Nos. 05-56753, 05-56846

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMANITARIAN LAW PROJECT, et al.,

Plaintiffs-Cross-Appellants,

v.

ALBERTO R. GONZALES,
Attorney General of the United States, et al.,

Defendants-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

THIRD CROSS-APPEAL BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES, RULES, AND OTHER AUTHORITIES

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SUMMARY

Perhaps the most important function of the United States Government is to protect national security and the safety of U.S. citizens. To that end, an Act of Congress vests the Secretary of State with authority to designate foreign terrorist organizations posing a threat to national security or U.S. nationals, and makes it a crime to provide material support to those terrorist groups.

This case involves U.S. citizens and groups that wish to provide material support to two of the deadliest and most dangerous terrorist groups in the world – the PKK and the Tamil Tigers. The PKK has waged a violent terrorist insurgency in

Turkey, claiming over 22,000 lives since 1984. It has attacked hotels and tourist sites, and has kidnaped foreign tourists, including U.S. citizens. It has bombed downtown Istanbul and London, killing and wounding many, including a U.S. citizen. And it is responsible for a series of bombings in Turkey that killed or injured many Turkish police officers and civilians. U.S. Br. 7.

Even more violent, the Tamil Tigers murdered hundreds of civilians in the 1990s, using suicide bombings and political assassinations. The group committed the most deadly terrorist attack in the world in 1996, exploding a truck bomb at the Central Bank in the capital of Sri Lanka. The next year it detonated another truck bomb, killing one hundred people, including seven U.S. citizens. And the year after that, a Tamil Tigers suicide bomber killed another 37 people and injured more than 238 others. The group has repeatedly attacked Sri Lankan government officials, killing the President, the Security Minister, and the Deputy Defense Minister. The Tamil Tigers have even bombed a ship chartered by the International Committee of the Red Cross. U.S. Br. 8.

Recent accounts only underscore the Tigers' lethal methods and continuing threat. See, e.g., Justin Hugler, McGuinness on Peace Mission to Sri Lanka, Independent (UK), at 22 (July 5, 2006) ("About 700 people have been killed in Sri Lanka since

April, more than half of them civilians. The Sri Lankan army's third most senior general was assassinated in a suicide bombing widely blamed on the Tigers last month.").

Plaintiffs in this case want to assist the PKK and the Tamil Tigers despite their vicious and deadly nature. But Congress has barred the provision of material support to these groups. In weighing the constitutionality of that statute, this Court should afford the Government significant latitude as the Court carries out its most fundamental and important duty. This Court and others have already found that foreign affairs considerations weigh heavily in the Government's favor when it comes to the First Amendment, the right to travel, and the non-delegation doctrine. The same considerations weigh strongly in the Government's favor for all of the constitutional issues in this case.

Moreover, while exercising its heavy responsibility to protect the Nation and its citizens in the arena where it is afforded the broadest latitude, Congress nonetheless gave careful attention to constitutional boundaries drawn by this Court in particular. In prior appeals, this Court identified certain constitutional concerns with the statutory scheme. Congress responded by amending and clarifying the statute in several respects. Where this Court found vagueness in several statutory terms – "personnel," "training," and "expert advice or

assistance" – Congress amended and clarified the definitions of those terms. And where this Court found ambiguity in the mens rea element, Congress responded by identifying precisely the scienter required for conviction under the Act. This Court spoke, and Congress acted.

Just as Congress carried out its legislative duty to swiftly fix the constitutional problems previously identified by this Court, so now it is this Court's obligation to review the newly amended statute and construe it to preserve rather than destroy its constitutionality. But plaintiffs strive mightily in the opposite direction – in one instance asserting that Congress's clarifying amendment should be confined to a construction that helps the statute the least, and in another instance ignoring a dictionary definition of a term that plainly avoids constitutional concerns. In doing so, plaintiffs seek, rather than avoid, constitutional doubts. But when this Court is asked to review an Act of Congress for conformity with constitutional demands – "the gravest and most delicate duty that this Court is called on to perform," Blodgett v. Holden, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.) – it is obligated to choose any reasonable construction of the statute that would preserve its constitutional validity. Plaintiffs' arguments cannot be squared with that bedrock principle.

Likewise, plaintiffs' vagueness argument rests heavily on

hypotheticals at the extreme margins of the statute – whether, for example, the statute would prohibit teaching terrorists how to darn socks (as "training") or how to cook and clean (as "expert advice or assistance").

Plaintiffs' argument is more calculated to gin up non-existent constitutional problems than to provide any reasonable metric for measuring the statute's constitutionality. Moreover, these frivolous hypotheticals belittle the serious and essential national security concerns that motivated Congress here.

Most critically, plaintiffs ask this Court to invalidate the statutory provisions on their face, which would mean that all material support for terrorist groups falling under the invalid provisions would be lawful (including, for example, training terrorist to use nuclear weapons) – simply because plaintiffs claim to be unable to tell if advice on basketweaving is or is not permissible.

Furthermore, many of plaintiffs' arguments have already been rejected by this Court, including plaintiffs' as-applied First Amendment claim and their argument that the statute at issue imposes "guilt by association" in violation of the First Amendment. Similarly, plaintiffs argue that the statute imposes an impermissible licensing scheme, but such a pre-enforcement facial challenge cannot be brought against a statute lacking a close nexus to speech – and this Court has already held that the

statute is not targeted at speech, but at the conduct of giving material support.

Finally, plaintiffs contend that due process requires a defendant to have the specific intent that his support will further terrorist acts, for otherwise the statute would punish supposedly "morally innocent activity." But plaintiffs' desire to provide direct assistance to two highly deadly terrorist organizations is far from "innocent" – in all cases, it constitutes direct support given to designated foreign terrorist organizations, which are so designated because they engage in terrorist activity threatening the security of United States nationals or the national security of this country. And, as all parties agree, the statute applies only where a defendant knows that the group has been so designated or knows that the group engages in terrorism or terrorist activities. That kind of support can in no way be described as "morally innocent."

ARGUMENT

I. THE MATERIAL SUPPORT STATUTE IS NOT UNCONSTITUTIONALLY VAGUE, OVERBROAD, OR CONTRARY TO THE FIRST AMENDMENT

A. The Material Support Statute Is Not Vague.

1. The Statutory Language Is Constitutionally Clear.

To survive a vagueness challenge, a statute need only provide "relatively clear guidelines as to prohibited conduct." Posters 'N' Things v. United States, 511 U.S. 513, 525 (1994).

All the challenged terms in the material support statute meet that standard.

As explained in our opening brief, all the terms' dictionary definitions are readily intelligible to the average person. U.S. Br. 25-26, 39, 45. The verb "train" is defined as "to teach so as to make fit, qualified, or proficient," Webster's New Collegiate Dictionary 1251 (9th ed. 1989), and this Court has held that the similar term "instruction" is sufficiently specific, California Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1151 (9th Cir. 2001).

As for "expert advice or assistance," the word "expert" is defined as "having, involving, or displaying special skill or knowledge derived from training or experience," Webster's Collegiate Dictionary 409 (10th ed. 1997), while "advice" is defined as a "recommendation regarding a decision or course of conduct," id. at 18, and "assistance" as "the act of assisting or the help supplied," id. at 70. Those definitions are readily comprehended by a person of ordinary intelligence.

The word "service" is also easily understood, being defined as "an act done for the benefit or at the command of another" and "useful labor that does not produce a tangible commodity." Webster's New International Dictionary 2075 (3d ed. 1993). This Court held that a similar term – "honest services" in the federal mail fraud statute – is not unconstitutionally vague. United

States v. Frega, 179 F.3d 793, 803 (9th Cir. 1999).

When this Court previously reviewed a prior version of the statute at issue, Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000), it identified a single ambiguity: whether the statute is limited to support given directly to a designated foreign terrorist organization, or whether the statute also prohibits independent actions that might be said to support such a group. Id. at 1137-38. See U.S. Br. 11-13 (explaining this Court's reliance on that distinction). The statute as amended, however, makes clear that it only reaches direct support given to terrorist groups, and does not prohibit independent actions.[1]

After this Court found that the term "personnel" in a prior version of the statute was vague because it was unclear whether it applied to independent advocacy, Congress addressed this Court's concern by specifying that the crime of providing "personnel" to a foreign terrorist organization requires proof that the defendant

> has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include

[1] Support is "direct" when it is given under the terrorist groups' direction or control, or when it is organized, managed, supervised, or otherwise directed by the terrorist group. "Direct" support is distinguished from "independent" support that is made without the terrorist group's direction, control, or is not otherwise directed by the terrorist group. "Direct" support, as used here, is not the opposite of "indirect support"; accordingly, the statute would prohibit, for example, giving money to a terrorist group through a third-party conduit.

> 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) (emphasis added). This amendment distinguishes between prohibited support (given directly to a terrorist group) and permissible conduct (entirely independent activities that may nonetheless advance the terrorists' goals). And while that clarification pertains specifically to the term "personnel," Congress surely intended it to address as well concerns equally applicable to the terms "training," "service," and "expert advice or assistance."

Other parts of the material support statute reinforce the distinction between prohibited direct support and permissible independent activities. As noted in our opening brief (U.S. Br. 26), the statute prohibits knowingly providing support "to" a foreign terrorist organization, 18 U.S.C. §§ 2339A(b)(1), 2339B(a)(1) (emphasis added), suggesting that the statute requires a direct connection between a defendant's support and the recipient terrorist group.

The same limitation is suggested by the statute's central purpose – to prevent giving material support to a terrorist organization because doing so defrays the costs of running the organization, thereby freeing the group's own resources to

conduct criminal activities. Direct support plainly constitutes the very evil with which Congress was concerned and most naturally causes the harm that Congress sought to eliminate. Not so with independent activities: while on some level independent advocacy may be said to free the terrorists' own resources, the connection is so attenuated that Congress should not be assumed to have adopted that approach, particularly where the legislative history clearly indicates to the contrary. See U.S. Br. 27; id. at 5-6 (legislative history shows that Congress intended statute to permit independent advocacy).

If there were any remaining doubts about the statute's meaning – and if the line between direct support and independent activities is constitutionally determinative – the material support statute should be construed in accordance with the principle of preserving a statute's constitutionality where possible. See, e.g., United States v. Vargas-Amaya, 389 F.3d 901, 906 (9th Cir. 2004). If there were any doubt about the statute's limitation to direct support, this Court should adopt the limiting construction, given that it is clearly compatible with the statutory text.

Aside from limiting the statute to prohibit direct support and not independent advocacy, Congress also narrowed the relevant terms. First, it amended the definition of "training" to clarify that it means "instruction or teaching designed to impart a

specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2). As previously explained (U.S. Br. 29-30), that definition is, on its face, sufficiently clear to a person of average intelligence, who in the overwhelming number of instances will be able to distinguish between what is and is not "general knowledge."

Second, Congress narrowed the definition of "expert advice or assistance" to mean "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3). As explained in our opening brief (U.S. Br. 40-41), that definition is based on Federal Rule of Evidence 702, which, in turn, has an established and easily understood meaning distinguishing between knowledge derived from common experiences and knowledge derived from experiences "foreign in kind" to those of the population in general, Kumho Tire v. Carmichael, 526 U.S. 137, 148 (1999). Again, a person of ordinary intelligence can, in most (if not all) cases, distinguish between what is a common experience for the public at large and what is not.

2. The District Court Confused Vagueness and Overbreadth

The district court found the statute unconstitutionally vague because it might "implicat[e]" First Amendment protected activities. ER 81. But whether the statute is unconstitutional as applied in some situations or whether the potential number of unconstitutional applications might be great enough to justify

facial invalidation of the statute, those are questions of substantive First Amendment law and overbreadth, not vagueness. See U.S. Br. 36-39. The statute here is not overbroad, nor does it violate the First Amendment as applied. See infra at 19-25. But our point is that whether the statute is unconstitutionally vague has nothing to do with whether or not the statute's scope might trench upon protected speech; rather, the question for vagueness is whether the statutory terms give relatively clear guidelines as to what it prohibits. The district court misunderstood this point and its vagueness holding is thus fundamentally flawed. Notably, plaintiffs never rebut our argument that the district court used an erroneous vagueness standard, nor do they argue that vagueness should be judged by whether a statute trenches on the First Amendment rather than by whether the statute sets forth sufficiently clear guidelines.

3. Plaintiffs' Arguments Are Incorrect

Plaintiffs posit a handful of hypotheticals and question whether or not they are prohibited by the material support statute. For instance, plaintiffs ask (Br. 39) whether training in "human rights advocacy" is a "specific skill" that qualifies under the statutory definition. Similarly, plaintiffs wonder (Br. 43) whether accepting a terrorist group's edits on an op-ed article is working under the "direction or control" of a terrorist group such that it fits the statutory definition of

"personnel."

Plaintiffs confuse statutory ambiguity with vagueness. No matter how clearly worded, virtually all statutes can be ambiguous as to whether certain factual situations fall under the statute. Courts can and do frequently resolve such statutory ambiguity, and juries routinely determine whether the facts of a particular case meet the Government's burden to show a statutory violation. But those facts do not render the statute in question unconstitutionally vague. See Scales v. United States, 367 U.S. 203, 223 (1961) (rejecting vagueness challenge where statutory ambiguity "is something that goes not to the sufficiency of the statute, but to the adequacy of the trial court's guidance to the jury by way of instructions in a particular case"). To be constitutional, a statute need not address all conceivable factual scenarios with "mathematical certainty," Grayned v. City of Rockford, 408 U.S. 104, 110 (1972), such that all ambiguity is obliterated and the outcome under any factual scenario can be predetermined with certainty. Rather, the Constitution requires that a statute provide "relatively clear guidelines as to prohibited conduct." Posters 'N' Things, 511 U.S. at 525. The material support statute does exactly that.

Plaintiffs' argument only demonstrates that, as the Supreme Court has observed, "[t]here is little doubt that imagination can conjure up hypothetical cases" that would raise uncertainty under

any statute. Hill v. Colorado, 530 U.S. 703, 733 (2000). But "uncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes 'in the vast majority of its intended applications.'" California Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1151 (9th Cir. 2001).

Accordingly, plaintiffs' marginal hypotheticals cannot sustain their vagueness challenge. Plaintiffs seemingly mock the important anti-terrorism legislative program at stake, as well as the constitutional issues involved, by speculating as to whether the statute would prohibit training a terrorist in darning socks or basketweaving (Br. 41), or whether advice on cooking and cleaning is based on scientific or technical knowledge (Br. 48). Those questions are so clearly at the margin of the statute that they cannot possibly sustain a serious constitutional vagueness challenge. Rather, the material support statute is clear in "the vast majority of its intended applications" – it prohibits such activities as providing mercenaries to a terrorist group to act under its direction or control; giving expert advice or assistance to terrorists on how to use chemical or biological weapons, evade surveillance, create false identities, avoid sanctions programs, or program computers and operate electronic equipment; training terrorist organizations in how to use weapons, fly airplanes, employ "guerilla" tactics, drive a truck,

or pilot a boat; and providing services such as money laundering or safe houses.

Plaintiffs also attempt to manufacture ambiguity where none exists. As explained above (supra at 11), the statutory definition of "expert advice or assistance" is based on the language of Federal Rule of Evidence 702, and distinguishes between "scientific, technical, or other specialized knowledge" on the one hand, and information that is common or general knowledge on the other. Plaintiffs find that distinction to be "fundamentally incoherent," Br. 48, because "almost every aspect of life" is informed by scientific or technical knowledge. Thus, plaintiffs reason, there is no such thing as "non-expert" advice. Ibid. That would be news to federal district courts throughout the country, which routinely apply the same language in Rule 702 and distinguish between witnesses who are and are not scientific or technical experts.

More importantly, plaintiffs' ruminations do not show that the statute fails to meet the constitutional standards of "relatively clear guidelines as to prohibited conduct," Posters 'N' Things, 511 U.S. at 525. Rather, they show only that plaintiffs' academic musings that much or all of human knowledge is ultimately "scientific" or "technical" in nature bears no reasonable resemblance to the way that ordinary people use and understand such words. Plaintiffs' approach is not how

constitutional adjudication should proceed, and it certainly does not meet the constitutional standard for vagueness.

Plaintiffs also argue that the statute does not, in fact, limit its prohibition to direct support rather than independent advocacy. Br. 51-54. Plaintiffs contend that the central purpose of the statute – to prohibit support that would free the terrorists' own resources to commit crimes – is served by prohibiting both direct support and independent activities. Br. 52. While independent advocacy might (in plaintiffs' own words, see Br. 52) "theoretically" free the terrorists' own resources and thus implicate the statute's central purpose, as explained above (supra at 9-10) the connection is an attenuated one, especially given the range of independent activities that "theoretically" might happen to benefit a terrorist group's overall goals. Absent a clearer statutory statement, Congress should not be presumed to have prohibited conduct bearing such an attenuated connection to the statute's purpose, especially where the legislative history (see U.S. Br. 5-6) clearly indicates that Congress did not intend to go so far as to reach independent advocacy.

We have also previously explained, see U.S. Br. 27-28, that the term "material" usually operates to limit the scope of the accompanying statutory terms (such as "training," "services," etc.), and in the present context indicates that the prohibited

support must have a "natural tendency" to affect the activities of a foreign terrorist group. Kungys v. United States, 485 U.S. 759, 772 (1988). As just noted, the most natural tendency to affect terrorist activities is through direct support rather than via independent activities.

Plaintiffs contend, however, that the scope of the material support statute is not narrowed by the use of the word "material." Br. 52. Plaintiffs note that "[a]nything that falls within the term 'training,' 'expert advice or assistance,' 'personnel,' or 'service' is *by definition* 'material support.'" Br. 52. That observation is correct, but it simply restates the question presented in this case – what, exactly, falls within the meaning of those terms? In answering that question, the disputed terms can and should be construed in light of the surrounding text, including the word "material," rather than (as plaintiffs suggest) interpreting the disputed terms in a vacuum. Plaintiffs offer no persuasive reason why surrounding text should be ignored when construing the terms in question.

More fundamentally, plaintiffs' arguments cannot be squared with the ordinary principle that a statute should be construed to preserve its constitutionality. As shown above (supra at 8-9), in response to this Court's constitutional vagueness concerns, Congress expressly limited the term "personnel" to direct support only. And as also explained above, it is unlikely that Congress

intended to address this Court's constitutional concern with respect to the term "personnel" while ignoring the identical concern as it applied to the remaining statutory terms ("training," "service," and "expert advice or assistance"); otherwise, the same independent activities permitted under the term "personnel" would remain banned under the other statutory terms. Plaintiffs, however, would read the limitation on "personnel" to be limited to that term alone, Br. 53, thus construing the statute to preserve rather than resolve the constitutional concern identified by this Court. That approach cannot be squared with the ordinary principle that a statute should be construed to preserve its constitutionality: Congress specifically amended the statute to address the vagueness concern identified by this Court, and if the statute as a whole is susceptible to a construction that would save its constitutionality, this Court is obligated to adopt it.

Similarly, our opening brief noted that the dictionary defines "service" as "an act done for the benefit or at the command of another," U.S. Br. 45 (quoting Webster's New International Dictionary 2075 (3d ed. 1993) (emphasis added)), and the definition's underlined portion contains a limitation that would confine the term to direct support only. But when plaintiffs cite our argument (Br. 49), they omit the part of the definition referring to "at the command of another" – the very

part of the definition that would address this Court's vagueness concern by limiting the term to direct support only. Again, ordinary principles of interpretation call for construing a statute to avoid constitutional doubts; plaintiffs cannot square that accepted principle with their intentional disregard of an ordinary meaning of word "service" that would address this Court's constitutional concern. Plaintiffs are seeking, rather than avoiding, constitutional doubts.

B. The Material Support Statute Is Not Overbroad Or Contrary to the First Amendment.

To be overbroad, a statute must prohibit a "substantial" amount of protected expression, judged in absolute terms and in relation to the law's plainly legitimate sweep. Virginia v. Hicks, 539 U.S. 113, 119-20 (2003). Facial invalidation on overbreadth grounds is "strong medicine," because "substantial social costs [are] created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." Id. at 122. Thus, plaintiffs bear the burden of demonstrating overbreadth. Ibid. Critically, the Supreme Court has declared that "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)," id. at 124. Under this standard, the district court correctly rejected plaintiffs' overbreadth

argument.

Plaintiffs raise several examples of what they consider to be constitutionally protected speech barred by the statute, arguing that those instances are "substantial" in relation to the statute's plainly legitimate sweep. Br. 41, 45, 48, 51. Even assuming plaintiffs' examples constitute protected speech (but see infra at 19-25), they are not "substantial" in relation to the statute's plainly legitimate sweep, which prohibits a vast array of support for criminal activity. To name but a few, as already described, the law bars providing mercenaries to a terrorist group to act under its direction or control; giving expert advice or assistance to terrorists on how to use chemical or biological weapons, evade surveillance, create false identities, avoid sanctions programs, or program computers and operate electronic equipment; training terrorist organizations in how to use weapons, fly airplanes, employ "guerilla" tactics, drive trucks, or pilot a boat; and providing services such as money laundering or safe houses. See supra at 14-15. Thus, as the full Fourth Circuit concluded, plaintiffs have "utterly failed to demonstrate . . . that any overbreadth is substantial in relation to the legitimate reach of § 2339B." United States v. Hammoud, 381 F.3d 316, 330 (4th Cir. 2004) (en banc).[2]

[2] The Supreme Court vacated Hammoud on other grounds, Hammoud v. United States, 543 U.S. 1097 (2005), but the relevant portions were reinstated on remand, United States v. Hammoud, 405

Plaintiffs contend that the terms "training" and "expert advice or assistance" are not limited to a finite number of topics, and therefore a "literally endless" number of constitutionally protected activities are banned. Br. 41, 48. But, as noted above, the crucial point of the material support statute is the many ways in which support and resources may knowingly be given directly to terrorist groups. This includes not only support that is intrinsically blameworthy (such as advice on how to build a bomb, create false identities, or launder money), but also training and expertise on topics that might in other circumstances appear to be benign (such as training on how to drive a truck, program a computer, fly an airplane, or pilot a boat). Whatever instances of constitutionally protected conduct plaintiffs may point to, they are not "substantial" judged in relation to the plainly legitimate sweep of the statute.

Furthermore, plaintiffs' overbreadth argument, like their vagueness challenge, relies upon hypotheticals at the extreme margins of the statute. Plaintiffs contend, for example, that the statute is overbroad because it prohibits them from directly training terrorist organizations on topics such as "music appreciation" or "needlepoint." Br. 41. Plaintiffs' frivolous examples betray a cavalier trivialization of the serious issues

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F.3d 1034 (4th Cir. 2005).

at stake, in light of the murderous behavior of the actual groups they wish to support. See supra at 1-3. And while it might be theoretically conceivable that someone wishes to train terrorists directly on those topics – or any other topic in the wide range of human knowledge – such speculation does not provide a realistic standard for measuring a statute's putative overbreadth, nor do concerns about teaching terrorists music appreciation provide a sound basis for facially invalidating such an important Act of Congress.

Invalidating a statute due to overbreadth is an "expansive remedy" imposed "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech," because "[m]any persons . . . will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." Hicks, 539 U.S. at 119. But where the supposedly "substantial" instances of protected speech consist of examples so far removed from the statute's core or from any realistic assessment of speech that might occur, there is no reason to believe that the "chill" with which overbreadth is concerned will occur, or that the "uninhibited marketplace of ideas" will suffer the harm justifying facial invalidation of the statute.

Furthermore, as noted, the Supreme Court has made clear that

overbreadth is seriously disfavored: "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." Hicks, 539 U.S. at 124.

That is precisely the case with the material support statute. This Court has already held that the statute is not specifically addressed to speech or expressive conduct. Humanitarian Law Project, 205 F.3d at 1133 ("What [the statute] prohibits is the act of giving material support . . . ."); id. at 1135 ("[T]he material support restriction here . . . is not aimed at interfering with the expressive component of their conduct but at stopping aid to terrorist groups."); id. at 1136-37 (material support statute "does not regulate speech or association per se. Rather, the restriction is on the act of giving material support to designated foreign organizations"). Instead, the statute is aimed at acts of providing support to groups like the Tamil Tigers and the PKK, which have murdered numerous people. "[T]here is no constitutional right to facilitate terrorism by giving terrorists" aid that might assist them in "carry[ing] out their grisly missions." Id. at 1133.

And, as this Court has already held, because the statute is not aimed at speech but serves a purpose unrelated to the content of any expression, it is subject to intermediate scrutiny under

the First Amendment. Ibid. Applying that standard, the material support statute is constitutional because it is within the Federal Government's authority to regulate the dealings of its citizens with foreign entities, ibid.; it promotes an essential government interest "in preventing the spread of international terrorism," ibid.; it is unrelated to suppressing free expression for the reasons stated above, ibid.; and it is reasonably tailored, considering the "wide latitude" given to the Government in this area "bound up with foreign policy considerations," and in light of Congress's conclusion that designated terrorist groups "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct," id. at 1136 (emphasis added). See Hammoud, 381 F.3d at 329 (agreeing with this Court that "[s]ection 2339B satisfies all four prongs of the O'Brien test").

That analysis applies even where the material support in question takes the form of both words and conduct – in that situation, the statute does not regulate the content of any expression or the speaker's viewpoint, but the act of knowingly giving material support. Nor does it matter whether the words are intrinsically blameworthy (training on how to build a bomb) or seemingly benign in other contexts (advice on international law, or how to program a computer), because, in either instance, the statute's aim is not directed at the content of the

expression, but at the act of giving material support to deadly terrorist organizations. Accordingly, all such prohibitions are subject only to intermediate scrutiny under the First Amendment, and all such restrictions (for the reasons stated above) pass muster under that standard.

Because the prohibition on giving material support to a terrorist group is not aimed at speech and otherwise satisfies the intermediate scrutiny standard, the prohibition does not contravene the First Amendment. Accordingly, contrary to plaintiffs' argument (Br. 42, 45-46, 49, 51), the statutory ban does not violate the First Amendment as applied to plaintiffs' conduct. Furthermore, the statute is not overbroad, because there clearly is not a "substantial" amount of speech that is unconstitutionally restricted under the statute.[3]

II. THE DISTRICT COURT CORRECTLY REJECTED PLAINTIFFS' LICENSING SCHEME ARGUMENT

The material support statute, in addition to banning material support or resources to designated foreign terrorist organizations, see 18 U.S.C. § 2339B(a), provides an exception:

> 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

[3] If this Court were to disagree and find the statute unconstitutional as applied (but not facially invalid), it should nonetheless vacate the district court's broad injunction and remand for entry of a narrower injunction commensurate with whatever as-applied violation is identified.

> 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 [8 U.S.C. § 1182 (a)(3)(B)(iii)].

18 U.S.C. § 2339B(j). Plaintiffs believe this exception is a facially invalid licensing scheme under the First Amendment. Br. 55-59.

As the district court held, ER 89 n. 27, plaintiffs lack standing to challenge the exception in § 2339B(j). To establish standing, plaintiffs must demonstrate at least a "causal connection between the injury and the conduct complained of" and that the injury is "likely" to be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). But plaintiffs' claimed injury – their inability to provide the aid they say they want to give to the PKK and Tamil Tigers – is not caused by the exception in § 2339B(j), nor would invalidating that exception redress their injury. Even if the exception in § 2339B(j) were invalidated, the material support ban in § 2339B(a) would remain in place. Thus, plaintiffs lack standing to challenge the exception because it is not the cause of their injury nor would their challenge, if successful, redress the alleged injury. Notably, plaintiffs' brief does not even dispute the district court's holding on standing.

Plaintiffs nevertheless assert that the exception to the material support statute is a "licensing scheme" that "grants the

Secretary unfettered discretion to license speech." Br. 55-56. They therefore contend that the exception violates the First Amendment on its face, and that they can bring such a challenge before they have even applied for any "license." Ibid. But the Supreme Court has foreclosed such a challenge in this situation.

In City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988), the Court addressed "when a licensing statute allegedly vest[ing] unbridled discretion in a government official . . . may [be] challenge[d] . . . facially without the necessity of first applying for, and being denied, a license." Id. at 755-56. The Court recognized that in certain situations "courts must entertain an immediate facial attack on the law." Id. at 759. Such pre-enforcement facial attacks are permitted in some circumstances because licensing schemes may pose a significant risk of content-based discrimination by the licensor or of self-censorship by potential licensees – and those risks can present serious harms to First Amendment values. Ibid.

The Court held, however, that not every licensing scheme is subject to a pre-enforcement facial attack. Ibid. ("This is not to say that the press or a speaker may challenge as censorship any law involving discretion to which it is subject."). Rather, only those licensing schemes that target speech or expressive activity will be susceptible to a pre-enforcement First Amendment facial challenge, because only those schemes present the very

harms to First Amendment values that justify allowing such an attack.

Thus, the Court concluded that to be susceptible to such a challenge, "[t]he 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. at 759; see also United States v. Griefen, 200 F.3d 1256, 1265 (9th Cir. 2000). In contrast, laws that "are not aimed at conduct commonly associated with expression" are not susceptible to such challenges. Lakewood, 486 U.S. at 760-61. For example, courts may not entertain a pre-enforcement facial challenge to "a law requiring building permits" or a licensing requirement for "soda vendors," id. at 761, because such laws lack a close nexus to expression or conduct commonly associated with expression, and therefore pose no substantial threat to First Amendment values.

Neither the material support prohibition in § 2339B(a), nor the exception found in § 2339B(j), has "a close enough nexus to expression, or to conduct commonly associated with expression," Lakewood, 486 U.S. at 759, to permit a pre-enforcement facial First Amendment challenge of the kind brought here. This Court has already held that "cases involv[ing] licensing schemes that were held to violate the Constitution by granting government officials unfettered discretion to regulate First Amendment

activity" are inapplicable here because the prohibition in the material support statute "does not regulate speech" but, rather, "the restriction is on the act of giving material support to designated foreign organizations." Humanitarian Law Project, 205 F.3d at 1137. The same analysis holds for the exception in § 2339B(j), which is targeted solely at the act of providing material support or resources to terrorists rather than at speech or expressive conduct.

Plaintiffs counter that the exception in § 2339B(j) "singles out" certain types of material support – namely, "training," "personnel," and "expert advice or assistance" – and applies only to these types. Br. 56. But that point does not change the applicable constitutional analysis. As noted, the material support prohibition singles out the conduct of providing support to terrorists, not speech. The same is true for the exception, which simply focuses on particular kinds of conduct, rather than speech.

Plaintiffs also contend that the exception in § 2339B(j) lacks the procedural safeguards required in licensing cases such as Freedman v. Maryland, 380 U.S. 51 (1965). Br. 58-59. But Freedman-style procedural safeguards do not apply to a licensing scheme that, like the material support statute, is content-neutral and not aimed at speech or expressive conduct. Thomas v. Chicago Park District, 534 U.S. 316, 322 (2002); see Southern

Oregon Barter Fair v. Jackson County, 372 F.3d 1128, 1138 (9th Cir. 2004). Accordingly, plaintiffs' argument must fail.

To be sure, even a content-neutral law like the material support statute cannot confer "unduly broad discretion in determining whether to grant or deny a permit," Thomas, 534 U.S. at 323, and plaintiffs argue that the Secretary's discretion under the exception in § 2339B(j) is unconstitutionally unfettered, Br. 57-58. But this Court has already considered and rejected a nearly identical argument by plaintiffs concerning the Secretary's discretion.

In a previous appeal, plaintiffs argued that 8 U.S.C. § 1189(1) vests "unfettered discretion" in the Secretary of State to designated entities as foreign terrorist organizations. Humanitarian Law Project, 205 F.3d at 1136-37. That standard provides that the Secretary may designate a group as a foreign terrorist organization if, inter alia, the organization "engages in terrorist activity (as defined in [8 U.S.C. § 1182(a)(3)(B)]." This Court held that the statute "does not grant the Secretary unfettered discretion" because it "authorizes the Secretary to designate only those groups that engage in terrorist activities." Id. at 1137. Under that standard, the Secretary could not, for example, "designate the International Red Cross or the International Olympic Committee as a terrorist organization," but must "have reasonable grounds to believe that an organization has

engaged in terrorist acts – assassinations, bombings, hostage-taking and the like – before she can place it on the list." Ibid. This Court found that standard "sufficiently precise to satisfy constitutional concerns," noting that because "the regulation involves the conduct of foreign affairs, we owe the executive branch even more latitude than in the domestic context." Ibid.

The exception in 18 U.S.C. § 2339B(j) likewise does not confer unfettered discretion upon the Secretary. Similar to the standard for designating foreign terrorist organizations, the exception states that "[t]he Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in [8 U.S.C. § 1182 (a)(3)(B)(iii)]." 18 U.S.C. § 2339B(j). The standard for designating terrorist groups is sufficiently confined for constitutional purposes because the Secretary must find that the organization is engaged in terrorist activities. It follows that the standard for the exception in § 2339B(j) is also sufficiently confined for constitutional purposes because the Secretary must find that the material support in question may not be used to carry out terrorist activity.

III. THE MATERIAL SUPPORT STATUTE DOES NOT REQUIRE SPECIFIC INTENT TO FURTHER TERRORIST ACTS

In a prior appeal, plaintiffs argued that the material support statute punishes mere association with a foreign

terrorist organization, and thus constitutes "guilt by association" in violation of the First Amendment under cases such as NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). See Humanitarian Law Project, 205 F.3d at 1133. This Court rejected that argument, holding that the material support statute "does not prohibit being a member of one of the designated groups" but instead prohibits "the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives." Ibid. Accordingly, any First Amendment "guilt by association" claim by plaintiffs is foreclosed.

Plaintiffs now pursue a nearly identical claim, contending that the material support statute punishes mere association with foreign terrorist organizations in violation of due process. Specifically, they argue that the material support statute should be construed to require that a defendant giving material support to a designated terrorist group have the specific intent to further the group's illegal activities. Br. 21. In the alternative, they argue that, if the statute is not so construed, it violates the Due Process Clause as applied to the material support plaintiffs wish to provide. Neither argument is well taken.

A. Congress Rejected Specific Intent.

In the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 § 6603, 118 Stat. 3638, 3762-63, Congress amended the material support statute to make the prohibition's scienter requirement unmistakable: To violate the statute, "a person must have knowledge that the organization is a designated terrorist organization . . ., that the organization has engaged or engages in terrorist activity . . ., or that the organization has engaged or engages in terrorism . . . ." 18 U.S.C. § 2339B(a)(1).

While the Government must prove that a defendant knows that the recipient is a terrorist group or that the group engages in terrorist activity or terrorism, Congress clearly did not require that the Government prove a defendant's specific intent for his support to further a terrorist group's criminal acts. As the district court correctly held, the statutory mens rea requirement is "straightforward, . . . clear and unambiguous," and requires only "that a donor know that the recipient of the material support is a foreign terrorist organization or engages in terrorist activities." ER 71.

The clarity with which Congress spoke is usefully contrasted with the prohibition in an adjacent statute, 18 U.S.C. § 2339A. That statute has a specific intent requirement, making it a crime to "provide[] material support or resources . . . knowing or

intending that they are to be used in preparation for, or in carrying out" various criminal acts. 18 U.S.C. § 2339A. By contrast, the material support provision at issue here (§ 2339B) contains no such specific intent requirement. As the district court held, ER 71-72, "Congress knows how to include a specific intent requirement when it so desires, as evidenced by § 2339A," and Congress "acted deliberately in excluding such an intent requirement in § 2339B." See Bates v. United States, 522 U.S. 23, 29-31 (1997) (where criminal provision included an express "intent to defraud" requirement, Court refused to read an identical requirement into an adjacent and similar criminal provision that did not expressly include that requirement).

The district court's construction of the scienter requirement is consistent with the statute's central concern. As explained in our opening brief, U.S. Br. 4-5, Congress determined that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 ("Antiterrorism Act"), Pub. L. No. 104-132 § 301(a)(7), 110 Stat. 1214, 1247, 18 U.S.C. § 2339B note (emphasis added). Because of "the fungibility of financial resources and other types of material support," any such support "helps defray the costs to the terrorist organization of running the ostensibly legitimate activities.

This in turn frees an equal sum that can then be spent on terrorist activities." H.R. Rep. 104-383, at 81 (1995).

Given its fungibility, material support is just as harmful whether or not the donor intends to further terrorist acts. And even if the donor has no such intent, "[o]nce the support is given, the donor has no control over how it is used." Humanitarian Law Project, 205 F.3d at 1134.

Further, plaintiffs ignore the essential point that even if the support is not fungible and even if the donor could somehow ensure it would be used only for humanitarian purposes, the support would still be harmful, by allowing terrorists to gain good will that could be used for terrorist recruitment or other assistance, or to gain political legitimacy for those who carry out deadly terrorist acts. See ER 27 (McKune Decl. ¶ 11). Thus, Congress banned a broad array of material support precisely because it all winds up furthering the terrorist group's criminal activities, regardless of the donor's intent.

Congress enacted a mens rea requirement consistent with that statutory purpose of eliminating support for terrorists groups altogether, by requiring only that a donor know that he is giving support to a designated terrorist group (or that the group engages in terrorism) rather than requiring a donor's specific intent to further the terrorists' criminal acts. To construe the statute as plaintiffs suggest would be strongly at odds with the

statute's central purpose; a specific intent requirement would open up precisely the loophole for providing support that Congress closed.

Congress's clarification of the scienter requirement is all the more clear because the 2004 amendment was enacted in direct response to prior judicial constructions of the mens rea requirement. Prior to 2004, the material support statute specified only that it was a crime to "knowingly provide[] material support or resources to a foreign terrorist organization." 18 U.S.C. § 2339B(a)(1) (Supp. III 2003). This Court (in a prior appeal) construed that old version of the statute to require "proof that a defendant knew of the organization's designation as a terrorist organization or proof that a defendant knew of the unlawful activities that caused it to be so designated." Humanitarian Law Project, 352 F.3d at 400, vacated by 393 F.3d 902 (9th Cir. 2004) (en banc). Similarly, the Fourth Circuit sitting en banc construed the statute to require proof that the defendant "knew that [the designated foreign terrorist organization] engaged in terrorist activity." Hammoud, 381 F.3d at 341 & n.12. A district court, however, reached a contrary conclusion, construing the material support statute to require proof of a defendant's specific intent to further the illegal activities of a designated terrorist group. United States v. Al-Arian, 308 F. Supp.2d 1322, 1339 (M.D. Fla.

2004); see Hammoud, 381 F.3d at 374-80 (Gregory, J., dissenting) (agreeing with Al-Arian).[4]

In the wake of those decisions, Congress clarified that, to violate the statute, "a person must have knowledge that the organization is a designated terrorist organization . . ., that the organization has engaged or engages in terrorist activity . . ., or that the organization has engaged or engages in terrorism . . . ." 18 U.S.C. § 2339B(a)(1). Congress was obviously well aware of the prior judicial interpretations interpreting the material support statute, see, e.g., Lane v. Pena, 518 U.S. 187, 202 (1996), and its 2004 amendment of the mens rea requirement was intended to settle the scienter issue, and not adopt a specific intent requirement.

Plaintiffs observe that § 2339B does not expressly reject specific intent. Their argument is that "Congress was silent on

[4] It is important to note that it does not appear that Al-Arian actually adopted the specific intent requirement urged by plaintiffs. Al-Arian recognized that a jury can infer specific intent "when a defendant knowingly provides weapons, explosives, or lethal substances" to a known terrorist group, or "when a defendant knows that the organization continues to commit illegal acts and the defendant provides funds to that organization knowing that money is fungible and, once received, the donee can use the funds for any purpose it chooses." 308 F. Supp.2d at 1339; see Staples, 511 U.S. at 615 n.11 ("knowledge can be inferred from circumstantial evidence"). Although we believe that even the limited specific intent standard applied in Al-Arian is mistaken, should this Court hold that the Government must prove a scienter over and above that expressly set forth in the statute, the Court should make clear that such circumstantial evidence cited by the Al-Arian court is sufficient to sustain a conviction.

whether it intended to incorporate a specific intent standard," Br. 35, thus leaving room for this Court to rewrite the statute to require specific intent. But here, "Congress' silence in this regard can be likened to the dog that did not bark." Chisom v. Roemer, 501 U.S. 380, 395-96 & n.23 (1991). Courts had reached opposing interpretations of the statute's mens rea element, and Congress's amendment conclusively resolved the statute's mens rea requirement. Congress' silence on specific intent cannot reasonably be construed to have left open the very matter that Congress was conclusively addressing.

Plaintiffs also argue that "courts frequently read mens rea requirements into criminal statutes, even where Congress has not expressly included them in the statutory language." Br. 33. But whether and what kind of mens rea the statute contains is a "question of statutory construction" to determine Congress's intent, Staples v. United States, 511 U.S. 600, 604 (1994), because "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute," Liparota v. United States, 471 U.S. 419, 424 (1985).

Moreover, the cases cited by plaintiffs in which courts added a mens rea requirement were far more ambiguous than the material support statute. In some cases, courts inferred a mens rea requirement where the statute contained no express reference

to scienter at all. Staples, 511 U.S. at 605. In other cases, statutes required that the defendant act "knowingly," but were unclear whether that term modified only some or all of the elements of the offense. Liparota, 471 U.S. at 424 & n.27; United States v. X-Citement Video, 513 U.S. 64, 68 (1994).

The material support statute is at the opposite end of the spectrum. It makes clear that a defendant must act "knowingly." 18 U.S.C. § 2339B(a)(1). Nor is it unclear to which elements the term "knowingly" applies: "a person must have knowledge that the organization is a designated terrorist organization . . ., that the organization has engaged or engages in terrorist activity . . ., or that the organization has engaged or engages in terrorism . . . ." 18 U.S.C. § 2339B(a)(1). Accordingly, the statute is unambiguous and leaves no room or reason to read in a different and contradictory mens rea requirement.

Even if the statute were ambiguous, plaintiffs err in presuming that any inferred mens rea must be one of specific intent to further the criminal acts of designated terrorist groups. "The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" Carter v. United States, 530 U.S. 255, 269 (2000). In some cases, "a general intent requirement suffices to separate wrongful from 'otherwise innocent' conduct," whereas "some

situations may call for implying a specific intent requirement into statutory text." Ibid.

Plaintiffs repeatedly claim that their desired support constitutes "morally innocent activity," Br. 20, and that, therefore, a specific intent requirement is necessary to avoid criminalizing innocent conduct. But plaintiffs' desired conduct is far from "innocent."

Plaintiffs attempt to characterize their conduct as merely "teach[ing] international law or how to petition the UN," Br. 27; see also Br. 19 ("[N]o one could reasonably say that teaching human rights advocacy, providing tsunami relief, or petitioning Congress is a wrong in itself."), but that description leaves out the most critical part of the statutory prohibition. What the statute forbids is direct support given to designated foreign terrorist organizations, which are so designated because they engage in terrorist activity or terrorism threatening U.S. nationals or the national security of this country. See 8 U.S.C. § 1189(a)(1). And, moreover, all parties agree that the statute prohibits such conduct only where a defendant knows that he is giving support to a group designated as a foreign terrorist organization, or knows that the group engages in terrorism or terrorist activities.

Providing direct support to known or designated terrorists can in no way be described as an apparently innocent act. By way

of contrast, the Court in Staples considered the "common experience" of gun ownership to be an innocent act, 511 U.S. at 613, given the "long tradition of widespread lawful gun ownership by private individuals in this country," id. at 610, and the fact that "[r]oughly 50 percent of American homes contain at least one firearm of some sort," id. at 613-14. There is no way that plaintiffs can characterize giving direct support to a known or designated terrorist group as a "common experience" or one backed by a "long tradition" of lawful practice engaged in by "[r]oughly 50 percent" of Americans. Nor can such assistance to terrorists be considered benign conduct similar to "a retail druggist . . . return[ing] an uninspected roll of developed film," X-Citement Video, 513 U.S. at 69, or similar to the erroneous receipt of food stamps mailed through administrative error, Liparota, 471 U.S. at 426-27.

That direct support given to known terrorists is not morally innocent is all the more apparent given Congress's finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism Act § 301(a)(7), 110 Stat. at 1247, 18 U.S.C. § 2339B note (emphasis added). Nor can direct support given to known terrorists be considered morally innocent where "the fungibility of financial resources and other types of material support" means that any

such support will wind up helping terrorists by, at a minimum, freeing the terrorists' resources to use for their criminal activities. See supra at 34-35.

As this Court explained, "[m]aterial support given to a terrorist organization can be used to promote the organization's unlawful activities, regardless of donor intent. Once the support is given, the donor has no control over how it is used." Humanitarian Law Project, 205 F.3d at 1134 (emphasis added). And, as previously noted (supra at 35), even non-fungible support confined to humanitarian purposes causes harm by increasing the terrorist group's good will, recruiting, and image of legitimacy.

Plaintiffs are not assisted by invoking examples of supposedly innocent conduct that could be prohibited if the material support statute were upheld. Br. 20, 28. First, there is nothing at all alarming, as plaintiffs suggest (Br. 28), in making it a crime to give a car ride or lodging to someone whom the defendant knows engages in terrorism or terrorist activities. If a person knows Osama bin Laden's identity as a terrorist, but nonetheless chooses to give him lodging or lend him a cell phone, it would hardly be surprising that the Government could prosecute that donor, even if it could not prove the donor's intent to support terrorism. Plaintiffs suggest (Br. 32 n. 13) that the constitutional outcome should somehow be different when the prohibited aid is given to al Qaeda. But it is difficult to see

why knowingly providing transportation to a PKK or LTTE leader is necessarily "morally innocent conduct," while the same ride for Osama bin Laden is not. See also infra at 51-52.[5]

Second, as the Court emphasized in Staples, there is no uniform rule for whether and what kind of mens rea will be inferred by a court; rather, what scienter is required "depends upon a commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items." 511 U.S. at 619. Accordingly, hypotheticals raised by plaintiffs in widely varying contexts provide no assistance for interpreting the instant statute.

Contrary to plaintiffs' argument (Br. 33), the material support statute is entirely different from the provision of the Smith Act at issue in Scales (where the Supreme Court inferred a specific intent requirement). While Scales quotes the entire Smith Act, Scales, 367 U.S. at 205 n.1, the only portion at issue was the so-called "membership clause" which criminalized mere membership in the Community Party. Id. at 205 (petitioner convicted under membership clause); id. at 220 (jury instructions involved only the membership clause). The material support

[5] Furthermore, giving a ride to a single member of a foreign terrorist organization would in many instances not constitute providing material support to the organization itself. Thus, plaintiffs' hypothetical may not fall under the statute at all.

statute, however, does not prohibit membership, but the act of providing material support to terrorists. Humanitarian Law Project, 205 F.3d at 1133.

Plaintiffs observe that a single district court judge, and one court of appeals judge in dissent, have interpreted the material support statute to require specific intent. Br. 33. But all the cited cases were decided under the prior version of the statute, before Congress amended the statute's mens rea requirement in December 2004. See also supra at 37 n. 4.

Plaintiffs also cite a statement from Senator Hatch supposedly supporting their interpretation. Br. 35-36. But it is not clear that Senator Hatch intended his statement to explain the legislation now enacted as § 2339B. Rather, it appears from Senator Hatch's reference to Presidential findings that he was referring to a prior legislative proposal which included a requirement of Presidential findings (rather than findings by the Secretary of State) that a group is engaged in terrorist activities. See Cong. Rec. 104th Cong. 1st Sess. 4500 (1995) (introducing S. 390, Sec. 301, 104th Cong. 1st Sess.). In any event, two sentences from a single Senator cannot overcome the plain text of the statute, adopted to address concerns raised by this Court; in 2004, Congress clearly expressed the scienter requirement in the statute's text, and that text plainly controls.

Finally, plaintiffs contend that the statute creates absurd results without a specific intent requirement because a defendant could be convicted for giving support to a group that was improperly designated. Br. 28-29. Whatever the merits of that concern may be, they are particularly unwarranted here because the Tamil Tigers did in fact challenge its designation, and its challenge was rejected by the D.C. Circuit, and the PKK chose not to seek review at all, U.S. Br. 6, which is not surprising given its activities. Plaintiffs cannot seriously contend that the PKK and Tamil Tigers are not foreign terrorist organizations.

In any event, as this Court has explained, there is nothing absurd or unconstitutional about using a possibly erroneous terrorist designation to serve as a predicate for a conviction under the material support statute – just as there is nothing absurd or unconstitutional about using a possibly erroneous (or even possibly unconstitutional) prior conviction as the predicate for a conviction under the felon in possession of a firearm statute. United States v. Afshari, 426 F.3d 1150, 1157 (9th Cir. 2005).

B. Due Process Does Not Require Specific Intent.

Plaintiffs contend that the material support statute violates due process unless construed to require a donor's intent to further the criminal acts of a designated terrorist organization. More broadly, plaintiffs argue that in every

instance in which a person is held criminally responsible for his or her relationship to a group engaged in criminal acts, the Due Process Clause demands proof that the defendant intended to further the group's illegal activities. Br. 21, 26. No such principle exists in law, and the district court correctly upheld the material support statute against plaintiffs' due process challenge. Moreover, plaintiffs fail to appreciate the importance of the Government's foreign affairs authority in prohibiting material support to known terrorist groups.

1. Foreign Affairs Considerations Counsel Strongly in Favor of the Statute's Constitutionality.

The Supreme Court and the courts of appeals have upheld the authority of the Government to place restrictions or outright bans on dealings with foreign entities that have acted against United States interests. Significantly, those bans did not make any exception for supposedly "innocent" dealings not intended to support the disfavored foreign regime – just as the material support statute does not make any exception for a donor who does not intend for his support to aid foreign terrorism. Furthermore, those cases emphasize that the Government's authority to restrict or ban material support is at its apex where, as here, the prohibition touches so centrally upon the conduct of foreign affairs.

For example, in Regan v. Wald, 468 U.S. 222, 240-43 (1984), the Supreme Court upheld a Presidential prohibition on any

dealings with Cuba against the plaintiff's right-to-travel due process claim. The Court explained that the Government had good reason to "curtail the flow of hard currency to Cuba" because such funds "could then be used in support of Cuban adventurism." Id. at 243. Although the prohibition (like the material support statute) made no distinctions depending on the donor's intent, the Court nonetheless upheld the ban, noting the Government's wide latitude in matters touching on foreign affairs: "Matters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Id. at 242. And, the Court emphasized, the constitutional analysis differed where the right at issue touched upon international concerns, rather than purely domestic considerations. Id. at 241 n.25.

Likewise, this Court and other Circuits have rejected arguments that restrictions on dealings with foreign nations are unconstitutional. In Freedom To Travel Campaign v. Newcomb, 82 F.3d 1431 (9th Cir. 1996), this Court upheld the Cuban travel ban against First and Fifth Amendment challenges, as well as a non-delegation argument. Again, this Court's analysis noted that the Government's "foreign affairs authority is given even broader deference than in the domestic arena" – so much so that a statute invalid in domestic application could nonetheless be "valid in

the foreign arena." Id. at 1438; see id. at 1439 (greater deference for restrictions on international right to travel). And that restriction, like the material support statute, did not make any exception based upon whether a person did not intend to support or aid the Castro regime. Id. at 1434. Accord Walsh v. Brady, 927 F.2d 1229, 1234-35 (D.C. Cir. 1991) (rejecting First Amendment and Equal Protection challenges to prohibition on travel related payments to Cuba); Veterans & Reservists for Peace in Vietnam v. Regional Commissioner of Customs, 459 F.2d 676, 679 (3d Cir. 1972) (upholding prohibitions on dealings with North Vietnam against First Amendment and non-delegation challenges, noting that Congress, "when dealing with matters of foreign relations," is afforded "broader discretion than would be permissible with regard to domestic affairs").

In this very case, this Court held that foreign affairs considerations are a particularly relevant in affirming the statute's constitutionality in the First Amendment context. Humanitarian Law Project, 205 F.3d at 1136 ("Because the judgment of how best to achieve that end is strongly bound up with foreign policy considerations, we must allow the political branches wide latitude in selecting the means to bring about the desired goal.").

Likewise, this Court in this case has found the same consideration relevant with respect to plaintiffs' argument that

the statute confers unfettered discretion in the Secretary of State. Id. at 1137 ("[B]ecause the regulation involves the conduct of foreign affairs, we owe the executive branch even more latitude than in the domestic context."). The greater latitude afforded to the Government in the foreign affairs context applies with equal force whether it is in the context of the First Amendment, the Secretary's discretion, the right to travel, or the due process mens rea issue. After all, one of the core reasons for affording greater latitude in this area – to ensure the Government's ability to protect the Nation against national security threats from abroad[6] – applies with equal force regardless of the constitutional issue involved.

Plaintiffs contend that foreign affairs considerations do not bear on the scienter analysis, and that Scales required

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[6] See, e.g. United States v. Flores-Montano, 541 U.S. 149, 153 (2004) ("It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity."); United States v. Odutayo, 406 F.3d 386, 391-92 (5th Cir. 2005) ("The interest in the regulation of the exportation of weapons, ammunition, and encryption technology, similar to the interest in the flow of currency, represents the fundamental power - indeed, responsibility - of every sovereign nation to maintain its national security."); United States v. Boumelhem, 339 F.3d 414, 423 (6th Cir. 2003) ("[T]he United States's interest in preventing the export of weapons to other countries also implicates the sovereign's interest in protecting itself."); United States v. Oriakhi, 57 F.3d 1290, 1296-97 (4th Cir. 1995) ("[I]nherent in national sovereignty are the overarching rights of a nation to defend itself from outside threats, to act in relation to other nations, and to secure its territory and assets" including "its power to prohibit the export of its currency, national treasures, and other assets.").

specific intent even though (in plaintiffs' view) it involved the exercise of foreign affairs authority. Br. 31. But Scales makes the opposite point – that the foreign affairs context matters. In construing the statute at issue in Scales, the Supreme Court noted that it had "pass[ed] on a similar provision" in Galvan v. Press, 347 U.S. 522 (1954), but that the statute in Galvan "did not press nearly so closely on the limits of constitutionality as this enactment [in Scales]." Scales, 367 U.S. at 222. And as Galvan explained, the statute at issue there was further from the limits of due process precisely because it "touch[ed] . . . basic aspects of national sovereignty, more particularly our foreign relations and the national security." Galvan, 347 U.S. at 530.

In other words, contrary to plaintiffs' contention, Scales itself recognized that the statute under consideration there did not implicate foreign affairs concerns, as the statute in Galvan did. Moreover, Scales recognized that, where foreign affairs considerations are implicated, the statute will not "press nearly so closely on the limits of constitutionality" with respect to due process and mens rea considerations. 367 U.S. at 222. Galvan was not further from the due process line because the statute at issue concerned aliens; the Court itself noted that "an alien has the same protection . . . under the Due Process Clause as is afforded to a citizen." Id. at 530. Nor was Galvan further from the due process line because it was not a

criminal statute; as plaintiffs themselves recognize, Br. 26 n.12, the same due process principle applies in both the criminal and civil contexts.

Indeed, plaintiffs themselves understand that foreign affairs considerations matter. As noted above, supra at 42-43, plaintiffs concede that whether the statute could ban material support to al Qaeda would "pose a very different constitutional question." Br. 32 n.13. Plaintiffs' contention is based on Congress's authorization of military force and the "customary" prohibition "forbid[ing] aiding the enemy during a military conflict." Ibid. Of course, we disagree with the validity of that distinction (see supra at 42-43) – not because we think foreign affairs considerations do not matter (they do), but because those considerations weigh as much in favor of banning material support for al Qaeda as for any other designated foreign terrorist organization. But assuming plaintiffs' point has any merit, it is no more than an affirmation of the principle that the foreign affairs context matters greatly in the constitutional analysis.

Plaintiffs also contend that the material support ban is different for al Qaeda than for any other foreign terrorist organization because "al Qaeda appears to engage exclusively in illegal activities." Br. 32 n.13. Plaintiffs do not explain, however, why the constitutional analysis would change depending

on whether, for example, al Qaeda opened an orphanage or other humanitarian endeavor. The only conceivable explanation is that one can presume that support to a terrorist group engaging only in criminal acts will necessarily aid terrorism, whereas the same assumption cannot be made for terrorist groups engaging in both lawful and unlawful activities. But if that is the argument, it is premised on a rejection of Congress's express findings – that all contributions to terrorist groups aid their criminal acts, see supra at 34 – and plaintiffs provide no reason why their view should trump Congress's findings.

Before the district court, plaintiffs argued that the greater deference afforded the Government in the foreign affairs area applies only to dealings with foreign nations, not foreign entities such as designated foreign terrorist organizations, citing National Council of Resistance to Iran v. Department of State, 251 F.3d 192 (D.C. Cir. 2001). In that case, the Government observed that foreign nations do not receive due process protection, and argued that the same principle should apply to foreign entities. Although the D.C. Circuit agreed with the premise, it declined to apply that principle to foreign entities with a presence in the United States. Id. at 202-03. That decision does not assist plaintiffs, however, as no one argues that the Due Process Clause is inapplicable in this case.

2. Providing Material Support to a Criminal Group Differs From Mere Membership.

In support of their argument that due process demands a specific intent requirement in the material support statute, plaintiffs rely principally on Scales v. United States, 367 U.S. 203 (1961). Scales, however, quickly put to rest any notion that a defendant cannot be convicted because of his connection to a criminal group: "Any thought that due process puts beyond the reach of the criminal law all individual associational relationships, unless accompanied by the commission of specific acts of criminality, is dispelled by familiar concepts of the law of conspiracy and complicity. . . . [S]ociety, having the power to punish dangerous behavior, cannot be powerless against those who work to bring about that behavior." Id. at 225.

The Court did explain (in language critical to plaintiffs' argument) that due process does impose some limits on punishing associational relationships:

> In our jurisprudence guilt is personal, and when the imposition of punishment on status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . ., 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.

Id. at 224-25. From that sentence, plaintiffs formulate the sweeping proposition that every statute criminalizing a person's relationship with a criminal organization automatically violates

due process unless it requires a specific intent to further the criminal organization's illegal activities. But Scales in no way endorses the plaintiffs' one-size-fits-all scienter requirement.

Scales asks whether the defendant's relationship to the criminal group is "sufficiently substantial," id. at 225, but the Court did not suggest that a substantial relationship to a criminal group could be established solely through only one type of mens rea. To the contrary, using language decidedly eschewing any rigid rule, the Court held that the ultimate question of whether due process is satisfied depends on a "total constitutional assessment of the statute," id. at 228, and "an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability." Id. at 226. In the end, a court must determine whether a defendant has a sufficient "quantum of participation [in] the organization's alleged criminal activity" such that it supplies a "significant form of aid and encouragement" to the group's criminal acts, id. at 227.

Under that inquiry, whether a conviction will satisfy due process depends on a combination of factors, including the mens rea required by the statute, as well as the nature of the defendant's actions in relation to the criminal group. The due process analysis asks whether, in combination, the relevant

factors demonstrate that the defendant has a sufficiently close nexus to the organization's criminal activities.

For example, in Scales, the statute on its face punished membership alone without requiring any further connection to the group. Id. at 205 n.1. The Court acknowledged (without actually deciding) that mere membership, by itself, might be "too tenuous" a connection to the group's unlawful activities support a conviction consistent with due process. Id. at 226; see also id. at 228 (noting that membership alone "fall[s] short" of the kind of "concrete, practical" support given by "a conspirator [who] act[s] in furtherance of that enterprise"). But because the statute was construed to require more than mere membership – specifically, that the defendant be an "active" member who intended to further the group's criminal activities, id. at 226-27; see also id. at 222-24 – it satisfied due process concerns. Id. at 228.

In other words, the more remote a defendant's own actions are to the criminal group's illegal activities (as in the case of membership alone), then the more stringent the statute's scienter requirement must be (as in the specific intent to further the group's criminal acts), so that those factors, in combination, will result in the defendant having a sufficiently substantial connection to the group's criminal activities.

The due process analysis, however, is altogether different

when the statute at issue does not criminalize being a member of a group that engages in illegal activity, but instead punishes a defendant for giving material support to such a group (especially in an international context). It is self-evident that merely signing onto the membership rolls of a group engaged in criminal wrongdoing is a far cry from giving the group something that could be used to carry out or assist its criminal acts. Indeed, Scales itself noted the difference, observing that membership does "nothing more than signify[]" the defendant's "assent to [the group's] purposes" and provide "moral encouragement" to the group, which "fall[s] short" of other "concrete, practical" support that a defendant might give to the criminal group. Id. at 227. And where the defendant's own actions evince a stronger and closer connection to the criminal group (as in the case of giving material support to the group), then the statute's scienter requirement may be correspondingly less stringent (as in knowing the group's criminal purposes, even without an intent to further its unlawful acts) and still satisfy due process.

That is precisely the case with the material support statute. As this Court has already held, the statute does not criminalize mere membership, but the act of giving material support to a group the donor knows is a terrorist group or engages in terrorism or terrorist activities. Humanitarian Law Project, 205 F.3d at 1136-37 (material support statute "does not

regulate speech or association per se. Rather, the restriction is on the act of giving material support to designated foreign organizations."). The statute prohibits, for example, providing money, weapons, communications equipment, explosives, or false identification, to a designated terrorist group. 18 U.S.C. § 2339A(b)(1). Such support, by its very nature, evinces a much stronger and closer connection to the terrorist group's unlawful activities than the mere "moral encouragement" of membership. And because the nexus between the defendant's actions and the criminal activities of the terrorist group is tighter, a correspondingly lower mens rea is required in order for the resulting combination of act and knowledge to satisfy the "sufficiently substantial" connection demanded by the Due Process Clause. Scales, 367 U.S. at 225.

Accordingly, the statute's scienter element – which requires a defendant to "have knowledge that the organization is a designated terrorist organization . . ., that the organization has engaged or engages in terrorist activity . . ., or that the organization has engaged or engages in terrorism," 18 U.S.C. § 2339B(a)(1) – is sufficient to satisfy due process in light of the nature of the defendant's own act of directly giving material support to a designated foreign terrorist organization. In this respect, the material support statute is analogous to 18 U.S.C. § 922(d)(1), which prohibits giving a firearm to someone known to

be a convicted felon, without any requirement that the defendant intend the weapon to be used to commit a crime.

Contrary to plaintiffs' suggestion (Br. 23-26), our argument is not that Scales applies only to statutes criminalizing membership, but not to statutes prohibiting "conduct." Rather, the point is that Scales itself recognized that the mens rea demanded by due process will vary depending what kind of actions are declared unlawful by that statute. And where the statute punishes actions consisting of conduct that in fact gives valuable support to a criminal group, there is a much stronger connection between the defendant and the criminal group's unlawful activities and, accordingly, due process requires a correspondingly lower mens rea.

None of the cases cited by plaintiffs requires a different conclusion. In some of those cases, the statute at issue would have punished mere membership alone (as in Scales and unlike the material support statute) and thus required a finding of specific intent to further the group's criminal activities. See Hellman v. United States, 298 F.2d 810, 814 n.2 (9th Cir. 1961) ("we are here concerned with the membership clause")(cited Br. 22-23)[7]; United States v. Elliott, 571 F.2d 880, 903 (5th Cir. 1978)

[7] Regardless of whether the defendant's acts in Hellman would be considered "material support" under the statute at issue in this case, see Br. 22, the only crime prosecuted in Hellman (and thus the only crime considered for consistency with due process) was the crime of being a member of the Communist Party.

(cited Br. 26); Sawyer v. Sandstrom, 615 F.2d 311, 316 (5th Cir. 1980) ("The loitering ordinance before us punishes an individual . . . for his act of being in a public place and associating with individuals whom he knows to be engaged in criminal activity.") (cited Br. 24-25). Other cases do not even address the due process question, and either deal only with what the statute requires (not what due process demands), see Mitchell v. Prunty, 107 F.3d 1337, 1340 (9th Cir. 1997) (cited Br. 24); United States v. Falcone, 109 F.2d 579 (2d Cir.), aff'd 311 U.S. 205 (1940) (cited Br. 25), or touch only upon the question of First Amendment "guilt by association," which, as noted above (supra at 32), is an issue that plaintiffs have already lost in this Court. See McCoy v. Stewart, 282 F.3d 626 (9th cir. 2002) (dicta) (cited Br. 24); Sawyer, 615 F.2d at 315-17.

Some of the cases cited by plaintiffs involve statutes punishing conduct that is not remotely analogous to what the material support statute prohibits. See Brown v. United States, 334 F.2d 488 (9th Cir. 1964) (en banc) (cited Br. 22-23) (criminalizing simultaneous membership in the Communist Party and serving as a labor union officer).[8] And some cases deal with

[8] If anything, Brown supports the Government's position. Rather than impose plaintiffs' one-size-fits-all mens rea requirement, the Court carefully assessed the "gist of the offense" at issue, its relationship to the criminal organization's illegal goals, and whether that relationship is "sufficiently substantial to justify . . . imposition of criminal punishment." Id. at 496.

vicarious liability (holding a defendant liable for the crimes committed by another person or group), as opposed to what the material support statute does (punishing a defendant for the support he himself gives to terrorists, rather than holding a defendant liable for the terrorists' crimes). See Ferguson v. Estelle, 718 F.2d 730 (5th Cir. 1983) (cited Br. 23-24); Boim v. Quranic Literacy Inst., 291 F.3d 1000 (7th Cir. 2002) (cited Br. 33).[9]

3. Giving Material Support Creates a Strong and Close Connection to the Terrorist Group.

Congress itself recognized that giving material support to terrorists has a close and strong connection to the terrorist group's unlawful activities. As noted above, supra at 34, Congress determined that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism Act § 301(a)(7), 110 Stat. at 1247, 18 U.S.C. § 2339B note (emphasis added). Further, because of "the fungibility of financial resources and other types of material support," any such support "helps defray the costs to the terrorist organization of running the ostensibly legitimate

[9] Boim was also careful to make clear that nothing in its decision touched upon the material support prohibition in § 2339B, see 291 F.3d at 1025 ("the constitutionality of section 2339B is not before us"), but commented that "[c]onduct giving rise to liability under section 2339B . . . does not implicate associational or speech rights," id. at 1026.

activities. This in turn frees an equal sum that can then be spent on terrorist activities." H.R. Rep. 104-383, at 81. And as this Court has observed, "[m]aterial support given to a terrorist organization can be used to promote the organization's unlawful activities, regardless of donor intent. Once the support is given, the donor has no control over how it is used." Humanitarian Law Project, 205 F.3d at 1134.

The fungibility of material support and the disconnect between donor intent and terrorist use is particularly true with regard to foreign terrorist groups, which often operate beyond the control of sovereign governments or are actively sheltered by state sponsors of terrorism. There is absolutely nothing to stop these organizations from using material support such as cash to purchase bombs or other weapons. ER 25-29 (McKune Decl. ¶¶ 7-15). Or the support will serve to free the terrorists' own resources to be used to fund criminal acts. ER 28 (McKune Decl. ¶ 14). And even non-fungible support can be used to provide social services, allowing the terrorist organizations to gain goodwill that can be used for terrorist recruitment. See ER 27 (McKune Decl. ¶ 11).

Plaintiffs argue that all this is undermined because he statute permits donations of medicine and religious materials, see 18 U.S.C. § 2339A(b)(1) (defining "material support or resources" to exclude "medicine or religious materials"), as well

as donations approved by the Secretary of State, see 18 U.S.C. § 2339B(j). But this Court has already rejected that argument, holding that "Congress is entitled to strike such delicate balances without giving up its ability to prohibit other types of assistance which would promote terrorism." Humanitarian Law Project, 205 F.3d at 1136 n.4.

Amicus ACLU argues that "humanitarian organizations may find it necessary to deal with [terrorist] groups," ACLU Br. 16, and the statute "seriously jeopardize[s] the capacity of amici and other humanitarian organization to serve civilian populations in conflict zones," id. at 21. But those are not legal arguments for construing or invalidating the statute; they are simply policy disagreements with what Congress has enacted. Likewise, amicus ACLU argues that humanitarian groups ensure that their support cannot be used for unlawful purposes, see id. at 22, and that the concern that support will free the terrorists' own resources to be used for criminal acts is "misplaced," id. at 25. Again, those arguments simply contradict Congressional findings enacted as part of the statute. See supra at 34. Amicus provides no rationale why its own view of the world should trump the findings and reasoning of the United States Congress.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court insofar as it held the terms "training," "expert advice or assistance," and "service" to be unconstitutionally vague, and affirm the remainder of the judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1, I certify that the attached Third Cross-Appeal Brief for Appellants complies with Fed. R. App. P. 28.1(e)(2)(A)(i) because it is Appellants' response and reply brief and contains no more than 13,949 words.

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