. Br. 7-11. But many courts have reviewed exclusions even where the government pointed to a non-speech reason for its actions. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (reviewing exclusion based on Mandel's alleged violation of his visa terms); *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990) (reviewing exclusion based on Adams' alleged engagement in terrorist activity); *AAR II*, 2007 WL 4527504 (reviewing exclusion based on Ramadan's alleged provision of material support to a terrorist organization). Courts have not looked to the government's statutory basis to find injury-in-fact. This is because the harm that confers standing – the inability to communicate in person with an invited speaker – has nothing to do with the government's stated reason. *See* Pl. Supp. Br. 4-6; *AAR I*, 463 F. Supp. 2d at 412 (explaining that "[p]laintiffs' injury [was] not caused by the application [of a particular inadmissibility provision] but by Ramadan's exclusion more generally . . . . *Regardless of the Government's reason for excluding Ramadan,* the fact remains that Ramadan is unable to enter the United States to share his views with a willing American audience" (emphasis added)).

The government's argument turns *Mandel* review on its head. The entire purpose of *Mandel* review is to assess whether the government's purported justification for barring an invited speaker – whether speech-related or not – has a basis in law and fact. This is the only

[3] The government's assertion that videoconferencing "can actually offer Plaintiffs *more* than in-person speech," Govt. Supp. Br. 5, is disingenuous. Professor Habib cannot via videoconference attend all aspects of a conference and engage in the myriad forms of formal, informal, and private conversations that occur over the course of the entire event. Pl. Supp. Br. 4 n.3, 9.

way to ensure the government has a *legitimate* basis for inflicting the constitutional injury and is not just picking an inadmissibility provision out of a hat in order to bar someone whose political views the government dislikes. The government would put the cart before the horse: it would have the Court grant standing only to those plaintiffs who could establish *success on the merits*. But as the case law makes clear, plaintiffs do not need to prove that the government acted *unconstitutionaly* in order to establish standing; they simply have to show that the government's actions deprive them of the opportunity to meet in person with an invited speaker. In any event, the First Circuit's decision in *Adams* alone disproves the government's theory. There, the First Circuit permitted a challenge to an exclusion predicated on a non-speech-related terrorism ground and assessed whether the terrorism justification was supported by the evidence. Just like in *Adams*, plaintiffs have standing to challenge Professor Habib's exclusion based on the "engage in terrorist activity" provision and, just like in *Adams*, this Court must ultimately assess whether the government's invocation of that provision is legally and factually supported.[4]

B. Plaintiffs have met the redressability requirement.

The government argues that plaintiffs do not meet the redressability standing requirement because the Court cannot order the government to issue Professor Habib a visa, Govt. Br. 12-14, but this misstates the relief plaintiffs are seeking. Plaintiffs are not asking the Court to order the government to issue a visa. Plaintiffs are asking the Court to enjoin the government from excluding Professor Habib under the "engage in terrorist activity" provision

[4] Just because the government's *stated* reason for barring Professor Habib is not directly related to the content of his speech does not render it facially legitimate and bona fide. Even non-speech related justifications that are legally or factually unsubstantiated, conclusory, or insufficiently specific are illegitimate grounds for barring an invited speaker. Pl. Supp. Br. 11 n.9. Plaintiffs' summary judgment briefs fully explain why the government's invocation of the "engage in terrorist activity" provision to bar Professor Habib – without providing the specific legal or factual basis and without any substantiation whatsoever that the statute *actually applies to him* – is not facially legitimate and bona fide. Pl. Summary Judgment Br. 18-23; Pl. Summary Judgment Reply 11-16.

because the government has failed to supply a facially legitimate and bona fide reason for applying that provision to him. Second Amended Complaint ¶¶ 91, 92, 95. In cases similar to this one, courts have issued precisely the kind of injunctive and declaratory relief plaintiffs seek here. *See, e.g.*, *Allende v. Shultz*, 1987 WL 9764, *6 (D. Mass. Mar. 31, 1987), *aff'd*, 845 F.2d 1111 (1st Cir. 1988) (granting declaration that invited speaker could not be barred under a particular inadmissibility provision); *City of New York v. Baker*, 878 F.2d 507, 512 (D.C. Cir. 1989) (modifying injunction that ordered government to issue a visa but permitting declaratory and injunctive relief that prohibited government from barring invited speaker on a particular inadmissibility ground); *Harvard Law Sch. Forum v. Shultz*, 633 F. Supp. 525, 532 (D. Mass 1986), *vacated as moot*, 852 F.2d 563 (1st Cir. 1986) (granting injunctive relief); *see also AAR I*, 463 F. Supp. 2d at 413 (rejecting government's redressability standing argument and remarking that "[s]hould it prove necessary, the Court is confident that it would be able to fashion a remedy that provides appropriate relief and satisfies Article III").

Indeed, the relief plaintiffs are seeking is essentially analogous to what the government itself argues is appropriate. Govt. Br. 13. If the Court were to grant the relief plaintiffs seek, when re-adjudicating Professor Habib's visa application or adjudicating a new application, the government would simply be precluded from barring Professor Habib on the particular ground the Court found was not facially legitimate and bona fide. The Court's ruling would not *require* the government to issue Professor Habib a visa; it would simply preclude it from denying his application on an illegitimate ground. The Court would not be treading inappropriately on the executive's immigration power; the Court would be ensuring it exercised the immigration power in a constitutional manner. *See Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) ("The Executive has broad discretion over the admission and exclusion of aliens, but that

discretion is not boundless. It . . . may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those . . . constitutional boundaries lie.").[5]

III. THE COURT SHOULD REJECT THE GOVERNMENT'S INVITATION TO CREATE A NOVEL MERITS ANALYSIS THAT WOULD EVISCERATE THE ENTIRE PURPOSE OF JUDICIAL REVIEW HERE.

As an alternative justification for the discovery it seeks, the government persists in advocating its newly-minted "balancing" analysis on the merits. Govt. Supp. Br. 14-17. But the inquiry it proposes has no basis in the relevant case law; the government simply invented it. Moreover, the proposed test is overtly rigged to guarantee an outcome in the government's favor, and would completely circumvent the modest review articulated in *Mandel* and applied by the First Circuit in *Adams* and *Allende*. The only merits question for the Court is whether the government has offered a facially legitimate and bona fide reason for its actions. Here, the government has not offered any reason at all, and it has made clear that it has no intention of ever providing one. In these circumstances, binding First Circuit precedent requires the Court to enter summary judgment in plaintiffs' favor.

The government misreads *Mandel* by proposing that it may maintain utter silence on its basis for excluding Professor Habib pending an assessment of the *weight* of plaintiffs' *acknowledged constitutional right.* Govt. Supp. Br. 15. Although *Mandel* may not have addressed a situation where the government refused to provide a reason, every court to have interpreted *Mandel*, including the First Circuit, has read it to *require* the government to have a

[5] Rather than looking to the First Amendment exclusion cases which *support* the appropriateness of plaintiffs' requested relief, the government relies on an inapposite case relating to Guantanamo Bay prisoners. Govt. Supp. Br. 12 (citing *Kiyemba v. Obama*, --- F.3d ----, 2009 WL 383618 (D.C. Cir. Feb. 18, 2009)). The *Kiyemba* case, however, involved nuanced questions regarding whether a court could order the government to issue visas as a *habeas* remedy to non-citizens who had never actually applied for visas or had their applications assessed by the executive branch. Again, plaintiffs are not asking the court to order the government to issue a visa here. Moreover, unlike this case, *Kiyemba* did not concern a court's authority to remedy a constitutional violation suffered by U.S. citizens.

facially legitimate and bona fide reason. Pl. Supp. Br. 12. Where the government does not supply a reason or does not have one, the courts have not thrown out the facially legitimate and bona fide requirement or engaged in balancing; they have ruled *against* the government. Pl. Supp. Br. 12-13. Other than its own refusal to accept the facially legitimate and bona fide requirement, the government offers no reason for departing from the simple merits analysis applied in every other First Amendment exclusion case.

It is evident that the purpose of the government's proposed test is to evade the modest requirements of *Mandel* review. In the government's view, "[t]he existence (or not) of a facially legitimate and bona fide reason is no longer part of the analysis if the Government does not advance one." Govt. Supp. Br. 14 n.5. This Court has rightfully rejected the notion that *Mandel* "intended to signal a willingness to accommodate evasion of the limited rule of review it was announcing." *Am. Sociological Ass'n v. Chertoff*, 588 F. Supp. 2d 166, 171 (D. Mass. 2008). Plaintiffs urge the Court to reject, once again, the government's invitation to construe *Mandel* as self-negating.

The government's new exposition of the details of the balancing test it envisions only underscores how doctrinally novel and analytically unsound the proposal is. In its merits analysis, according to the government, the Court should weigh "the difference between speech received by videoconferencing and speech received in person . . . against the Government's general regulatory and foreign policy interests," which it defines as the government's "compelling interest in controlling its borders and in maintaining . . . the confidentiality of visa records in order to effectively assert such border control." Govt. Supp. Br. 16.

The first shortcoming of this proposal is the paucity of law to support it. The government cites no precedent for the tilted balancing framework it puts forward.

The second shortcoming is that it gives the government such an inherent advantage as to render *Mandel* review meaningless. In the government's view, its interest should be understood in the most abstract and all-encompassing terms possible – the government's overarching interest in "controlling its borders" and protecting "the confidentiality of visa records," unmoored from the government's interests with respect to any particular exclusion. Measured against such broad concepts, the government would have the Court consider only a fraction of the plaintiffs' interests – not even the weight of their well-established First Amendment right, but some supposedly incremental "difference" between their interest in interacting with Professor Habib in person versus interacting with him through an alternative means proffered by the government.

There are a number of problems with this approach. First, although the government's immigration power is broad, it is subject to constitutional restraint. Only the *legitimate* and *constitutional* exercise of the immigration or national security power is worthy of any accommodation; thus, in the face of a First Amendment challenge, the government's interest is not assessed in a vacuum but rather with respect to the government's legitimate basis for a *particular exclusion.* If the "engage in terrorist activity" statute does not properly apply to Professor Habib – and all available evidence suggests it does not – then the government does not even have a legitimate interest that could be weighed here. *See, e.g.*, *AAR I*, 463 F. Supp. 2d at 419 ("while the Government may exclude Ramadan if he poses a legitimate threat to national security, it may not invoke 'national security' as a protective shroud to justify the exclusion of aliens on the basis of their political beliefs"). Second, slanting the scale so heavily in the government's favor would significantly undercut the plaintiffs' well-established "right to receive information and ideas" and "to hear, speak, and debate [with invited speakers] in person." *Mandel*, 408 U.S. at 762. By simultaneously placing a thumb on the government's side of the

scale and carving up plaintiffs' constitutional interest, this proposed balancing test is manifestly outcome-determinative. But protecting the government's interests does not require eviscerating plaintiffs' constitutional rights. As plaintiffs have explained, the government's interests are already accommodated by the less stringent facially legitimate and bona fide standard. *See* Pl. Supp. Br. at 12 n.10.[6]

Like the First Circuit in *Adams* and *Allende,* the Court must simply assess whether the government has offered a facially legitimate and bona fide basis for excluding Professor Habib.

CONCLUSION

Nothing the government seeks to discover about videoconferencing can undermine plaintiffs' legal basis for standing or relieve the government of its obligation to proffer a facially legitimate and bona fide reason for barring Professor Habib. Binding precedent requires the Court to find that plaintiffs have standing, to deny the government's discovery request, and to

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[6] The government raises two other points that are little more than distractions. First, the government makes the unremarkable observation that "discovery on the issue of a plaintiff's harm is not a new concept in First Amendment jurisprudence." Govt. Supp. Br. 17. Plaintiffs have never made any categorical assertion to the contrary; the question is not whether discovery is generally appropriate in "First Amendment jurisprudence" but whether the kind of discovery the government seeks is appropriate in *Mandel* review. It is telling that the government finds no support for its discovery request in the *Mandel* line of cases. Rather, the government relies on a case examining a statute that required cable television carriers to devote a portion of their channels to the transmission of local broadcast stations. Govt. Supp. Br. 17. Aside from being far afield in subject matter, *Turner Broadcasting System, Inc., v. FCC*, 512 U.S. 622 (1994), involved a different doctrinal analysis – application of the *O'Brien* test – which required a determination of whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 662. The fact that the court remanded for further discovery in a doctrinal context demanding a fact-driven balancing analysis provides no support for the government's proposed renovation of *Mandel* review.

Second, the government claims that 8 U.S.C. § 1202(f) "bars a court from ordering the Government to produce visa records." Govt. Supp. Br. 16 n.6. But, as the government recognizes, the statute explicitly contemplates disclosure of visa records in compliance with court orders. *Id.* at § 1202(f)(1); *see also Association for Women in Science*, 566 F.2d 339, 346 n.38 (D.C. Cir. 1997) (recognizing that § 1202(f) allows for disclosure in judicial proceedings); *INS v. Zambrano*, 972 F.2d 1122, 1125 (9th Cir. 1992) (same). In any event, this statute cannot trump the constitutional facially legitimate and bona fide requirement and never has in any other First Amendment exclusion case.

resolve whether the government has provided a facially legitimate and bona fide reason for excluding Professor Habib. Because the government has not supplied a facially legitimate and bona fide reason here and has made clear that it never intends to, binding precedent compels the Court to grant summary judgment in plaintiffs' favor.

Respectfully submitted,

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