UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN SOCIOLOGICAL ASSOCIATION; AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; AMERICAN-ARAB ANTIDISCRIMINATION COMMITTEE; BOSTON COALITION FOR PALESTINIAN RIGHTS; and ADAM HABIB, Plaintiffs, v. MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Security; CONDOLEEZZA RICE, in her official capacity as Secretary of State, Defendants.	Case No. 07-11796 (GAO)

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS; AND DEFENDANTS' MEMORANDUM IN SUPPORT FOR HOLDING IN ABEYANCE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Submitted by:

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

MICHAEL J. SULLIVAN
United States Attorney

MARK T. QUINLIVAN
Assistant United States Attorney

DAVID J. KLINE
Director, District Court Section

VICTOR M. LAWRENCE
Senior Litigation Counsel

CHRISTOPHER W. HOLLIS
Trial Attorney
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0899
(202) 305-7000 (fax)
christopher.hollis@usdoj.gov

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INTRODUCTION

In opposing Defendants' motion to dismiss, Plaintiffs attempt to side-step Defendants' arguments that this Court lacks jurisdiction over this action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and Plaintiffs proceed to seek Rule 56 summary judgment. Plaintiffs seek summary judgment nothwithstanding the Court's lack of jurisdiction, and on the basis of a "Statement of Uncontested Facts" that is replete with allegations that are non-material, irrelevant, or otherwise incorrect and not supported by credible evidence. Moreover, the "uncontested" allegations underlying Plaintiffs' standing in this matter are disputed.

For the reasons expressed herein, the Court should grant Defendants' motion to dismiss for lack of jurisdiction and failure to state a claim, and should the Court not dismiss the Complaint, then it should hold Plaintiffs' motion for summary judgment in abeyance. In the event this action is not dismissed on the jurisdictional grounds already raised, discovery into the issue of Plaintiffs' alleged harms in this lawsuit would enable the Government to establish that Plaintiffs lack standing in this litigation, and would provide yet another jurisdictional ground for dismissal of this action. Even if the material facts relating to Plaintiffs' standing were not in dispute, the consular nonreviewability doctrine divests this Court of subject matter jurisdiction, and necessarily prevents a grant of summary judgment in favor of Plaintiffs as a matter of law.

This case challenges the denial of a visa to Mr. Adam Habib, and the Government's denial of a waiver of inadmissibility. Mr. Habib had "engaged in terrorist activity," as defined in the Immigration and Nationality Act ("INA"), and there is no credible evidence contradicting the conclusion that Mr. Habib had engaged in terrorist activity, and no reasonable basis to question the legitimacy or bona fides of the stated legal basis for denial. The Department of State has no obligation to disclose visa records to facilitate second guessing of this determination, neither is the Department required to provide a reason for denial of the discretionary waiver of inadmissibility. For a court to impose an evidentiary burden for justifying the visa denial would undermine the confidentiality Congress intended for visa records, which, pursuant to statute, may only be disclosed in limited situations, and subject to the Secretary of State's discretion. To impose such a burden for the exercise of the discretionary waiver authority would undermine the discretionary nature of the waiver.

Based on the adverse decisions on Mr. Habib's visa and the request for a waiver, Plaintiff interest groups, who profess a desire to engage in academic debate with Mr. Habib, repeatedly allege that the United States Government is violating the First Amendment of the Constitution by "censoring" Mr. Habib through its immigration laws, and not allowing him to speak simply because the Government disapproves of his views.[1] However, Plaintiffs offer absolutely no credible evidence to support this conjecture, and, other than Mr. Habib's self-serving statements in a declaration, Plaintiffs have no evidence to dispute the fact that Mr. Habib was denied a visa because he had engaged in terrorist activity.

Except for the Government's decisions to exclude Mr. Habib from this country, resulting in Plaintiff groups' professed inability to have in-person, face-to-face dialogue with Mr. Habib, Plaintiffs make no allegation that the Government is in any way seeking to prevent Mr. Habib's views and content-based speech from being disseminated into the United States through other channels such as videolink hook-up, teleconferencing, satellite feed, audiotape, internet, or other means. Thus, and contrary to Plaintiffs' assertions, various means continue to exist to allow Plaintiffs to "receive information and ideas" from Mr. Habib. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("the Constitution protects the right to receive information and ideas; . . . "th[e] right to receive information and ideas . . . is fundamental to our free society."). No one, not the

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[1] *See* Plaintiffs' Motion for Summary Judgment and Opposition to Motion to Dismiss ("Pl. Opp.") at 1, 2 ("Circumstances suggest that defendants are excluding Professor Habib because he is a prominent critic of some U.S. policies."), *Id.* at 1; ("The Government cannot constitutionally prevent U.S. citizens from engaging a foreign scholar they have invited to speak inside the U.S. simply because the Government disapproves of his views.), *Id.* at 2; ("[T]he Government . . . [is] using the immigration laws as a tool of censorship."), *Id.* at 10; ("Plaintiffs believe that the Government is barring Professor Habib not because of his actions but because of his political views."), *Id.* at 23.

United States Government nor anyone else, is preventing Plaintiff groups from hearing Mr. Habib's ideas, philosophies, anti-American speech, etc., or from having a real-time exchange of views with him.

Plaintiffs state that "[c]ensorship does not become constitutionally permissible simply because the government uses the immigration laws, rather than some other mechanism, to achieve its ends." *See* Pl. Opp. at 11. Plaintiffs continue by stating that, "[f]or this reason, courts have an important role in overseeing the government's exclusion of invited foreign scholars." *Id.* Notwithstanding Plaintiffs' assertions, no exception exists that allows greater scrutiny to apply to the review of consular decisions involving foreign scholars.[2] More importantly, however, it is the Department of State – and specifically United States consuls and consular officers abroad – that are charged with approving or disapproving alien visa applications, not the courts.[3]

ARGUMENT

I. The Court Should Grant Defendants' Motion to Dismiss

Plaintiffs' challenge to Mr. Habib's visa denial must be dismissed because the doctrine of

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[2] There is no "foreign scholar exception" that allows judicial review of foreign scholar visa denials when U.S. citizens raise First Amendment challenges to the exclusion of an invited foreign scholar. *See Kleindienst v. Mandel*, 408 U.S.753, 768-70 (1972) (rejecting requirement that courts balance the Government's proffered justification for exclusion against the audience and speakers' First Amendment interests, degree of influence or education, or general popularity). Accordingly, much of Plaintiffs' Opposition can be disregarded to the extent it discusses Mr. Habib's purported importance, prestige, prominence, and authority as a scholar. *See* Pl. Opp. at 3, 8, 10, and 21. This is simply irrelevant.

[3] *See, e.g., American Academy of Religion v. Chertoff,* 2007 WL 4527504 *14 (S.D.N.Y. 2007) (hereinafter *AAR II)* (acknowledging the role of Congress in crafting the language on which consular officers rely on making their visa denial decisions, and finding that, "it is not the Court's role – sitting without the benefit of the subject matter expertise or detailed information on the applicant available to the consular official – to second guess the result.").

consular non-reviewability deprives the Court of subject matter jurisdiction to review Mr. Habib's visa denial and the denial of a waiver of his inadmissibility. *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *United States ex rel. Knauff*, 338 U.S. 537 (1950); *Rivera de Gomez v. Kissinger*, 534 F.2d 518 (2d Cir. 1976); *Centeno v. Shultz*, 817 F.2d 1212 (5th Cir. 1987); *U.S. ex rel. Ulrich v. Kellog*, 30 F.2d 984 (D.C. Cir. 1929). In addition, Plaintiffs fail to state claim upon which relief can be granted.

As a testament to their longstanding recognition of the political branches' sovereign authority over the inherently political decisions regarding alien admissibility, courts have held that, "[t]he judicial branch should not intervene in the executive's carrying out the policy of Congress with respect to exclusion of aliens." *See Burrafato v. United States Dep't of State*, 523 F.2d 554, 556 (2d Cir. 1975); *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (finding that, "[t]he action of the executive officer [to admit or exclude an alien] is final and conclusive . . . . [I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien"). This nonintervention by the judiciary in alien admissibility determinations has resulted in the doctrine of consular nonreviewability, which bars courts from exercising jurisdiction over suits challenging the decision of a consular officer to grant or deny a visa. *See, e.g., Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158-60 (D.C. Cir. 1999); *Chi Doan v. INS*, 160 F.3d 508, 509 (8th Cir. 1998); *Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987) (per curiam); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986); *Rivera de Gomez v. Kissinger*, 534 F.2d 518, 519 (2d Cir. 1976) (per curiam); *Romero v. Consulate of the United States, Barranquilla, Colombia*, 860 F. Supp. 319, 322-24 (E.D. Va. 1994). *See also Touarsi v.*

Mueller, -- F.Supp.2d -- , 2008 WL 707282 (D. Mass. March 17, 2008) (noting the "unmistakable congressional efforts . . . to insulate executive decision-making in the area of immigration from judicial review.")

Plaintiffs' First Amendment arguments are unavailing. Although Plaintiffs cite to *Mandel* as a basis for this Court's jurisdiction, *Mandel* did not review a visa denial and, as such, the facially legitimate and bona fide standard *Mandel* considered in conjunction with the Government's explanation of its *waiver* denial there does not apply to the *visa* denial here. *See Mandel*, 408 U.S. at 769. Accordingly, neither *Mandel* nor the decisions Plaintiffs cite as employing the facially legitimate and bona fide standard apply here as a basis for jettisoning the doctrine of consular nonreviewability as a bar to judicial review of Mr. Habib's visa denial.

The *Mandel* Court explicitly recognized that the doctrine of consular nonreviewability imposes no requirement upon the Government to justify consular officer decisions excluding aliens:

> 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.

Id. at 766 (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)) (emphasis added). Some decisions subsequent to *Mandel* have overlooked *Mandel's* recognized vitality of the doctrine of consular nonreviewability and, in doing so, have improperly conflated the issue of visa denial with denial of waiver of an applicant's inadmissibility. *See Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990); *Abourezk v. Shultz*, 785 F.2d 1043 (D.C. Cir. 1986); *American Academy of Religion v. Chertoff*, 2007 WL 4527504 (S.D.N.Y. 2007). Here, Mr. Habib's visa application

was denied with the explanation stated that he had engaged in terrorist activities in violation of INA § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I). The Court may not review this decision under the doctrine of consular nonreviewability.

There is no precedent relevant to this case for requiring Defendants to provide any form of evidence to support its visa-related decisions. Cases cited by the Plaintiffs for imposing such a burden either relate to situations where the court was interpreting INA provisions not applicable to this action, as in the case of *Adams* and *Abourezk*, or to a case that is distinguishable under the "unique circumstances" analysis applied in *AAR II*.[4] Accordingly, in deference to the Executive's sovereign authority over alien admissions, as recognized in the doctrine of consular nonreviewability, the Court lacks jurisdiction to review the denial of Mr. Habib's visa, and the Court should also find that Plaintiffs fail to state a claim regarding the visa denial.

Moreover, the Court lacks jurisdiction to review Defendants' waiver denial, and Plaintiffs' allegations on this count also fail to state a claim. First, the waiver decision at issue here is distinguishable from other decisions evaluating the denial of a waiver of inadmissibility where the other courts either 1) already had the Government's explanation for its denial decision and the courts considered whether it was facially legitimate and bona fide; or 2) were relying on other statutes in the INA (that are not applicable here) which necessitated more of a factual inquiry into the reasons for the denial. *See, e.g.*, *Mandel*, 408 U.S. at 759, 769 (holding that a letter from the Immigration and Naturalization Service, acting on behalf of the Attorney General,

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[4] Issues of statutory construction also predominated in *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988), a case comparable to *Abourezk,* in that both cases reviewed the Government's denial of a visa, but did not rely on the *Mandel* decision or any purported extension of the facially legitimate and bona fide criteria referenced in that case.

denying applicant's waiver of inadmissibility provided the applicant with a facially legitimate and bona fide reason for the denial); *Adams*, 909 F.2d at 647-48, 650 (finding that State Department's determination of applicant's involvement with terrorist activity constituted a facially legitimate and bona fide reason and was a sufficient basis for consular decision not to apply a waiver under either the McGovern Amendment or Section 901, Public Law 100-204); *Abourezk*, 785 F.2d at 1058 (finding that, because of goals associated with McGovern Amendment and "congressionally mandated restrictions" on subsection (28) [of 8 U.S.C. § 1182(a)] "when an applicant is a member of a proscribed organization, so that subsection (28) applies, the government may bypass that provision and proceed under subsection (27) [[of 8 U.S.C. 1182(a)] only if the reason for the threat to the 'public interest[,] . . . welfare, safety, or security' is independent of the fact of membership in or affiliation with the proscribed organization").

Mr. Habib's waiver denial is likewise distinguishable from both *Adams* and *Abourezk*. The review in both those decisions focused on statutory construction and the interplay between the McGovern Amendment and the Government's basis for not applying the McGovern Amendment's waiver provision. Here, the congressionally mandated scrutiny and conditions for exercise of the waiver authority are not at issue; rather, Plaintiffs simply challenge denial of the waiver on the basis of INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A), and the applicable regulation, 8 C.F.R. § 212.4. In this regard, it is significant that neither the waiver statute nor the regulations applying the statute contain a standard against which to judge the denial of waiver of Mr. Habib's inadmissibility. Plaintiffs argue that, under *Mandel*, the Government is obligated to provide a facially legitimate and bona fide reason for denial of a waiver of inadmissibility. *See*

Pl. Opp. at 32. However, *Mandel* did not *obligate* the Government to provide a facially legitimate and bona fide reason for denying the waiver. The *Mandel* Court merely found that the Government had provided a facially legitimate and bona fide explanation for its decision, and specifically reserved the issue of whether or not the Government could be required to provide any explanation in future cases with similar First Amendment challenges. *Mandel*, 408 U.S. at 770.

In any event, Plaintiffs' argument in support of jurisdiction over the waiver denial fails because no standard exists for reviewing the purely discretionary decision of whether to recommend or issue a waiver of inadmissibility. Moreover, there is no statutory requirement to explain a waiver denial, and there is no standard against which to measure the Government's exercise of discretion. While Plaintiffs argue that the Government must explain its waiver decisions, they have identified no statute establishing that requirement or establishing standards for determining when the Government must explain its waiver determinations and when it must not. *See* Defendants' MTD at 25-26.

Indeed, the relevant waiver statute does not contain any standards for waiver or a requirement for justification. INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A). State Department regulations on recommendations for waivers, found at 22 C.F.R. § 40.301, contain no standards for making such a recommendation. Department of Homeland Security regulations on such recommendations, found at 8 C.F.R. § 212.4, note the requirement for justification of the recommendation, but again, include no standards or conditions that might be reviewed by a court. Furthermore, any such justification would merely be part of the deliberative process and protected from disclosure or review, because it is the Department of Homeland Security official that makes the determination, not the recommending consular officer.

As explained in Defendants' Motion to Dismiss, in the absence of a statutory standard against which to evaluate the agency's exercise of discretion, the Supreme Court, in discussing agency discretion in the context of Administrative Procedure Act ("APA ") review, held in *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), that the statute in question "can be taken to have 'committed' the decision-making to the agency's judgment absolutely."[5] Because no standard exists and, as a result, absolute discretion is committed to the agency regarding its waiver determinations, Plaintiffs' argument that this Court should exercise jurisdiction over the waiver denial accordingly fails.

A. Aside from Being Inconsistent with the Doctrine of Consular Non-Reviewability, Requiring the State Department to Produce Additional Evidence to Support a Visa Denial Would Undermine Congress's Law Requiring the Confidentiality of Visa Records.

Plaintiffs complain in their brief that the Government did not provide a facially legitimate and bona fide reason for denying Mr. Habib a visa. Defendants disagree. At the time of the visa denial, Consular Officer Charles Louma-Overstreet gave Mr. Habib a letter explaining that the denial was based on Section 212(a)(3)(B)(i)(I) of the INA, 8 U.S.C. § 1182(a)(3)(B)(i)(I), and attached a copy of the statute, which renders aliens inadmissible if they have "engaged in terrorist activity," as defined in Section 212(a)(3)(B)(iv) of the INA. The consular officer's letter establishes the basis for denial of the visa and complies with applicable State Department guidance, which provides only for disclosure of the legal provision on which denial was based, not the underlying facts.[6] Furthermore, as previously mentioned, there are no legal standards for

[5] Plaintiffs fail to distinguish or even address *Heckler v. Chaney* in their Opposition.

[6] *See* 9 FAM 41.121 Refusal of individual visas:

exercising discretionary waiver authority. Accordingly, no factual or legal basis for that decision need be noted.

Plaintiffs complain that the Government did not further describe the actions of Mr. Habib that rendered him inadmissible for engaging in terrorist activity; thus, they assert, it has not provided a sufficient factual basis for the denial. *See* Pl. Opp. 14-18 (arguing that the Government should provide supporting evidence that was used by the consular officer when he concluded that Mr. Habib had engaged in terrorist activity). However, under the relevant statutory scheme set out in the INA and under State Department regulations, it is clear that the Government has *no obligation* to disclose the factual basis for its visa decisions. Defendants thus fulfilled the statutory and regulatory requirements attendant with informing a visa applicant

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(a) GROUNDS FOR REFUSAL. Nonimmigrant visa refusals must be based on legal grounds, that is, one or more provisions of INA §§ 212(a) or (e), INA § 214(b), INA § 221(g), or INA § 222(g). Certain classes of nonimmigrant aliens are exempted from specific provisions of INA § 212(a) under INA § 102, INA § 212(d)(1), INA § 212(d)(2) and, upon a basis of reciprocity, under INA § 212(d)(8). When a visa application has been properly completed and executed in accordance with the provisions of INA and the implementing regulations, the consular officer must either issue or refuse the visa.

(b) REFUSAL PROCEDURES. If a consular officer knows or has reason to believe that an alien is ineligible to receive a visa on grounds of ineligibility which cannot be overcome by the presentation of additional evidence, the officer shall refuse the visa and, if practicable, shall require a nonimmigrant visa application to be executed before the refusal is recorded. In the case of a visa refusal the consular officer shall inform the applicant of the provision of law or regulations upon which the refusal is based. If the alien fails to execute a visa application after being informed by the consular officer of a ground of ineligibility to receive a nonimmigrant visa, the visa shall be considered refused. The officer shall then insert the pertinent data on the visa application, noting the reasons for the refusal, and the application form shall be filed in the consular office. Upon refusing a nonimmigrant visa, the consular officer shall retain the original or a copy of each document upon which the refusal was based as well as each document indicating a possible ground of ineligibility and may return all other supporting documents supplied by the applicant.

of the basis for denial by informing Mr. Habib of the legal grounds of ineligibility. Furthermore, to Defendants' knowledge, no court has overturned a visa or waiver denial because the Government failed to set out the facts on which the visa-related decision was based.

In *Mandel*, the Supreme Court addressed a situation where the Government had advised the visa applicant, outside the litigation, of the factual basis for denying a waiver. The Court reviewed the facts disclosed by the Government and found they constituted a facially legitimate and bona fide reason for denying the waiver. Importantly, the Court imposed no evidentiary burden on the Government. Rather, the Court reserved the question whether courts could impose any such burden, writing:

> What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.

Mandel, 408 U.S. at 770.

Although the *Mandel* decision did not address whether the Government could be required to justify visa-related decisions, Congress has spoken clearly. Congress enacted Section 222(f) of the INA, 8 U.S.C. § 1202(f), pursuant to which the State Department generally is prohibited from disclosing visa records. Section 222(f) "incorporates a [C]ongressional mandate of confidentiality" with respect to records concerning the issuance or non-issuance of visas. *Medina-Hincapie v. Dept. of State*, 700 F.2d 737, 741 (D.C. Cir. 1983). Pursuant to that provision:

> The records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States *shall be considered confidential* and shall be used only for the formulation,

> amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States . . . .

8 U.S.C. § 1202(f) (emphasis added). Under section 222(f), "the Secretary of State has *no authority* to disclose material to the public. In that sense the confidentiality mandate is absolute; *all* matters covered by the statute shall be considered confidential." *Medina-Hincapie,* 700 F.2d at 741 (emphasis added).

Although the statute contains two exceptions to the mandate of confidentiality, both are limited to very narrow and specific circumstances. One of these exceptions, set forth at Section 222(f)(1), affords the Secretary of State discretion to make available "certified copies of [visa] records to a court which certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case pending before the court."[7] 8 U.S.C. § 1202(f)(1). This discretion, however, "does not relieve the Secretary of the mandate to treat the matter as confidential" – rather, "it *permits* the Secretary to do only that which any agency subject to a confidentiality requirement would be required to do if it received a court order or subpoena to produce specified documents." *Medina-Hincapie*, 700 F.2d at 741 (emphasis added).

Thus, Section 222(f)(1) of the INA makes clear, even where a court certifies that it needs visa records "in the interest of the ends of justice" in a pending case, the Secretary of State still has unmitigated discretion to withhold the records. Such a grant of discretion, in the face of a court-certified need for visa records, is unusual and demonstrates the sensitivity of those records.

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[7] The second exception, not relevant here, provides that the Secretary of State may, in her discretion, share information with a foreign government "for the purpose of preventing, investigating, or punishing acts that would constitute a crime in the United States" or "to deny visas to persons who would be inadmissible to the United States." 8 U.S.C. § 1202(f)(2).

The protection afforded by Section 222(f) is absolute, and disclosure is possible only in limited circumstances, and when the Department determines it is appropriate.

There are a range of reasons why visa records require protection, including that some records may be classified, some are protected by deliberative process privilege, and some may be law enforcement sensitive. Any number of the concerns may be relevant in any given case, but merely identifying the nature of the concern may harm U.S. national interests. In other cases, consular officers may be required to make subjective determinations about, for example, whether an alien may be an intending immigrant instead of a short-term visitor. Such determinations may require the consular officer to take into account the economic and political circumstances in the country and very subtle cues he has picked up in the course of an interview of that applicant or other applicants related to the applicant. In such cases, nondisclosure of visa records may not be required to protect national security, but rather, to avoid inviting second-guessing of the administrative and deliberative process prescribed in detail by statute and regulations.

The provisions of Section 222(f) of the INA reflect that visa decisions may be based on highly classified and other sensitive information. Similarly, the protection of visa records helps protect against the second-guessing of visa-related decisions by those who do not have the specialized training or access to relevant screening tools, the support of counter-terrorism and fraud prevention experts, or access to other resources essential to protecting U.S. border security. Accordingly, admissibility decisions must be made by consular officers and other Executive Branch officials authorized to make admissibility determinations based on their own training and resources, or their reliance on others with specialized training and access to these resources, and such decisions should not be reviewed by those without such training and access. Accordingly,

the sources of the information, their analysis and their conclusions should not be subject to judicial scrutiny. By enacting Section 222(f) of the INA, Congress provided the essential authority to ensure that such scrutiny cannot occur without Department of State consent.

B. Plaintiffs' Arguments for Supporting Judicial Review are Inapposite

Plaintiffs cite numerous cases in urging the Court to exercise jurisdiction, each of which is legally and factually distinguishable from the instant case. Plaintiffs primarily rely on *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986); *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988); and *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990). Plaintiffs' argument is based on the application of *Mandel's* facially legitimate and bona fide criteria, and neither *Abourezk* nor *Allende* reviewed plaintiffs' claims under those criteria. Furthermore, to the extent that *Adams* applied First Amendment scrutiny, it did so based on the mandates of INA provisions that are not applicable to the present case, and are no longer in effect.

(1) *Abourezk v. Reagan* and *Allende v. Shultz* do not provide precedent for this Court's jurisdiction over Mr. Habib's visa denial

Plaintiffs rely extensively on *Abourezk* and *Allende* for the proposition that courts have jurisdiction to review United States citizens' First Amendment challenges to the exclusion of aliens. *See* Pl. Opp. at 12-16. While these courts hold that judicial review was necessary to determine "whether specific inadmissibility grounds properly applied to invited scholars" and "whether the government had a 'sound basis' for applying a particular bar" to an applicant, *see id.* at 15, they did so with reference to INA inadmissibility provisions repealed in 1990 that were subject to certain statutory conditions that do not apply in this case. Thus, those cases are readily distinguishable and their analysis inapplicable to the present case.

As the court in *Abourezk* noted, the "case concerns the scope of the authority Congress accorded to the Secretary of State under [INA] § 182, 8 U.S.C. § 1182(a)(27)(1982), to deny non-immigrant visas to aliens who wish to visit this country in response to invitations from United States citizens and residents to attend meetings or address audiences here." *Abourezk*, 785 F.2d at 1047. Thus, the court assumed jurisdiction to address an issue of statutory interpretation, not a simple question of fact, and not to apply the "facially legitimate and bona fide" criteria as articulated in *Mandel*.[8] *See Abourezk*, 785 F.2d at 1051-52, 1057 (specifically avoiding constitutional questions, and finding that the district court had incorrectly analyzed then-applicable 8 U.S.C. §§ 1182(a)(27) and (28)).

Similarly, the court in *Allende* was concerned with the interaction between then-applicable subsections (27) and (28) of 8 U.S.C. § 1182(a), and whether, in denying applicant Allende's visa, the Government had correctly interpreted the statutory interplay between these two subsections in accord with principles of statutory construction. *Allende*, 845 F.2d at 1116-18. Importantly, and in significant contrast to the factual predicate of the instant case, the court in *Allende* identified specific facts leading it to the "irrefutable conclusion" that the Government ideologically excluded Allende on the basis of "speeches" she would deliver in the United States and the interchange of her ideas.[9] *Id.* at 1120-21.

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[8] In *Abourezk*, the court noted that "the plaintiffs are substantively interested in, and adversely affected by, the Department's interpretation of subsection (27) as it coexists with subsection (28) [and their stake in the construction of these subsections enables them] to secure judicial review of their pleas regarding those provisions." *Abourzek*, 785 F.2d at 1051.

[9] Here, there is no evidence that the Consular Officer in Johannesburg, South Africa based the visa denial on Mr. Habib on his ideological views. Rather, the visa was denied because Mr. Habib has engaged in terrorist activities. *See* Section 212(a)(3)(B)(i)(I) of the INA, 8 U.S.C. § 1182(a)(3)(B)(i)(I).

The First Circuit Court of Appeals in *Allende* did not apply a generalized "facially legitimate and bona fide" standard to the visa denial on First Amendment grounds. Instead, relying on the specific statute at issue, the court found that the Government "failed to advance a *sound basis* for exclusion under subsection 27." *Id.* at 1116 (emphasis added). Thus, to the extent the court scrutinized the Government's justification for Allende's visa denial, the court did so in the context of the statutory construction analysis that formed the core of its decision. *Id.* at 1118. The court was not relying on *Mandel.*

Plaintiffs' assertions to the contrary, the facially legitimate and bona fide criteria did not figure into either *Abourzek* or *Allende,* and it should not be used as a springboard for arguing subject matter jurisdiction or judging the basis for Mr. Habib's visa and waiver denials. Plaintiffs here do not raise questions about the scope or meaning of the INA provision on which Defendants relied in denying Mr. Habib's visa – Section 212(a)(3)(B)(i)(I) of the INA, 8 U.S.C. § 1182(a)(3)(B)(i)(I). *Abourezk* and *Allende*, then, are inapposite for purposes of determining whether or not this Court has jurisdiction to review the denial of Mr. Habib's visa.

(2) *Adams v. Baker* is inapposite because the court's analysis was based on statutes inapplicable here and since repealed

Plaintiffs contend that the *Adams* court exercised jurisdiction and applied facially legitimate and bona fide review to the consular officer's visa denial because such review is "mandated by the *constitution*, not any particular statute." Pl. Opp. at 28. However, the holding in *Adams* was to the contrary. The *Adams* Court stated:

> We note, first that in the absence of statutory authorization or mandate from Congress, factual determinations made by consular officers in the visa issuance process are not subject to review by the Secretary of State, . . . and are similarly not reviewable by

> courts . . . . Thus, while Section 901 does authorize judicial review over the question of whether there was a "facially legitimate and bona fide reason" for an alien's exclusion, that review is limited to the determination of whether there was sufficient evidence to form a "reasonable ground to believe" that the alien had engaged in terrorist activity.

Adams, 909 F.2d at 649 (internal citations omitted). Thus, the court based its scrutiny of the Government's actions on Section 901, after noting that such scrutiny would not be permissible absent this statutory authorization.

In *Adams*, plaintiffs' challenge to the Government's visa and waiver denials was founded largely on the McGovern Amendment and Section 901 of Public Law 100-204 which required the Government, acting through the Secretary of State, once he declined to waive the "proscribed organization" inadmissibility determination, to certify that such waiver would implicate the security interests of the United States. *Adams*, 909 F.2d at 645-46; 22 U.S.C. § 2691 (1982); 8 U.S.C. § 1182(a)(28); *Allende*, 845 F.2d at 1113 (explaining the requirements of the McGovern Amendment). With this condition imposed on the Government by the McGovern Amendment for declining to waive admissibility, it is understandable that the *Adams* Court in reviewing such a waiver denial would likewise subject the waiver denial decision to some form of review. *See Adams*, 909 F.2d at 647-48.

As *Abourezk* and *Allende* also had previously established in the McGovern Amendment context, mere membership in a subsection (28)-proscribed organization was an insufficient basis on its own to preclude waiver under the McGovern Amendment. *See Abourezk*, 785 F.2d at 1058-59; *Allende*, 845 F.2d at 1116. It is this interaction in *Adams* between 8 U.S.C. § 1182(a)(28)(F), the basis for applicant Adams's visa denial, and the certification requirement that

the then-effective McGovern Amendment imposed upon the Secretary of State's decision not to waive admissibility, that led the *Adams* Court to scrutinize the Government's basis for Adams' visa denial. *See Adams*, 909 F.2d at 649-50 (reviewing the Government's basis for declining to apply the McGovern Amendment waiver to applicant Adams and finding that neither the McGovern Amendment nor Section 901 of Public Law 100-204 applied to Adams's situation).

The McGovern Amendment constituted a legal basis for reviewing the Government's decision not to waive inadmissibility. The McGovern Amendment functioned as a statutory check to the propriety of subsection (28)-based exclusions and gave the court both grounds and cause for scrutinizing the Government's exclusion of Adams. Neither the McGovern Amendment nor subsection (28) remains in effect today, and there are no other restrictions on Defendants' authority to deny visas to aliens found inadmissible under the INA. The jurisdictional basis for the court's review in *Adams* – and in *Abourezk* and *Allende* discussed *supra* – is not present here. Accordingly, like *Abourezk* and *Allende, Adams* is inapposite to the instant matter and is inapposite precedent for the Court to rely upon to exercise jurisdiction.[10]

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[10] Plaintiffs attempt to turn the Southern District of New York's opinion in *American Academy of Religion II v. Chertoff*, 2007 WL 4527504 (S.D.N.Y. 2007), into persuasive authority in their favor when the holding -- in a case brought by the same counsel in the instant matter -- was a win for the Government. Pl. Opp. at 16-17 (noting that the district court in that case, under similar circumstances to Mr. Habib's case, did a limited First Amendment review). However, as Defendants pointed out in their motion to dismiss, the district court's limited First Amendment review in *AAR II* was principally brought about by "unique circumstances" in that case, including the Government's media statements, never disavowed outside of that pending case, that the visa applicant was denied a visa for endorsing or espousing terrorism -- a position that contradicted what the Government was alleging in court. The court also noted what it viewed as unusual involvement by the Department of Homeland Security in the visa denial process. Defendants' MTD at 11; *AAR II* at *11. Thus, the *AAR II* court took an extremely fact-specific approach to its jurisdictional inquiry -- facts that are not present in this case -- and the decision in *AAR II* is not helpful to plaintiffs.

C. APA Review is Unavailable for Plaintiffs' Claims

Plaintiffs argue in favor of APA review of their claim on the bases that Defendants' inadmissibility determination under Section 212(a)(3)(B)(i)(I) of the INA, 8 U.S.C. § 1182 (a)(3)(B)(i)(I), is "'contrary to constitutional right,'" that there exists no evidence that this statute applies to Mr. Habib, that Defendants' reasonable belief that Mr. Habib has engaged in terrorist activity "runs counter to" the evidence before Defendants, and that there exists no support in case law to show the inapplicability of the APA to Mr. Habib's visa denial. Pl. Opp. at 34-35. Defendants briefly address Plaintiffs' APA claim.

The discretion afforded consular officers in their admissibility determinations is a vital component in maintaining the power of a sovereign nation to exclude aliens without judicial interference of visa determinations in this regard. *See Mandel*, 408 U.S. at 765; *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); *Saavedra Bruno*, 197 F.3d at 1159; *see also United States ex rel. Knauff*, 338 U.S. at 543. Review of Mr. Habib's visa, therefore, cannot be contrary to constitutional right since longstanding, controlling precedent recognizes the doctrine of consular nonreviewability and APA review here would directly undermine the vitality of the doctrine. In this regard, courts reviewing APA challenges to visa denials have held that the discretion Congress gave the Executive over admissibility determinations precludes application of the APA. *See* 5 U.S.C. § 701(a) (stating the APA "applies . . . *except* to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency *discretion* by law") (emphasis added); INA § 104(a), 8 U.S.C. § 1104(a); INA § 221(i), 8 U.S.C. § 1201(i); *Mandel*, 408 U.S. 753; *Saavedra Bruno*, 197 F.3d at 1158 n. 2; *Centeno*, 817 F.2d 1212.

Plaintiffs' second and third arguments are both evidentiary-based; they simultaneously allege the non-existence of evidence linking Mr. Habib to INA § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182 (a)(3)(B)(i)(I), and allege that Defendants' evidence is an insufficient basis for the statute's application. *See* Pl. Opp. at 34 (*citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).[11] This APA argument fails for two reasons. First, judged in view of the deference afforded consular officer decisions under the doctrine of consular nonreviewability, the consular officer had a reasonable belief here that Mr. Habib engaged in terrorist activity based on a recommendation provided by the State Department. Plaintiffs have not provided any credible evidence that the decision was arbitrary and capricious or an abuse of the wide discretion afforded consular officers and the State Department over admissibility determinations.[12] Second, Plaintiffs' evidentiary-based APA arguments fall back on Plaintiffs' fabricated adaptation of the facially legitimate and bona fide standard, which Defendants have shown is both inaccurate based on the plain text of *Mandel,* which imposed no such burden on the Government, and is unsupported by case law. Moreover, applicable law and regulations do not require the State Department to provide facts justifying visa-related decisions and INA §

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[11] In citing also to *Penobscot Air Servs., Ltd. v. Fed. Aviation Admin.*, 164 F.3d 713, 719 (1st Cir. 1999), Plaintiffs imply that there exists no "rational connection between the facts found and the choice made." Pl. Opp. at 34. To the extent that this APA-based standard could apply here, the rational connection between the facts before the consular officer and his decision to deny Mr. Habib's visa remains the consular officer's reasonable belief under an unchallenged statute that, based on the facts before him, Mr. Habib has engaged in terrorist activity. Under the law as stated in INA § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182 (a)(3)(B)(i)(I), the Consular Officer chose to deny Mr. Habib a visa on this basis.

[12] Moreover, Plaintiffs have provided no evidence that the Defendants' basis for the visa denial – that Mr. Habib has engaged in terrorist activity – is arbitrary and capricious and therefore subject to APA review on this basis. *See* INA § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I).

222(f) precludes the Court from ordering the disclosure of the relevant visa records. *See Heckler v. Chaney,* 470 U.S. 821 (1985) (precluding review where the statute does not have a meaningful standard to interpret).

Finally, Plaintiffs argue that case law does not support the inapplicability of the APA to Mr. Habib's visa denial. Plaintiffs make this argument by limiting their interpretation of *Ardestani v. INS*, 502 U.S. 129, 133 (1991). In *Ardestani*, the court plainly stated that Congress intended the INA "to supplant the APA in immigration proceedings." *Id.* at 132-34 (*citing Marcello v Bonds*, 349 U.S. 302, 310 (1955)). Plaintiffs contend that only the APA's hearing provisions are supplanted. However, based on the plain language, the INA supplants the APA regarding, not just hearing proceedings but *immigration and visa related proceedings generally.*[13] *Id.* at 133.

Plaintiffs further argue that the holding in *Saavedra Bruno* does not support the argument that the doctrine of consular nonreviewability precludes application of APA review to Mr. Habib's visa denial. Plaintiffs stretch the *Saavedra Bruno* decision into a refutation of the doctrine of consular nonreviewability. In truth, however, *Saavedra Bruno* reaffirms the vitality of the doctrine of consular nonreviewability by citing the decision in *City of New York v. Baker*, 878 F.2d 507 (D.C. Cir. 1989), an appeal from the judgment in *Abourezk*, in which the court held

[13] Also, the APA excludes "foreign affairs functions" from both its rulemaking and adjudication provisions (5 U.S.C. §§ 553(a)(1) and 554(a)(4)), an exemption deemed to include matters relative to the overseas authorization of alien admission and the actions of Executive officers abroad. *See* S. Doc. No. 248 ("Admin. Procedure Act – Legislative History"), 79th Cong., 2d Sess. 157, 199, 202, 257, 261; U.S. Admin. Conference, A Guide To Federal Agency Rulemaking (1983 ed.), p. 30. The waiver of sovereign immunity does not allow courts "to decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action." *See* Sovereign Immunity: Hearings Before the Subcommittee on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 135 (1970) (report of the Administrative Conference on Judicial Review).

that it lacked the "power to serve as a proxy consular officer." *Id.* at 512. This holding is all the more significant given that, like *Abourezk*, the appeal from *Abourezk* in *City of New York* involved a visa denial coupled with the First Amendment claims of United States citizens. *Id.* Plaintiffs' claim, then, that *Saavedra Bruno* favors APA review over the shield that the doctrine of consular nonreviewability provides to decisions like the denial of Mr. Habib's visa simply ignores the actual holding in *Saavedra Bruno* and precedent cited therein.

II. Plaintiffs' Motion for Summary Judgment Should be Held in Abeyance Pursuant to Fed. R. Civ. P. 56(f)(2) so that the Government May Conduct Discovery Regarding Plaintiffs' Claim to Standing[14]

A. Legal Standard

Summary judgment is appropriate when the record reveals "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether there are any genuine issues as to material fact contested between the parties, a court must "carefully review the parties' submissions to ascertain whether they reveal a trialworthy issue as to any material fact." *Perez v. Volvo Car Corp.*, 247 F.3d 303, 310 (1st Cir. 2001) (*citing Grant's Dairy-Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 14 (1st Cir. 2000)). For a fact to be "material," its resolution must have the potential to change the outcome of the suit under the governing law if resolved in the

[14] In order for a court to decide a motion for summary judgment under Fed. R. Civ. P. 56, the court must first determine that it has jurisdiction over the matter. Thus, Plaintiffs' motion for summary judgment places the cart before the horse. Defendants moved to dismiss on the basis that the Court does not have jurisdiction, and, procedurally, the Court should rule on Defendants' motion to dismiss, and only consider Plaintiffs' motion for summary judgment in the event that Plaintiffs are able to establish jurisdiction in this matter. Plaintiffs bear the burden of proving jurisdiction when a defendant challenges a claim under Rule 12(b)(1). *Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996); *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995). As described *supra*, Plaintiffs fail to meet their burden.

nonmovant's favor. *See Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) *(quoting McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). To be "genuine," the evidence concerning the issue must be such that a reasonable jury could resolve the point in favor of the nonmoving party. *Id.*

A non-movant defending against a motion for summary judgment "may not rely on allegations in its pleadings, but must set forth specific facts indicating a genuine issue for trial." *Geffon v. Micrion Corp.*, 249 F.3d 29, 34 (1st Cir. 2001) *(citing Lucia v. Prospect St. High Income Portfolio, Inc.*, 36 F.3d 170, 174 (1st Cir. 1994)). Likewise, a court ruling on a party's summary judgment motion must "scrutinize the summary judgment record 'in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor.'" *Navarro*, 261 F.3d at 94 (*quoting Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990)). The award of summary judgment is proper against a party who, "after adequate time for discovery . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Dykes v. DePuy, Inc.*, 140 F.3d 31, 36 (1st Cir. 1998) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

B. Summary Judgment is Inappropriate Because There Remain Issues of Material Fact in Dispute

Summary judgment is not appropriate here because there are material facts in dispute relating to Plaintiffs' allegations of injury essential to their standing to pursue this case, *See* Defendants' Response to Plaintiffs' Statement of Undisputed Facts at 7; Declaration of Victor M. Lawrence at ¶¶ 5-6. In the event the Court does not grant Defendants' motion to dismiss

pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(6), it should allow Defendants to conduct discovery regarding the issue of whether Plaintiffs have standing in this matter. *See* Declaration of Victor M. Lawrence at ¶¶ 3-6. Defendants contend that Plaintiffs lack standing because they have not been harmed and are suffering no harm as a result of Defendants' actions. *Id.* at ¶ 4. Defendants further contend that, despite the denial of Mr. Habib's visa application, the use of satellite-based videoconferencing and other communications technologies allows Plaintiffs to engage in virtual face-to-face discussion and debate with Mr. Habib such that there would not be any compromise of First Amendment rights and would be fully justified by the requirements of the INA, and the Government's regulatory interests.[15] *Id.*

If Defendants are given the opportunity to engage in discovery, Defendants would investigate, through the use of discovery methods such as depositions, interrogatories, requests for production of documents, and requests for admissions, the accuracy of several assertions Plaintiffs make in their Statement of Undisputed facts, including, but no limited to those facts alleging that Plaintiffs have suffered harm as a result of Mr. Habib's exclusion from the United States. *Id.* at ¶ 5; *see also* Plaintiffs' Statement of Undisputed Facts:

> IV. The government's exclusion of Professor Habib has prevented U.S. audiences, including plaintiffs and their members, from engaging Professor Habib in face-to-face discussion and debate.
>
> IV.D. The visa and waiver denials prevent Professor Habib from attending upcoming speaking engagements in the U.S. and from accepting invitations for speaking engagements in the U.S., including events hosted by plaintiffs.

[15] By comparison, when Ernest Mandel was denied a visa into the United States in the early 1970s, Mr. Mandel delivered his address by "transatlantic telephone." *Mandel*, 408 U.S. at 459.

IV.E. The government's denial of a visa and waiver of inadmissibility to Professor Habib has prevented and continues to prevent plaintiffs, their members, and the U.S. public from engaging Professor Habib in face-to-face discussion and debate.

IV.F. The government's exclusion of Professor Habib has caused and will cause plaintiffs administrative and economic harms.

The use of satellite-based videoconferencing and other technologies are communications methods that Plaintiffs overlook in making these assertions. When the Court considered the state of modern technology in 1972 in *Mandel,* the Government then argued that "tapes or telephone hook-ups . . . readily supplant [the need for] physical preference." *Mandel*, 408 U.S. at 765. The Supreme Court – even in 1972 – recognized that alternative means of access might be relevant in determining First Amendment rights. *Id.* However, the Supreme Court in *Mandel* did not believe that it had the necessary factual record in Mandel's case to make that determination. *Id.* Conversely, in Mr. Habib's case, with technology considerably advanced in the past 36 years, discovery on this issue will enable the Government to make a compelling factual record and argument that whatever First Amendment rights Plaintiff interest groups may have are not diminished by having a speaker appear via a sophisticated 21st Century satellite videoconferencing hook-up.

Discovery on the standing issue would allow Defendants to investigate the extent to which Plaintiff groups (i) currently use or in the past have used alternative communications methods to communicate with speakers not present in the United States; (ii) have used such methods and what the result has been; (iii) have not used such methods and, if this is the case, why they have not used such methods; (iv) have justification for their argument against the

viability of alternative methods to receive speech from persons unable to be present in the United States to speak.

In the event that the Court denies Defendants' motion to dismiss, Defendants respectfully request the opportunity to conduct discovery relating to Plaintiffs' standing in this matter, as Defendants believe that the requested discovery will yield information that will prove that Plaintiffs lack standing and that this case should be dismissed for want of jurisdiction.[16] Declaration of Victor M. Lawrence at ¶ 6.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' motion to dismiss. In the event the Court denies Defendants' motion, then Defendants respectfully request that the Court hold Plaintiffs' motion for summary judgment in

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[16] Defendants reserve the right to cross-move for summary judgment at the end of discovery in the event that Defendants' motion to dismiss is denied.

abeyance pursuant to Fed. R. Civ. P. 56(f)(2) to enable the Government to take discovery on the issue of Plaintiffs' claim that they have standing to bring this lawsuit.

Respectfully submitted,

MICHAEL J. SULLIVAN
United States Attorney

MARK QUINLIVAN
Assistant United States Attorney

JEFFREY BUCHOLTZ
Acting Assistant Attorney General

DAVID J. KLINE
Director, District Court Section

VICTOR M. LAWRENCE
Senior Litigation Counsel

By: /s/ Christopher W. Hollis
CHRISTOPHER W. HOLLIS
Trial Attorney
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0899; (202) 305-7000 (fax)
Christopher.Hollis@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS; AND DEFENDANTS' MEMORANDUM IN SUPPORT FOR HOLDING IN ABEYANCE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** and **DECLARATION OF VICTOR M. LAWRENCE** was served via the Court's ECF Filing System on this 20th day of March 2008 to the following counsel:

MELISSA GOODMAN
JAMEEL JAFFER
NASRINA BARGZIE
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400
(212) 549-2500

JUDY RABINOVITZ
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400
(212) 549-2618

SARAH R. WUNSCH
JOHN REINSTEIN
ACLU of Massachusetts
211 Congress St., 3rd Floor
Boston, MA 02110
(617) 482-3170

/s/ Victor M. Lawrence
VICTOR M. LAWRENCE
U.S. DEPARTMENT OF JUSTICE