Case No. 08-1498

In the

Supreme Court of the United States

ERIC H. HOLDER, JR. ATTORNEY GENERAL, ET. AL,

Petitioners,

v.

HUMANITARIAN LAW PROJECT, ET. AL,

Respondents.

On a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

This brief is filed on behalf of the Anti-Defamation League ("ADL").[1] ADL is a 501(c)(3) not-for-profit organization founded in 1913 "to stop the defamation of the Jewish people and to secure justice and fair treatment of all."[2] In its almost 100 year history, ADL has become the premier civil rights organization in the country combating anti-Semitism and all forms of bigotry. ADL educates and informs the general public about prejudice and discrimination and has appeared as *amicus curiae* in a broad range of cases involving important questions of law regarding the separation of church and state, racial and religious discrimination and free speech.[3]

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[1] No counsel for a party or a party to this proceeding authored this brief in whole or in part and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than *amicus curiae*, their members or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of the Parties' general consent for *amicus curiae* to submit a brief in this proceeding are on file with the Court.

[2] ADL Mission Statement at http://www.adl.org/about.asp.

[3] A representative list of cases in which ADL has appeared as *amicus curiae* is available by category at http://www.adl.org/civil_rights/ab/. Most recently, on October 27, 2009, ADL moved the New York Court of Appeals to appear as *amicus curiae* on behalf of the People of the State of New

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As part of its mission, ADL has for decades been at the forefront of monitoring the actions of extremist groups domestically and world-wide, including groups identified by the United States Department of State (the "State Department") as foreign terrorist organizations.[4] It is ADL's belief that such groups pose a threat to the very things that allow a diverse society to flourish as well as to the physical safety and security of Americans and others throughout the world.

First and foremost, ADL is an advocate of the First Amendment rights guaranteed under the United States Constitution. Indeed, absent the guarantees provided under the First Amendment, ADL could not carry forth its own mission. It does not advocate for the official censorship of any person, group or organization. ADL recognizes, however, the distinct difference between speech and conduct, which is at the heart of the instant dispute before this Court. It has long advocated for the implementation of constitutionally sound laws that

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York in the matter of *People v. Mazin Assi,* with respect to the statutory construction of New York's Hate Crimes Statute (New York Penal Law § 485.05) and the public policy reasons for the New York Legislature's enactment of the law as it relates to crimes against property. That motion was granted on November 19, 2009.

[4] *See, e.g.*, ADL's regularly updated sections on extremism and terrorism on its website at http://www.adl.org.

will protect Americans not from the exercise of free speech rights but from the evil that can result from conduct engaged in to support hateful beliefs. *See, e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 480-81 (1993) (citing ADL's *amicus* brief and upholding Wisconsin's hate crimes statute, Wis. Stat. Ann. § 939.645, against a First Amendment challenge). ADL was, in fact, an early advocate of the government's ban on supporting the fundraising efforts of organizations designated as foreign terrorist organizations. *See, e.g.*, 142 Cong. Rec. S3363 (Apr. 16, 1996) (Statement of Sen. Orrin Hatch (R-Utah) acknowledging ADL's "strong work" in support of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 104th Cong. (1996)).

ADL actively monitors various foreign terrorist organizations, including the Kurdistan Workers' Party (the "PKK"), the Liberation Tigers of Tamil Eelam (the "LTTE") and Hamas, and can provide the Court with documented evidence of how the elaborate so-called "social service" networks maintained by these and similar organizations serve to nurture terrorist activities. Once resources are put into the hands of foreign terrorist organizations, how those resources are used is out of the control of even a high-minded, well-intentioned benefactor. While ADL is a strong believer in humanitarian outreach, such outreach must – and can be – constitutionally inhibited by law when the effect of the donation would be to strengthen an organization that exists for the purpose of harming the people of the United States or its allies.

In its dual role as an advocate of civil rights and liberties and an aggressive supporter of law enforcement and of the United States government's important efforts to fight international terrorism, ADL respectfully submits that it is uniquely qualified to assist the Court in this matter. ADL believes that it can be of assistance with respect to the application of the term "material support or resources" and the constitutionality of Section 303 of AEDPA, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, § 6603(b), 118 Stat. 3762, 108th Cong. (2004). ADL also can provide the Court with an exploration of the sound public policy reasons for the law proscribing Americans from providing "material support or resources" to foreign terrorist organizations under the mantle of humanitarian outreach.

SUMMARY OF ARGUMENT

> *"In all states of created beings, capable of laws, where there is no law there is no freedom. For liberty is to be free from the restraint and violence from others; which cannot be where there is no law; and is not as we are told, a liberty for every man to do what he lists."* --
>
> John Locke

In determining that international terrorism "threatens the vital interests of the United States," Congress concluded that material support from domestic donors to terrorist organizations facilitates and promotes international terrorism even where such support is directed to ostensibly "charitable" or "humanitarian" elements of such organizations. *See* AEDPA, codified at 18 U.S.C. § 2339B (Congressional Findings notes). Based on these findings, Congress deemed it necessary to prohibit the provision of material support to groups identified by the federal government as foreign terrorist organizations ("FTOs"), which it did by enacting AEDPA in 1996 and amending certain statutory provisions through the adoption of IRTPA in 2004. Providing material support and resources to terrorist organizations either directly or through their so-called charitable arms accomplishes two things, both of which are adverse to the best interests of the United States: (1) it allows the FTO to paint a benevolent picture of its role within the communities it is trying to reach, thereby enticing more followers,

and (2) it allows the FTO to focus its existing resources on its terrorist activities.

The material support prohibitions enacted by Congress have proven to be an invaluable tool in the war on terrorism. As explained by Gary M. Bald, Assistant Director of the Counterterrorism Division of the Federal Bureau of Investigation, in a statement before the U.S. Senate Committee on the Judiciary:

> The material support statutes serve as the framework enabling a thorough and aggressive prosecution of the entire terrorist network – leaving the network without the necessary resources or personnel to conduct terrorist operations. These statutes, based upon a fundamentally simple concept, prohibit material support or resources to all individuals or entities that facilitate, plan or engage in terrorism. By criminalizing the actions of those who provide, channel or direct resources to terrorists or a U.S. designated Foreign Terrorist Organization, the material support statutes provide an effective tool to intervene at the earliest possible stage of terrorist planning in order to arrest terrorists and their supporters well before their violent plans come to fruition.

Oversight Hearing: Aiding Terrorists: An Examination of the Material Support Statute, 108th Cong. 110 (2004) (Statement of Gary M. Bald).

By striking down portions of the material support prohibitions, the court of appeals effectively deprives law enforcement of a tool that has proven critical to the federal government's counterterrorism efforts. If the court of appeals is not reversed, the ability of law enforcement to prosecute those who supply training, expert advice and/or services to FTOs will be critically diminished. Consequently, the FTOs will be strengthened. It matters not whether those who seek to supply training, expert advice and/or services have a specific intent to further the terrorist activities of the FTOs. (Indeed, *Amicus* concedes that in the instant case the Respondents' interests appear genuinely to lie in teaching and training members of the PKK and LTTE in how to use humanitarian and international law with respect to relief efforts.) The benefits of such outreach, however, do not diminish the risk that if Americans are allowed to make such donations, resources would be freed up within the associated FTOs to further the terrorist aims of the organizations. As the court of appeals noted in its 2000 opinion:

> [E]ven contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive. More fundamentally, money is fungible; giving support

> intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts.

Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000) (citing *Amicus* ADL's brief submitted in support of the government).[5] Senator Jon Kyl (R-Arizona) echoed this sentiment in 2007: "There is no such thing as 'good' aid to a terrorist

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[5] ADL appeared as *amicus curiae* in the 1999 proceeding before the Court of Appeals for the Ninth Circuit, *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), in which it similarly asserted that Congress had correctly ascertained that material support or resources proffered by donors in the United States to foreign terrorist organizations serves to facilitate and promote terrorism even when the donations are directed to the humanitarian efforts of those organizations. In that instance, the court of appeals acknowledged that "there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor . . . is there a right to provide resources with which terrorists can buy weapons and explosives." *Id.* at 1133. The court of appeals, however, found the terms "training" and "personnel" to be impermissibly vague, in that neither were specifically defined. Seven years after that decision and three years after the terms "training," "expert advice and assistance" and "personnel" were defined under IRTPA, the court of appeals determined that Congress resolved the vagueness problem with respect to the definition of "personnel," but held that the term "training" remains vague, as do the terms "expert advice or assistance" and "service." *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007).

organization, because all aid is fungible and can be converted to evil purposes, and because even humanitarian aid can be used by a terrorist organization to help it recruit new members." 153 Cong. Rec. S15876 (Dec. 18, 2007).

The Congressional findings are clear: donations of material support or resources to an FTO place the interests of the nation and the safety of the American people at grave risk. In the face of such findings, Congress was left to balance our civil liberties and our nation's response to terrorism. The legislative history of AEDPA shows that in undertaking this balancing process, Congress was cognizant of the First Amendment concerns and seriously examined the constitutional issues raised by a ban on material support. *See* H.R. Rep. No. 104-383, at 43-45 (1995). It recognized that such a ban could not "attempt to restrict a person's right to join an organization." *Id.* Any ban had to be limited to a "contribution of financial or material resources" to an FTO. *Id.* Ultimately, Congress rightfully concluded that our government's interest in protecting the nation from the threat of terrorism can only be served by a legislative ban on material support, and in enacting that ban it made clear what constitutes "material support" or "resources." Just as it did in 1999, ADL continues to firmly believe that the conduct outlawed by AEDPA, as amended by IRTPA, does not qualify as "protected speech" under the First Amendment and, in fact, is not speech at all. Moreover, it believes that the Due Process Clause of the Fifth Amendment is not implicated because the terms "training," "expert advice or assistance," and "service" are facially clear

and not vague. As such, ADL urges this Court to reverse the court of appeals insofar as it found these terms to be vague and otherwise to affirm so that AEDPA can be applied as written for the safety and security of our nation.

ARGUMENT

At its core, the material support statute protects the very liberty the Respondents claim the statute violates. In advocating aggressively against the material support statute – and stressing the First Amendment rights to speech and association and the Fifth Amendment Due Process Clause – Respondents have lost sight of the fact that there can be no enjoyment of rights under the First and Fifth Amendments unless we as a nation first ensure that our people remain free from the violence of others.

Terrorism cases are often characterized, as the Respondents seek to do, as a struggle between the right of individuals to be free (including the rights of putative terrorists) and the right of society to remain safe. Despite the Respondents' claims, this dilemma plays no role in this case. At its core, the material support statute protects democracy from an internal contradiction: the allowance of a person to exercise their putative right to fund and to train those who use violence undermines the very state that protects that putative right. In short, neither the First Amendment nor the Due Process Clause can logically or legally require their use to support organizations that would use violence to destroy the very democracy from which these provisions derive

their meaning and operation. Permitting such an abuse of democracy would be unprecedented. After all, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Haig v. Agee*, 453 U.S. 280, 309-10 (1981) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)).

If the decision below is allowed to stand, our nation's ability to effectively wage war against terrorism will be significantly impaired and our national security interests severely short-changed. This is a grave risk that cannot be justified, especially in light of the fact that the alternative of upholding the material support statute as written will not unconstitutionally curtail the civil liberties Respondents seek to protect.[6] Applying the material support laws as written will protect the American people from the restraint and violence that FTOs seek to impose. Only in a society where such protection exists can civil liberties flourish.

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[6] *See* H.R. Rep. No. 104-383, at 45 (1995): "The ban does not restrict an organization's or an individual's ability to freely express a particular ideology or political philosophy. Those inside the United States will continue to be free to advocate, think and profess the attitudes and philosophies of the foreign organizations. They are simply not allowed to send material support or resources to those groups, or their subsidiary groups, overseas."

I. AEDPA's Prohibitions On Providing "Material Support Or Resources" To A Foreign Terrorist Organization Are Well-Within Constitutional Bounds And Key to The Nation's Interest In Fighting Terrorism

"[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." 18 U.S.C. § 2339B (Congressional Findings, note 7). Section 303(a) of AEDPA, as codified at Section 2339B(a)(1) of Title 18 of the United States Code, provides that a person who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so" may be criminally charged. The law requires that the person have "knowledge that the organization is a designated terrorist organization" under AEDPA or otherwise have knowledge that the organization engages in terrorist activity as specified under certain other federal laws. 18 U.S.C. § 2339B(a)(1). "Material support or resources" is defined under the statute as:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and

> transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b).

The purpose behind 18 U.S.C. § 2339B is to stop *terrorist groups* from gathering strength. The statute is not intended to impinge upon an individual's freedom of association or freedom of speech or to reach any other constitutionally-protected conduct. *See, e.g.*, *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004) (*en banc*), *vacated for other reasons*, 543 U.S. 1097 (2005), and *reinstated in part*, 405 F.3d 1034 (4th Cir. 2005) (prosecuting charges of fundraising for Hezbollah is not a constitutional violation because § 2339B does not target advocacy and is unrelated to the suppression of free expression); *United States v. Shah*, 474 F. Supp. 2d 492, 499 (S.D.N.Y. 2007) (finding no evidence that "§ 2339B reaches any, let alone a substantial amount of, constitutionally protected conduct"); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (training young men in the Pacific Northwest for jihad and distributing jihadi training manuals over a terrorist website can be found to be illegally providing material support and resources to Al Qaeda without violating the defendant's constitutional rights).

Congress' reasoning behind enacting AEDPA is simple and sound: money is fungible. When monetary gifts and other material support or resources are donated to an FTO, it allows the FTO to allocate its assets most efficiently for its needs. A substantial motivation for designating a terrorist

organization as an FTO is to cut-off that financial pipeline. In fact, the State Department has articulated five substantive advantages in the fight against terrorism that are realized through designating terror organizations as FTOs: (1) it curbs terrorism financing and encourages other countries to do the same; (2) it stigmatizes and isolates FTOs internationally; (3) it deters donations and contributions and economic transactions with FTOs; (4) it increases "public awareness and knowledge of terrorist organizations"; and (5) it signals to other governments the United States' concerns about the FTOs. U.S. State Department, Report on Foreign Terrorist Organizations (July 7, 2009), at http://www.state.gov/s/ct/rls/other/des/123085.htm.

Numerous safeguards are in place to ensure that only the most dangerous organizations are designated as FTOs. The Secretary of State must reach the decision in consultation with the Attorney General and the Secretary of the Treasury after the compiling and review of an investigative record (which may include classified information), and she must notify Congress seven days in advance of the designation taking effect, after which the designation is published in the Federal Register; furthermore, the designation is subject to judicial review, and may be revoked following a review of the designation by the Secretary of State or legislatively by Congress at any time. 8 U.S.C. §§ 1189(a)(1-4). Once a terrorist organization is designated an FTO, any of its assets that are under the control of a United States financial institution may be frozen at

the direction of the Secretary of the Treasury. 8 U.S.C. § 1189(a)(2)(C).

Currently, 45 organizations are designated FTOs, including the PKK, the LTTE, Hamas and other terrorist groups that regularly appear on newspaper front pages due to their heinous and atrocious actions. U.S. State Department, Report on Foreign Terrorist Organizations (July 7, 2009). Many of these organizations raise money through their so-called charitable arms, creating false illusions that can attract innocent donors. This is why a high bar was set under the statute before criminal liability attaches: the donor must know that the material support or resources are going to an FTO. 18 U.S.C. § 2339B(a)(1). A person, however, who "knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities." *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698-99 (7th Cir. 2008), *cert den. Boim v. Salah*, 175 L. Ed. 2d 324, 2009 U.S. LEXIS 7577, 78 U.S.L.W. 3238 (Oct. 20, 2009).

A ruling upholding the court of appeals' determination that the terms "training," "expert advice or assistance" and "services" are unconstitutionally vague would undermine the very purpose of enacting the material support prohibitions, *i.e.,* leaving the FTOs without the necessary resources or personnel to conduct terrorist operations. *See* 18 U.S.C. § 2339B (Congressional Findings, note 6). Any quantum of training, advice, services or personnel that is donated to an FTO from within the United States, is a valuable commodity

that once in the hands of an FTO will allow that FTO to maximize its assets and funnel more money into its terrorist activities. The avoidance of such a dangerous result by adherence to the material support prohibitions does not mean that an individual's right to associate or right to political advocacy or right to pursue philanthropic goals will be curtailed. AEDPA in no way attempts to restrict a person's right to join an organization so long as that person refrains from providing material support to the organization if it is a designated FTO; nor does the law prohibit a person's right to espouse a particular political view or ideology.[7] Moreover,

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[7] *See* Statement of Christopher A. Wray, Assistant Attorney General, Criminal Division Before the Committee on the Judiciary United States Senate (May 5, 2004):

> "[T]he material support statutes do not, and should not, prohibit people from believing what they want, however misguided, advocating what they believe in and acting independently and nonviolently based on their beliefs. It is only when someone crosses the line between advocacy and action on behalf of terrorists or a designated foreign terrorist group that they can and should be prosecuted. As Judge William Skretny told Shafal Mosed . . . when sentencing him to eight years in prison, the material support offense 'is not a thought crime,' and that '[i]f you had supported Al Qaeda in your heart only, you would not be here today.' Rather, Judge Skretny said, he was being punished because he 'made the decision to take action.' In short, neither the statutes nor our enforcement of them infringes First Amendment rights."

S. Hrg. 108th Cong. 185-86 (2004).

people within the United States have an absolute right to contribute material support and/or resources to myriad *legitimate* non-governmental organizations ("NGOs") and charitable organizations doing work around the world. These organizations are well-positioned to help people in need without any of the risk associated with providing material support to FTOs.

II. All Activities Of A Terrorist Organization Are Inextricably Linked, Making It Impossible To Separate Social Services or Humanitarian Outreach from Support for Terrorist Activities

"[T]he fungibility of financial resources and other types of material support" means that when individuals "supply funds, goods, or services to" an FTO to "defray the cost to the terrorist organization of running . . . ostensibly legitimate activities," their contribution of such material support serves to free up other money that can then be used to purchase weapons or in other ways to facilitate terrorism. *See* H.R. Rep. No. 104-383, at 81 (1995). Moreover, charities, social service programs and/or schools operated by FTOs and funded by "humanitarian" aid often operate as part of a culture of hate and violence. Such programs can and do nurture

potential terrorists, setting and keeping them on the path to violence, destruction and murder.[8]

In enacting AEDPA, Congress understood the necessity for a ban on providing support for designated foreign terrorist organizations which would be as comprehensive as possible. Congress recognized that the social service networks of foreign terrorist organizations are inextricably connected to the terrorist programs of these organizations. Therefore, Congress reasoned, it is not sufficient to stop the flow of money explicitly intended by the donor for purchasing arms and funding violence. All aid to terrorists must be banned.

The decision below undermines the statutory scheme created by Congress for the purpose of banning aid to international terrorists. Under the injunction confirmed by the court of appeals, Respondents are free to provide "training," "expert advice or assistance" and "service" to the Liberation Tigers of Tamil Eelam ("LTTE") and the Kurdistan

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[8] "Terror networks often use compromised or complicit charities and businesses to support their objectives." U.S. Treasury Dept., Terrorist Financing 8 (Feb. 2008), at http://www.treas.gov/offices/enforcement/money_laundering.shtml. Terrorist organizations "can utilise affiliated charities as a source of financing that may be diverted to fund terrorist attacks and terrorist recruitment by providing a veil of legitimacy over an organisation based on terrorism." *Id.*

Workers' Party ("PKK"), organizations that the Secretary of State has found to engage in terrorist activity that "threatens the security of the United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1). And, of course, any weakening of these prohibitions will extend to support of other FTOs, such as the violent Middle East organization called Hamas.

A. The Kurdistan Workers' Party ("PKK")

The PKK's political interest from its inception has been to force the creation of a separate nation for Turkish Kurds. The PKK is, however, a full-fledged FTO capable of horrific terrorist acts, many of which have been carried out in recent years against Turkish tourist destinations, hotels and resorts. U.S. State Dept., Terrorist Organizations 17, at http://www.state.gov/s/ct/rls/crt/2006/82738.htm. President Obama recently made clear that the United States believes the PKK to be a continuing terrorist threat:

> Make no mistake. . .: Iraq, Turkey, and the United States face a common threat from terrorism. That includes the al Qaeda terrorists who have sought to drive Iraqis apart and destroy their country. That includes the PKK. There is no excuse for terror against any nation. . . . As President, and as a NATO ally, I pledge that you will have our support against the terrorist activities of the PKK or anyone else. These efforts will be strengthened by

> the continued work to build ties of cooperation between Turkey, the Iraqi government, and Iraq's Kurdish leaders, and by your continued efforts to promote education and opportunity and democracy for the Kurdish population here inside Turkey.

Remarks by President Obama to the Turkish Government (Apr. 6, 2009), at http://www.white house.gov.

"Historically, support for the PKK has come from an extensive network of displaced Kurds living throughout Europe, and a number of governments, including Syria, Iraq and Iran." U.S. State Department Country Reports on Terrorism 2008 http://www.state.gov/documents/organization/122599 .pdf. In addition, the PKK has availed itself of a number of PKK-run NGOs and charitable organizations that basically serve to launder money raised through contributions. ADL PKK Fact Sheet, at http://www.adl.org/terrorism /symbols/pkk_1.asp. It is impossible to verify the final destination or ultimate use of a "charitable" contribution within the budget of a terrorist organization. Even if a donor's purported intent is to provide money and other support for what they say are lawful, nonviolent activities of the PKK and the Tamil Tigers (as Respondents have claimed there intent to be), there is no guarantee that the money or support will be used that way. On the contrary, "[o]nce the charity money hits its foreign destination, it is very difficult to determine where it really goes," according to Oliver B. Revell, a Texas security consultant who

previously served as the Deputy Director of the FBI. James Brooke & Elaine Sciolino, *Bread or Bullets: Money for Hamas - A Special Report; U.S. Muslims Say their Aid Pays for Charity, Not Terror*," N.Y. Times, Aug. 16, 1995, at A1.

The PKK insurgency is 5,000 strong with more than half of the insurgents living across the Turkish border in Iraq. U.S. State Dept., Terrorist Organizations 17. Clearly, the PKK remains positioned to strike. Affirmation of the court of appeals' ruling will allow the PKK not only to maintain that position but to strengthen it.

B. The Liberation Tigers of Tamil Eelam ("LTTE")

The LTTE is reported to be approximately 10,000 strong. *Id.* at 19.[9] The LTTE was reportedly behind

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[9] In a sudden political turn, on May 18, 2009, after a 26-year civil war between the Sinhalese majority in Sri Lanka and the Tamil minority, the Sri Lankan government declared the war over and the LTTE-led Tamil rebels defeated. *See, e.g., Sri Lanka Says Leader of Rebels Has Died*, N.Y. Times, May 19, 2009. This development should not be viewed as eliminating the possibility that elements of the LTTE continue to operate. In fact, it is a near certainty that such elements exist and continue to operate. Accordingly, there has been no action by the Secretary of State to revoke the designation of the LTTE as an FTO which she may do "at any time" if she concludes that "circumstances that were the basis

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the assassinations of the Indian prime minister in 1991 and the Sri Lankan president in 1993, *id.*, and is infamous for its terrorist tactics, including using women and children as suicide bombers, *id.*; ADL LTTE Fact Sheet, *at* http://www.adl.org/terrorism/symbols/liberation_tigers_te1.asp.

The "LTTE relies on sympathetic Tamil expatriates residing in the United States, Canada, the United Kingdom, Australia, France and several other countries to raise and launder money; smuggle arms, explosives, equipment, and technology into LTTE-controlled territory; obtain intelligence about the Sri Lankan government; and spread propaganda." Press Release, Dept. of Justice, *Leader of American Branch of Sri Lankan Terrorist Group Arrested and Charged with Providing Material Support to a Foreign Terrorist Organization* (Apr. 25, 2007), at http://www.justice.gov/usao/nye/pr/2007/2007Apr25.html. In order to coordinate these activities the LTTE had established "branches" in at least 12 countries, including the United States. *Id.* In the first six months of 2009 alone, eight people pled guilty in New York for providing material support in the form of money and weapons to the LTTE in violation of AEDPA and other U.S. laws. *See* Press Releases, Dept. of

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for the designation have changed in such a manner as to warrant revocation." 8 U.S.C. § 1189(a)(6)(A).

Justice, Jan. 27, 2009 and June 9, 2009, at http://newyork.fbi.gov/press.htm.

Included in the group of eight was the leader of the U.S. branch of the LTTE, Karunakaran Kandasamy, (also known as "Karuna"). The defendants operated the American branch of the LTTE through an organization called the World Tamil Coordinating Committee (the "WTCC"). The government charged that the WTCC oversaw and directed the LTTE's activities in the United States, including fundraising. In the summer and fall of 2004, for example, the LTTE undertook a major worldwide campaign to raise money for its planned offensive against the Sri Lankan government in late 2005. In support of this planned offensive, Karuna held fundraising events in November and December 2004 at a church and a public high school in Queens, New York, and a school in South Brunswick, New Jersey. Hundreds attended. http://www.justice.gov/usao/nye/pr/2007/2007Apr25.html.

According to the criminal complaint filed against the defendants, Karuna also was responsible for arranging meetings in LTTE-controlled territory in Sri Lanka between LTTE leaders and prominent LTTE supporters from the United States. These supporters typically have backgrounds in engineering, technology, weaponry, medicine and other scientific fields. Karuna and his subordinates also assisted LTTE intelligence agents in researching military technology.

In addition, millions of dollars per year are funneled to the LTTE through charity organizations

purporting to support Tamil humanitarian aid. U.S. State Dept., Terrorist Organizations 19; ADL LTTE Fact Sheet.[10] Much of the money raised in the United States that goes to the LTTE was laundered through the "Tamil Rehabilitation Organization," ("TRO") a charitable arm of the LTTE that the Treasury Department designated as a Specially Designated Global Terrorist in November 2007. Press Release, U.S. Treasury Dept., *Treasury Targets Charity Covertly Supporting Violence in Sri Lanka* (Nov. 15, 2007), at http://www.treas.gov/press/releases/hp683.htm. The Treasury Department noted that "TRO's efforts worldwide reportedly have allowed the LTTE to use humanitarian aid, which TRO collected from the international community after the December 2004 tsunami, to launch new campaigns to strengthen LTTE military capacity." *Id.* In addition, Treasury found the TRO to be the LTTE's "preferred conduit of funds from the United States to the LTTE in Sri Lanka."[11] *Id.*

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[10] In May 2007, three men were prosecuted in Australia on charges related to fundraising for the LTTE "under the guise it was donations for charitable projects and included money raised after the 2004 Tsunami." Sydney Morning Herald, *Funds Were For Tamil Tigers, Court Told*, Sept. 13, 2007.

[11] TRO's Australian operation continues to have an accessible (although dated) website, in which it describes itself as a non-governmental agency "providing expertise and

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C. Hamas

Like the PKK and the LTTE, Hamas is a prominent example of the dangers that AEDPA is intended to address. Hamas – along with Hezbollah, al-Jihad, the PKK, the LTTE and others – was classified as an FTO more than a dozen years ago. 62 Fed. Reg. 52650 (Oct. 8, 1997). Hamas is a terrorist organization that "seeks the establishment of a Palestinian identity and homeland." *In re Extradition of Mousa Mohammed Abu Marzook*, 924 F. Supp. 565, 568 (S.D.N.Y. 1996). Hamas' charter contains numerous references to the destruction of the Israel and the elimination of the Jewish people, including such pledges as:

> Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it;
>
> and

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funds for the relief, rehabilitation and development of North East Sri Lanka." *See* TRO Australia at http://www.tro.org.au/. Among the projects it describes are "TRO's Nutrition Rehabilitation Programme" aimed at addressing malnutrition in children under the age of five and the "Deaf and Blind Institute for Children," for which it is seeking donations to care for the 82 residents it allegedly supports. *Id.*

> [T]he Islamic Resistance Movement [Hamas] aspires to the realization of Allah's promise, no matter how long that should take. The Prophet, Allah bless him and grant him salvation, has said: "The Day of Judgement [sic] will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him. Only the Gharkad tree, (evidently a certain kind of tree) would not do that because it is one of the trees of the Jews."

Hamas Covenant 1988 (Yale Law School, Lillian Goldman Law Library), at http://avalon.law.yale.edu/20th_century/hamas.asp.

Hamas establishes itself in part through "education, health care, and other social services," but also engages in overt and horrific acts of terrorism, including "indiscriminate bombing of buses laden with civilians and other such types of attacks targeted at civilians." *In re Extradition of Mousa Mohammed Abu Marzook*, 924 F. Supp. at 568, 577. Hamas' far-reaching tentacles into the United States and other affluent countries reveals how seamless terrorism and social programs can be and why Congress and the courts must be vigilant in protecting Americans from ostensibly charitable donations that once made are converted to whatever use the FTO recipient chooses to make.

On May 27, 2009, a federal court in Dallas, Texas sentenced five founders and fundraisers of the Holy Land Foundation following their November 2008 conviction for Hamas-related fundraising activities. In the years since Hamas was designated a terrorist organization by the U.S. government, the Holy Land Foundation has funneled more than $12 million dollars to it. *See, e.g., 5 Decry Jail Terms in Holy Land Foundation Case*, Dallas Morning News, May 28, 2009; *see also Estates of Yaron Ungar v. Palestinian Auth.*, 304 F. Supp. 2d 232, 242 (D.R.I. 2004) (describing the Holy Land Foundation as acting "as Hamas' fund-raising agent in the United States"). The Holy Land Foundation was shut down largely on the basis of the material support statutes, including AEDPA.

Hamas is also allied with Union of Good, a Saudi-based organization specifically created to transfer funds from a web of charitable organizations into the hands of "Hamas members and the families of terrorist operatives." Press Release, U.S. Treasury Dept., *Treasury Designates the Union of Good* (Nov. 12, 2008), at http://www.treas.gov/press/ releases/ hp1267.htm. Hamas' annual budget is estimated at $70 million, with approximately 85% of that coming from Iran, Saudi Arabia and charitable donations funneled through United States-based charities. U.S. Treasury Dept., Terrorism and Financial Intelligence Rpt., at http://www.ustreas.gov/offices/ enforcement/key-issues/protecting/charities_ execorder_13224-e.shtml#h. Hamas is a very visible example of the reason AEDPA was enacted; the type of health and welfare services that an FTO may offer to its constituents enhances its credibility and

political strength, and thereby its ability to conduct terrorist operations.

The Treasury Department recognizes the risk of making charitable contributions that ultimately support Hamas:

> Hamas raises tens of millions of dollars per year throughout the world using charitable fundraising as cover. While Hamas may provide money for legitimate charitable work, this work is a primary recruiting tool for the organization's militant causes. Hamas relies on donations from Palestinian expatriates around the world and private benefactors located in moderate Arab states, Western Europe and North America. Hamas uses a web of charities to facilitate funding and to funnel money. Charitable donations to non-governmental organizations are commingled, moved between charities in ways that hide the money trail, and are then often diverted or siphoned to support terrorism.

U.S. Treasury Dept., Terrorism and Financial Intelligence Rpt.

This description of Hamas' endeavors can just as easily be applied to many other FTOs and their charitable arms, including those at issue here. The structure and operation of organizations such as Hamas demonstrates that the decision by Congress

to ban giving material support or resources to FTOs is well justified. The division of Hamas into military and political/social wings has led some people to assume that there is a separation between the two. Such assumptions could not be more wrong: "funds raised for the social programs of Hamas free up other funds for the military wing and there is no open accounting system whereby the international community can ascertain whether or not the social wing finances the military wing." *See* ADL Hamas Fact Sheet, at http://www.adl.org/main_israel/hamas_facts.htm. Indeed, humanitarian donations made in the United States can and do go to reward the families of Hamas suicide bombers. *Id.* Moreover, in November 2009, a Hamas-related charitable organization offered a $1.4 million dollar reward to any Arab living in Israel who could capture an Israeli soldier. Diaa Hadid, *Hamas-Linked Group Offers Cash for Israeli* Capture, Wash. Post, Nov. 18, 2009 (noting that Hamas is believed to have millions of dollars at its disposal). Cutting off monetary or in-kind donations to FTOs and their charitable entities will keep money out of the hands of the terrorists. That will save lives.

Monetary or in-kind donations made by Americans that allow terrorist organizations to (1) enhance their credibility with their constituents and on the world stage and (2) shift funds to their terrorist endeavors are banned for good reason. A person of ordinary intelligence knows the reasons for that ban and what contributing material support or resources would include without any need for Congress to define or redefine "training," "expert advice or assistance," "service" or "personnel." ADL

is extremely vigilant in seeking to protect our citizens' civil liberties. However, we also must provide the tools needed by law enforcement to provide for the nation's security.[12] The material

[12] There is solid evidence that the material support prohibitions are advancing our nation's goals in the war on terrorism. Barry Sabin, chief of the counter-terrorism section of the criminal division of the United States Department of Justice, addressed this issue with members of a United States Senate subcommittee in 2004. He informed the subcommittee that the Justice Department had successively disrupted terrorist acts "due to the wide array of legislative tools provided by Congress, particularly the material support statutes." *See* Tools to Fight Terrorism Act of 2004: Hearing on S. 2679 Before Senate Judiciary Committee, 108th Cong. 4 (2004). He described the material support statutes as "the backbone and the lifeblood of [the Justice Department's] Article 3 judicial prosecutions in the post-9/11 realm." *Id.* Mr. Sabin pointed to examples of how the Justice Department relied upon the material support statutes for achieving indictments against a number of individuals and organizations, including against the U.S.-based Holy Land Foundation for "conspiring to provide material support to Hamas over the last decade." *Id.* On the other hand, there are no examples to cite in which the material support prohibitions have been invoked to infringe on civil rights or liberties. While AEDPA's prohibition on providing material support to foreign terrorist organizations does prohibit the provision of training, expert advice and services to the PKK and LTTE, Respondents are not barred from participating in other forms of political expression and association on behalf of the PKK's and LTTE's allegedly legitimate goals. Respondents are "free to spend money themselves, such as distributing information about the plight of the Kurds and Tamils; are free to associate with others to express their

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support laws fall on the constitutional side of the line: there is no inalienable right to donate material support or resources to a designated foreign terrorist organization. The dangers of doing so cannot be overstated.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the Ninth Circuit should be reversed with respect to its decision that the term

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advocacy of the PKK's and LTTE's political and humanitarian goals; and are free to provide direct humanitarian aid to individuals who need it." *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1197 (C.D. Cal. 1998). *See also Testimony of Paul Rosenzweig Senior Legal Research Fellow Center For Legal And Judicial Studies, The Heritage Foundation Before the United States Senate Committee On The Judiciary* (May 5, 2004) at 170 ("[T]here are no 'actual facts' of abuse that have been reported – no public advocates criminalized for their political speech.").

"training," "expert advice or assistance" and "service" are unconstitutionally vague. In all other respects, its decision should be affirmed.

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