No. 07-55893

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMANITARIAN LAW PROJECT, et al.,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF THE TREASURY, et al.,

Defendants-Appellee.

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

BRIEF FOR APPELLEES

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JURISDICTIONAL STATEMENT

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. § 1331. On November 21, 2006, the district court granted partial summary judgment to plaintiffs and granted defendants' motion to dismiss in part. ER 26-71. On April 20, 2007, the district court granted defendants' motion for reconsideration and dismissed all claims against defendants. ER 72-87. The district court entered final judgment on April 20, 2007. ER 23-25. Plaintiffs filed a notice of appeal on June 15, 2007, within the 60-day period permitted under Fed. R. App. P. 4(a)(1)(B). ER 1-2. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

Pursuant to his authority under the Constitution, the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701, et seq., and the United Nations Participation Act ("UNPA"), 22 U.S.C. § 287c, the President issued Executive Order 13224. The Order blocks all property and interests in property of persons or groups named by the President, in an Annex to the Order, as specially designated global terrorists. The Order also authorizes the Secretary of the Treasury or the Secretary of State to block all property and interests in property of other persons or groups, if certain criteria are met. Finally, pursuant to regulations issued under the Order, the Treasury Department may issue licenses permitting transactions that would otherwise be prohibited under the Order. The issues presented are:

1. Whether plaintiffs have standing to claim that the President's designation authority is unconstitutionally vague.

2. Whether the President's designation authority is unconstitutionally vague.

3. Whether the Secretary of the Treasury's designation authority is unconstitutionally vague or overbroad.

4. Whether plaintiffs have standing to claim that the Treasury Department's licensing regulation violates the First Amendment.

5. Whether this Court should construe IEEPA (a) to impose a specific intent requirement for violating the statute; or (b) to forbid sanctions against foreign individuals or groups unless they are accompanied by sanctions against a foreign country.

STATEMENT OF THE CASE

As noted above, Executive Order 13224 blocks all property and interests in property of persons and groups designated by the President, or later designated by the Secretary of the Treasury. The Secretary of the Treasury may issue licenses permitting transactions that would otherwise be prohibited. Plaintiffs are U.S. persons and organizations that wish to provide money and services to two groups designated under the Order. Plaintiffs contend in this suit that the designation authorities of the President and the Secretary of the Treasury are unconstitutionally vague and/or overbroad. They also argue that the Treasury Department's licensing regulation violates the First Amendment. Finally, plaintiffs proffer two limiting constructions of IEEPA that, in their view, would avoid these alleged constitutional problems. The district court rejected all of these arguments, in part on the merits and in part because plaintiffs lack standing. Plaintiffs now appeal.

STATEMENT OF FACTS

I. LEGAL BACKGROUND

A. The International Emergency Economic Powers Act.

IEEPA, 50 U.S.C. § 1701 et seq., vests the President with authority to regulate various transactions relating to property interests of foreign nationals or foreign nations during peacetime national emergencies. Under this statute, the President may declare a national emergency if he finds "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." Id. § 1701(a). The President's authority "may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared" and "may not be exercised for any other purpose." Id. § 1701(b). See also 50 U.S.C. § 1703(a) (President must consult with Congress "in every possible instance" before exercising his authority); 50 U.S.C. § 1622 (President's actions reviewed periodically by Congress).

If the President declares a national emergency, he may issue regulations to "block" any transaction "with respect to * * * any property in which any foreign country or a national thereof has any interest." Id. § 1702(a)(1)(B). See also id. § 1704 ("The President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of

the authorities granted by this chapter."). The President's authority does not extend to donations of various humanitarian aid unless the President determines that such donations would impair his ability to deal with a national emergency. Id. § 1702(b)(2). A person who violates a regulation or order issued pursuant to IEEPA may be punished by a civil penalty, and willful violators may be criminally punished. Id. § 1705.

B. Executive Order 13224.

On September 23, 2001, the President issued E.O. 13224 to inhibit the flow of money from the United States to finance international terrorism. In the Order, the President made the findings required by IEEPA, namely, that "grave acts of terrorism and threats of terrorism committed by foreign terrorists," including the attacks of September 11, 2001, "constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States," and he therefore "declare[d] a national emergency to deal with that threat." E.O. 13224. See also Presidential Proclamation 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) (declaring national emergency). As relevant here, Section 1(a) of the E.O. blocks "all property and interests in property" for 29 foreign individuals or groups listed by the President in a publicly-available Annex to the E.O. The President made 27 designations in the immediate aftermath of the terrorist attacks on September

11, 2001; the other two designations – of the Taliban and its leader, Mohammed Omar – were made on July 2, 2002.[1] All 29 persons and groups listed in the Annex are known terrorists and terrorist groups, including Osama bin Laden and Al Qaeda. See infra note 8.

Section 1(d)(ii) of the Order also blocks all property and interests in property of any person who the Secretary of the Treasury designates as being "otherwise associated with" either a person listed in the Annex or a person designated under certain other Sections of the E.O. Section 1(d)(i) authorizes the designation (and the blocking of the property) of anyone who provides "services" to a designated person. Section 2(a) contains a prohibition barring any transaction or dealing in blocked property, including the making or receiving of any contribution of "services" to or for the benefit of a designated person. Any person whose property is blocked by reason of the Executive Order is known as a "specially designated global terrorist," or SDGT, see 31 C.F.R. § 594.310, and is listed as such in the Federal Register, see 31 C.F.R. § 594.201, Note 2 to paragraph (a).

In Section 4 of the Order, the President set forth his

[1] Executive Order 13268 of July 2, 2002 amended the Annex to Executive Order 13224 to include the Taliban and Omar, whose property and interests in property had previously been blocked pursuant to a separate national emergency with respect to the Taliban, which was terminated by Executive Order 13268.

determination that making humanitarian aid donations to specially designated global terrorists would seriously impair his ability to deal with the national emergency declared in the Order, and thus such donations are prohibited. See 50 U.S.C. § 1701(b)(2); supra at 5.

Finally, in Section 7, the President authorized the Secretary of the Treasury to promulgate rules and regulations to carry out the purposes of the Executive Order. Pursuant to that authority, the Treasury Department issued regulations that: (a) clarify the meaning of the terms "services" and "otherwise associated with" as used in Sections 1(d) and 2(a) of the Order, see 31 C.F.R. §§ 594.316, 594.406; (b) define the term "specially designated global terrorist," to include any person or group listed in the Annex or otherwise designated under the E.O., see 31 C.F.R. § 594.310; (c) provide that a person or group designated as an SDGT may avail itself of the Treasury Department's generally applicable procedures to seek administrative reconsideration of the designation, see 31 C.F.R. §§ 594.201(a), Note 3 and 501.807; and (d) authorize the Treasury Department to grant licenses on a case-by-case basis to permit transactions that would otherwise be prohibited under the E.O., see 31 C.F.R. §§ 594.501 and 501.801-02.

C. Relevant Designations.

The Kurdistan Workers' Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE" or "Tamil Tigers") are terrorist groups that have engaged in numerous acts of violence. See Humanitarian Law Project v. Department of Justice, 352 F.3d 382, 388-91 (9th Cir. 2003), vacated on other grounds 393 F.3d 902 (9th Cir. 2004);[2] see also People's Mojahedin Org. of Iran v. Secretary of State, 182 F.3d 17, 19-20 (D.C. Cir. 1999) (describing terrorist acts of LTTE). On October 31, 2001, the Secretary of State determined that the PKK and LTTE met the criteria set forth in Section 1(b) of E.O., and thus designated them as SDGTs. 67 Fed. Reg. 12633 (March 19, 2002).

II. FACTS AND PRIOR PROCEEDINGS

A. Plaintiffs and Their Desired Support.

Plaintiffs are two U.S. citizens and five domestic organizations that want to provide support to the assertedly lawful, nonviolent activities of the PKK and the LTTE. Plaintiffs wish to provide these groups with money, legal services, medical services, engineering and technological

[2] As that opinion discusses, there is a separate legislative scheme under which foreign terrorist organizations are so designated by the Secretary of State, their assets are blocked, and U.S. persons may not render them material support. See 8 U.S.C. § 1189; 18 U.S.C. § 2339B. Both of these entities have also been designated under this separate, but in some ways parallel, program also designed to stop, among other things, international terrorist financing.

services, and training in human rights advocacy and peacemaking negotiations. In November 2005, plaintiffs brought their current suit, raising several challenges to the E.O.'s prohibitions.

B. The District Court's November 2006 Order.

The E.O. uses the term "services" twice – once in Section 1(d)(i), which authorizes the Secretary of the Treasury to block the property of any person who provides "services" to a person listed in the Annex or designated under certain provisions of the Order; and once in Section 2(a), which prohibits any transaction or dealing in blocked property, including the making or receiving of any contribution of "services" to or for the benefit of designated persons. The district court rejected plaintiffs' argument that the term "services" is unconstitutionally vague.

The term is not vague as applied, the court held, because it "unquestionably" applies to plaintiffs' desired conduct. ER 39. A Treasury Department regulation implementing the E.O. clarifies that the prohibitions on providing "services" include the provision of "legal" or "educational" services, ER 39-40 n.3 (quoting 31 C.F.R. § 594.406), which unambiguously covers plaintiffs' desired conduct of "providing training in human rights advocacy and peacemaking negotiations, as well as providing legal services in setting up institutions to provide

humanitarian aid and in negotiating a peace agreement," ER 40.[3] Alternatively, the aid plaintiffs wish to give would plainly be prohibited under other provisions of the E.O. – Section 4's prohibition on giving humanitarian aid precludes plaintiffs from providing humanitarian aid to the PKK or LTTE, ibid., and Section 1(d)(i)'s prohibition on giving "technological support" precludes plaintiffs from providing engineering services and technological support to those groups, ER 40-41. Furthermore, the court held, the term "services" is not vague because it does not prohibit a person's independent advocacy in support of an SDGT. ER 41.

Nor, held the court, is the term "services" vague on its face because it is "a word of common understanding and one that could not be used for selective or subjective enforcement," ER 48, and the term's regulatory definition "does not permit subjective standards of enforcement," ER 47. Furthermore, the term "services" is not vague because it would be "unreasonable" to interpret it to bar a person from engaging in independent advocacy. ER 49.

The court also held that the term "services" is not overbroad. ER 50-52. Because the prohibition is "content-neutral and serves the legitimate purpose of deterring groups and

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[3] 31 C.F.R. § 594.406(b) provides clarifying examples for the types of "services" referenced in 31 C.F.R. §§ 594.201(a)(4) and 594.204. Sections 594.201 and 594.204, in turn, repeat the provisions of Sections 1(d) and 2(a) of the E.O.

individuals from providing services to foreign terrorist organizations," ER 51, it does not contravene the First Amendment, let alone do so in the substantial number of cases sufficient to justify facial invalidation under the overbreadth doctrine, ER 51-52.[4]

The court further held that plaintiffs lack standing to assert that the Treasury Department's regulations, which permit case-by-case licenses to engage in otherwise prohibited transactions, lack procedural or substantive safeguards in contravention of the First and Fifth Amendments. ER 67. Specifically, plaintiffs cannot show that they have suffered the injury necessary to establish standing, because they have neither applied for, nor been denied, a license under that regulation. ER 67-68. Plaintiffs also fail to demonstrate a causal connection between the Treasury Department licensing regulation and their claimed injury; rather, to the extent they are injured, it is not because of the licensing regulation but because of the E.O.'s ban on providing "services" and other prohibited transactions. ER. 68. Finally, plaintiffs cannot show that their injury would be redressed by striking down the licensing

[4] The court also rejected plaintiffs' contention that the term "specially designated global terrorist" is vague, because it is expressly defined in a Treasury Department regulation as "any foreign person or person listed in the Annex or designated pursuant to Executive Order 13224 of September 23, 2001." ER 52 (quoting 31 C.F.R. § 594.310). Plaintiffs do not contest that holding in this appeal.

regulation; even in the regulation's absence, plaintiffs' desired conduct would still be prohibited under the E.O. Ibid.

The court also rejected plaintiffs' contention that it should (a) read a "specific intent" requirement into the E.O.; and/or (b) construe IEEPA to authorize sanctions against foreign persons or groups only if they are accompanied by sanctions against a foreign nation. The district court held that the statute neither left room for either construction nor were they necessary to avoid constitutional concerns. ER 69.

The district court, however, did agree with two of plaintiffs' contentions. First, the court held that plaintiffs had standing to challenge the President's designation authority as unconstitutionally vague, ER 56-57, and agreed with plaintiffs on the merits that the President's designation authority is vague, ER 56. The district court also agreed (ER 65-66) with plaintiffs' argument that the E.O. is unconstitutionally vague and overbroad insofar as it permits the Secretary of the Treasury to designate a person as an SDGT if he or she is "otherwise associated with" a person or group previously designated as an SDGT. See E.O. § 1(d)(ii).

Given its holdings, the district court granted the government's motion to dismiss and cross-motion for summary judgment in relevant part, ER 71, but also granted plaintiffs' motion for summary judgment in part, ER 70-71. The court also

issued a narrow injunction prohibiting the defendants from designating any plaintiffs as SDGTs pursuant to the President's authority under the E.O., or from enforcing the "otherwise associated with" provision against plaintiffs with respect to their aid to the PKK and LTTE. ER 71.

C. New Treasury Department Regulations.

On January 26, 2007, following the district court's order invalidating the "otherwise associated with" provision in the E.O., the Treasury Department promulgated a new regulation clarifying the meaning of that provision. Specifically, the new regulation clarifies that to be "otherwise associated with" an SDGT refers to a person who "own[s] or control[s]" an SDGT, and to anyone who "attempt[s], or * * * conspire[s] with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to" an SDGT. 31 C.F.R. § 594.316.[5]

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[5] In full, Section 594.316 defines the term "otherwise associated with" as:

> (a) To own or control; or
> (b) To attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to.

Section 594.316 states that the definition provided is for the purposes of 31 C.F.R. § 594.201(a)(4)(ii), and Section 594.201(a)(4)(ii), in turn, simply repeats in material part the restriction set forth in Executive Order 13224 with respect to being "otherwise associated with" an SDGT.

The Treasury Department also amended its regulations to make clear that there is an administrative procedure available to challenge an SDGT designation made by the President. 31 C.F.R. § 501.807.[6]

D. The District Court's April 2007 Order.

After the new Treasury Department regulation was promulgated, the Government moved the district court to reconsider its previous holding that the term "otherwise associated with" is unconstitutionally vague and overbroad. The Government also moved the court to reconsider its holding that plaintiffs had standing to challenge the President's authority to designate terrorists under the E.O., and to reconsider its holding on the merits of that question. On April 20, 2007, the district court granted the Government's motion. ER 72-87.

The district court agreed with the Government that the phrase "otherwise associated with," as clarified by the new regulation, is not vague. First, the court held (ER 79-80) that the Secretary of the Treasury had authority to promulgate the

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[6] The Treasury Department revised Note 3 to paragraph (a) of 31 C.F.R. § 594.201, which specifies that Section 501.807 (the administrative reconsideration provision) "sets forth the procedures to be followed by persons seeking administrative reconsideration of their designation pursuant to § 594.201(a)." Section 594.201(a)(1), in turn, includes "[f]oreign persons listed [by the President] in the Annex to Executive Order 13224 of September 23, 2001." Thus, Note 3 to paragraph (a) makes clear that anyone designated under the E.O. by the President may seek administrative reconsideration pursuant to the procedures set forth in 31 C.F.R. § 501.807.

regulation. Second, the district court rejected plaintiffs' argument that the new regulation – in referring to an "attempt" to give support to an SDGT or "to conspire" to give such support – is unconstitutionally vague. Those concepts, the district court held, are sufficiently clear to a person of ordinary intelligence. ER 81-82. Third, the court held that the new regulation's prohibition on attempts and conspiracies to give support to SDGTs is not overbroad, because it does not reach constitutionally protected association, and plaintiffs failed to provide any "credible scenarios" in which the new regulation could be employed beyond its plainly legitimate scope. ER 82.

On reconsideration, the district court also agreed with the Government that plaintiffs lacked standing to argue that the President's authority to designate SDGTs is unconstitutionally vague. The district court had originally held that ordinary standing requirements would be "relaxed" for this claim, because it implicated the First Amendment. ER 59. On reconsideration, the court concluded that the President's designation authority is derived not from the E.O. itself, but from IEEPA, and that IEEPA "does not on its face implicate First Amendment rights." ER 83; see also ER 85. And because First Amendment concerns are not implicated, the court ruled that no "relaxed standing analysis" is afforded to plaintiffs. ER 83. Under ordinary standing requirements, in this pre-enforcement challenge, plaintiffs must

show a "genuine threat of imminent prosecution," ER 85, which plaintiffs cannot do here, because they "have pointed to no instance of their being issued a specific threat or warning that * * * they would be designated" under the President's designation authority, ER 86. Nor could plaintiffs show a genuine threat that they would imminently be designated by the President given that plaintiffs have made no showing that they are similar to, or engaged in conduct similar to, any of the individuals or organizations previously designated by the President. ER 86. Accordingly, plaintiffs lack standing to challenge the President's designation authority.

Given these rulings, the district court struck the section of its prior opinion regarding the vagueness challenge to the President's designation authority, and vacated its prior injunction. ER 87.

SUMMARY OF ARGUMENT

I. Plaintiffs' claim that the President's designation authority is vague is both non-justiciable and meritless. First, plaintiffs lack standing to bring such a claim. Because neither IEEPA, the UNPA, nor the President's constitutional authority implicates First Amendment rights on its face, ordinary standing requirements are not relaxed in this case. Under ordinary standing rules, plaintiffs lack standing unless they can show a genuine threat that the President's designation authority will be

imminently applied to them. Plaintiffs cannot do so, given the uncontested facts that the President has designated only 29 persons or groups as SDGTs; 27 of those designations were made in the immediate aftermath of the attacks on September 11, 2001; the President has made only two additional designations in the intervening six and a half years, and none since July 2002; and plaintiffs have not remotely shown that they are similar to, or wish to engage in similar conduct as, the persons and groups that the President designated, such as Usama bin Laden and Al Qaeda. Plaintiffs also lack standing because their claim is not redressable. Plaintiffs ultimately seek an injunction against the President himself, precluding him from exercising his designation authority, and this Court lacks jurisdiction to enter such an injunction.

On the merits, plaintiffs' argument fails because the President's designation authority is not unconstrained. The President's authority derives from IEEPA, the UNPA, and the Constitution. Both statutes constrain the President's authority. IEEPA limits the President to acting in response to a declared national emergency, and the President is categorically or conditionally barred from prohibiting certain transactions even during a national emergency. The UNPA constrains the President's authority because he may act only when enforcing a resolution of the U.N. Security Council. Thus, this Court in Sacks v. Office

of Foreign Assets Control, 466 F.3d 764, 775-76 (9th Cir. 2006), noted that both IEEPA and the UNPA constrain the President's authority. Finally, the President's constitutional authority is constrained by the limitations that inhere in the Constitution itself.

II. The Secretary of the Treasury's designation authority is neither vague nor overbroad. The Secretary's designation authority is constrained by the criteria, enumerated in the E.O., that must be satisfied before he can designate an SDGT. The term "services" in the E.O. is not vague either. Its ordinary dictionary definition – "an act done for the benefit or at the command of another" and "useful labor that does not produce a tangible commodity" – is sufficiently clear for a person of ordinary intelligence. Thus, several courts have held the term "services" (or a nearly identical term) found in different IEEPA blocking orders sufficiently clear. Treasury Department regulations also further clarify the meaning of the word "services," by listing examples of prohibited services, such as "legal, accounting, financial, brokering, freight forwarding, transportation, public relations, educational, or other services." 31 C.F.R. § 594.406(b). Finally, IEEPA's criminal provision contains a scienter requirement (liability imposed only if a defendant "willfully" violates an IEEPA regulation), which further mitigates any potential vagueness for the criminal

provision.

Plaintiffs also allege that the term "services" is vague or overbroad because it prohibits independent advocacy. But "services" does not reach such conduct. The Treasury Department's consistent practice has excluded independent advocacy from the term "services," and plaintiffs cannot point to a single designation or penalty under the Order based on a person's independent advocacy. The Treasury Department also interprets the term "services" to exclude independent advocacy, an interpretation to which this Court should defer. If any doubt remained, the relevant term is readily susceptible to a limiting construction that would save the E.O.'s constitutionality.

The Secretary's designation authority is not overbroad for the additional reason that prohibiting transactions and activities that would assist designated terrorist groups is a content-neutral restriction reasonably tailored to the government's legitimate national security interests. As this Court has held, such neutral prohibitions designed to stop financial and other support for international terrorism do not violate the First Amendment, see Humanitarian Law Project v. Reno, 205 F.3d 1130, 1134-36 (9th Cir. 2000), and are not overbroad, see Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1136-37 (9th Cir. 2007).

III. Plaintiffs lack standing to contend that the Treasury

Department's regulation permitting case-by-case licenses to engage in otherwise prohibited activities violates the First Amendment. Plaintiffs are not injured by the licensing regulation, because they have neither applied for, nor been denied, a license. Nor is there a causal connection between the licensing regulation and plaintiffs' claimed injury of being unable to support the LTTE and PKK; to the extent they are injured, it is not because of the licensing regulation, but because of the E.O.'s ban on providing "services" and other prohibitions. Finally, plaintiffs' injury would not be redressed by striking down the licensing regulation; even in its absence, plaintiffs' desired conduct would still be prohibited under other provisions of the E.O.

Similarly, plaintiffs cannot bring a pre-enforcement challenge to a licensing scheme unless the relevant law has a sufficiently close nexus to protected speech. For example, in Humanitarian Law Project v. Mukasey, 509 F.3d at 1137-39, this Court held that plaintiffs could not bring a pre-enforcement facial challenge to the similar licensing provision in 18 U.S.C. § 2339B(j) – which permits the Secretary of State to allow individuals and organizations to give otherwise prohibited material support or resources to designated terrorists – because that statute did not, on its face, regulate constitutionally protected activity. As noted above, nothing on the face of

IEEPA, the UNPA, or the E.O. implicates First Amendment concerns either, and thus plaintiffs may not bring their pre-enforcement challenge.

IV. This Court should reject the two limiting constructions of IEEPA urged by plaintiffs. The suggestions are both unnecessary (because they are intended to avoid constitutional problems that do not exist) and unsupported by the statutory text. Plaintiffs ask this Court to read a specific intent mens rea into IEEPA, even though the statute's criminal provision expressly adopts a different scienter requirement (that the defendant act "willfully"), and even though such a requirement is not remotely constitutionally required in order to separate wrongful conduct from otherwise innocent activities. Nor is such a heightened scienter required for the IEEPA's civil provision, as civil penalties traditionally may rely on a lower scienter standard than that required for a criminal provision.

This Court should also reject plaintiffs' suggestion that IEEPA should not permit sanctions against foreign individuals or groups, unless they are accompanied by sanctions against a foreign nation. Plaintiffs point to nothing in the statute that would lead to such a conclusion. Moreover, Presidents have imposed individually-targeted sanctions of the kind at issue here since at least 1995, and Congress has taken no steps to limit the President's authority in the way plaintiffs suggest. Indeed,

Congress has amended IEEPA in the intervening years, yet did not adopt plaintiffs' construction. Such action can only be construed as Congressional approval of the exercise of the President's authority to impose individually-targeted sanctions even in the absence of sanctions on a foreign nation.

STANDARD OF REVIEW

This Court's review is de novo. See Doran v. 7-Eleven, Inc., 506 F.3d 1191, 1195 n.1 (9th Cir. 2007) (whether plaintiff has standing is reviewed de novo); United States v. Stansell, 847 F.2d 609, 612 (9th Cir. 1988) (whether law is unconstitutionally vague or overbroad is reviewed de novo); Nichols v. Birdsell, 491 F.3d 987, 989 (9th Cir. 2007) (questions of statutory construction reviewed de novo); Bias v. Moynihan, 508 F.3d 1212, 1223 (9th Cir. 2007) (questions of law reviewed de novo); Harper v. San Diego Transit Corp., 764 F.2d 663, 665-66 (9th Cir. 1985) (district court's decision on motions to dismiss or for summary judgment are reviewed de novo).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY UPHELD THE PRESIDENT'S DESIGNATION AUTHORITY

The district court correctly held that plaintiffs lack standing to challenge the President's designation authority. In any event, the President's designation authority is fully consistent with the Constitution and is not vague.

A. Plaintiffs' Challenge to the President's Designation Authority is Non-Justiciable.

The district court correctly held that plaintiffs lacked standing to challenge the President's designation authority as unconstitutionally vague. First, the court held that the President's designation authority derives from IEEPA, and nothing on the face of that statute implicates First Amendment rights. Because First Amendment rights are not implicated, no "relaxed standing" rules apply in this case. ER 83. Second, under ordinary standing requirements, plaintiffs must show a "genuine threat of imminent prosecution." ER 85. Plaintiffs cannot meet that standard here. As the district court observed, ER 86, plaintiffs have never made any showing that they are similar to any of the individuals or groups designated by the President, or that they engage in similar conduct as those designated persons or groups. Furthermore, the President has made only 29 designations under the E.O. Twenty-seven of those designations were issued within weeks of the attacks on September 11, 2001, and the other two – of the Taliban and its leader – were made in July 2002. Since that time, the President has made no further designations. Accordingly, plaintiffs cannot show a genuine threat that they will be imminently designated by the President, and they thus lack standing to challenge the President's designation authority.

Plaintiffs offer no persuasive response. They first argue

that relaxed standing requirements should apply because the Executive Order implicates First Amendment rights by authorizing the Secretary of the Treasury to make designations based on a person's mere association with an SDGT, or for engaging in independent advocacy. Br. 23-24. Plaintiffs' argument misses the mark in three critical respects.

First, as discussed below, plaintiffs are simply incorrect in contending that the Executive Order permits the Secretary of the Treasury to make a designation based on mere association, see infra at 44, or for independent advocacy, see infra at 42-43. Second, plaintiffs' argument fails because it attempts to show that the President's designation authority implicates the First Amendment by pointing to the designation authority of the Secretary of the Treasury.

Third, plaintiffs' argument misses the district court's point entirely – the President's designation authority does not derive from the Executive Order itself, but from IEEPA, the UNPA, and the Constitution. Nothing on the face of IEEPA implicates First Amendment rights. Rather, the statute authorizes the President, during peacetime national emergencies, to "block" any transaction "with respect to * * * any property in which any foreign country or a national thereof has any interest," 50 U.S.C. § 1702(a)(1)(B). Nothing in that statute, or in any relevant Executive Order issued pursuant to it, implicates First

Amendment concerns. See Islamic American Relief Agency v. Gonzales, 477 F.3d 728, 737 (D.C. Cir. 2007) (holding that IEEPA blocking order "does not implicate [the] First Amendment right of association"); Holy Land Found. v. Ashcroft, 333 F.3d 156, 165 (D.C. Cir. 2003) (in rejecting First Amendment challenge to IEEPA blocking order, holding that "the law is established that there is no constitutional right to fund terrorism"); see also Global Relief Found. Inc. v. O'Neill, 207 F. Supp.2d 779, 805-06 (N.D. Ill.) (rejecting First Amendment and overbreadth challenges to IEEPA blocking order, because the E.O. does not "directly regulate[] speech or expression arguably protected by the First Amendment" even with respect to the "otherwise associated with" provision), aff'd 315 F.3d 748 (7th Cir. 2002).

Similarly, the UNPA, on its face, does not implicate First Amendment concerns either. That statute simply authorizes the President to implement U.N. Security Council measures by taking certain actions, including prohibiting economic relations between any foreign country or national and persons subject to U.S. jurisdiction. See 22 U.S.C. § 287c.[7] Nor, finally, does the

[7] "[W]henever the United States is called upon by the [United Nations] Security Council to apply measures which said Council has decided * * * the President may, * * * under such orders, rules, and regulations as may be prescribed by him, * * * prohibit, in whole or in part, economic relations * * * between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States." 22 U.S.C. § 287c(a).

President's authority under the Constitution to act in the area of foreign affairs implicate First Amendment rights on its face.

Because neither IEEPA nor the UNPA implicates First Amendment interests on their face, they are entirely unlike the statute at issue in California Pro-Life Council v. Getman, 328 F.3d 1088, 1095 (9th Cir. 2003) (cited at Br. 23-25), which on its face regulated the core First Amendment activity of "a communication advocating the defeat" of a ballot initiative. IEEPA and the UNPA are also unlike the regulation considered in City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 760 (1988) (cited at Br. 26), which was "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers," and thus on its face implicated First Amendment concerns.

Plaintiffs also argue that, because the E.O. itself does not constrain the President's designation authority, "by definition" it implicates First Amendment rights. Br. 25. That argument also fails to join issue with the district court's holding that the President's designation authority derives not from the E.O. itself, but from IEEPA (as well as the UNPA and the Constitution). Moreover, as explained below, infra at 30-33, IEEPA, the UNPA, and the Constitution do provide sufficient constraints for the exercise of the President's authority.

Next, plaintiffs contend that, even if First Amendment

concerns do not relax the ordinary rules of standing in this case, they have still have standing to challenge the President's designation authority. To bring such a pre-enforcement challenge, plaintiffs must demonstrate a "genuine threat of imminent prosecution," Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 773 (9th Cir. 2006), i.e., a real threat that they will be designated as SDGTs by the President. Strict adherence to that requirement is all the more important here, where plaintiffs challenge the President's constitutional and statutory authority in the areas of foreign policy and national security, which are exclusively entrusted to the elected branches of government. See, e.g., Regan v. Wald, 468 U.S. 222, 242 (1984) ("Matters relating to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judiciary inquiring or interference."); Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

But plaintiffs cannot show a genuine threat that they will be imminently subject to the President's designation authority. As noted above, the President has designated only 29 persons or groups as SDGTs; all but two of those designations were made just weeks after the September 11, 2001 attacks, and the other two designations (of the Taliban and its leader) were made in July

2002 under unique circumstances obviously inapplicable to the plaintiffs, see supra note 1; and the President has not made a single designation since July 2002. What plaintiffs argue (Br. 24) is that they are so similar to the persons and groups designated by the President on the basis of their clear ties to terrorism, that plaintiffs face the real and imminent threat that the President will designate them as SDGTs too, even though the President has not designated them in the more than six years since he issued the E.O. That contention, on its face, is obviously wrong.[8]

Plaintiffs also lack standing to challenge the President's designation authority because their injury is not redressable. Plaintiffs, in effect, ask this Court to enjoin the President from exercising his authority to designate entities and individuals tied with international terrorist financing, but this Court obviously has no power to enter such an injunction against the President himself. See Mississippi v. Johnson, 71 U.S. 475, 501 (1867) ("[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.");

[8] Plaintiffs complain (Br. 24 n.7) that the Government makes only a "bare-bones assertion" that the 29 persons or groups designated by the President have clear ties to terrorism. But all of the 29 persons and groups listed in the Annex are also named in a list, maintained by the U.N. Security Council, of persons and groups with ties to the terrorist activities of the Taliban and Al Qaeda. See www.un.org/sc/committees/1267/consolist.shtml.

Franklin v. Massachusetts, 505 U.S. 788, 801-02 (1992) ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements. * * * [I]njunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows.") (plurality opinion); id. at 823, 827 (no cause of action under APA to review Presidential action and questioning injunctive relief against the President) (Scalia, J., concurring); see also Swan v. Clinton, 100 F.3d 973, 978 (D.C. Cir. 1996); Armstrong v. Bush, 924 F.2d 282, 288-89 (D.C. Cir. 1991). Because any claim of injury from the President's designation authority cannot be redressed by an injunction against the President, plaintiffs lack standing on such a claim.

Lastly, plaintiffs argue that the district court should not have considered the Government's argument on a motion to reconsider. Br. 23 n.6. Plaintiffs cite Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877 (9th Cir. 2000), but that case acknowledges that a motion to reconsider is proper where the district court "committed clear error, or if there is an intervening change in the controlling law," id. at 890. Here, the district court had committed a clear error in granting plaintiffs standing to challenge the President's designation authority. Furthermore, there was an intervening change in the law, namely, new Treasury Department regulations clarifying that

the procedures for seeking administrative reconsideration of an SDGT designation apply to Presidential designations, see supra at 14, a factor the district court thought relevant to plaintiffs' vagueness argument, see ER 56. In any event, this Court reviews the district court's decision to grant or deny a motion for reconsideration for an abuse of discretion, see Kona, 229 F.3d at 883, and plaintiffs have not come close to demonstrating any such abuse.

B. The President's Designation Authority is not Vague or Overbroad.

Even if this Court were to reach the merits, plaintiffs' argument fails because the President's designation authority is neither vague nor overbroad. Plaintiffs argue that the President's authority is invalid because IEEPA gives the President unfettered discretion to designate SDGTs "wholly by executive fiat and constrained by *nothing* in the U.S. Code." Br. 28. Plaintiffs' argument is meritless.

While the President's authority under IEEPA is broad, it is not unconstrained: before acting, the President must find and declare a national emergency, which must be based on an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States," id. § 1701(a); the President's authority "may only be exercised to deal with an unusual and extraordinary threat with respect to

which a national emergency has been declared" and "may not be exercised for any other purpose," id. § 1701(b); the emergency does not authorize prohibitions on humanitarian aid unless the President expressly finds that to be necessary, id. § 1702(b)(2); and the emergency does not authorize the President to regulate the export of personal communications, information such as films, artworks, and news wire feeds, and transactions ordinarily incident to travel to a foreign country, id. § 1702(b)(1), (3)-(4). See also 50 U.S.C. § 1703(a) (President must consult with Congress "in every possible instance" before exercising his authority); 50 U.S.C. § 1622 (President's actions are reviewed periodically by Congress).

Thus, this Court has stated that although "IEEPA grants the President authority to unilaterally impose regulations * * * the President's power under IEEPA is constrained." Sacks, 466 F.3d at 775 (emphasis added). Plaintiffs, however, do not respond to this point, do not mention this Court's observation in Sacks, and do not discuss the numerous constraints apparent on the face of the statute.[9]

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[9] In Humanitarian Law Project v. Reno, 205 F.3d at 1137, this Court held that the Secretary of State's authority to designate foreign terrorist organizations under 8 U.S.C. § 1189 was sufficiently constrained to satisfy due process. Plaintiffs argue (Br. 18, 28-29) that the President's authority here is unlimited because IEEPA does not contain the same constraints as those upheld in Humanitarian Law Project v. Reno. But their argument misses the obvious point that due process requires the President's statutory authority to be constrained in some way,

The E.O. also expressly invokes the President's authority under the UNPA, 22 U.S.C. § 287c, which authorizes the President to implement U.N. Security Council measures by taking certain actions, including prohibiting economic relations between any foreign country or national and persons subject to U.S. jurisdiction. See E.O. 13224, preamble. The E.O. cites several Security Council resolutions that call on member States to take certain actions to block the financing of terrorist groups. See U.N. Security Council Resolution 1269 ¶ 4 (Oct. 19, 1999) (copy included at Supplemental Excerpts of Record ("SER") 17-18); U.N. Security Council Resolution 1333 ¶ 8(c) (Dec. 19, 2000) (SER 19-25); U.N. Security Council Resolution 1368 ¶ 4 (Sept. 12, 2001) (SER 26). And this Court has noted that, although the UNPA "granted extraordinary powers to the President to enforce United Nations sanctions," Sacks, 466 F.3d at 776, the President's authority is constrained, as he may act only "when enforcing a Security Council resolution," ibid.

Finally, the E.O. also invokes the President's authority under Article II of the Constitution. The constraints on the President's constitutional authority inhere in the Constitution itself, and need not be expressly set forth in any Executive

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which it is, as explained above; nothing in the Constitution requires those constraints to be the same limitations as the constraints upheld in Humanitarian Law Project v. Reno. See also infra at 46 (discussing plaintiffs' similar argument with respect to the Secretary of the Treasury's designation authority).

Order. Neither plaintiffs, nor any court of which we are aware, has ever argued to the contrary.

Plaintiffs' vagueness and overbreadth claims are even weaker here, given that the broad Presidential powers such as those conferred in IEEPA and UNPA have been upheld against constitutional challenge. See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 672-74 (1981) (noting the "broad authority of the Executive" conferred by IEEPA, and observing that Presidential action "taken pursuant to specific congressional authorization * * * is supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."); Palestine Information Office v. Shultz, 853 F.2d 932, 944 (D.C. Cir. 1988) (rejecting vagueness challenge to the Foreign Missions Act in part because "the conduct of foreign policy will sometimes require more general enactments than other governmental functions").[10]

[10] Plaintiffs argue (Br. 16, 23 n.6) that the Government waived its defense of the President's authority by not timely raising it below. But the district court never once suggested that it considered the Government's merits argument on reconsideration to be waived. In any event, this Court can affirm the judgment below on any grounds supported by the record, even if the Government had not raised the issue below. Intel Corp. v. Advanced Micro Devices, 12 F.3d 908, 914 n.9 (9th Cir. 1993).

II. THE SECRETARY OF THE TREASURY'S DESIGNATION AUTHORITY IS CONSTITUTIONAL

A. The Term "Services" Is Not Unconstitutionally Vague.

As noted above, supra at 6, the E.O. uses the term "services" twice – once in Section 1(d)(i), which authorizes the Secretary of the Treasury to block the property of any person who provides "services" to a person listed in the Annex or otherwise designated under the Order; and once in Section 2(a), which prohibits any transaction or dealing in blocked property, including the provision of "services" to or for the benefit of designated persons. Plaintiffs contend that the term "services" is unconstitutionally vague as applied and on its face.

To satisfy due process, a statute must be sufficiently clear to give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); see Foti v. City of Menlo Park, 146 F.3d 629, 638 (9th Cir. 1998). To satisfy this requirement, the Government need not define an offense with "mathematical certainty," Grayned, 408 U.S. at 110, but must provide only "relatively clear guidelines as to prohibited conduct," Posters N' Things, Ltd. v. United States, 511 U.S. 513, 525 (1994). Furthermore, where a civil statute is involved, rather than a criminal one, due process tolerates greater vagueness, "because the consequences of imprecision are qualitatively less severe." Village of Hoffman Est. v. Flipside,

Hoffman Est., 455 U.S. 489, 498-99 (1982); see Craft v. National Park Serv., 34 F.3d 918, 922 (9th Cir. 1994).[11]

The term "services" easily meets the due process standard. "Service" means "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). A person of ordinary intelligence would understand what that word means.

Furthermore, other courts have upheld previous Executive Orders and Treasury Department regulations issued pursuant to IEEPA that have used the term "services." In United States v. Homa Int'l Trading Corp., 387 F.3d 144, 146 (2d Cir. 2004), the court considered a Treasury Department regulation, issued under IEEPA and Executive Order 12959, that prohibited the exportation of "services" to Iran, and concluded that "[t]he term 'services'

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[11] Plaintiffs argue (Br. 34-35 n.11) that IEEPA's civil penalty provisions should be subject to a heightened vagueness standard because they implicate First Amendment rights. But as discussed above, supra at 24-25, IEEPA does not, on its face, implicate First Amendment rights. Plaintiffs also argue that a more stringent standard should apply because the IEEPA civil penalties are "quasi-criminal" in nature. Br. 34-35 n.11. But Congress has expressly indicated that the relevant IEEPA provision imposes only a "civil penalty," 50 U.S.C. § 1705(b) (emphasis added), and "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," Reiserer v. United States, 479 F.3d 1160, 1163 (9th Cir. 2007). For the reasons discussed below, infra at 56-58, plaintiffs cannot meet that standard. In any event, the term "services" is sufficiently clear under even a heightened vagueness standard.

is unambiguous." See also Karpova v. Snow, 402 F. Supp.2d 459, 466-67 (S.D.N.Y. 2005) (where Treasury Department regulation, issued pursuant to IEEPA and Executive Order 12724, prohibited the exportation of any "services" to Iraq, court would defer to Treasury Department's interpretation of that term, including its dictionary definition), aff'd 497 F.3d 262 (2d Cir. 2007); United States v. Lindh, 212 F. Supp.2d 541, 574 (E.D. Va. 2002) (rejecting vagueness challenge to Treasury Department regulation, issued pursuant to IEEPA and Executive Order 13129, which prohibited the exportation of any "services" to the Taliban or Taliban-controlled Afghanistan); United States v. Hescorp, 801 F.2d 70, 77 (2d Cir. 1986) (rejecting vagueness challenge to provision of Executive Order 12205 prohibiting any person from engaging in any "service contract" in Iran, because the language in the Executive Order "gave [the defendant] fair notice" of what was prohibited).

As the district court correctly noted (ER 39-40 & n.3), the term "services" has also been further clarified by Treasury Department regulations. 31 C.F.R. § 594.406(b) provides examples of services that "U.S. persons may not * * * provide," including "legal, accounting, financial, brokering, freight forwarding, transportation, public relations, educational, or other services." The regulation's unambiguous ban on providing "legal" or "educational" services plainly covers plaintiffs' desired

conduct of "providing training in human rights advocacy and peacemaking negotiations, as well as providing legal services in setting up institutions to provide humanitarian aid and in negotiating a peace agreement." ER 40. Other aspects of plaintiffs' desired conduct would clearly be barred by E.O. § 4's prohibition on giving humanitarian aid, and by E.O. § 1(d)(i)'s prohibition on giving "technological support." ER 40-41. Because plaintiffs' desired conduct is unquestionably barred, they cannot complain that the E.O. and its implementing regulations are vague as applied to their conduct. See Parker v. Levy, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); Flipside, 455 U.S. at 495 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."). Plaintiffs never respond to this basic point.

Nor is the term "services" vague on its face. As this Court has recognized, "a party challenging the facial validity of an ordinance on vagueness grounds outside the domain of the First Amendment must demonstrate that the enactment is impermissibly vague in all of its applications." Hotel & Motel Ass'n of Oakland v. City of Oakland, 344 F.3d 959, 972 (9th Cir. 2003). As discussed above, the E.O. was promulgated under the President's authority pursuant to IEEPA, the UNPA, and Article II

of the Constitution, and none of these sources of authority 'targets First Amendment rights on its face. Supra at 24-26. Because the President's authority operates "outside the domain of the First Amendment," City of Oakland, 344 F.3d at 972, plaintiffs' facial vagueness challenge must show that the E.O. is vague in all its applications. And, of course, they cannot do so because, as discussed above, the E.O. is not vague with respect to plaintiffs' own desired conduct.

In any event, plaintiffs' facial vagueness argument fails because the E.O. is clear "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). As the district court correctly held (ER 47-49), the word "services" is sufficiently clear, both in terms of its ordinary dictionary definition and the Treasury Department's clarifying regulation, that it can be easily understood by a person of ordinary intelligence in most of its intended applications.

Further, if there were any doubt about the law's clarity, plaintiffs could avail themselves of several administrative mechanisms for clarification – for example, they could call Treasury's compliance hotline to consult an operations officer; send an e-mail to Treasury's e-hotline mailbox; call Treasury's licensing division to inquire whether a proposed transaction requires authorization; speak with an attorney in the Chief

Counsel's Office (Foreign Assets Control); or submit a request for a written interpretation addressing whether the activity in which they wish to engage would constitute a violation. See SER 11-12 (Hammerle Declaration ¶ 28). Alternatively, plaintiffs could apply for a license to engage in their desired conduct. 31 C.F.R. §§ 501.801-02. Courts are particularly reluctant to find a statute vague on its face where a regulated entity can "clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." Flipside, 455 U.S. at 498.

Finally, with respect to IEEPA's criminal provision, 50 U.S.C. § 1705(c), a defendant must "willfully commit[]" the violation, which means that the government must "prove that the defendant acted with knowledge that his conduct was unlawful," Bryan v. United States, 524 U.S. 184, 192 (1998). That scienter mitigates any possible vagueness with respect to the criminal provision. Flipside, 455 U.S. at 499 ("a scienter requirement may mitigate a law's vagueness"); Craft, 34 F.3d at 922 (same); see also Hescorp, 801 F.2d at 77 (rejecting vagueness challenge to the term "service contracts" in IEEPA regulation in part because of scienter requirement); Lindh, 212 F. Supp.2d at 574 (rejecting vagueness challenge to term "services" in IEEPA regulation in part because of scienter requirement).

B. Plaintiffs' Arguments are Meritless.

1. Plaintiffs argue that the term "services" is vague as applied to their conduct because, in their view, none of their conduct "is linked in any way to the carrying out of terrorist activity." Br. 42. That argument is doubly mistaken. First, plaintiffs are incorrect that their desired conduct would not support terrorism. Even seemingly innocent humanitarian aid can bolster terrorism. For example, humanitarian aid to "an organization's peaceful activities frees up resources that can be used for terrorist acts." Humanitarian Law Project v. Reno, 205 F.3d at 1136. Thus, seemingly benign support can assist terrorists in "carry[ing] out their grisly missions." Id. at 1133. Such aid "can [also] be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive." Id. at 1136. Second, even if plaintiffs were correct, their observation would be irrelevant. As explained above, plaintiffs never confront the central and critical point that the term "services" is not vague because it plainly covers exactly the conduct in which plaintiffs wish to engage. Their complaint that the E.O. and regulations reach too far to conduct that is (in their erroneous opinion) too remote from terrorist activity is simply a policy disagreement with the scope of the E.O.; it is not a basis for invalidating the Order as vague.

2. Plaintiffs also argue that, because this Court held in Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1135-36 (9th Cir. 2007) (pet'n for rehearing or rehearing en banc pending), that the term "service" in 18 U.S.C. § 2339A(b) is unconstitutionally vague, it follows that the term "services" here must also be vague. Br. 37. But as the district court explained (ER 49), and as this Court held (509 F.3d at 1136), the term "service" in 18 U.S.C. § 2339A(b) was considered unconstitutionally vague because the court thought it was unclear whether the term "service" would include training terrorists how to use international law. By contrast, the Treasury Department's regulations make it clear that "services" applies to "legal" and "educational" services. Supra at 36. Accordingly, the applicable regulations remove the perceived ambiguity central to Humanitarian Law Project v. Mukasey.[12]

3. Plaintiffs further argue that "services" is vague because it could reach constitutionally protected independent advocacy. Br. 35-37. But that is not an issue of vagueness at all. One might argue (incorrectly, as discussed infra at 48-50) that the E.O. could be unconstitutional as applied to some situations, or that the potential number of such applications

[12] Plaintiffs also argue (Br. 37) that, if the term "services" clearly applies to legal and educational services, it must violate the First Amendment or be overbroad, even if it is not vague. For the reasons discussed infra at 48-50, the E.O. neither contravenes the First Amendment nor is it overbroad.

might be great enough to justify facial invalidation. But those are questions of substantive First Amendment law and overbreadth, not vagueness, as plaintiffs suggest.

More importantly, plaintiffs' argument fails because the term "services" does not reach independent advocacy. See ER 41, 49. The Treasury Department's consistent practice has been to interpret the term "services" as not including independent advocacy on behalf of a designated person. The agency has made this practice evident to the public by explicitly stating that the "designation criteria in [31 C.F.R. part 594] will be applied in a manner consistent with pertinent Federal law, including, where applicable, the First Amendment to the United States Constitution." 72 Fed. Reg. 4206 (January 30, 2007). Indeed, plaintiffs have not even alleged that the Treasury Department has, in the six and a half years since the E.O. was promulgated, designated any person pursuant to the Order for engaging in independent advocacy on behalf of a designated person. Nor have they alleged that any person engaged in such independent advocacy has been subject to civil or criminal penalties under IEEPA for engaging in such conduct. Given the agency's consistent practice, as well as its interpretation of the E.O. to which the Court owes deference, see Auer v. Robbins, 519 U.S. 452, 461-62 (1997) (agency's interpretation entitled to deference even where it "comes * * * in the form of a legal brief"); Karpova, 402 F.

Supp.2d at 466-67 (deferring to Treasury's interpretation of the word "services" in Executive Order 12724), aff'd 497 F.3d 262 (2d Cir. 2007), the term "services" does not reach independent advocacy as plaintiffs allege. Were there any remaining doubt, this Court should construe the term "services" to exclude independent advocacy, if that result is necessary to preserve the Order's constitutionality. See United States v. Vargas-Amaya, 389 F.3d 901, 906 (9th Cir. 2004) ("[I]f a statute is fairly susceptible of two constructions, one of which leads the court to doubt gravely the statute's constitutionality, then we must adopt the construction that avoids the serious constitutional problem.").

4. Before the district court, plaintiffs had argued that the phrase "otherwise associated with" in E.O. § 1(d)(ii) is unconstitutionally vague and overbroad. Supra at 12. Treasury Department regulations now clarify that this phrase refers to a person who "own[s] or control[s]" an SDGT, and anyone who "attempt[s], or * * * conspire[s] with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to" an SDGT. 31 C.F.R. § 594.316. The district court on reconsideration correctly held that this regulation sufficiently clarified the phrase "otherwise associated with" to cure any vagueness or overbreadth concerns. ER 81-82.

In their opening brief to this Court, plaintiffs hardly mention that phrase at all. In a single footnote, plaintiffs argue that the clarifying regulations renders the phrase "even more vague and overbroad," because the word "attempt" may include "*any* associational activity," protected by the Constitution. Br. 41-42 n.12. The term "attempt," however, has a clearly recognized meaning that is neither vague nor overbroad. ER 81-82. Plaintiffs do not even respond to that point. Furthermore, the E.O. simply does not target associational activities or rights. As this Court held in Humanitarian Law Project v. Reno, 205 F.3d at 1133, the federal prohibition on providing material support to terrorist organizations, 18 U.S.C. § 2339B, does not punish individuals "by reason of association alone," but instead "prohibits is the act of giving material support" to terrorists, which activity is not constitutionally protected.[13] Finally, for the reasons discussed above, supra at 42-43, it is no more plausible to construe the word "attempt" as reaching constitutionally protected advocacy or association, than it would be to construe the term "services" to reach protected independent advocacy.

[13] The panel's rejection of this First Amendment association argument was later affirmed by this Court sitting en banc. See Humanitarian Law Project v. Department of Justice, 393 F.3d 902 (9th Cir. 2004) (en banc) (affirming panel's decision with respect to plaintiffs' First Amendment argument).

C. Plaintiffs' Untethered Vagueness Argument is Incorrect.

Plaintiffs argue, without any particular reference to the term "services" or any other specific language in the E.O., that the Secretary's authority is unconstitutionally vague because it gives him unconstrained discretion to designate anyone for any reason as an SDGT. Br. 30-33.

But the E.O. on its face sufficiently constrains the Secretary's authority. He may designate persons or groups as SDGTs only if he makes certain findings – for example, that a person is "owned or controlled by, or * * * act[s] for or on behalf of" or "provide[s] financial, material, or technological support for" those persons listed in the Annex or otherwise designated under the Order. E.O. §§ 1(c), 1(d)(i). The E.O. thus expressly provides the very constraints that plaintiffs allege to be absent. Plaintiffs even acknowledge this to be so. Br. 29 (E.O. "articulates standards for designation by the Secretary"). Those constraints satisfy any due process concerns.

In Humanitarian Law Project v. Reno, 205 F.3d at 1136-37, this Court held the Secretary of State's authority, under 8 U.S.C. § 1189, to designate foreign terrorist organizations was sufficiently constrained because she had to make certain factual findings prior to any designation. Plaintiffs argue (Br. 31) that the constraints in the E.O. are not the same as those imposed on the Secretary of State in 8 U.S.C. § 1189. That

argument misses the point that due process only requires some reasonable constraints on the Secretary's authority; the Constitution does not demand criteria identical to the ones upheld by this Court in Humanitarian Law Project v. Reno. See also supra note 9 (discussing plaintiffs' similar argument).

Plaintiffs also complain (Br. 31) that there have never been any findings that those listed by the President in the E.O. Annex are engaged in terrorism, see Br. 31, and that a person may be designated without a statement of reasons or in reliance on classified information, see Br. 32, 26. To the extent plaintiffs are arguing that they are deprived of due process because they lack fair notice of who is designated, the argument fails given that all SDGTs are listed in the publicly-available Annex or in the Federal Register. Furthermore, before the Treasury Department assesses a civil penalty under IEEPA, it sends the involved party a pre-penalty notice describing the violation; specifying the laws and regulations allegedly violated and the amount of the proposed penalty; and notifying the recipient of his right to make a written presentation within 30 days as to why a penalty should not be imposed. Karpova v. Snow, 497 F.3d 262, 266 (2d Cir. 2007); 31 C.F.R. § 594.702; SER 12-13 (Hammerle Declaration ¶¶ 31-32).

To the extent plaintiffs are arguing that the E.O. deprives them of due process because some designations may be factually

deficient, the argument ignores the facts that: (a) designations are subject to judicial review, see Holy Land Found. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003); (b) the SDGTs listed in the President's Annex do have clear lies to terrorism, see supra note 8 (all persons and groups in the Annex are also named in U.N. Security Council list of terrorists); and (c) in any event, the use of a possibly erroneous terrorist designation to serve as a predicate for a conviction for violating the criminal provisions of IEEPA would not raise constitutional concerns, given that this Court has held that using a possibly erroneous terrorist designation to serve as a predicate for a conviction for violating the material support statute provision in 18 U.S.C. § 2339B is not constitutional, see United States v. Afshari, 426 F.3d 1150, 1156-59 (9th Cir. 2005), cert. denied 127 S. Ct. 930 (2007).

Finally, to the extent plaintiffs are arguing that the Secretary's designation authorities are simply unconstrained, the argument fails for the reasons previously discussed. See supra at 45-46. It would also fail because plaintiffs appear to (illogically) contend that the Secretary's designation authority is vague solely by pointing to the alleged absence of constraints on the President's designation authority.

Plaintiffs also complain (Br. 32) about a "literally infinite regression of designations." Each and every

designation, however, is based on a direct and immediate link – Person B may be designated as an SDGT for having direct financial or other dealings with Person A, who has already been designated as an SDGT. But in that situation, there is obviously a direct connection between persons A and B. Plaintiffs are correct that, in theory, where Person B meets the criteria for designation, Person C may also be designated for dealings with Person B. But again, that is because Person C has engaged in direct financial or other dealings with a person (Person B) who satisfies the criteria for designation as an SDGT. Plaintiffs try to make much of the fact that, in this hypothetical, Person C may have no direct connection with Person A, but they ignore the obvious point that Person C has had direct financial or other dealings with Person B, who is himself designated as an SDGT. It is difficult to see why any such designation would be unconstitutional.

D. The Secretary's Designation Authority is Not Overbroad.

To be overbroad, a law 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 119.

Where a statute is not "specifically addressed to speech," an overbreadth challenge will "[r]arely, if ever * * * succeed." Hicks, 539 U.S. at 124. As discussed above, nothing on the face of IEEPA or the UNPA implicates First Amendment rights, see ER 83, 85; supra at 24-26, and courts have generally agreed that IEEPA blocking orders do not implicate the First Amendment either, see supra at 24-25.

In any event, the E.O.'s prohibition on providing "services" to an SDGT does not violate the First Amendment at all, and thus cannot be overbroad. This Court held that a similar statute – 18 U.S.C. § 2339B, which bars the provision of material support to foreign terrorist organizations – does not violate the First Amendment, because the prohibition does not regulate speech or association per se, is content-neutral, and is reasonably tailored. Humanitarian Law Project v. Reno, 205 F.3d at 1134-36. For similar reasons, this Court held that the prohibition on providing any "service" to a foreign terrorist organization is not overbroad. Humanitarian Law Project v. Mukasey, 509 F.3d at 1136-37. Following suit, the district court in this case correctly held that the E.O.'s prohibition on providing "services" to SDGTs is not overbroad because it is "content-neutral and serves the legitimate purpose of deterring groups and individuals from providing services to foreign terrorist

organizations," ER 51 – a decision that follows a fortiori from this Court's holding in Humanitarian Law Project v. Mukasey. Even if plaintiffs could postulate some instances in which the E.O. might contravene the First Amendment, they cannot show that such instances are substantial enough – either in absolute number or in comparison to the prohibition's plainly legitimate sweep – to justify facial overbreadth invalidation.

Plaintiffs' overbreadth argument, in its essence, merely repeats their vagueness argument – that the term "services" prohibits constitutionally protected independent advocacy, and is thus overbroad. This argument fails for the same reasons discussed above, supra at 41-43, namely, that the E.O. cannot be construed to reach constitutionally protected independent advocacy, and even if it could be, the E.O. is easily susceptible to a contrary construction that would save its constitutionality. Plaintiffs' attempt to force the words of the E.O. to reach constitutionally protected conduct is directly contrary to this Court's obligation to construe a law to preserve, rather than to defeat, its constitutionality.

III. THE DISTRICT COURT CORRECTLY REJECTED PLAINTIFFS' LICENSING ARGUMENT.

Treasury regulations authorize the Department to grant licenses to permit transactions that would otherwise be prohibited under the E.O. 31 C.F.R. §§ 501.801-02. Plaintiffs contend that the licensing regulation violates the First

Amendment. Br. 46-47.

The district court, however, correctly held that plaintiffs lack standing to bring such a challenge. ER 67. First, plaintiffs cannot show that they are injured by the licensing regulation, because they have neither applied for, nor been denied, a license. ER 67-68. Second, plaintiffs fail to demonstrate a causal connection between the regulation and their claimed injury of being unable to provide services to the LTTE and PKK; rather, to the extent they are injured, it is not because of the licensing regulation, but because of the E.O.'s ban on providing "services" and other prohibitions. ER. 68. Third, plaintiffs cannot show that their injury would be redressed by striking down the licensing regulation; even in the regulation's absence, plaintiffs' desired conduct would still be prohibited under other provisions of the E.O. Ibid.

Plaintiffs do not respond to any of these three holdings by the district court, and thus they have waived any such argument (nor can they raise the argument for the first time in their reply brief, see Cedano-Viera v. Ashcroft, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003)). Accordingly, this Court need not resolve the question of whether the district court properly concluded that plaintiffs lack standing, because plaintiffs have failed to raise the issue on appeal. Because plaintiffs do not challenge the district court's judgment with respect to standing, that part

of the judgment must be affirmed.[14]

Furthermore, the Supreme Court has foreclosed precisely the kind of pre-enforcement challenge to a licensing scheme that plaintiffs float here. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988), 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 held that not every licensing scheme is subject to a pre-enforcement facial attack. Ibid. Rather, a pre-enforcement First Amendment facial challenge will be permitted only for those laws that "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. 486 U.S. at 760-61.

In Humanitarian Law Project v. Mukasey, 509 F.3d at 1137-39, this Court held that plaintiffs could not bring a pre-enforcement

[14] This is not inconsistent with this Court's ordinary obligation to resolve questions of standing before reaching the merits. By affirming the district court's holding that plaintiffs lack standing, this Court need not reach the underlying merits. In effect, plaintiffs have not appealed on the standing question at all.

facial challenge to the similar licensing provision in 18 U.S.C. § 2339B(j), which permits the Secretary of State to allow individuals and organizations to take actions that would otherwise violate the federal criminal prohibition on providing material support or resources to designated foreign terrorist organizations. This Court held that because the material support statute did not "on its face, regulate[] constitutionally protected activity," 509 F.3d at 1138, it did not have a close enough nexus to expression to permit a pre-enforcement facial challenge to the statute's licensing scheme.

The same is true for the licensing provision at issue here. As discussed above, nothing on the face of IEEPA or the UNPA implicates the First Amendment, and as courts have generally held, nothing in IEEPA blocking orders implicate such rights either. See supra at 24-25. Furthermore, the E.O. neither prohibits constitutionally protected independent advocacy, see supra at 42-43, nor bars mere association with an SDGT, see supra at 44. Because neither IEEPA, the UNPA, nor the E.O. has a close nexus to protected expression, plaintiffs may not bring a pre-enforcement challenge to Treasury's licensing regulation.[15]

[15] If this Court were to reach the merits, it should hold that the Treasury Department's discretion under the licensing scheme is sufficiently constrained to comply with constitutional requirements. As the agency has explained, when it receives an application, it "considers whether a proposed license would

IV. THIS COURT MAY NOT RE-WRITE IEEPA TO REQUIRE SPECIFIC INTENT OR TO LIMIT IEEPA TO "NATION-TARGETED SANCTIONS."

A. The Constitution Does Not Require Specific Intent.

Plaintiffs argue (Br. 43-46) that IEEPA's civil and criminal penalties are unconstitutional unless construed to require that a defendant have the specific intent to further an SDGT's terrorist activities. Plaintiffs argue that, if specific intent is not required, a person could be convicted for merely associating with an SDGT, or for engaging in independent advocacy. Br. 44-45. Plaintiffs' argument here simply re-packages the same argument they made in the context of vagueness and overbreadth, and should be similarly rejected because the E.O. does not prohibit mere association or independent advocacy. Supra at 42-44.

Moreover, the Supreme Court has made clear that the Constitution requires "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. For instance, in Humanitarian Law

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conflict with the program's goals by resulting in a benefit to terrorist organizations or their supporters, or, more specifically, by providing direct or indirect means that could enable the planning or orchestration of terrorist acts." SER 15 (Hammerle Decl. ¶ 38).

Project v. Mukasey, 509 F.3d at 1130-33, this Court considered 18 U.S.C. § 2339B, which prohibits providing material support or resources to foreign terrorist organizations, and concluded that specific intent was unnecessary because the statute's express scienter requirement (that the defendant know that recipient was designated as a terrorist or engaged in terrorist activities) was constitutionally sufficient.

IEEPA's criminal provision, 50 U.S.C. § 1705(c), easily satisfies constitutional requirements. As plaintiffs acknowledge, Br. 11, under that provision a person may not be criminally convicted unless he "willfully commits" a violation of an IEEPA regulation. The "willful" standard means that the Government must "prove that the defendant acted with knowledge that his conduct was unlawful." Bryan v. United States, 524 U.S. 184, 192 (1998). IEEPA's "willfulness" provision is plainly sufficient to separate otherwise innocent conduct from wrongful activity, and is thus constitutional.

Nor can a specific intent requirement be read into IEEPA's civil penalty provision, 50 U.S.C. § 1705(b). "It is not unusual for Congress to provide for both criminal and administrative penalties in the same statute and to permit the imposition of civil sanctions without proof of the violator's knowledge," Iran Air v. Kugelman, 996 F.2d 1253, 1258 (D.C. Cir. 1993) (Ginsburg, J.), and "centuries of Anglo-American legal tradition instruct

that criminal liability ordinarily should be premised on malevolent intent, whereas civil liability, to which less stigma and milder consequences commonly attach, often requires a lesser showing of intent." United States v. Nippon Paper Indus. Co., 109 F.3d 1, 7 (1st Cir. 1997). See also United States v. Bailey, 444 U.S. 394, 404 n.4 (1980) (recognizing that "offenses based on strict liability" include those "actions punishable by a fine, forfeiture, or other civil penalty rather than imprisonment"); Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1488 (6th Cir. 1995) ("a heightened level of mens rea is required in criminal acts that pose a possibility of loss of liberty" rather than civil provisions); Allied Prods. v. Federal Mine Safety & Health Review Commission, 666 F.2d 890, 893 (5th Cir. 1982) ("it is a common regulatory practice to impose a kind of strict liability" in civil penalty cases). Due process simply does not require proof of specific intent before the Government can impose a civil penalty.

Plaintiffs argue (Br. 43) that IEEPA's civil penalties are so severe that they should be considered criminal in nature. But "[w]hether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction," and a court "must first ask whether the legislature * * * indicated either expressly or impliedly a preference for one label or the other." Reiserer v. United States, 479 F.3d 1160, 1163 (9th Cir. 2007).

Here, Congress has expressly indicated its intent by providing that a "civil penalty may be imposed on any person" who violates an order or regulation promulgated under IEEPA. 50 U.S.C. § 1705(b) (emphasis added). That should be the end of the matter. Congress' intent is clear, and plaintiffs cannot show with the "clearest proof" that § 1705(b) is nonetheless criminal in nature. Reiserer, 479 F.3d at 1163 (emphasis added).

IEEPA's civil penalty is $250,000 or double the amount of the underlying transaction, 50 U.S.C. § 1705(b), which is hardly sufficient to transform it into a criminal penalty. See Helvering v. Mitchell, 303 U.S. 391, 399-400 (1938) (penalty of over $364,000 held to be civil in nature, rather than a criminal sanction). And given that Congress already provided for an expressly criminal penalty for the same conduct, it is difficult to imagine that Congress intended for the separate civil sanctions also to be treated as criminal in nature.

Similarly, nothing in an IEEPA designation itself is criminal in nature. The designation is just a civil regulation and restriction on property and property interests. Nor is the civil penalty remotely criminal in nature. Although plaintiffs argue that a designation could potentially result in severe consequences in some situations, even they acknowledge (Br. 6-7) that its effect clearly depends on whether or not the designated group or entity lives in the U.S., and whether or not the

designee can obtain licenses to engage in certain transactions. Thus, a designation cannot, on its face, be considered a criminal sanction.

Finally, the Government is ordinarily afforded greater latitude and deference regarding constitutional matters when it is operating in the foreign affairs context. See Regan v. Wald, 468 U.S. 222, 242 (1984) ("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."); Freedom To Travel Campaign v. Newcomb, 82 F.3d 1431, 1438 (9th Cir. 1996) ("[F]oreign affairs authority is given even broader deference than in the domestic arena," so that a statute invalid in domestic application could nonetheless be "valid in the foreign arena.").[16] The greater latitude afforded the Government in the

[16] See also 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."); 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."); 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 Comm'r 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").

foreign affairs context applies equally to the mens rea sufficient to satisfy the Constitution for offenses falling squarely within the foreign affairs field.

B. IEEPA Is Not Limited To "Nation-Targeted Sanctions."

Plaintiffs argue that the constitutional problems they have alleged could be avoided if IEEPA were limited to "nation-targeted sanction[s]," Br. 50, by which they mean that IEEPA first requires sanctions against a foreign nation and then, and only then, can a person or group within that nation be designated as an SDGT. Without the sanction on a foreign nation, plaintiffs contend, no person or group may be designated.

Plaintiffs do not contend that anything in the text of IEEPA expressly requires their construction, but they argue, Br. 48-49, that it is necessary to avoid constitutional concerns. That suggestion fails at the outset, however, because (as explained above) there are no constitutional deficiencies in the statute, and thus such a saving construction is unnecessary. It is therefore unsurprising that plaintiffs are unable to point to a single case from any court that has adopted their construction in the 31 years since IEEPA was enacted, or in the 13 years since Presidents began imposing IEEPA sanctions on individuals unconnected with sanctions on foreign countries (see Br. 6).

Furthermore, even if plaintiffs had correctly identified constitutional problems with the E.O., their proposed

construction of IEEPA would not avoid them. For instance, plaintiffs allege that the term "services" is unconstitutionally vague and overbroad, but they fail to explain how that term would be any less vague or overbroad were individually-based sanctions to be coupled with nation-based sanctions. Nor is it clear why their proposed construction would avoid any alleged vagueness with the President's designation authority, or how their statutory interpretation would render valid a supposedly unlawful licensing scheme. Plaintiffs proposed construction would not avoid any supposed constitutional problems so much as it would just make the statute inapplicable to the groups to which they wish to give services. But that is simply a policy dispute with the reach of the statute; it is not an argument that proffers a statutory construction designed to save the law from supposed constitutional problems.

More importantly, however, plaintiffs' suggested interpretation is unsupported by the language of IEEPA. Plaintiffs' argument (Br. 49-50) ultimately focuses on the statutory phrase "foreign country or a national thereof" – indeed, plaintiffs appear to place decisive weight on the single word "thereof," see Br. 50 – but their strained reading of the statute never persuasively explains how those six words somehow translate into a requirement that sanctions on foreign nationals must be coupled with sanctions on a foreign nation. Congress'

use of the disjunctive "or" is contrary to plaintiffs' apparent suggestion that sanctions on a foreign national must be conjoined with sanctions on a foreign country.[17]

Nor would Congress have intended such a construction. Plaintiffs make much out of the absence, in the legislative history, of any discussion that individuals and groups would be sanctioned without an accompanying sanction on a foreign nation. Br. 51-52. While divining Congressional intent from legislative history is sometimes misleading, it is all the more difficult to attempt to ascertain that intent, as plaintiffs do here, from what Members of Congress did not say. In any event, IEEPA is by definition designed to address national emergencies, and one would have every reason to believe that Congress intended for the President to have the flexibility, in a time of emergency, to act in ways that Members of Congress could not have anticipated at the time of the statute's enactment.

Moreover, Congress has implicitly ratified the current use of IEEPA. As plaintiffs note (Br. 6), since 1995, IEEPA sanctions have been imposed on individuals even in the absence of sanctions on a foreign nation, yet Congress has not acted to

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[17] Even if plaintiffs' theory about the meaning of the words "foreign country or a national thereof" were correct, the E.O.'s sanctions would nonetheless be authorized under the UNPA, which authorizes the President to prohibit economic relations between "any foreign country or any national thereof or any person therein." 22 U.S.C. § 287c(a) (emphasis added).

narrow the statute's reach in the way plaintiffs suggest, even though (as plaintiffs acknowledge, Br. 53) Congress has otherwise amended IEEPA in the intervening years. Such congressional action can only be taken as a ratification of the President's use and construction of IEEPA.

Finally, plaintiffs argue (Br. 53) that if IEEPA permits the kind of designations at issue here, it would render superfluous the prohibition in 18 U.S.C. § 2339B on giving material support or resources to terrorists. But the material support statute differs from IEEPA because in the former, Congress enacted a criminal prohibition applicable when the Secretary of State designates a group as a foreign terrorist organization, whereas IEEPA is triggered only when the President declares a national emergency and takes action under this statutory authority. And unlike IEEPA, the material support statute also includes immigration consequences. See 8 U.S.C. § 1182(a)(3)(B)(i)(IV) and (V). Conversely, IEEPA's scope is broader than the material support statute, or at least different in nature, as IEEPA permits the President to block a person's property and interests in property altogether, a provision not found in the material support statute. Finally, the two statutes differ in their criminal mens rea requirements. Compare 50 U.S.C. § 1705(c) (providing criminal penalties for "[a] person who willfully commits, willfully attempts to commit, or willfully conspires to

commit" a violation of an IEEPA blocking order), with 18 U.S.C. § 2339B(a)(1) ("[A] person must have knowledge that the organization is a designated terrorist organization" or that the organization "has engaged or engages in terrorist activity" or "has engaged or engages in terrorism.").

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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MARCH 2008

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 Brief for Appellees complies with Fed. R. App. P. 32(a)(7)(C) because it is a principal brief of no more than 13,991 words.

_____
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CERTIFICATE OF SERVICE

I certify that on March 6, 2008, I served two copies of the foregoing Brief for Appellees and one copy of the accompanying Supplemental Excerpts of Record by causing them to be sent by overnight Federal Express to:

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I also certify that on March 6, 2008, I filed an original and 15 copies of the foregoing Brief for Appellees and 5 copies of the accompanying Supplemental Excerpts of Record by causing them to be sent by overnight Federal Express to:

MS. CATHY CATTERSON
Clerk, United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

_____
Joshua Waldman
Counsel for Appellees

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that Humanitarian Law Project v. Mukasey, Nos. 05-56753, 05-56846, 509 F.3d 1122 (9th Cir. 2007), pet'n for rehearing pending, is a related case in that it involves the same plaintiffs as the instant case and also involves a constitutional challenge to a statute, 18 U.S.C. § 2339B, that is designed in part to stop the provision of financial and other support to terrorist organizations. This Court, however, has previously denied plaintiffs' motion in this case to assign the appeal to the same panel that heard Humanitarian Law Project v. Mukasey.

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Joshua Waldman
Counsel for Appellants