No.

In the Supreme Court of the United States

HUMANITARIAN LAW PROJECT, ET AL.

CROSS-PETITIONERS

V.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the criminal prohibitions in 18 U.S.C. § 2339B(a)(1) on provision of "expert advice or assistance" "derived from scientific [or] technical … knowledge" and "personnel" are unconstitutional with respect to speech that furthers only lawful, nonviolent activities of proscribed organizations.

PARTIES TO THE PROCEEDINGS

The following parties were plaintiffs in the district court and appellees and cross-appellants in the court of appeals, and are respondents and conditional cross-petitioners in this Court: Humanitarian Law Project; Ralph Fertig; Ilankai Thamil Sangam; Tamils of Northern California; Tamil Welfare and Human Rights Committee; Federation of Tamil Sangams of North America; World Tamil Coordinating Committee; and Nagalingam Jeyalingam.

The following parties were defendants in the district court and appellants and cross-appellees in the court of appeals, and are petitioners and conditional cross-respondents in this Court: the Attorney General of the United States, Eric Holder, Jr.; the United States Department of Justice; the United States Secretary of State, Hillary Rodham Clinton; and the United States Department of State.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and rule:

U.S. Const.:

Statutes and rule:

Miscellaneous:

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a)[1] is reported at 552 F.3d 916. Earlier opinions of the court of appeals are reported at 393 F.3d 902, 352 F.3d 382, and 205 F.3d 1130. The opinion of the district court (Pet. App. 33a- 76a) is reported at 380 F. Supp. 2d 1134. Earlier opinions of the district court are reported at 309 F. Supp. 2d 1185, 9 F. Supp. 2d 1176, and 9 F. Supp. 2d 1205.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2007. A petition for rehearing was denied on January 5, 2009. Pet. App. 3a. On March 24, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 5, 2009. On April 22, 2009, Justice Kennedy further extended the time to June 4, 2009. The government's petition for certiorari was filed and docketed on June 4, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court.

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[1] References to "Pet. App." are to the Appendix to the government's Petition for a Writ of Certiorari, No. 08-1498.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." The Fifth Amendment provides, in pertinent part: "No person shall … be deprived of life, liberty, or property, without due process of law." The relevant statutory provisions are reprinted at Pet. App. 77a-81a.

STATEMENT

This case involves the constitutionality of several provisions of 18 U.S.C. § 2339B, in particular those that criminalize speech and associational support that furthers the lawful, nonviolent activities of an organization that the government has designated as "terrorist." The government has petitioned the Court for review of a narrow, as-applied injunction affirmed by the court of appeals, which barred enforcement of three specific sub-provisions of the "material support" statute – those prohibiting the provision of "training," "expert advice or assistance" "derived from … other specialized knowledge," and "service" – as they applied to plaintiffs' proposed pure speech.

Plaintiffs have opposed review on the ground that the court of appeals' limited, as-applied decision creates no conflict among the circuits, leaves the material-support statute valid on its face, involves even the as-applied validity of only a few of the statute's provisions, imposes no substantial limits on the

the government's authority to prosecute support of terrorism, permits Congress to take further action, and is correct. For all the reasons stated in plaintiffs' Brief in Opposition in No. 08-1498, the Court should deny review.

If the Court grants the government's petition, however, plaintiffs ask the Court to grant the present petition as well, to review the validity of two other interrelated sub-provisions of the statute – the bars on providing "expert advice or assistance" "derived from scientific [or] technical … knowledge" and "personnel." 18 U.S.C. §§ 2339A(b)(3), 2339B(h). The court of appeals rejected plaintiffs' challenges to those provisions. But their validity raises questions closely related to those raised by the government's petition.

Plaintiffs rely on the Statement in their Brief in Opposition for the factual and procedural background of this dispute, and add here only a brief discussion of the court of appeals' treatment of the prohibitions on the provision of "expert advice or assistance" "derived from scientific [or] technical … knowledge" and "personnel."

Plaintiffs challenged these prohibitions on the same grounds that they advanced to challenge the prohibitions that the court of appeals invalidated as applied. They argued that the provisions were vague and overbroad on their face and as applied, and that they punished speech and association in violation of the First and Fifth Amendments.[2]

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[2] As with the three sub-provisions that the court of appeals held invalid as applied, respondents seek to enjoin these two provisions only with respect to their proposed speech activities in support of

The district court determined that these prohibitions were not vague or overbroad, and did not otherwise violate the First or Fifth Amendments. Pet. App. 66a n.23, 68a-70a.[3]

The court of appeals affirmed. The court concluded that while the statute's prohibition on expert advice "derived from … other specialized knowledge" was unconstitutionally vague, its prohibition on expert advice "derived from scientific [or] technical … knowledge" was "reasonably understandable to a person of ordinary intelligence." *Id.* at 24a. The court offered no reasoning for this conclusion, and merely cited school reading lists that identified "technical" as a fifth-grade vocabulary word and "scientific method" as a third-grade vocabulary word. *Id.*

While the court of appeals had twice previously declared the material-support statute's prohibition on providing "personnel" unconstitutionally vague,[4] *see id.* at 7a-8a (summarizing earlier rulings), it concluded

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the lawful, nonviolent activities of the PKK and the LTTE. *See* Pet. App. 5a n.1; *id.* at 34a-36a.

[3] The district court erroneously stated that respondents had not challenged the prohibition on providing "expert advice or assistance" "derived from scientific [or] technical ... knowledge." Pet. App. 66a n.23. In fact, respondents challenged the "expert advice or assistance" prohibition as a whole, and did not limit their challenge to advice derived from "specialized knowledge." *See* Complaint in 03-06107, ¶ 53; CA Excerpts of Record at 49.

[4] *Humanitarian Law Project v. Reno (HLP I)*, 205 F.3d 1130, 1137-38 (9th Cir. 2000); *Humanitarian Law Project v. U.S. Dep't of Justice*, 352 F.3d 382 (9th Cir. 2003), *vacated and remanded in light of intervening legislation by* 393 F.3d 902 (9th Cir. 2004) (en banc).

that Congress had cured the infirmity by adding the following clause to the statute in 2004:

> No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

18 U.S.C. § 2339B(h). The court of appeals concluded that this definition "provides fair notice of prohibited conduct to a person of ordinary intelligence and no longer punishes protected speech." Pet. App. 26a-27a.

The court also rejected plaintiffs' claim that these terms were substantially overbroad, that they imposed guilt by association in violation of the First and Fifth Amendments, and that they should be construed to require proof of intent to further the organization's illegal activities. *Id.* at 13a-19a, 27a-29a.[5]

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[5] The court of appeals rejected respondents' First Amendment-based right of association challenges to the statute in its en banc decision, 393 F.3d 902 (9th Cir. 2004) (en banc), but respondents preserved that challenge in all subsequent litigation in the event that further review were granted. *See* Principal and Response CA Brief of Appellees at 4 n.3 (May 16, 2006).

REASONS FOR GRANTING THE PETITION

Plaintiffs have opposed the government's petition for a writ of certiorari. However, if the Court decides to grant review, plaintiffs request that the Court also grant review of the constitutional validity of two other inextricably interrelated prohibitions in the same statute, barring the provision of "expert advice or assistance" "derived from scientific [or] technical … knowledge" and "personnel." Both provisions have the same constitutional infirmities as those the court of appeals invalidated, and as applied to plaintiffs' intended speech activities, they implicate the same constitutionally protected values. Moreover, their interaction with the invalidated provisions exacerbates the vagueness of each provision, and thus fair consideration of the statute's validity requires review of all the provisions plaintiffs specifically challenged. Accordingly, if the Court decides to review the validity of the three prohibitions the court of appeals invalidated, it should also review the two terms the court of appeals upheld.

I. The Provision Proscribing "Expert Advice or Assistance" "Derived from Scientific or Technical Knowledge" Is Unconstitutional

The court of appeals correctly deemed the ban on advice "derived from … specialized knowledge" to be unconstitutionally vague as applied to plaintiffs' speech, but erroneously concluded that the ban on advice "derived from scientific [or] technical … knowledge" was constitutional. The court offered no reasoning for its conclusion that the latter aspect of the

expert advice ban was sufficiently clear, and simply cited two sources indicating that "technical" and "scientific method" are fifth-grade and third-grade level vocabulary words, respectively.

This misconceives the duty of a court in assessing a vagueness challenge – of any sort, let alone under the First Amendment. The question is whether the statute provides notice of what is prohibited – here, notice adequate to the context of a criminal prohibition where First Amendment interests are at stake. Many words on grammar school vocabulary lists would not pass that test, or even lesser tests of vagueness. *See Coates v. Cincinnati*, 402 U.S. 611 (1971) (declaring vague even under due process guarantee, as well as a First Amendment violation, a city ordinance banning "annoying" behavior).[6] Indeed, the word "specializes" – whose vagueness the court of appeals recognized (in the form, "specialized") – is on one of the fourth grade lists from the same source the court cited.[7]

From any relevant perspective, both "technical" and "scientific" are insufficiently clear where, as here, speech itself is criminalized. In one common usage, what knowledge is "technical" depends entirely on what one's assumed audience already knows or remembers or how much effort will be required to take it in. (Is high school algebra "technical"? In what setting?) Is speech about human rights, or lobbying, or

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[6] Houghton Mifflin Reading Spelling and Vocabulary Word Lists (3rd Grade), www-kes.stjohns.k12.fl.us/wordlists/3rd/vocab3.htm (*e.g.*, "monstrous," "tremendous," "awesome," "incredible," "intense," "dreadful").

[7] www-kes.stjohns.k12.fl.us/wordlists/4th/vocab5.htm.

public relations derived from "technical" knowledge? How can any speaker reliably gauge the answer?

Merriam-Webster's on-line dictionary defines "technical" to include, *inter alia*: (1) "having special and usually practical knowledge especially of a mechanical or scientific subject," (2) "marked by or characteristic of specialization," (3) "of or relating to a particular subject," and (4) "of or relating to technique."[8] This is at least as vague as "specialized knowledge," the term the court of appeals found unconstitutionally vague; indeed, the second definition enumerated above is effectively identical to "specialized knowledge." And "of or relating to a particular subject" or "of or relating to a technique" may be even more expansive and ambiguous.

"Scientific" also leaves vast room for uncertainty. Merriam-Webster's on-line dictionary defines "scientific" as "of or relating to science." It defines "science" as, *inter alia*: (1) "the state of knowing**:** knowledge as distinguished from ignorance or misunderstanding," (2) "a department of systematized knowledge as an object of study;" or (3) "knowledge or a system of knowledge covering general truths or the operation of general laws especially as obtained and tested through scientific method."[9] Debates rage about when, or the extent to which, disciplines have become "scientific" (economics? psychology? linguistics? political science?). Would training on how to present torture claims to a human rights tribunal be barred because assessing whether someone has been the

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[8] http://www.merriam-webster.com/dictionary/technical.

[9] http://www.merriam-webster.com/dictionary/science.

someone has been the victim of torture may in part involve "scientific" knowledge?

Moreover, the statute requires individuals to determine not whether their speech is itself "technical" or "scientific," but, even more ambiguously, whether its content in any way "*derives from*" scientific or technical knowledge. Virtually all knowledge – from cooking to cleaning to nutrition to weather to law – can probably be said in some sense to *derive from* "scientific" or "technical" knowledge, rendering the distinction the provision draws not just unclear, but fundamentally incoherent.

The government has noted that this definition is modeled on the definition of "expert testimony" under Rule 702 of the Federal Rules of Evidence. But as the district court held, Rule 702 serves as a general standard to be employed by trained judges and lawyers as a guide for trial practice, and "does not clarify the term … for the average person with no background in the law." Pet. App. 66a. *See Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993). Courts generally deal with the notorious difficulty of assessing expertise by interpreting the term liberally and allowing cross-examination and the adversarial process to test the experts. But such an open-ended approach is plainly insufficient to provide constitutionally adequate notice to ordinary citizens where criminal liability for speech and association is on the line.

The prohibition on advice derived from "scientific [or] technical … knowledge" also warrants review because its interaction with the provisions the court of appeals declared vague as applied to plaintiffs' speech only exacerbates the vagueness of each. If Judge Fertig, for example, were to offer legal instruction that permissibly consisted of general knowledge, could it nonetheless be barred if part of its content could be said to be derived from "technical" knowledge? Is this permissible instruction because it is not "training," or impermissible "expert advice?" These overlapping and sometimes contradictory demands further complicate the already murky lines that individuals must navigate if they seek to avoid criminal liability.

The "scientific or technical knowledge" prohibition also violates the First Amendment because it criminalizes speech – advice – on the basis of its content. Individuals are free to provide advice to designated organizations if the advice is *not* "derived from scientific, technical, or other specialized knowledge," but face criminal sanctions if its content includes these proscribed subjects. Content-based discrimination triggers strict scrutiny, and is permissible only where the government can establish that the distinction is the least restrictive means to further a compelling state interest. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) ("content-based restrictions on speech [are] presumed invalid, and … the Government bear[s] the burden of showing their constitutionality"); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it

interest if it chooses the least restrictive means to further the articulated interest."). The government has made no showing that singling out speech "derived from scientific, technical or other specialized knowledge" is necessary to further its interest in national security.

Finally, the expert advice prohibition imposes guilt by association in violation of the First and Fifth Amendments. Advice derived from scientific knowledge may be provided freely to the Palestine Liberation Organization or the Irish Republican Army, but the very same advice is a crime if provided to the PKK or the LTTE – even if the advice concerns only lawful, nonviolent activity, and the PKK and the LTTE use it only for such purposes. The trigger for the criminal penalty, then, is not the provision of advice, but the fact that it was provided to a particular group. Just as a statute prohibiting the provision of advice to the Communist Party but permitting the provision of advice to the Democratic Party would be penalizing association, so too this provision penalizes association. Invoking the First and Fifth Amendments, this Court has repeatedly insisted that any liability – civil or criminal – imposed on the basis of association must be limited to association intended to further the unlawful ends of the group.[10]

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[10] Congress specifically found that the Communist Party was a foreign-dominated group with the purpose of overthrowing the United States government, through means including terrorism. 50 U.S.C. § 781 (West 1991) (repealed 1993), quoted in *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 n.2 (1964). Yet this Court consistently held that individuals could not be penalized for their Communist Party associations absent proof of "specific intent" to further the group's illegal ends. *See*, *e.g.*, *United States v. Robel*, 389 U.S. 258, 262 (1967) (government could not ban Communist

II. The "Personnel" Provision Is Unconstitutional

The court of appeals also erred in upholding the amended "personnel" provision. It concluded that in light of the 2004 definition limiting the "personnel" prohibition to action under the recipient organization's "direction or control," and exempting "entirely independent" activity, the provision is sufficiently clear to apprise individuals of the proscribed zone. That definition, however, does not solve the constitutional problem with "personnel" for several reasons.

First, it leaves the reach of the statute intolerably vague where, as here, core speech is at issue. "Direction or control" could mean many things, and the exception for "entirely independent" activity can only leave a citizen worrying that "direction or control" might actually cover substantial sectors of a vast grey area between complete control and complete independence, consisting of myriad forms of coordination, collaboration, and communication. An individual has to wonder: Why else would Congress have provided a safe harbor only for "*entirely* independent" activity? An ordinary citizen cannot reliably tell whether the "personnel" provision

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Party members from working in defense facilities absent proof that they had specific intent to further the Party's unlawful ends); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); *Noto v. United States*, 367 U.S. 290, 299-300 (1961) (applying same principle to criminal statute).

criminalizes or permits a host of contemplated activities within the class of plaintiffs' proposed speech (*see* Pet. App. 5a n.1).

For example, would running an op-ed or press statement by the PKK's leader, or discussing its themes with him, constitute criminal acceptance of "direction," or would that still be "entirely independent"? What if the author accepted only three of the leader's five suggestions? Two? One? What if a plaintiff offered his legal services to work with the PKK or the LTTE in presenting a human rights petition to the UN? One might think that a lawyer generally acts under the "direction" of her client, as, subject only to professional obligations, the client's wishes are controlling. But when this very issue arose in the prosecution of a lawyer under the "personnel" provision, the government opined that a lawyer acting as "house counsel" would be acting impermissibly under the organization's "direction or control," but an outside counsel doing the same work could be seen as "independent." *United States v. Sattar*, 272 F. Supp. 2d 348, 359 (S.D.N.Y. 2003). The court in *Sattar* concluded that such distinctions were altogether too evanescent to satisfy constitutional scrutiny, and declared the "personnel" ban unconstitutionally vague. 272 F. Supp. 2d at 359. [11]

Second, the "personnel" provision is vague with respect to associational rights. It does not provide an

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[11] The *Sattar* case preceded the 2004 amendment to the "personnel" provision, but the government in that case maintained that the "personnel" provision was limited to action under a designated group's "direction or control," so it remains relevant to the amended statute's meaning.

adequate distinction between membership in or affiliation with a designated group, which the government has said Congress permitted, *HLP I*, 205 F.3d at 1134, and providing the group with "personnel," which is a crime. In the *Sattar* case, the government was unable to articulate any coherent or reliable distinction:

> When asked at oral argument how to distinguish being a member of an organization from being a quasi-employee, the government initially responded "You know it when you see it." ... While such a standard was once an acceptable way for a Supreme Court Justice to identify obscenity, see *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring), it is an insufficient guide by which a person can predict the legality of that person's conduct. See *United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002) ("It is not enough to say that judges can intuit the scope of the prohibition if [the defendants] could not.")

Sattar, 272 F. Supp. 2d at 359-60. The definition added to the statute in 2004 continues to leave unclear how one can be a member of or affiliated with a designated group without acting, in some respect, under its "direction or control." Plaintiffs reasonably fear that any affiliation or collaboration may render them criminally liable.

Third, as with the expert advice provision, the interaction of the "personnel" prohibition with those the court of appeals held invalid as applied to plaintiffs' proposed speech exacerbates the vagueness of each

of each provision. Entirely independent advocacy might be deemed "for the benefit" of a group, and training or legal advice on a subject of "general knowledge" might nonetheless be deemed to have been provided under a group's direction. Thus, if the Court is to review the three provisions the court of appeals invalidated, it should simultaneously review the "personnel" provision.

Finally, as applied here, the proscription on acting under a designated organization's "direction or control" impermissibly penalizes plaintiffs' speech and association. Penalizing speech because it is engaged in with another penalizes association, and violates the First and Fifth Amendments for the same reason that penalizing expert advice only when done in connection with particular groups violates the right of association. Speech is often inextricably related to association; one usually speaks *to* or *with* or *on behalf of* others, especially when one engages in the sort of political speech that plaintiffs propose here, and to which the First Amendment extends its highest protection. *Whitney v. California*, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring); *Buckley v. Valeo*, 424 U.S. 1, 14-15, 25 (1976). Advocacy is protected even when undertaken in collaboration with another, or under another's direction. The freedom of speech applies not only to Garry Wills, an independent author, but also to Bob Woodward, a *Washington Post* reporter. Yet as applied here, the "personnel" ban impermissibly prohibits speech based on the identity of the political organization with which the speaker collaborates.

CONCLUSION

For all of the above reasons, if the Court grants the government's petition for a writ of certiorari, it should also grant plaintiffs' conditional cross-petition.

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