No. 08-1498

In the Supreme Court of the United States

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

PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID D. COLE
Counsel of Record
c/o Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, D.C. 20001
(202) 662-9078

(Additional counsel on next page)

SHAYANA KADIDAL
JULES LOBEL
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6438

PAUL HOFFMAN
SCHONBRUN, DE SIMONE, SEPLOW,
HARRIS AND HOFFMAN LLP
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

CAROL SOBEL
429 Santa Monica Blvd., Suite 550
Santa Monica, California 90401
(310) 393-3055

VISUVANATHAN RUDRAKUMARAN
875 Avenue of the Americas
New York, New York 10001
(212) 290-2925

COUNSEL FOR RESPONDENTS

QUESTION PRESENTED

Whether the criminal prohibitions in 18 U.S.C. § 2339B(a)(1) on provision of "training," "expert advice or assistance" "derived from … other specialized knowledge," and "service" to organizations designated as terrorist are unconstitutionally vague as applied to speech that furthers only lawful, nonviolent activities of the proscribed organizations.

PARTIES TO THE PROCEEDINGS

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution, Statutes and Rule:

Miscellaneous:

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

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

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT

The injunction at issue in this case narrowly bars the application of three provisions of 18 U.S.C. §

2339B, a criminal proscription carrying a penalty of 15 years' imprisonment or life imprisonment if death results, to respondents' proposed speech in support of the lawful, nonviolent activities of two foreign organizations designated as "terrorist." The court of appeals left the entire statute valid on its face, and merely held that the prohibitions on providing "training," "expert advice or assistance" "derived from … other specialized knowledge," and "service" were unconstitutionally vague as applied to respondents' proposed speech. Respondents seek, among other things, to teach persons in conflict situations how to use international law and other nonviolent means to advance human rights. As applied to such pure speech, the court held, the three particular provisions are insufficiently clear about what they criminalize.

The district court rejected all of respondents' challenges except to the application of the three provisions noted, and therefore left intact the entire material-support statute on its face. The court declined to issue a nationwide injunction. Pet. App. 76a. Even as applied to respondents, the court's decision expressly permits enforcement of the remainder of the statute, which prohibits provision of, *inter alia*, "any property, tangible or intangible, … including currency or monetary instruments or financial securities, financial services, lodging, … safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel … and transportation." 18 U.S.C. § 2339A(b) (definitional provision incorporated into § 2339B); *see* Pet. App. 76a n.29.

The court of appeals unanimously affirmed the district court in all respects, upholding the limited injunction and rejecting the remainder of respondents' claims. The court of appeals denied the government's petition for rehearing en banc, again without dissent.

A. The Statutory Scheme

Sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act (AEDPA), codified at 8 U.S.C. § 1189 and 18 U.S.C. § 2339B, respectively, authorize the Secretary of State to designate "foreign terrorist organizations" and make it a crime to provide certain "material support" for even nonviolent and humanitarian activities of such groups.

Section 1189 of 8 U.S.C. authorizes the Secretary to designate as "terrorist" any group: (1) that is foreign; (2) that has ever used or threatened to use a weapon against person or property; and (3) whose activities threaten the "national defense, foreign relations, or economic interests of the United States."[1] Once the Secretary designates a group, it becomes a crime to "knowingly provide[] material support or resources" to it, 18 U.S.C. § 2339B(a), with the phrase "material support or resources" defined as "mean[ing]" certain activities listed in a definition of the same phrase in a related statute. *See* 18 U.S.C. § 2339B(g)(4), incorporating definitions of 18 U.S.C. § 2339A(b). Unlike other federal statutes criminalizing support for "terrorist activity," *see, e.g.,* 18 U.S.C. § 2339A(a), the

[1] 8 U.S.C. § 1189(a) (criteria for designation); 8 U.S.C. § 1182(a)(3)(B) (definition of "engage in terrorist activity"); 8 U.S.C. §1189(d)(2) (definition of "national security").

prohibition at issue here, § 2339B(a)(1), does not require any showing that the defendant intended that his support be used for any terrorist, violent, or independently illicit purpose. "Knowing[]" provision of "material support or resources" to a designated group is enough.

In enacting the material-support statute in 1996, Congress declared that any "*contribution to*" a foreign organization that engages in terrorist activity "facilitates that conduct." AEDPA, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (April 24, 1996), 18 U.S.C. § 2339B note (emphasis added). Then, in defining its proscriptions, Congress listed a number of activities, using terms of varying clarity and breadth, while expressly permitting unlimited donations of medicine and religious materials. 18 U.S.C. § 2339A(b)(1). In the Ninth Circuit, the government argued that Congress was trying not to impinge on actual speech:

> The law was carefully drafted … to ensure that it does not infringe upon constitutional rights. Recognizing that "[t]he First Amendment protects one's right to associate with groups that are involved in both legal and illegal activities," Congress noted that the statutory ban "only affects one's contribution of financial or material resources" to a foreign terrorist organization, a ban that is permissible because "[t]he First Amendment's protection of the right of association does not carry with it the 'right' to finance terrorist, criminal activities." But "[t]he basic protection of free association afforded individuals under the First Amendment remains in place"

> in place" even under the statutory prohibition, because it does not prohibit "one's right to think, speak, or opine in concert with, or on behalf of, such an organization."

C.A. First Cross-Appeal Br. for Appellants at 5-6 (Apr. 4, 2006) (quoting H.R. Rep. No. 104-383, at 43, 44 (1995)). And in 2004 Congress added to the statute an express recognition that application of the statute might infringe First Amendment interests, and disclaimed any intent to abridge such rights in the statute's construction or application:

> **(i) Rule of construction.**—Nothing in this section shall be *construed or applied* so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.

18 U.S.C. § 2339B(i) (emphasis added).

Partly in response to several decisions in this litigation, Congress amended the statute in the USA Patriot Act of 2001, Pub. L. No. 107-56, § 805(a)(2), 115 Stat. 272, 377 (2001), and again in the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(b), 118 Stat. 3638, 3762 (2004). The current version of the statute prohibits provision of "training," which the statute since 2004 has defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2). The statute also outlaws the provision of "expert advice or assistance," which since 2004 has been defined as "advice or assistance derived from scientific, technical or other

specialized knowledge." 18 U.S.C. § 2339A(b)(3). And, in a provision added in 2004, the statute prohibits the provision of "service," without defining that term. The government maintains that "service" includes any "act done for the benefit of" a designated group. Pet. 17. The statute contains many other enumerated prohibitions that are not now at issue – quoted *supra*.[2]

B. Respondents' Intended Support

Respondents include the Humanitarian Law Project (HLP), a longstanding human rights organization with consultative status to the United Nations; Ralph Fertig, a retired United States administrative law judge who has served as the HLP's President; Nagalingam Jeyalingam, an American physician; and several domestic organizations of persons of Tamil descent. Prior to AEDPA's enactment, the HLP and Judge Fertig had been assisting the

---

[2] One provision – which the court of appeals and district court upheld and so is not at issue in the petition (but is addressed in respondents' limited conditional cross-petition) – is the prohibition on providing "personnel." 18 U.S.C. § 2339A(b). Since 2004, the amended statute has provided:

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

18 U.S.C. § 2339B(h).

Kurdistan Worker's Party (PKK) in human rights advocacy and peacemaking efforts. They seek to continue supporting the PKK in such activities. Dr. Jeyalingam and the Tamil organizations similarly seek to engage in speech in support of the humanitarian and political activities of the Liberation Tigers of Tamil Eelam (LTTE).[3]

In the mid-1990s, the Secretary of State designated both the PKK and LTTE as terrorist organizations. In this case, resolved on summary judgment, the district court made no findings about terrorist activities of either group, but did find that both groups engage in a broad range of lawful activities, including the provision of social services, political advocacy, and economic development. Pet. App. 34a-36a. The PKK is the principal political organization representing the Kurds in Turkey, an ethnic minority subjected to substantial discrimination and human rights violations. *See id.* at 34a-35a. Similarly, the LTTE is the principal political organization representing the Tamils in Sri Lanka, another ethnic minority that has been subjected to human rights abuses and discrimination. *See id.* at 35a. It is undisputed that respondents intend to support only the *lawful and nonviolent* activities of these groups. *Id.* at 34a-36a (describing intended support).

---

[3] As the petition notes, the LTTE were recently defeated militarily in Sri Lanka. Pet. 5 n.1. Much of the support the Tamil organizations and Dr. Jeyalingam sought to provide is now moot, because it consisted of humanitarian assistance to persons living in LTTE-controlled areas of Sri Lanka. However, the LTTE continues to exist as a political organization outside Sri Lanka advocating for the rights of Tamils, and respondents continue to seek to support its lawful, nonviolent activities through the speech identified by the court of appeals, Pet. App. 5a n.1.

C. The Decisions Below

Respondents initially filed this action in 1998, after the Secretary of State designated the PKK and the LTTE as foreign terrorist organizations. They challenged the statute on First and Fifth Amendment grounds, and asserted, among other things, that the statute's prohibitions on providing "training" and "personnel" were unconstitutionally vague. (Neither provision was defined in the original 1996 statute). The district court granted respondents a preliminary and permanent injunction against enforcement of these two provisions, finding them unconstitutionally vague. *See* Pet. App. 6a-7a. It rejected respondents' other challenges, including their contention that the statute infringed on the right of association. *Id.* Two separate panels of the court of appeals, in 2000 and 2003, unanimously affirmed both the preliminary and permanent injunctions. *Id.* at 7a, 8a.

Meanwhile, when Congress in 2001 amended the "material support" statute to add a prohibition on the provision of "expert advice or assistance," respondents filed a second challenge. The district court in March 2004 held that this provision, too, was unconstitutionally vague. *See id.* at 8a.

In September 2004, in the original case, the court of appeals granted rehearing en banc (on requests from both parties). *Id.* at 9a. While en banc review was pending, Congress in 2004 amended the statute, providing definitions for "training," "personnel," and "expert advice or assistance," and adding a new, and undefined, prohibition on the provision of "service." *Id.*

at 9a-10a. In response, the en banc court of appeals remanded for consideration of the effect of these statutory amendments. *Id.* at 11a.

On remand, the district court held that Congress's definition of "personnel" cured the vagueness of that provision, but that the prohibitions on "training" and on "expert advice or assistance" "derived from … other specialized knowledge" were still unconstitutionally vague as applied to respondents' intended speech. *Id.* at 62a-66a, 68a-69a. It also held that the new, and undefined, ban on the provision of "service" was vague as applied to respondents' speech. *Id.* at 66a-68a. It rejected respondents' other contentions. *Id.* at 46a-60a, 69a-74a.

Both parties appealed, and the court of appeals once again unanimously affirmed. It reasoned that the constitutional "'requirement for clarity is enhanced'" where, as here, a criminal statute touches on "'sensitive areas of basic First Amendment freedoms.'" *Id.* at 20a (quoting *Info. Providers' Coal. for the Def. of the First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991)). It stressed that it was addressing only the provisions' vagueness as applied to respondents' conduct, *id.* at 2a, 22a n.6, and noted that those activities all constituted speech. *Id.* at 5a n.1 (describing respondents' proposed activities as "to train members … on how to use humanitarian and international law to peacefully resolve disputes"; "to engage in political advocacy"; "to teach … members how to petition various representative bodies such as the United Nations for relief"; "to train members to present claims for tsunami-related aid to mediators and international bodies"; "to offer their legal expertise in negotiating

in negotiating peace agreements"; "to engage in political advocacy").[4]

With respect to "training," the court found it "highly unlikely that a person of ordinary intelligence would know whether, when teaching someone to petition international bodies for tsunami related aid, one is imparting a 'specific skill' or 'general knowledge.'" *Id.* at 21a-22a. Stressing that the term as defined "could still be read to encompass speech and advocacy protected by the First Amendment," *id.* at 22a, the court held that

> the term "training" remains impermissibly vague because it "implicates, and potentially chills, Plaintiffs' protected expressive activities and imposes criminal sanctions of up to fifteen years imprisonment without sufficiently defining the prohibited conduct for ordinary people to understand."

Id. at 22a-23a (quoting *id.* at 64a).

The court noted that the prohibition on "expert advice or assistance" similarly encompassed protected speech, and concluded that it was unconstitutionally vague in part. *Id.* at 24a. Specifically, it held that the prohibition on advice or assistance "derived from … other specialized knowledge" did not give "a person of ordinary intelligence reasonable notice of conduct

---

[4] Respondents initially sought to provide a broader range of humanitarian assistance to the PKK and the LTTE, but the injunction affirmed by the court of appeals is limited to the speech activities described by the district court and the court of appeals. Pet. App. 5a n.1; *id.* at 35a-36a.

prohibited under the statute." *Id.* at 23a; *see also id.* at 23a-24a. But the court upheld the prohibition on advice or assistance "derived from scientific [or] technical … knowledge." *Id.* at 24a.

The court also held vague as applied the prohibition on "service," which encompassed the bans on "training" and "expert advice or assistance" that it had already held vague. *Id.* at 25a (adopting district court's holding and reasoning at *id.* at 66a-68a).

The court agreed with the district court that the amended definition of "personnel" cured that term's prior vagueness. *Id.* at 26a-27a. And it rejected respondents' other contentions, including the contention that the statute imposed guilt by association in violation of the Fifth Amendment's requirement that statutes impose only individual culpability. *Id.* at 13a-19a; *id.* at 27a-32a.

REASONS FOR DENYING THE PETITION

The petition should be denied. The decision below is a straightforward application of settled vagueness doctrine, resulting in a narrow decision carefully confined to three sub-provisions of the material-support statute as they apply to respondents' proposed speech activities. The government has identified no decision from any court, much less this Court or a court of appeals, that is in conflict with the decision below. The decision itself applies to a unique context involving pure speech that Congress in all likelihood did not intend to criminalize, and that in any event is peripheral to the statute's purpose. The decision leaves the material-support statute valid on

its face, and declares only a small portion of it vague *as applied* to respondents' intended speech in support of indisputably lawful and nonviolent ends. Thus, the government may continue, and has continued, to enforce the material-support statute, including the provisions enjoined as applied here.

Moreover, because the decision below rests on vagueness, Congress remains free to define more precisely the conduct it seeks to prohibit, should it conclude that it is critical to ban "training," "expert advice or assistance," and "service" as applied to speech in support of otherwise lawful activities. The court's decision does not rule these activities immune from regulation, but merely demands greater precision.

The government's protestations about national security aside, it has made no showing that the limited injunction at issue here undermines its efforts to fight terrorism in any meaningful way. Nor has it cited a single prosecution that was or would have been frustrated by the court of appeals' narrow, as-applied ruling.

I. The Court of Appeals' Decision Does Not Warrant Review Because Its Narrow, As-Applied Ruling Leaves the Material-Support Statute Facially Intact and Permits Congress to Take Further Action

The government identifies no conflict in the circuits, but contends that review is nonetheless warranted on the ground that the decision below invalidates part of an Act of Congress, and because "the material-support statute is an important tool in

the Nation's fight against international terrorism." Pet. 10-11. But the decision below leaves the entirety of the material-support statute facially intact, and enjoins only three specific sub-provisions as applied to respondents' pure speech in support of lawful, nonviolent ends. In any event, this Court does not automatically review decisions invalidating federal statutes.

The government does not and could not assert that a case in which an Act of Congress is invalidated always merits review. Pet. 9. Congress itself rejected that conclusion in 1988, when, with the support of all nine Justices, it eliminated 28 U.S.C. § 1252's provision for non-discretionary appellate jurisdiction in cases declaring federal statutes unconstitutional. *See United States v. Sperry Corp.*, 493 U.S. 52, 59 & n.5 (1989); H.R. Rep. No. 100-660, at 2, 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 766, 767, 774.

Earlier this year, the Court denied a government petition seeking review of a ruling that invalidated an Act of Congress on First Amendment (including vagueness) grounds. *Mukasey v. American Civil Liberties Union*, 129 S. Ct. 1032 (2009) (denying United States petition, No. 08-565, seeking review of *American Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3d Cir. 2008)). Even before the amendment of 28 U.S.C. § 1252, the Court denied review where, as here, a lower court had merely held that a federal statute could not be applied constitutionally to a particular set of facts. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (declaring that Title VII provisions prohibiting race and sex discrimination were unconstitutional as applied to

church's decision to hire a pastor), *cert. denied*, 478 U.S. 1020 (1986).

Review in this case should similarly be denied. The decision below is carefully circumscribed, holding only that three particular sub-provisions of a statute are invalid *as applied to the pure speech in which respondents want to engage*. The court of appeals did not invalidate any aspect of the statute on its face and, in fact, specifically disclaimed any such ruling. Pet. App. 2a-3a, 22a n.6, 27a-29a. The court also expressly noted that its ruling did not extend to a situation where any money passed to the designated organizations. *Id.* at 3a, 25a n.8. The limited activities that the court of appeals identified as protected by the narrow injunction it upheld are all pure speech. *Id.* at 5a n.1 ("to train members … on how to use humanitarian and international law to peacefully resolve disputes"; "to engage in political advocacy"; "to teach … members how to petition various representative bodies such as the United Nations for relief"; "to train members to present claims for tsunami-related aid to mediators and international bodies"; "to offer their legal expertise in negotiating peace agreements"; "to engage in political advocacy").

The court of appeals' ruling leaves the entire statute valid on its face. The government is free to enforce the statute – including the "training," "expert advice or assistance," and "service" clauses -- in other contexts, and, by its own account, it has done so successfully. Pet. 11. The only direct restriction the decision imposes is on enforcement of three specific provisions against these respondents for the speech identified above. The government cites not a single

instance of similar speech in furtherance of lawful, nonviolent activities that it has been frustrated from prosecuting.[5]

The decision does not warrant review for a related reason. The court of appeals held only that the particular provisions at issue were written too vaguely. That ruling does not foreclose further congressional action; Congress need only be more precise in targeting forms of support that it concludes warrant criminal prohibition, thereby avoiding needless collateral harm to First Amendment protected speech and association. Such a process of further congressional consideration and refinement is particularly appropriate given that Congress, as it expressly declared in 2004 and the government stressed to the court of appeals, was acutely aware of the sensitive First Amendment terrain and positively trying to avoid harm to protected speech. *See* page 4, *supra*.

---

[5] The government cites only two cases in which it has charged defendants with providing "training," "expert advice or assistance," or "service." Pet. 11. In both it confronted no obstacles to proceeding. Neither involved speech in furtherance solely of lawful, nonviolent ends. In *United States v. Shah*, No. 05-Cr-673 (LAP) (S.D.N.Y. filed Dec. 6, 2006), defendants were alleged to have provided "martial arts training and instruction" to al Qaeda and "medical support to wounded jihadists." Pet. 11. In *United States v. Iqbal*, No. 06-Cr-1054 (RMB) (S.D.N.Y. filed Jan. 20, 2007), defendant was alleged to have sold satellite transmission services to Hizballah, which the indictment characterized as, *inter alia*, "property, tangible and intangible," and "facilities," provisions not at issue here. Superseding Indictment at 3. Both cases resulted in convictions. The government has cited no case in which it has sought to prosecute individuals for pure speech in furtherance of lawful activities but was, or would have been, barred from doing so by this decision.

In this respect, the constitutional ruling by the court of appeals is not the end of the matter for Congress. It bears important similarities to statutory rulings, to which Congress may respond through ordinary legislation. Such rulings generally do not warrant this Court's review without a persistent circuit conflict. Indeed, when earlier versions of this very statute were held invalid, the Executive returned to Congress and obtained statutory clarifications. While the court below held that some of those clarifications were not adequate, Congress can readily undertake further revisions, with the added guidance the court below has provided.

Moreover, the government's own argument that there are "numerous legitimate applications" of the ban on training – for example, "training a terrorist organization on how to build a bomb, use a weapon, fly a plane, or launder money" (Pet. 21) – shows how easy it is to write more precisely to target specific activities of concern, without criminalizing constitutionally protected speech. Nothing in the court of appeals' opinion precludes Congress from criminalizing the provision of instruction in techniques that terrorist organizations have used to carry out violent attacks.

Finally, the government cites no conflict in the circuits, notwithstanding that the statute has been on the books for more than a decade, and in its current amended form for five years. In the absence of any disagreement in the circuits, any evidence that the decision has undermined the government's anti-terrorism efforts, or any reason to believe the court's

narrow as-applied holding will have wider effects, the case does not merit review.[6]

II. The Decision Below Correctly Applies Settled Doctrine

The court of appeals correctly applied clearly established principles of constitutional law. Its conclusions that the statute's prohibitions on the provision of "training," "expert advice or assistance" in the form of information "derived from … specialized knowledge," and "service" are unconstitutionally vague as applied to respondents' proposed speech are firmly grounded and raise neither new nor significant questions of law.

A. The Provisions Are Vague As Applied to Respondents' Intended Speech

1. Training

The court of appeals correctly held that the prohibition on "training" requires individuals to draw impossible distinctions between prohibited instruction in a "specific skill" and permissible instruction in "general knowledge." Pet. App. 20a-23a. Respondents are forced to guess at whether human rights advocacy

[6] The court of appeals rejected respondents' contention that the bans on providing "personnel" and "expert advice or assistance" "derived from scientific [or] technical … knowledge" were similarly unconstitutional. Respondents do not independently seek certiorari on those aspects of the court's ruling. But they are filing a conditional cross-petition for certiorari, because these provisions are sufficiently related to the three provisions at issue in the government's petition to warrant review as well, if the Court grants review at all.

or peacemaking, for example, are "specific skills" or "general knowledge." And what about training in public speaking, lobbying Congress, or public relations? The statute provides no guidance.

The attempts by government counsel below to clarify the distinction only confirmed how murky it is. Counsel opined that, under this definition, teaching geography would be permissible because it constitutes "general knowledge," but teaching the political geography of terrorist organizations would constitute a banned "specific skill," as would the teaching of English.[7] What if a "general" course on geography included a discussion of the political geography of terrorist organizations? What if it included a session on the history of geography, or the geography of a specific region incorporating statistical information? An ordinary person could only hazard a guess as to whether these are impermissible "specific skills," or permissible aspects of "general knowledge."

In the district court, government counsel asserted that respondents were free to advocate "on behalf of" the PKK before the United Nations or "any forum of their choosing." Govt. Mem. in Supp. of S.J. at 17 n.8. But when the district court asked whether respondents could lobby the UN with members of the PKK present, and then divide up into groups to lobby the rest of the UN, counsel first opined that such conduct "presumably could" constitute "training," D.

---

[7] The colloquy took place during the en banc oral argument, at approximately 49 minutes into the argument. At the time of oral argument, Congress had passed IRTPA, but President Bush had not yet signed it into law.

Ct. Tr. 11, SER 220,[8] and minutes later opined that it "clearly comes within the proscriptions against training and expert advice or assistance." *Id.* at 15; SER 224. At the close of the colloquy, the district court said, "I don't know how you think anyone, a normal person, would figure this out based on this exchange." *Id.* at 19, SER 228. The court of appeals correctly determined that this provision is unconstitutionally vague as applied to respondents' proposed speech.

2. Expert Advice or Assistance

The court also correctly concluded that the ban on providing "expert advice or assistance" "derived from … specialized knowledge" is unconstitutionally vague. Much as with "training," a citizen must guess as to whether any aspect of his advice is somehow derived from "other specialized knowledge." An expert on human rights could presumably provide advice only if it was derived from "general knowledge," but not if any particular answer was informed by "specialized knowledge." But how does one distinguish which aspects of human rights derive from general as opposed to specialized knowledge? Indeed, if general knowledge is "specialized knowledge" that has become sufficiently widely known, then literally all general knowledge may be said to be "derived from" specialized knowledge.[9]

---

[8] "SER" refers to the Supplemental Excerpts of Record in the court of appeals.

knowledge.[9] The lower court correctly determined that this provision, too, is vague as applied here.

3. Service

The most expansive provision in the definition of "material support" is the prohibition on providing any "service" to a designated group, which Congress added in 2004 without defining the term. That term was likewise correctly held unconstitutionally vague.

Attempting to show otherwise, the government, citing a dictionary, maintains that the term encompasses any "act done for the benefit ... of another." Pet. 17. But that interpretation only makes matters more confusing, as it appears to conflict with the narrowing limitations Congress simultaneously placed in the statute's other definitions. Thus, while Congress provided that teaching a subject of "general knowledge" would *not* constitute prohibited "training," it *could* be considered an "act done for the benefit of" a designated group. Similarly, advice derived from non-specialized knowledge is exempted from the "expert advice" definition, but could be prohibited by the

---

[9] The government notes that the definition tracks Federal Rule of Evidence 702. Pet. 15. 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." Pet. App. 66a. It is one thing to use the standard as a guide to judges overseeing civil litigation; it is another to hold citizens criminally liable under such terms. Here, as elsewhere in the law, "context matters." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)); *see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2754 (2007); *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005).

government's gloss on "service." The "personnel" definition added in 2004 likewise seeks to protect acts done "entirely independently of the … organization to advance its goals or objectives," 18 U.S.C. § 2339B(h), yet such activity would be a crime if seen as "for the benefit of" the organization. And, as noted above, Congress in 2004 (the same time that it added the "service" prohibition) specifically disclaimed that its statute should be construed or applied to outlaw protected speech (*id.* § 2339B(i)) – such as, *e.g.*, a domestic speech stressing the humanitarian work of a designated organization to improve its reputation, which could certainly be seen as "for the benefit of" the organization. The government's construction of "service" renders the statute hopelessly vague.

At the same time, the government claims that the statute does *not* reach advocacy "on behalf of" a designated group. Govt. Mem. in Supp. of S.J. at 17 n.8. But if that is so, respondents must somehow distinguish between permissibly advocating "on behalf of" and impermissibly advocating "for the benefit of" a designated group. How is an ordinary person supposed to know whether his advocacy of the PKK's position on Kurdish human rights is permissible advocacy "on behalf of" the group, or a proscribed service "for the benefit of" the group?

As construed by the government, the "service" provision also forces individuals to guess whether their affiliation with a group may constitute a prohibited "service." Before the "service" prohibition was added in 2004, the government represented that citizens were free under this statute to join designated groups, and that concession was critical to the court of appeals'

rejection of respondents' right-of-association challenge. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133-34 (9th Cir. 2000) (rejecting First Amendment associational challenge because the statute permits membership and affiliation with foreign terrorist organizations, but prohibits the conduct of providing material support or resources). But the permissibility of membership and affiliation is now in doubt. Joining or affiliating with a political organization is quintessentially an act done "for the benefit of" the group. Thus, the government's construction would appear to criminalize even pure membership and affiliation. The government does not explain how one is supposed to distinguish between ostensibly permitted membership and advocacy, on the one hand, and "service," on the other. Citizens are forced to guess, at their peril. Accordingly, the court of appeals correctly deemed this provision unconstitutional as applied as well.

B. The Provisions At Issue Directly Implicate Speech and Associational Rights, Triggering Heightened Vagueness Standards

The government's principal response to the court of appeals' unsurprising and unanimous conclusion that these provisions are vague as applied to respondents' speech is to cite inapposite examples of terms deemed not vague where First Amendment interests and/or criminal penalties were *not* at stake. Pet. 13-18. But vagueness standards are at their most demanding when a criminal prohibition affects speech. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997); *Village of Hoffman Estates v. Flipside,*

Hoffman Estates, Inc., 455 U.S. 489, 499 (1982). All of the government's examples arise from contexts tolerating more lenient vagueness standards – such as determining an appropriate attorney's fee (Pet. 15),[10] admitting expert evidence in court (Pet. 16),[11] prohibiting the overseas transfer of money (Pet. 17)[12] or heavy equipment (Pet. 18),[13] or noncriminal regulation of public employees' speech (Pet. 14).[14]

---

[10] *Pierce v. Underwood*, 487 U.S. 552, 572 (1988). *Pierce* did not address any vagueness issue, or purport to define (or explore the precision of) the difference between "some distinctive knowledge or specialized [litigation] skill" and "general lawyerly knowledge" – both of which, from a lay person's perspective, might or might not be "specialized knowledge" in the present context.

[11] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999). *Kumho* did not address any vagueness issue, or purport to explore the precision of "specialized knowledge" in Fed. R. Evid. 702.

[12] *United States v. Homa Int'l Trading Corp.*, 387 F.3d 144, 146 (2d Cir. 2004) (transferring money for a fee was undeniably a service).

[13] *United States v. Hescorp, Heavy Equip. Sales Corp.*, 801 F.2d 70, 73-77 (2d Cir.), *cert. denied*, 479 U.S. 1018 (1986). *Hescorp* undertook a lengthy analysis of an Executive Order's various provisions and its history before concluding that, in context, the "service" exception in the order could not reasonably be understood to apply to limit the separately stated flat prohibition on transferring physical goods to Iran. Even in the absence of a speech issue, the court's rejection of an ordinary vagueness challenge required extensive reliance on interpretive guides that are simply missing in the present context.

[14] The government's one cited authority involving speech is the Ninth Circuit's own decision in *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001). There, the court rejected a facial vagueness challenge to a law that required public school teachers to use English predominantly in their instruction. In that context, involving the interests of public employees in public schools and no apparent criminal penalties, the court explained that the rest of the law made clear that "instruction" was tied to the "curriculum," and on that basis concluded that there was no substantial number of instances where there would

The government maintains that, as applied in this case, "the material-support statute does not regulate speech," and therefore does not warrant heightened vagueness scrutiny. Pet. 13. That is simply false, both as applied and more generally. All of the activities the court of appeals listed as at stake here *are* pure speech. *See* Pet. App. 5a n.1 (quoted at page 10, *supra*). More generally, when the statute prohibits "training," defined as "*instruction or teaching*," it directly criminalizes speech. When the statute prohibits conveying "expert *advice*," it again directly criminalizes speech. And when the statute prohibits "service" as applied to respondents' intended activities, it also criminalizes speech – including, according to the government, any advocacy done "for the benefit of" a designated group. As applied here, these provisions would criminalize the teaching of humanitarian and international law, as well as political advocacy. The essential premise of the Government's challenge in its petition is therefore wrong.

For the same reason, the government is mistaken in contending that the material-support statute is sustainable as a content-neutral regulation of conduct under *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Pet. 19-20. The *O'Brien* intermediate scrutiny standard is reserved for content-neutral regulations of conduct that only incidentally affect speech or association, *i.e.*, where the conduct might have an expressive aspect. *O'Brien* does not apply to

---

be doubt about when English had to be used – in the classroom to present the curriculum, not in private conversations with students and parents, etc.

direct criminalization of actual speech or association, or to content-based discrimination. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 402-03 (1989) (*O'Brien* inapplicable to content-based flag desecration law). As shown above, the statute here criminalizes speech *qua* speech. And, far from being a mere regulation of time, place, or manner, it flatly bans certain speech to or for certain persons. Moreover, the provisions barring "training" and "expert advice or assistance" expressly discriminate on the basis of its content, favoring speech on subjects of "general knowledge" and disfavoring speech about "specific skill[s]" or derived from "specialized knowledge." Thus, *O'Brien* does not apply.

O'Brien also does not apply where a law directly regulates expressive association. In *Boy Scouts v. Dale*, 530 U.S. 640, 659 (2000), the Court held *O'Brien* inapplicable where a state's general ban on discrimination in public accommodations was applied to the Boy Scouts in a way that directly infringed the group's rights of "expressive association" (by restricting its ability to choose who would serve as a scoutmaster). As the Court explained:

> Dale contends that we should apply the intermediate standard of review enunciated in *United States v. O'Brien,* 391 U.S. 367 (1968), to evaluate the competing interests. There the Court enunciated a four-part test for review of a governmental regulation that has only an incidental effect on protected speech-in that case the symbolic burning of a draft card. A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a

> symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O'Brien* is inapplicable.

The same holds true in this case. As in *Dale*, the application of the law directly infringes respondents' associational rights, by precluding them from engaging in any expressive activity whatsoever in conjunction with the PKK or the LTTE.

Indeed, the challenged provisions' criminalization of speech and imposition of liability on the basis of association with proscribed groups provide independent grounds for affirming the court of appeals' decision.[15] The "training" and "expert advice" provisions criminalize speech on the basis of its content; and the "service" provision reaches speech and association that Congress, trying to avoid First Amendment harm, showed no interest in proscribing. Because these provisions do not meet the tailoring and interest requirements of any applicable First Amendment test, they independently violate the First Amendment.[16]

---

[15] Respondents argued below that the material-support statute as a whole, as well as the specific provisions at issue here, were invalid because they imposed guilt by association, in violation of the First Amendment right of association and the Fifth Amendment principle of individual culpability, and that the provisions at issue were vague on their face The court of appeals rejected those contentions, but respondents have preserved the arguments, and they are independent bases for affirming the injunction at issue here.

[16] The provisions also are substantially overbroad. Rather than restricting their scope to support that furthers terrorist activity,

In addition, all three challenged provisions penalize association, because their penalties are triggered by the identity of the organization with which respondents collaborate. Training the Irish Republican Army in human rights advocacy, for example, is permitted; but the very same training provided to the PKK is a crime. Lobbying in conjunction with the Palestine Liberation Organization is permissible; but doing so in conjunction with the PKK is not. A law barring the provision of services to the Kiwanis Club, but prohibiting the same services if provided to the Rotary Club, would readily be seen as a penalty on association. That the targeted groups here are labeled "terrorist" does not alter the fact that the trigger for the criminal penalty is not the nature of the underlying training, advice, or service, but the nature of the *association*. As such, like the public accommodations law in *Dale*, the provisions at issue here directly penalize association, and can withstand constitutional challenge only if they are narrowly tailored to serve a compelling interest – which they are not.[17]

---

they sweep within their ambit a substantial amount of political speech, advocacy, and association having no nexus whatsoever to terrorism. *See Houston v. Hill*, 482 U.S. 451 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The government contends that the court "confused the vagueness and overbreadth doctrines." Pet. 18-19. But this misreads the court of appeals' opinion. The court merely noted, in finding the terms vague, that they could conceivably encompass a broad range of constitutionally protected speech. Pet. App. 22a, 24a, 25a. This was perfectly appropriate, because whether a statute potentially criminalizes speech is "the most important factor" affecting vagueness analysis. *Village of Hoffman Estates*, 455 U.S. at 499.

not.[17]

C. The Government's Proposed Statutory Construction Conflicts with the Statute's Plain Language, and Would Not Cure the Provisions' Infirmities

Finally, the government is wrong that the challenged provisions could have been saved by interpreting them not to apply to "independent advocacy." Pet. 21. While courts are obliged to construe ambiguous statutes to avoid constitutional questions, they can do so "only when such a course is 'fairly possible' or when the statute provides a 'fair alternative' construction." *Swain v. Pressley*, 430 U.S. 372, 378-79 n.11 (1977). Here, the government's proposed construction is not "fairly possible," and in any event would not cure the constitutional defect.

It is not "fairly possible" because Congress specifically addressed the scope of an exception for "independent advocacy," and chose to make "entirely independent" advocacy a safe harbor *only* from the specific prohibition on "personnel," and *not* from any of the statute's other prohibitions. 18 U.S.C. § 2339B(h). To read the statute as containing a general

---

[17] This Court has repeatedly held that association-based penalties must be restricted to association that is intended to further the unlawful ends of the group. *See*, *e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982); *United States v. Robel*, 389 U.S. 258, 262 (1967); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 606 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) ("a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); *Noto v. United States*, 367 U.S. 290, 299-300 (1961).

"independent advocacy" exception would disregard Congress's choice to limit that exception to one particular provision.

If the government wishes to rewrite the statute, it should approach Congress, not this Court. The court of appeals' narrow ruling invites such congressional reconsideration. It is not too much to ask Congress to engage in that process, given the importance of the constitutional rights at stake – rights that, as the government has argued and Congress has declared, Congress sought to respect.

In any event, the government's proposed construction would not save the statute. For one thing, the government's notion of "independent advocacy" would not seem to cover speaking *to* members of the organization, as respondents proposed to do here. That is enough to make the government's proposal not a "saving" construction. And even when the audience is outside the organization, activities such as writing, speaking, and teaching do not lose their First Amendment protection when done in coordination with others. Newspaper reporters, for example, do not forfeit their First Amendment rights because they write under the direction of their editors.

Finally, the government's proposed construction would not clarify the provisions' vagueness. Citizens would still have to guess at whether their activities were entirely "independent," or involved "some collaboration or other relationship between the giver and the recipient." Pet. 22. Would checking facts with a PKK official on a human rights complaint constitute a "collaboration or other relationship" warranting

criminal sanctions? Virtually any effort to communicate with a designated group regarding one's advocacy could be viewed as forfeiting independence and entering a "collaboration or other relationship." The government's proposed "construction" would only further muddy the waters.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be denied.

Dated: July 6, 2009

Respectfully submitted,

DAVID D. COLE
Counsel of Record for Respondents
c/o Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9078

SHAYANA KADIDAL
JULES LOBEL
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6438

PAUL HOFFMAN
Schonbrun, De Simone, Seplow, Harris and Hoffman LLP
723 Ocean Front Walk

Venice, California 90291
(310) 396-0731

CAROL SOBEL
429 Santa Monica Blvd., Suite 550
Santa Monica, California 90401
(310) 393-3055

VISUVANATHAN
RUDRAKUMARAN
875 Avenue of the Americas
New York, New York 10001
(212) 290-2925

COUNSEL FOR RESPONDENTS