UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMANITARIAN LAW PROJECT, et al.,	)	Appeal No. 05-56753, 05-56846
Plaintiffs-Appellees	)	(Dist. Ct. No. 03-CV-6107 ABC(MCx) Central District of California)
v.	)	
ALBERTO GONZALES et al.,	)	
Defendants-Appellants	)	

ON APPEAL FROM THE ORDER GRANTING IN PART AND DENYING IN PART SUMMARY JUDGMENT FOR THE PLAINTIFFS AND DENYING DEFENDANTS' MOTION TO DISMISS ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, HON. AUDREY B. COLLINS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 2339B, which criminalizes material support to designated political groups, violates the Fifth Amendment as applied to persons who provide support only to peaceful, nonviolent, and otherwise lawful activities of those groups, and who have no intent to further any unlawful activity of any kind.

2. Whether the prohibitions in 18 U.S.C. § 2339B on providing "training," "personnel," "expert advice or assistance," and "services" to proscribed groups are unconstitutionally vague and overbroad.

3. Whether 18 U.S.C. § 2339B(j), which vests unfettered discretion in the Secretary of State and Attorney General to issue or deny licenses for otherwise prohibited expressive activity, constitutes an impermissible licensing scheme in violation of the First and Fifth Amendments.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §1331, because plaintiffs' constitutional challenge presents a federal question. The district court order appealed from denies in part and grants in part plaintiffs' and defendant's cross-motions for summary judgment, and constitutes a final order. This Court therefore has jurisdiction pursuant to 28 U.S.C. §1291. The district court entered partial summary judgment on July 27, 2005, ER 51-92, and entered a final judgment disposing of all claims on September 18, 2005. ER 93-94. Defendants timely filed

a notice of appeal on November 10, 2005, ER 95-97. Plaintiffs timely filed a cross-appeal on November 22, 2005. ER 121.[1]

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs, who include a longstanding human rights group in Los Angeles, a former federal administrative judge, and several Tamil immigrant groups, contend that 18 U.S.C. § 2339B is unconstitutional on its face and as applied to their intended support of the lawful, nonviolent activities of two organizations, the Kurdistan Workers Party ("PKK") in Turkey, and the Liberation Tigers of Tamil Eelam ("LTTE") in Sri Lanka. The statute makes it a crime to provide "material support" – broadly defined to include "services," "training," "expert advice or assistance," and "personnel" – to groups designated as "foreign terrorist organizations." The statute makes such support a crime regardless of the intended or actual use of the support. Thus, as the government concedes in its opening appeal brief, the statute prohibits plaintiffs from providing training or advice on how to petition the United Nations or Congress, even if it is provided solely to further peaceful ends, and even if its only effect is to further peaceful ends. Plaintiffs maintain that such an open-ended criminalization of speech and conduct, without regard to whether it is intended to or in fact furthers any violent or criminal end, violates both the First and Fifth

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[1] Defendants' Excerpts of Record will be cited as "ER." Plaintiffs' Supplemental Excerpts of Record will be cited as "SER."

Amendments.

This case has been before the Court of Appeals on two prior occasions. In the first appeal, from a preliminary injunction, the panel held that the statute's prohibitions on providing "personnel" and "training" were unconstitutionally vague, but rejected a First Amendment challenge to the remainder of the statute. *Humanitarian Law Project v. Reno (HLP I)*, 205 F.3d 1130 (9th Cir. 2000). In the second appeal, from a permanent injunction, a separate panel reaffirmed that the bans on providing "personnel" and "training" were unconstitutionally vague, recognized that the statute raised serious constitutional concerns to the extent that it imposed guilt by association in violation of the Fifth Amendment's requirement of individual culpability, and interpreted the statute to seek to avoid those concerns. *Humanitarian Law Project v. Dept of Justice (HLP II)*, 352 F.3d 382 (9th Cir. 2003). Both sides sought en banc review, which the Court granted. While the en banc case was pending, however, Congress amended the material support statute, and shortly thereafter the Court of Appeals remanded the case to the district court for consideration of the newly revised statute. *Humanitarian Law Project v. Dept. of Justice*, 393 F.3d 902 (9th Cir. 2004) (en banc).

On remand, the district court declared the amended statute's bans on providing "training," "expert advice or assistance," and "services" unconstitutionally vague, for much the same reasons that this Court had previously held the bans on "personnel" and "training" to be vague. *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134 (C.D. Cal. 2005), ER 51. The district court found that the amended statute

cured the vagueness of the prohibition on "personnel." The court rejected plaintiffs' claims that the amended statute violates the Fifth Amendment's requirement of individual culpability, and vests the Secretary of State and Attorney General with unconstitutional licensing authority.

In this appeal, plaintiffs maintain that the district court was correct to invalidate the bans on providing "training," "expert advice or assistance," and "services," but erred in rejecting plaintiffs' other challenges. The amended statute imposes guilt by association without the *mens rea* required by the Fifth Amendment, is overbroad, fails to cure the vagueness of the prohibition on "personnel," and creates a new and facially unconstitutional licensing scheme.[2]

B. Statement of Facts

1. The Statutory Scheme

The material support provisions at issue here, codified at 8 U.S.C. § 1189 and 18 U.S.C. § 2339B, authorize the Secretary of State ("Secretary") to designate "foreign terrorist organizations," and then make it a crime for anyone to support even the wholly lawful, nonviolent activities of such organizations.

All of the key words in these provisions are defined expansively, far beyond their commonly understood meaning. For example, 8 U.S.C. § 1189(a)(1) authorizes

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[2] Plaintiffs also contend that the material support statute's imposition of guilt by association violates the First Amendment, but that argument is foreclosed at this level by the Court's en banc decision, 393 F.3d at 903. Accordingly, plaintiffs will not address that claim in detail, but simply note that they seek to preserve it for any potential subsequent review of this case by this Court en banc or by the Supreme Court.

the Secretary to designate groups if she finds that "(A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined at [8 U.S.C. § 1182(a)(3)(B)]); and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States." *Id.* The term "terrorist activity" is in turn defined to include virtually any unlawful use of, or threat to use, a weapon against person or property, unless for mere personal monetary gain. 8 U.S.C. § 1182(a)(3)(B). And "national security" is broadly defined far beyond its commonly understood meaning to mean "national defense, foreign relations, or economic interests of the United States." 8 U.S.C. § 1189(d)(2). The Secretary's determination that a group's activities threaten our "national security" is judicially unreviewable. *People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). Thus, this statute effectively empowers the Secretary to criminalize support of any foreign group that has used or threatened to use a weapon.

The term "material support" is similarly defined far beyond whatever commonly understood meaning that term might have. "Material support or resources" is defined 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) (emphasis added).[3]

In enacting the statute, Congress asserted -- without any factual predicate -- that *all* support to terrorist organizations furthers their terrorist ends. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §301(a)(7), 110 Stat. 1214, 1247 (April 24, 1996).[4] Directly contrary to this assertion, however, the statute permits the donation of unlimited amounts of medicine and religious materials to designated organizations, 18 U.S.C. §2339A(b), and permits the Secretary to authorize certain other forms of support that she finds "may [not] be used to carry out terrorist activity." 18 U.S.C. § 2339B(j).

On October 8, 1997, the Secretary designated 30 foreign organizations as "terrorist," including the PKK and the LTTE. 62 Fed. Reg. 52650 (Oct. 8, 1997). The Secretary has consistently redesignated the PKK and the LTTE, and they remain proscribed organizations today. 64 Fed. Reg. 55112 (Oct. 8, 1999); 66 Fed. Reg. 51088 (Oct. 5, 2001); 70 Fed. Reg. 38256 (July 1, 2005).

Congress has amended the material support statute twice in the course of this

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[3] These terms appear in 18 U.S.C. §2339A(b), but are incorporated by reference in 18 U.S.C. §2339B(g)(4) (2002).

[4] This statement purports to be a "finding." But Congress heard not one iota of evidence about even a single terrorist organization, much less the literally thousands of organizations around the world that could potentially be designated terrorist by the Secretary under the open-ended definition Congress employed. Indeed, when Congress enacted AEDPA, it had no idea which organizations might eventually be designated terrorist. It is one thing for Congress to hold hearings about a particular group, and make findings about that group. It is another thing to opine about a limitless number of foreign groups without hearing evidence about a single one.

litigation. In the USA PATRIOT Act, Pub. L. No. 107-56, §805(a)(2), 115 Stat. 272 (Oct. 26, 2001), it expanded the definition of "material support" to ban the provision of all "expert advice or assistance." As noted below, plaintiffs subsequently successfully challenged the constitutionality of that provision.

In 2004, in part in response to decisions in this litigation declaring the bans on "training," "personnel," and "expert advice or assistance" unconstitutionally vague, Congress again amended the material support statute. The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603, 118 Stat. 3638 (Dec. 17, 2004), amended the material support ban in several respects.

First, it added an entirely new ban on the provision of any "service," by amending the definition of "material support" to include "any property, tangible or intangible, or service." 18 U.S.C. §2339A(b)(1). It provided no definition of "service."

Second, it defined the three terms that this Court and the district court had previously declared unconstitutionally vague – "training," "expert advice or assistance," and "personnel." It defined "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. §2339A(b)(2). It defined "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. §2339A(b)(3). And it modified "personnel" by providing that:

> 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).

Third, the 2004 Act provided that knowledge that an organization is designated, or has engaged in terrorist activity, is required to trigger criminal responsibility:

> To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act [8 U.S.C. § 1182(a)(3)(B)]), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 [22 U.S.C. § 2656f(d)(2)]).

18 U.S.C. §2339B(a)(1).

Finally, the 2004 Act created a licensing authority for those forms of material support that most clearly involve speech, by providing an exception to criminal liability where the Secretary and Attorney General give advance approval to the provision of otherwise illegal "personnel," "training," and "expert advice or assistance":

> No person may be prosecuted under this section in connection with the term "personnel", "training", or "expert advice or assistance" if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not

> approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act [8 U.S.C. § 1182(a)(3)(B)(iii)]).

18 U.S.C. §2339B(j). Congress established no licensing procedures, however, and set forth no substantive standards for when, if ever, such a license must be granted, leaving the Secretary effectively unfettered discretion to grant or deny licenses. To plaintiffs' knowledge, the Secretary has never granted such a license.

2. Plaintiffs' Intended Material Support

Plaintiffs are six organizations, a retired federal administrative judge, and a surgeon. They include the Humanitarian Law Project (HLP), a longstanding human rights organization with consultative status to the United Nations that had been assisting the PKK in human rights advocacy and peacemaking prior to that group's designation, and several organizations of Tamil immigrants from Sri Lanka. Plaintiffs seek to support only the lawful and nonviolent activity of the PKK and the LTTE.

It is undisputed that both the PKK and the LTTE engage in a broad range of lawful activities, including the provision of social services, political advocacy, and economic development, and that plaintiffs seek to support only nonviolent, lawful activities. 380 F. Supp. 2d at 1136-37, ER 52-54; *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1188-92 (C. D. Cal. 2004); 2001 U.S. Dist. LEXIS 16729, at *9-*23 (describing lawful activities of the PKK and LTTE, and plaintiffs' intended support). Prior to the government's designations, plaintiffs had supported

these groups' nonviolent and lawful activities. The HLP and Judge Fertig seek to continue to support the PKK in numerous ways, including providing training, advice and assistance in human rights advocacy, and soliciting funds for, and making contributions to, the PKK's political branch for its advocacy on behalf of Kurds' human rights and for its humanitarian assistance to Kurdish refugees. *See, e.g.*, Fertig Declaration (May 11, 2005) at ¶¶ 20-21, SER 57.

The Tamil plaintiffs would like to distribute LTTE literature within the United States, donate humanitarian goods to LTTE-run orphanages, and offer medical, engineering, technical, literary and cultural assistance to the LTTE, among other forms of support.[5] Needs in Sri Lanka are particularly urgent because that country is still recovering from the devastation of the December 2004 tsunami. The LTTE controls some of the hardest hit regions of the country, and it is virtually impossible to provide humanitarian aid in those regions without working with and through LTTE institutions.[6]

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[5] *See, e.g.*, Jeyalingam Decl. (on behalf of WTCC) (May 12, 2005) at ¶ 5, SER 106 (humanitarian aid and legal assistance); Id. at ¶ 10, SER 108 (literature); Jeyalingam Decl. (on behalf of himself) (May 12, 2005) at ¶¶ 6-7, SER 87-88 (medical services); Haran Decl. (May 10, 2005) at ¶¶ 4-5, SER 121-122 (medical and engineering services, humanitarian goods); Sreetharan Decl. (May 11, 2005) at ¶¶ 4-7, SER 71-72 (technological assistance, psychiatric counseling, cash and humanitarian goods).

[6] Oberst Decl. (July 19, 2005) at ¶ 3, SER 199; Sreetharan Decl. (May 11, 2005) at ¶ 5, SER 72; Jeyalingam Decl. (on behalf of himself) (May 12, 2005) at ¶ 6, SER 87; Jeyalingam Decl. (on behalf of WTCC) (May 12, 2005) at ¶¶ 6, 8, SER 107-107; Haran Decl. (May 10, 2005) at ¶¶ 4-5, SER 121-122.

The plaintiffs oppose violence, and seek to support only nonviolent, lawful activities of the PKK and the LTTE. Indeed, much of HLP's and Judge Fertig's assistance is designed precisely to encourage the PKK to forego violence in favor of lawful and nonviolent means of furthering the rights of the Kurds. Nonetheless, plaintiffs are deterred even from assisting the PKK in renouncing violence for lawful activities, because to do so would render plaintiffs vulnerable to criminal prosecution.

3. Prior Proceedings

In June 1998, the district court preliminarily enjoined enforcement of the prohibitions on the provision of "training" and "personnel," finding these terms unconstitutionally vague. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1201-05 (C.D. Cal. 1998). The Court rejected plaintiffs' First Amendment challenge to the remainder of the material support ban, deeming it a permissible content-neutral restriction on conduct. *Id.* at 1187-97.

In March 2000, this Court unanimously affirmed the preliminary injunction. *Humanitarian Law Project v. Reno ("HLP I")*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001). Judge Kozinski, writing for the Court, reasoned that the prohibition on providing "personnel":

> blurs the line between protected expression and unprotected conduct... Someone who advocates the cause of the PKK could be seen as supplying them with personnel .... But advocacy is pure speech protected by the First Amendment.

205 F.3d at 1137. The "training" prohibition raised similar concerns:

> Again, it is easy to imagine protected expression that falls within the bounds of this term. For example, a plaintiff who wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such protected expression falls within the scope of the term "training." The government insists that the term is best understood to forbid the imparting of skills to foreign terrorist organizations through training. Yet presumably, this definition would encompass teaching international law to members of designated organizations.

Id. at 1138.

The *HLP I* court also affirmed the district court's determination that the remainder of the statute did not violate the First Amendment because it was content-neutral. *See id.* at 1134-35.

On remand, the district court transformed its preliminary injunction into a permanent injunction. *HLP v. Reno*, 2001 U.S. Dist. LEXIS 16729. On December 3, 2003, a separate panel of the Ninth Circuit again affirmed. *HLP II*, 352 F.3d 382. The *HLP II* panel also unanimously concluded that the bans on providing "personnel" and "training" left citizens unsure about what conduct they prohibited, and could conceivably encompass a wide range of "unequivocally pure speech and advocacy protected by the First Amendment." 352 F.3d at 404-05.

The *HLP II* panel also addressed plaintiffs' due process challenge, which had not been addressed on the first appeal. The panel noted that the Fifth Amendment's due process clause prohibits guilt by association, and that therefore, statutes imposing vicarious criminal liability based on one's support of a proscribed group require proof of both knowledge of the group's proscribed character and specific intent to further the group's illegal ends. *Id.* at 394-96. Seeking to avoid that due process problem,

the panel interpreted the statute to require proof that the individual knew that the group he supported was proscribed, or knew of the unlawful activities that caused it to be proscribed. *Id.* at 400. Without explanation, the panel did not address whether a showing of specific intent was statutorily or constitutionally required. *Id.*

Meanwhile, plaintiffs had filed a related case challenging the provision of the USA PATRIOT Act that added a ban on "expert advice or assistance" to the material support statute.[7] The district court declared that provision unconstitutionally vague for the same reasons that it had invalidated the ban on "training" and "personnel." *HLP v. Ashcroft*, 309 F. Supp. 2d 1185. Both sides appealed that decision.

Both sides also sought en banc review of the *HLP II* decision. The Ninth Circuit granted en banc review, but three days after the en banc panel heard argument, the President signed into law the Intelligence Reform and Terrorism Prevention Act of 2004 (2004 Act), which included several amendments to the material support statute. Four days thereafter, the en banc court issued a one-page order affirming the district court's rejection of plaintiffs' First Amendment challenge "for the reasons set out in *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000)," and remanding the rest of the case in light of the amendments made by the 2004 Act, "for further proceedings, if any, as appropriate." *HLP II*, 393 F.3d at 903. The en banc court "decline[d] to reach any other issue urged by the parties." *Id.* The panel hearing the separate appeal in the case involving the "expert advice or assistance" ban

[7]Plaintiffs filed a separate suit after defendants objected to plaintiffs' attempt to file a supplemental complaint in the initial suit, on the ground that the initial suit was on appeal.

followed suit, and similarly remanded to the district court for consideration of the effect of the 2004 Act's amendments.

On remand, the district court consolidated the cases, and once again granted partial summary judgment. *HLP v. Gonzales*, 380 F. Supp. 2d 1134, ER 51. The court declared the bans on "service," "training," and "expert advice or assistance" unconstitutionally vague, but ruled that the definition of "personnel" was sufficient to cure that provision's vagueness. *Id.* at 1150-53, ER 77-84.[8]

The court rejected plaintiffs' other challenges. It concluded that the Fifth Amendment's requirement of intent to further illegal acts as a predicate for vicarious criminal liability applies only where guilt is based on pure association, and not to the imposition of guilt for "material support." *Id.* at 1143-44, ER 65-67. And it found that due process is fully satisfied by a showing that the individual knew that the group supported was a designated "foreign terrorist organization," even if the support in question is neither intended to nor has the effect of furthering terrorism or any other illegal activity. *Id.* at 1148, ER 76-77.[9]

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[8] The court declared the revised "expert advice or assistance" ban vague only in part, insofar as it turned on advice or assistance derived from "specialized knowledge."

[9] The district court also declined to construe the material support statute to contain a specific intent element, as the Supreme Court had done in *Scales v. United States*, 367 U.S. 203 (1961). 380 F. Supp. 2d at 1144-48, ER 67-75. In this respect, the district court's decision conflicts with *United States v. Al-Arian ("Al-Arian I")*, 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004) and *United States v. Al-Arian ("Al-Arian II")*, 329 F. Supp. 2d 1294, 1299-1300 (M.D. Fla. 2004), which interpreted § 2339B to require proof of "specific intent" to further terrorist activities in order to avoid the constitutional concerns that the absence of such an intent requirement

Finally, the court rejected plaintiffs' challenge to the scheme granting the Secretary authority to license otherwise prohibited expressive activities. It recognized that statutes granting government officials open-ended discretion to license expressive activity violate the First Amendment, but reasoned that because the material support statute as a whole was not directed at expression, this licensing scheme – which selectively singles out expressive forms of support – need not satisfy the standards required for licensing expressive activity. 380 F.Supp.2d at 1154-55, ER 87-90.

Both sides appealed.

REVIEWABILITY AND STANDARD OF REVIEW

The district court issued a final order granting in part and denying in part cross-motions for summary judgment. This Court reviews the district court's legal determinations *de novo*. *Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (*en banc*).

SUMMARY OF ARGUMENT

The material support statute is the only statute in the U.S. Code that imposes vicarious criminal liability based on support of another without requiring any proof of intent to further the other's illegal activities. It criminalizes material support – in the form of funds, goods, and a virtually limitless range of speech – not because the material support is a wrong in itself, but because the support has been provided to a

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presented.

group proscribed on the basis of a finding that the *group* has engaged in some illegal activity. The law criminalizes the Humanitarian Law Project's training in how to petition the United Nations only when it is provided to a group that has been designated a "foreign terrorist organization," based on a finding that the designated group has engaged in some unlawful use of or threat to use a weapon.

No other federal law imposes vicarious criminal liability without requiring a showing of intent to further the other's illegal acts. Conspiracy provisions, aiding and abetting statutes, money laundering laws, and RICO all require proof of a "shared purpose to achieve jointly held illegal aims" as a prerequisite to criminal responsibility. *Ferguson v. Estelle*, 718 F.2d 730, 735-36 (5th Cir. 1983). That consistent pattern reflects the constitutional demand of the Fifth Amendment, which requires "personal guilt," and therefore precludes the punishment of A because of B's acts absent proof that A intended to further B's acts. This Court has characterized specific intent as a "constitutionally essential component[]" of vicarious criminal liability. *Brown v. United States*, 334 F.2d 488, 497 (9th Cir. 1964) (en banc), *aff'd on other grounds*, 381 U.S. 437 (1965). As construed by the government and the district court, however, Section 2339B wholly disposes of this element, thereby rendering criminal the teaching of human rights advocacy or assistance in peacemaking.

The district court ruled that the Fifth Amendment "personal guilt" principle applies only to statutes that criminalize *membership*, and not to statutes that criminalize *conduct*. But that distinction confuses the First and Fifth Amendments.

The Fifth Amendment draws no distinction between membership and conduct. The Supreme Court has described the Fifth Amendment personal guilt principle as applying to laws that criminalize "status or conduct," *Scales*, 367 U.S. at 224-25, and the principle has been applied consistently without distinction to statutes criminalizing association and conduct. A law that made material support of a Mafia family or gang a crime without any requirement that the support be intended to further illegal activity would plainly violate the Fifth Amendment, even though it punished conduct, not membership.

The district court should therefore have invalidated the statute. Alternatively, it should have construed the statute to require a showing of specific intent, as the Supreme Court did in *Scales*. There, as here, the challenged statute on its face required only proof that the defendant had knowledge of the character of the group, but the Court interpreted the law to require proof of intent as well, in order to save its constitutionality.

The statute's prohibitions on "training," "personnel", "services," and "expert advice or assistance" are unconstitutionally vague and overbroad, both on their face and as applied to plaintiffs' intended conduct. The prohibitions on "training" and "expert advice or assistance" require citizens to distinguish between "general" and "specialized" knowledge, a distinction the government's own lawyers have been unable to articulate. The prohibition on "personnel" leaves a vast gray area between membership and "entirely independent" activity on the one hand, which are assertedly protected, and any activity under a designated group's "direction or

control" on the other, which is a crime. Finally, under the prohibition on "service," individuals must guess at whether their speech is "on behalf of" a designated group, which the government claims is permitted, or "for the benefit of" the group, which the government says is a criminal "service." A wrong guess on any of these imponderables will land plaintiffs in jail for 15 years to life.

These prohibitions are also unconstitutionally overbroad, both on their face and as applied to plaintiffs's constitutionally protected conduct. The government concedes that these laws make it a crime to teach international law or human rights advocacy. Under the government's definition of "personnel" and "service," it is also a crime to petition Congress to change the material support law, to file a constitutional challenge in court, or to issue a report on human rights abuses of the Kurds or the Tamils if one does any of these things "for the benefit of" or at the "direction" of a proscribed group. The challenged provisions also criminalize advice on every subject derived from "scientific, technical or other specialized knowledge," and training on any subject other than "general knowledge." As such, the laws criminalize a substantial amount of speech, both in absolute terms and relative to the legitimate scope of their prohibitions. Moreover, even if these provisions are not facially overbroad, they are unconstitutional as applied to the sorts of protected speech activities in which plaintiffs seek to engage. There is no constitutionally legitimate justification for making it a crime to petition Congress, teach human rights, or provide assistance in peacemaking.

Finally, the revised material support statute creates an unconstitutional

licensing scheme. Congress carved out those forms of material support that most clearly implicate expressive activity – "training," "personnel," and "expert advice or assistance" – and authorized the Secretary to exempt such support from criminal prosecution. The licensing scheme contains no substantive limits on the Secretary's discretion to deny licenses, and no procedural safeguards whatsoever. Accordingly, it fails to meet any of the constitutional requirements for licensing schemes.

ARGUMENT

I. UNLESS CONSTRUED TO REQUIRE PROOF OF SPECIFIC INTENT TO FURTHER A RECIPIENT ORGANIZATION'S ILLEGAL ACTIVITIES, THE MATERIAL SUPPORT STATUTE VIOLATES THE DUE PROCESS REQUIREMENT OF PERSONAL GUILT

No principle is more central to due process than the notion that criminal liability requires evidence of *personal*, as opposed to *collective*, guilt. It is elemental that A cannot be convicted because of B's crimes unless A has in some way intentionally aided, abetted, or otherwise supported those crimes. The material support statute, as interpreted by defendants and the district court, violates that principle. It punishes "material support" not because the support constitutes a wrong in itself – no one could reasonably say that teaching human rights advocacy, providing tsunami relief, or petitioning Congress is a wrong in itself – but because the support aids another – a "foreign terrorist organization" – that has in turn engaged in criminal activity. Criminalizing the petitioning of Congress simply because it is done for the benefit of a group that has engaged in wrongdoing, without regard to

whether the petitioner intended to further or in fact furthered the wrongdoing, is to punish a moral innocent in violation of due process.

As interpreted by defendants, the material support statute reflects a radical departure from fundamental concepts of criminal responsibility. If this departure is upheld as constitutional, it would constitute a revolution in our understandings of criminal liability. Prosecutors would no longer need to show that a criminal defendant's actions were intended to further any wrongdoing. Instead, the government would be free to officially "designate" individuals, groups, or corporations, and to make it a crime to provide those entities with any material support, regardless of the nature and purpose of the support. While this would undoubtedly make criminal prosecution more efficient, it would also risk criminalizing a wide range of morally innocent activity. A mother could be prosecuted for providing food and shelter to her son if he were a member of a designated drug conspiracy, a customer could be prosecuted for purchasing a slice of pizza from a restaurant owned by a designated Mafia family, a teacher could be prosecuted for teaching English to a young man in a designated street gang, and a donor could be prosecuted for making a charitable contribution to a designated pro-life or environmental organization. These examples may seem far-fetched, but they are in principle no different from the material support statute, which the government concedes criminalizes even petitioning the United Nations if it is done "for the benefit of" a designated group.

As construed by the district court, therefore, the material support statute

violates due process. If the Court agrees with the district court's construction of the statute, it should declare the statute unconstitutional as applied to plaintiffs' intended support of lawful, nonviolent activities of the PKK and the LTTE. Alternatively, the Court should interpret the statute to require proof of specific intent to further a designated group's illegal activities. *See, e.g. Al Arian I,* 308 F. Supp.2d at 1339 (Fifth Amendment requires that material support statute should be interpreted to require a finding of "specific intent"); *United States v. Hammoud,* 381 F.3d 316, 378 (4th Cir. 2004) (en banc) (Gregory, J., dissenting) (finding that specific intent is required to satisfy due process), *vacated and remanded on other grounds,* 543 U.S. 1097 (2005), *reinstated in part on other grounds,* 405 F.3d 1034 (4th Cir. 2005).

A. Due Process Requires Proof of Personal Guilt

It has long been established that vicarious criminal liability – holding A responsible based on wrongs committed by B – requires proof that A intended to further B's wrongdoing. This principle applies to all vicarious criminal liability statutes, from anti-gang ordinances to aiding and abetting to RICO.[10] As interpreted by the district court, however, the material support statute imposes vicarious criminal liability without regard to whether the defendant sought to further the recipient group's illegal activities. Under the district court's reading, a human rights activist who assists a designated group in petitioning Congress in order to encourage the group to forego violence and pursue lawful and nonviolent avenues of redress for

[10] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68.

their grievances is as culpable as an explosives expert who provides the group training in the art of making bombs for suicide attacks.

In *Scales v. United States,* 367 U.S. 203 (1961), the Supreme Court held that the Fifth Amendment bars the imposition of vicarious criminal liability absent proof that the individual specifically intended to further the group's illegal activities. The Court wrote:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

367 U.S. at 224-25. On its face, the Smith Act provision at issue prohibited knowing membership in an organization seeking violent overthrow of the United States. To avoid violating due process, the Court construed the statute to require specific intent to further the group's illegal aims. *Id.* at 229.

This Court followed *Scales* in *Hellman v. United States,* 298 F.2d 810 (9th Cir. 1961), and *Brown v. United States*, 334 F.2d 488 (9th Cir. 1964) (en banc). *See HLP II*, 352 F.3d at 395-96. In *Hellman*, the Court reversed the conviction of a man who had "solicited contributions" for the Communist Party, "sold subscriptions to Party publications," recruited members, and "participated in the Party underground." 298 F.2d at 813. Despite the fact that the defendant had provided what today would be called "material support," the Court held that specific intent was required, and declared it impermissible "to draw an inference of personal illegal intent from the fact

of active membership and knowledge of the illegal aims of the Party." *Id.* at 812. In *Brown*, an en banc decision, the Court described specific intent as a "*constitutionally essential component*[]," and held unconstitutional a federal statute that made it a crime for a Communist Party member to hold office in a union. 334 F.2d at 497 (emphasis added).

1. The Personal Guilt Principle Applies to Statutes that Criminalize Conduct as Well as Status

The district court concluded that the personal guilt principle applies only to statutes that penalize membership as such, and therefore does not apply to Section 2339B, which targets "material support." 380 F. Supp. 2d at 1142-44, ER 65-67. But even assuming *arguendo* that the distinction between membership and conduct is relevant from a *First Amendment* standpoint, *see HLP I*, 205 F.3d at 1134, there is no reason that the distinction should be determinative with respect to the *Fifth Amendment* requirement of personal guilt. In the passage quoted above, the *Scales* Court itself described the Fifth Amendment principle as triggered by "the imposition of punishment on a status *or on conduct*." 367 U.S. at 224 (emphasis added). And contrary to the district court's decision in this very case, courts have consistently applied the principle to all forms of punishment imposed on "status *or conduct*," wherever criminal responsibility is justified by the illegal actions of others. Thus, the crimes of conspiracy, aiding and abetting, and enterprise liability under RICO, all of which punish *conduct*, not *membership*, nonetheless require:

> a community of illicit intent between the individual held responsible for the criminal act of others, and the actual perpetrators of those crimes.

> That *shared purpose to achieve jointly held illegal aims* is the common thread among the diverse doctrines of vicarious criminal responsibility.

Ferguson v. Estelle, 718 F.2d at 735-36 (emphasis added; citations omitted).

Whether interpreting anti-gang ordinances, aiding and abetting statutes, loitering laws, anti-riot acts, RICO, or money laundering provisions, courts have consistently stressed the critical requirement of intent to further illegal activity, and have either interpreted the laws to require such a showing, or have invalidated laws that could not be so interpreted. Thus, in *McCoy v. Stewart*, 282 F.3d 626, 631-33 (9th Cir. 2002), this Court held that a defendant could not be punished under an anti-gang law for providing advice on initiation activities – conduct that would presumably constitute "material support" under Section 2339B – to a gang absent evidence that he intended to incite illegal activity. The Court dismissed the government's argument to the contrary as "dangerously close to a finding of guilt by association." *Id.* at 633.

Similarly, in *Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir. 1997), this Court reversed a conviction for aiding and abetting imposed on a gang member where the state relied on gang membership and presence at the crime scene, without "proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation necessary to establish aiding and abetting." The Court found that "the state's argument smacks of guilt by association." *Id.* *See also Sawyer v. Sandstrom*, 615 F.2d 311, 317 (5th Cir. 1980) (reversing conviction under an anti-drug loitering ordinance because liability was predicated on "'companionship or direct contact with'

persons suspected of engaging in drug transactions," and not "active participation in any criminal act") .

The Second Circuit applied similar reasoning to a conspiracy statute in *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). The court held that even knowledge that others will use one's otherwise innocent supplies for unlawful purposes does not make one a conspirator; "he must in some sense promote their [illegal] venture himself, make it his own, have a stake in its outcome."[11]

Where, by contrast, courts have sustained vicarious liability statutes against charges that they violate due process, they have done so precisely because the statutes were interpreted to require proof of intent to further an illegal act. *See People v. Castenada*, 3 P.3d 278, 284 (Cal. 2000) (upholding anti-gang law against due process challenge under *Scales* because law required proof that a defendant actively participated in a criminal street gang while also aiding and abetting a felony offense committed by gang member); *State v. Bennett*, 782 N.E.2d 101, 110 (Ohio App. 1st Dist. 2002) (upholding anti-gang statute against *Scales* due process challenge because statute required proof that defendant willfully promoted, furthered, or assisted other

[11] For this reason, convictions for aiding or abetting or conspiracy generally require the government to show that the defendant *intended* to further the criminal act; mere knowledge that a criminal act will occur is usually insufficient. Wayne LaFave, *Criminal Law* 540 (attempt), 579-83 (conspiracy) (3d ed. 2000); *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (aiding and abetting statute requires government to show "that a defendant 'in some sort associate himself with the [criminal] venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed'") (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Learned Hand, J.)).

gang members in the commission of two or more enumerated offenses); *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978), *cert. denied,* 439 U.S. 953 (1978) (holding RICO is consistent with due process requirement of personal guilt because it requires proof that the defendant "manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes" (emphasis removed)); *cf. United States v. Kaufmann*, 985 F.2d 884, 896 (7th Cir. 1993) (upholding money laundering statute against due process challenge because it requires proof of "specific intent to conceal or disguise the nature [or] location .... of property he believed to be the proceeds of unlawful activity").[12]

These decisions, all of which apply to statutes criminalizing not just *membership* but *conduct,* reflect a single animating principle: Where statutes impose criminal liability based on the illegal actions of others, due process demands proof that the defendant specifically intended to further the illegal aims of the enterprise. The district court erred as a matter of law in limiting that principle to statutes that

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[12] Indeed, this Court and the Supreme Court have held that specific intent is required even for civil tort liability. This Court upheld a civil tort award against pro-life organizations and individuals only after finding that "the jury was instructed that ... one becomes a member of a conspiracy by willfully participating in an unlawful plan with the intent to advance or further some aspect or purpose of [the unlawful plan]." *Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists*, 290 F.3d 1058, 1081 (9th Cir. 2001) (en banc), *cert. denied*, 539 U.S. 958 (2003). In doing so, the Court followed *NAACP v. Claiborne Hardware*, 458 U.S. 886, 920 (1982), which applied the prohibition on guilt by association to a civil tort suit, and required specific intent to further illegal aims to support a tort award. If specific intent is required to sustain a civil tort remedy, then *a fortiori* it is required to sustain a criminal conviction.

punish membership as such.

2. Absent Specific Intent, the Material Support Statute Criminalizes a Vast Range of Innocent and Constitutionally Protected Conduct

The necessity of a specific intent requirement is underscored by the absurd consequences that would ensue in its absence. *Cf. Liparota v. United States*, 471 U.S. 419, 426 (1985) (especially important to interpret *scienter* strictly where "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct"). Absent a specific intent element, the material support statute criminalizes a virtually limitless range of innocent and constitutionally protected activities. The government admits that the "training" ban would make it a crime to teach international law or how to petition the UN, even if that support was intended to discourage the group from resorting to violence. The "services" ban would criminalize literally any advocacy performed "for the benefit of" a designated group, including such core First Amendment activities as petitioning Congress or filing a lawsuit challenging the validity of the material support statute. To criminalize as a terrorist one who petitions Congress for a change in law or trains a group in human rights advocacy is patently absurd.

Indeed, absent a specific intent requirement, virtually everyone who provides any support whatsoever, even of the most de minimus character, faces criminal prosecution if he knows that the group has been designated or has used violence. As a result, if the leader of a designated organization were to address the United Nations, his trip would jeopardize virtually everyone who came into contact with him.

Because "material support" includes "transportation," the statute would hold liable a taxi driver who gave the leader a ride from JFK Airport to the UN. *Al Arian I*, 308 F. Supp. 2d at 1337-38. The prohibition on "lodging" would treat as a terrorist criminal the hotel clerk who provided the leader a room for the night. *Id.* A UN employee who permitted the leader to use his phone to call a taxi for his return to the airport after the UN meeting would face prosecution for providing "communications equipment." *United States v. Sattar*, 272 F. Supp. 2d 348, 357-58 (S.D.N.Y. 2003) (declaring prohibition on provision of "communications equipment" unconstitutionally vague). An international lawyer who advised the leader on his UN report or a writer who agreed to edit the leader's speech could face prosecution for providing "training," "personnel," "expert advice and assistance," or "services." *See, e.g*, *HLP II*, 352 F.3d at 403-04.

These consequences are all the more absurd in light of this Court's recent decision in *Afshari*. In that case, the Court held that a defendant charged with providing material support to a designated group has no right to challenge the propriety of the group's designation in his criminal proceeding. *United States v. Afshari*, 426 F.3d 1150 (9th Cir. 2005); *see also United States v. Afshari*, 2006 U.S. App. LEXIS 10588 (9th Cir. Apr. 28, 2006) (Kozinski, J., dissenting from denial of rehearing en banc). If the Court in this case finds that due process does not require any showing of intent to further the designated group's illegal acts, then individuals could be prosecuted as terrorists for supporting only nonviolent and lawful activities of groups that in fact have engaged in no terrorist activity whatsoever, and were

therefore wrongly designated.

An intent requirement avoids all of these absurd and unconstitutional results. It distinguishes between the innocent taxi driver and the culpable getaway car driver, between those who train a group's members to employ nonviolent peaceful means of protest and those who train them in bombmaking or guerrilla warfare, and between those who lend a cellphone for a call to arrange a ride from the UN to the airport, and those who provide communications equipment in order to coordinate terrorist attacks.

3. Knowledge That a Group Has Been Designated is Insufficient to Satisfy the Due Process Requirement of Personal Guilt

The district court held that due process is satisfied by the requirement that the government prove that a supporter knew that the group was designated or involved in terrorist activities. 380 F. Supp. 2d at 1148. ER 76-77. But knowledge of the status of the recipient is insufficient without any intent to further the recipient's illegal ends. The Smith Act required knowledge that one was supporting a group that advocated overthrow of the government, but the Supreme Court in *Scales* held that that was not enough: the Fifth Amendment required, in addition, proof of specific intent to further the group's illegal ends.

That knowledge is insufficient is made clear with a domestic analogy. An anti-gang statute that made it a crime to provide material support to designated street gangs without regard to the intent of the support provided would plainly violate the Fifth Amendment. Otherwise, a social worker who provided mediation counseling to two gangs that she knew had been designated could be prosecuted for material

support even if her intent was to ward off a violent gang fight. As the Supreme Court has stated, "[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for punishment. *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967).

4. Neither the Fungibility of Support Nor the Foreign Affairs Setting Excuses a Departure From the Personal Guilt Requirement

The government argued below that material support may be criminalized without any intent to further the group's illegal activities because even support intended and used only for legal activities may "free up" resources that the group can use to further illegal activities. But this theory would eviscerate the Fifth Amendment principle of personal guilt. On that theory, all vicarious criminal liability statutes could be replaced with statutes penalizing material support to any group designated as having engaged in some illegal activity. Helping a gang negotiate a dispute with another gang theoretically frees up resources that can be used for crime, and donating to Operation Rescue's lawful political advocacy theoretically frees up resources that it could use to engage in criminal anti-abortion activities. Yet such "material support" plainly could not be prohibited absent a showing of intent to further the gang's or Operation Rescue's illegal activities, even if the donors knew that the gang and Operation Rescue had been official proscribed.

While the statute's "findings" reflect some concern over the possibility that resources contributed for one purpose might free up resources for terrorist ends, the statute does not in fact prohibit all support across the board, and therefore undermines

the very "fungibility" argument that the government has advanced to defend the statute The statute expressly *permits* unlimited donations of medicine and religious materials to designated organizations. As Judge Kozinski noted at oral argument in *HLP I,* under the material support statute a donor could lawfully give two million dollars worth of medicine or religious materials to Al Qaeda, including materials that could easily be resold, even though under the government's theory that donation would "free up" resources for criminal conduct. And the 2004 Act's licensing provision, discussed in Point III *infra,* authorizes approval of certain forms of material support as long as the aid itself may not "be used to carry out terrorist activity," 18 U.S.C. §2339B(j), a provision directly at odds with the "freeing up" theory.

The government also argued below that proof of intent is not required because the statute involves foreign affairs. But it did not cite a single case that abandons the Fifth Amendment principle of personal guilt in the foreign affairs setting (or in any other setting, for that matter). In fact, the very case that gave birth to the personal guilt principle, *Scales,* involved a paradigmatic exercise of foreign affairs authority – the criminalization of association with the Communist Party, which Congress had expressly found to be a foreign-dominated organization backed by the Soviet Union. 50 U.S.C. § 781 (West 1991) (repealed 1993).

5. The Government's Success in Obtaining Prosecutions Under Other Vicarious Criminal Liability Statutes Demonstrates That a Specific Intent Standard Does Not Make the Statute Unenforceable

The government objected below that requiring it to prove intent to further illegal activities would make convictions impossible. But every day across the country prosecutors obtain convictions under a wide array of vicarious criminal liability statutes, from aiding and abetting to conspiracy to RICO to money laundering to anti-gang and anti-loitering laws, *all of which require proof of intent.* The government contended that because terrorist organizations do not keep open books, it cannot show how particular donations were spent. But it need not do so. The Mafia, drug cartels, and criminal street gangs also do not keep open books, yet prosecutors have convicted untold numbers of defendants who have aided and abetted crimes by these entities. Intent can and routinely is established by all sorts of circumstantial evidence, including statements made by the donor or the solicitor, the character and context of the aid, the nature of the recipient group, and the donor's knowledge.[13]

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[13] Requiring specific intent to criminalize material support under § 2339B would not restrict the government's ability to prohibit aid to al Qaeda. Congress has authorized the use of all necessary and appropriate military force against al Qaeda, the modern-day substitute for a declaration of war. Authorization to Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). It has long been customary to forbid aiding the enemy during a military conflict. In addition, al Qaeda appears to engage exclusively in illegal activities. A statute limited to al Qaeda would therefore pose a very different constitutional question. But we are not at war with the PKK, the LTTE, or indeed most of the groups that have been designated, and it is undisputed here that the PKK and the LTTE engage in a wide range of nonviolent and lawful activities. ER 52-54.

In short, this Court should declare the material support statute unconstitutional as applied to plaintiffs' intended support if it agrees with the district court that the statute omits what this Court en banc has described as the "constitutionally essential component"[3] of specific intent. *Brown v. United States*, 334 F.2d at 497.

B. The Court Should Interpret the Statute to Incorporate a Specific Intent Standard

Alternatively, the Court can avoid the constitutional problems identified above if it interprets the statute to incorporate a *mens rea* requirement that the defendant intended to further the designated organization's illegal activities. Two judges have already reached precisely that conclusion. *Al Arian I*, 308 F. Supp. 2d at 1339; *Al Arian II*, 329 F. Supp. 2d at 1299-1300; *Hammoud,* 381 F.3d at 376-80 (Gregory, J., dissenting). The Seventh Circuit has construed a related statute imposing civil liability for support of terrorist acts to require proof of "specific intent to further [the group's] illegal aims." *Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1022 (7th Cir. 2002). And the relevant language of the material support statute is indistinguishable from the Smith Act provision that the Supreme Court interpreted to require specific intent in *Scales*.

In order to avoid criminalizing moral innocents, courts frequently read *mens rea* requirements into criminal statutes, even where Congress has not expressly included them in the statutory language. *United States v. X-Citement Video*, 513 U.S.

64, 69-70 (1994).[14] "'[T]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" *Staples v. United States*, 511 U.S. 600, 605 (1994) (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978)). The rule applies with particular force where a *mens rea* requirement will help avoid constitutional difficulties. *X-Citement Video*, 513 U.S. at 78.

The Supreme Court took this approach in *Scales v. United States*. The Smith Act criminalized "membership" in organizations that advocated violent overthrow, "knowing the purpose thereof." 18 U.S.C. § 2385. The statute did not by its terms require specific intent to further the group's illegal aims. Yet to avoid the due process and First Amendment concerns raised by the statute, the Court interpreted it to require not merely knowledge of the group's purposes, but "'specific[] inten[t] to accomplish [the aims of the organization] by resort to violence.'" *Scales*, 367 U.S. at 229 (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)).

The same analysis applies here. On its face, the material support statute also criminalizes "knowing" provision of material support, and raises similar constitutional concerns. As in *Scales*, the material support statute should be read to

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[14] *See Morissette v. United States*, 342 U.S. 246, 274 (1952) ("It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention" (quoting *People v. Flack*, 125 N.Y. 324, 334 (1891))); *Staples v. United States*, 511 U.S. 600, 610 (1994) (courts should take care to avoid dispensing with *mens rea* where doing so would "'criminalize a broad range of apparently innocent conduct'" (quoting *Liparota*, 471 U.S. at 426)).

incorporate a requirement of specific intent to further the illegal aims of the designated group.

The district court rejected this interpretation as contrary to "clear congressional intent." 380 F. Supp. 2d at 1144, ER 67. The court reasoned that because other terrorism statutes expressly contain a specific intent standard, Congress must have chosen not to include one in Section 2339B. It stated that a specific intent standard would be inconsistent with Congress's finding that "any contribution to such an organization facilitates [terrorist activity]." *Id.* at 1146, ER 73, quoting AEDPA, § 301(a)(7), 18 U.S.C. § 2339B note. And it noted that in the 2004 Act, Congress required proof that the defendant knew the recipient organization had been designated or had engaged in terrorist activity, but did not expressly require proof of specific intent to further terrorist conduct. *Id.* at 1147, ER 74-75.

None of these considerations precludes adopting an interpretation of the statute that would save its constitutionality, however. In the end, Congress was silent on whether it intended to incorporate a specific intent standard. That silence might well reflect its acceptance of the background rule that such an intent standard is implicit in vicarious criminal liability statutes. After all, that is precisely how the Supreme Court treated the Smith Act in *Scales*. Moreover, Congress stated in enacting § 2339B that it sought to prohibit the provision of material support "to the fullest possible basis, consistent with the Constitution." AEDPA, § 301(b), 18 U.S.C. § 2339B note (quoted in *Al Arian I*, 308 F. Supp. 2d at 1335 n. 23). In addition, the bill's sponsor, Senator Hatch, stated in introducing the Conference Report that "[t]his

bill also includes provisions making it a crime to *knowingly provide material support to the terrorist functions* of terrorist groups designated by a Presidential finding to be engaged in terrorist activities.... I am satisfied that we have crafted a narrow but effective designation provision which meets these obligations *while safeguarding the freedom to associate.*" 142 Cong. Rec. S3354 (daily ed. April 16, 1996) (statement of Sen. Hatch) (emphasis added) (quoted in *HLP II*, 352 F.3d at 402). To interpret the statute to include a specific intent requirement accords with the background presumption set forth in *Scales*, honors Congress's express directive that the statute be interpreted "consistent with the Constitution," and criminalizes precisely what the bill's sponsor said it would criminalize: material support "to the terrorist functions of terrorist groups ... while safeguarding the freedom to associate."

The 2004 Act does not in any way preclude a specific intent interpretation. In that act, Congress added a requirement of proof of the defendant's *knowledge* of the status or character of a recipient group. 18 U.S.C. §2339B(a)(1). In doing so, however, Congress simply left unaddressed the separate question of specific intent to further terrorist activities. Despite the fact that a federal court in a very prominent material support prosecution had interpreted the material support statute to require proof of specific intent, *Al Arian I*, 308 F. Supp. 2d at 1339, Congress chose not to address the issue of intent one way or the other. At a minimum, the question remains open to judicial interpretation, and the rule of constitutional avoidance requires adoption of a specific intent requirement.

The Court should therefore either declare the statute unconstitutional, or

interpret it to permit prosecution only of those who intend to further the illegal activities of designated groups.

II. THE BANS ON PROVIDING "TRAINING," "PERSONNEL," "EXPERT ADVICE OR ASSISTANCE," AND "SERVICES" ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD

Congress expansively defined "material support" to prohibit not only the provision of funds and tangible goods, but also an almost infinite range of purely expressive activity, from "training" to "expert advice" to speaking, writing, or even petitioning Congress, the courts, or the United Nations "for the benefit of" a designated group. Plaintiffs challenge as vague and overbroad the prohibitions on "training," "personnel," "expert advice or assistance," and "services," all of which encompass vast amounts of protected speech and fail to offer ordinary citizens clear guidance as to what is prohibited.

A statute is vague if it requires "'persons of common intelligence .... necessarily [to] guess at its meaning and [to] differ as to its applicability.'" *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). The degree of precision required increases with the gravity of the penalty imposed and the importance of the rights at stake. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). The material support statute is subject to the most stringent vagueness scrutiny both because it imposes criminal sanctions and because it threatens to chill speech and associational rights. *Reno v. American Civil Liberties Union*, 521 U. S.

844, 871-72 (1997); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

A statute is overbroad if it punishes a "'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). The court must ask both whether the statute punishes a substantial amount of protected speech in an absolute sense, and in relation to the conduct legitimately prohibited by the statute. *Hicks*, 539 U.S. at 119-20.

Even if the Court were to deem any of the challenged provisions facially valid, they are plainly unconstitutional as applied to plaintiffs' intended activities, which include teaching human rights advocacy, providing medical assistance, distributing literature, and assisting in peace negotiations. While some forms of "training," "personnel," "expert advice or assistance," or "services" might not be constitutionally protected, there is no legitimate basis for prohibiting the specific activities in which plaintiffs seek to engage, and therefore the statute is at a minimum unconstitutional as applied to them.

A. Training

Two unanimous panels of this Court have previously declared the ban on "training" unconstitutionally vague. The first panel reasoned that "it is easy to imagine protected expression that falls within the bounds of this term. For example, a plaintiff who wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such

protected expression falls within the scope of the term 'training.'" *HLP I*, 205 F.3d at 1138. The second panel concurred. *HLP II*, 352 F.3d at 404-05.

In response, Congress defined "training" in the 2004 Act as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. §2339A(b)(2). But this does not clarify matters. Indeed, when the government previously proposed a virtually identical definition as a "narrowing construction," this Court rejected it as insufficient: "The government insists that the term is best understood to forbid the imparting of skills to foreign terrorist organizations through training. Yet, presumably, this definition would encompass teaching international law to members of designated organizations." *HLP I*, 205 F.3d at 1138.

The statute may be even more vague now, for it requires individuals to attempt to guess whether their instruction involves a "specific skill" or "general knowledge." Is human rights advocacy or peacemaking a specific skill or general knowledge? Is driving a car "general knowledge" or a "specific skill"? What about training in public speaking, lobbying Congress, or media relations?

At oral argument before the en banc court, the government's attorney, Douglas Letter, was asked specifically to apply this new definition to a number of hypotheticals. Letter opined that teaching geography would be permissible because it constitutes "general knowledge," but that teaching the political geography of terrorist organizations would constitute a banned "specific skill," as would the

teaching of English.[15] Letter's attempt to explicate the new definition only underscores its ambiguity. What if a general introductory course on geography included within it a lecture on the political geography of terrorist organizations? What if it included a session on the history of geography, or the geography of a specific region? Would these be impermissible "specific skills," or permissible parts of "general knowledge?"

The district court's extended colloquy along similar lines with government counsel on remand further illustrates the point. D. Ct. Tr. 6-20; SER 215-229. Government counsel below asserted that the material support statute left plaintiffs free to advocate "on behalf of" the PKK before the UN or "any forum of their choosing." Govt. Mem. in Supp. of S.J. at 17 n.8. But when the district court asked whether plaintiffs could begin to lobby the UN with members of the PKK present, and then divide up the rest of the UN to lobby, counsel first opined that such conduct "presumably could" constitute "training," D. Ct. Tr. 11, and a few minutes later opined that it "clearly comes within the proscriptions against training and expert advice or assistance." *Id.* at 15; SER 224. At the close of the colloquy, the district court said, "I don't know how you think anyone, a normal person, would figure this out based on this exchange." Dist. Ct. Tr. at 19; SER 228.[16] The district court

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[15] The oral argument tape is available under case number 02-55082 here: http://www.ca9.uscourts.gov/ca9/media.nsf/media%20Search?OpenForm&Seq=1. The colloquy takes place at approximately 49 minutes into the argument.

[16] The court continued:

I think the hypotheticals [] illustrate the difficulty in this vagueness area

correctly concluded that the 2004 Act definition fails to cure the vagueness this Court previously identified in the "training" ban.

The prohibition on "training" is also substantially overbroad. The law does not narrowly prohibit training in bombmaking, guerrilla warfare, or other tactics likely to be used for nefarious purposes. As the government itself concedes, it criminalizes the teaching of international law, political advocacy, or how to petition the United Nations, lessons that could not possibly be used to further terrorist acts. Govt. Br. 18. In fact, the ban prohibits all teaching, indisputably a form of protected speech, on *every* subject that could be characterized as a "specific skill," from archeology to botany to classics to darning socks to music appreciation to basketweaving, needlepoint, and infant nutrition – the list is literally endless. All of this speech is constitutionally protected, yet all of it is prohibited by the statute. As a result, the ban plainly prohibits a substantial amount of protected speech. Moreover, because the

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> to this Court because you're ... making these distinctions that ... A's teaching is either training or he's doing expert advice or assistance, if he simply does it back at his own headquarters even though he could teach geography there, but if he goes to the U.N., even with others watching, that's okay because then it's on behalf of the PKK, instead of your definition of 'service," which is, you know, for the benefit of. So he also has to figure out is he doing it on behalf of the PKK when he does it at the U.N., or he decides at some point, even while he's talking to A, and while he's talking to the first two U.N. representatives, that after this, he's going to ask the other two guys, B and C, to do this. Then is he suddenly, at some point, doing it for their benefit so that, when he finishes, he can ask B and C to go somewhere else? I ... think these terms are vague.

D.Ct. Tr. 21; SER 230.

"plainly legitimate scope of the law" is limited to "training" provided with specific intent to further a designated group's illegal activities, *see* Point I, *supra,* the reach of the speech prohibition is substantial "not only in an absolute sense but also relative to the scope of the law's plainly legitimate applications." *Hicks*, 539 U.S. at 120.

The prohibition on "training" is also unconstitutional as applied to plaintiffs' specific intended activities. This Court has held that "there is no constitutional right to facilitate terrorism by giving terrorists" aid that might assist them in "carry[ing] out their grisly missions." *HLP I*, 205 F.3d at 1133. But defendants have made no showing that teaching human rights advocacy will assist the PKK in carrying out any terrorist activity. Accordingly, even if it is permissible to ban training in bombmaking, it is not constitutionally permissible to ban the training plaintiffs seek to provide here. Whatever the legitimate scope of a criminal ban on training, the government lacks any legitimate interest whatsoever in proscribing the teaching of human rights advocacy and peacemaking negotiation skills.

B. Personnel

This Court found the prior ban on providing "personnel" unconstitutionally vague because it "blur[red] the line between protected expression and unprotected conduct." *HLP I*, 205 F.3d at 1137. As the Court put it, "[s]omeone who advocates the cause of the PKK could be seen as supplying them with personnel." *Id.* Under the new definition of "personnel," someone who "advocates the cause of the PKK" could still be "seen as supplying them with personnel." *Id.*

The district court found that the 2004 Act cured the term's vagueness because it draws a distinction between those who provide personal support under a designated group's "direction or control," and those who act "entirely independently." But that distinction does not solve the vagueness problem, because it leaves undefined a vast area between "entirely independent" advocacy and advocacy directed or controlled by a group, and because other overlapping provisions fail to draw the same distinction, thereby rendering it for all practical purposes meaningless.[17]

For example, would running an op-ed by the group'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 edits? Two? One? What about a lawyer representing a group in a challenge to a designation? 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 issue arose in litigation involving the lawyer Lynne Stewart, 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." *Sattar*, 272 F. Supp. 2d at 359. The court in *Sattar* agreed with this Court that such distinctions were altogether too evanescent to satisfy constitutional scrutiny, and declared the

[17] Adding to the ambiguity is the fact that the new definition initially defines "personnel" as acting under an organization's "direction *or* control," but later *in the same definition* appears to define it as acting under the organization's "direction *and* control." 18 U.S.C. § 2339B(h). If Congress cannot make up its mind, how is an ordinary citizen to decide what the standard is?

"personnel" ban unconstitutionally vague. 272 F.Supp.2d at 359.

The new definition also fails to clarify how to distinguish in any clear way between *membership* in a designated group, which the government and this Court say is 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 distinction between membership and "personnel":

> When asked at oral argument how to distinguish being a member of an organization from being a quasiemployee, 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 new statute, like the old, leaves undefined where membership falls within the vast gray area that lies between conduct "under [the] direction or control" and conduct undertaken "entirely independently."

Moreover, even if an ordinary person could somehow navigate this gray area with any confidence, the distinction drawn by the 2004 Act definition is meaningless from the standpoint of the statute as a whole, since even "entirely independent" advocacy will constitute the criminal provision of "services" if it is done "for the benefit of" the designated group, *see infra* Pt. II. D, and the criminal provision of "expert assistance" if it is based in any way on "scientific, technical, or other specialized knowledge." *See infra* Pt. II. C. Thus, what Congress purported to give with one hand it took away with the other: what little conduct the definition of

"personnel" theoretically leaves unencumbered is eliminated in the same statute by the bans on "service" and "expert assistance."

The "personnel" prohibition is also unconstitutionally overbroad. Advocacy is constitutionally protected whether engaged in independently or as an employee; the freedom of speech and of the press, for example, applies equally to Garry Wills, an independent author, Bob Woodward, a *Washington Post* reporter, and Suzanne Goldenberg, Washington correspondent for London's *The Guardian*. From a First Amendment standpoint, there is no distinction between an essay written "entirely independently," and one written "under the direction or control" of a newspaper, magazine, or non-governmental organization. The "personnel" ban prohibits *every* form of speech engaged in under a designated group's "direction or control," whether it be a constitutional argument made to a court, a petition for redress of grievances directed to the Executive, or a plea for legislative reform expressed to Congress or the public at large. Accordingly, the statute plainly prohibits a "substantial" amount of protected speech. And because the "plainly legitimate scope of the law" is limited to "personnel" intended to further a designated group's illegal activities, the reach of the speech prohibition is substantial "not only in an absolute sense but also relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks*, 539 U.S. at 120.

Here, too, even if the Court were to deem the "personnel" ban facially valid, it is plainly unconstitutional as applied to the sorts of coordinated work plaintiffs seek to engage in – peace negotiations, rebuilding after the tsunami, medical care, and the

like. Again, there is no legitimate interest in criminalizing such activity, which cannot be used to carry out terrorist activity.

C. Expert Advice or Assistance

The ban on providing "expert advice or assistance," added to the statute by the USA PATRIOT Act, is unconstitutionally vague and overbroad for much the same reasons that the bans on "personnel" and "training" are. The ban on expert *advice* is at least as vague as the ban on training, and the ban on expert *assistance* appears to ban any conduct that has any element of expertise associated with it.

The district court initially declared this provision void for vagueness in 2003. In that decision, the court noted that the government's own arguments illustrated the phrase's vagueness:

> Defendants' contradictory arguments on the scope of the prohibition underscore the vagueness of the prohibition. The "expert advice or assistance" Plaintiffs seek to offer includes advocacy and associational activities protected by the First Amendment, which Defendants concede are not prohibited under the [provision.] Despite this, the [provision] places no limitation on the type of expert advice and assistance which is prohibited, and instead bans the provision of all expert advice and assistance regardless of its nature. Thus, like the terms "personnel" and "training," "expert advice or assistance" "could be construed to include unequivocally pure speech and advocacy protected by the First Amendment" or to "encompass First Amendment protected activities."

309 F. Supp. 2d at 1201 (quoting *HLP II*, 352 F.3d at 404).

Congress defined "expert advice or assistance" in the 2004 Act, but failed to clarify any of the ambiguities identified by the district court. The statute now defines "expert advice or assistance" as advice and assistance "derived from scientific,

technical, or other specialized knowledge." 18 U.S.C. § 2339A(b)(3). But this definition only exacerbates the statute's vagueness, because an individual must now guess as to whether his advice or assistance was somehow derived from "scientific, technical, or ... specialized knowledge." An expert on geography could apparently provide advice, according to government counsel's representations at the *en banc* argument, to the extent that it derived only from "general knowledge," but not if the advice concerned any geographical question whose answer was informed by "scientific, technical, or ... specialized knowledge." But what geographical fact is not in some way "derived from scientific [or] technical ... knowledge?"

Similarly, advice or assistance to the LTTE on post-tsunami recovery would be permissible under this term if it derived from no "specialized knowledge," but as soon as the advice or assistance veered into an area informed by any scientific, technical or specialized knowledge, it would be a crime – whether on the subjects of rebuilding homes, clearing debris, or helping clothe and feed displaced refugees. Moreover, as with "personnel," even this distinction is meaningless with respect to the statute as a whole, because even "non-expert" assistance would likely constitute either "personnel" or a "service," both of which are separately criminalized. In short, the 2004 Act neither clarifies nor narrows the ban.

The district court erroneously stated that plaintiffs challenged "only the 'specialized knowledge' portion of the definition of 'expert advice or assistance.'" 380 F. Supp. 2d at 1151 n. 23, ER 82. In fact, plaintiffs challenged the entire prohibition on "expert advice or assistance" as vague and overbroad, and in no way

limited their challenge to the term "specialized." Complaint in 03-06107, ¶ 53; ER 49. The court also stated, in a footnote and without explanation, that it found the definition's references to "scientific" and "technical" knowledge not vague. 380 F. Supp. 2d at 1151 n. 23, ER 82. In fact, the entire definition is vague, not just the reference to "specialized knowledge." The distinction the definition draws may well be fundamentally incoherent, as almost all forms of what might conceivably be viewed as "general knowledge" – from cooking to cleaning to nutrition to hygiene – are themselves derived from some "scientific" or "technical" knowledge. Indeed, as scientific and technical knowledge informs almost every aspect of life, it may well be that "non-expert" advice or assistance under this definition is a null set.

Like the above provisions, the ban on "expert advice or assistance" is also unconstitutionally overbroad, as it prohibits literally every form of advice or assistance that can be said to derive from "scientific, technical, or other specialized knowledge." "Advice" is constitutionally protected speech, regardless of how specialized or general its provenance. The only "advice" that would not be constitutionally protected would be that which would constitute aiding or abetting, conspiracy, or incitement to commit an imminent crime. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Everything else encompassed by "expert advice" is protected speech, and therefore the prohibition is both substantially overbroad in an absolute sense and in relation to the few incidents of unprotected advice that it might proscribe. The ban on "expert assistance" is equally overbroad – it encompasses everything within "expert advice," since advice is a form of assistance. While it

might also prohibit some forms of assistance that do not involve speech or communication, it plainly encompasses a substantial amount of protected speech, and since its only clearly legitimate applications are to assistance specifically intended to further a designated group's illegal activities, it is also substantially overbroad in relation to its prohibition of legitimate activities.

As with the prior terms, "expert advice or assistance" is also unconstitutional as applied to plaintiffs' intended support. Plaintiffs seek to provide advice and assistance on tsunami relief work, human rights advocacy, peacemaking, economic development, Tamil language, literature, cultural heritage, and history, among other things. As above, while the government may well have a legitimate interest in prohibiting expert advice on terrorist tactics, it has no legitimate interest in making it a crime to provide advice on human rights law.

D. Services

The most expansive provision in the entire definition of "material support" is the prohibition on providing any "service" to a designated group. Congress added this prohibition in the 2004 Act, without providing any further specification of what it encompasses. Citing a dictionary, the government maintains that this prohibition includes any "act done for the benefit ... of another." Govt. Br. 45 (quoting *Webster's New International Dictionary* 2075 (3d ed. 1993). If so, the prohibition on "services" is even more sweeping than the prohibitions on "personnel," "training," and "expert advice or assistance," and is so broad that it swallows any of the

limitations contained in the previous definitions. Thus, while "expert advice" and "training" do not reach teaching derived from or imparting only general knowledge, even the teaching of general knowledge would constitute a "service" and therefore be a crime if it is done "for the benefit of" a designated group. Similarly, while "personnel" does not extend to "entirely independent" advocacy, the ban on "service" applies to any activity, *no matter how independent*, that is done "for the benefit of" a designated group.

On the one hand, the government says anything done "for the benefit of" a designated group is a prohibited "service." Govt. Br. 45. On the other hand, it says plaintiffs should feel free to join designated groups, engage in "independent advocacy," *id.* at 46, and advocate "on behalf of" designated groups. Govt. Mem. in Supp. of S.J. 17 n.8. But joining a group could be seen as an act "for the benefit of" the group, since political groups are presumably benefitted by increasing their numbers. And how is an ordinary citizen to know whether his advocacy of the PKK's position on Kurdish human rights is "independent" advocacy "on behalf of" the group, which the government claims is protected, or a "service" "for the benefit of" the PKK, which could land him in prison for fifteen years? Would aid to tsunami survivors in LTTE-controlled regions of Sri Lanka be seen as "for the benefit of" the LTTE, as it would presumably reduce the obligations of the LTTE to care for the people under its control? The ban on "service," particularly when read in conjunction with the supposedly preserved rights to join designated groups and independently advocate their views, is hopelessly vague.

The "service" ban is also overbroad. Every form of speech done "for the benefit of" a designated group would potentially constitute a "service." Writing an op-ed, lobbying, providing legal representation, petitioning the UN, providing medical counseling, volunteering to teach reading in a daycare center, distributing an organization's literature, or merely joining the organization might all be seen as "services" as the government defines the term. As with "training" and "expert advice or assistance," all such conduct is constitutionally protected. The only "service" that is legitimately prohibited is that which is intended to further a designated group's illegal activities. Accordingly, the ban on "services" is substantially overbroad both in absolute terms and in relation to the legitimate scope of the statute.

Even if the "service" ban were not unconstitutionally vague and overbroad on its face, it is unconstitutional as applied to the specific "services" plaintiffs intend to offer. None of the conduct plaintiffs seek to engage in for the benefit of the PKK and LTTE – whether advocacy, literature distribution, medical services, or the like – is linked in any way to the carrying out of terrorist activity. Accordingly, while the government may well have an interest in barring those services that would further terrorist activity, it has no legitimate interest in banning plaintiffs' activities.

E. The Government's Attempts to Save These Terms Fails

The government advances several general arguments that it contends narrow all four of the above terms and help render them constitutional. These arguments, virtually all of which were equally available under the statute *before* its 2004 Act

amendments, did not cure the terms' invalidity then, and do not now. The government first contends that because the statute prohibits the provision of material support "to" designated groups, it prohibits only direct, and not indirect aid. Govt. Br. 26-27. This Court has already heard and rejected this argument; as the Court explained, under the government's "freeing up" theory, aid can theoretically defray an organization's costs whether it is provided indirectly or directly. *See HLP I*, 205 F.3d at 1137 (noting that "having an independent advocate frees up members to engage in terrorist activities instead of advocacy"). The vagueness of the challenged terms inheres in those terms themselves, and is not saved by an unarticulated distinction between indirect and direct support.

The government also claims that the modifier "material" helps to cure the vagueness of the terms in question. Govt. Br. 27-28. But this argument is circular. "Material" does not modify or narrow any of the terms challenged here. Rather, the challenged terms define what constitutes "material support." Anything that falls within the term "training," "expert advice or assistance," "personnel," or "service" is *by definition* "material support." Accordingly, "material" does literally no work in defining those terms, as they define it. Moreover, even if the statute were rewritten to forbid only "material training" or "material expert advice or assistance," it would hardly clarify what is and is not forbidden.

The government next argues that the prohibitions on "training," "service," and "expert advice or assistance" are somehow narrowed by the fact that Congress limited the prohibition on "personnel" to "work under th[e] terrorist organization's direction

or control," and exempted from that term "individuals who act entirely independently." Govt. Br. 28 (quoting 18 U.S.C. § 2339B(h)); *id.* at 40 (making same argument with respect to "expert advice or assistance"); *id.* at 45 (same argument with respect to "service"). But even if that statutory definition helps clarify "personnel" – and as explained above, it does not – by its own terms the definition does not apply to any of the other terms challenged here. Conceivably, Congress might have applied this limitation to the entirety of "material support," but it did not, choosing instead to apply it to one and only one subpart of "material support," namely "personnel." Whatever its merits, this definition simply does not apply to any word in the statute other than "personnel."

The government argues that the "scienter" requirement also somehow saves the statute. Govt. Br. 30. This Court previously rejected an identical argument, when it noted that the fact that the statute prohibits "knowingly providing" material support did not save the terms "training" and "personnel" from a vagueness challenge. The Court explained, "the term 'knowingly' modifies the verb 'provides,' meaning that the only scienter requirement here is that the accused violator have knowledge of the fact that he has provided something, not knowledge of the fact that what is provided in fact constitutes material support" *HLP I*, 205 F.3d at 1138 n.5. The government now points to the scienter requirement added by the 2004 Act, but like the first one, this scienter requirement has nothing to do with knowledge that what is provided "in fact constitutes material support" – it concerns only knowledge about the status of the recipient group. 18 U.S.C. § 2339B(h). Thus, the scienter requirement does not even

apply to the terms plaintiffs challenge as vague.

Defendants' final contention, that the challenged provisions clearly apply to plaintiffs' intended conduct and that therefore the Court should not concern itself with "marginal" and "hypothetical" questions, Govt. Br. 32, is frivolous. The government's own failure to distinguish permissible subjects of "general knowledge" from impermissible "specific skills," protected membership from prohibited "personnel," or "entirely independent" activity "on behalf of" a designated group from a prohibited "service" done "for the benefit of" a designated group make clear that these terms are not vague at the margins, but at their core, and therefore in all their applications. [18] Accordingly, the terms are vague as to plaintiffs' conduct as well. The fact that plaintiffs used the statutory terms to describe their conduct as potentially falling afoul of the statute to demonstrate that they have a justiciable case or controversy has no bearing on the vagueness inquiry on the merits.[19]

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[18] Defendants argue that a statute cannot be invalidated as vague unless it is vague in all its applications. Govt. Br. 36 n. 8. But the Supreme Court and this Court have squarely rejected that view, and hold that a facial vagueness challenge may succeed so long as the statute's terms are ambiguous and reach "'a substantial amount of constitutionally protected conduct.'" *Kolender v. Lawson,* 461 U.S. 352, 358 n.8 (1983) (quoting *Hoffman Estates*, 455 U.S. at 494); *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001) (same); *Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997) (same). *Hill v. Colorado*, 530 U.S. 703, 733 (2000), does not alter that analysis, but merely reaffirms the corollary proposition, namely that where a statute's application is generally clear and unambiguous, the fact that there is some ambiguity at the hypothetical margins does not render the statute unconstitutionally vague. Here, the ambiguity is not at the margins.

[19] The boilerplate language adopted by the 2004 Act providing that "[n]othing in this section shall be construed or applied so as to abridge the exercise of rights

III. THE 2004 ACT GRANTS GOVERNMENT OFFICIALS UNCONSTITUTIONAL LICENSING AUTHORITY

The 2004 Act establishes a classic prior restraint licensing scheme, without any of the safeguards that the Constitution requires for such schemes. It singles out those forms of support most likely to include expressive activity, and then creates a prospective exemption from criminal liability for those who obtain advance approval for such activity. This provision provides:

> No person may be prosecuted under this section in connection with the term 'personnel', 'training', or 'expert advice or assistance' if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act).

18 U.S.C. § 2339B(j).

In effect, this scheme grants the Secretary unfettered discretion to license

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guaranteed under the First Amendment," 18 U.S.C. §2339B(i), does not alter the vagueness or overbreadth analysis for two reasons. First, it is mere surplusage, as *all statutes* are already subject to the rule that they should be construed wherever possible to avoid constitutional problems. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2000). As the Fifth Circuit said of identical language in another federal statute: "Such a provision cannot substantively operate to save an otherwise invalid statute, since it is a mere restatement of well-settled constitutional restrictions on the construction of statutory enactments." *CISPES (Committee in Solidarity with the People of El Salvador) v. FBI*, 770 F.2d 468, 474 (5th Cir. 1985).

Second, the boilerplate provision adds no clarity that would permit ordinary people to know what is permitted and what is prohibited. The ordinary person cannot be charged with understanding all the nuances of First Amendment doctrine, and without that understanding, a statute that merely says it should not be construed to abridge First Amendment rights does not give adequate notice of what is prohibited and what is protected.

speech. Such a discretionary licensing scheme is subject to a facial First Amendment challenge. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). *Lakewood* established that "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.* at 759. The Court clarified that "[t]his is not to say that the press or a speaker may challenge as censorship any law involving discretion to which it is subject. The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Id.* In *Lakewood* itself, the Court found that a newsrack licensing authority could be challenged on its face.

The licensing provision here similarly "has a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat" of censorship. It singles out the very types of material support that this Court has already recognized raise particular concerns of suppression of free speech – "personnel," "training," and "expert advice and assistance." *See HLP I*, 205 F.3d at 1137 (bans on "training" and "personnel" blur "the line between protected expression and unprotected conduct"). And given the inherently political considerations that underlie the designation decision in the first place, *see* 8 U.S.C. § 1189(d)(2) (one criterion for designation is that group's activities undermine our "foreign relations"), there is a substantial risk that the Secretary's decision to grant or deny exemptions

would be affected by the administration's political views of the group in question.

The district court concluded that the licensing precedents nonetheless do not apply because the provision is an exception to a criminal statute that the court had deemed constitutional. 380 F. Supp. 2d at 1154-55, ER 89-90. But this is a non sequitur. Even assuming *arguendo* that the material support statute in general is constitutional, that does not permit Congress to carve out speech-related activities within the statute's prohibition and to give executive officials carte blanche to license them. Even if a statute prohibiting all driving without a license is constitutionally sound, a provision that carved out an exemption for driving for expressive purposes and gave the mayor unbridled discretion to grant or deny such exemptions would be properly analyzed as a licensing scheme.

The district court also found that the Secretary's discretion is not entirely unfettered, because the statute permits her to grant licenses only if she finds that the support may not be "used to carry out terrorist activity." 380 F. Supp. 2d at 1155 n.28, ER 89-90. But it is not enough to specify one circumstance in which licenses may *not* be granted, and then to leave entirely to executive discretion whether to grant or deny a license to speech that meets that sole criterion. The hypothetical drivers' license scheme noted above, for example, would not survive a constitutional challenge if it authorized the mayor to grant exemptions only to those whose expression is in English, but otherwise left the mayor's discretion unfettered.

Accordingly, § 2339B(j) is facially invalid for its failure to set forth the

"'narrowly drawn, reasonable, and definite standards'" required to guide licensing decisions. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)). As the Supreme Court has made clear, regulations on speech must "contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002).[20]

In addition, Section 2339B(j) contains none of the *procedural* safeguards constitutionally required for licensing schemes of this type. It does not require any statement of reasons for a denial. *Forsyth County*, 505 U.S. at 133. It imposes no time limits on deciding whether to grant approval. "[A] prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990); *see also Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988)

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[20] As this Court has stated in another setting in which it declared a licensing scheme involving foreign affairs considerations unconstitutional, "'there is no 'sliding scale' of First Amendment protection under which the degree of scrutiny fluctuates in accordance with the degree to which the regulation touches on foreign affairs.'" *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988) (quoting *Bullfrog Films, Inc. v. Wick*, 646 F. Supp. 492, 504 (C.D. Cal. 1986)). Congress may not grant the Secretary wholly unfettered discretion when it comes to licensing speech, even when that speech has foreign affairs implications. *Kent v. Dulles*, 357 U.S. 116 (1958) (refusing to construe a federal statute as granting the State Department unfettered discretion to issue passports because of First and Fifth Amendment protections); *see also Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (invalidating on First and Fifth Amendment grounds a statute barring members of Communist organizations from using or obtaining U.S. passports).

(striking down licensing scheme for failure to put a time limit on licensing decision); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (striking down a nuisance law, which when combined with the Texas Rules of Civil Procedure, allows for a prior restraint of indefinite duration). It does not provide for prompt judicial review, and does not place the burden of justifying the denial on the Secretary in any such judicial review, both of which are constitutionally required. *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965).

Accordingly, Section 2339B(j) should be invalidated on its face for failing to provide any of the substantive and procedural safeguards required for licensing schemes.

CONCLUSION

For all the above reasons, the Court should affirm the district court's invalidation of the prohibitions on "training," "services," and "expert advice or assistance" with respect to "specialized knowledge," but reverse it in all other respects, and remand for entry of an injunction barring defendants from prosecuting plaintiffs for their intended support of the lawful activities of the PKK and the LTTE.

Dated: May 15, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned submits that the Prinicipal and Response Brief of Appellees complies with Fed. R. App. P. 32(a)(7)(c) and Circuit Rule 32-1 as it is a principal and response brief on cross appeal and is 16,234 words, exclusive of all tables, the Certificate of Compliance and the Statement of Related Cases..

CAROL A. SOBEL

STATMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the undersigned hereby certifies that there are no related cases presently pending before this Court.

CAROL A. SOBEL

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 429 Santa Monica Boulevard, Ste. 550, Santa Monica, CA 90401.

On May 15, 2006, I served the foregoing document described as: PRINCIPAL AND RESPONSE BRIEF OF APPELLEES by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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DOUGLAS N. LETTER
JOSHUA WALDMAN
Department of Justice
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Washington, D.C. 20530-0001
[By FED EX]

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JOHN TYLER
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(By FED EX)

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed on May 15, 2006, at Santa Monica, California.

Carol A. Sobel
CAROL A. SOBEL