UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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INTRODUCTION

The "material support" statute at issue in this case makes it a crime to engage in any speech or conduct that might be deemed to be "for the benefit of" a designated "foreign terrorist organization." It makes such speech or conduct a crime even if it is engaged in wholly independently of the designated group, and is neither intended to advance, nor has the effect of advancing, any terrorist activity. The statute does not merely criminalize the provision of support tied to terrorist activity, such as "training" in how to build explosives, but sweeps far more broadly, criminalizing even "training" that is intended to *discourage* the designated group from engaging in terrorism.

Plaintiffs concede that the government has a compelling interest in fighting terrorism and protecting our national security. But as the Supreme Court has reminded us three times already since 9/11, those interests do not afford a "blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring) (quoting *Hamdi*); *see also Rasul v. Bush*, 542 U.S. 466 (2004). The government cannot thrust aside constitutional concerns about chilling protected expression and association, or the fundamental principle that guilt must be personal, simply because it is fighting terrorism.

The Constitution's guarantees of due process, free speech and free association are not a straitjacket. They allow the government to criminalize support for terrorist activities. But they do not allow the government to hold citizens criminally liable for writing op-eds, lobbying Congress or the United Nations, supporting lawsuits, aiding tsunami survivors, or providing training in human rights advocacy and peacemaking. The district court properly invalidated as vague three of the statute's prohibitions: on providing "training," "expert advice or assistance," and "services." *Humanitarian Law Project v. Gonzales*, 380 F. Supp.

2d 1134 (C.D. Cal. 2005). Plaintiffs' cross-appeal argues that the district court erred, however, in: (1) finding the ban on "personnel" and certain aspects of the ban on "expert advice or assistance" not impermissibly vague; (2) finding the bans on "personnel," "training," "expert advice or assistance," and "services" not substantially overbroad; (3) ruling that neither the Fifth Amendment nor the statute requires proof of specific intent to meet the mandate of individual culpability; and (4) rejecting plaintiffs' challenge to a licensing scheme that gives the Secretary of State unfettered discretion to license speech without constitutionally required safeguards.

It is important at the outset to emphasize what the government pointedly ignores: the district court's findings of undisputed facts. The court found that plaintiffs seek to support only the "lawful, nonviolent activities" of two organizations – the Liberation Tigers of Tamil Eelam (LTTE) and the Kurdistan Workers' Party (PKK) – and that both of these organizations engage in a wide range of perfectly lawful, peaceful, and nonviolent activity, including "political organizing and advocacy, providing social services and humanitarian aid." 380 F. Supp. 2d at 1136-37. Defendants did not dispute these facts below, and do not challenge the district courts' findings here.[1] The question presented, then, is whether plaintiffs can be constitutionally prohibited, on pain of criminal conviction as "terrorists," from supporting such activity.

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[1] The government opens its brief with a litany of sensational and *unsupported* allegations about the LTTE's and the PKK's terrorist activities, Third Cross-App. Br. 1-3, but those allegations are not properly before this Court. The district court made no such findings, *compare* 380 F. Supp. 2d at 1136-37; the government offered no admissible evidence to support the allegations; and the government has not argued in this appeal that the district court erred in any of its findings of fact. This appeal must be decided on the district court's unchallenged findings, not the defendants' unsupported allegations.

I. THE MATERIAL SUPPORT STATUTE IS UNCONSTITUTIONALLY VAGUE

The district court held unconstitutionally vague the bans on "training" and "services," and the ban on "expert advice or assistance" insofar as it reaches any advice or assistance derived from "specialized knowledge." The court upheld the bans on providing "personnel" and "expert advice or assistance" derived from "scientific or technical knowledge." Plaintiffs' cross-appeal challenges the latter two conclusions.[2]

This Court previously held the ban on providing "personnel" impermissibly vague. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137-38 (9th Cir. 2000). Defendants maintain that the "personnel" ban is no longer vague, because Congress subsequently defined "personnel" to prohibit acting under the "direction or control" of an organization, and not to prohibit acting "entirely independently" of the designated group. 18 U.S.C. § 2339B(h). But that hardly clarifies matters for two reasons. The amended statute leaves a wide and undefined swath of collaborative activity of questionable status – conduct neither under a group's "direction or control" nor "entirely independent" of the group. And the new ban on "services" renders irrelevant any distinction drawn within the "personnel" prohibition because it separately bans any activity done "for the benefit of" a designated group. Third Cross-App. Br. 7 (quoting *Webster's New International Dictionary* 2075 (3d ed. 1993)). Activity undertaken "entirely independently" of a designated group but done for its benefit appears to be criminalized by the

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[2] Because this is cross-appellants' reply brief, we directly address only the vagueness of the "personnel" provision and that part of the "expert advice or assistance" provision that the district court upheld. However, most of the government's arguments in defense of these provisions apply more generally to each of the four prohibitions challenged as vague, and therefore plaintiffs' responses are also generally applicable.

"services" ban, even if it is not criminalized by the "personnel" ban. Thus, it remains entirely unclear whether plaintiffs can write an op-ed on the human rights of the Kurds for the PKK's benefit, even if they do so entirely independently. And if they seek any editorial input or approval from the PKK, will they be treated as having provided "personnel" because they are no longer acting "entirely independently"?

Plaintiffs agree that marginal ambiguities do not render a statute impermissibly vague. Third Cross-Appeal Br. 4-5, 13-14. But the "personnel" provision offers no guidance whatsoever on how the wide range of conduct undertaken without a group's direction or control but not "entirely independently" shall be treated, or on how to reconcile this limitation with the statute's even broader ban on "services." What sort of collaboration, if any, with the lawful activities of designated groups is permissible? How is an ordinary person to know whether his activity is permissible because it is "entirely independent" or impermissible because it is done "for the benefit of" the group? Is merely joining a group now criminally proscribed, as such an act is presumably done "for the benefit of" the group? These are not marginal questions, but go to the very heart of what is and is not permitted.

Instead of explaining how an ordinary citizen is supposed to navigate these shoals, the government advances several general arguments in defense of the "personnel" provision – and by extension, of the other challenged provisions as well. It contends, for example, that the distinction Congress drew between acting independently and acting under a group's direction and control in the "personnel" prohibition should be extended to all other provisions of the statute, so that the statute as a whole would prohibit only direct support of designated groups, and not independent activity. Third Cross-App. Br. 8-10.

This argument fails, however, for four reasons. First, as we have seen, defendants themselves have taken the position that the ban on "services" criminalizes "an act done for the benefit" of a designated group, a definition that appears to include wholly independent acts. In its response brief, the government emphasizes that the definition of "services" also includes acts done "at the command of" another, suggesting that this part of the definition is consistent with the "direction or control" language. Third Cross-App. Br. 18. But the government's definition is in the disjunctive, and therefore by its plain terms prohibits conduct done "for the benefit of" a designated group regardless of whether it is "at the command of" the group.

Second, Congress placed the distinction between acting under a group's "direction or control" and acting "entirely independently" *only* in the definition of "personnel." It could have applied that limitation to the entire "material support" statute, or to the other terms that had previously been declared invalid, or to its new prohibition on "services" – but it chose *not* to do so. As defendants themselves argue elsewhere in their brief, where Congress uses different language in different sections of the same statute, it is presumed to do so deliberately. Third Cross-App. Br. 34. And as this Court has already acknowledged, it is not the province of the judiciary to rewrite statutes. *HLP v. Reno*, 205 F.3d at 1137-38.

Third, the use of the term "material" does not support a reading of the statute as limited to "direct" support. The government argues that "material" support means support having "'a natural tendency' to affect the activities of a foreign terrorist group." Third Cross-App. Br. 16-17. But how is an ordinary citizen to judge whether his or her activity's "natural tendency" will be to "affect" the activities of a designated group? And surely independent activity could have such a "natural tendency." If anything, the government's newfound emphasis on "material" only exacerbates the statute's vagueness.

Moreover, the statute expressly defines the compound term "material support" without any reference to the "natural tendency" language the government now invokes. If the statute defined the word "support" as "personnel," "expert advice or assistance," and the like, one might then read "material" as having an independent limiting meaning. But the statute uses these terms to define the compound term "material support," 18 U.S.C. § 2339A(b), and therefore *any* provision of "personnel," "training," "services," or "expert advice" is by definition "material support," without regard to its "natural tendency."

Fourth, the government's purported distinction between direct support and independent activity runs counter to its claim that any conduct that boosts an organization's "good will" with the public facilitates its terrorist activity. Third Cross-Appeal Br. 35, 42, 61. Independent advocacy that applauds the legitimate activities of a designated group is more likely to increase that group's "good will" than a direct training on how to advocate for human rights.

Accordingly, the government's effort to limit the statute as a whole to support provided directly to a designated group conflicts with the statute's language and purpose, and in any event does not cure the statute's vagueness.

The government also argues that the district court confused vagueness and overbreadth, because "whether the statute is unconstitutionally vague has nothing to do with whether or not the statute's scope might trench upon protected speech." Third Cross-Appeal Br. 11-12. But this Court in *Humanitarian Law Project v. Reno* expressly stated that whether "a criminal law implicates First Amendment concerns" is relevant to the vagueness analysis, and relied on the statute's potential extension to protected expression as its principal reason to find it vague. 205 F.3d at 1137-38. The Supreme Court has declared, also contrary to defendants' argument, that where a "law interferes with the right of free speech or of

association, a more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

Finally, the government maintains that the definition of "expert advice or assistance" is sufficiently clear because it tracks in part the definition of expert testimony under Federal Rule of Evidence 702. As the district court held, however, Rule 702, a general guide for trained judges and lawyers, "does not clarify the term ... for the average person with no background in the law." 380 F. Supp. 2d at 1151.[3]

Accordingly, the Court should declare that the bans on providing "personnel" and "expert advice or assistance" derived from "scientific" or "technical" knowledge are unconstitutionally vague, in addition to affirming the district court's invalidation of the other challenged terms.

II. THE MATERIAL SUPPORT STATUTE IS SUBSTANTIALLY OVERBROAD

When this Court initially invalidated the prohibitions on providing "training" and "personnel" to designated organizations, it emphasized that these prohibitions could apply to a wide range of protected speech, and stated that "the result would be different if the term 'training' were qualified to include only military training or training in terrorist activities." 205 F.3d at 1138. Congress ignored the Court's advice, however, and instead not only retained sweeping bans on "personnel" and "training," but *added* still broader prohibitions on any "expert advice or assistance"

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[3] Moreover, the definition of "expert testimony" is anything but clear under the Federal Rules of Evidence. *See Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993). Courts generally deal with the difficulty of assessing expertise by interpreting the term liberally and allowing cross-examination and the adversarial process to test the experts. But such an open-ended approach is plainly insufficient to provide notice to ordinary citizens where criminal liability is on the line.

or "service." As a result, the material support statute criminalizes literally *every* form of training, *every* form of "expert advice or assistance," *every* form of "service," and *every* form of "personnel" – no matter how remote from terrorist activity. The point of the examples used in plaintiffs' principal brief was not to trivialize the issue, as defendants repeatedly suggest, but to illustrate just how expansive the statute is, prohibiting activities, such as human rights or music appreciation, that have *no conceivable nexus* to the government's legitimate interest in countering terrorist activity.

Plaintiffs readily concede that *some* of what the statute forbids is not constitutionally protected – such as teaching terrorists how to manufacture bombs. But the overbreadth analysis does not stop there – it *begins* there. It asks whether Congress has painted with too broad a brush by sweeping in a substantial amount of protected activity in addition to the unprotected conduct that it can legitimately proscribe. To make that assessment, the Court must consider *all* possible applications of the statute – not just the handful the government highlights. The critical point here, noted by this Court in the first appeal, *see* 205 F.3d at 1138, is that the challenged terms have *no subject matter limitations whatsoever*, and therefore make it a crime to teach *anything*, whether it be basketweaving, pottery, swimming, international law, the history of medieval Europe, or glovemaking; to provide any service, whether it be writing an op-ed, lobbying Congress, petitioning the United Nations, mailing a letter, publishing a magazine, or baking a pie; and to provide advice on any subject deriving from technical, scientific, or other specialized form of knowledge, whether it be singing, remedial reading, homebuilding, or any form of legal or medical knowledge.

In assessing the statute's overbreadth, moreover, the Court must consider its potential application not only to protected speech, but also to protected *association*. A statute is unconstitutionally overbroad whether it infringes on a substantial

amount of protected speech, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), or association. *United States v. Robel*, 389 U.S. 258, 266 (1967); *see also Sawyer v. Sandstrom*, 615 F.2d 311, 315-16 (5th Cir. 1980) (holding overbroad an anti-loitering ordinance because it penalized a substantial amount of protected associational activities).

The revised statute's challenged terms are so broad that they now appear to prohibit even membership as such, as well as protected speech and association having no nexus whatsoever to terrorism. Joining a group could well be seen as "for the benefit of" the group, as could advocating for the group's political goals. Yet this Court upheld the prior version of the material support statute against a First Amendment challenge only because it concluded that it did *not* criminalize membership or advocacy. 205 F.3d at 1133 ("The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group.").

As this Court said before, Congress is perfectly free to criminalize training, services, personnel, and expert advice that have some connection to terrorism; it is not free to criminalize literally *every* form of training, personnel, services, and expert advice, no matter how far removed from terrorism.

III. THE STATUTE IS UNCONSTITUTIONAL AS APPLIED TO PLAINTIFFS' INTENDED SUPPORT

Even if the Court concludes that the statute is not facially vague and overbroad, plaintiffs maintain that it is unconstitutional as applied to the types of services and support they seek to provide – human rights advocacy, humanitarian aid to tsunami survivors, and the like. These forms of support have no nexus to terrorism, and could not be used to further terrorist activity, and accordingly

banning them is not essential in order to further the government's legitimate interest in stemming support for terrorist activity. The Court previously rejected an argument that the material support statute impermissibly penalized association in violation of the First Amendment, finding that the statute survived intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968). *See HLP v. Reno*, 205 F.3d at 1135-36. That decision was limited, however, in two important ways. First, in the very same decision, the Court invalidated the statute's bans on providing "personnel" and "training." *Id.* at 1137-38. Second, the statute at that time did not prohibit "expert advice or assistance" or "services," terms added later. Thus, the Court's holding in *HLP v. Reno* is only that the material support statute, *minus its prohibitions on "personnel" and 'training," and without any ban on "expert advice" or "services,"* was sufficiently narrowly tailored to satisfy *O'Brien* scrutiny.

Plaintiffs' as applied challenge focuses specifically on the revised statute's prohibitions on providing "personnel," "training," "expert advice or assistance," and "services" – none of which were upheld by *HLP v. Reno*. These provisions present a very different question from that presented in *HLP v. Reno*. Even assuming *arguendo* that *O'Brien* is the correct standard,[4] these provisions cannot satisfy the *O'Brien* tailoring requirement, which demands that the statute's restriction on First Amendment activity be "no greater than necessary." *HLP v. Reno*, 205 F.3d at 1135; *O'Brien*, 391 U.S. at 377.

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[4] Because the provisions challenged here prohibit those forms of support that most plainly involve speech – training, expert advice, personnel, and services – and prohibit that support only when provided to disfavored political groups, they are content-based, and must satisfy strict scrutiny. However, as shown in the text, they cannot satisfy even the more relaxed scrutiny used in *O'Brien*.

As this Court's prior opinion suggests, Congress could have specified those forms of "training" and "services" that posed a particular threat of furthering terrorist activity. *See* 205 F.3d at 1138. Congress chose not to do so, however, and instead prohibited activity that has literally no chance of furthering terrorist activity, and that is in fact designed and likely to *reduce* resort to violence. A statute that makes it a crime to provide human rights advocacy training restricts more First Amendment activity "than is necessary" to further the government's legitimate interest in reducing support for terrorist activity. Accordingly, even under the *O'Brien* test that this Court applied in *HLP v. Reno*, the prohibitions on providing "training," "personnel," "expert advice or assistance," and "services" are unconstitutional as applied to plaintiffs' intended conduct.

IV. THE MATERIAL SUPPORT STATUTE VIOLATES DUE PROCESS TO THE EXTENT THAT IT PENALIZES MATERIAL SUPPORT WITHOUT PROOF OF INTENT TO FURTHER A DESIGNATED GROUP'S TERRORIST ACTIVITIES

As construed by defendants, the material support statute makes a criminal out of a human rights activist who does nothing more than advise a designated group on how to pursue its grievances peaceably and lawfully through human rights complaint mechanisms. Were the same human rights activist to provide *the same advice* to the Irish Republican Army or the Palestine Liberation Organization – neither of which has been designated as a "terrorist" group – he would face no criminal sanctions whatsoever. Accordingly, the statute penalizes the activist not for the character of his actions, but because of the identity of the group his actions benefit. This is guilt by association in its classic form, and violates the Fifth Amendment principle that guilt must be personal. *Scales v. United States*, 367 U.S. 203 (1961).

A. The Statute Imposes Guilt by Association in Violation of the Fifth Amendment

Defendants offer two principal defenses to plaintiffs' First Amendment challenge. They contend that criminalizing material support does not trigger the principle of individual culpability, even if criminalizing membership does. And they maintain that the personal guilt principle does not apply where foreign affairs are concerned. Both arguments are misguided.

1. Membership and Material Support Are Not Distinguishable From the Standpoint of the Fifth Amendment Principle of Personal Guilt

Defendants seek to distinguish the legion of cases holding that due process is violated by statutes penalizing membership in the Communist Party on the ground that the statute here penalizes support, not membership. From the standpoint of the Fifth Amendment, however, there is no logical difference between a statute that imposes guilt on membership alone and one that imposes guilt on the payment of dues or the volunteering of one's time to further the group's lawful activities. A statute that penalized membership in a street gang, without more, would plainly violate the Fifth Amendment. But so, too, would a statute that penalized the provision of training to a street gang, even if the training were vocational training designed to offer gang members an alternative to a life of crime. Thus, while this Court found the distinction between material support and association to be critical to plaintiffs' First Amendment challenge, there is no authority in logic or precedent for treating that distinction as critical to their Fifth Amendment challenge.

That the personal guilt principle applies beyond membership per se is illustrated by the black letter rule, set forth in plaintiffs' opening appeal brief and virtually ignored by defendants' response, that criminal liability under conspiracy,

complicity, and aiding and abetting statutes always requires proof of a "shared purpose to achieve jointly held illegal aims." *Ferguson v. Estelle*, 718 F.2d 730, 735-36 (5th Cir. 1983). It is only this "community of illicit intent" that establishes the requisite personal guilt for Fifth Amendment purposes. *Id.* Conspiracy statutes distinguish between the person who provides training to a criminal gang in how to launder its illegally gotten gains and the person who provides the same gang vocational training in order to encourage gang members to find lawful employment Were a conspiracy statute to criminalize the vocational trainer, it would violate the due process principle of personal culpability. The material support statute, as construed by defendants, does just that.

Defendants insist that "material support, by its very nature, evinces a much stronger and closer connection to the terrorist group's unlawful activities than the mere 'moral encouragement' of membership." Third Cross-App. Br. 57. But that is patently false. Under no rational understanding of blame can a social worker who provides drug rehabilitation services to a gang be "more culpable" than one who actually joined the gang. If anything, joining a group generally shows a stronger connection to the group's unlawful activities than the provision of aid to lawful activities designed to *discourage* the group's illegal activities.

Similarly, defendants argue – again by bare assertion rather than any exercise of logic – that providing material support to a group designated by the government is not an inherently "innocent" act – unlike, defendants argue, owning a gun. Third Cross-Appeal Br. 41. But providing human rights advocacy training or relief to tsunami survivors is every bit as "innocent" as owning a gun. Constitutional law cannot rest on such illusory and unsupported distinctions.

Most importantly, the membership distinction on which defendants place so much reliance simply does not work under the revised statute. As noted above, joining a group could itself be seen as a "service," thereby erasing any distinction

between membership and material support. And even if the mere act of joining were not deemed a "service," once a member undertakes literally any act "for the benefit of" the group he has just joined, whether it be to attend a meeting, show up for a demonstration, volunteer his time, or do any of the myriad things associations demand of their members to survive, he will face criminal sanctions for providing material support. Thus, there simply is no tenable distinction between penalizing membership and penalizing material support from the standpoint of personal guilt.

2. There Is No Foreign Affairs Exception to Due Process

Defendants also argue that foreign affairs considerations permit the government to set aside the constitutional principle of personal guilt when addressing foreign entities. But the principle of individual culpability was itself forged in a foreign affairs setting – the Cold War struggle against the Soviet Union and the Communist Party, which Congress had found to be a foreign-dominated organization aimed at overthrowing the United States by force and violence.[5] There is no "foreign affairs exception" to the Fifth Amendment demand that guilt be personal.

It is true, as defendants point out, that the Supreme Court in *Scales* stated that a statute authorizing deportation for association with the Communist Party, which the Court had upheld in *Galvan v. Press*, 347 U.S. 522 (1954), "did not press nearly so closely on the limits of constitutionality as th[e] enactment" in *Scales* itself. *Scales,* 367 U.S. at 222; Third Cross-App. Br. 50. Defendants deduce from this that the personal guilt principle does not apply where foreign affairs are concerned. But

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[5] *See Communist Party of the United States v. Subversive Activities Control Bd.* 367 U.S. 1, 5 (1961) (quoting Internal Security Act of 1950, ch. 1024, sec. 2, 64 Stat. 987 (codified as amended at 50 U.S.C. § 781 (repealed 1993))).

defendants neglect to mention that the Court in *Scales* explained that the reason the statute in *Galvan* was upheld was that it "rested on Congress' far more plenary power over aliens," not that it involved foreign affairs. *Scales*, 367 U.S. at 222. Both *Galvan* and *Scales* involved foreign affairs and national security; the difference was that *Galvan* involved deportation of aliens. As the material support statute imposes criminal liability on citizens, it plainly falls on the *Scales* side of the line.

Nor does the fact that courts have routinely upheld embargoes on trade with foreign *nations* mean that the government is similarly free to block all support of designated foreign *organizations*. There is a critical difference between targeting a foreign *nation* and targeting a foreign political *organization*. Nation-to-nation diplomacy necessarily requires nations to deal with each other as sovereigns, and economic sanctions have long been an established tool in the diplomatic arsenal. When the United States imposes an embargo on a nation, such as Cuba or Libya, it is therefore not targeting individuals for their political associations, but is targeting a sovereign qua sovereign. By contrast, the material support statute criminalizes activity solely because it is done in connection with a proscribed *political group*. While the United States plainly can impose a trade embargo on Cuba, *Regan v. Wald*, 468 U.S. 222 (1984), it has no more right to criminalize association with or support of Amnesty International, a British organization, than it has to criminalize association with or support of Operation Rescue, a domestic groups.

The Supreme Court has repeatedly drawn just this distinction. In *Regan v. Wald* itself, the Court expressly distinguished two prior decisions, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), and *Kent v. Dulles*, 357 U.S. 116 (1958), in which it had overturned denials of passports to members of the Communist Party. As the *Regan* Court explained, the "Secretary of State ... made no effort selectively to deny passports on the basis of political ... affiliation, but simply imposed a

general ban on travel to Cuba." *Regan*, 468 U.S. at 241. In *Regan* and the appellate court decisions that have followed it, the challenged laws were held not to implicate guilt by association precisely because they were "across-the-board restriction[s]" not targeted at association with a political group. *See* 468 U.S. at 241.[6] By contrast, the material support statute does not impose an across-the-board restriction on a particular sovereign, but selectively criminalizes "material support" *only when done in association with particular political groups*.

The D.C. Circuit has also recognized the important distinction between foreign *nations* and foreign *organizations* in a related context. In *Nat'l Council of Resistance to Iran v. Department of State*, 251 F.3d 192, 202-03 (D.C. Cir. 2001), the government argued that its authority to deal externally with sovereigns without regard to due process restrictions should be extended to designated foreign terrorist organizations. The D.C. Circuit acknowledged that "[i]t is certainly true that sovereign states interact with each other through diplomacy and even coercion in ways not affected by constitutional protections such as the Due Process Clause." *Id.* at 202. But it held that the same treatment does not apply to foreign terrorist organizations: "since neither [of the designated organizations] is a government, none of the authorities offered by the Secretary have any force." *Id.* Defendants object that "no one argues that the Due Process Clause is inapplicable in this case." Third Cross-App. Br. 52 But the point is a more general one: the government's power to deal with other sovereigns is categorically different from its power to deal

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[6] *Freedom to Travel Campaign*, 82 F.3d 1431, 1441-42 (9th Cir. 1996) (upholding across-the-board restrictions on travel to Cuba); *Walsh v. Brady*, 927 F.2d 1229, 1234-35 (D.C. Cir. 1991) (same).

with foreign political groups, and therefore it cannot find support in cases addressing embargoes on foreign nations.[7]

B. The Only Way to Avoid These Constitutional Infirmities is to Construe the Statute to Require Proof of Specific Intent

The constitutional infirmity identified above can be avoided by interpreting the statute to require proof that the donor specifically intended to further the recipient group's illegal activity. Such an intent requirement distinguishes the innocent human rights activist from the criminal aider and abettor, as the Constitution requires. Defendants object that this interpretation is foreclosed by the language and legislative history of the material support statute. In fact, both the language and the legislative history *support* such a reading, and therefore under the canon of constitutional avoidance the Court is obligated to adopt it.

The Supreme Court confronted remarkably similar statutory language in *Scales,* and nonetheless construed the statute precisely as plaintiffs suggest this Court should construe the material support statute – to require proof of specific intent. *Scales* accordingly supports plaintiffs' statutory construction, and refutes each of defendants' objections.

Defendants argue, for example, that the material support statute cannot be read to require intent because a neighboring statute, 18 U.S.C. § 2339A, includes an explicit intent requirement, and therefore Congress must have intentionally omitted

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[7] Defendants suggest that plaintiffs' concession that Congress could prohibit all material support to al Qaeda implies that foreign affairs considerations trump the principle of individual culpability. Third Cross–App. Br. 51. But the reason al Qaeda is different is not that it is a foreign group, but that Congress has authorized military force against it, permitting certain actions that in the absence of such an authorization would be illegal. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (upholding preventive detention of enemy combatants under authorization to use military force against al Qaeda).

an intent requirement from § 2339B. Third Cross-App. Br. 34. But the same was true in *Scales*. One clause expressly included an intent requirement, making it a crime to print, publish, or distribute literature "*with intent to cause the overthrow or destruction of any such government.*" 18 U.S.C. § 2385 (quoted in *Scales*, 367 U.S. at 205 n.1) (emphasis added). The membership clause, by contrast, was silent on intent, as it made it a crime to "*become[] or [be] a member of*, or affiliate[] with, *any such society, group, or assembly of persons* [who advocate the forcible overthrow of government], *knowing the purposes thereof.*" *Scales*, 367 U.S. at 205 n.1 (emphasis in original). The Supreme Court nonetheless construed the membership clause to require more than mere knowledge, but specific intent to further the group's illegal activities.

Scales also disposes of defendants' argument that because § 2339B explicitly requires proof of knowledge, it cannot be read to require, in addition, proof of intent. Third Cross-App. Br. 37. The membership provision in *Scales* similarly expressly required only knowledge, yet the Court construed it to require proof of intent as well.

If anything, the argument for construing § 2339B to incorporate an intent element is even stronger than in *Scales*. *Scales* and its progeny have effectively established a background rule that statutes penalizing association must require proof of specific intent, and will be read to do so even where they do not do so expressly. The Congress that enacted the Smith Act before *Scales* was decided could not have known that. But the Congress that enacted the material support statute can be assumed to have accepted the *Scales* Court's holding that statutes imposing guilt on association will be read to include a specific intent requirement.

Defendants argue that the Congressional "finding" regarding aid to "terrorist" groups is inconsistent with an intent requirement. Third Cross-App. Br. 41-42. But Congress itself acted inconsistently with that finding, both by

permitting the provision of medicine and religious materials, and by creating a licensing provision that permits the provision of "training," "personnel," and "expert advice or assistance" so long as the Secretary of State determines that such aid cannot be used to carry out terrorist activity. 18 U.S.C. § 2339B(j). It is no more "inconsistent" with the finding to construe the statute to require proof of specific intent.

Finally, the legislative history supports plaintiffs' reading. Senator Hatch, the bill's sponsor, while introducing the Conference Report for the material support bill, expressly stated that the bill would make it a crime only to "knowingly provide material support *to the terrorist functions* of terrorist groups," and would thereby "safeguard[] the freedom to associate." 142 Cong. Rec. S3354 (daily ed. April 16, 1996). Defendants' only response to this language, which speaks directly and unequivocally to the question of intent, and was offered by the bill's sponsor in direct connection with its consideration by the Senate, is to suggest that perhaps Senator Hatch was confused, because he also described the bill as assigning the power to designate terrorist groups to the President rather than the Secretary of State. Third Cross-App. Br. 44. But defendants offer no explanation for why the identity of the designator would have any relevance to the question of whether criminal liability required a showing of intent to further a group's terrorist activities. Moreover, the other statute that defendants suggest Senator Hatch may have been thinking of, an unpassed bill from the previous year, is indistinguishable from the material support statute in terms of its prohibitory language; it expressly barred knowing support of designated groups, and was silent as to intent. *See* S. 390, 104th Cong. § 301 (1995).

In sum, the Court should either construe the material support statute to incorporate the intent requirement imposed in *Scales*, or invalidate the statute under the Fifth Amendment for failure to include that requirement.

V. THE LICENSING PROVISION IS UNCONSTITUTIONAL

Finally, plaintiffs challenge the constitutionality of 18 U.S.C. § 2339B(j), a new licensing provision added by the 2004 Intelligence Reform and Terrorism Prevention Act. It singles out precisely those forms of support that this Court and the district court identified as most likely to criminalize speech, and grants an executive official carte blanche to approve or disapprove of such expressive activity – without the safeguards constitutionally required for such licensing schemes.

Defendants argue that plaintiffs lack standing to challenge the validity of this provision. They concede, however, that special standing rules apply to licensing schemes, and that under *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988), plaintiffs have standing to bring a pre-enforcement challenge if § 2339B(j) has "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." Third Cross-App. Br. 28 (quoting *Lakewood*, 486 U.S. at 759). Defendants argue that § 2339B(j) does not have a sufficient "nexus" because it is not targeted at speech, citing this Court's decision in *HLP v. Reno*, 205 F.3d at 1137, which found that the material support statute, minus its personnel and training provisions, was not so targeted.

But whether § 2339B(j) has a *nexus* to expression is a different question from whether the material support statute was *targeted* at speech. This Court has found the *Lakewood* "close enough nexus" standard satisfied with respect to statutes that are not targeted at expression. In *Nunez v. City of San Diego*, 114 F.3d 935, 950-51 (9th Cir. 1997), for example, the Court granted pre-enforcement standing under *Lakewood* to challenge a curfew ordinance on its face. The Court held that the ordinance was "a general regulation of conduct, not speech." *Id.* at 950. But citing *Lakewood* and noting that only a "nexus" is required to permit a facial challenge,

the Court found it sufficient that the ordinance had "an integral effect on the ability of minors to express themselves" as it "restrict[ed] access to any and all public forums." *Id.* at 950-51.

Section 2339B(j) easily satisfies the "close enough nexus" standard. As noted above, § 2339B(j) is not generally applicable to all forms of material support, but singles out precisely those forms of support that this Court and the district court have already found are most likely to criminalize protected expression. It is as if a city park barred all public use of its open spaces, but then created an exception for parades, fairs, and speeches that the mayor found satisfactory in his discretion. The absolute ban might not trigger First Amendment scrutiny or warrant a facial challenge, see *Kovacs v. Cooper*, 336 U.S. 77 (1949), but the licensing scheme singling out expressive uses would plainly merit a facial challenge. *Saia v. New York*, 334 U.S. 558 (1948). *See Lakewood*, 486 U.S. at 764-66 (discussing *Kovacs* and *Saia*).

In addition, plaintiffs have an independent ground for standing to challenge the validity of § 2339B(j) to the extent that the Court considers it in assessing the constitutionality of the bans on providing "personnel," "training," and "expert advice or assistance." Congress enacted the licensing scheme as an integral part of amendments designed to cure the constitutional defects in those bans identified by this Court and the district court. Defendants concede that plaintiffs have standing to challenge the constitutionality of the bans on "personnel," "training," and "expert advice or assistance." If § 2339B(j) is unconstitutional for failure to include the safeguards required for licensing provisions, it cannot be relied upon to mitigate the intrusions on speech and association that these provisions effectuate.

On the merits, defendants concede § 2339B(j) "cannot confer 'unduly broad discretion in determining whether to grant or deny a permit.'" Third Cross-App. Br. 30 (quoting *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002)). They

maintain that the licensing scheme satisfies that demand because it provides that the Secretary of State may grant a license only where she finds that aid may not be used to carry out terrorist activity, analogizing it to the criteria for designating "foreign terrorist organizations," which this Court previously found sufficiently specific. *Id.* at 30-31.

But there is a world of difference between the criteria set forth for designating groups and the criteria for granting exemptions. 8 U.S.C. § 1189 limits designations to groups that are (1) foreign; (2) have engaged in specifically defined "terrorist activities"; and (3) whose activities threaten our national security. By contrast, § 2339B(j) permits the Secretary to grant or deny an exemption to any "personnel," "training," or "expert advice or assistance" of any type or content, so long as she finds that the aid "may [not] be used to carry out terrorist activity." Once aid satisfies that criterion, § 2339B(j) leaves the Secretary wholly unfettered discretion as to whether to grant or deny the exemption. Thus, even if she found that the Humanitarian Law Project's human rights advocacy training could not be used to carry out terrorist activity, she would be perfectly free to deny an exemption for any reason or no reason at all. This is unfettered discretion.

Accordingly, under case law that defendants concede governs here – *City of Lakewood* – plaintiffs have standing to challenge the licensing scheme before it is applied to them, and under well-established principles governing licensing schemes, § 2339B(j) fails constitutional muster.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment insofar as it invalidated the bans on providing "training," "expert advice or assistance," and "services" to designated groups, and should reverse the remainder of the district court's judgment.

Dated: August 13, 2006

Respectfully submitted,

DAVID COLE
SHAYANA KADIDAL
PAUL L. HOFFMAN
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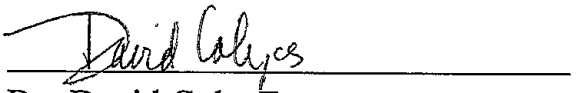
CENTER FOR CONSTITUTIONAL RIGHTS



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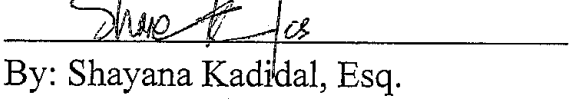

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Reply Brief of Appellants on Cross-Appeal complies with Fed. Rules of Appellate Procedure 32(a)(7)(c) and Circuit Rule 32-1 as it is the third or fourth brief on cross-appeal and is 6,902 words, exclusive of all tables and this Certificate of Compliance.

Dated: August 13, 2006

Carol A. Sobel

CAROL A. SOBEL

PROOF OF SERVICE

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COUNTY OF LOS ANGELES)

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

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Carol A. Sobel

CAROL A. SOBEL