UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

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

INTRODUCTION

For over two years, the government has barred Professor Adam Habib, a renowned South African scholar, from attending speaking engagements at plaintiffs' U.S. events. Because Professor Habib's exclusion directly impairs their First Amendment right to engage in in-person discussion with an invited speaker, plaintiffs suffer a well-recognized, concrete legal injury that gives them standing to challenge his exclusion. Once standing is established, one simple merits question remains: whether the government has satisfied its constitutional obligation to demonstrate a facially legitimate and bona fide reason for the exclusion. The law is clear that the First Amendment prohibits the government from excluding an invited speaker unless it provides a facially legitimate and bona fide reason for its actions. Here, the government has not only failed to supply a facially legitimate and bona fide reason for excluding Professor Habib, it has refused to supply *any* reason at all and has indicated that it never intends to. Under these circumstances, the exclusion cannot stand, and plaintiffs are entitled to summary judgment.

The government seeks to distract the Court from this inescapable legal conclusion by manufacturing two wholly irrelevant factual disputes. *First*, the government asserts that plaintiffs' lack standing because they have other means of communicating with Professor Habib and that discovery is needed on this issue. However, courts have uniformly rejected this argument on the law; the existence of other modes of communication with an excluded speaker is irrelevant to both the standing and *Mandel* review analysis. No court has ever permitted the government to conduct discovery on the issue. Transforming the simple legal question here into a complicated factual one would be unprecedented, contrary to established law, and ultimately futile as no facts the government seeks to discover could undermine plaintiffs' legal basis for standing. *Second*, in an effort to evade its constitutional obligation to supply a facially legitimate and bona fide reason for barring Professor Habib, the government concocts a radical new legal analysis for resolving this kind of case – a factually-based balancing analysis – and asserts discovery is needed to determine whether plaintiffs' constitutional rights are trumped by the government's (statutory) interest in visa confidentiality. But departing from traditional *Mandel* review here would be a significant legal error. The *Mandel* analysis does not change simply because the government refuses to supply any reason at all for its actions. If it did, the government could, by staying silent, unilaterally evade judicial review and exclude invited speakers at will without *ever* having to demonstrate a legitimate basis for doing so. The government simply cannot "balance" its way out of the facially legitimate and bona fide requirement.

In sum, the discovery the government seeks is completely irrelevant to the proper standing and merits analysis the Court must conduct. The Court should reject its discovery proposal and proceed instead to adjudicating plaintiffs' pending summary judgment motion.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE PROFESSOR HABIB'S EXCLUSION AS A MATTER OF LAW.

Plaintiffs have standing because they are unable to engage in in-person debate with an invited speaker. To establish standing, a plaintiff must demonstrate "injury-in-fact." *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 106 (1st Cir. 2008). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.*; *see also Sprint Comm. Co., L.P. v. APCC Services, Inc.*, 128 S.Ct. 2531, 2535 (2008). "Satisfying the injury in fact requirement is not onerous; plaintiffs need only show that they [are] directly affected by the conduct complained of, and therefore have a personal stake in the suit." *CoxCom, Inc.*, 536 F.3d at 107.[1]

Plaintiffs satisfy the injury-in-fact standing requirement because the government's exclusion of Professor Habib causes a well-recognized, concrete, particularized invasion of plaintiffs' First Amendment rights and the First Amendment harms they suffer are both actual and imminent. Because the government has denied Professor Habib a visa, plaintiffs and their members are unable to communicate with him *in-person*, in the United States at the academic conferences and public events to which they have invited him to speak. The government's exclusion of Professor Habib has already prevented him from attending plaintiff American Sociological Association's ("ASA") Annual Meetings in 2007 and 2008, plaintiff American Association of University Professors' Annual Meeting in 2008, and a public event hosted by plaintiffs the Boston Coalition for Palestinian Rights and the American-Arab Antidiscrimination

[1] Plaintiffs focus only on the injury requirement here because the government has not questioned their ability to meet the causation and redressability standing requirements. Nor could it. Plaintiffs' First Amendment injuries are directly traceable to the government's exclusion of Professor Habib and can be redressed by the relief they have requested. *See id.* ("[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

Committee of Massachusetts. Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment § IV.A, C-E (Declaration of Sally T. Hillsman ¶¶ 18-22, 24, 26; Declaration of Cary Nelson ¶¶ 8-9; Declaration of Sherif Fam ¶¶ 11-13; Declaration of Merrie Najimy ¶¶ 10-13; Declaration of Adam Habib ¶¶ 21, 26, 32).[2] Professor Habib is also unable to attend future U.S. speaking engagements, including plaintiff ASA's next Annual Meeting in early August 2009 to which ASA has invited Professor Habib to speak on a Presidential Panel about human rights in Africa. Second Declaration of Sally T. Hillsman ¶ 3.[3]

Citizens who are prevented from meeting in-person with invited speakers by virtue of a visa denial have standing to challenge the speaker's exclusion. The Supreme Court definitively decided this question as a matter of law in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), where it held that citizens who had invited Belgian scholar Ernst Mandel to various speaking engagements in the United States had standing to challenge his exclusion. The court ruled that the First Amendment "right to receive information and ideas," *id.* at 762, includes the right "to have the alien enter and to hear him explain and seek to defend his views," *id.* at 764 (quoting district court affirmatively). The injury the citizen inviters suffered was the invasion of their legally-protected right "to hear, speak, and debate with Mandel *in person*." *Id.* at 762 (emphasis added); *see also id.* at 764 (describing right to have Mandel participate "in colloquia debate and discussion in the United States."). Because plaintiffs were being deprived of "this particular

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[2] These declarations were filed in support of plaintiffs' summary judgment motion.

[3] There is nothing speculative or abstract about plaintiffs' injury. Professor Habib's inability to physically attend plaintiffs' events prevents them from, for example, hearing his presentations live and experiencing an in-person debate between him and other panelists; asking him questions in-person during panels; speaking with him before or after his presentation or asking him questions privately; engaging him on other topics at different conference panels; and conversing with him in the hallway, at meals, or at conference social events as part of the informal debate and relationship-building that occurs at all such events. Professor Habib's exclusion also prevents him from collaborating with ASA members on academic projects in-person and from delivering lectures in their classrooms. Declaration of Sally T. Hillsman ¶¶ 17, 25-26.

form of access" to Mr. Mandel, their First Amendment rights were "implicated," and they had standing to challenge the visa denial. *Id.* at 765.

First Circuit law on the matter is also clear: although foreign residents invited to speak here do not have standing to challenge their visa denials, U.S. citizens who have invited them most certainly do. In *Allende v. Shultz*, the First Circuit held that Mrs. Allende lacked standing but permitted a challenge to the visa denial by U.S. citizens asserting First Amendment harm. *See* 845 F.2d 1111, 1114 n.4 (1st Cir. 1988). Although the court did not engage in its own standing analysis, it summarized approvingly the district court's holding that "the denial of a visa to Mrs. Allende implicated plaintiffs' [F]irst [A]mendment rights to receive information and ideas and thereby inflicted sufficient injury to meet the standing requirement." *Id.* at 1114. Notably, the *Allende* district court had resoundingly rejected the government's standing argument, finding that *Mandel* had squarely settled the question as a matter of law. *See* 605 F. Supp. 1220, 1223 (D. Mass. 1985) (finding legal injury because *Mandel* "explicitly recognized that First Amendment rights are implicated in the Government's refusal to grant a visa to an alien with whom American citizens wish to speak."). Similarly, in *Adams v. Baker*, the First Circuit rejected Mr. Adams' standing but presumed, as a matter of law, that his exclusion caused the citizen inviters First Amendment harm that gave rise to standing. *See* 909 F.2d 643, 647 n.3 (1st Cir. 1990) (holding Adams had no "standing" but court could consider "the possibility of impairment of United States citizens' First Amendment rights through the exclusion of the alien.").[4]

[4] Although this Court did not explicitly address plaintiffs' standing in its December 8th ruling, it did correctly recognize that the right implicated here is "the plaintiffs' First Amendment rights, as the Court put it in *Mandel*, to hear speak, and debate with [an invited speaker] in person in the United States." *Am. Sociological Ass'n v. Chertoff*, 588 F. Supp. 2d 166, 172 (D. Mass 2008); *see also id.* at 174 n.3 (acknowledging *Mandel* court found plaintiffs had First Amendment "injury");

In fact, *every court* faced with a First Amendment challenge like this one has easily concluded, as a matter of law, that the inability to meet in-person, in the United States with an invited speaker causes a First Amendment injury that confers standing. *See 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) (finding plaintiffs suffered "injury in fact" and were "aggrieved" where government was "keep[ing] out people they ha[d] invited to engage in open discourse . . . within the United States");[5] *Am. Acad. of Religion v. Chertoff*, 463 F. Supp. 2d 400, 410, 412 (S.D.N.Y. 2006) (hereinafter "*AAR I*") (finding "plaintiffs' inability to interact with [the invited speaker] at their upcoming conferences [was]" a "very real injury" that was "actual and particularized, and therefore amount[ed] to an injury-in-fact sufficient to create standing"); *Abourezk v. Reagan*, 592 F. Supp. 880, 884 n.10 (D.C. Cir. 1984), *vacated on other grounds*, 785 F.2d 1043 (finding citizen inviters "ha[d] suffered injury-in-fact" based solely on their "nexus" to the "particular alien invitee"); *Harvard Law Sch. Forum v. Shultz*, 633 F. Supp. 525, 530 (D. Mass. 1986), *vacated as moot*, 852 F.2d 563 (1st Cir. 1986) (finding citizen inviters had standing because the "loss of First Amendment freedoms constitute[d] irreparable injury"). As this uniform body of case law makes clear, there is no serious question about plaintiffs' standing to challenge Professor Habib's visa denial. Plaintiffs suffer a clear First Amendment injury by virtue of their inability to communicate with Professor Habib in-person at their U.S. events.

The question of standing in cases like this has always been resolved as a legal matter, not

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id. at 174 (finding organizational plaintiffs "whose First Amendment rights are implicated" were the proper parties). The potential violation of this right is the legal injury that gives plaintiffs standing.

[5] In *Abourezk*, even the dissenting judge agreed with the majority's standing holding; he also noted the government's concession "that the Supreme Court ha[d] already implicitly decided the issue of whether plaintiffs who wish to meet with excluded aliens have standing to raise a constitutional ([F]irst [A]mendment) claim." *Id.* at 1063 n.1 (Bork, J., dissenting).

a factual one. Courts have never engaged in an extensive factual analysis to determine whether a First Amendment injury exists. Uniformly, only two facts have been relevant to every court's standing analysis: (1) whether plaintiffs had invited a foreign citizen to speak at U.S. events and (2) whether the government had refused that speaker admission to the country. Certainly no court has ever permitted the government to conduct discovery regarding whether plaintiffs are harmed by an exclusion – the injury is recognized as a matter of law.

In a vain attempt to manufacture a factual dispute about plaintiffs' standing, the government suggests that plaintiffs suffer no injury because they could communicate with Professor Habib through other means. The government has made this argument in nearly every First Amendment challenge to a visa denial; each time the courts have flatly rejected it *as a matter of law*. In *Mandel*, the Supreme Court rejected the argument that plaintiffs' suffered no First Amendment harm because other means of accessing Mandel's ideas "supplant[ed] his physical presence." 408 U.S. at 765. Recognizing plaintiffs' right "to hear, speak, and debate with Mandel *in person*," *id.* at 762, and acknowledging the "particular qualities inherent in sustained, face-to-face debate, discussion and questioning," *id.* at 765, the Court refused to hold "that [the] existence of other [means of communication] extinguish[ed] altogether any constitutional interest on the part of [plaintiffs] *in this particular form of access*," *id.* (emphases added). Since *Mandel*, courts have uniformly rejected the legal relevance of other avenues of communication with the invited speaker. *See Harvard Law Sch. Forum,* 633 F.Supp. at 530 n.3 (rejecting government's standing argument because "[w]hether plaintiffs ha[d] access to Terzi's ideas through alternative means such as books, speeches, tapes, or telephone hookups [was] *irrelevant to the First Amendment inquiry in this case*" (emphasis added)); *Allende*, 605 F. Supp. at 1223 (rejecting argument that plaintiffs lacked standing because they could "communicate with Mrs. Allende by mail or telephone or . . . meet her in Mexico City," finding argument

"soundly rejected by the Supreme Court" in *Mandel.*); *Abourezk*, 592 F. Supp. at 886 (because plaintiffs had a right "to have the invited aliens enter the United States," it was "not an answer to say – as the government does – that there are alternative means (mails, television, travel abroad) to receive the message of these aliens."); *AAR I*, 463 F. Supp. 2d at 412 (finding standing despite plaintiffs' ability to communicate with speaker via videoconference).[6]

The government is asking this Court to be the first to transform a simple legal question with a well-settled legal answer into a messy, burdensome, and unnecessary factual dispute. Every single court has concluded that plaintiffs prevented from engaging in-person, in the United States with an invited speaker suffer a legal injury regardless of whether they could communicate with the excluded scholar through other means. No court has ever found it necessary to examine plaintiffs' ability to utilize other means of communication, their past use of communication technologies, or whether other modes of communication are an adequate substitute for in-person attendance. Nor has any other court ever permitted the government to conduct the kind of discovery it proposes here. That is because there is literally nothing the government could establish factually – through discovery or otherwise – that would alleviate or erase plaintiffs' purely legal injury. No matter how many means of communication other than in-person discussion may be available, and no matter how advanced communication technologies may become, the undisputable fact (and the only legally relevant fact) remains that the government is cutting citizens off from a *particular form of access* to invited speakers by blocking all in-person engagement on U.S. soil.[7]

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[6] Indeed, courts have rejected the relevance of other modes of communication not only to the standing inquiry but to the "*Mandel* review" analysis altogether. *See infra* at 9-10.

[7] This is consistent with black letter First Amendment law that the government cannot foreclose an entire medium of communication, or deprive Americans of a particular medium for receiving information, simply because other avenues to communicate or obtain information exist.

That communications technologies such as videoconferencing are particularly advanced changes nothing; at bottom, it is a *different* form of access. For this reason, the *AAR I* court, without engaging in any factual analysis whatsoever, easily concluded as a matter of law that plaintiffs suffered an injury despite their ability to videoconference with an invited speaker. *See* 463 F. Supp. at 411 n.11 (finding standing and observing that "technological alternatives [like videoconferencing] are expensive and limited" and are "not a long-term substitute for in-person interaction."). It is self-evident that hearing Professor Habib speak remotely through a screen for a limited period of time is *different* than having him physically present and able to engage in the myriad forms of communication – formal and informal – that occur at all academic conferences.

Most importantly, the government's argument is squarely at odds with the key First Amendment principle undergirding *Mandel* and its progeny. The government cannot foreclose U.S. citizens from all in-person communication with an invited speaker and force them into a *different* mode of communication, advanced or otherwise, without a facially legitimate and bona fide reason. To hold that plaintiffs lack standing to challenge Professor Habib's exclusion simply because they have other ways of communicating with him would mean that they could never judicially enforce the facially legitimate and bona fide reason requirement as to the physical exclusion. But this, of course, is the entire purpose of *Mandel* review. Again, the *AAR I* court's analysis is instructive. Despite holding that videoconferencing might, at the preliminary

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See, e.g., Virg. State Bd. of Pharm. v. Virg. Citizens Consumer Coun., 425 US 748, 757 n.15 (striking down law that banned pharmacists from advertising drug prices even though customers could obtain the information elsewhere, holding "[w]e are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means"); *see also 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. State of NJ*, 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.").

injunction stage, alleviate *irreparable* injury, the court cautioned that videoconferencing could not alter the fundamental requirements of *Mandel* review:

> 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.[8]

Plaintiffs' standing is clear: a uniform body of case law confirms that they are suffering a legal injury that confers standing as a matter of law. This Court should make this legal finding and deny the government's request for burdensome and irrelevant discovery on this issue. *Cf.* Fed. R. Civ. P. 26(b)(1); *Whittingham v. Amherst College*, 164 F.R.D. 124, 127 (D. Mass. 1995) (parties may only seek discovery on matters that are *relevant* to claims or defenses).

II. THE ONLY REMAINING QUESTION FOR THE COURT IS WHETHER THE GOVERNMENT HAS PROVIDED A FACIALLY LEGITIMATE AND BONA FIDE REASON FOR EXCLUDING PROFESSOR HABIB.

Once plaintiffs have established that the exclusion of an invited speaker implicates their First Amendment rights – thus establishing their standing to challenge the exclusion – the legal inquiry on the merits boils down to one simple question: whether the government has demonstrated a facially legitimate and bona fide reason for the exclusion. *See, e.g.*, *Adams*, 909 F.2d at 647, 650 (examining whether exclusion was based on a "facially legitimate and bona fide

[8] Nor may the government force citizens to hold their events in a foreign country for no legitimate reason whatsoever. *See* Defendants' Response to Plaintiffs' Proposed Agenda at 2 n.2. The idea that American citizens should have to leave the country in order to exercise their First Amendment rights is absurd. This is like saying the U.S government could ban all newspapers, without any First Amendment problem whatsoever, simply because citizens could travel to Canada to read the news. In any event, courts have already rejected this argument. *See e.g.*, *Allende*, 605 F. Supp. at 1223; *Abourezk*, 592 F. Supp. at 886; *see also Virg. St. Bd. of Pharm.*, 425 U.S. at 758 n.15.

reason"); *Allende*, 845 F.2d at 1116 & n.9 (same); *see also Am. Academy of Religion v. Chertoff*, 2007 WL 4527504, *9 (S.D.N.Y. 2007) (hereinafter "*AAR II*") (the legal "standard is clear: when a consular official denies a visa which implicates a United States citizen's First Amendment rights, he or she must have a facially legitimate and bona fide reason for doing so"); *Abourezk*, 592 F. Supp. at 881 (noting that "the legal issue which ultimately governs is relatively straightforward," explaining that courts must "inquire whether the government has provided a 'facially legitimate' explanation for its refusal to permit an alien to enter"); *Am. Sociological Ass'n*, 588 F. Supp 2d at 170 (finding judicial review appropriate because courts must "review whether [the facially legitimate and bona fide] condition has been met"). The First Amendment simply does not permit the government to bar an invited speaker where it lacks a facially legitimate and bona fide reason, whether because the government fails to provide any reason at all or because the reason it provides is legally or factually unsupported.[9]

In an effort to escape this constitutional obligation, the government invents a radical new analysis for resolving this kind of case. It suggests that upon a showing of plaintiffs' standing, the Court would need to perform a "balancing test" to determine "whether or not the little bit of harm that the plaintiffs' [sic] might be experiencing by not having a . . . physical face-to-face debate with Mr. Habib is outweighed by the government's strong interests in the confidentiality of its visa records"; and the government claims entitlement to discovery to this end. *See* Transcript of Status Conference at 11 (Feb. 2, 2009) (hereinafter "St. Conf. Tr."); *see also id.* at 8, 18. In other words, the government asserts that pending some kind of factual showing by

[9] As discussed fully in plaintiffs' summary judgment briefs, if the government's basis for excluding an invited speaker is conclusory or insufficiently specific, lacks a basis in law or fact, or is unsupported by evidence, it is not facially legitimate and bona fide. *See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss Complaint at 14-18 (hereinafter "Pl. Summary Judgment Br.").

plaintiffs, and some kind of balancing analysis it creates out of whole-cloth, the government may *never need to provide any justification whatsoever* for Professor Habib's exclusion.

The government's position, however, defies every single court ruling on this issue. No court has ever conducted a balancing test to decide *whether* the government must supply an explanation for the exclusion of an invited speaker. To the contrary, courts have (correctly) proceeded from the understanding that demonstrating a facially legitimate and bona fide reason for impairing plaintiffs' First Amendment rights is not optional, it is constitutionally required. *See, e.g.*, *Harvard Law Sch. Forum*, 633 F. Supp. at 531 (the government "*is obliged* to justify [an exclusion] with a facially legitimate and bona fide reason" (emphasis added)); *Allende*, 605 F. Supp. at 1224 ("The lower federal courts have interpreted *Mandel to require* the Government to provide a justification for an alien's exclusion when that exclusion is challenged by United States citizens asserting constitutional claims." (emphasis added)); *AAR II*, 2007 WL 4527504, *9 (the government "must have a facially legitimate and bona fide reason"); *AAR I*, 463 F. Supp. 2d at 400 ("*Mandel* and its progeny...*require* the Government to justify the exclusion of an alien." (emphasis added)); *see also Burrafato v. Dept. of State*, 523 F.2d 554, 556 (2d Cir. 1975) (interpreting *Mandel* "to *require* justification for an alien's exclusion") (emphasis added)). No discovery the government proposes to conduct, nor balancing test it asks the Court to invent, would permit it to escape this constitutional obligation.[10]

The fundamental *Mandel* inquiry does not change simply because the government refuses to provide any reason at all. This principle is most aptly illustrated in *AAR I*. In that case, like

[10] Indeed, in conducting *Mandel* review, courts traditionally have not engaged in *any* kind of balancing. The sole question is whether the government has a facially legitimate and bona fide reason. The "balance" is expressed in the modest standard of review. Plaintiffs' First Amendment interests are accommodated by the imperative of *some* judicial review. The government's countervailing interests are accommodated by having a standard less stringent than traditional strict scrutiny.

this one, the government refused to provide its justification for the challenged exclusion. Rather than force the plaintiffs to make an elaborate factual showing before deciding *whether* the government had to supply a justification, the court required the government to explain itself or face the constitutional consequences. *AAR I*, 463 F. Supp. 2d at 419. Similarly, in cases where the government has supplied only a very conclusory explanation, courts have simply ruled that those justifications are constitutionally insufficient, without any balancing or factual analysis of the parties' competing interests. *See Allende*, 605 F. Supp. at 1225; *Allende v. Shultz*, 1987 WL 9764, *5 (D. Mass. 1987); *Abourezk*, 592 F. Supp. at 886, 888. Just as the government cannot evade, alter, or prevail in a traditional strict scrutiny analysis simply by refusing to provide a compelling interest for its actions, it cannot evade, alter, or prevail in *Mandel* review by refusing to supply a facially legitimate and bona fide reason. When the government does not establish a facially legitimate and bona fide reason for its actions, it fails the constitutional test and the exclusion cannot stand. *See Allende*, 845 F.2d at 1116, 1121 (affirming grant of summary judgment for plaintiffs where government failed to provide facially legitimate and bona fide reason); *City of New York v. Baker*, 878 F.2d 507, 512 (D.C. Cir. 1989) (altering scope of injunction but affirming grant of summary judgment for plaintiffs in the *Abourezk* litigation); *see also AAR I*, 463 F. Supp. 2d. at 415 ("where the Government is unable to provide a facially legitimate and bona fide reason for excluding the alien, thereby revealing that the true reason for exclusion was the content of the alien's speech . . . a court [may] remedy the constitutional infirmity by enjoining the Government from excluding the alien in contravention to the First Amendment.").

Adopting the government's unprecedented analysis would eviscerate *Mandel* and permit the government unilaterally to evade the judicial review the First Amendment demands. The government's proposed "balancing" analysis would apply only where "[n]o reason has been

offered" for an exclusion. *See* St. Conf. Tr. at 11. This approach would remove any incentive for the government to *ever* proffer a facially legitimate and bona fide basis for exclusion, encouraging it instead to seek extensive discovery on the weight of each side's interest in the hopes that it would *never* have to provide a reason. *Cf. Am. Sociological Ass'n*, 588 F.Supp.2d at 170 ("The incentive the defendants' proposed interpretation would give the government would be perverse: better to give no reason for a denial so that it would be unreviewable than to give a reason and be second-guessed by a court."). This approach would strip the Court of its vital role in ensuring the government is not impairing plaintiffs' First Amendment rights without any legitimate basis whatsoever. *See Abourezk*, 785 F. 2d at 1061; *AAR I*, 463 F. Supp. 2d 417 (finding that *Mandel* review "is necessary to ensure compliance with the First Amendment, a duty that has been expressly delegated to the federal courts").

The government's position, at bottom, is simply an attempt to re-litigate an argument it has already lost. In rejecting the contention that *Mandel* can be read to support the view that "where no reason is proffered, no review is permitted," this Court observed: "It seems unlikely in the extreme that . . . the [*Mandel*] Court intended to signal a willingness to accommodate evasion of the limited rule of review it was announcing." *Am. Sociological Ass'n*, 588 F.Supp.2d at 170-71. The government, however, is clinging to its original position – now through the guise of seeking irrelevant discovery – and asking this Court to ratify its exclusion of Professor Habib without holding it to the modest facially legitimate and bona fide requirement. The discovery the government seeks can serve no purpose in resolving the merits of this case. Because it is wholly irrelevant to any claim or defense, it is outside of the scope of discovery permitted by the Federal Rules. *See supra* at 10. This Court should reject its request.

Rather than permitting the government to engage in irrelevant and distracting discovery, the Court should proceed to the only proper question that remains: whether the government has

provided a facially legitimate and bona fide reason for barring Professor Habib from attending plaintiffs' U.S. events. This issue is squarely presented in plaintiffs' pending motion for summary judgment. The government has not provided a facially legitimate and bona fide reason for excluding Professor Habib; it has not provided any reason at all. Pl. Summary Judgment Br. at 18-23; Plaintiffs' Reply in Support of Summary Judgment at 11-16. Nor, according to its statement at the February 2, 2009 status conference, does it ever intend to. St. Conf. Tr. at 17. Under these circumstances, the exclusion cannot stand. Plaintiffs are entitled to summary judgment.[11]

CONCLUSION

For the reasons stated above, plaintiffs urge the Court to find that they have established standing as a matter of law, to deny the government's request to conduct discovery, and to proceed to the question whether the government has a facially legitimate and bona fide reason for excluding Professor Habib by adjudicating plaintiffs' motion for summary judgment and granting summary judgment in plaintiffs' favor.

Respectfully submitted,

/s/ Melissa Goodman
MELISSA GOODMAN (Admitted *Pro Hac Vice*)
JAMEEL JAFFER (Admitted *Pro Hac Vice*)
LAURENCE M. SCHWARTZTOL (Motion for admission *Pro Hac Vice* pending)

[11] Plaintiffs believe that summary judgment is appropriate on the present record. Accordingly, plaintiffs strongly urge the Court to adjudicate plaintiffs' pending summary judgment motion and enter summary judgment in plaintiffs' favor. However, should the Court believe that further factual development is required on the question whether the government has provided a facially legitimate and bona fide reason for excluding Professor Habib, the Court should order the government to disclose the specific sub-provision of the inadmissibility statute upon which it relies in barring Professor Habib; its specific reason and factual basis for invoking that provision; and its specific reason and factual basis for declining to recommend a waiver of inadmissibility. Such an order would be particularly appropriate in light of the government's assertion that it does not intend to voluntarily supply any reason at all. Alternatively, plaintiffs request the opportunity to conduct discovery on this issue.

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

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