UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN SOCIOLOGICAL ASSOCIATION; AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; AMERICAN-ARAB ANTI-DISCRIMINATION 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)

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION TO HOLD PLAINTIFFS' SUMMARY JUDGMENT MOTION IN ABEYANCE

MELISSA GOODMAN (Admitted *Pro Hac Vice*)
JAMEEL JAFFER (Admitted *Pro Hac Vice*)
NASRINA BARGZIE (Admitted *Pro Hac Vice*)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400
(212) 549-2622

JUDY RABINOVITZ (Admitted *Pro Hac Vice*)
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004-2400

SARAH R. WUNSCH (BBO # 548767)
JOHN REINSTEIN (BBO # 416120)
ACLU of Massachusetts
211 Congress Street, 3rd Floor
Boston, MA 02110

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INTRODUCTION

The government's arguments in this case rest on a specious premise: that its power to exclude non-citizens invited to speak in the U.S. is free from statutory or constitutional restraint and immune from any judicial scrutiny. Rather than defend its exclusion of Professor Habib on the merits, as the First Amendment demands, the government argues that its actions are not subject to judicial review and that it need not provide any justification whatsoever for preventing Professor Habib from speaking at plaintiffs' upcoming events. But while the government's immigration power is broad, it is not limitless, and it is certainly not limitless where the constitutional rights of U.S. citizens are at stake.

The government's arguments to the contrary have consistently been rejected by the courts, including the First Circuit. Indeed, the government fails to point to a single case in which a court has found it lacked jurisdiction to hear a First Amendment challenge to a visa or waiver denial. The First Circuit and other courts have held that the government cannot exclude an invited foreign scholar from the U.S. except on the basis of a facially and bona fide reason.

The government has not carried its burden here. Indeed, it has failed even to identify the subsection of the "engage in terrorist activity" statute it believes applies to Professor Habib, let alone substantiate that the statute *properly* applies to him. The obligation to provide a facially legitimate and bona fide reason for excluding Professor Habib serves an important purpose. The government's refusal to permit Professor Habib physically to attend and to speak at plaintiffs' upcoming events causes plaintiffs real First Amendment harm. Facially legitimate and bona fide scrutiny ensures that the government is not impairing plaintiffs' First Amendment rights without any legitimate basis whatsoever.

For the reasons stated in plaintiffs' opening brief, and for the reasons explained below, plaintiffs respectfully urge the Court to deny the government's motion to dismiss, to deny the government's motion to hold plaintiffs' motion for summary judgment in abeyance, and to grant plaintiffs' motion for summary judgment.

ARGUMENT

I. THE GOVERNMENT'S EXCLUSION OF PROFESSOR HABIB IS SUBJECT TO JUDICIAL REVIEW.

This Court plainly has jurisdiction to hear plaintiffs' First Amendment challenge to Professor Habib's visa denial. Courts have routinely accepted jurisdiction to hear precisely the claims presented here: that the government's failure to supply a facially legitimate and bona fide reason for excluding an invited foreign speaker violates U.S. citizens' First Amendment right to hear and debate his ideas face-to-face. Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss Complaint ("Pl. Br.") 8-11, 23-29. The Court should reject the government's jurisdictional arguments; indeed, accepting them would require the Court to disregard binding precedent.

The government's jurisdictional argument stems from the erroneous premise that the immigration power is essentially absolute and unchecked. But while the power to exclude non-citizens is broad, it is subject to constitutional limitation. Like all government powers, the immigration power must be exercised consistent with the Constitution and the Bill of Rights. Pl. Br. 11; *see also Fong Yue Ting v. United States*, 149 U.S. 698, 712 (1893) (immigration power must be exercised "consistent[ly] with the Constitution"); *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889) (immigration power limited "by the [C]onstitution itself").[1]

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[1] The government's foreign affairs power – another broad power from which the immigration power mainly derives – is also limited by the Constitution. *See, e.g.*, *Perez v. Brownell*, 356 U.S. 44, 58 (1958), *overruled on other grounds by Afroyim v. Rusk*, 387 U.S. 253 (1967) ("Broad

The immigration power is also subject to judicial review. As more fully discussed in plaintiffs' opening brief, it is the role of the courts to ensure that the executive does not exercise its immigration power in a manner that violates the First Amendment. Where immigration decisions impair or harm U.S. citizens' First Amendment rights, judicial review is not only appropriate, but required. Pl. Br. 11, 13; *see also Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977) ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power . . . to regulate the admission and exclusion of aliens."); *id.* at 795 n.6 (same); *Fong Yue Ting*, 149 U.S. at 713 (judicial review of immigration power appropriate where "required by the paramount law of the Constitution"); *see also Am.-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1076 (C.D. Cal. 1989), *overruled on other grounds by Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501 (9th Cir. 1992) (in First Amendment challenge to deportation law, stating that "even conceding Congress' authority in the immigration arena, we are not relieved of our duty to ensure that Congress exercises its power within constitutional limits"). While the government is correct that the State Department is "charged with approving or disapproving alien visa applications, not the courts," Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss; and Defendants' Memorandum in Support for Holding in Abeyance Plaintiffs' Motion for Summary Judgment ("Govt. Br.") 4, it is the courts, not the executive, that are ultimately responsible for ensuring First Amendment rights are not impermissibly infringed.

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as the power . . . to regulate foreign affairs must necessarily be, it is not without limitation."); *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 320 (1936) (foreign affairs power "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution"); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Robel*, 389 U.S. 258, 264 (1967) (war and foreign affairs power subject to the First Amendment).

A. The Doctrine of Consular Non-Reviewablity Does Not Strip the Court of Jurisdiction to Hear Plaintiffs' First Amendment Challenge to Professor Habib's Visa Denial.

The government fails to point to a single case in which a court has found it lacked jurisdiction to hear a First Amendment challenge to a visa denial. This is because *every* court to have considered the issue has found jurisdiction. Pl. Br. 9-10, 23-29. Indeed, binding precedent compels the Court to find jurisdiction here. In both *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990), and *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988), the First Circuit accepted jurisdiction over First Amendment challenges to visa denials. Pl. Br. 10, 25, 27.

The government's reliance on the doctrine of consular non-reviewability here is misplaced. While the doctrine of consular non-reviewability may preclude courts from entertaining visa challenges brought by aliens overseas or even certain non-First Amendment challenges brought by U.S. residents, courts have rejected the application of the doctrine to a U.S. citizen's First Amendment challenge to a visa denial. Pl. Br. 23-29. Indeed, the *Adams* court *expressly rejected* application of the consular non-reviewability doctrine and found it could consider "the possibility of impairment of United States citizens' First Amendment rights." 909 F.2d at 647 n.3; Pl. Br. 25. In *Abourezk v. Reagan*, 785 F.2d 1043, 1050-51 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987); *Am. Acad. of Religion v. Chertoff*, 463 F. Supp. 2d 400, 410, 412 (S.D.N.Y. 2006) ("*AAR I*"); and *Am. Acad. of Religion v. Chertoff*, 2007 WL 4527504, *7 (S.D.N.Y. Dec. 20, 2007) ("*AAR II*") the courts did the same. Pl. Br. 24.[2] The consular non-reviewability doctrine did not give the *Allende* court pause even though jurisdiction had been contested in the district court. Pl. Br. 25. The government's effort to evade the

[2] The government characterizes the *AAR II* as a "win for the Government," Govt. Br. 19 n.10, but the *AAR II* court found jurisdiction because the case involved U.S. citizens' First Amendment claims and explicitly rejected the precise jurisdictional arguments the government advances here. Pl. Br. 24-25.

jurisdictional implications of *Kleindienst v. Mandel*, 408 U.S. 753 (1972) fares no better. The *Mandel* court also did not question its jurisdiction to hear plaintiffs' First Amendment claim, even though it expressly acknowledged the consular non-reviewability doctrine. Pl. Br. 26.[3]

The government contends that *Adams*, *Allende*, and *Abourezk* turned on statutes that have since been repealed. Govt. Br. 16-19. But as discussed exhaustively in plaintiffs' opening brief, jurisdiction in *Adams* and *Allende* (as well as the *Abourezk* and *AAR* cases) was predicated *not* on the particular statute the government had invoked to exclude the invited speakers but rather on the U.S. citizens' claim of First Amendment injury. Pl. Br. 9-10, 23-29. None of the now-repealed statutes contained jurisdictional grants of any kind. Neither the McGovern Amendment nor Section 901 invested the court with jurisdiction. Like 8 U.S.C. § 1182(a)(3)(B)(i)(I) and 8 U.S.C. § 1182(d)(3) here, those statutes were merely the statutory inadmissibility and waiver provisions whose proper or improper application was at issue.

Nor, as the government seems to suggest, Govt. Br. 16, does the fact that some of these courts engaged in statutory interpretation have any bearing on the jurisdictional question. As an initial matter, these courts engaged in both factual and statutory analysis. Pl. Br. 15-16. But regardless of the mode of analysis, the courts either properly had jurisdiction to hear plaintiffs' challenges to the exclusions or they did not; they could not simply "assume[ ] jurisdiction" to engage in statutory analysis, *id.*, if jurisdiction was, in fact, lacking. That the *Adams* and *Allende*

[3] The government places great weight on the fact that *Mandel* involved a waiver, not a denial of inadmissibility, but jurisdiction in *Mandel* was predicated on plaintiffs' First Amendment injury, not on the fact that a waiver denial was at issue. As plaintiffs explained in their opening brief, the notion the judicial review authorized by *Mandel* is limited to wavier denials is inconsistent with the entire body of case law interpreting *Mandel*. Pl. Br. 26-27. Moreover, is difficult to comprehend why the Court would have contemplated *more* review for largely discretionary waiver decisions (which, while discretionary, are still subject to constitutional limitation) than for inadmissibility determinations which are limited by a complex and detailed statutory scheme as well as the Constitution. *Id.*

courts (and every other court faced with a First Amendment exclusion challenge) accepted jurisdiction is fatal to the government's argument.

The government's reading of the relevant cases is tortured and nonsensical. While the relevant cases differ from one another in many respects, they have one thing in common: a court presented with First Amendment challenges brought by U.S. citizens to the exclusion of an invited foreign speaker accepted jurisdiction and reviewed whether the exclusion was proper. The doctrine of consular non-reviewability simply does not preclude review here.[4]

B. The Court Has Jurisdiction to Hear Plaintiffs' First Amendment Challenge to the Government's Refusal to Grant Professor Habib a Waiver.

The government appears to concede that the *Mandel* court (as well as the *Adams* and *Abourezk* courts for that matter) accepted jurisdiction to hear a First Amendment challenge to the denial of a waiver of inadmissibility. Govt. Br. 7-8. This concession is difficult to square with the government's contention that this Court lacks jurisdiction to hear plaintiffs' First Amendment challenge to the denial of a waiver to Professor Habib.

The government advances two core arguments against jurisdiction. First, it suggests that these other courts accepted jurisdiction because they "already had the Government's explanation for [the] denial." Govt. Br. 7. This argument is nonsensical. That the government voluntarily provided an explanation for its actions could not have any bearing on whether a court has *jurisdiction* over a First Amendment claim.

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[4] The government fails even to address plaintiffs' additional argument that the doctrine of consular non-reviewability poses no bar to review because officials in Washington, not consular officials, made the inadmissibility determination. Pl. Br. 30-31. Instead, the government reiterates in a conclusory fashion that it is the consular officer who denied Professor Habib's visa. Even the government, however, concedes that the inadmissibility determination was "based on a recommendation provided by the State Department." Govt. Br. 21. The government simply ignores that the record is replete with evidence that officials in Washington made every significant decision with respect to Professor Habib's exclusion. Pl. Br. 30-31.

Second, the government argues that the Court lacks jurisdiction because 8 U.S.C. § 1182(d)(3), the waiver statute at issue here, supplies no standard for the Court to apply. Once again, the government argues that the *Adams*, *Abourezk*, and *Allende* courts accepted jurisdiction because they were dealing with statutes (primarily the McGovern Amendment) that contained a more definite standard than 8 U.S.C. § 1182(d)(3), Govt. Br. 9, or "necessitated more of a factual inquiry into the reasons for the denial," Govt. Br. 7. But, once again, those statutes did not provide the court with *jurisdiction*; it was the First Amendment that provided jurisdiction. *See supra* at 5. Moreover, this argument erroneously conflates the question of jurisdiction over plaintiffs' First Amendment waiver claim with the question of what standard the court applies to decide whether the government's decision to deny the waiver and prevent Professor Habib from engaging U.S. audiences in-person is constitutionally permissible (whether it is a facially legitimate and bona fide). The facially legitimate and bona fide standard derives not from statutory law but from the First Amendment. Pl. Br. 33 n.21. In any event, while the McGovern Amendment might have had more detailed standards, the waiver provision at issue in *Mandel* was precisely the same general waiver statute at issue here: 8 U.S.C. § 1182(d)(3). *Mandel*, 408 U.S. at 755. Just like the *Mandel* court, this Court may properly exercise jurisdiction over plaintiffs' First Amendment waiver claim.

C. The First Amendment Requires That the Court Ensure That the Government Has Provided a Facially Legitimate and Bona Fide Reason for Excluding Professor Habib.

In arguing against jurisdiction, the government also contends that it has no obligation to provide a facially legitimate and bona fide reason for preventing Professor Habib from speaking at and attending plaintiffs' upcoming events. Govt. Br. 7, 10-15. In the government's view, since it has no obligation, the court lacks jurisdiction. This argument suffers from the same flaws as its consular non-reviewability argument: it is contradicted by a uniform body of case

law, it erroneously conflates the question of jurisdiction with standard of review, and, most importantly, accepting it would require the Court to disregard binding precedent.

Every court to have considered the question, including the First Circuit and lower courts in this Circuit, has held that the government has a burden in the face of a First Amendment challenge by U.S. citizen inviters to show the exclusion is based on a facially legitimate and bona fide reason. Pl. Br. 12-14; *see also Lesbian/Gay Freedom Day Comm., Inc. v. I.N.S.*, 541 F. Supp. 569, 585 n.8 (N.D. Cal. 1982) ("when a court is presented with a constitutional challenge to an immigration decision by the executive or by Congress, the court determines whether that decision is based upon a facially legitimate and bona fide reason") (internal quotation marks omitted). In imposing this burden on the government, *Mandel* and its progeny seek to accommodate both the government's power over immigration and a citizens' First Amendment rights. Because the protection of U.S. citizens' First Amendment rights is vital, *Mandel* and its progeny recognize *some* judicial review is imperative. But, in view of the breadth of the government's immigration power, courts have eschewed the more stringent strict scrutiny standard traditionally employed in First Amendment cases in favor of the more lenient facially legitimate and bona fide standard of review. While this burden is a modest one, it is still a burden the government must meet, and one the Court has both the authority and obligation to ensure is met.

The government attempts to shirk its burden by repeating its flawed interpretation of *Mandel*: that *Mandel* did not actually impose a burden on the government to provide an explanation for its actions and, even if it did, that the obligation is limited to explaining waiver denials, not inadmissibility determinations. Govt. Br. 6. But again, it is hard to comprehend why the Supreme Court would have imposed a burden to justify more discretionary waiver

determinations but not inadmissibility findings which are tightly constrained by statute and the Constitution. *See supra* 4 n.4; Pl. Br. 26-27. Nearly every court to have considered whether *Mandel* imposed a burden of justification for both visa and waiver denials has concluded that it did, rejecting the cramped reading the government advances here. Pl. Br. 12-14.

Once again, the government unsuccessfully attempts to distinguish the body of precedent that has interpreted *Mandel* to impose a burden of justification by arguing that the burden recognized in those cases sprang not from the First Amendment but rather now-repealed statutes. Govt. Br. 7-8, 15-19. But just as those statutes did not confer jurisdiction, they did not specify a standard of review; it was the First Amendment that did both. Whether each court called it "facially legitimate and bona fide" review (as in *Adams*, *AAR I*, and *AAR II*), "sound basis" review (as in *Allende*) or simply assessed the law and the facts to see if the particular statutory provision invoked applied to the invited scholar (as each court did), the courts assessed whether the government had a legal and factual basis for the exclusion.

Nor can the government point to the visa confidentiality statute as a means to escape its First Amendment obligation. Govt. Br. 12-13. The visa confidentiality statute does not and cannot trump the First Amendment burden to provide a facially legitimate and bona fide reason for an exclusion of an invited foreign scholar. It is significant that this statute, which has existed since 1952, Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952), did not prevent the Supreme Court in *Mandel*, the First Circuit in *Adams* and *Allende*, or any other court from evaluating a First Amendment challenge to the exclusion of a foreign scholar and assessing whether the government had supplied a factual basis for its actions. In any event, even if the statute were relevant here, it contains an exception for disclosure of visa-related information in court proceedings. *See Zambrano v. I.N.S.*, 972 F.2d 1122, 1125 (9th Cir. 1992), *vacated on*

other grounds in 509 U.S. 918 (1993) (8 U.S.C. § 1202(f) "expressly allow[s] for disclosure in legal proceedings"); *United States v. O'Keefe*, 2007 WL 1239204, *2 (D.D.C. Apr. 27, 2007) (8 U.S.C. § 1202(f) "suggests procedures for the use of confidential information under the Immigration and Nationality Act where it is needed by a court in a case pending before it 'in the interest of the ends of justice'"); *Medina-Hincapie v. Dep't of State*, 700 F.2d 737, 741 (D.C. Cir. 1983) (the Secretary of State may "disclose [confidential visa] material to a court which certifies that the information in needed in the interest of justice in a pending case"); *Ass'n for Women in Science v. Califano*, 566 F.2d 339, 346 n.38 (D.C. Cir. 1977) (8 U.S.C. § 1202(f) "specifically provides that confidential reports must be furnished to a requesting court"); *Maizus v. Weldor Trust Reg.*, 144 F.R.D. 34, 36-37 (S.D.N.Y. 1992) (certifying need for visa records, which were ultimately provided to court). The existence of this statute simply has no bearing on the First Amendment inquiry here.[5]

In sum, the case law is uniform: judicial review of an exclusion that implicates U.S. citizens' First Amendment rights – whether effected by an inadmissibility determination or the denial of a waiver – is not only permissible but required. The government is obligated to supply a facially legitimate and bona fide reason for excluding a foreign citizen invited to speak to U.S. audiences, and the courts must assess whether, consistent with the First Amendment, the government has met this burden. The government's motion to dismiss this suit should be denied.[6]

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[5] For the same reasons, the government's argument that various statutes and regulations pertaining to the issuance of visas do not require it to provide a justification for visa or waiver denial is a red herring. Govt. Br. 10-11. Whatever these statutes may require, the First Amendment demands the government provide a facially legitimate and bona fide reason.

[6] The government restates its argument that APA review of visa denials is unavailable. Govt. Br. 20-23. This argument is misguided for at least three reasons. First, the notion that the denial of a visa can *never* be "contrary to [a] constitutional right," and is *never* subject to judicial review is

II. THE GOVERNMENT HAS NOT SUPPLIED A FACIALLY LEGITIMATE AND BONA FIDE REASON FOR EXCLUDING PROFESSOR HABIB.

As demonstrated above, consistent with *Mandel* and its progeny, including two binding First Circuit cases, the government has an obligation to provide a facially legitimate and bona fide reason for denying Professor Habib a visa and for denying him a waiver of inadmissibility. Plaintiffs are entitled to summary judgment because the government has failed to carry its burden.

With respect to the visa denial, the government believes that it satisfies facially legitimate and bona fide scrutiny by merely pointing to 8 U.S.C. § 1182(a)(3)(B)(i)(I) – the umbrella provision that bars from entry those who have engaged in terrorist activity – and stating in a conclusory fashion that it has a "reasonable belief" that Professor Habib has engaged in terrorist activity. Govt. Br. 10. But as discussed in great detail in plaintiffs' opening brief, if the government fails to provide a factual basis for excluding an invited scholar (or, as in this case fails to even point to its specific legal basis for the exclusion), it is not facially legitimate and bona fide. Pl. Br. 14-18. A long line of precedent, binding precedent included, makes clear that in order to satisfy its constitutional burden the government must supply a specific *reason* for barring Professor Habib (including which subsection of the "engage in terrorist activity" statute it is invoking to bar him) and it must demonstrate that it has *some factual basis* for applying the engage in terrorist activity statute to him. Merely pointing to an inadmissibility statute, without

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belied by the case law. *See supra* Sec. I. Second, inadmissibility determinations are not wholly unfettered, standardless decisions committed exclusively to agency discretion but rather carefully circumscribed by statute. Pl. Br. 34 n.23. Third, the government's reliance on *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999), is misplaced, Pl. Br. 35 n.24, and its citation to *City of New York v. Baker*, 878 F.2d 507 (D.C. Cir. 1989) is disingenuous. *Baker* concerned only what *remedy* a court could order *after it determined a visa denial was unlawful*: a court could not order that a visa be issued but could enjoin the government from denying a visa on the statutory ground challenged in the litigation, *id.* at 512, precisely the relief plaintiffs seek here. Finally, the government reads *Ardestani v. I.N.S.*, 502 U.S. 129 (1991) too broadly. Pl. Br. 34-35.

more, does not meet this burden, and is, in fact, precisely the kind of "justification" courts have rejected because it is conclusory and entirely unsubstantiated. *Id.*[7]

Indeed, pointing to 8 U.S.C. § 1182(a)(3)(B)(i)(I) alone does not supply a "reason" for the government's actions, let alone a facially legitimate and bona fide one. As explained in plaintiffs' opening brief, this statute is an umbrella provision that bars those who have engaged in terrorist activity. But the term "engage in terrorist activity" is defined elsewhere to encompass a range of activities including, among other things, directly committing terrorist acts, inciting terrorist acts, preparing or planning terrorist acts, soliciting things for terrorist acts, soliciting members for terrorist organizations, and providing material support to terrorists or terrorist organizations. Pl. Br. 18-19. Merely pointing to the umbrella provision, without identifying which subsection of the "engage in terrorist activity" statute applies, does not inform plaintiffs or the Court of what *type* of activity the government "reasonably believes" Professor Habib purportedly committed or *why* the government believes he has done one of those things.

The government points to *Mandel* to suggest that a citation to a statute in a letter constitutes a facially legitimate and bona fide reason. But in *Mandel*, unlike here, the government did far more than cite to the waiver provision, it *explained* that the government was denying the waiver because Mandel had violated the terms of his visa on a number of occasions; specifically, that he had violated the condition that he "conform to his itinerary and limit his activities to the stated purposes of the trip" by expanding his itinerary and by attending events in which money was solicited for political causes. *Mandel*, 408 U.S. at 758. Indeed, in the face of other First Amendment challenges like this one, the government has at least explained the facts

[7] As discussed fully in plaintiffs' opening brief, courts applying facially legitimate and bona fide review have not hesitated to reject justifications for visa and waiver denials (and other types of immigration determinations) that are too conclusory or without record support. Pl. Br. 14-17. Thus, the contention that "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," Govt. Br. 12, is inaccurate.

that led it to rely on a particular statute. *See, e.g.*, *Adams*, 909 F.2d at 648-49 (government barring Adams pursuant to 8 U.S.C. § 1182(a)(28)(F) because of his "advocacy of and personal involvement with . . . terrorist violence" and describing specific terrorist acts he directed); *Allende*, 845 F.2d at 1114 (government barring Allende because of "her membership in and attendance at conferences of the [World Peace Council]" and because her entry was prejudicial to U.S. foreign policy interests); *AAR II*, 2007 WL 4527504 at *3 (government barring Professor Ramadan for engaging in terrorist activity because he allegedly provided material support to particular organizations). Despite these more complete explanations some courts still rejected them as insufficient. *See, e.g.*, Pl. Br. 14-16; *Allende*, 845 F.2d at 1116 (holding government "failed to advance a sound basis for exclusion" and that it could "not exclude Allende on the bare assertion that her presence in the [U.S.] at a given time may prejudice foreign policy interests").

Not only has the government refused to even identify the subsection of the "engage in terrorist activity" statute it believes applies to Professor Habib, it has also failed to meet its burden to provide a factual basis for applying the engage in terrorist activity statute to Professor Habib. In fact, there is literally no evidence in the record to suggest that the government is properly applying this statute to Professor Habib. While the government insists it need not "provide any form of evidence to support its visa-related decisions," Govt. Br. 7, this contention is contradicted by First Circuit precedent. In *Adams*, for example, the First Circuit held that "the *government's evidence linking Adams with terrorist activity* constitute[d] a 'facially legitimate and bona fide reason' . . . under [*Mandel*]" for finding Adams inadmissible pursuant to 8 U.S.C. § 1182(a)(28)(F) and ineligible for any relief provided by the McGovern Amendment or Section 901. 909 F.2d at 650 (emphasis added). In reaching this conclusion the court relied on *evidence supplied by the* government:

> The State Department had evidence of Adams' involvement with, and leadership in, the IRA. In the affidavit submitted to the district court, the Deputy Secretary of State declared that '[t]here is reason to believe that, as commander of the Belfast Brigade, Adams had overall policy control over, and granted approval for, major PIRA terrorist operations carried out within the greater Belfast area.' Not only did the State Department have information identifying Adams as the commanding officer of one of the three battalions of the IRA Belfast Brigade, but it also had evidence that he was the commander of the entire IRA Belfast Brigade during 1971-1972. Moreover, the Secretary of State had evidence of Adams' participation in a series of "Bloody Friday" bombings in Belfast, where 9 persons were killed and 130 were injured, as well as many other bombings. Finally, the State Department had information that Adams was a member of the IRA's Army Council, the body primarily responsible for setting the policy and strategy of the IRA, and which grants approval for major IRA terrorist campaigns. It believed that Adams was Chief-of-Staff of the Council for some period of time, and that, during his tenure, terrorist activities were intensified.

Id. at 648-49. The strength of this evidence stands in stark contrast to the government's conclusory assertion here – without more – that Professor Habib has engaged in terrorist activity. In other First Amendment exclusion cases, the government has both pointed to a specific statutory basis for its action and provided factual evidence to show that the statute actually applied, and assessing that evidence was a vital part of the court's facially legitimate and bona fide review. *See, e.g.*, *Allende*, 845 F.2d at 1117 (after evaluating government affidavits, rejecting application of 8 U.S.C. § 1182(a)(27) to Allende because there was no evidence she would engage in activities "'prejudicial to the public interest'"); *see also* Pl. Br. 14-18 (citing both First Amendment and non-First Amendment facially legitimate and bona fide cases in which evidence assessed). The government simply cannot prevent plaintiffs from engaging with Professor Habib merely by pointing to a statute that does not apply to him.

The government's suggestion that *plaintiffs* have provided "no credible evidence contradicting" the government's inadmissibility determination, Govt. Br. 2, misunderstands that the burden of justification is not the plaintiffs' but the government's. Even if the burden were

reversed, plaintiffs cannot *disprove* the inapplicability of a statutory subsection that the government has not even identified. This said, plaintiffs have introduced evidence which, far from being "irrelevant," Govt. Br. 1, casts grave doubt on the government's claim that Professor Habib has somehow engaged in terrorist activity. Professor Habib is a widely-respected scholar and political commentator who has dedicated his life to peaceful advocacy for social justice and does not advocate, support, or engage in terrorism as a means to achieve political change. Pl. Br. 21-22. He works with government institutions and international bodies, as well as respected researchers and scholars to encourage democracy and solve policy problems. *Id.* Professor Habib has repeatedly condemned terrorism. Pl. Br. 21. Terrorism is inconsistent with his scholarship and, in fact, his entire life's work. Pl. Br. 21-22. South African officials have publicly questioned the U.S. government's claim that he has ties to terrorism. Pl. Br. 22. In light of these facts, the government's conclusory allegation that he has engaged in terrorist activity, without any explanation or basis, is highly suspect. That, until recently, Professor Habib easily obtained visas to travel to the U.S. for speaking engagements, conferences, and meetings, Pl. Br. 3-4, makes the government's actions all the more puzzling.[8]

With respect to the waiver denial, it is plain that the government has not provided a facially legitimate and bona fide reason because it has provided no reason or factual basis at all. Pl. Br. 7, 32-33. The contention that it need not do so is wrong for the reasons discussed in Section I.C. In *Mandel*, which concerned the same general waiver authority at issue here, the

[8] For the same reasons that the government's application of the engage in terrorist activity statute to Professor Habib is not facially legitimate and bona fide, it is arbitrary and capricious and in excess of defendant's statutory authority: there is no evidence to suggest the statute properly applies to him. Pl. Br. 33-34. Contrary to the government's suggestion, Govt. Br. 21, its conclusory statement that the government made a rational decision based on some unknown set of facts is entirely unsupported by actual evidence. The only evidence in the record is that Professor Habib condemns terrorism.

government advanced a basis for denying the waiver and the Court assessed whether it was facially legitimate and bona fide. Because the government has supplied no explanation here, it is impossible to determine whether the government is denying the waiver on constitutionally impermissible grounds such as the content of Professor Habib's speech. Pl. Br. 33. In any event, it is difficult to fathom a legitimate basis for depriving Professor Habib a waiver for the purposes of temporarily entering the U.S. to speak at plaintiffs' events.

In sum, the government has failed to provide a facially legitimate and bona fide reason for barring Professor Habib for engaging in terrorist activity because it has failed to identify which part of the engage in terrorist activity statute it is invoking to bar Professor Habib, let alone demonstrated that the statute is *properly applied* to him. The government has also failed to provide a facially legitimate and bona fide reason for denying Professor Habib a waiver because it has supplied no reason at all. Plaintiffs are entitled to summary judgment on this basis.[9]

III. PLAINTIFFS HAVE STANDING TO CHALLENGE PROFESSOR HABIB'S EXCLUSION.

The government contends that summary judgment is inappropriate because plaintiffs have not established standing. Govt. Br. 24-27. Specifically, the government asserts in a conclusory fashion in its brief and an affidavit filed by counsel that plaintiffs "have not been harmed" by the government's exclusion of Professor Habib, and that facts bearing on plaintiffs'

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[9] There is no genuine issue of material fact with respect to whether the government has provided a facially legitimate and bona fide reason for excluding Professor Habib. The government has submitted no evidence – not even a "scintilla," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), to support its conclusory assertion that Professor Habib has engaged in terrorist activity or to contradict plaintiffs' evidence to the contrary. The government's conclusory assertions are not sufficient to create a genuine issue of material fact. *See, e.g.*, *Maymi v. P.R. Ports Auth.*, 515 F.3d 20, 25 (1st Cir. 2008) ("summary judgment cannot be defeated by relying on improbable inferences, conclusory allegations, or rank speculation"). However, should the Court disagree, it should demand that the government disclose to the Court and to plaintiffs: (1) which part of the "engage in terrorist activity" definition it is relying upon, (2) its factual basis for applying 8 U.S.C. § 1182(a)(3)(B)(i)(I) to bar Professor Habib, and (3) its basis for denying Professor Habib a waiver. Pl. Br. 23 n.13. It is also open to the Court to certify the need for the visa file pursuant to 8 U.S.C. 1202(f).

injury are in dispute because any harm to plaintiffs might be mitigated by advanced communication technologies. Govt. Br. 25. For this reason, the government asks the Court, pursuant to Fed. R. Civ. P. 56(f)(2), to hold plaintiffs' summary judgment motion in abeyance so that it may later conduct discovery concerning these alternative technologies. The Court should reject the government's motion because (1) no facts with respect to plaintiffs' standing have legitimately been put in dispute; (2) the government has not adequately demonstrated that it could not have presented facts to justify its opposition to plaintiffs' standing; (3) the government is not actually disputing each of plaintiffs' concrete harms; and (4) plaintiffs have established injury and are entitled to judgment as a matter of law.

Plaintiffs satisfy the "injury in fact" requirement because the government's exclusion of Professor Habib causes plaintiffs concrete and particularized harm that is actual or imminent rather than conjectural or hypothetical. *Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1453 (2007); *Me. People's Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006). Because the government has denied Professor Habib a visa and a waiver of inadmissibility, Professor Habib cannot speak at or attend plaintiffs' public events and academic conferences in June and August. Pl. Br. 7-8. The government's exclusion of Professor Habib causes plaintiffs and their members well-established First Amendment harms including: (1) the inability to meet physically with Professor Habib, engage him in face-to-face debate, and exchange ideas with him in-person and in real time; (2) the inability to hear his presentation live and ask him questions in-person; (3) the inability to engage with him after the event and ask him questions privately; (4) the inability to engage him in side conversations at other conference panels on other topics; and (5) the inability to engage in the informal networking that is part of all scholarly conferences. Declaration of Sherif Fam ("Fam Decl.") ¶¶ 13, 15; Declaration of

Sally T. Hillsman ("Hillsman Decl.") ¶¶ 22, 26, 27; Declaration of Merrie Najimy ("Najimy Decl.") ¶¶ 13, 16; Declaration of Cary Nelson ("Nelson Decl.") ¶¶ 9, 11. If Professor Habib is unable to attend some of plaintiffs' events in person, some plaintiffs will also incur economic and administrative costs associated with cancelling an advertised program. Fam Decl. ¶ 15; Najimy Decl. ¶ 16. The government's exclusion of Professor Habib also prevents ASA members from collaborating with him in-person on academic projects and delivering lectures in their classrooms. Hillsman Decl. ¶¶ 25-26.[10]

As an initial matter, the government has not demonstrated that there are genuine issues of material fact with respect to plaintiffs' standing. "Once the moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 37 (1st Cir. 1995) (internal quotation marks omitted). Here, the government has disputed the plaintiffs' injury allegations merely with conclusory assertions in its brief and an affidavit of counsel in support of its Rule 56(f) motion that plaintiffs have not shown harm because alternative technologies might relieve their injuries. It has presented no facts to support its purported dispute of plaintiffs' harms. *Cf.* 10 Wright & Miller, Federal Practice and Procedure § 2738 (3d ed. 2008) ("The affidavit of the opposing party's attorney which does not contain specific facts or is not based on firsthand knowledge is not entitled to any weight by the court deciding a motion for summary judgment."); *Sheinkopf v. Stone*, 927 F.2d 1259, 1262 (1st Cir. 1991) ("The mere existence of a

[10] The government's exclusion of Professor Habib has already prevented Professor Habib from speaking at and attending one of plaintiff ASA's Annual Meetings. ASA was forced to resort to having another scholar read the paper Professor Habib was slated to present during the panel. ASA members were deprived the opportunity to hear Professor Habib speak and to ask him questions about his research. The ASA did not have Professor Habib present via videoconference due to the "substantial costs." Hillsman Decl. ¶¶ 22-23.

factual dispute, of course, is not enough to defeat summary judgment. The evidence relied upon must be significantly probative of specific facts, which are material in the sense that the dispute over them necessarily affects the outcome of the suit.") (internal quotation marks and citations omitted); *Wyler v. United States*, 725 F.2d 156, 160 (2d Cir. 1983); *supra* p. 16 n.9.

Rather than submit evidence to demonstrate there is a genuine issue of material fact with respect to plaintiffs' evidence of harm, the government has invoked Fed. R. Civ. P. 56(f)(2), which provides that: "[i]f a party opposing the [summary judgment] motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken." As the First Circuit has made clear, however, "the prophylaxis of Rule 56(f) is not available merely for the asking." *Rivera-Torres v. Rey-Hernandez*, 502 F.3d 7, 10 (1st Cir. 2007). To invoke this rule, the government must "act with due diligence to show that [its] predicament fits within its confines" and "must submit to the trial court an affidavit or other authoritative document showing (i) good cause for his inability to have discovered or marshaled the necessary facts earlier in the proceedings; (ii) a plausible basis for believing that additional facts probably exist and can be retrieved within a reasonable time; and (iii) an explanation of how those facts, if collected, will suffice to defeat the pending summary judgment motion," *id.*, or will "influence the outcome of the pending motion for summary judgment," *Resolution Trust Corp. v. North Bridge Assocs., Inc.*, 22 F.3d 1198, 1203 (1st Cir. 1994). The government cannot "rely simply on conclusory statements or on contentions that the affidavits in support of the motion are incredible." *Wyler*, 725 F.2d at 160; *Rivera-Torres*, 502 F.3d at 12 ("Speculative conclusions, unanchored in facts, are not sufficient to ground a Rule 56(f) motion."); *Vargas-Ruiz v. Golden Arch Dev., Inc.*, 368 F.3d 1, 4 (1st Cir. 2004) ("optimistic

surmise" carries no weight); *Paterson-Leitch Co., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 989 (1st Cir. 1988) ("cryptic allusions [that] fail[ ] to set out any basis for believing that some discoverable material facts . . . exist" are "entirely inadequate to extract the balm of Rule 56(f)"). The government has not demonstrated *any* reason, let alone good cause, for its inability to have discovered or presented facts to support its opposition to plaintiffs' standing.[11] More importantly, it has not demonstrated that the facts it wishes to seek will *actually* create a *genuine* issue of fact *material* to defeating plaintiffs' standing.

The government appears to concede that its exclusion of Professor Habib implicates plaintiffs' First Amendment rights because it prevents plaintiffs from engaging him and his ideas in-person; however, it asserts 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." Govt. Br. 25 (emphasis added); *id.* at 26 (suggesting it would like to prove that plaintiffs' First Amendment rights would not be "*diminished*" by having a speaker appear by videoconference) (emphasis added).

But the theoretical availability of videoconferencing technology is immaterial. *As a matter of law*, the government cannot foreclose plaintiffs' chosen means of communication by pointing to the availability of other means. *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 880 (1997) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place") (quoting *Schneider v.*

[11] To the extent the government seeks to dispute whether videoconferencing is, as a general matter, equivalent to or an adequate substitute for face-to-face exchange based on the particular qualities of videoconferencing, these facts are by no means in the plaintiffs' "exclusive control," *Resolution Trust Corp.*, 22 F.3d at 1208, or "sole possession," *Hebert v. Wicklund*, 744 F.2d 218, 222 n.4 (1st Cir. 1984). There are numerous sources the government could have turned to (such as government officials and government bodies that use videoconferencing technologies) to marshal such facts.

State of N.J., 308 U.S. 147, 163 (1939)); *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression.").

Courts have repeatedly found that plaintiffs deprived of their right to have an invited speaker *enter* the U.S. and to engage that speaker *in person* have suffered injury as a matter of law. *See, e.g.*, *Mandel*, 408 U.S. at 746 (permitting challenge because plaintiffs' First Amendment right "to have the alien enter and to hear him explain and seek to defend his views" was impaired) (quoting district court affirmatively); *AAR I*, 400 F. Supp. 2d at 412 (finding "[p]laintiffs' inability to interact with Ramadan at their upcoming conferences is actual and particularized, and therefore amounts to an injury-in-fact sufficient to create standing"); *Abourezk*, 785 F.2d at 1050-51 (finding plaintiffs "aggrieved" where government was "keep[ing] out people they have invited to engage in open discourse with them within the United States"); *Harvard Law Sch. Forum v. Schultz*, 633 F. Supp. 525, 530 n.3 (D. Mass. 1986), *vacated as moot*, 852 F.2d 563 (1st Cir. 1986) (finding standing to challenge travel permit denial because the "loss of First Amendment freedoms constitute[d] irreparable injury"); *Allende v. Shultz*, 605 F. Supp. 1220, 1223 (D. Mass. 1985) (finding standing); *see also* Pl. Br. 8-10.

Recognizing the unique value of *in person* communication, these courts have rejected the notion that the availability of other forms or means of exchanging ideas mitigates the harm caused by depriving U.S. audiences of in-person debate. In *Mandel*, the Supreme Court rejected the government's argument that plaintiffs' suffered no First Amendment harm because they had other means of accessing Mandel's ideas that "supplant[ed] his physical presence." 408 U.S. at 764. Because "[t]his argument overlook[ed] what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning," the Court refused to hold "that

existence of other alternatives extinguishes altogether any constitutional interest on the part of [plaintiffs'] in this particular form of access." *Id.*; *see also Harvard Law. Sch. Forum*, 633 F. Supp. at 530 n.3 ("Whether plaintiffs have access to the [foreign invitee's] ideas through alternative means, such as books, speeches, tapes or telephone hookups is irrelevant to the First Amendment inquiry in this case."); *Allende*, 605 F. Supp. at 1223 (finding standing even though plaintiffs could meet with Allende in other countries or communicate with her by phone or mail); *Abourezk v. Reagan*, 592 F. Supp. 880, 886 (D.D.C. 1984) ("It is not an answer to say . . . that there are alternative means (mails, television, travel abroad) to receive the message of these aliens").[12]

While videoconferencing is a more advanced technology, it is not equivalent to engaging in face-to-face dialogue and debate. As the *AAR I* court held, "technological alternatives [like videoconferencing are expensive and limited" and are "not a long-term substitute for in-person interaction." 463 F. Supp. at 411 n.11. Accordingly, despite holding that videoconferencing might be adequate at the preliminary injunction stage to allieviate *irreparable* injury the court emphasized:

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[12] Communicating face-to-face is substantively important to plaintiffs. *See, e.g.*, Hillsman Decl. ¶ 22 ("[I]nformal dialogue within the context of a scholarly meeting is a vital aspect of the ASA Annual Meetings. Scholars and graduate students from the U.S., North America and internationally interrupt their summer research and writing and spend significant financial resources coming to this meeting, rather than relying on reading published papers and other impersonal forms of communication. They do this because the personal exchanges in which they engage at this meeting are vital to face-to-face exchanges that hone their arguments and analyses and create professional relationships that are vital to continuing scholarly exchange. These types of exchanges cannot be fully replaced through technology"); Fam Decl. ¶ 15 ("Face-to-face dialogue . . . can open people up to new ideas and move them from ideas to concrete action. By bringing scholars, activists and the information-seeking public together in one room, the BCPR is able to create an atmosphere where the participants are in a position to hear and to learn from one another, but also to ask questions of fellow attendees, and to engage in other side conversations that are only possible with physically present participants. These face-to-face interactions are an integral part of the BCPR's mission and cannot be replaced by even the most advanced technologies."); Najimy Decl. ¶ 16 (Professor Habib's "physical presence would also ensure a more engaged experience").

> The Court does not hold that technological alternatives are sufficient to satisfy Plaintiffs' First Amendment right to interact with Ramadan on a permanent basis . . . . If the Government fails to meet [its burden to present a facially legitimate and bona fide explanation for Ramadan's exclusion] in the future, thereby triggering a presumption that the Government excluded Ramadan in violation of the First Amendment, it cannot nullify this First Amendment violation and continue excluding Ramadan from the United States by arguing that technological alternatives readily supplant Ramadan's physical presence.

Id. at 411 n.13; *see also United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) ("[V]irtual reality is rarely a substitute for actual presence, and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it."); *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993) ("In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact.").[13]

Even if speaking with someone through a video screen were exactly the same as speaking with them in person (which it is not), having Professor Habib present his formal presentation and perhaps take some questions from the audiences afterward might alleviate only one of plaintiffs' harms. It would not permit plaintiffs or their members to ask him questions privately after the event or panel, to engage with him at other panels or on other topics, to converse with him privately or in smaller groups, to network with him, or to engage him more informally at conference social events. Fam Decl. ¶ 15; Najimy Decl. ¶ 16; Hillsman Decl. ¶ 22, 26-27. Professor Habib simply cannot by means of videoconferencing technologies attend plaintiffs' public events and conferences, travel from panel to panel, and engage in the myriad forms of

[13] The AAUP previously has used videoconferencing after the government barred another foreign scholar (Professor Tariq Ramadan) who was slated to deliver an address to the AAUP and its members. It not only cost the AAUP $2,000, but was a "poor substitute" that did not supplant "face-to-face meetings, which facilitate debate, collaboration, and academic exchange." Nelson Decl. ¶ 11. Videoconferencing during panel discussion is also quite likely to alter significantly the interaction between the panelist and diminish the quality of discussion.

informal conversation and interaction that are vital to scholarly exchange. Videoconferencing will not allow ASA members to collaborate with Professor Habib on academic projects in any sustained fashion. Hillsman Decl. ¶ 26. Not even the government seems to suggest that videoconferencing would relieve plaintiffs of all these independent deprivations of their First Amendment rights. And of course, even finding, paying for, and utilizing alternative technologies imposes separate administrative and economic burdens that constitute concrete harm. Fam Decl. ¶ 15; Najimy Decl. ¶ 16; Nelson Decl. ¶ 11; Hillsman Decl. ¶¶ 21, 27. Thus, even if the government's statements in its brief and affidavit by counsel pointing to the theoretical possibility of videoconferencing as an alterative created a genuine issue of fact with respect to *one type* of harm (which they do not), there is no genuine issue of material of fact with respect to plaintiffs' other injuries. *Hershey v. Donaldson, Lufkin & Jenrette Securities*, 317 F.3d 16, 25 (1st Cir. 2003) (upholding district court's refusal to grant FRCP 56(f) continuance where grant would not have affected outcome of the case); *Sheinkopf*, 927 F.2d at 1263-64 (same).

In any event, whatever the merits of advanced communication technologies, videoconferencing is costly and requires an event to be held in a locale that has the requisite equipment to even use it. Three of the plaintiffs organizations have made clear that if Professor Habib is unable to attend their events in person they *will not* (and some cannot) use videoconferencing as an alternative means to engage with Professor Habib. The BCPR and the ACD-MA will be forced to cancel their public education event. Fam Decl. ¶ 15; Najimy Decl. ¶ 16. The ASA will once again find someone to read Professor Habib's paper but ASA members will be unable to debate his ideas with him. Hillsman Decl. ¶ 27. The theoretical benefits of videoconferencing as an alternative are irrelevant.

In sum, plaintiffs have demonstrated injury in fact sufficient to establish standing as a matter of law. Even the theoretical resort to alternative technologies will not relieve all of the concrete harms that flow from Professor Habib's inability to be physically present at plaintiffs' upcoming events. For these reasons, the Court should deny the defendants' motion to hold plaintiffs' summary judgment in abeyance and grant summary judgment in plaintiffs' favor.

CONCLUSION

For the reasons stated in plaintiffs' opening brief, and for the reasons explained above, plaintiffs respectfully urge the Court to deny the government's motion to dismiss, to deny the government's motion to hold plaintiffs' motion for summary judgment in abeyance, and to grant plaintiffs' motion for summary judgment.

Respectfully submitted,

/s/ Melissa Goodman
MELISSA GOODMAN (Admitted *Pro Hac Vice*)
JAMEEL JAFFER (Admitted *Pro Hac Vice*)
NASRINA BARGZIE (Admitted *Pro Hac Vice*)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400
(212) 549-2622

JUDY RABINOVITZ (Admitted *Pro Hac Vice*)
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004-2400

SARAH R. WUNSCH (BBO # 548767)
JOHN REINSTEIN (BBO # 416120)
ACLU of Massachusetts
211 Congress Street, 3rd Floor
Boston, MA 02110

Attorneys for Plaintiffs

April 3, 2008

CERTIFICATE OF SERVICE

In accordance with Local Rule 5.2(b) and Section E.2 of the Electronic Case Filing Administrative Procedures of the United States District Court for the District of Massachusetts, I, Melissa Goodman, hereby certify that on April 3, 2008, the within Plaintiffs' Reply in Support of their Motion For Summary Judgment and Opposition to Defendants' Motion to Hold Plaintiffs' Summary Judgment Motion in Abeyance filed through the ECF system will be sent electronically to registered participants as identified on the Notice of Electronic Filing.

Respectfully submitted,

/s/ Melissa Goodman
MELISSA GOODMAN (Admitted *Pro Hac Vice*)