No.

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

PETITION FOR A WRIT OF CERTIORARI

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
NEAL KUMAR KATYAL
Deputy Solicitor General
ERIC D. MILLER
Assistant to the Solicitor General
DOUGLAS N. LETTER
JOSHUA WALDMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether 18 U.S.C. 2339B(a)(1), which prohibits the knowing provision of "any * * * service, * * * training, [or] expert advice or assistance," 18 U.S.C. 2339A(b)(1), to a designated foreign terrorist organization, is unconstitutionally vague.

PARTIES TO THE PROCEEDING

The petitioners are Eric H. Holder, Jr., Attorney General; the United States Department of Justice; Hillary Rodham Clinton, Secretary of State; and the United States Department of State.

The respondents are Humanitarian Law Project; Ralph Fertig; Ilankai Thamil Sangram; Tamils of Northern California; Tamil Welfare and Human Rights Committee; Federation of Tamil Sangrams of North America; World Tamil Coordinating Committee; and Nagalingam Jeyalingam.

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The Solicitor General, on behalf of Eric H. Holder, Jr., Attorney General, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 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 (App., *infra*, 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

The judgment of the court of appeals was entered on December 10, 2007. A petition for rehearing was denied on January 5, 2009 (App., *infra*, 3a). On March 24, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 5, 2009. On April 22, 2009, Justice Kennedy further extended the time to June 4, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law." The pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 77a-81a.

STATEMENT

1. This case involves a constitutional challenge to key provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, that aid America in its fight against terrorism. The statute authorizes the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to designate an entity as a "foreign terrorist organization" if she finds (1) that "the organization is a foreign organization"; (2) that "the organization engages in terrorist activity," as defined in 8 U.S.C. 1182(a)(3)(B); and (3) that the organization's terrorist activity "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. 1189(a)(1). An organization may seek judicial

review of its designation by filing a petition for review in the District of Columbia Circuit. 8 U.S.C. 1189(c).

It is a criminal offense for any person within the United States or subject to its jurisdiction "knowingly" to provide "material support or resources" to a designated foreign terrorist organization. 18 U.S.C. 2339B(a)(1). The statute defines "material support or resources" as

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include onself), and transportation, except medicine or religious materials.

18 U.S.C. 2339A(b)(1).

In the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(b), 118 Stat. 3762, Congress clarified several provisions of Section 2339B, the material-support statute. In particular, IRTPA defined the term "training" to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. 2339A(b)(2). It also defined "expert advice or assistance" to mean "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. 2339A(b)(3). Finally, IRTPA specified:

> 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).

2. The Secretary of State has designated the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (Tamil Tigers or LTTE) as foreign terrorist organizations. The PKK has not sought judicial review of its designation. See *Humanitarian Law Project* v. *Reno*, 9 F. Supp. 2d 1176, 1180 (C.D. Cal. 1998). The LTTE sought judicial review, but the District of Columbia Circuit upheld its designation. See *People's Mojahedin Org. of Iran* v. *United States Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999), cert. denied, 529 U.S. 1104 (2000).

a. The PKK was founded in 1974 for the purpose of establishing an independent Kurdish state in southeastern Turkey. C.A. E.R. 20. Since its inception, the organization has waged a violent insurgency that has claimed over 22,000 lives. *Ibid.* In the 1990s, the PKK conducted terrorist attacks on Turkish targets throughout Western Europe; it also targeted areas of Turkey frequented by tourists. *Id.* at 20-21. For instance, in 1996, PKK members hijacked a bus in Turkey and kidnapped two passengers, one of whom was a United States citizen. *Id.* at 21. Earlier, the PKK claimed responsibility for a series of bombings in Istanbul that killed two people and wounded at least ten others, including a United

States citizen. *Ibid.* In 1993, the PKK firebombed five sites in London. *Id.* at 22. In a separate incident that year, it kidnapped tourists from the United States and New Zealand and held them hostage. *Ibid.*

b. The Tamil Tigers were founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. C.A. E.R. 22. The organization has used suicide bombings and political assassinations in its campaign for independence, killing hundreds of civilians in the process. *Id.* at 22-25; see *People's Mojahedin Org. of Iran*, 182 F.3d at 19-20. In 1996, the Tamil Tigers exploded a truck bomb at the Central Bank in Colombo, Sri Lanka, killing 100 people and injuring more than 1400. C.A. E.R. 23. The following year, the group exploded another truck bomb near the World Trade Center in central Colombo, injuring 100 people, including 7 United States citizens. *Ibid.* In 1998, a Tamil Tiger suicide bomber exploded a car bomb in Maradana, Sri Lanka, killing 37 people and injuring more than 238 others. *Id.* at 22. In addition, throughout the 1990s, the Tamil Tigers carried out several attacks on Sri Lankan government officials, killing the President, the Security Minister, and the Deputy Defense Minister. *Id.* at 24.[1]

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[1] Sri Lankan forces recently recaptured the remaining portions of Sri Lankan territory that had been held by the LTTE. See Somini Sengupta & Seth Mydans, *Rebels Routed in Sri Lanka After 25 Years*, N.Y. Times, May 18, 2009, at A1. That development does not moot this case, because it does not eliminate the possibility that elements of the LTTE could continue to operate. The Secretary of State may revoke her designation of a foreign terrorist organization "at any time" if she finds that "the circumstances that were the basis for the designation have changed in such a manner as to warrant revocation," 8 U.S.C. 1189(a)(6)(A), but she has not taken such an action with respect to the LTTE. In any event, respondents have asserted that they wish to aid both the LTTE and the PKK, and the district court's order applies

3. Respondents are two United States citizens and five domestic organizations who wish to provide money and other support for what they say are lawful, nonviolent activities of the PKK and the Tamil Tigers. They brought two separate actions, eventually consolidated in the district court, challenging the constitutionality of the material-support statute.

a. In the first action, respondents raised several constitutional challenges to the statute, including the assertion that the terms "training" and "personnel" are unconstitutionally vague. The district court rejected all of respondents' constitutional arguments except for the vagueness challenge, and it entered a preliminary injunction barring the enforcement of the challenged provisions against respondents with respect to the PKK and the LTTE. *Humanitarian Law Project* v. *Reno*, 9 F. Supp. 2d 1176 (C.D. Cal. 1998), and 9 F. Supp. 2d 1205 (C.D. Cal. 1998). The court of appeals affirmed the preliminary injunction on the same ground. *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1137-1138 (9th Cir. 2000). Respondents petitioned for a writ of certiorari, seeking review of the rejection of their other constitutional claims, but this Court denied the petition. *Humanitarian Law Project* v. *Ashcroft*, 532 U.S. 904 (2001).

On remand, the district court permanently enjoined enforcement of the challenged provisions against respondents, again on vagueness grounds. *Humanitarian Law Project* v. *Reno*, No. CV-98-1971ABC, 2001 WL 36105333 (C.D. Cal. Oct. 2, 2001). A panel of the court of appeals affirmed that judgment as well. *Humanitarian*

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equally to the two groups. App., *infra*, 75a-76a. There is unquestionably still a live controversy concerning the constitutionality of the statute as applied to the PKK.

Law Project v. *United States Dep't of Justice*, 352 F.3d 382 (9th Cir. 2003). After the IRTPA amendments became law, however, the court granted the government's petition for rehearing en banc, vacated the panel's decision in relevant part, and remanded to the district court to consider the case in light of those amendments. *Humanitarian Law Project* v. *United States Dep't of Justice*, 393 F.3d 902 (9th Cir. 2004) (en banc).

b. In the second action, respondents focused on the term "expert advice or assistance," asserting that it too is unconstitutionally vague. The district court agreed and enjoined the government from enforcing the challenged provision against respondents with respect to the PKK and the LTTE. *Humanitarian Law Project* v. *Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004). The court of appeals subsequently vacated and remanded that judgment for consideration of the IRTPA amendments. *Humanitarian Law Project* v. *Gonzales*, No. 04-55871 (9th Cir. Apr. 1, 2005).

c. Both remanded cases were consolidated before the district court, where respondents asserted that the terms "training," "personnel," and "expert advice or assistance" are unconstitutionally vague, even as amended and clarified by IRTPA. Respondents also argued that the term "service"—which IRTPA had added to the definition of "material support or resources"—is impermissibly vague. The district court agreed with those claims, except as to "personnel," and it again entered an injunction. App., *infra*, 33a-76a.

4. The court of appeals affirmed. App., *infra*, 1a-32a.

The court of appeals held that the term "training" is unconstitutionally vague. App., *infra*, 20a-23a. The court considered it "highly unlikely that a person of or-

dinary intelligence would know whether, when teaching someone to petition international bodies for [humanitarian] aid, one is imparting a 'specific skill' or 'general knowledge.'" *Id.* at 21a-22a. In addition, "[e]ven if persons of ordinary intelligence could discern between the instruction that imparts a 'specific skill,' as opposed to one that imparts 'general knowledge,'" the court stated that "the term 'training' could still be read to encompass speech and advocacy protected by the First Amendment." *Id.* at 22a. The court concluded that the term "training" is vague "because it 'implicates, and potentially chills, [respondents'] protected expressive activities.'" *Id.* at 22a-23a (quoting *id.* at 64a).

The court of appeals also held that the term "expert advice or assistance" is unconstitutionally vague. App., *infra*, 23a-24a. The court noted that the statute's definition of "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge," 18 U.S.C. 2339A(b)(3), was borrowed from Federal Rule of Evidence 702. But that borrowing, the court stated, "does not clarify the term 'expert advice or assistance' for the average person with no background in law." App., *infra*, 24a (quoting *id.* at 66a). In particular, the court concluded that "the 'other specialized knowledge' portion of the ban" would "cover constitutionally protected advocacy." *Ibid.* By contrast, the court held that the provision was not vague insofar as it reached "scientific [or] technical * * * knowledge," because "the meaning of 'technical' and 'scientific' is reasonably understandable to a person of ordinary intelligence." *Ibid.*

Similarly, the court of appeals held that the term "service" is vague "because it is easy to imagine protected expression that falls within the bounds of the term

service,'" and because "each of the other challenged provisions could be construed as a provision of 'service.'" App., *infra*, 25a (internal quotation marks omitted).

Finally, the court of appeals held that the term "personnel" is not vague. App., *infra*, 26a-27a. The court noted that, as a result of IRTPA, the statute "criminalizes providing 'personnel' to a foreign terrorist organization only where a person, alone or with others, '[work]s under that terrorist organization's direction or control or . . . organize[s], manage[s], supervise[s], or otherwise direct[s] the operation of that organization.'" *Id.* at 26a (brackets in original) (quoting 18 U.S.C. 2339B(h)). As amended, the court held, the term is not vague because it "no longer criminalizes pure speech protected by the First Amendment." *Id.* at 26a-27a.

5. The court of appeals denied a petition for rehearing en banc. App., *infra*, 3a.

REASONS FOR GRANTING THE PETITION

The court of appeals declared parts of an Act of Congress unconstitutionally vague under the Fifth Amendment. Such a decision would ordinarily warrant this Court's review. That is especially so in this case, because the statute in question, which prohibits the knowing provision of material support to designated foreign terrorist organizations, is a vital part of the Nation's effort to fight international terrorism.

The court of appeals held that three components of the statutory definition of material support—"training," "expert advice or assistance," and "service"—are unconstitutionally vague. That is incorrect. Each of those terms has an established meaning and is readily understandable by persons of ordinary intelligence. Because

the statute provides fair notice of what is prohibited, it satisfies the requirements of the Due Process Clause.

The court of appeals believed that the terms at issue are vague primarily because they could be construed to prohibit speech that is protected by the First Amendment. That conclusion rests on a confusion between the vagueness and overbreadth doctrines. The breadth of a statute, by itself, has nothing to do with whether the statute is vague. In any event, the statute in question regulates conduct, not speech, and does not violate the First Amendment in any of its applications. To the extent that there is any doubt about the statute's applicability to constitutionally protected advocacy, the court of appeals could have construed the statute to avoid any constitutional infirmity, and erred in failing to do so.

A. This Court's Review Is Warranted Because The Court Of Appeals Invalidated An Important Act Of Congress

This Court should grant review because the court of appeals held that portions of an Act of Congress are unconstitutional. App., *infra*, 20a-25a (concluding that the terms "training," "expert advice or assistance," and "service" in 18 U.S.C. 2339A(b)(1) are unconstitutionally vague). As this Court has repeatedly observed, judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)). The Court has frequently reviewed lower-court decisions holding a federal law unconstitutional, even in the absence of a circuit conflict. See, *e.g.*, *United States* v. *Williams*, 128 S. Ct. 1830 (2008); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *United States* v. *Morrison*, 529 U.S. 598 (2000).

This Court's review is particularly appropriate in this case because the material-support statute is an important tool in the Nation's fight against international terrorism. Since 2001, the United States has charged approximately 120 defendants with violations of the material-support provision of 18 U.S.C. 2339B, and approximately 60 defendants have been convicted. Several of those prosecutions have involved the provision of "training," "expert advice or assistance, or "service"—the parts of the statute struck down by the court of appeals in this case. See, *e.g.*, Indictment at 4-5, *United States* v. *Iqbal*, No. 06-Cr-1054 (RMB) (S.D.N.Y. filed Jan. 20, 2007) (defendants were charged under Section 2339B with providing satellite-television services to Hizballah; defendants pleaded guilty); Indictment at 1-2, *United States* v. *Shah*, No. 05-Cr-673 (LAP) (S.D.N.Y. filed Dec. 6, 2006) (defendants were charged under Section 2339B with providing al Qaeda "martial arts training and instruction" and "medical support to wounded jihadists"; one defendant pleaded guilty and the other was found guilty after a jury trial). And several of the cases have involved the provision of material support to the LTTE, one of the terrorist organizations at issue here. See, *e.g.*, *United States* v. *Osman*, No. 06-cr-00416-CCB-1 (D. Md.); *United States* v. *Sarachandran*, No. 06-cr-00615-RJD-1 (E.D.N.Y.); *United States* v. *Thavaraja*, No. 06-cr-00616-RJD-JO-1 (E.D.N.Y.). Many of those prosecutions potentially prevented substantial harm to the Nation.

When it enacted the material-support statute, Congress expressly found that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States," and that "foreign organizations that engage in terrorist activity are so tainted

by their criminal conduct that *any* contribution to such an organization facilitates that conduct." AEDPA § 301(a)(1) and (7), 110 Stat. 1247 (18 U.S.C. 2339B note) (emphasis added). "[T]he fungibility of financial resources and other types of material support" means that when individuals "supply funds, goods, or services to [a terrorist] organization" to "defray the cost to the terrorist organization of running * * * ostensibly legitimate activities," their contribution "frees an equal sum that can then be spent on terrorist activities." H.R. Rep. No. 383, 104th Cong., 1st Sess. 81 (1995); see *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc) ("Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."), petition for cert. pending, No. 08-1441 (filed May 1, 2009). Accordingly, Congress has banned a broad range of material support—regardless of whether the terrorist group claims to engage in otherwise lawful activities, and regardless of whether the support is ostensibly given to assist those supposedly lawful activities.

The decision below seriously undermines the statutory scheme created by Congress to address the problem of international terrorism. Under the injunction affirmed by the court of appeals, respondents are free to provide "training," "expert advice or assistance," and "service"—of whatever kind—to the PKK and the LTTE, organizations that the Secretary of State has found to engage in terrorist activity that "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. 1189(a)(1); see App., *infra*, 75a-76a. That result warrants correction by this Court.

B. The Court of Appeals Erred In Holding The Material-Support Statute Unconstitutionally Vague

1. The terms "training," "expert advice or assistance," and "service" are not vague

The Due Process Clause requires that a criminal statute be sufficiently clear to give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). The Clause does not require that an offense be defined with "mathematical certainty," *id.* at 110, but only that it give "relatively clear guidelines as to prohibited conduct," *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 525 (1994). The statutory definition of "material support" in 18 U.S.C. 2339A(b)(1) easily satisfies that standard.

The court of appeals believed that, because "First Amendment freedoms" are at issue in this case, the government "may regulate * * * only with narrow specificity." App., *infra*, 20a (quoting *Foti* v. *City of Menlo Park*, 146 F.3d 629, 638-639 (9th Cir. 1998)). That is incorrect. As explained below, see pp. 19-21, *infra*, the material-support statute does not regulate speech; it is a regulation of conduct that only incidentally impinges on expression. In any event, this Court has observed that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989).

Moreover, the court of appeals failed to appreciate that Section 2339B is violated only when the person providing material support *knows* that the organization being supported is a designated terrorist organization or has engaged in terrorism or terrorist activity. 18 U.S.C.

2339B(a)(1). That scienter requirement helps to mitigate any potential vagueness problem by reducing the possibility that the statute could be applied to innocent conduct. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982).

The court of appeals identified three components of the definition of material support that it considered vague: "training," "expert advice or assistance," and "service." App., *infra*, 20a-25a. In fact, each of those terms is sufficiently clear to satisfy the Due Process Clause.

a. Even before Congress clarified the definition of "training" by enacting IRTPA in 2004, the meaning of that term was clear and readily intelligible to the average person. "Train" is defined as "to teach or exercise (someone) in an art, profession, trade, or occupation," to "direct in attaining a skill," or to "give instruction to." *Webster's Third New International Dictionary of the English Language* 2424 (1993) (*Webster's*). As the court of appeals recognized in an earlier case, a person of ordinary intelligence would readily understand those concepts. See *California Teachers Ass'n* v. *State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) (holding that "instruction" is a "word[] of common understanding" and is not unconstitutionally vague). Indeed, "training" is sufficiently intelligible that respondents used the term in their complaints to describe their own activities. C.A. E.R. 11-12 (alleging that respondents "would like to * * * provide the PKK * * * with training"); *id.* at 44 (same). The clarity of the statute as applied to respondents' own conduct is fatal to their claim of vagueness. See *Village of Hoffman Estates*, 455 U.S. at 495 ("A plaintiff who engages in some conduct that is clearly

proscribed cannot complain of the vagueness of the law as applied to the conduct of others.").

IRPTA further clarifies the meaning of "training" by providing that it includes only "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. 2339A(b)(2). Contrary to the court of appeals' conclusion, App., *infra*, 21a-22a, that definition is clear on its face: a person of ordinary intelligence is capable of distinguishing between what is commonly or generally known and what is not. See *Pierce* v. *Underwood*, 487 U.S. 552, 572 (1988) (distinguishing "some distinctive knowledge or specialized [litigation] skill" from "general lawyerly knowledge").

b. Likewise, the phrase "expert advice or assistance" has a clearly understood meaning and is not vague. See *Webster's* 800 (defining "expert" as "having special skill or knowledge derived from training or experience"). Again, respondents themselves have used the term in describing their activities. See, *e.g.*, C.A. E.R. 42 (alleging that some respondents "have devoted a substantial amount of time and resources to * * * providing training, expert advice and other forms of support to the PKK"); *id.* at 45 (alleging that other respondents "wish to offer their expert medical advice and assistance to the LTTE"); *id.* at 46-47.

The clarity of "expert advice or assistance" has only been enhanced by IRTPA, which further defines it to mean "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. 2339A(b)(3). That definition is derived from Federal Rule of Evidence 702, which permits expert witnesses to offer testimony based on "scientific, technical, or other specialized knowledge." This Court explained in *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999), that the

category of scientific, technical, and other specialized knowledge consists of "specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case" that is based upon experiences "foreign in kind" to those of the population in general. *Id.* at 149. Once again, a person of ordinary intelligence could readily distinguish between common knowledge and knowledge that is so specialized that it is foreign to the experiences of most people.

The court of appeals believed that the origins of the phrase "expert advice or assistance" in Rule 702 did not clarify the statute "for the average person with no background in law." App., *infra*, 24a (quoting *id.* at 66a). But this Court's interpretation of Rule 702 has been based on the ordinary meaning of the rule's words, not on obscure legal arcana. See *Daubert* v. *Merrell Dow Pharms. Inc.*, 509 U.S. 579, 589-590 (1993) (citing dictionary definitions of "scientific" and "knowledge"). The average person need not know anything about Rule 702 or about the relationship between Rule 702 and the phrase "expert advice or assistance" in order to understand the meaning of that term.[2]

The analysis of the court of appeals is particularly puzzling because the court held that part of the phrase —namely, "scientific [or] technical * * * knowledge" —is *not* vague, while "other specialized knowledge" is vague. App., *infra*, 24a. But under the principle of *ejusdem generis*, "other specialized knowledge" takes

[2] In any event, the court of appeals' criticism rests on a misunderstanding of the vagueness standard. Many terms in criminal statutes, such as "malice aforethought" or "conspiracy," are not clear as a matter of ordinary English but are nevertheless sufficiently definite to be enforceable because they have specialized meanings in the law.

its meaning from the surrounding (concededly non-vague) terms "scientific" and "technical." See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001) ("[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (citation omitted). Indeed, "the average person with no background in law," App., *infra*, 24a, would not need to be familiar with "such Latin phrases as *ejusdem generis* and *noscitur a sociis* to reach [the] obvious conclusion" that "words grouped in a list should be given related meaning," *Third Nat'l Bank* v. *Impac Ltd.*, 432 U.S. 312, 322-323 & n.16 (1977) (quotation marks omitted). Moreover, *Kumho Tire* makes clear that the entire phrase—"scientific, technical, or other specialized knowledge"—refers to knowledge based on experiences not usually shared by the general public. 526 U.S. at 148-149. That understanding of all the parts of the definition of "expert advice or assistance" taken together is just what a person of ordinary intelligence would take the words to mean.

c. The term "service" is also not unconstitutionally vague. "Service" refers to "an act done for the benefit or at the command of another" or to "useful labor that does not produce a tangible commodity." *Webster's* 2075. Those words are readily understood by people of ordinary intelligence. In other contexts, courts of appeals have found the same or similar terms to be sufficiently clear to define the scope of criminal liability. See, *e.g.*, *United States* v. *Homa Int'l Trading Corp.*, 387 F.3d 144, 146 (2d Cir. 2004) (concluding that "[t]he term 'services,'" as used in a statute and Executive Order prohibiting the export of "services" to Iran, is "un-

ambiguous"); *United States* v. *Hescorp, Heavy Equip. Sales Corp.*, 801 F.2d 70, 77 (2d Cir.) (rejecting vagueness challenge to a provision of an Executive Order prohibiting any person from engaging in any "service contract" in Iran, because the language in the Executive Order "gave * * * fair notice" of what was prohibited), cert. denied, 479 U.S. 1018 (1986). The word is no less easy to understand in the material-support statute.

2. The court of appeals confused the vagueness and overbreadth doctrines

The decision of the court of appeals rested in large part on the court's view that prohibiting the provision of any "training," "expert advice or assistance," or "service" to a terrorist group would violate the First Amendment. For example, the court reasoned that "training" is vague because it could "be read to encompass speech and advocacy protected by the First Amendment." App., *infra*, 22a; see *id.* at 24a (holding that "expert advice or assistance" is vague because it "continues to cover constitutionally protected advocacy"); *id.* at 25a (holding that "service" is vague "because it is easy to imagine protected expression that falls within the bounds of the term 'service'") (internal quotation marks omitted).

The court of appeals' analysis erroneously conflated the doctrines of vagueness and overbreadth. If the court were correct that "training" could "be read to encompass speech and advocacy protected by the First Amendment," App., *infra*, 22a, then the statute might be unconstitutional, as a matter of substantive First Amendment law, in some of its applications. And if those applications were sufficiently numerous in relation to the legitimate applications of the statute, then the

statute would be vulnerable to an overbreadth challenge. See *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003). But overbreadth and vagueness are distinct doctrines, and the coverage of a statute, by itself, has nothing to do with whether its meaning is unclear. See *Massachusetts* v. *EPA*, 549 U.S. 497, 532 (2007) (That a statute can be applied in many different situations "does not demonstrate ambiguity. It demonstrates breadth.") (quotation marks omitted); *Grayned*, 408 U.S. at 114 ("A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct."). Assuming arguendo that this statute has unconstitutional applications to protected First Amendment activity, that does not render the statute unconstitutionally vague.

3. The material-support statute does not violate the First Amendment

Even if the breadth of Section 2339B were somehow relevant to a vagueness inquiry, the decision below would still be incorrect. Contrary to the view of the court of appeals, the statute does not restrict speech that is protected by the First Amendment.

a. Section 2339B is not aimed at speech. Instead, the statute is a regulation of conduct that, as the court below has previously recognized, serves a purpose unrelated to the content of any expression: "stopping aid to terrorist groups." App., *infra*, 28a (quoting *Humanitarian Law Project*, 205 F.3d at 1135). And as a regulation of conduct that only incidentally restricts speech, Section 2339B easily survives review under the longstanding test set out in *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)—*i.e.*, that the regulation be within the government's power; that it promote an important

interest; that the interest be unrelated to suppressing free expression; and that the regulation restrict First Amendment rights no more than is necessary. As the court of appeals observed, the statute is within the Federal Government's authority to regulate the dealings of its citizens with foreign entities; it promotes an essential government interest "in preventing the spread of international terrorism"; it is aimed at stopping aid to terrorist groups rather than at suppressing expression; and it is reasonably tailored, especially considering the "wide latitude" given to the government in an area "bound up with foreign policy considerations" and considering Congress's conclusion that designated terrorist groups "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." *Humanitarian Law Project*, 205 F.3d at 1136 (internal quotation marks omitted); accord *United States* v. *Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (en banc) ("Section 2339B satisfies all four prongs of the *O'Brien* test."), vacated on other grounds, 543 U.S. 1097 (2005), reinstated in relevant part, 405 F.3d 1034 (4th Cir. 2005).

The same analysis applies whether the material support takes the form of conduct or words, because the statute does not regulate the content of any expression, but only the act of knowingly giving material support. Nor does it matter, when the support takes the form of words, whether those words are intrinsically blameworthy (*e.g.*, training on how to build a bomb) or seemingly benign (*e.g.*, advice on international law, or on how to program a computer). In either instance, the statute's aim is not directed at the content of speech, but at the act of aiding deadly terrorist organizations. Accordingly, the prohibition does not contravene the First

Amendment, as applied to plaintiffs' conduct or otherwise.

b. Because the statute does not violate the First Amendment in any of its applications, it follows *a fortiori* that it is not overbroad. To be overbroad, a statute must prohibit a "substantial" amount of protected expression, judged in absolute terms and in relation to the law's plainly legitimate sweep. *Hicks*, 539 U.S. at 119-120; see *Williams*, 128 S. Ct. at 1838. Even if respondents could show some cases in which the statute would ban protected speech, those instances would not be "substantial" in absolute number, nor would they be "substantial" in relation to the numerous legitimate applications of the statute, such as prohibiting a person from training a terrorist organization on how to build a bomb, use a weapon, fly a plane, or launder money. See *Hicks*, 539 U.S. at 124 ("Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."). Thus, as even the court below recognized in another part of its analysis, the statute is not overbroad. App., *infra*, 27a-29a.

c. The court of appeals drew a distinction between material support in the form of independent advocacy (which it held could not be prohibited consistent with the First Amendment), and material support provided directly to, or under the control of, a terrorist group (which can permissibly be banned). App., *infra*, 26a-27a. But the court failed to appreciate that the challenged terms—"training," "expert advice or assistance," and "service"—can easily be construed so as not to prohibit any independent advocacy, and thus so as not to offend the First Amendment even under the court of appeals'

theory. The court of appeals was obliged to adopt such a construction if necessary to save the statute, and it erred by failing to do so. See *Jones* v. *United States*, 526 U.S. 227, 239 (1999) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") (internal quotation marks omitted); *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

All the terms at issue here imply a relationship to another person or entity. The ordinary meaning of "service," for example, is "an act done * * * at the command of another." *Webster's* 2075. One does not "serve" in the abstract; one serves someone or something. Similarly, "training," "advice," and "assistance" all assume an object—the person to whom or entity to which the training, advice, and assistance are rendered—and some collaboration or other relationship between the giver and the recipient of the type of aid in question. The terms are therefore naturally read, even if not inevitably read, to exclude independent advocacy.

Other parts of Section 2339B also support this interpretation. The key provision of the statute criminalizes only support provided "*to*" a foreign terrorist organization, 18 U.S.C. 2339A(b)(1), 2339B(a)(1) (emphasis added), which suggests that it prohibits only support that is given directly to a terrorist group or provided with some significant level of collaboration. A person who acts independently to advocate for a terrorist group would not commonly be considered to have knowingly provided something "to" that terrorist organization; if independent support were covered, Congress would have prohibited support "of" or "for" a terrorist group. And the

scienter requirement ensures that the individual must knowingly provide support to an organization he or she knows is involved with terrorism, again implying a relationship other than independence between the two. See pp. 13-14, *supra*.

Accordingly, to the extent that Section 2339B's constitutionality turns on ensuring that its prohibitions do not bar independent advocacy, the statute can easily be construed in such a fashion. And a court would be obliged to adopt that construction if necessary to save the statute, not only under general principles of constitutional avoidance, but also under Congress's specific instruction that the statute not "be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment." 18 U.S.C. 2339B(i). The court of appeals, however, made no attempt to adopt a saving construction. Its failure to do so is another error warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
NEAL KUMAR KATYAL
Deputy Solicitor General
ERIC D. MILLER
Assistant to the Solicitor General
DOUGLAS N. LETTER
JOSHUA WALDMAN
Attorneys

JUNE 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-56753

HUMANITARIAN LAW PROJECT; RALPH FERTIG; ILANKAI THAMIL SANGRAM; TAMILS OF NORTHERN CALIFORNIA; TAMIL WELFARE AND HUMAN RIGHTS COMMITTEE; FEDERATION OF TAMIL SANGRAMS OF NORTH AMERICA; WORLD TAMIL COORDINATING COMMITTEE; NAGALINGAM JEYALINGAM, DR., PLAINTIFFS-APPELLEES

v.

MICHAEL B. MUKASEY,* ATTORNEY GENERAL, OF THE UNITED STATES; UNITED STATES DEPARTMENT OF JUSTICE; CONDOLEEZA RICE, SECRETARY OF STATE; UNITED STATES DEPARTMENT OF STATE, DEFENDANTS-APPELLANTS

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* Michael B. Mukasey is substituted for his predecessor, Alberto R. Gonzales, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

No. 05-56846

HUMANITARIAN LAW PROJECT; RALPH FERTIG; ILANKAI THAMIL SANGRAM; TAMILS OF NORTHERN CALIFORNIA; TAMIL WELFARE AND HUMAN RIGHTS COMMITTEE; FEDERATION OF TAMIL SANGRAMS OF NORTH AMERICA; WORLD TAMIL COORDINATING COMMITTEE; NAGALINGAM JEYALINGAM, DR., PLAINTIFFS-APPELLANTS

v.

MICHAEL B. MUKASEY,* ATTORNEY GENERAL, OF THE UNITED STATES; UNITED STATES DEPARTMENT OF JUSTICE; CONDOLEEZA RICE, SECRETARY OF STATE; UNITED STATES DEPARTMENT OF STATE, DEFENDANTS-APPELLEES

Filed: Dec. 10, 2007
Amended: Jan. 5, 2009

Before: HARRY PREGERSON, SIDNEY R. THOMAS, and JOHNNIE B. RAWLINSON, Circuit Judges.

ORDER

The opinion filed in this case on December 10, 2007, slip op. at 16135, 509 F.3d 1122 is hereby amended as follows:

At slip op. 16157, line 12: 509 F.3d at 1134, at the end of the paragraph, add the following footnote:

> The issue of a facial vagueness challenge is not before this court. We therefore do not reach that issue.

At slip op. 16160, line 10: 509 F.3d at 1136, at the end of the paragraph, add the following footnote:

> Whether the outcome would be different if evidence were presented showing that "service" rendered to a designated foreign terrorist organization resulted in the receipt of money by the designated foreign terrorist organization itself is not an issue presented by this case. We therefore do not reach that issue.

With these amendments, the panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of these amendments and of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.) Future petitions for panel rehearing and future petitions for rehearing en banc will not be entertained.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

OPINION

PREGERSON, Circuit Judge:

We are once again called upon to decide the constitutionality of sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and its 2004 amendment, the Intelligence Reform and Terrorism Prevention Act ("IRTPA").

I. OVERVIEW

Section 302(a) of AEDPA, Pub. L. 104-132, 110 Stat. 1214 (1996), codified in 8 U.S.C. § 1189, authorizes the Secretary of State (the "Secretary") to designate a group as a "foreign terrorist organization." Section

303(a) makes it a crime for anyone to provide support to even the nonviolent activities of the designated organization. *See* 18 U.S.C. § 2339B(a). Specifically, 8 U.S.C. § 1189(a)(1) authorizes the Secretary of State

> to designate an organization as a foreign terrorist organization . . . if the Secretary finds that (A) the organization is a foreign organization; (B) the organization engages in terrorist activity . . . ; and (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

8 U.S.C. § 1189(a)(1).

The pertinent facts may be found in prior published decisions in this case. *See Humanitarian Law Project v. Reno,* 205 F.3d 1130 (9th Cir. 2000) ("*HLP I*"), cert. denied, 532 U.S. 904, 121 S. Ct. 1226, 149 L. Ed. 2d 136 (2001); *see also Humanitarian Law Project v. United States Dep't of Justice,* 352 F.3d 382 (9th Cir. 2003) ("*HLP II*"), *vacated,* 393 F.3d 902 (9th Cir. 2004). We, therefore, set forth only a brief overview of the facts of this case.

Plaintiffs are six organizations, a retired federal administrative law judge, and a surgeon. The Kurdistan Workers Party, a.k.a Partiya Karkeran Kurdistan ("PKK"), and the Liberation Tigers of Tamil Eelam ("LTTE") engage in a wide variety of unlawful and lawful activities. Plaintiffs seek to provide support only to nonviolent and lawful activities of PKK and LTTE. This support would help Kurds living in Turkey and Tamils

living in Tamil Eelam in the Northern and Eastern provinces of Sri Lanka to achieve self-determination.[1]

On October 8, 1997, the Secretary of State designated PKK, LTTE, and twenty-eight other foreign organizations as "foreign terrorist organizations." *See* 62 Fed. Reg. 52,650, 52,650-51 (Oct. 8, 1997). To this day, both PKK and LTTE remain on the designated foreign terrorist organization list. Plaintiffs, fearing that they would be criminally investigated, prosecuted, and convicted under section 2339B(a), have been withholding their support for the PKK and LTTE from the time they were designated as foreign terrorist organizations.

On March 19, 1998, Plaintiffs filed a complaint in the district court (CV-98-01971-ABC; appeal No. 05-56753), alleging that AEDPA violated their First and Fifth Amendment rights. Plaintiffs sought a preliminary injunction to bar the government from enforcing against them AEDPA's prohibition against providing "material support or resources" to PKK and LTTE. In support of their motion for a preliminary injunction, Plaintiffs argued: (1) that AEDPA violated their First Amendment right to freedom of association and their Fifth Amendment right to due process because section 2339B(a) imposed a criminal penalty for their association with the

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[1] Plaintiffs who support PKK want: (1) to train members of PKK on how to use humanitarian and international law to peacefully resolve disputes, (2) to engage in political advocacy on behalf of Kurds who live in Turkey, and (3) to teach PKK members how to petition various representative bodies such as the United Nations for relief.

Plaintiffs who support LTTE want: (1) to train members of LTTE to present claims for tsunami-related aid to mediators and international bodies, (2) to offer their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government, and (3) to engage in political advocacy on behalf of Tamils who live in Sri Lanka.

designated organizations without requiring the government to prove that Plaintiffs had the specific intent to further the designated organizations' unlawful goals; (2) that AEDPA violated their First Amendment right to association by prohibiting them from making political contributions to the designated organizations; and (3) that AEDPA violated their First and Fifth Amendment rights because it gave the Secretary of State unfettered licensing power to designate a group as a foreign terrorist organization.

In June 1998, the district court partially granted Plaintiffs' motion for a preliminary injunction and enjoined the Attorney General's enforcement of AEDPA with respect to its prohibition on providing "training" and "personnel" to PKK and LTTE. *See Humanitarian Law Project v. Reno,* 9 F. Supp. 2d 1205, 1215 (C.D. Cal. 1998) ("*DC-HLP I*"). The district court held that "Plaintiffs have demonstrated a probability of success on their claim that the terms 'personnel' and 'training' are impermissibly vague." *Id.* The district court rejected the remainder of Plaintiffs' challenges, holding that AEDPA's prohibition on providing "material support or resources" to designated foreign terrorist organizations is a "content-neutral limitation on Plaintiffs' right to freedom of association" and "is subject to an intermediate scrutiny level of review." *Id.* at 1212. The district court also held that "AEDPA does not impose 'guilt by association alone' in violation of the First Amendment because the AEDPA only limits the permissible *ways* in which Plaintiffs can associate with PKK and LTTE." *Id.* (emphasis in the original). In other words, the district court held that AEDPA does not criminalize mere membership. Rather, AEDPA criminalizes conduct that provides "material support or resources" to a designated

foreign terrorist organization. Finally, the district court held that Plaintiffs failed to establish a probability of success on their claim that AEDPA affords the Secretary of State unfettered discretion to designate a group as a foreign terrorist organization. *See id*. at 1213.

Both parties appealed the district court's order. On March 3, 2000, we affirmed the district court. *See HLP I*. In *HLP I,* we determined that AEDPA section 2339B is a content-neutral regulation of conduct subject to intermediate scrutiny. *See id*. at 1135. Further, we rejected Plaintiffs's licensing scheme argument and held that the discretion accorded to the Secretary of State to designate a group as a foreign terrorist organization is not "unfettered" "because the regulation involves the conduct of foreign affairs" for which the courts "owe the executive branch even more latitude." *Id*. at 1137. Finally, we agreed with Plaintiffs that AEDPA's prohibitions on providing "personnel" and "training" to designated foreign terrorist organizations were unconstitutionally vague because these prohibitions could be read to criminalize conduct protected by the First Amendment. *See id*. at 1137-38.

After the case went back to the district court, the government moved to dismiss and both parties sought summary judgment in their favor. The district court reaffirmed its prior decision in an unpublished order. *See Humanitarian Law Project v. Reno,* No. CV 98-01971 ABC, 2001 WL 36105333, 2001 U.S. Dist. LEXIS 16729 (C.D. Cal. Oct. 3, 2001). The district court entered a permanent injunction against enforcing AEDPA's prohibition on providing "personnel" and "training" to designated organizations. *See id*. 2001 WL 36105333 at *12-13, 2001 U.S. Dist. LEXIS 16729 at *38.

Both parties appealed. On appeal, in addition to renewing previously raised arguments, Plaintiffs also raised a Fifth Amendment due process challenge, arguing that AEDPA section 2339B imposes vicarious liability because it does not contain a mens rea element.

On October 26, 2001, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act"), Pub. L. No. 107-56, § 805(a)(2), 115 Stat. 272 (Oct. 26, 2001). The USA PATRIOT Act amended AEDPA's definition of "material support or resources" to include the prohibition against providing "expert advice or assistance" to a designated foreign terrorist organization. *See* 18 U.S.C. § 2339A(b) and § 2339B(g)(4).

On August 27, 2003, Plaintiffs filed a separate complaint in the district court (CV-03-06107-ABC; appeal No. 05-56846), challenging AEDPA's ban on providing "expert advice or assistance" to a designated foreign terrorist organization. The district court found that term to be unconstitutionally vague, but not overbroad. *See Humanitarian Law Project v. Ashcroft,* 309 F. Supp. 2d 1185 (C.D. Cal. 2004). The district court granted Plaintiffs's request for injunctive relief. *See id*. at 1204. Both parties appealed.

On December 3, 2003, we affirmed the district court's holding that the terms "training" and "personnel" were void for vagueness. *See Humanitarian Law Project v. United States Dep't of Justice,* 352 F.3d 382 (9th Cir. 2003) ("*HLP II*"), *vacated,* 393 F.3d 902 (9th Cir. 2004). A majority of the panel also read into the statute a mens rea requirement holding that, "to sustain a conviction under § 2339B, the government must prove beyond a

reasonable doubt that the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization's unlawful activities that caused it to be so designated." *Id*. at 403. The parties sought, and we granted, en banc review of *HLP II*. *See Humanitarian Law Project v. United States Dep't of Justice,* 382 F.3d 1154 (9th Cir. 2004).

On December 17, 2004, three days after the en banc panel heard oral argument, Congress passed the Intelligence Reform and Terrorism Prevention Act ("IRTPA") which amended AEDPA. As amended, AEDPA now provides in part:

> Whoever *knowingly* provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

18 U.S.C. § 2339B(a)(1) (emphasis added).

> The term "material support or resources" includes:
>
> any property, tangible or intangible, or *service,* including currency or monetary instruments or financial securities, financial services, lodging, *training, expert advice or assistance,* safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, *personnel* (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b) (emphasis added).

In enacting IRTPA, Congress amended the definition of "material support or resources" to include an additional ban on providing "service." *See id*. Congress also defined for the first time the terms "training" and "expert advice or assistance," 18 U.S.C. § 2339(A)(b)(2)-(3), and clarified the prohibition against providing "personnel" to designated organizations, 18 U.S.C. § 2339B(h).

Post-IRTPA, "training" refers to "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2). "Expert advice or assistance" encompasses "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3). "Personnel" includes "1 or more individuals" who "work under th[e] terrorist organization's direction or control or [who] organize, manage, supervise, or otherwise direct the operation of that organization." 18 U.S.C. § 2339B(h). AEDPA, as amended by IRTPA, narrows the definition of "personnel" by providing that "[i]ndividuals 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 or control." *Id*. (emphasis added).

Further, IRTPA provides that AEDPA's prohibition on providing "material support or resources" to a designated foreign terrorist organization includes a mens rea requirement. To violate the statute, a person who provides "material support or resources" to a designated organization must *know* that (1) "the organization is a designated terrorist organization," (2) "the organization has engaged or engages in terrorist activity," or that (3)

"the organization has engaged or engages in terrorism."[2] 18 U.S.C. § 2339B(a)(1).

Lastly, AEDPA, as amended by IRTPA, gives the Secretary of State discretion to authorize (with the concurrence of the Attorney General) certain forms of support[3] otherwise proscribed under section 2339B(a) unless such support "may be used to carry out terrorist activity." 18 U.S.C. § 2339B(j).

Because of the amendments to AEDPA contained in IRTPA, the en banc panel, on December 21, 2004, "vacate[d] the judgment and injunction [of the *HLP II* panel] regarding the terms 'personnel' and 'training,' and remanded [this case] to the district court for further proceedings." *See Humanitarian Law Project v. United States Dep't of State,* 393 F.3d 902, 902 (9th Cir. 2004) ("*HLP en banc*"). The en banc panel also affirmed the district court's rulings on the rest of Plaintiffs' First Amendment challenges "for the reasons set out in [*HLP I*]," and vacated the decision in *HLP II*. *Id*. On April 1, 2005, we remanded Plaintiffs' separate challenge to the term "expert advice or assistance" to the district court to consider IRTPA's impact on the litigation.

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[2] This language essentially adopts our holding in HLP II, where we held that "to sustain a conviction under § 2339B, the government must prove beyond a reasonable doubt that the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization's unlawful activities that caused it to be so designated." *HLP II,* 352 F.3d at 403.

[3] Section 2339B(j) allows the Secretary of State to exempt from prosecution persons who may otherwise be held liable for providing "training," "expert advice or assistance," and "personnel." 18 U.S.C. § 2339B(j).

On remand, the district court consolidated the two cases (the "personnel" and "training" challenge and the "expert advice and assistance" challenge). Plaintiffs also challenge IRTPA's newly added term "service." The parties thereafter filed cross-motions for summary judgment. On July 25, 2005, the district court granted in part and denied in part the summary judgment motions in the consolidated cases. *See Humanitarian Law Project v. Gonzales,* 380 F. Supp. 2d 1134 (C.D. Cal. 2005) ("*DC-HLP III*"). The district court held that the terms "training" and "service" are unconstitutionally vague. *Id.* at 1152. With respect to the term "expert advice or assistance," the district court held that the "other specialized knowledge" part of the definition is void for vagueness, but that the "scientific" and "technical" knowledge part of the definition was not vague. *Id.* at 1151 & n.23. The district court also held that the newly-added definition of "personnel" found in AEDPA section 2339B(h) cured the vagueness of that term. *Id.* at 1152. The district court rejected the rest of Plaintiffs' challenges and granted partial summary judgment for the government. *See id.* at 1155. Both parties timely appealed.

II. STANDARD OF REVIEW

We review the district court's order granting summary judgment de novo. *See Balint v. Carson City,* 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact. *See id.*

The district court's determination that a statute is unconstitutionally vague is reviewed de novo. *See United States v. Wyatt,* 408 F.3d 1257, 1260 (9th Cir. 2005).

III. DISCUSSION

A. Specific Intent

In their prior appeals, Plaintiffs argued that AEDPA section 2339B(a) violates their Fifth Amendment due process rights because that section does not require proof of mens rea to convict a person for providing "material support or resources" to a designated foreign terrorist organization. *See HLP-II,* 352 F.3d at 394. In *HLP-II,* we read the statute to require that the donor of the "material support or resources" have knowledge "either of an organization's designation or of the unlawful activities that caused it to be so designated." *Id*. at 402-03.

In December 2004, Congress passed IRTPA that revised AEDPA to essentially adopt our reading of AEDPA section 2339B to include a knowledge requirement. Thus, post-IRTPA, to convict a person for providing "material support or resources" to a designated foreign terrorist organization, the government must prove that the donor defendant "ha[d] knowledge that the organization is a designated terrorist organization, that the organization has engaged or engages in terrorist activity, or that the organization has engaged or engages in terrorism." 18 U.S.C. § 2339B(a) (citations omitted). As explained above, on December 21, 2004, the en banc panel vacated our judgment in *HLP II,* and remanded the case to the district court for further proceedings in light of IRTPA. *See HLP en banc,* 393 F.3d 902. The

district court's decision on remand is now the matter before us.

Plaintiffs argue that IRTPA does not sufficiently cure AEDPA section 2339B's *mens rea* deficiency. They contend that section 2339B(a) continues to violate due process because it does not require the government to prove that the donor defendant acted with specific intent to further the terrorist activity of the designated organization. Plaintiffs urge us to invalidate the statute or, alternatively, to read a specific intent requirement into the statute.

"In our jurisprudence guilt is personal." *Brown v. United States,* 334 F.2d 488, 495 (9th Cir. 1964) (internal quotations and citation omitted). Thus, we must "construe [a criminal] statute in light of the fundamental principle that a person is not criminally responsible unless 'an evil-meaning mind' accompanies 'an evil-doing hand.'" *United States v. Nguyen,* 73 F.3d 887, 890 (9th Cir. 1995) (quoting *Morissette v. United States,* 342 U.S. 246, 251, 72 S. Ct. 240, 96 L. Ed. 288 (1952)). In other words, unless Congress expressly communicates its intent to dispense with a mens rea requirement and create strict criminal liability, the notion of "personal guilt" requires some culpable intent before criminal liability attaches.

"[D]etermining the mental state required for commission of a federal crime requires 'construction of the statute and . . . inference of the intent of Congress.'" *Staples v. United States,* 511 U.S. 600, 605, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) (quoting *United States v. Balint,* 258 U.S. 250, 253, 42 S. Ct. 301, 66 L. Ed. 604 (1922)). We remain mindful that we "should not enlarge the reach of enacted crimes by constituting them from

anything less than the incriminating components contemplated by the words used in the statute." *Morissette,* 342 U.S. at 263, 72 S. Ct. 240.

In *Liparota v. United States,* 471 U.S. 419, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985), the Supreme Court examined the constitutionality of a federal statute that criminalized the acquisition or possession of food stamps in any unauthorized manner. *See id.* at 420-21, 105 S. Ct. 2084. The statute contained no explicit *mens rea* requirement. The Court read into the statute the requirement that the government prove that "the defendant *knew* his conduct to be unauthorized by statute or regulations." *Id.* at 425-26, 105 S. Ct. 2084 (emphasis added) (noting that "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct").[4]

Here, AEDPA section 2339B(a) already requires the government to prove that the donor defendant provided "material support or resources" to a designated foreign terrorist organization with *knowledge* that the donee organization is a designated foreign terrorist organiza-

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[4] The other two cases Plaintiffs rely on, *Staples,* 511 U.S. 600, 114 S. Ct. 1793, 128 L. Ed. 2d 608, and *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994), also involved statutes that did not contain an explicit mens rea requirement. In *Staples,* the Supreme Court interpreted the statute punishing possession of an unregistered machine gun to require knowledge that the gun he or she possessed is unregistered. *See Staples,* 511 U.S. at 619, 114 S. Ct. 1793. Similarly, in *X-Citement Video,* the Court interpreted the term "knowingly" to require that defendant knew that the persons appearing in a sexually explicit video were minors. *See X-Citement Video,* 513 U.S. at 78, 115 S. Ct. 464. However, as in *Liparota,* the Court required that, in the absence of a specific mens rea requirement, the government prove the defendant acted *knowingly.*

tion, or with *knowledge* that the organization is or has engaged in terrorist activities or terrorism. 18 U.S.C. § 2339B(a). As amended, AEDPA section 2339B(a) complies with the "conventional requirement for criminal conduct—awareness of some wrongdoing." *Staples,* 511 U.S. at 606-07, 114 S. Ct. 1793. Thus, a person with such knowledge is put on notice that "providing material support or resources" to a designated foreign terrorist organization is unlawful. Accordingly, we hold that the amended version of section 2339B comports with the Fifth Amendment's requirement of "personal guilt."

Plaintiffs urge us to read a specific intent requirement into AEDPA section 2339B. They rely on *Scales v. United States,* 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961). In *Scales,* the Supreme Court held that it was wrong to impute criminal guilt based on membership in an organization without proof that the defendant acted with culpable intent. *See id.* at 224-25, 81 S. Ct. 1469. As amended, section 2339B(a) does not proscribe membership in or association with the terrorist organizations,[5] but seeks to punish only those who have provided "material support or resources" to a foreign terrorist organization with *knowledge* that the organization was a designated foreign terrorist organization, or that it is or has engaged in terrorist activities or terrorism. Accordingly, unlike the statute in *Scales* which was silent with respect to requisite mens rea, section 2339B(a) exposes one to criminal liability only where the govern-

[5] Although section 2339B(a) does not punish mere membership, the statute does prohibit the paying of membership dues. *See HLP I,* 205 F.3d at 1134 (rejecting Plaintiffs' argument that "the First Amendment requires the government to demonstrate a specific intent to aid an organization's illegal activities before attaching liability to the donation of funds[ ]").

ment proves that the donor defendant acted with culpable intent—knowledge.

At oral argument, Plaintiffs conceded that, were we to read into section 2339B a specific intent requirement that the person providing "material support or resources" do so with an intent to further the organization's unlawful goals (terrorist activity), we would be extending *Scales*. Because we find that acting with "knowledge" satisfies the requirement of "personal guilt" and eliminates any due process concerns, we decline Plaintiffs' invitation to extend the holding in *Scales*.

Plaintiffs also rely on what they consider "vicarious criminal liability" cases where courts required proof of intent to further the group's illegal ends. Those cases are distinguishable. We disagree with Plaintiffs' characterization of section 2339B(a) as a statute that imposes "vicarious criminal liability."

Vicarious liability involves holding one person accountable for the actions of another. Section 2339B(a) criminalizes the act of knowingly providing "material support or resources" to a designated foreign terrorist organization. Donor defendants are penalized for the criminal act of support. Donor defendants cannot be penalized under section 2339B(a) for the illegal conduct of the donee organization.

Ferguson v. Estelle, 718 F.2d 730 (5th Cir. 1983), is instructive. In *Ferguson,* defendants, participants in a violent riot, were prosecuted for arson committed by other rioters. *See id*. at 731-32. The court held that the state (Texas) could prosecute the defendants for arson even though they were not the arsonists. *See id*. at 731. The court noted that the statute at issue conformed with *Scales*'s requirement of personal guilt because, to obtain

a conviction, the state had to prove that the accused riot participants had specific intent to further the illegal aims of the rioters who committed arson. *Id*. at 736.

Unlike the statute at issue in *Ferguson,* section 2339B(a) seeks to punish only those who commit the acts proscribed by the statute. In other words, a person who provides "material support or resources" to a designated foreign terrorist organization is liable for knowingly doing so in violation of section 2339B(a). Section 2339B(a) does not impose "vicarious criminal liability" because the statute cannot be invoked to punish the donor defendant for crimes committed by the donee foreign terrorist organization. A person cannot be convicted of murder under section 2339B(a) if the foreign terrorist organization committed an act of terrorism that took innocent lives. In sum, because section 2339B(a) does not impose "vicarious criminal liability," due process is satisfied without proof of specific intent to further the organization's illegal goals.

Finally, in enacting IRTPA, Congress explicitly stated that knowledge of the organization's designation as a foreign terrorist organization, or knowledge of its engagement in terrorist activities or terrorism is required to convict under section 2339B(a). As the district court correctly observed, Congress could have, but chose not to, impose a requirement that the defendant act with the specific intent to further the terrorist activity of the organization, a requirement clearly set forth in sections 2339A and 2339C of the statute, but left out of section 2339B. *See DC HLP III,* 380 F. Supp. 2d at 1146. Moreover, it is not our role to rewrite a statute, and we decline to do so here. *See HLP I,* 205 F.3d at 1137-38.

Because there is no Fifth Amendment due process violation, we affirm the district court on this issue.

B. Vagueness

AEDPA section 2339B(a), as amended by IRTPA in December 2004, now criminalizes the act of knowingly providing "material support or resources" to a designated foreign terrorist organization. The amended statute defines "material support and resources" as:

> any property, tangible or intangible, or *service,* including currency or monetary instruments or financial securities, financial services, lodging, *training, expert advice or assistance,* safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, *personnel* (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b) (emphasis added).

Plaintiffs argue that this amended definition is impermissibly vague because the statute fails to notify a person of ordinary intelligence as to what conduct constitutes "material support or resources." Specifically, Plaintiffs argue that the prohibitions on providing "training," "expert advice or assistance," "service," and "personnel" to designated organizations are vague because they are unclear and could be interpreted to criminalize protected speech and expression.

The Due Process Clause of the Fifth Amendment requires that statutes clearly delineate the conduct they proscribe. *See Foti v. City of Menlo Park,* 146 F.3d 629, 638 (9th Cir. 1998). While due process does not "require

'impossible standards' of clarity," *Kolender v. Lawson,* 461 U.S. 352, 361, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), the "requirement for clarity is enhanced when criminal sanctions are at issue or when the statute abut[s] upon sensitive areas of basic First Amendment freedoms," *Info. Providers' Coal. for the Def. of the First Amendment v. FCC,* 928 F.2d 866, 874 (9th Cir. 1991) (alteration in original) (internal quotation marks omitted). In such cases, the statute "must be sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *HLP I,* 205 F.3d at 1137 (quoting *Foti,* 146 F.3d at 638) (internal quotation marks omitted). Moreover, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Foti,* 146 F.3d at 638-39 (internal quotation marks omitted).

Vague statutes are invalidated for three reasons: "(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of laws based on 'arbitrary and discriminatory enforcement' by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms." *Id.* at 638.

1. "*Training*"

In *HLP I*, we held that the term "training" under AEDPA was unconstitutionally vague. 205 F.3d at 1138. At the time of Plaintiffs' initial challenge in 1998, AEDPA provided no definition of the term "training." After we issued our opinion in *HLP I* in 2000, Congress amended the statute and defined the term "training" as "instruction or teaching designed to impart a specific

skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2). On remand, Plaintiffs argued to the district court that the term "training" as defined by IRTPA remains unconstitutionally vague. Plaintiffs contended that persons of ordinary intelligence must discern whether the topic they wish to teach to members of designated organizations amounts to "teaching designed to impart a specific skill," which is criminalized, or "general knowledge," which is not. Specifically, Plaintiffs contended that they must guess whether training PKK members in how to use humanitarian and international human rights law to seek peaceful resolution of ongoing conflict amounts to teaching a "specific skill" or "general[ized] knowledge."

The district court again agreed with Plaintiffs. The district court held that IRTPA did not cure the vagueness of the term "training," and enjoined the government from enforcing against Plaintiffs AEDPA's ban on providing "training." *See DC-HLP III,* 380 F. Supp. 2d at 1150, 1156. We agree.

Generally, we would start our vagueness analysis by considering the plain meaning of the language at issue. *See Johnson v. Aljian,* 490 F.3d 778, 780 (9th Cir. 2007). However, where Congress expressly defines a term, the definition provided by Congress guides our vagueness analysis. *See United States v. Rowland,* 464 F.3d 899, 905 (9th Cir. 2006).

To survive a vagueness challenge, the statute must be sufficiently clear to put a person of ordinary intelligence on notice that his or her contemplated conduct is unlawful. *See Foti,* 146 F.3d at 638. Because we find 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," we find the statute's proscription on providing "training" void for vagueness. *See HLP I,* 205 F.3d at 1138 (finding the term "training" impermissibly vague because "a plaintiff who wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such protected expression falls within the scope of the term 'training.'"); *see also Info. Providers' Coalition,* 928 F.2d at 874.[6]

Even if persons of ordinary intelligence could discern between the instruction that imparts a "specific skill," as opposed to one that imparts "general knowledge," we hold that the term "training" would remain impermissibly vague. As we previously noted in *HLP I,* limiting the definition of the term "training" to the "imparting of skills" does not cure unconstitutional vagueness because, so defined, the term "training" could still be read to encompass speech and advocacy protected by the First Amendment. *See HLP I,* 205 F.3d at 1138 (finding "training" void for vagueness because "it is easy to imagine protected expression that falls within the bounds of this term").[7]

For the foregoing reasons, we reject the government's challenge and agree with the district court that the term "training" remains impermissibly vague be-

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[6] The issue of a facial vagueness challenge is not before this court. We therefore do not reach that issue.

[7] In deciding previously raised challenges such as vagueness, we are bound by our decision in *HLP I. See Murdoch v. Castro,* 489 F.3d 1063, 1067 (9th Cir. 2007) (" '[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'").

cause 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." *DC-HLP III,* 380 F. Supp. 2d at 1150 (citing *Info. Providers' Coalition,* 928 F.2d at 874).

2. "*Expert Advice or Assistance*"

The district court previously invalidated the undefined term "expert advice or assistance" on vagueness grounds. The district court reasoned that the prohibition against providing "expert advice or assistance" could be construed to criminalize activities protected by the First Amendment. *Id*. at 1151. The government appealed. We now have the benefit of IRTPA's language while reviewing this appeal.

IRTPA defines the term "expert advice or assistance" as imparting "scientific, technical, or other specialized knowledge." 18 U.S.C. § 2339A(b)(3).

The government argues that the ban on "expert advice or assistance" is not vague. The government relies on the Federal Rules of Evidence's definition of expert testimony as testimony based on "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702; *see also Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 589-91, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The government argues that this definition gives a person of ordinary intelligence reasonable notice of conduct prohibited under the statute. Plaintiffs contend that the definition of "expert advice or assistance" is vague as applied to them because they cannot determine what "other specialized knowledge" means.

We agree with the district court that "the Federal Rules of Evidence's inclusion of the phrase 'scientific, technical, or other specialized knowledge' does not clarify the term 'expert advice or assistance' for the average person with no background in law." *DC-HLP III,* 380 F. Supp. 2d at 1151.

At oral argument, the government stated that filing an amicus brief in support of a foreign terrorist organization would violate AEDPA's prohibition against providing "expert advice or assistance." Because the "other specialized knowledge" portion of the ban on providing "expert advice or assistance" continues to cover constitutionally protected advocacy, we hold that it is void for vagueness. *See HLP I,* 205 F.3d at 1137-38; *NAACP v. Button,* 371 U.S. 415, 432-33, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) (noting that vagueness and overbreadth depend on "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application").

The portion of the "expert advice or assistance" definition that refers to "scientific" and "technical" knowledge is not vague. Unlike "other specialized knowledge," which covers every conceivable subject, the meaning of "technical" and "scientific" is reasonably understandable to a person of ordinary intelligence. *See* Houghton Mifflin Reading Spelling and Vocabulary Word Lists (5th Grade), http://www-kes.stjohns.k12.fl.us/wordlists/5th/vocab2.htm (including "technical" as a fifth-grade vocabulary word); *see also* Tennessee Department of Education Third Grade Science Vocabulary, http://jc-schools.net/tutorials/vocab/sci-3.htm (including "scientific method" on third-grade vocabulary list).

3. "*Service*"

IRTPA amended the definition of "material support or resources" to add the prohibition on rendering "service" to a designated foreign terrorist organization. There is no statutory definition of the term "service."

Plaintiffs argue that proscribing "service" is vague because each of the other challenged provisions could be construed as a provision of "service." The district court agreed.

We adopt the district court's holding and its reasoning. *See DC-HLP III,* 380 F. Supp. 2d at 1151-52. The term "service" presumably includes providing members of PKK and LTTE with "expert advice or assistance" on how to lobby or petition representative bodies such as the United Nations. "Service" would also include "training" members of PKK or LTTE on how to use humanitarian and international law to peacefully resolve ongoing disputes. Thus, we hold that the term "service" is impermissibly vague because "the statute defines 'service' to include 'training' or 'expert advice or assistance,'" and because " 'it is easy to imagine protected expression that falls within the bounds' of the term 'service.'" *Id*. at 1152.[8]

[8] Whether the outcome would be different if evidence were presented showing that "service" rendered to a designated foreign terrorist organization resulted in the receipt of money by the designated foreign terrorist organization itself is not an issue presented by this case. We therefore do not reach that issue.

4. "*Personnel*"

In *HLP I,* we concluded that "personnel" was impermissibly vague because the term could be interpreted to encompass expressive activity protected by the First Amendment. *HLP I,* 205 F.3d at 1137. We stated that, "[i]t is easy to see how someone could be unsure about what AEDPA prohibits with the use of the term 'personnel,' as it blurs the line between protected expression and unprotected conduct." *Id.* We observed that "[s]omeone who advocates the cause of the PKK could be seen as supplying them with personnel. . . . But advocacy is pure speech protected by the First Amendment." *Id.*

As stated above, in 2004, Congress passed IRTPA which amended AEDPA. IRTPA added a limitation to the ban on providing "personnel." 18 U.S.C. § 2339B(h). Section 2339B(h) clarifies that section 2339B(a) criminalizes providing "personnel" to a foreign terrorist organization only where a person, alone or with others, "[work]s under that terrorist organization's direction or control or . . . organize[s], manage[s], supervise[s], or otherwise direct[s] the operation of that organization." Section 2339B(h) also states that the ban on "personnel" does not criminalize the conduct of "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives." *Id.*

As amended by IRTPA, AEDPA's prohibition on providing "personnel" is not vague because the ban no longer "blurs the line between protected expression and unprotected conduct." *HLP I*, 205 F.3d at 1137. Unlike the version of the statute before it was amended by IRTPA, the prohibition on "personnel" no longer crim-

inalizes pure speech protected by the First Amendment. Section 2339B(h) clarifies that Plaintiffs advocating lawful causes of PKK and LTTE cannot be held liable for providing these organizations with "personnel" as long as they engage in such advocacy "entirely independently of th[ose] foreign terrorist organization[s]." 18 U.S.C. § 2339B(h).

Because IRTPA's definition of "personnel" provides fair notice of prohibited conduct to a person of ordinary intelligence and no longer punishes protected speech, we hold that the term "personnel" as defined in IRTPA is not vague.

C. Overbreadth

Plaintiffs argue that the terms "training," "personnel," "expert advice or assistance" and "service" are substantially overbroad. The district court rejected Plaintiffs' challenge. *See DC-HLP III,* 380 F. Supp. 2d at 1152-53. We affirm.

A statute is facially overbroad when its application to protected speech is "substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks,* 539 U.S. 113, 119-20, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003) (internal quotation marks and citations omitted). The Supreme Court held in *Hicks* that "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech." *Id.* at 124, 123 S. Ct. 2191. The Court reasoned that the "concern with chilling protected speech attenuates as the otherwise unprotected behavior that it forbids the State to

sanction moves from pure speech toward conduct." *Id.* (internal quotation marks and citations omitted).

We have previously held that AEDPA's prohibition against providing "material support or resources" to a designated organization "is not aimed at interfering with the expressive component of [Plaintiffs'] conduct but at stopping aid to terrorist groups." *HLP I,* 205 F.3d at 1135. Thus, because the statute is not aimed primarily at speech, an overbreadth challenge is more difficult to show. However, we still conduct the *Hicks* analysis. That is, we decide whether the material support statute's application to protected speech is substantial when compared to the scope of the law's plainly legitimate applications. *See Hicks,* 539 U.S. at 118-19, 123 S. Ct. 2191.

Section 2339B(a)'s ban on provision of "material support or resources" to designated foreign terrorist organizations undoubtably has many legitimate applications. For instance, the importance of curbing terrorism cannot be underestimated. Cutting off "material support or resources" from terrorist organizations deprives them of means with which to carry out acts of terrorism and potentially leads to their demise. Thus, section 2339B(a) can legitimately be applied to criminalize facilitation of terrorism in the form of providing foreign terrorist organizations with income, weapons, or expertise in constructing explosive devices. *See HLP I,* 205 F.3d at 1133.

The Supreme Court cautioned in *Hicks* that "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." *Hicks,* 539 U.S. at 119,

123 S. Ct. 2191. Were we to restrain the government from enforcing section 2339B(a) that prohibits individuals in the United States from providing "material support or resources" to foreign terrorist organizations, we would potentially be placing our nation in danger of future terrorist attacks.

Moreover, although Plaintiffs may be able to identify particular instances of protected speech that may fall within the statute, those instances are not substantial when compared to the legitimate applications of section 2339B(a).

Thus, because AEDPA section 2339B is not aimed at expressive conduct and because it does not cover a substantial amount of protected speech, we hold that the prohibition against providing "material support or resources" to a foreign terrorist organization is not facially overbroad.

D. Licensing Scheme

IRTPA added section 2339B(j), an entirely new section, to AEDPA. Section 2339B(j) allows the Secretary of State, with the concurrence of the Attorney General, to grant approval for individuals and organizations to carry out activities that would otherwise be considered providing "material support or resources" to designated foreign terrorist organizations. 18 U.S.C. § 2339B(j). Section 2339B(j) states that no one can be prosecuted under the terms "'personnel,' 'training,' or 'expert advice or assistance' if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General." 18 U.S.C. 2339B(j). The exception limits the scope of discretion by providing only

that the "Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity." *Id.*

Plaintiffs argue that this provision constitutes an unconstitutional licensing scheme. We disagree.

Courts may entertain pre-enforcement facial challenges to a licensing scheme where the law 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." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988). A licensing scheme is facially invalid if the "licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speaker." *Id.* The relevant censorship risks include "self-censorship by speakers in order to avoid being denied a license to speak" and the "difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *Id.*

In our first decision, we rejected Plaintiffs' challenge to the licensing scheme in another portion of AEDPA that allows the Secretary of State to designate a group as a foreign terrorist organization. *See HLP I*, 205 F.3d at 1136-37. We held that the Secretary of State's discretion to designate a group as a foreign terrorist organization was not unconstitutional. *See id.* We reasoned that "AEDPA does not regulate speech or association per se. Rather, the restriction is on the act of giving material support to designated foreign organizations." *Id.* at 1136-37. We reach the same conclusion here.

Section 2339B(j) gives the Secretary of State the discretion to approve the provision of "material support or resources." It does not regulate speech per se. Rather, the statute permits the Secretary of State to authorize the otherwise prohibited provision of "material support or resources" to a designated foreign terrorist organization. Indeed, we clarified in *HLP I* that contributions of "material support or resources" to foreign entities designated as foreign terrorist organizations should *not* be equated with political expression and association itself, even if such organizations are engaged in political expression. *See HLP I,* 205 F.3d at 1134-35 (contrasting the *Buckley* doctrine, where monetary support is a proxy for speech and is therefore a constitutionally protected activity). Thus, we hold that the discretion given to the Secretary poses no "real and substantial threat" to Plaintiffs' protected expression or their expressive conduct. *See City of Lakewood,* 486 U.S. at 759, 108 S. Ct. 2138.

We recognize that it is possible for the Secretary to exercise his or her discretion in a way that discriminates against the donor of "material support or assistance." For example, the Secretary could conceivably exempt from prosecution a person who teaches peacemaking skills to members of Hezbollah, but deny Plaintiffs immunity from prosecution if they teach the same peacemaking skills to PKK. However, when evaluating the constitutionality of a licensing scheme, we look at how closely the prior restraint, *on its face,* regulates constitutionally protected activity. Here, even though it is possible for the Secretary to refuse to exercise his or her discretion to exempt from prosecution a disliked speaker, any such power is incidental. The statute does not give the Secretary "*substantial* power to discrimi-

nate based on the content or viewpoint of speech" or the identity of the speaker. *Id.* (emphasis added).

Moreover, in Plaintiffs' case, any potential for content or viewpoint-based discrimination or discrimination based on the identity of the speaker is significantly reduced because the government is enjoined from enforcing those provisions of the statute we hold vague. Thus, because Plaintiffs are already immune from prosecution for protected speech, the danger that the Secretary can base his or her exercise of discretion on Plaintiffs' identity or the content or viewpoint of Plaintiffs' message is almost non-existent.

Accordingly, we affirm the district court's holding that section 2339B(j) does not have a close enough nexus to protected speech to allow a facial challenge.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Nos. CV98-1971ABCRCX,
CV03-6107ABCRCX

HUMANITARIAN LAW PROJECT, ET AL., PLAINTIFFS

v.

ALBERTO GONZALES, ET AL., DEFENDANTS

July 25, 2005

ORDER RE: PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

COLLINS, District Judge.

This action involves a challenge to portions of the Antiterrorism and Effective Death Penalty Act and the Intelligence Reform and Terrorism Prevention Act. Specifically, the parties seek summary judgment regarding the constitutionality of the prohibition on providing material support or resources, including "training," "expert advice or assistance," "personnel," and "service," to designated foreign terrorist organizations.

The Humanitarian Law Project, Ralph Fertig, Ilankai Thamil Sangam, Dr. Nagalingam Jeyalingam, World

Tamil Coordinating Committee, Federation of Tamil Sangams of North America, and Tamil Welfare and Human Rights Committee (collectively, "Plaintiffs") desire to provide support for the lawful activities of two organizations that have been designated as foreign terrorist organizations. Plaintiffs seek summary judgment and an injunction to prohibit the enforcement of the criminal ban on providing material support to such organizations. Alberto Gonzales (in his official capacity as United States Attorney General), the United States Department of Justice, Condoleeza Rice (in her official capacity as Secretary of the Department of State), and the United States Department of State (collectively, "Defendants") bring a motion to dismiss and cross-motion for summary judgment. After considering the parties' submissions, the arguments of counsel, and the case file, the Court hereby DENIES Defendants' motion to dismiss and GRANTS IN PART and DENIES IN PART the parties' cross-motions for summary judgment.

I. FACTUAL BACKGROUND

The background of this case is well known to the parties and to the Court and need not be recited at length here. Plaintiffs are five organizations and two United States citizens seeking to provide support to the lawful, nonviolent activities of the Partiya Karkeran Kurdistan (Kurdistan Workers' Party) ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). The PKK and the LTTE have been designated as foreign terrorist organizations.

The PKK is a political organization representing the interests of the Kurds in Turkey, with the goal of achieving self-determination for the Kurds in Southeastern Turkey. Plaintiffs allege that the Turkish government

has subjected the Kurds to human rights abuses and discrimination for decades. The PKK's efforts on behalf of the Kurds include political organizing and advocacy, providing social services and humanitarian aid to Kurdish refugees, and engaging in military combat with Turkish armed forces.

Plaintiffs wish to support the PKK's lawful and nonviolent activities towards achieving self-determination. Specifically, Plaintiffs seek to provide training in the use of humanitarian and international law for the peaceful resolution of disputes, engage in political advocacy on behalf of the Kurds living in Turkey, and teach the PKK how to petition for relief before representative bodies like the United Nations.

The LTTE represents the interests of Tamils in Sri Lanka, with the goal of achieving self-determination for the Tamil residents of Tamil Eelam in the Northern and Eastern provinces of Sri Lanka. Plaintiffs allege that the Tamils constitute an ethnic group that has for decades been subjected to human rights abuses and discriminatory treatment by the Sinhalese, who have governed Sri Lanka since the nation gained its independence in 1948. The LTTE's activities include political organizing and advocacy, providing social services and humanitarian aid, defending the Tamil people from human rights abuses, and using military force against the government of Sri Lanka.

Plaintiffs wish to support the LTTE's lawful and nonviolent activities towards furthering the human rights and well-being of Tamils in Sri Lanka. In particular, Plaintiffs emphasize the desperately increased need for aid following the tsunamis that devastated the Sri Lanka region in December 2004, especially in Tamil areas along

the Northeast Coast. Plaintiffs seek to provide training in the presentation of claims to mediators and international bodies for tsunami-related aid, offer legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government, and engage in political advocacy on behalf of Tamils living in Sri Lanka.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (the "AEDPA") proscribing all material support and resources to designated foreign terrorist organizations in the interests of law enforcement and national security. Specifically, the AEDPA sought to prevent the United States from becoming a base for terrorist fundraising. Congress recognized that terrorist groups are often structured to include political or humanitarian components in addition to terrorist components. Such an organizational structure allows terrorist groups to raise funds under the guise of political or humanitarian causes. Those funds can then be diverted to terrorist activities.

Following the September 11, 2001 terrorist attacks on the World Trade Center Twin Towers in New York, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the "USA PATRIOT Act") and the Intelligence Reform and Terrorism Prevention Act (the "IRTPA") in 2001 and 2004, respectively, to further its goal of eliminating material support or resources to foreign terrorist organizations. The USA PATRIOT Act and the IRTPA amended the AEDPA.

While Plaintiffs are committed to providing the above-mentioned support, they fear doing so would expose them to criminal prosecution under the AEDPA for

providing material support and resources to foreign terrorist organizations. Accordingly, Plaintiffs challenge the portion of the AEDPA, as amended by the IRTPA, providing as follows:

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

18 U.S.C. § 2339B(a).

The AEDPA, as amended by the USA PATRIOT Act and the IRTPA, defines "material support or resources" as:

> any property, tangible or intangible, or *service,* including currency or monetary instruments or financial securities, financial services, lodging, *training, expert advice or assistance,* safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, *personnel* (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b)(1) (emphasis added).

II. PROCEDURAL BACKGROUND

The procedural history of the cases before the Court is somewhat complex.

A. Case No. 98-1971

Plaintiffs first filed a complaint on March 19, 1998 in Case No. 98-1971, in which they alleged that the

AEDPA violated the First and Fifth Amendments. Specifically, Plaintiffs sought a preliminary injunction barring the enforcement of the AEDPA against them for three reasons: (1) the AEDPA's prohibition on providing material support to foreign terrorist organizations violated the First Amendment rights of freedom of speech and association; (2) the AEDPA unconstitutionally granted the Secretary of State unfettered discretion to designate disfavored organizations as foreign terrorist organizations; and (3) the terms "training" and "personnel" were impermissibly vague under the Fifth Amendment. The Court rejected most of Plaintiffs' arguments, instead finding that the AEDPA neither violated the First Amendment nor allowed the Secretary of State unfettered discretion to blacklist organizations. However, the Court agreed in part with Plaintiffs' arguments regarding vagueness and, therefore, preliminarily enjoined the prosecution of Plaintiffs and their members under the AEDPA's prohibition on providing "training" and "personnel" to foreign terrorist organizations. *See Humanitarian Law Project v. Reno,* 9 F. Supp. 2d 1176 (C.D. Cal. 1998) ("*District Court-HLP I*").

On March 3, 2000, the Ninth Circuit affirmed this Court's order. *See Humanitarian Law Project v. Reno,* 205 F.3d 1130 (9th Cir. 2000) ("*HLP I*"). In response, this Court issued a permanent injunction on October 2, 2001, which the Ninth Circuit upheld on December 3, 2003. *See Humanitarian Law Project v. United States Department of Justice,* 352 F.3d 382 (9th Cir. 2003) ("*HLP II*"), *vacated,* 393 F.3d 902 (9th Cir. 2004). In addition to upholding this Court's conclusion that "training" and "personnel" are impermissibly vague, the Ninth Circuit's ruling in *HLP II* construed the AEDPA to require that the donor of material support have

knowledge that the recipient either had been designated as a foreign terrorist organization or engaged in terrorist activities. Subsequently, the Ninth Circuit voted to rehear the three-judge panel's ruling in *HLP II en banc. See Humanitarian Law Project v. United States Department of State,* 382 F.3d 1154 (9th Cir. 2004).

However, on December 17, 2004, three days after oral argument before the *en banc* panel, Congress enacted the IRTPA, amending the terms "training," "personnel," "expert advice or assistance" and adding the term "service" to the definition of "material support or resources" to designated terrorist organizations. *See* 18 U.S.C. §§ 2339A(b); 2339B(h). The IRTPA also clarified a *mens rea* requirement that the donor know that the foreign terrorist organization has been designated as a foreign terrorist organization or has engaged in terrorist activities. Accordingly, the AEDPA, as amended by the IRTPA, now states: "To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization, that the organization has engaged or engages in terrorist activity, or that the organization has engaged or engages in terrorism. . . . " 18 U.S.C. § 2339B (internal citations omitted).

Subsequently, on December 21, 2004, the Ninth Circuit *en banc* panel declined to decide *HLP II* in light of Congress's amendment of the terms at issue and adoption of a *mens rea* requirement. However, the Ninth Circuit affirmed this Court's October 2, 2001 order holding the terms "training" and "personnel" impermissibly vague for the reasons set forth in *HLP I. See Humanitarian Law Project v. United States Department of State,* 393 F.3d 902 (9th Cir. 2004). The Ninth Circuit also vacated its order in *HLP II,* in which

it had previously construed the AEDPA to require knowledge that a recipient organization was either a foreign terrorist organization or had engaged in terrorist activities. The Ninth Circuit then remanded the case to this Court for further proceedings. *See id*.

B. Case No. 03-6107

On October 31, 2001, Congress enacted the USA PATRIOT Act, amending the AEDPA to add "expert advice or assistance" to the definition of "material support or resources" to designated terrorist organizations. *See* 18 U.S.C. §§ 2339A(b); 2339B(g)(4). Plaintiffs filed a second complaint in this Court on August 27, 2003, in Case No. 03-6107, in which they alleged that the prohibition on providing "expert advice and assistance" violated the First and Fifth Amendments. On March 17, 2004, this Court again rejected most of Plaintiffs' arguments. However, the Court enjoined Defendants from enforcing the "expert advice or assistance" provision against Plaintiffs, finding the term "expert advice or assistance," like "training" and "personnel," to be impermissibly vague. *See Humanitarian Law Project v. Ashcroft,* 309 F. Supp. 2d 1185 (C.D. Cal. 2004) ("*District Court-HLP II*"). Thereafter, the parties cross-appealed this Court's ruling to the Ninth Circuit. In view of the IRTPA amendments, the Ninth Circuit subsequently remanded the case to this Court to allow it to be heard with the earlier case.

C. Consolidation of Case No. 98-1971 and Case No. 03-6107

The two cases filed by Plaintiffs (the first construing "training" and "personnel" and the second construing "expert advice or assistance") were consolidated in this Court, and the parties agreed to an extended briefing

schedule on the instant cross-motions. On May 16, 2005, Plaintiffs filed the instant motion for summary judgment. Defendants filed their opposition to Plaintiffs' motion for summary judgment on July 8, 2005.[1] Defendants also filed a motion to dismiss and cross-motion for summary judgment on July 8, 2005. The parties filed replies in support of their respective cross-motions on July 18, 2005 and July 20, 2005. On July 25, 2005, Defendants submitted a supplemental brief without the Court's permission regarding the vagueness challenge. Oral argument was heard on July 25, 2005.

III. LEGAL STANDARDS

A. Motion to Dismiss for Lack of Justiciability

A motion to dismiss will be denied unless it appears that the plaintiff can prove no set of facts that would entitle him or her to relief. *See Gilligan v. Jamco Dev. Corp.,* 108 F.3d 246 (9th Cir. 1997). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir. 1986).

Standing is a threshold requirement in every federal case. *See Warth v. Seldin,* 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). "As an aspect of justiciability, the standing question is whether the plaintiff has alleged such a personal stake in the controversy as to warrant his invocation of federal court jurisdiction." *MAI Sys. Corp. v. UIPS,* 856 F. Supp. 538, 540 (N.D. Cal. 1994) (citation omitted). Article III standing con-

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[1] Defendants' opposition was originally due on June 10, 2005. Due to extenuating circumstances, the Court granted Defendants an extension of time to file their opposition on July 8, 2005.

sists of "three separate but interrelated components": "(1) a distinct and palpable injury to the plaintiff; (2) a fairly traceable causal connection between the injury and challenged conduct; and (3) a substantial likelihood that the relief requested will prevent or redress the injury." *Id.* (citing *McMichael v. County of Napa,* 709 F.2d 1268, 1269 (9th Cir. 1983)).

B. Motion for Summary Judgment

Summary judgment shall be granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The moving party bears the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The burden then shifts to the nonmoving party to "go beyond the pleadings, and by [its] own affidavits, or by the 'depositions, answers to interrogatories, or admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citations omitted). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The moving party discharges its burden by showing that the nonmoving party has not disclosed the existence of any "significant probative evidence tending to support the complaint." *First Natal Bank v. Cities Serv. Co.,* 391 U.S. 253, 290, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968). The Court views the inferences drawn from the facts in the light most favorable to the party opposing the mo-

tion. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractor's Ass'n,* 809 F.2d 626, 631 (9th Cir. 1987).

When the parties file cross-motions for summary judgment, the district court must consider all of the evidence submitted in support of both motions to evaluate whether a genuine issue of material fact exists precluding summary judgment for either party. *See Fair Housing Council of Riverside County, Inc. v. Riverside Two,* 249 F.3d 1132, 1135 (9th Cir. 2001).

IV. DISCUSSION

A. Defendants' Motion to Dismiss

Defendants move to dismiss Plaintiffs' challenge to the terms "training," "expert advice or assistance," "personnel," and "service" "for lack of justiciability". According to Defendants, Plaintiffs lack standing to bring a vagueness challenge under the Fifth Amendment for two reasons: (1) Plaintiffs rely on speculative hypotheticals inapplicable to their own conduct; and (2) Plaintiffs conflate vagueness under the First and Fifth Amendments. Plaintiffs oppose Defendants' motion, arguing that their claims are justiciable under both the First and Fifth Amendments because they face a credible threat of prosecution for their own intended activities. The Court finds that Defendants' motion to dismiss for lack of justiciability must be DENIED.

"To satisfy the Article III case or controversy requirement, [a plaintiff] must establish, among other things, that it has suffered a constitutionally cognizable injury-in-fact." *California Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1093 (9th Cir. 2003). "[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or con-

troversy' requirement." *Thomas v. Anchorage Equal Rights Commission,* 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*). Instead, there must be a "genuine threat of imminent prosecution." *Id.* "In evaluating the genuineness of a claimed threat of prosecution, [the Ninth Circuit considers] whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Id.*

Plaintiffs have identified more than a hypothetical intent to violate the law. In fact, Plaintiffs have provided services in the past specifically to the PKK and the LTTE and would do so again if the fear of criminal prosecution were removed. Plaintiffs' desire to provide services is heightened by the December 2004 tsunamis that impacted the Sri Lankan coast. Further, Defendants' contention that Plaintiffs lack standing to attack the AEDPA for vagueness based on mere hypothetical situations ignores the evidence that Plaintiffs submitted regarding their intended activities. Plaintiffs do not seek injunctive relief as to hypothetical activities, but as to their own.[2]

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[2] Defendants' reliance on *Hill v. Colorado,* 530 U.S. 703, 733, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) as support that courts may not consider hypothetical situations in void for vagueness challenges is misplaced. In *Hill,* the Supreme Court declined to entertain hypotheticals after it had already found that the "the likelihood that anyone would not understand any of those common words [in the statute] seems quite remote." *Hill,* 530 U.S. at 733, 120 S. Ct. 2480. In contrast, the statutory language regarding the ban on "training," "expert advice or assistance," "personnel," and "service" is more ambiguous and complex.

Finally, Defendants do not contest that Plaintiffs face a threat of prosecution or that the challenged statute has been enforced in the past. Plaintiffs' intended activities arguably fall within the statute's reach, and the government has been active in its enforcement of the AEDPA. Therefore, the Court finds that Plaintiffs have sufficiently established standing to assert a vagueness challenge.[3]

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[3] The Court also rejects Defendants' argument regarding the conflation of vagueness under the First and Fifth Amendments. Citing *Parker v. Levy,* 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974), Defendants contend that a statute must be vague in all applications in order to be held unconstitutionally vague under the Fifth Amendment. According to Defendants, Plaintiffs conflate vagueness and overbreadth by asserting vagueness as applied to the hypothetical conduct of others instead of Plaintiffs' own intended activities. The Supreme Court rejected this argument in *Kolender v. Lawson,* 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). Specifically, the Supreme Court stated, "First, it neglects the fact that we permit a facial challenge if a law reaches 'a substantial amount of constitutionally protected conduct.' Second, where a statute imposes criminal penalties, the standard of certainty is higher. This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application . . . " *Kolender,* 461 U.S. at 358 n. 8, 103 S. Ct. 1855 (citations omitted). The Supreme Court noted that "we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines." *Id*. The Supreme Court further distinguished *Parker* as a case involving military regulation. *See id*. Accordingly, the Court rejects Defendants' argument that Plaintiffs' First Amendment concerns are limited to a First Amendment overbreadth attack and cannot be raised in the context of a Fifth Amendment vagueness challenge. As discussed below, Plaintiffs' Fifth Amendment vagueness challenge is intertwined with their First Amendment concerns. The legal standards applied to a vagueness challenge and an overbreadth challenge, however, differ. Accordingly, the Court addresses Plaintiffs' vagueness and overbreadth arguments separately below.

B. The Parties' Cross-Motions for Summary Judgment

Plaintiffs move for summary judgment on three grounds: (1) the prohibition on providing material support or resources to foreign terrorist organizations without requiring a showing of specific intent to further the organization's unlawful terrorist activities violates due process under the Fifth Amendment; (2) the prohibitions on "training," "expert advice or assistance," "personnel," and "service," as amended by the IRTPA, are impermissibly vague under the Fifth Amendment; and (3) the provision exempting prosecution for providing material support to a foreign terrorist organization that has been approved by the Secretary of State is an unconstitutional licensing scheme under the First Amendment.

Defendants, in turn, seek summary judgment on three grounds: (1) the AEDPA, as amended by the IRTPA, is consistent with Congressional intent, and its *mens rea* requirement is constitutionally sufficient under the Fifth Amendment; (2) the terms "training," "expert advice or assistance," "personnel," and "service" are neither vague nor overbroad under the First and Fifth Amendments in relation to Plaintiffs' own conduct; and (3) the IRTPA amendments do not grant the government unconstitutional licensing authority.

After considering the arguments, the Court finds that the parties' cross-motions for summary judgment must be GRANTED IN PART and DENIED IN PART as follows: (1) the prohibition on providing material support to foreign terrorist organizations without requiring a showing of specific intent to further the organization's unlawful terrorist activities does not violate due process under the Fifth Amendment; (2) the terms "training,"

"expert advice or assistance," and "service" are impermissibly vague; (3) the term "personnel" is not impermissibly vague; (4) the prohibitions on providing "training," "expert advice or assistance," "personnel," and "service" are not overbroad; and (5) the exemption from prosecution for providing material support that has been approved by the Secretary of State is not an unconstitutional licensing scheme under the First Amendment. The Court addresses each of these issues in turn below.

1. The Prohibition on Providing Material Support or Resources Does Not Violate the Fifth Amendment.

Citing *Scales v. United States,* 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961), Plaintiffs argue that the AEDPA's prohibition on providing material support or resources to foreign terrorist organizations violates due process under the Fifth Amendment. Specifically, Plaintiffs contend that the prohibition imposes vicarious criminal liability without requiring proof of specific intent to further the terrorist activities of foreign terrorist organizations. Plaintiffs, therefore, urge the Court to read a specific intent *mens rea* requirement into 18 U.S.C. § 2339B in order to avoid Fifth Amendment due process concerns.

Defendants, in contrast, assert that the AEDPA does not impose vicarious criminal liability, but instead prohibits only the conduct of giving material support or resources to foreign terrorist organizations. Moreover, Defendants point to Congressional intent regarding the *mens rea* required and Congress's wide latitude to legislate in the foreign affairs arena. Defendants also contend that the Ninth Circuit previously rejected the specific intent argument in *HLP II*. Finally, Defendants note that the IRTPA amendment requiring that a donor

know that the recipient of the material support is a foreign terrorist organization adequately addresses Plaintiffs' concerns regarding specific intent.

As further explained below, the Court finds that the AEDPA does not violate due process under the Fifth Amendment and, therefore, declines to read a specific intent requirement into the statute. First, *Scales* is inapposite, as the holding there turned on specific facts not present here. Second, the clear and unambiguous Congressional intent to exclude a specific intent requirement precludes a judicial interpretation of a specific intent element. Finally, the statute's current requirement that a donor know that the recipient of material support is a foreign terrorist organization eliminates any Fifth Amendment due process concerns.

a. *Scales* Is Distinguishable from This Case.

Plaintiffs rely primarily on *Scales v. United States,* 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961), a Communist Party membership case, to support their argument that the AEDPA violates due process under the Fifth Amendment. *Scales* involved a Fifth Amendment challenge to a conviction under the Smith Act, which prohibited membership in a group advocating the overthrow of the government by force or violence, with punishment by fine or imprisonment for up to twenty years. *See Scales,* 367 U.S. at 206 n.1, 81 S. Ct. 1469; 18 U.S.C. § 2385. The defendant contended that the Smith Act violated the Fifth Amendment because it unconstitutionally imputed guilt based on associational membership rather than concrete criminal conduct. The Supreme Court agreed that "[i]n our jurisprudence guilt is personal" and that "[m]embership, without more, in an organization engaged in illegal advocacy" was insuffi-

cient to satisfy personal guilt. *Id.* at 224-25, 81 S. Ct. 1469. Nevertheless, the Supreme Court upheld the conviction because the defendant was not merely a member of the Communist Party, but had committed concrete acts with a specific intent to further the organization's illegal activities. *Id.* at 226-27, 81 S. Ct. 1469.

Plaintiffs attempt to stretch the *Scales* holding regarding the Smith Act into a general rule that specific intent is always constitutionally required. However, *Scales* was not so broad, but focused specifically on the Smith Act's criminal prohibition on *membership* in certain organizations, including the Communist Party. Indeed, membership itself was an element of the offense. While *Scales* discussed the concept of personal guilt in relation to "status or conduct," a close reading of *Scales* reveals that at heart, it was concerned with criminalizing associational membership in violation of the First Amendment.[4] By requiring specific intent in addition to actual membership, the Supreme Court sought to "prevent[ ] a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action." *Scales*, 367 U.S. at 228, 81 S. Ct. 1469. In contrast, the AEDPA does not criminalize mere membership, association, or expressions of sympathy with

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[4] In addition to *Scales*, Plaintiffs also cite two Ninth Circuit cases from the same era regarding Communist Party membership: *Hellman v. United States*, 298 F.2d 810 (9th Cir. 1961) and *Brown v. United States*, 334 F.2d 488 (9th Cir. 1964). As with *Scales*, *Hellman* and *Brown* are distinguishable from the instant case because they involved imputed guilt based on Communist Party membership without further proof of active conduct or intent to overthrow the government.

foreign terrorist organizations.[5] Instead, the AEDPA permits membership and affiliation with foreign terrorist organizations, but prohibits the conduct of providing material support or resources to an organization that one knows is a designated foreign terrorist organization or is engaged in terrorist activities.

b. Clear Congressional Intent Precludes a Judicial Reading of Specific Intent Into the AEDPA.

Plaintiffs urge the Court to read an additional *mens rea* requirement into 18 U.S.C. § 2339B to require the government to prove that a donor specifically intended to further the terrorist activities of the foreign terrorist organization.[6] Plaintiffs cite three cases in which the Supreme Court read a *mens rea* requirement into federal criminal statutes, namely, *Liparota v. United States,* 471 U.S. 419, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985), *Staples v. United States,* 511 U.S. 600, 114 S. Ct.

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[5] Both the Ninth Circuit and this Court have rejected Plaintiffs' First Amendment associational challenges to the AEDPA's criminalization of material support to foreign terrorist organizations. *See HLP I,* 205 F.3d at 1134 ("We therefore do not agree . . . that the First Amendment requires the government to demonstrate a specific intent to aid an organization's illegal activities before attaching liability to the donation of funds."); *District Court-HLP I,* 9 F. Supp. 2d at 1191 ("AEDPA does not criminalize *mere* association with designated terrorist organizations by prohibiting the provision of material support regardless of the donor's intent. . . . "). As previously noted, Plaintiffs remain free to affiliate with and advocate on behalf of foreign terrorist organizations.

[6] The AEDPA, as amended by the IRTPA, currently reads, "To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization, that the organization has engaged or engages in terrorist activity, or that the organization has engaged or engages in terrorism. . . . " 18 U.S.C. § 2339B (internal citations omitted).

1793, 128 L. Ed. 2d 608 (1994), and *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994). As explained below, none of these cases warrants a judicial interpretation that would contravene the clear Congressional intent to dispense with a specific intent requirement.

In *Liparota,* the Supreme Court interpreted a federal statute criminalizing the acquisition or possession of food stamps in any unauthorized manner to include a *mens rea* requirement that a defendant must know that he or she acquired or possessed food stamps in an unauthorized manner. In doing so, the Supreme Court noted that Congress has the power to define the elements of a federal statutory crime: "The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota,* 471 U.S. at 424, 105 S. Ct. 2084. Finding, however, that the legislative history of the statute was silent as to a *mens rea* requirement and that criminal statutes without *mens rea* are "'generally disfavored,'" the Court concluded that it was proper to read a *mens rea* element into the statute. *Id*. at 425-26, 105 S. Ct. 2084 (quoting *United States v. Gypsum Co.,* 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)). In so concluding, the Supreme Court noted that its result would likely have been different if Congress had intended to omit a *mens rea* element to the offense:

> Of course, Congress *could* have intended that this broad range of conduct be made illegal, perhaps with the understanding that prosecutors would exercise their discretion to avoid such harsh results. However, given the paucity of material suggesting that

> Congress did so intend, we are reluctant to adopt such a sweeping interpretation.

Id. at 427, 105 S. Ct. 2084. Thus, the Court unequivocally recognized that Congress, as the creator of federal crimes, has the power to dispense with *mens rea,* even when doing so would criminalize a broad range of conduct.

Subsequently, in *Staples,* the Supreme Court interpreted the National Firearms Act, which criminalizes the possession of an unregistered firearm by up to ten years imprisonment, to have a *mens rea* element. *See* 26 U.S.C. § 5861(d). Specifically, the Supreme Court held that a defendant must know that the gun he or she possesses is actually a firearm in order to be convicted. *See Staples,* 511 U.S. at 619, 114 S. Ct. 1793. In construing a *mens rea* requirement, the Court drew on statutory construction and legislative intent, reiterating that "[w]e have long recognized that determining the mental state required for commission of a federal crime requires 'construction of the statute and . . . inference of the intent of Congress.'" *Id*., at 605, 114 S. Ct. 1793 (quoting *United States v. Balint,* 258 U.S. 250, 253, 42 S. Ct. 301, 66 L. Ed. 604 (1922)). As that section of the National Firearms Act was silent as to scienter, the Supreme Court construed the statute to include *mens rea,* noting that the statute's harsh penalties further supported such a reading. However, the Supreme Court emphasized that its holding was "a narrow one," dependent on the lack of Congressional intent in that case to dispense with *mens rea. Staples,* 511 U.S. at 619, 114 S. Ct. 1793. Moreover, the Supreme Court again reiterated that Congress had the authority to eliminate a *mens rea* requirement: "[I]f Congress thinks it neces-

sary to reduce the Government's burden at trial to ensure proper enforcement of the Act, it remains free to amend § 5861(d) by explicitly eliminating a *mens rea* requirement." *Id.* at 616 n.11, 114 S. Ct. 1793.

Several months later, in *X-Citement Video,* the Supreme Court interpreted the Protection of Children Against Sexual Exploitation Act, which prohibits the interstate transportation of visual depictions of minors engaged in sexually explicit conduct, to require that a defendant knew that the performers were minors. *See* 18 U.S.C. § 2252(a)(1)(A)-(2)(A). The Supreme Court noted that both the statutory construction and legislative history could support a scienter requirement, which would help justify the harsh penalties and avoid absurd applications of the statute.[7] *See X-Citement Video,* 513 U.S. at 69-72, 115 S. Ct. 464. In so concluding, the Supreme Court again acknowledged Congress's authority to craft statutes without a *mens rea* element, observing that courts may construe a *mens rea* requirement "*so long as* such a reading is not plainly contrary to the intent of Congress." *Id.* at 78, 115 S. Ct. 464 (emphasis added).

Accordingly, following *Liparota, Staples*, and *X-Citement Video,* the Court must analyze the statutory language and Congressional intent with respect to the

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[7] The Court notes, however, that the Supreme Court has specifically stated that even absurd consequences resulting from an elimination of *mens rea* would not "justify judicial disregard of a clear command to that effect from Congress, but they do admonish us to caution in assuming that Congress, without clear expression, intends in any instance to do so." *Morissette v. United States,* 342 U.S. 246, 256 n.14, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

AEDPA, as amended by the IRTPA.[8] The AEDPA's statutory language regarding the *mens rea* required is straightforward, namely, that a donor know that the recipient of the material support is a foreign terrorist organization or engages in terrorist activities. *See* 18 U.S.C. § 2339B.

With respect to legislative intent, moreover, Congress's intent regarding the level of *mens rea* required for violation of 18 U.S.C. § 2339B is clear and unambiguous. First, Congress enacted 18 U.S.C. § 2339B in 1996, only two years after it had enacted 18 U.S.C. § 2339A, which prohibits the provision of material support or resources "knowing or intending" that they be used for executing violent federal crimes. 18 U.S.C. § 2339A. While the statutory language of § 2339A includes an explicit *mens rea* requirement to further illegal activities, such a requirement is notably missing from the statutory language of § 2339B. Instead, § 2339B requires only that an individual knowingly provide material support or resources.[9] This Court must assume that Congress knows how to include a specific intent requirement

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[8] The Court notes that the Supreme Court did not impose a specific intent requirement in any of these cases. Instead, the Supreme Court construed a *mens rea* requiring that a defendant act with knowledge of the prohibited conduct. *See Liparota,* 471 U.S. 419, 105 S. Ct. 2084 (defendant must know that he or she acquired or possessed food stamps in an unauthorized manner), *Staples,* 511 U.S. 600, 114 S. Ct. 1793 (defendant must know that he or she possessed an unregistered firearm), and *X-Citement Video,* 513 U.S. 64, 115 S. Ct. 464 (defendant must know that the performers in sexually explicit videos were minors).

[9] As discussed below, Congress clarified in the IRTPA amendments that a donor must know that the recipient of the material support or resources is a foreign terrorist organization or engages in terrorist activities.

when it so desires, as evidenced by § 2339A, and that Congress acted deliberately in excluding such an intent requirement in § 2339B.[10]

Second, the legislative history indicates that Congress enacted § 2339B in order to close a loophole left by § 2339A. Congress, concerned that terrorist organizations would raise funds "under the cloak of a humanitarian or charitable exercise," sought to pass legislation that would "severely restrict the ability of terrorist organizations to raise much needed funds for their terrorist acts within the United States." H.R. Rep. 104-383, at *43 (1995). As § 2339A was limited to donors intending to further the commission of specific federal offenses, Congress passed § 2339B to encompass donors who acted without the intent to further federal crimes.

In fact, during Congressional hearings on the legislation, representatives from civil liberties, humanitarian, and religious organizations objected to the criminalization of all donations without regard to a donor's intent and a donee's humanitarian deeds. *See* "Civil Liberties Implications of H.R. 1710, the Comprehensive Antiterrorism Act of 1995 and Related Legislative Responses to Terrorism": Hearing before the United States House of Representatives Committee on the Judiciary, 104th Congress (1995) (statement of Gregory T. Nojeim of the American Civil Liberties Union); "The Comprehensive Antiterrorism Act of 1995 and Its Implications for Civil Liberties": Hearing before the House Committee on the Judiciary, 104th Congress (1995) (statement of Azizah Y. Al-Hibri, American Muslim Council); "The Comprehensive Antiterrorism Act of 1995 and Its Implications for

[10] The Court notes that 18 U.S.C. § 2339C also included a specific intent requirement.

Civil Liberties": Hearing before the House Committee on the Judiciary, 104th Congress (1995) (statement of Ehalil E. Jahshan, National Association of Arab Americans).[11]

Congress, however, rejected these objections in enacting § 2339B. In fact, it made a specific finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[12] AEDPA § 301(a)(7), 18 U.S.C. § 2339B note. Congress's concerns regarding the fungibility of money and resources have also been noted by the Ninth Circuit. *See HLP I,* 205 F.3d at 1136 ("More fundamentally, money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts."). Moreover, the single sentence to which Plaintiffs cling—Senator Orrin Hatch's 1996 statement—is insufficient to negate Congress's subsequently enacted and amended clear intent.[13] This iso-

[11] It is noteworthy that "the AEDPA's predecessor, the Violent Crime Control and Law Enforcement act of 1994, specifically excepted from 'material support,' 'humanitarian assistance to persons not directly involved' in terrorist activities . . . . However, the government enacted the AEDPA and specifically deleted this exception permitting contributions for humanitarian assistance . . . . " *District Court-HLP I,* 9 F. Supp. 2d at 1194 (citations omitted).

[12] Plaintiffs argue that this finding is undercut by Congress's allowance of unlimited donations of medicine and religious items. But as the Ninth Circuit explained in *HLP I,* Congress is entitled to select what types of assistance to allow and what types to prohibit. *See HLP I,* 205 F.3d at 1136 n.4.

[13] In introducing the Senate Conference Report to the Senate, Senator Hatch stated: "This bill also includes provisions making it a crime to knowingly provide material support to the terrorist functions of foreign groups designated by a Presidential finding to be engaged in ter-

lated statement does not justify a judicial reading of specific intent into the statute, particularly given that Senator Hatch subsequently supported the IRTPA without a specific intent provision.

Finally, Congress's 2004 IRTPA amendment underscores Congress's decision to dispense with any specific intent requirement. The 2004 IRTPA amendment clarified that the only *mens rea* required under § 2339B is that a donor know that the recipient is a foreign terrorist organization.[14] Notably, Congress passed the IRTPA in the aftermath of the Ninth Circuit's decision in *HLP II* and the Middle District of Florida's contrasting decision in *United States v. Al-Arian,* 308 F. Supp. 2d 1322 (M.D. Fla. 2004) and *United States v. Al-Arian,* 329 F. Supp. 2d 1294 (M.D. Fla. 2004), (together, "*Al-Arian*"). As discussed above, the Ninth Circuit held in *HLP II* that the Fifth Amendment required the government to prove that a donor knew the recipient was either a foreign terrorist organization or engaged in terrorist activities. The Middle District of Florida held in *Al-Arian* that the Fifth Amendment required the government to prove that a donor not only knew the recipient

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rorist activities." 142 Cong. Rec. S3354 (April 16, 1996) (statement of Sen. Hatch).

[14] Plaintiffs previously asserted that the AEDPA was unconstitutional under the First Amendment because it prohibits donating material support even if the donor does not have the specific intent to aid in the recipient organization's unlawful activities. In rejecting Plaintiffs' specific intent argument under the First Amendment, the Ninth Circuit noted, "Material support given to a terrorist organization can be used to promote the organization's unlawful activities, regardless of donor intent. Once the support is given, the donor has no control over how it is used." *HLP I,* 205 F.3d at 1134. *See also District Court-HLP I,* 9 F. Supp. 2d at 1192.

was a foreign terrorist organization, but also that the donor specifically intended to further the terrorist activities of the foreign terrorist organization. This Court must assume that Congress, with full awareness of these decisions, incorporated the *HLP II* holding into the statute and rejected the *Al-Arian* ruling requiring specific intent. Therefore, the Court finds that an imposition of specific intent to further terrorist activities cannot be reconciled with Congress's clear intent in passing the AEDPA and the IRTPA.[15]

Based on Congress's recent IRTPA amendments, the Court believes that Congress would prefer to further amend the statute to cure any remaining vagueness problems rather than have a court impose a *mens rea* requirement that would eliminate the distinctions Congress purposely drew between § 2339B versus §§ 2339A and 2339C.[16] If, contrary to its findings and the legisla-

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[15] This Court respectfully disagrees with the Middle District of Florida's decision in *Al-Arian.* In *Al-Arian,* the court engrafted a *mens rea* element into § 2339B, requiring that a donor of material support intend to further the terrorist activities of the foreign terrorist organization. The Middle District of Florida noted that courts should interpret statutes to avoid constitutional issues. The Court cited as examples the morally innocent cab driver or hotel clerk providing transportation or lodging, respectively, to a foreign terrorist organization member in New York City for a United Nations meeting. As discussed above, this Court finds that the legislative history of the statute and Congress's actions since the *Al-Arian* opinion reveal an unequivocal intent to exclude any *mens rea* requirement beyond the plain language of the statute, as amended by the IRTPA. Moreover, the circumstances of the hotel clerk and cab driver are not before this Court.

[16] While the Court recognizes that courts often defer to the political branches in the foreign affairs context, the Court also notes that its decision does not rest on that ground. Even in legislation affecting foreign affairs, the judiciary must, of course, balance constitutional rights

tive history of § 2339B, Congress did not, in fact, intend to dispense with a *mens rea* specific intent requirement, it remains free to amend the statute by explicitly requiring the additional element of specific intent. *See Staples,* 511 U.S. at 616 n.11, 114 S. Ct. 1793.

c. The *Mens Rea* Requirement in § 2339B Satisfies Any Due Process Concerns.

In any event, Congress's recent clarification of the *mens rea* required under § 2339B satisfies any due process issues under the Fifth Amendment. Significantly, the Ninth Circuit in *HLP II* did not extend its Fifth Amendment analysis of *Scales* to require that the government prove specific intent to further terrorist activities.[17] Rather, the Ninth Circuit held that it was sufficient to "avoid due process concerns" to require that the government "prove beyond a reasonable doubt that the accused knew that the organization was designated as a foreign terrorist organization or that the accused knew of the organization's unlawful activities that caused it to be so designated."[18] *HLP II,* 352 F.3d at 405. The AEDPA, as amended by the IRTPA, incorporates this reading of *mens rea* and prohibits the provision of material support to a recipient that the donor knows is a for-

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with governmental interests. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004).

[17] As already noted above, *HLP II* was vacated by the Ninth Circuit after Congress enacted the IRTPA.

[18] Moreover, the Ninth Circuit read the statement by Senator Hatch upon which Plaintiffs rely as supportive of this level of *mens rea. See HLP II,* 352 F.3d at 402 (citing 142 Cong. Rec. S3354 (daily ed. April 16, 1996) (statement of Sen. Hatch)).

eign terrorist organization.[19] Accordingly, Congress's clarification of the *mens rea* requirement satisfies the notion of personal guilt under the Due Process Clause because an offender must know that he or she was materially supporting a foreign terrorist organization.

2. The Prohibitions on "Training," "Expert Advice or Assistance," and "Service" Are Impermissibly Vague, but "Personnel" Is Permissible.

Plaintiffs argue that the IRTPA amendments of the terms "training," "expert advice or assistance," and "personnel" fail to cure the vagueness concerns identified in *HLP I*, *District Court-HLP I*, and *District Court-HLP II*. Plaintiffs allege that, in fact, the IRTPA amendments exacerbate the vagueness concerns.[20] Moreover, Plaintiffs contend that Congress added an-

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[19] While *Al-Arian* interpreted § 2339B to have two elements of personal guilt, namely, knowledge of the recipient's status as a foreign terrorist organization and intent to further the organization's terrorist activities, the Court notes that the statute can also be read as having a single element of personal guilt. For instance, in *X-Citement Video,* the Supreme Court held that "the age of the performers is the crucial element separating legal innocence from wrongful conduct," as sexually explicit videos featuring adults would not be prohibited. *X-Citement Video,* 513 U.S. at 73, 115 S. Ct. 464. Here, the status of the recipient organization is the crucial element separating legal innocence from wrongful conduct, as the provision of material support to non-foreign terrorist organizations would not be prohibited by the AEDPA.

[20] The 2004 IRTPA amendment also states that "[n]othing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment. . . . " 18 U.S.C. § 2339B(i). Plaintiffs assert that such "boilerplate language" is superfluous and fails to eliminate constitutional concerns. The Court agrees, and Defendants do not contest, that this provision is inadequate to cure potential vagueness issues because it does not clarify the prohibited conduct with sufficient definiteness for ordinary people.

other vague term, "service," to the statute. Defendants respond that the terms "training," "expert advice or assistance," "personnel," and "service" are clear and straightforward.[21]

A challenge to a statute based on vagueness grounds requires the court to consider whether the statute is "sufficiently clear so as not to cause persons 'of common intelligence . . . necessarily [to] guess at its meaning and [to] differ as to its application.'" *United States v. Wunsch,* 84 F.3d 1110, 1119 (9th Cir. 1996) (quoting *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). Vague statutes are void for three reasons: "(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on 'arbitrary and discriminatory enforcement' by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms." *Foti v. City of Menlo Park,* 146 F.3d 629, 638 (9th Cir. 1998) (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)).

"[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the 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

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[21] As discussed above, Defendants' contention that Plaintiffs lack standing to attack the AEDPA for vagueness based on mere hypothetical situations ignores Plaintiffs' submitted evidence of their intended conduct. Plaintiffs do not seek injunctive relief as to hypothetical activities, but as to their own.

U.S. 489, 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). "The requirement of clarity is enhanced when criminal sanctions are at issue or when the statute abuts upon sensitive areas of basic First Amendment freedoms." *Information Providers' Coalition for the Defense of the First Amendment v. FCC,* 928 F.2d 866, 874 (9th Cir. 1991) (internal quotation marks and citations omitted). Thus, under the Due Process Clause, a criminal statute is void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss,* 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954). A criminal statute must therefore "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. . . . " *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

After considering the arguments, the Court finds that the terms "training," "expert advice or assistance," and "service" are impermissibly vague under the Fifth Amendment. With respect to the term "personnel," the Court finds that the IRTPA amendment to "personnel" sufficiently cures the previous vagueness concerns. The Court addresses each of these terms separately below.

a. "Training" Is Impermissibly Vague.

This Court previously concluded that "training," an undefined term, was impermissibly vague because it easily reached protected activities, such as teaching how to seek redress for human rights violations before the United Nations. *See District Court-HLP I,* 9 F. Supp. 2d at 1204, *aff'd,* 205 F.3d 1130, 1138. The IRTPA amendment now defines "training" as "instruction or

teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2).

Plaintiffs contend that the amendment to "training" exacerbates the vagueness problem because Plaintiffs must now guess whether teaching international law, peacemaking, or lobbying constitutes a "specific skill" or "general knowledge." Defendants respond that training encompasses a broad range of conduct, ranging from flying lessons to training in the use of weapons.

The Court agrees with Plaintiffs that the IRTPA amendment to "training" (distinguishing between "specific skill" and "general knowledge") fails to cure the vagueness concerns that the Court previously identified. Even as amended, the term "training" is not sufficiently clear so that persons of ordinary intelligence can reasonably understand what conduct the statute prohibits. Moreover, the IRTPA amendment leaves the term "training" impermissibly vague because it easily encompasses protected speech and advocacy, such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations.[22]

In fact, the Ninth Circuit indicated in *HLP I* that limiting "training" to the "imparting of skills" would be

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[22] Defendants contend that the AEDPA prohibits Plaintiffs from providing "advice or training 'on how to engage in human rights advocacy on their own behalf and on how to use international law to seek redress for human rights violations.'" Defendants' Opposition at 16. This position is in direct contrast to the Ninth Circuit and this Court's holdings, which recognized that such activities are protected under the First Amendment rights to free speech and association. *See HLP I,* 205 F.3d at 1137-38; *District Court-HLP I,* 9 F. Supp. 2d at 1204; *District Court-HLP II,* 309 F. Supp. 2d at 1200-01.

insufficient because such a definition would encompass protected speech and advocacy activities. The Ninth Circuit explained:

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

HLP I, 205 F.3d at 1138.

"Training" 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. Therefore, the Court finds that "training" fails to satisfy the enhanced requirement of clarity for statutes touching upon protected activities under the First Amendment or imposing criminal sanctions. *See Information Providers' Coalition for the Defense of the First Amendment,* 928 F.2d at 874.

b. "Expert Advice or Assistance" Is Impermissibly Vague.

The Court previously found "expert advice or assistance," an undefined term, to be impermissibly vague under the same analysis it applied to "training" and "personnel" because "expert advice or assistance" could be construed to include First Amendment protected activities. *See District Court-HLP II,* 309 F. Supp. 2d at 1200-01 ("The 'expert advice or assistance' Plaintiffs seek to offer includes advocacy and associational activities protected by the First Amendment, which Defendants concede are not prohibited under the USA PATRIOT Act.").

The IRTPA amendments define "expert advice or assistance" as "scientific, technical, *or other specialized knowledge.*" 18 U.S.C. § 2339A(b)(3) (emphasis added). Plaintiffs contend that the "specialized knowledge" portion of this definition is vague because it merely repeats what an expert is and provides no additional clarity. Similar to their attack on the term "training," Plaintiffs assert that they must now guess whether their expert advice constitutes "specialized knowledge." Defendants argue that "expert advice or assistance" is not vague because the definition is derived from the established Federal Rules of Evidence regarding expert testimony.

The Court agrees with Plaintiffs that the IRTPA amendment to "expert advice or assistance" (adding "specialized knowledge") does not cure the vagueness issues. Even as amended, the statute fails to identify the prohibited conduct in a manner that persons of ordinary intelligence can reasonably understand. Similar to the Court's discussion of "training" above, "expert advice or assistance" remains impermissibly vague because

"specialized knowledge" includes the same protected activities that "training" covers, such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations. Moreover, the Federal Rules of Evidence's inclusion of the phrase "scientific, technical, or other specialized knowledge" does not clarify the term "expert advice or assistance" for the average person with no background in law. Accordingly, the Court finds that the "expert advice or assistance" fails to provide fair notice of the prohibited conduct and is impermissibly vague.[23]

c. "Service" Is Impermissibly Vague.

Plaintiffs attack the IRTPA's insertion of the undefined term "service" to the definition of "material support or resources" on vagueness grounds.[24] According to Plaintiffs, the prohibition on "service" is at least as sweeping as the prohibitions on "training," "expert advice or assistance," and "personnel," as each of these could be construed as services. Defendants concede that the term "service" is broad, but argue that it is a common term that the dictionary defines (among other definitions) as "an act done for the benefit or at the com-

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[23] Plaintiffs attack only the "specialized knowledge" portion of the definition of "expert advice or assistance" as vague. The Court's injunction of enforcement of this prohibition against Plaintiffs applies only to the "specialized knowledge" portion of the definition, not the "scientific, technical . . . knowledge" portion of the definition, which the Court finds is not vague.

[24] Plaintiffs did not file an amended complaint challenging the ban on "service," which was recently enacted in December 2004. In any event, the parties briefed the issue fully. In the interest of judicial economy, the Court deems the complaint amended so that these issues may be resolved together.

mand of another" or "useful labor that does not produce a tangible commodity." Defendants' Opposition at 21. Plaintiffs reply that Defendants' own definition is vague and would infringe on all sorts of speech and advocacy done for the benefit of another that is clearly protected by the First Amendment.

In addition, Plaintiffs note that Defendants' argument that any activity done "*for the benefit of another*" would violate the ban on "services" contradicts Defendants' concession that Plaintiffs could freely engage in "human rights and political advocacy *on behalf of* the PKK and the Kurds before any forum of their choosing." Defendants' Opposition at 17 (emphasis added). Plaintiffs argue that this supposed distinction proves their point. In other words, "service" is impermissibly vague because it forces Plaintiffs to guess whether their human rights and political advocacy constitutes action taken "on behalf of another," which Defendants concede is protected action, or "for the benefit of another," which Defendants argue is prohibited.

The Court finds that the undefined term "service" in the IRTPA is impermissibly vague, as the statute defines "service" to include "training" or "expert advice or assistance," terms the Court has already ruled are vague. Like "training" and "expert advice or assistance," "it is easy to imagine protected expression that falls within the bounds of" the term "service." *HLP I,* 205 F.3d at 1137. Moreover, there is no readily apparent distinction between taking action "on behalf of another" and "for the benefit of another." Defendants' contradictory arguments on the scope of the prohibition only underscore the vagueness. As with "training" and "expert advice or assistance," the term "service" fails to

meet the enhanced requirement of clarity for statutes affecting protected expressive activities and imposing criminal sanctions.

d. "Personnel" Is Not Impermissibly Vague.

The Court previously found personnel to be impermissibly vague because it "broadly encompasses the type of human resources which Plaintiffs seek to provide, including the distribution of LTTE literature and informational materials and working directly with PKK members at peace conferences and other meetings." *District Court-HLP I*, 9 F. Supp. 2d at 1204. The Ninth Circuit affirmed, finding that the ban on personnel "blurs the line between protected expression and unprotected conduct," as an individual "who advocates the cause of the PKK could be seen as supplying them with personnel." *HLP I*, 205 F.3d at 1137.

The IRTPA amendment now limits prosecution for providing "personnel" to the provision of "one or more individuals" to a foreign terrorist organization "to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization." 18 U.S.C. § 2339B(h). Further, the statute states that "[i]ndividuals 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." *Id.* Plaintiffs argue that the new language distinguishing between acting under an organization's "direction and control" and acting "independently" still impinges on protected activities. Defendants respond that the IRTPA amendments use clear terms that are readily understandable to persons of ordinary intelligence.

The Court finds that the IRTPA amendment sufficiently narrows the term "personnel" to provide fair notice of the prohibited conduct. Limiting the provision of personnel to those working under the "direction or control" of a foreign terrorist organization or actually managing or supervising a foreign terrorist organization operation sufficiently identifies the prohibited conduct such that persons of ordinary intelligence can reasonably understand and avoid such conduct.

3. The Prohibitions on "Training," "Expert Advice or Assistance," "Personnel," and "Service" Are Not Substantially Overbroad.

Plaintiffs also contend that the prohibitions on "training," "expert advice or assistance," "personnel," and "service" are sweepingly overbroad because they proscribe a substantial amount of speech activity that is protected by the First Amendment.[25]

"The First Amendment doctrine of overbreadth is an exception to [the] normal rule regarding the standards for facial challenges." *Virginia v. Hicks*, 539 U.S. 113, 118, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003). Under the overbreadth doctrine, a "showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep, suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'" *Id*. at

[25] Plaintiffs recognize that the Court has previously rejected their overbreadth argument in the past, but wish to preserve their right to appeal.

118-19, 123 S. Ct. 2191 (internal quotation marks and citations omitted).

However, the Supreme Court has recognized that "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law-particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Hicks*, 539 U.S. at 119, 123 S. Ct. 2191 (citations omitted). Accordingly, the Supreme Court requires that the "law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications before applying the 'strong medicine' of the overbreadth invalidation." *Id.*

This Court has previously rejected Plaintiffs' overbreadth arguments and sees no reason to revisit the issue, as the arguments remain the same. Plaintiffs have failed to establish that the prohibitions on "training," "personnel," "expert advice or assistance," and "service" are substantially overbroad, as the prohibitions are content-neutral and their purpose of deterring and punishing the provision of material support to foreign terrorist organizations is legitimate. Further, the statute's application to protected speech is not "substantial" both in an absolute sense and relative to the scope of the law's plainly legitimate applications. The Court, therefore, declines to apply the "strong medicine" of the overbreadth doctrine, finding instead that as-applied litigation will provide a sufficient safeguard for any potential First Amendment violation.

4. The IRTPA Does Not Impose an Unconstitutional Discretionary Licensing Scheme.

Plaintiffs' final argument in support of their motion for summary judgment is that the IRTPA exception to prosecution under 18 U.S.C. § 2339B(j) constitutes an unconstitutional licensing scheme.[26] The statutory exception provides:

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

18 U.S.C. § 2339B(j).

According to Plaintiffs, this provision grants the Secretary of State unfettered discretion to license speech because it targets those sections of 18 U.S.C. § 2339B(a) that concern expressive activity, namely, "training," "expert advice or assistance," and "personnel," and vests a government official with unbridled discretion to permit individuals to provide such support to foreign terrorist organizations. Plaintiffs rely on cases involving prior restraints to support their argument that 18 U.S.C. § 2339B(j) is an unconstitutional licensing scheme.

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[26] Having found that "personnel" and the "scientific, technical . . . knowledge" portion of the ban on "expert advice or assistance" are not vague, the Court must address Plaintiffs' challenge to 18 U.S.C. § 2339B(j).

In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988), the Supreme Court struck down a licensing statute requiring permits from the mayor to place newspaper racks on public property because "in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood*, 486 U.S. at 757, 108 S. Ct. 2138. Similarly, in *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992), the Supreme Court invalidated an ordinance regarding assembly and parade permit fees as an overly broad prior restraint on public speech. In striking the ordinance, the Supreme Court noted that a licensing scheme must be narrowly tailored with reasonable and definite standards, and must not be content-based or delegate overly broad discretion to the issuing official. *See Forsyth County,* 505 U.S. at 130-33, 112 S. Ct. 2395. *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226-27, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) (prior restraint must include a time limit within which government official must decide whether to issue a license).

Defendants respond that these cases do not apply to the instant case, as § 2339B(j) is not a prior restraint licensing scheme. While conceding that the *City of Lakewood* and *Forsyth* involved restrictions on speech pending a permit from a government official, Defendants maintain that § 2339B(j) imposes no restriction at all on Plaintiffs' activities. Rather, according to Defendants, the other sections of the AEDPA, as discussed earlier, prohibit Plaintiffs from providing material support or

resources to foreign terrorist organizations. *See* 18 U.S.C. § 2339B(a).[27]

The Court finds that 18 U.S.C. § 2339B(j) does not impose an unconstitutional licensing scheme. In fact, § 2339B(j) operates as an *exception* to prosecution under § 2339B(a) for providing material support or resources as to "training," "expert advice or assistance," and "personnel." As this Court has previously held, the AEDPA's actual prohibition on providing material support is not directed to speech or advocacy in violation of the First Amendment. *See District Court-HLP I*, 9 F. Supp. 2d at 1196-97, *aff'd,* 205 F.3d at 1135-36. Rather, Plaintiffs are restricted only from the conduct of providing material support to foreign terrorist organizations and remain free to exercise their First Amendment rights with no prior restraints. Accordingly, the *City of Lakewood* and *Forsyth* are inapplicable to this case.[28]

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[27] Furthermore, Defendants assert that Plaintiffs lack standing to bring this claim because they are not harmed by the exception set forth in 18 U.S.C. § 2339B(j). The Court agrees that Defendants have asserted a sound argument regarding standing. Plaintiffs have failed to articulate how they are injured by 18 U.S.C. § 2339B(j), as the prohibition on providing material support is set forth in another section of the AEDPA. Nevertheless, the Court addresses Plaintiffs' claim on the merits.

[28] Moreover, the Court notes that even if the exception constituted a licensing scheme, there would be no unfettered discretion in its application. On the contrary, the Secretary of State cannot approve material support without determining that it will not be used for terrorist activity. This Court previously rejected Plaintiffs' challenges to the Secretary of State's discretion in designating foreign terrorist organizations, which requires a determination that an organization actually engages in terrorist activity. *See District Court-HLP I,* 9 F. Supp. 2d at 1199-1200; *see also HLP I,* 205 F.3d at 1137 (affirming this Court's decision and noting that because "the regulation involves the conduct of

The Court therefore DENIES Plaintiffs' motion for summary judgment on this basis, finding that Plaintiffs have failed to establish that 18 U.S.C. § 2339B(j) is an unconstitutional licensing scheme in violation of the First Amendment.

V. CONCLUSION

The Court concludes that Plaintiffs have standing to raise vagueness challenges to the terms "training," "expert advice or assistance," "personnel," and "service." Therefore, Defendants' motion to dismiss for lack of standing is DENIED.

The parties' cross-motions for summary judgment are GRANTED IN PART and DENIED IN PART as follows:

1. The Court finds that the lack of a specific intent requirement to further the terrorist activities of foreign terrorist organizations in the AEDPA's prohibition on providing material support or resources to foreign terrorist organizations does not violate due process under the Fifth Amendment. The Court therefore GRANTS Defendants' motion and DENIES Plaintiffs' motion on this ground.

2. The Court finds that the AEDPA's prohibitions on material support or resources in the form of "training," "expert advice or assistance," "personnel," and "service" are not overbroad under the First Amendment. The Court therefore GRANTS Defendants' motion and DENIES Plaintiffs' motion on this ground.

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foreign affairs, we owe the executive branch even more latitude than in the domestic context").

3. The Court finds that the term "personnel" is not impermissibly vague under the Fifth Amendment. The Court therefore GRANTS Defendants' motion and DENIES Plaintiffs' motion on this ground.

4. The Court finds that the terms "training"; "expert advice or assistance" in the form of "specialized knowledge"; and "service" are impermissibly vague under the Fifth Amendment. The Court therefore GRANTS Plaintiffs' motion and DENIES Defendants' motion on this ground.

5. The Court finds that the IRTPA amendment prohibiting the prosecution of donors who received approval from the Secretary of State to provide material support or resources is not an unconstitutional licensing scheme under the First Amendment. The Court therefore GRANTS Defendants' motion and DENIES Plaintiffs' motion on this ground.

Accordingly, Defendants, their officers, agents, employees, and successors are ENJOINED from enforcing 18 U.S.C. § 2339B's prohibition on providing "training"; "expert advice or assistance" in the form of "specialized knowledge"; or "service" to the PKK or the LTTE

against any of the named Plaintiffs or their members.[29] The Court declines to grant a nationwide injunction.

IT IS SO ORDERED.

[29] This Court's injunction does not enjoin enforcement of the remaining categories of material support or resources against Plaintiffs, namely, "property, tangible or intangible"; "currency or monetary instruments or financial securities"; "financial services"; "lodging"; "expert advice or assistance" in the form of "scientific or technical . . . knowledge"; "safehouses"; "false documentation or identification"; "communications equipment"; "facilities"; "weapons"; "lethal substances"; "explosives"; "personnel (1 or more individuals who may be or include oneself)"; and "transportation."

APPENDIX C

1. 18 U.S.C. 2339A provides:

Providing material support to terrorists

(a) OFFENSE.—Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, or 2340A of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(b) DEFINITIONS.—As used in this section—

(1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses,

false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

2. 18 U.S.C. 2339B provides in pertinent part:

Providing material support or resources to designated foreign terrorist organizations

(a) PROHIBITED ACTIVITIES.—

(1) UNLAWFUL CONDUCT.—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

* * * * *

(c) INJUNCTION.—Whenever it appears to the Secretary or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of this section, the Attorney General may initiate civil action in a district court of the United States to enjoin such violation.

(d) EXTRATERRITORIAL JURISDICTION.—

(1) IN GENERAL.—There is jurisdiction over an offense under subsection (a) if—

(A) an offender is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)));

(B) an offender is a stateless person whose habitual residence is in the United States;

(C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

(D) the offense occurs in whole or in part within the United States;

(E) the offense occurs in or affects interstate or foreign commerce; or

(F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or con-

spires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

(2) EXTRATERRITORIAL JURISDICTION.—There is extraterritorial Federal jurisdiction over an offense under this section.

* * * * *

(g) DEFINITIONS.—As used in this section—

(1) the term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

(2) the term "financial institution" has the same meaning as in section 5312(a)(2) of title 31, United States Code;

(3) the term "funds" includes coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, stocks, bonds, debentures, drafts, letters of credit, any other negotiable instrument, and any electronic representation of any of the foregoing;

(4) the term "material support or resources" has the same meaning given that term in section 2339A (including the definitions of "training" and "expert advice or assistance" in that section);

(5) the term "Secretary" means the Secretary of the Treasury; and

(6) the term "terrorist organization" means an organization designated as a terrorist organization

under section 219 of the Immigration and Nationality Act.

(h) PROVISION OF PERSONNEL.—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.

(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.

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