

ORAL ARGUMENT SET FOR SEPTEMBER 16, 2008

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 07-5317

**EMERGENCY COALITION TO DEFEND
EDUCATIONAL TRAVEL, et al.,
Plaintiffs/Appellants,**

v.

**UNITED STATES DEPARTMENT
OF THE TREASURY, et al.,
Defendants/Appellees.**

**On Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR THE APPELLEES

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED
CASES**

A. Parties and Amici. The parties to this case are all listed in the certificate filed by the plaintiffs/appellants in their opening brief. We are not aware of any *amicus curiae*.

B. Rulings under Review. The rulings under review are all described in the certificate filed by the plaintiffs/appellants in their opening brief.

C. Related Cases. This case has not previously been before this Court. We are not aware of any related cases.

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GLOSSARY

The term “OFAC” means the Office of Foreign Assets Control within the Department of the Treasury.

The term “TWEA” means the Trading with the Enemy Act.

The term “APA” means the Administrative Procedure Act.

The term “Cuba sanctions regulations” means the Cuban Assets Control Regulations.

JURISDICTIONAL STATEMENT

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. § 1331 and Article III of the U.S. Constitution. As discussed below, we believe that the plaintiffs lack standing in this case, and that there was thus no proper district court jurisdiction.

Under 28 U.S.C. § 1291, this Court has jurisdiction over this appeal, which arises from a final order and judgment of the district court, dated July 30, 2007, which disposed of all of plaintiffs' claims. Plaintiffs filed a notice of appeal on September 26, 2007, which was timely under 28 U.S.C. § 2107(b) and FRAP 4(a)(4).

STATEMENT OF THE ISSUES

1. Whether the plaintiffs lack standing to challenge a 2004 Treasury Department regulation concerning the embargo on transactions with Cuba.

2. Whether the district court correctly rejected plaintiffs' First and Fifth Amendment claims that the Government has interfered with their asserted constitutional rights to participate in study abroad programs in Cuba.

3. Whether the district court correctly ruled that the Government's 2004 restrictions on study abroad programs in

Cuba were sufficiently supported by important foreign policy interests regarding the efficacy of the embargo on Cuban transactions.

STATEMENT OF THE CASE

Plaintiffs here are the Emergency Coalition to Defend Educational Travel (“the Coalition”), and various professors and college students who wish to teach and attend short-term educational courses to be given in Cuba.¹ (The Coalition is an association comprising academics, professors, and undergraduate students but, notably, no educational institutions.)

Plaintiffs challenge on statutory and constitutional grounds the validity of particular regulations promulgated in 2004 by the Department of the Treasury Office of Foreign Assets Control (“OFAC”). These regulations implement, in part, a broad United States embargo against various economic dealings with Cuba. Plaintiffs sued the Department of the Treasury and OFAC, as well as the Secretary of the Treasury and the OFAC Director in their official capacities.

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In this brief, unless specific plaintiffs are being discussed, such as in our argument on standing, we generally refer to the plaintiffs collectively as “the Coalition.”

Plaintiffs challenge specifically the validity of 31 C.F.R. § 515.565, which is part of the Cuban Assets Control Regulations promulgated under authority of the Trading With the Enemy Act (“TWEA”). This regulation governs requirements for educational travel programs (also called “study abroad” programs) in Cuba. As an exception to the broader embargo against Cuba, the Department of the Treasury may issue specific licenses to U.S. institutions of higher learning so that they may sponsor undergraduate students to study in Cuba, and so that professors may travel to Cuba to direct and teach courses in those programs.

The current version of Section 515.565 was promulgated in 2004, pursuant to a Presidential directive stemming from extensive findings by an interagency commission headed by Secretary of State Colin Powell to make recommendations to plan for and hasten Cuba’s transition from the Castro regime to a free and open society. Among other conclusions, this Commission found that the previous regulatory scheme governing study abroad programs in Cuba had regularly been abused by some academic institutions, students, and professors

engaging in “a form of disguised tourism.” JA 82.² The Commission accordingly recommended that, to curb the flow of hard currency to the Castro regime, the regulatory system should be amended to deter such abuses of the specific licenses permitting academic study in Cuba.

Accordingly, the regulation under attack allows such programs, but it requires students to be enrolled in a degree-granting program at the college or university whose program the student wishes to attend, and clarifies that professors must be full-time employees of the academic institution in whose program they teach. The regulation also mandates that academic programs offered in Cuba by U.S. institutions span a full academic term of at least ten weeks.

The district court concluded that plaintiffs have standing to bring this action, although it noted that the pleadings present a “close case.” The court then ruled entirely for the Government on the merits, rejecting the Coalition’s claims under the Administrative Procedure Act, as well as the First and Fifth Amendments.

² “JA __” citations refer to pages in the Joint Appendix.

STATEMENT OF THE FACTS

A. The Statutory and Regulatory Scheme

1. The Trading with the Enemy Act

Passed in 1917, TWEA was meant to “define, regulate, and punish trading with the enemy.” 65 Cong. Ch. 106, 40 Stat. 411 (Oct. 6, 1917). President Kennedy utilized TWEA in 1962, when he first imposed an embargo on trade with Cuba. The statute has been amended several times since then – most significantly by the passage of the International Emergency Economic Powers Act (50 U.S.C. §§ 1701, *et seq.*) – but it continues to serve as the statutory basis for the comprehensive embargo against Cuba.

Section 5(b) of TWEA broadly authorizes the President to: “investigate, regulate, * * * prevent or prohibit, any * * * use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or * * * transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States.” 50 U.S.C. § 5(b)(1)(B).

With regard to Cuba, the President has delegated this authority to the Secretary of Treasury, and has authorized the Secretary to issue regulations necessary to carry out TWEA’s purposes. See, *e.g.*, Exec. Order No. 12854, 58 Fed. Reg. 36587

(July 4, 1993). The Secretary, in turn, has delegated his authority to OFAC to promulgate and administer the Cuban Assets Control Regulations (“the Cuba sanctions regulations”) (31 C.F.R. Part 515), which embody the Cuban embargo’s current terms and restrictions.

2. The Cuban Assets Control Regulations

The first version of the Cuba sanctions regulations came into force in 1963, and was designed to isolate the Cuban government economically and deprive it of hard currency. See *Regan v. Wald*, 468 U.S. 222, 225-26 (1984). Accordingly, those regulations restrict many travel-related transactions. Throughout the embargo’s existence, the regulations have, however, permitted specific types of Cuba-related travel transactions – such as educational travel transactions – that were deemed consistent with overall U.S. policy towards Cuba, including fostering a free exchange of ideas between American students and professors, and members of Cuban society, as well as promoting civil society. Declaration of OFAC Director Adam J. Szubin, at ¶¶ 14, 18 (reprinted at JA 110, 115).³

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In the district court, the Government submitted the Szubin Declaration in order to explain the background of the Cuban embargo, the role of OFAC, the conclusions of the Commission for

The Government's policy regarding permitted travel transactions has evolved over the course of the Cuban embargo to reflect changing international developments and different Administration policies. JA 110-13; see *Regan*, 468 U.S. at 243 (explaining that the Cuba sanctions regulations have been "alternately loosened and tightened in response to specific circumstances").

3. National Security Presidential Directive 29 and the Commission for Assistance to a Free Cuba

On October 10, 2003, the President announced an initiative "intended to assist the Cuban people in their struggle for freedom and to prepare the U.S. government for the emergence of a free and democratic Cuba." White House Fact Sheet, Oct. 10, 2003;⁴ Remarks by the President on Cuba, Oct. 10, 2003.⁵ The President then formally constituted the interagency Commission for Assistance to a Free Cuba ("the

Assistance to a Free Cuba report, and the actions taken by OFAC in response to the President's directive to implement certain of the Commission's recommended courses of action.

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Available at <http://www.whitehouse.gov/news/releases/2003/10/20031010-7.html>, last visited April 1, 2008.

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Available at <http://www.whitehouse.gov/news/releases/2003/10/20031010-2.html>, last visited April 1, 2008.

Commission”) when he issued National Security Presidential Directive 29. The Directive explained:

The objectives of United States policy regarding Cuba are the end of the dictatorship and a transition to representative democracy and a free market economy. The United States embargo on the Cuban regime is intended to advance these objectives by continuing to deny resources to the repressive Castro government. In the absence of meaningful political and economic reforms in Cuba, these restrictions should remain in place.

National Security Presidential Directive/NSPD-29, Nov. 30, 2003.

The Commission was chaired by Secretary of State Powell, and included various other cabinet secretaries such as the Secretaries of the Treasury and Commerce, as well as the National Security Adviser. *Ibid.*

The Commission delivered its findings and recommendations to the President in May 2004, in a lengthy report that focused on “means by which the United States can help the Cuban people bring about an expeditious end to the Castro dictatorship.” JA 34. It identified a more “proactive, integrated, and disciplined approach” than previous policy initiatives had achieved, and described six inter-related tasks: (i) empower Cuban civil society, (ii) break the information blockade,

(iii) deny resources to the Cuban dictatorship, (iv) illuminate the reality of Castro's Cuba, (v) encourage international diplomatic efforts to support Cuban civil society and challenge the Castro regime, and (vi) undermine the regime's "succession strategy." JA 34-37.

Of considerable relevance to the case at bar, the Commission found that "tourism was one of the economic lifelines of the Castro regime and the single largest source of revenue to the Cuban government." JA 81, 113. The Commission noted that "flooding the island with tourists" was part of that regime's "strategy for survival." JA 80.

In discussing the educational travel programs permitted by the U.S. Government at that time, the Commission reported that this type of travel was one of several activities providing the Castro regime with tourism revenues (*i.e.*, hard currency) used for purposes inimical to United States interests. JA 65, 80-82.⁶ The Commission found that "tourism is Cuba's largest single source of revenue, generating some \$1.8-\$2.2 billion in annual gross revenues." JA 81.

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The other activities were tourism and travel-related exports, fully-hosted travel, and travel by private aircraft. See JA 81-83.

The Commission noted that then-current regulations allowed academic institutions to receive specific licenses to permit students to travel to Cuba for certain educational activities. JA 82. However, the Commission found that, “while there are well-meaning participants who use this license category as intended, other travelers and academic institutions regularly abuse this license category and engage in a form of disguised tourism.” JA 82.

The Commission explained that many institutions “use Cuba ‘study-tour programs’ to generate revenues for other programs and most accept students not enrolled in their institution.” JA 82. A large number of programs “are for a short duration, allow for limited interaction with the Cuban people, and include lengthy unscheduled time periods to permit largely tourist activities to be accomplished. Such travel does not promote a genuinely free exchange of ideas between Cubans and American students.” JA 82. The Commission found that “[e]vidence indicates that the majority of visits by U.S. students are organized by or coordinated through Cuban state travel and tour entities, are highly controlled by Cuban state security officials, and allow for only limited interaction with the average Cuban citizen.” JA 82. Further, “the regime has often used the

visits by U.S. education groups to cultivate the appearance of international legitimacy and openness to the exchange of ideas.”

JA 82.

The Commission report concluded that granting educational licenses only to programs “engaged in full-semester study in Cuba would support U.S. goals of promoting the exchange of U.S. values and norms in Cuba, would foster genuine academic study in Cuba, and would be less prone to abuse than the [then-]current regulations.” JA 82.

4. The Current Governing Treasury Department Regulations

On May 6, 2004, the President directed that certain recommendations in the Commission’s report be implemented by Executive Branch agencies, and the Treasury Department was specifically tasked by the National Security Council with taking steps to eliminate abuses of educational travel, as described by the Commission. See JA 114; 69 Fed. Reg. 33768 (June 16, 2004). See also Remarks by the President After Meeting with the Commission for Assistance to a Free Cuba (May 6, 2004) (the Commission’s recommendations constitute “a strategy that will

prevent the regime from exploiting hard currency of tourists and of remittances to Cubans to prop up their repressive regime”).⁷

In an interim final rule issued on June 16, 2004, the Treasury Department implemented these recommendations, and also further altered the Cuba sanctions regulations, consistent with the President’s policy with respect to Cuba. JA 114-15.

The 2004 amendments to 31 C.F.R. § 515.565 now govern the conditions upon which academic institutions may receive specific licenses to operate study abroad programs in Cuba. Section 515.565(a)(1) requires that such programs be for a full academic term (at least ten weeks long) and that the attending students be enrolled in a degree-granting program of the licensed institution.

In addition to making the changes recommended in the Commission report, the Treasury Department also clarified its existing rules to make clear that employees traveling to Cuba under an educational institution’s license must be full-time permanent employees of the licensed institution, and that temporary employees and contractors do not qualify as full-time

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Available at <http://www.whitehouse.gov/news/releases/2004/05/20040506-4.html>, last visited April 21, 2008.

permanent employees. *Ibid.*; 69 Fed Reg. 33770. As the Treasury Department has explained, “[b]oth before and after the 2004 amendment of section 515.565, a professor who taught a structured educational program in Cuba was required to be a full-time permanent employee of the licensed U.S. educational institution.” JA 115-16. The Treasury Department recognized that this pre-existing requirement had not been stated as clearly as possible because of the ordering of provisions in the prior regulation, and that the section was therefore being modified “to explicitly state in the first paragraph that only full-time permanent employees of a licensed educational institution were authorized to engage in any of the Cuba travel-related transactions listed in section 516.565.” JA 115-16.

B. This Litigation and the District Court’s Decision

The Coalition and five of its professor and student members brought this action to challenge the 2004 amendments to the Cuba sanctions regulations, seeking relief under a variety of theories, including the Administrative Procedure Act and the Constitution (First and Fifth Amendments). They filed this suit approximately two years after the amendments went into effect.

The Coalition sought an injunction and declaratory relief against the 2004 version of Section 515.565, and the district

court heard that motion in conjunction with the Government's motion to dismiss and for summary judgment. In July 2007, the district court denied the Government's motion to dismiss for lack of standing, but granted the Government's motion to dismiss for failure to state a claim upon which relief could be granted

1. Standing: Named plaintiffs in the matter below were the Coalition and five of its members – Professors Wayne Smith and John Cotman, and undergraduate students Adnan Ahmad, Jessica Kamen, and Abby Wakefield. The Coalition is an organization of higher education professionals affiliated with U.S. colleges and universities, although, tellingly, no colleges or universities themselves are members (nor are any educational institutions actual plaintiffs in this case). JA 19-20, 23.

The district court found that neither Professor Cotman nor students Ahmad and Kamen had established injury-in-fact as required by *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). JA 21-22. For Cotman, an associate professor at Howard University, who formerly taught courses in Cuba during the university's spring breaks, the court found that he did not "allege or describe any specific plans or concrete opportunities he had to teach in Cuba that were foreclosed by the 2004 [Cuba sanctions regulations] amendments." JA 21.

The court also found that student plaintiffs Ahmad and Kamen failed to allege “any specific plans or concrete opportunities to attend an academic program in Cuba.” *Ibid.* Neither alleged “that they planned to enroll in any particular course in Cuba at any particular time.” JA 22. Furthermore, neither student presented evidence indicating that he would be admitted to any such program if and when they applied. JA 22. Finally, the court noted that Ahmad’s and Kamen’s claims may be moot because both had alleged that they planned to graduate from their undergraduate institution (Johns Hopkins) in the spring of 2007, before the court’s decision was delivered. JA 22 at n.3.

Regarding plaintiffs Smith and Wakefield, however, the court found there to be a “close case” as to their standing, as they “[had] arguably alleged sufficient facts to meet their burden under *Lujan*.” JA 22. Smith, an adjunct professor at Johns Hopkins University, had previously taught in Cuba during two- or three-week programs. JA 118. He had already begun planning a January 2005 program when the revamped Treasury Department regulation became effective. JA 119. Likewise, Wakefield, an undergraduate student at Johns Hopkins, was “informed by Professor Smith, in his capacity as Director of

Johns Hopkins' Cuban Exchange Program, that the school's inter-sessional courses will resume immediately upon the rescission of the OFAC rulemaking challenged in this case, [and] that she has been accepted for enrollment in the first such resumed course." 1st Am. Compl. ¶ 9 (reprinted at JA 7-8). The court found that, "on balance," those two plaintiffs (and therefore the Coalition) had "elevate[d] their claims beyond the realm of hypothetical intentions," and had established injury-in-fact. JA 22.

As to Smith and Wakefield, the court then held that the evidence that their injuries might be remedied if an injunction against the 2004 amendment to Section 515.565 were granted was not too speculative, and that "there is no reason to even suppose that Johns Hopkins or other universities would not reinstate their academic programs in Cuba should the 2004 amendments be repealed." JA 24. Accordingly, the court found that plaintiffs Smith and Wakefield, and therefore the Coalition as well, had established Article III standing. JA 24.

2. Administrative Procedure Act: Turning to the merits, the district court rejected the Coalition's arguments that the Trade Sanctions Reform and Export Enhancement Act of 2000 (22 U.S.C. § 7209) and the Free Trade in Ideas Act of 1994 (Pub.

L. No. 103-236 § 525) prohibited the promulgation of the challenged amendments under TWEA.

The court noted that regulations implementing the Trade Sanctions Act explicitly exclude educational activities from their scope (JA 27), and that the “prefatory language” in the Free Trade Act upon which the Coalition relied is merely the non-binding sense of Congress. JA 27. The court also observed that the Free Trade Act simultaneously amended both TWEA and the International Emergency Economic Powers Act, 50 U.S.C. § 1702(b); in the amendments to the latter statute “Congress *did* explicitly regulate the President’s authority to regulate transactions ordinarily incident to travel,” while the House of Representatives Conference Report specifically stated that provision did **not** apply to the TWEA-based embargo against Cuba. JA 28, at n. 9.

The court therefore accorded the 2004 amendments “the full measure of deference set forth in *Chevron*.” JA 28. Noting the Commission’s “extensive findings,” including that the prior version of Section 515.565 was being abused by some travelers and educational institutions for “disguised tourism,” the court held that the 2004 amendments are “rationally related to TWEA’s grant of authority to the Executive to investigate,

regulate, prevent or prohibit, any use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or transactions involving, any property in which [Cuba] has an interest, by any person, or with respect to any property, subject to the jurisdiction of the United States.” JA 28 (quoting 50 U.S.C. App. § 5(b)(1)(B), punctuation omitted).

3. First Amendment: The Coalition had also argued that Section 515.565 infringes asserted First Amendment rights to “academic freedom,” and that any such infringement “must be supported by the weightiest considerations of national security.” Pls. Opp’n at 44. The district court found this argument incorrect.

The court held that the 2004 Cuba sanctions regulations amendments are content neutral and “place no restrictions on what universities and their professors may teach their students about Cuba,” and “only incidentally, if at all, burden [the Coalition’s] First Amendment rights.” JA 25. The court explained that “the proper standard under which to evaluate content-neutral restrictions that incidentally burden speech is the intermediate scrutiny test announced in *United States v. O’Brien*.” JA 26, citing *O’Brien*, 391 U.S. 367, 377 (1968). The court relied on this Court’s ruling in *Walsh v. Brady*, 927 F.2d

1229 (D.C. Cir. 1991), that “content-neutral regulations that have an incidental effect on First Amendment rights will be upheld if they further an important or substantial government interest. * * * And the D.C. Circuit has previously held that the interest in denying hard currency to embargoed countries such as Cuba is important and substantial.” JA 26 (punctuation omitted), quoting *Walsh*, 927 F.2d at 1235, and *O’Brien*, 377 U.S. at 377. The court therefore dismissed the Coalition’s academic freedom claim.

4. Fifth Amendment: The Coalition also argued that the 2004 amendments infringed an alleged liberty interest in “educational programs conducted abroad.” JA 15. The Coalition argued that such rights to international travel could not be infringed absent a significant national security threat. The court found this claim “simply wrong.” JA 26.

Relying on Supreme Court precedent – *Haig v. Agee*, 453 U.S. 280 (1981), and *Regan v. Wald*, 468 U.S. 222 (1984) – instructing the courts to afford “a substantial measure of deference to the political branches” in matters relating to the conduct of foreign affairs, including promulgation of regulations implementing the embargo against Cuba, the district court found “no basis for [the Coalition’s] invocation of a ‘national

security’ standard as a prerequisite to restrictions on international travel.” JA 27 (punctuation omitted). The court accordingly held that “the government has advanced an important and substantial reason for the [Cuba sanctions regulations] educational travel restrictions (i.e., the denial of U.S. currency to the Castro government) * * * .” JA 27 (citations and punctuation omitted).

RELEVANT STATUTES AND RULES

The pertinent parts of the TWEA and the Cuba sanctions regulations are reprinted in an addendum at the end of this brief.

SUMMARY OF ARGUMENT

I. In the first part of our argument, we contend that the judgment here should be affirmed, but for a ground that the district court did not accept: the plaintiffs lack standing. The district court believed the issue was a “close call,” but ultimately determined that Professor Smith and one of the named student plaintiffs, Abby Wakefield, have standing; the standing of the Coalition was premised on the standing of these individuals.

As noted above, no academic institutions are named plaintiffs here, or are members of the Coalition. Thus, Professor Smith’s standing is based on the theory that, if the 2004 version

of Section 515.565 is struck down, Johns Hopkins University will again create a short-term course for study in Cuba, and that it will assign Smith to teach in that program. However, as explained in the declaration of the Director of OFAC, Smith is ineligible to teach in such a hypothetical program because he is only a part-time employee of Johns Hopkins, and the version of the Cuba sanctions regulations already in existence before the 2004 amendment prohibited such employees from engaging in Cuban transactions as part of educational programs. Accordingly, Smith cannot meet the redressability requirement for standing, given that it is certainly not likely that Johns Hopkins would employ him in an illegal way even if the 2004 regulatory amendments are overturned.

The problem for Professor Smith's standing is key because the standing of the named student plaintiff – Wakefield – is linked closely to his. The district court found standing premised on the allegation that Smith had told Wakefield that, if Johns Hopkins does reinstitute a new short-term Cuba study abroad program in the future, she would be admitted. But given that Smith cannot operate such a program, the basis for Wakefield's standing is thrown into serious question.

II. In the second part of our argument, we demonstrate that, even if this Court finds that plaintiffs have standing, the judgment should be affirmed because the district court correctly dismissed the Coalition's constitutional claims under the First and Fifth Amendments.

The Coalition claims that the 2004 Treasury Department regulation violates constitutionally protected rights of academic freedom. In other words, the Coalition argues that the President was barred from changing the terms of the existing limited exception to the broad embargo placed on transactions with Cuba for study in that country. Although the Coalition wisely does not attack the validity of the embargo itself, it contends that the President has no power to restrict the exception to that embargo to term-long courses of study for a university's own students. Rather, the Coalition says that the President must continue to allow short-term programs in Cuba even though a commission headed by the Secretary of State concluded that many such short-term programs were being abused by educational institutions and used for school break tourist holidays. As the Commission found, such abuse undermines the effectiveness of United States foreign policy toward Cuba because it helps provide much needed hard money for the

Castro regime, and allows that regime to enhance its claims to legitimacy.

As the district court determined, this academic freedom claim is without merit. Under precedent from the Supreme Court and various courts of appeals, content-neutral restrictions placed on universities in no way violate whatever academic freedom rights are protected by the Constitution. The 2004 changes made to the Cuba sanctions program by the Treasury Department at the direction of the President were content-neutral because universities and professors remain free to teach whatever they wish about Cuba, both in the United States and in Cuba. The Executive has merely acted to eliminate a category of special license to avoid the effect of the otherwise applicable Cuban embargo because that category was particularly prone to abuse.

The Coalition's Fifth Amendment-based argument fares no better. The Supreme Court has ruled that the Executive can impose an embargo on transactions with Cuba, and such restrictions are valid even if they interfere with or prevent travel to that country. Such an embargo has been upheld because it is based on an important foreign policy decision to minimize hard money provided to the Castro regime. Accordingly, the district

court correctly rejected the Coalition's claim that its Fifth Amendment right to travel to Cuba for study abroad purposes has been violated.

III. Finally, we show that the district court properly denied the Coalition's claims that the Executive Branch's action here was not properly supported. The Treasury Department acted at the direction of the President in closing a loophole in the Cuba sanctions program that had proved problematic. The President's direction was based on conclusions drawn by a Commission headed by Secretary of State Powell and consisting of various cabinet departments. The Commission's relevant recommendations were reasonable, and the Executive's decision to adopt them was properly upheld by the district court.

STANDARD OF REVIEW

This Court reviews the district court's decision *de novo*, using the same substantive standard that the district court employed. *Broudy v. Mather*, 460 F.3d 106, 116 (D.C. Cir. 2006).

ARGUMENT

I. Plaintiffs Lack Standing, And This Case Should Have Been Dismissed On That Ground.

As described above, the district court here held that plaintiffs had standing to pursue this action, although the court said that it was a “close case.” JA 22. The court found that one of the named plaintiff professors (Cotman) and two of the named plaintiff students (Kamen and Ahmad) lacked standing, but that another of the named plaintiff professors (Smith) and one of the named plaintiff students (Wakefield) had “arguably” made a sufficient showing to establish standing. JA 22. The court determined, based on the agreement of the parties, that the Coalition’s standing “may be resolved based on whether Smith has standing to bring this action as an individual.” JA 21; see also JA 24.

We now demonstrate that Professor Smith actually lacked standing, and the Coalition therefore had none. In addition, Wakefield’s standing as a student seems to be tied to that of Smith, and cannot stand independently.

To demonstrate standing, Professor Smith was required to show that he had personally suffered a concrete and particularized actual injury, caused by the defendants’ conduct,

and that his injury would “likely” be redressed by a favorable decision from the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Moreover, courts should “presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record.” *Renne v. Geary*, 501 U.S. 312, 316 (1991).

In addition, a litigant “must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975); see *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973) (“[C]onstitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation’s laws”).

As noted above, no educational institutions are plaintiffs in this case, nor are they members of the Coalition. This fact creates serious obstacles for plaintiffs’ ability to meet the redressability aspect of standing because the amended Cuba sanctions regulation that they attack governs specific licenses to educational institutions to pursue educational activities in Cuba. See 31 C.F.R. § 515.565(a).

As OFAC Director Szubin explained in his declaration (JA 115-16), even before the 2004 version of the Cuba sanctions regulations came into being, Treasury Department regulations provided that only full-time educational institution employees were allowed to engage in transactions with Cuba as part of study abroad programs in that country. Thus, before Section 515.565 was changed and clarified in 2004, it provided that, once a specific license was obtained from OFAC, an educational institution “and its students and employees are authorized to engage in * * * transactions * * * directly incident to any of the categories of educational activities” involving Cuba permitted by the regulation. See 31 C.F.R. § 515.565(a)(2) (2003); 64 Fed. Reg. 25808, 25816 (May 13, 1999).

That regulation also stated explicitly that the “[a]ctivities covered by this authorization are limited to” ones described in the subsections that immediately followed. *Ibid.* The only one of those subsections applicable to Smith’s situation here provided that “**a full time employee**” of an academic institution with a license could carry out organization and preparation for transactions and activities with Cuba otherwise authorized by the regulation. *Id.* at 515.565(a)(2)(vii) (emphasis added).

In other words, the relevant regulation in effect in 2003 provided that educational institutions could obtain specific licenses from OFAC to operate the types of short-term programs that Professor Smith had participated in for John Hopkins University in Cuba, but could do so only through full-time employees. Smith's own declaration in the record (JA 119) makes clear that he is not, and does not wish to be, a full-time Johns Hopkins professor.

Accordingly, even if Smith were successful in having the 2004 version of Section 515.565 invalidated, such a court ruling would not benefit him personally because he would be prohibited by the pre-existing Cuba sanctions regulations from playing the role he wishes to play with regard to Cuban study abroad programs at Johns Hopkins.

This standing flaw is not solved by the fact that before 2004, Smith indeed did participate in short-term study abroad programs in Cuba for Johns Hopkins. As OFAC Director Szubin made clear (JA 115-16), professors in Smith's status were not allowed to do so. The fact that Smith's conduct in the past went beyond the scope of the activity authorized and was not the subject of an OFAC enforcement process does **not** make it likely that Johns Hopkins would retain him in the future, knowing

OFAC's position – expressed formally now at its highest level -- that Smith would not be eligible to engage in transactions with Cuba in order to make a Johns Hopkins course operational. Indeed, given the agency's publicly stated interpretation of its own embargo regulations, which is entitled to great deference (see *Consarc Corp. v. U.S. Treasury Dept., Office of Foreign Assets Control*, 71 F.3d 909, 914 (D.C. Cir. 1995)), we assume that Johns Hopkins would not flout that position and nevertheless utilize ineligible personnel under any license it later might obtain from OFAC as a result of this litigation.

Even aside from this problem, Smith has made no showing that, if Johns Hopkins were at some point in the future – some four years after the current relevant Cuba sanctions regulation went into effect – to recreate a short-term program, it would then likely retain Smith to run such a program in Cuba. Thus, Smith's ability to meet the redressability requirement for standing is seriously undermined by the fact that Johns Hopkins is not a plaintiff in this case and has not itself indicated that, if it obtained a license from OFAC in the future, Smith personally would benefit from such a license.

The district court briefly addressed in a footnote (JA 22-23 at n.5) these problems with Smith's standing, concluding that,

based on the past, there is “arguably a fair inference” that if Johns Hopkins is permitted to operate a short-term Cuba program in the future, Smith would be able to teach again. The court therefore found that it need not determine if, despite the clear statement by the OFAC Director describing the agency’s position on the meaning of its governing regulation, Smith would be legally authorized to engage in Cuban transactions. *Ibid.* This reasoning is flawed because it is obviously problematic to premise a standing determination concerning the likelihood of redressability on the supposition that Johns Hopkins would utilize Smith for this responsibility in the future knowing that OFAC believes him ineligible under its controlling regulation.

We also note that there is a disconnect between Professor Smith and the First Amendment claim being made by the plaintiffs – that the Constitution protects the right to determine “who may teach, who may attend, what may be taught and how it should be taught.” JA 14-15. This claim apparently derives from Justice Frankfurter’s concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), in which he referred to “the four essential freedoms’ of a university – to determine for itself on academic grounds who may teach, what may be taught, how

it shall be taught, and who may be admitted to study.” 354 U.S., at 263 (Frankfurter, J., concurring) (emphasis added).

To the extent that these rights are constitutionally protected, they inhere in a university, not its professors or students. See *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) (en banc) (“Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self governance in academic affairs.”); accord *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593-95 (6th Cir. 2005). Accordingly, Smith is not an appropriate plaintiff to raise the First Amendment claims that form the heart of plaintiffs’ appeal.

The district court also held that one of the named student plaintiffs, Abby Wakefield, had standing. However, Wakefield’s standing appears to depend heavily on Professor Smith’s status. The district court found standing for her because the First Amended Complaint averred that Wakefield wanted to take a Johns Hopkins short-term course in Cuba, and that Professor Smith had informed her that she had been accepted for

enrollment in such a course if it is eventually offered in the future. JA 22.

A serious question is raised about the adequacy of this claim for standing because, as explained above, Smith will not be eligible to operate a Johns Hopkins short-term program in Cuba. Thus, Wakefield's standing is dependent on decisions by Johns Hopkins – not a party to this case – to reinstitute a short-term Cuban program while she is still able to enroll in it (and is interested in doing so), to hire a full-time employee to operate it and engage in transactions with Cuba, and to admit her to this hypothetical program. Even aside from these problems, just like Smith, Wakefield's standing to litigate a constitutional academic freedom claim essentially on behalf of Johns Hopkins is highly doubtful.

As discussed earlier, the district court rejected standing for the other named plaintiff individuals. This decision was correct and has not been challenged by plaintiffs in their appellate brief. And, the Coalition's standing was entirely based on Smith's (JA 21), which should not be recognized. Further, the Coalition has provided no other ground for its standing – none of its members is an educational institution, and it has provided no information that its members include full-time professors who have

demonstrated a likelihood of teaching short-term courses in Cuba, and thus can claim a personal and concrete injury from the challenged Treasury Department's action.

Thus, the judgment here should be affirmed because plaintiffs lack standing, and the merits of plaintiffs' claims need not be reached. In any event, as we show next, the district court correctly rejected those claims.

II. The District Court Rightly Concluded That The Coalition's Constitutional Claims Are In Error.

Relying on *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967) and *Kent v. Dulles*, 357 U.S. 116 (1958), the Coalition claims that the 2004 Cuba sanctions regulations infringe its First Amendment right of "academic freedom" and its Fifth Amendment right to international travel. However, as the district court here recognized, both of those decisions are distinguishable from this case because the challenged Treasury Department regulations are content-neutral, and do not in any way call for, expect, or otherwise require any certification or oath, or otherwise pertain to affiliation or support of any political or religious viewpoint. See *Keyishian*, 385 U.S. at 603; *Kent*, 357 U.S. at 125. The Supreme Court has relied on that crucial point in upholding

regulations such as Section 515.565. See, e.g., *University of Pennsylvania v. EEOC*, 493 U.S. 182, 197 (1990); see also *Schrier v. University of Colorado*, 427 F.3d 1253, 1266 (10th Cir. 2005) (“Thus the right to academic freedom is not cognizable without a protected free speech or associational right”); *George Washington University v. District of Columbia*, 318 F.3d 203, 212 (D.C. Cir. 2003) (no violation of claimed First Amendment academic freedom rights caused by application of neutral and generally applicable land-use regulations).

In this instance, at the direction of the President, the Treasury Department has merely placed new restrictions on the grant of exceptions to the general embargo on Cuban trade for educational institutions that wish to engage in financial transactions for the purpose of operating study programs in Cuba. These content-neutral restrictions are valid because they are designed to limit the flow of hard currency to the Castro regime. Thus, the district court’s judgment should be affirmed.

A. The OFAC Regulations Affecting Educational Travel To Cuba Are Content-Neutral And Neither the Coalition Nor Its Members Have Been Deprived of First Amendment Rights

The Coalition contends that the 2004 OFAC rulemaking violates a First Amendment right of academic freedom because

the governing regulation dictates “who may teach and attend courses offered, either at home or abroad, by accredited U.S. institutions of higher education.” Appellants’ Br. at 55. However, the Supreme Court has never invalidated a regulation on the ground that it violated a First Amendment right to academic freedom. See *Urofsky*, 216 F.3d at 412. To the extent that the First Amendment protects “academic freedom,” any burdens placed upon the substantive scope of that protection by Section 515.565 are merely incidental and justified by weighty government interests. In addition, the regulation is both viewpoint- and content-neutral. The Coalition’s First Amendment claims are therefore devoid of merit.

1. Cuban Travel Regulations Have Long Withstood First Amendment Challenges

Courts have consistently rejected First Amendment challenges to restrictions imposed by the Executive Branch on international travel and dealings with countries that are the subject of economic sanctions imposed for foreign policy purposes. See, e.g., *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1439-42 (9th Cir. 1996) (rejecting First Amendment challenges to Cuban Assets Regulation of educational travel, both on vagueness grounds and on claim

that the regulation interfered with plaintiff's "right to gather firsthand information about Cuba"); *Walsh*, 927 F.2d at 1234-35 (rejecting First Amendment challenge to application of travel ban, where plaintiff alleged that travel to Cuba for the purpose of importing informational materials was the "constitutional equivalent" of newsgathering); *Teague v. Regional Commissioner of Customs*, 404 F.2d 441, 445-47 (2nd Cir. 1968) (rejecting First Amendment challenge to prohibition on unlicensed importation of informational materials, because restriction was "only incidental to the proper general purpose of the regulations: restricting the dollar flow to hostile nations"); *Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007, 1012-15 (S.D.N.Y. 1990) (rejecting First Amendment challenge to OFAC's refusal to license broadcasting deal where royalties would have been paid to Cuban regime); *Farrakhan v. Reagan*, 669 F. Supp 506, 510-512 (D.D.C. 1987) (rejecting Free Exercise clause challenge to sanctions on Libya because "[a]n accommodation toward all religious groups exempting them from the limitations of economic sanctions would intolerably limit the President's power to deal with international emergencies"), *aff'd*, (table) 851 F.2d 1500 (D.C. Cir. 1988).

In its seminal decision in *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965), the Supreme Court held that the Secretary of State's refusal to validate passports for travel to Cuba did not implicate First Amendment rights *at all*. While the Court recognized that the travel restriction would diminish the "free flow of information," the Court nonetheless concluded:

[We] cannot accept the contention of appellant that it is a First Amendment right that is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. * * * The right to speak and publish does not carry with it the unrestrained right to gather information.

Id. at 16-17. See also *Walsh*, 927 F.2d at 1235 (noting that it was undisputed that the Cuba sanctions regulations "are aimed at denying hard currency to Cuba, rather than at suppressing the receipt of information from or about Cuba").

Two decades later, in *Regan v. Wald*, 468 U.S. 222 (1984), the Supreme Court relied upon *Zemel's* holding to reject the argument that the Cuba sanctions regulations violated liberty interests secured by the Due Process Clause of the Fifth Amendment. The *Regan* Court observed that the passport restriction challenged in *Zemel* had effectively prevented travel to

Cuba and “thus diminished the right to gather information about foreign countries,” and reiterated that the *Zemel* Court’s “across-the-board restriction” did not implicate First Amendment rights. 468 U.S. at 241.

In *Freedom to Travel*, the Ninth Circuit applied *Zemel* to a Cuba sanctions regulation covering educational travel, rejecting the argument that the restrictions implicated an educational organization’s First Amendment rights, because there was no constitutional right to travel abroad to gather information, and the relevant regulation was sufficiently clear. 82 F.3d at 1441.

In sum, constitutional attacks against travel restrictions under the Cuban embargo have long been rejected by the courts. The Coalition’s claim here that Section 515.565 infringes on their “academic freedom” rights under the First Amendment similarly fails.

2. The Coalition’s Academic Freedom Argument Is Meritless in Light of the Challenged Content-Neutral Regulations

The Coalition rests its First Amendment argument on the concept of “academic freedom.” However, the Coalition’s own definition of “academic freedom,” even if adopted by this Court, does not implicate the Regulations in question:

The freedom of the teacher * * * in higher institutions of learning * * * to express his conclusions * * * in the instruction of students, without interference from political or ecclesiastical authority.

Appellants' Br. at 15, citing 1 Arthur Lovejoy, *Encyclopedia of the Social Sciences* 383 (Edwin R.A. Seligman ed. 1930) (emphasis added). Section 515.565 in no way violates this asserted freedom.

The challenged regulation does not, by text or by implication, purport to have any substantive impact on what students may learn in Cuban or U.S. classrooms. Under the regulation, full-time professors are free to teach their students by whichever methods they choose, and draw whatever academic, philosophical, political, or other conclusions they believe true.

The Supreme Court has clarified that in “the so-called academic freedom cases” that the Coalition cites – including *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), upon which the Coalition’s argument relies – the Court invalidated government efforts “to control or direct the *content* of the speech engaged in by the university or those affiliated with it.” *Univ. of Pa.*, 493 U.S. at 197. Professor Smith is free to teach whatever content he chooses regarding Cuba in a classroom at Johns Hopkins

University, and full-time professors can themselves determine the content of any courses they teach in Cuba.

Further, the Supreme Court noted in *Board of Regents v. Southworth*, 529 U.S. 217, 238 (2000), that “broad statements on academic freedom” are not helpful. While the Constitution “protects the right to receive information and ideas” (*Stanley v. Georgia*, 394 U.S. 557, 567 (1969)), the Coalition does not point to any precedent suggesting that the Constitution protects the right to receive information in any one place, especially in a specific foreign country against which the United States has a comprehensive, long-standing embargo. To the contrary, the Supreme Court has specifically held that travel for “information gathering” purposes is not protected by the First Amendment. *Zemel*, 381 U.S. at 17. In other words, academic freedom is properly seen as “what” can be taught, not “where.”

The Coalition nevertheless labels academic freedom as a “fundamental right,” and cites *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1994) for the proposition that “fundamental rights are identified by reference to this nation’s most valued traditions,” Appellants’ Br. at 23. The Coalition, however, does not offer any evidence that the ability to study in a country covered by a broad embargo imposed for legitimate foreign policy

reasons is, in fact, a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” See *ibid.* In fact, the Coalition cannot make such a showing in light of the precedents in *Regan* and *Zemel*.

As the district court emphasized (JA 25-26), the fact that the challenged regulation is content- and viewpoint-neutral causes the Coalition’s First Amendment claim to fail. “The principal inquiry in determining content neutrality, in speech cases generally * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Capital Cities/ABC*, 740 F. Supp. at 1013-14. As pointed out already, the regulation in question does not restrict the theories or ideas that can be expressed in courses about Cuba regardless of where they are taught. There is no political or ideological component to the regulations; no qualifiers other than those designed as general rules to help ensure that programs in Cuba are truly academic courses rather than winter vacation tropical getaways.

In sum, Section 515.565 merely implements the President’s most current position on the best way to carry out the long-standing, broad embargo against the Castro regime, and does

not restrict any subject that can be taught by U.S. universities, either in the United States or in Cuba. The Coalition’s argument clearly confuses “academic freedom” with having a “right” to short-term, overseas undergraduate-level student travel to a foreign location that is the subject of an embargo imposed for important foreign policy reasons. As such, the district court correctly rejected the Coalition’s First Amendment claim.

3. The Content-Neutral Cuban Travel Regulations Serve an “Important or Substantial Government Interest”

If Section 515.565 did affect First Amendment rights, the standards for evaluating a content-neutral regulation in the face of a First Amendment challenge are well settled: “[C]ontent-neutral regulations that have an incidental effect on First Amendment rights will be upheld if they further ‘an important or substantial governmental interest.’” *Walsh*, 927 F.2d at 1235 (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968)).

Even assuming for purposes of argument that Section 515.565 does burden plaintiffs’ First Amendment rights, that burden is wholly incidental to the regulation’s purpose. The well-established purpose of the Cuba sanctions regulations is to deprive the Castro regime of hard currency. See *Regan*, 468 U.S. at 225-26. The Commission’s 2004 Report recommended

altering the Cuban embargo to reduce the likelihood of abuses of short-term educational travel licenses that were effectively forms of disguised tourism, thereby benefitting Cuba more than U.S. academics. At the same time, the report allowed for meaningful academic activity by recommending that full-semester courses of study in Cuba continue to be permitted. Implementation of the report's recommendations on this subject were directed by the President, and the current version of Section 515.565 reflects the new policy with respect to specific licensing of certain educational activities in Cuba. 69 Fed. Reg. at 33769; JA 114-16.

Thus, as we have emphasized, the purpose of the regulation is not to suppress academic activity, but instead to diminish the flow of tourism revenues to the Castro regime. See JA 114-15; *Walsh*, 927 F.2d at 1235; *Teague*, 404 F.2d at 445-47 (“[R]estricting the flow of information or ideas is not the purpose of the regulations. The restriction of first amendment freedoms is only incidental to the proper general purpose of the regulations: restricting the dollar flow to hostile nations.”); *Capital Cities/ABC*, 740 F. Supp. at 1013 n.13 (explaining that “[t]he interests advanced by the Regulations” include “limit[ing]

funds which Cuba may use to promote activities inimical to the United States' interests").

As noted, where a government restriction is "unrelated to the suppression of expression but * * * burden[s] First Amendment freedoms incidentally" (*Walsh*, 927 F.2d at 1235), *O'Brien's* intermediate scrutiny standard applies. A content-neutral governmental restriction survives intermediate scrutiny if: (1) it is within the Government's constitutional power; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. See *O'Brien*, 391 U.S. at 376-77; *Walsh*, 927 F.2d at 1235.

First, it is indisputably within the President's constitutional power to restrict travel to Cuba under TWEA. See, e.g., *Regan*, 468 U.S. at 232-44; *Freedom to Travel Campaign*, 82 F.3d at 1438-41. Second, depriving the Castro regime of hard currency is an important and substantial governmental interest. See *Walsh*, 927 F.2d at 1235; *Freedom to Travel Campaign*, 82 F.3d at 1439. Third, as discussed, the governmental interest in stifling the Castro regime's access to tourism revenues is

unrelated to the suppression of free expression. See *Walsh*, 927 F.2d at 1235; *Teague*, 404 F.2d at 445.

Finally, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. The Executive has preserved an exception to the Cuba embargo for educational programs.⁸ At the same time, though, the Treasury Department has implemented the President's direction by drawing on the Commission's conclusion that many programs had abused that exception through short study abroad programs in Cuba that provided significant hard money to the Castro regime, but did

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In its brief, the Coalition asserts that Section 515.565 "had the immediate effect of eliminating all, but possibly one, of the many for-credit academic courses in Cuba offered to American college students by accredited U.S. institutions of higher education." Appellants' Br. at 4. This observation is factually incorrect. In 2007, OFAC issued some 68 specific licenses to U.S. universities that would allow them to offer full-term academic programs to their degree-seeking students in Cuba. The websites of various schools – such as American University, the University of Buffalo, and the State University of New York at Oswego – show that they are offering full-semester courses of study to undergraduates in Cuba. See <http://auabroad.american.edu/enclave/cuba.cfm> (and associated pages), last visited April 3, 2008; http://inted.oie.buffalo.edu/studyabroad/program.asp?prog=cuba&file=pro&img=pro_cuba.jpg&i=131 (and associated pages), last visited April 3, 2008; www.oswego.edu/academics/international/cuba.html (and associated pages), last visited April 3, 2008.

not serve the purposes of the United States. As the Commission found, “[a] large number of programs are for a short duration, allow for limited interaction with the Cuban people, and include lengthy unscheduled time periods to permit largely tourist activities to be accomplished.” JA 82. The Commission concluded that full-semester study programs in Cuba “would be less prone to abuse than the current regulations.” *Ibid.*

Thus, the Treasury Department eliminated the types of programs that posed the greatest threat of abuse, while retaining an educational exception to the otherwise broad Cuban embargo that would be far less likely to lead to simple tourism for college students on break. The district court’s dismissal of the Coalition’s First Amendment Claim, therefore, must be upheld.

B. The OFAC Regulations Restricting Travel To Cuba To Deny Hard Currency To The Castro Regime Are Narrowly Tailored To Fit A Legitimate Government Purpose and Do Not Violate Fifth Amendment Rights

The Coalition also argues that 31 C.F.R. § 515.565 restricts its Fifth Amendment liberty interest, which the Coalition describes as:

The liberty of the Appellant professors to design and teach academic courses *in Cuba* of a length they deem suitable to the pedagogical and scheduling needs of their students. And in the case of the Appellant students, the liberty to attend courses of their choice

in Cuba offered by accredited U.S. colleges and universities.

Appellants' Br. at 26 (emphasis added). The Supreme Court's opinion in *Regan v. Wald* forecloses this argument. See 468 U.S. at 240-43.

As explained earlier, *Regan* upheld travel restrictions under the Cuba sanctions regulations against a Fifth Amendment challenge premised on the argument that "the right to travel 'is a part of the 'liberty' of which the citizen cannot be deprived without due process of law.'" *Id.* at 240 (quoting *Kent v. Dulles*, 357 U.S. 116, 125 (1958)). The *Regan* Court relied upon *Zemel*, the case upholding passport restrictions against First and Fifth Amendment challenges, to affirm the travel restrictions. *Id.* at 241-42. *Regan* interpreted *Zemel* as holding that "the Fifth Amendment right to travel, standing alone" was "insufficient to overcome the foreign policy justifications supporting the restriction." *Id.* at 242. The *Regan* Court saw "no reason to differentiate between" the restrictions challenged in *Zemel* and the restrictions challenged in *Regan*, because "[b]oth have the practical effect of preventing travel to Cuba by most American citizens, and both are justified by weighty concerns of foreign policy." *Ibid.*

The *Regan* Court further rejected the argument that “only a Cuban missile crisis in the offing will make area restrictions on international travel constitutional,” because “matters relating ‘to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.’” *Ibid.* “Given the traditional deference to executive judgment in this vast external realm,” the *Regan* Court held that there was “an adequate basis under the Due Process Clause of the Fifth Amendment to curtail the flow of hard currency to Cuba – currency that could then be used in support of Cuban adventurism – by restricting travel.” *Id.* at 243; *Freedom to Travel Campaign*, 82 F.3d at 1438-39 (declining to evaluate validity of Executive Branch rationale justifying the Cuba sanctions regulations because foreign affairs arena merited judicial deference). See also *Haig v. Agee*, 453 U.S. 280, 306 (1981) (“[T]he *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States”).

Thus, as the district court recognized (JA 26-27), the Coalition’s Fifth Amendment claim fails as a matter of law. The Supreme Court has twice held, first in *Zemel* and later in *Regan*, that there is no overriding protected liberty interest to travel to

Cuba in light of the important foreign policy reasons to restrict dealings with the Castro regime.

III. The 2004 Restrictions On Transactions With Cuba By Educational Institutions Are Fully Consistent With Statutory Requirements.

At the end of its appellate brief (at 46-54), the Coalition makes two additional points. It contends that the Government failed to provide sufficient administrative record support to explain the justifications for the 2004 changes to the program for special licenses for educational programs in Cuba, and that the Executive Branch acted here without the support of Congress, which had in the Free Trade in Ideas Act of 1994 (50 U.S.C. App. § 5(b)(4)) expressed its sense that the President should not restrict international travel for educational purposes.

Taking this second point first, the Coalition itself makes clear that it is not arguing that the 2004 changes to Section 515.565 are barred by statute; the Coalition notes (Appellants' Br. at 54) that the district court described the sense of Congress provision in the Free Trade in Ideas Act as non-binding. See JA 27-28. The Coalition agrees with this conclusion (Appellants' Br. at 54) and says that it was merely bringing this provision to the court's attention to show that the Executive's decision to more narrowly restrict the exception to the Cuban embargo for

educational programs is not due deference in considering the Coalition's constitutional challenges. Given that we have already shown that the district court correctly determined that those constitutional claims lack merit, this point concerning the Free Trade in Ideas Act warrants no further attention.

On the first point, the Coalition's argument appears to be that it disagrees with the Executive's conclusions regarding the need to tighten the exception for educational programs in Cuba, and that the reasons for the Executive's actions in 2004 have not been sufficiently supported by a record.

The district court rejected this argument (JA 28) as it concluded that the Treasury Department's reliance on the Commission's recommendations was not "arbitrary and capricious" within the meaning of the Administrative Procedure Act, which provides for judicial review to determine if an agency's action is "arbitrary, capricious * * * or otherwise not in accordance with law," "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A)-(C).

As we have explained already, the President directed the Treasury Department to implement the Commission's recommendation that the embargo exception for study abroad in

Cuba be tightened in order to reduce the possibility that these programs could be abused by U.S. persons, and thereby provide the Castro regime with much-needed hard money and legitimacy. See JA 65, 80-82, 113-15. Thus, the Treasury Department was acting at the direction of the President. The district court ruled properly in finding this action constitutional because of the President's immense inherent authority in the realm of foreign affairs. See, e.g., *Holy Land Found. For Relief and Dev. v. Ashcroft*, 333 F.3d 156, 159 (D.C. Cir. 2003) (observing that a Presidential declaration of national emergency under IEEPA, a statute modeled on TWEA, "clothes the President with extensive authority"); *Freedom to Travel Campaign*, 82 F.3d at 1439 (declining to examine policy reasons underlying Cuban travel ban, citing "history of judicial deference" to Executive decision-making in the foreign policy arena).

As the Supreme Court has observed, "[m]atters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Regan*, 468 U.S. at 243-44 (quoting *Harrisiades v. Shaughnessy*, 342 U.S. 580 (1952)). And, "[w]hen the President acts pursuant to an express or implied authorization from Congress, he exercises not only his

powers but also those delegated by Congress. In such a case the executive action would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.” *Dames & Moore v. Regan*, 453 U.S. 654, 672 (1981).⁹

Thus, the Commission concluded that the program existing in 2003 for specific licenses as an exception to the Cuban embargo was providing hard cash to the Castro regime, and should be narrowed because in certain instances it was subject to abuse. The President agreed and directed the Secretary of the Treasury to narrow the exception and implement the Commission’s recommendations. The Treasury Department did so, and the district court quite properly deferred to the difficult foreign policy judgments made by the Executive regarding how best to structure the Cuban embargo in order to most effectively achieve the important foreign policy goal of assisting the Cuban

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This principle is fully applicable here because, as the Coalition itself has now conceded, the Free Trade in Ideas Act did not override the President’s authority under TWEA to impose an embargo on Cuba while providing only a limited study abroad exception for that country. And, the Coalition has on appeal identified no other statute that would have done so.

people in changing the Castro regime. The Coalition's disagreement with the President on this foreign relations strategy decision is plainly an insufficient ground to override the Executive's action here.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed, either because the plaintiffs lack standing or because of the district court's reasoning on the merits.¹⁰

Respectfully submitted,

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We wish to acknowledge the substantial assistance provided for this brief by Adam R. Pearlman, a student at the George Washington University Law School.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that this brief was prepared using WordPerfect 9, Bookman Old Style font, 14-point type, and contains 10,251 words.

Douglas Letter
Counsel for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have, this 30th day May 2008, served the foregoing Brief For The Appellees by mailing two copies by first class U.S. mail to counsel listed below (and sending a copy to counsel electronically). The brief will be filed this same date by first class US mail.

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