

CA Nos. 05-56753, 05-56846

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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HUMANITARIAN LAW PROJECT, *et al.*,

*Plaintiffs/Cross-Appellants,*

v.

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

*Defendants/Appellants.*

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**On Appeal from the United States District Court  
for the Central District of California  
(Honorable Audrey B. Collins)**

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AND ALLIED EDUCATIONAL FOUNDATION  
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS/APPELLANTS,  
URGING REVERSAL IN PART AND AFFIRMANCE IN PART**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. Neither WLF nor AEF has either a parent corporation or any stock owned by a publicly held company.

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
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**IDENTITY AND INTERESTS OF *AMICI CURIAE***

The interests of *amici curiae* are set forth more fully in the accompanying motion for leave to file this brief. The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *DeMore v. Kim*, 538 U.S. 510 (2003); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

*Amici* are concerned that this lawsuit, if successful, could significantly impair the federal government’s ability to counter the threat to national security posed by foreign terrorist groups. Congress has determined that the threat posed by such groups is magnified by the support they have been able to garner from within the United States; it has adopted legislation designed to cut off such support. *Amici* believe that Congress is acting well within its powers by authorizing the imposition of criminal sanctions on those who provide material support for such groups, regardless of the form in which that support is given.

This brief focuses on the Plaintiffs’ vagueness and First Amendment overbreadth claims only. It does not address other claims, including whether the Fifth Amendment prohibits Congress from criminalizing support for a foreign terrorist organization without requiring proof of intent to further the organization’s terrorist activities, and whether the statutory regime amounts to an unconstitutional licensing scheme under the First Amendment.

### **STATEMENT OF THE CASE**

Congress has authorized the Attorney General to designate an organization as a “foreign terrorist organization” if, *inter alia*, the organization engages in terrorist activity and that activity “threatens the security of United States nationals or the national security of the United States.” 8 U.S.C. § 1189(a)(1).

If an organization has been so designated, it is a serious criminal offense to “knowingly provide material support or resources” to the organization. 18 U.S.C. § 2339B(a)(1).

Among the organizations that the Attorney General has designated as foreign terrorist organizations are the Kurdistan Workers Party (“Partiya Karkeran Kurdistan” or “PKK”) and the Liberation Tigers of Tamil Eelam (“LTTE”). Despite that designation, the Plaintiffs (six organizations and two U.S. citizens) seek to provide material support to those terrorist groups. Plaintiffs contend that they do not seek to support the PKK’s and the LTTE’s terrorist activities; rather, they assert a desire to provide material support for the groups’ lawful humanitarian and political activities. They filed two suits in U.S. District Court for the Central District of California, seeking to enjoin the federal government from initiating criminal proceedings against them for providing such support. The suits alleged, *inter alia*, that: (1) several of the statutory terms used to define what constitutes the provision of “material support or resources” – including “training,” “expert advice or assistance,” “service,” and “personnel” – are impermissibly vague, in violation of the Fifth Amendment, because they fail to provide people of common intelligence with a clear understanding of what activities are impermissible; and (2) the prohibition against providing “material

support and resources” to foreign terrorist organizations violates the plaintiffs’ First Amendment rights to freedom of speech and association.

As set forth in detail in the federal government’s opening brief, the cases have a lengthy procedural history – including several previous appeals to this Court. In December 2004, Congress adopted the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”), Pub. L. No. 108-458, 118 Stat. 3638, which amended several of the statutory provisions challenged by the Plaintiffs. Following adoption of IRTPA, this Court vacated an earlier injunction issued by the district court against enforcement of portions of § 2339B, and remanded the case to the district court for reconsideration of light of the IRTPA amendments. *Humanitarian Law Project v. U.S. Department of Justice*, 393 F.3d 902 (9th Cir. 2004) (*en banc*) (“*HLP V*”).

On remand, the district court consolidated the two cases and largely duplicated its prior rulings in the case. *See Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134 (C.D. Cal. 2005) (“*HLP VI*”). It held that three of four challenged statutory terms were impermissibly vague: “training,” “expert advice or assistance,” and “service.”<sup>1</sup> It held that the 2004 IRTPA amendments

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<sup>1</sup> *See* 18 U.S.C. § 2339A(b). The challenged terms are among a laundry list of items included within the definition of “material support or resources,” 18 U.S.C. § 2339A(b)(1), the provision of which to a foreign terrorist organization

failed to cure the vagueness concerns expressed by the court in prior decisions with respect to the first two terms, and that “service,” a term added for the first time by the IRTPA, suffered from similar vagueness problems. *Id.* at 1148-52. It denied a vagueness challenge to a fourth statutory term: “personnel.” It held that the IRTPA had cured the previously identified deficiencies in the definition of “personnel” by providing “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.

*Id.* at 1152-53.

The district court rejected Plaintiffs’ First Amendment claims. It held that the statutory prohibitions against providing “training,” “expert advice or assistance,” “personnel,” or “service” to a foreign terrorist organization were not subject to First Amendment “overbreadth” challenge, because “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.” *Id.* at 1153. The court said that “as-applied litigation will provide a sufficient safeguard for any potential First Amendment violation.” *Id.*

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is made subject to criminal sanction by 18 U.S.C. § 2339B(a)(1).

The district court also rejected Plaintiffs' claim that the IRTPA, by authorizing the Attorney General under certain circumstances to approve the provision of material support to a foreign terrorist organization,<sup>2</sup> constituted an unconstitutional discretionary licensing scheme in violation of the First Amendment. *Id.* at 1153-55. The court held that the statute prohibition against the provision of material support "is not directed at speech or advocacy in violation of the First Amendment. . . . 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." *Id.* at 1155.

The district court issued an injunction that barred the federal government from enforcing, against Plaintiffs or their members, § 2339B's prohibition on providing "training," "expert advice or assistance" in the form of "specialized knowledge," or "service" to the PKK or the LTTE. *Id.* at 1156. Both sides have appealed from the district court's judgment.

### **SUMMARY OF ARGUMENT**

A statute is impermissibly vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.

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<sup>2</sup> *See* 18 U.S.C. § 2339B(j)

The words adopted by Congress in §§ 2339A and 2339B easily meet that standard. Congress quite clearly has prohibited the knowing provision of significant direct assistance to certain explicitly enumerated terrorist organizations, including the PKK and the LTTE. The list of means by which that direct assistance is not to be provided is comprehensive, and the words used in that list are common words such that it is highly unlikely that those reading the statute will not understand what is prohibited. Even a casual reader would take away the message that there are few, if any, forms of significant direct assistance to designated foreign terrorist organizations that are not prohibited.

Of course, Plaintiffs' real complaint is not that they are confused regarding the scope of § 2339B's prohibition. Rather, they simply do not like the prohibition's breadth because they seek to provide direct material assistance to the PKK and the LTTE of a type that is prohibited by the statute. They have challenged the prohibition as an impermissible infringement on their First Amendment rights to freedom of speech and association. Those First Amendment claims warrant the Court's careful attention. But the courts should not use the vagueness claim as a convenient way to duck the First Amendment claims, given that § 2339B sets forth in such straightforward language the types of support that are prohibited.

The district court’s decision to strike down the prohibitions against “training,” “expert advice or assistance,” and “service” was based on a misunderstanding of the vagueness doctrine. The district court started with the assumption that Congress could not possibly have intended to prohibit speech that is fully protected by the First Amendment. It then determined that the prohibitions against “training,” “expert advice or assistance,” and “service” *could* rationally be interpreted as covering “material support” provided in the form of what the court deemed constitutionally protected speech – *e.g.*, Plaintiffs’ expressed desire to train terrorist groups regarding how to petition the United Nations to seek redress. *HLP VI*, 380 F. Supp. 2d at 1150-52. Based on that determination, it concluded that the challenged terms must be impermissibly vague if rational people could interpret those terms as prohibiting actions that Congress (based on its aversion to violating the First Amendment) could not possibly have intended to prohibit. *Id.*

That approach to constitutional analysis is not a vagueness analysis at all, but rather is a disguised First Amendment analysis. One properly begins a vagueness analysis by determining whether a challenged statute fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. If the statute provides such an opportunity, it is not

impermissibly vague, regardless whether it arguably infringes on free speech rights. Any such argument should be determined based on a First Amendment analysis, not on a vagueness analysis.

Nor does § 2339B violate the First Amendment, whether challenged facially under an overbreadth analysis, or as applied to specific types of activities that Plaintiffs wish to undertake. Plaintiffs assert that the First Amendment immunizes their efforts to provide material support to terrorist groups so long as that support takes the form of written or spoken words. That assertion has never been accepted by courts in this country. It has never been deemed an abridgement of freedom of speech to make a course of conduct illegal merely because the conduct was initiated, evidenced, or carried out by means of language, either spoken or written. The government may constitutionally prohibit providing aid to fleeing felons, for example, even if that aid is evidenced solely by oral directions regarding a good escape route. *See* 18 U.S.C. § 3. While careful First Amendment analysis is warranted whenever a statute touches on free speech rights, such statutes are unobjectionable if they do not target speech based on its content, if they further an important government interest, and if they regulate speech no more than is necessary to further the government's interests.

Congress has determined that international terrorism “threatens the vital interests of the United States” and that direct material support to international terrorist groups must be prohibited because *any* such support to terrorist groups facilitates their terrorism. *See* Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), P.L. 104-243, Title III, Subtitle A, § 301(a)(1) & (7), 110 Stat. 1247, *codified at* 18 U.S.C. § 2339B *note*. As the Court determined when this case was before it in 2000, donations to a terrorist organization – even donations intended to further the organization’s non-terroristic activities – can be prohibited because donated resources used to cover the costs of non-terroristic activities free up other resources and thereby permit the organization to divert those other resources to terrorism. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134 (9th Cir. 2000) (“*HLP II*”). That analysis does not change when the donor chooses to express his support not by giving money but by imparting skills (through spoken or written words) that provide the terrorist group with resources for which it has an organizational need; in both cases, the donor has provided the terrorist group with a resource that facilitates its core institutional mission: to conduct terrorism. Just as it does not matter that the donor of money has earmarked his gift for humanitarian purposes, so too it does not matter that specialized skills provided by a donor have no direct connection to terrorism. In

both cases, by providing the terrorist organization with a resource for which it had a need, the donor has freed the organization from having to appropriate other assets to procure the resource – thereby permitting the organization to devote more of its assets to terrorism. Congress quite rationally determined that American national security interests would be served by cutting off all such material support.

In restricting individuals from speaking in a manner that directly facilitates terrorism, Congress has acted in a content-neutral fashion that only narrowly touches on First Amendment values. Section 2339B broadly prohibits providing material support for international terrorism organizations; it does not discriminate based on the subject matter or point-of-view of the expressive activity at issue. Moreover, it leaves Americans with ample alternative opportunities to express their views on relevant issues. For example, speech that is unaffected by § 2339B’s prohibition includes expressions of support for a terrorist organization; independent advocacy in support of the organization; and dialogue with the organization so long as communications do not take the form of “training,” “expert advice or assistance,” “service,” or “personnel” (as those terms are defined in the statute). Under those circumstances, § 2339B should not be deemed to violate First Amendment rights.

## ARGUMENT

### I. THE TERMS “TRAINING,” “EXPERT ADVICE OR ASSISTANCE” AND “SERVICE” ARE NOT IMPERMISSIBLY VAGUE

#### A. The Challenged Terms Provide People of Ordinary Intelligence a Reasonable Opportunity to Understand What Conduct They Prohibit

A statute is impermissibly vague if it “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000).<sup>3</sup> Courts have stressed that because no set of words will convey precisely the same meaning to all people, all that is required to survive a vagueness challenge is that “it is clear what the ordinance *as a whole* prohibits.” *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (emphasis added). Because we are “[c]ondemned to the use of words, we can never expect mathematical certainty from our language.” *Id.*

The Supreme Court has noted that where, as here, some small portion of the conduct prohibited by the statute has an expressive component and thus

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<sup>3</sup> A statute can also be impermissibly vague “if it authorizes or even encourages arbitrary and discriminatory enforcement.” *Id.* However, this second prong of vagueness analysis is not at issue here. Plaintiffs do not allege that the language of §§ 2339A and 2339B encourages arbitrary and discriminatory enforcement of the ban on providing material support to designated foreign terrorist groups. Indeed, Plaintiffs’ pre-enforcement challenge does not point to *any* history of enforcement of the ban.

implicates First Amendment values, the courts should apply a somewhat more stringent vagueness test. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Nonetheless, the Court has been very reluctant to entertain facial vagueness challenges based on factual settings not presented by the case at issue: “speculation about possible vagueness in hypothetical situations not before the court will not support a facial attack on a statute when it is surely valid ‘in the vast majority of intended applications.’” *Hill*, 530 U.S. at 733 (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)).

The language employed by Congress in prohibiting significant direct support for designated “foreign terrorist groups,” when taken as a whole, easily meets the vagueness test described above. Section 2339B(a)(1) prohibits “knowingly” providing “material support or resources” to a foreign terrorist organization. “Material support or resources” in turn is defined as meaning:

[A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documents 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). “Training” is further defined to mean “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” is further defined to mean “advice or assistance derived from scientific, technical or other specialized knowledge.” 18 U.S.C. § 2339A(b)(3). “Personnel” is further defined to make clear that one cannot be deemed to have provided “personnel” if the individuals involved work “independently of the foreign terrorist organization to advance its goals or objectives” and not under the organization’s “direction and control.” 18 U.S.C. § 2339B(h).

In view of the comprehensive nature of the definition of “material support or resources” contained in § 2339A(b)(1), Congress’s overall intent is readily apparent to people of ordinary intelligence: Congress intended to prohibit virtually *all* direct significant support for designated foreign terrorist organizations. Given the overall tenor of the statute, Plaintiffs’ challenge to individual components of the definition of “material support or resources” seems somewhat silly. Included within that definition is *any* “property” or “service”; the words that follow serve merely to flesh out the many and varied types of property and service that Congress had in mind. Plaintiffs complain that they do not have a good idea regarding the types of “training” they may provide. But since virtually any activity that might be deemed “training” performed under the auspices of a foreign terrorist organization would also be a “service,” all such

activity is banned. Similarly, the ban on “advice or assistance derived from scientific, technical or other specialized knowledge” is crystal clear: while casual advice is not banned (*e.g.*, “it looks to me as though it is going to rain today”), the phrase “specialized knowledge,” when read in the context of the entire statute, makes clear that *any* type of advice that could have real strategic value to the organization (because it is based on knowledge that is not generally possessed by members of the organization) is banned.

To the extent that there is any real limit on the ban on direct material assistance, it comes not from the language of § 2339A but from the word “knowingly” in § 2339B(a)(1) and from that statute’s requirement that the “material support or resources” be given “to” the foreign terrorist organization. Many of the hypothetical examples put forward by Plaintiffs would not be covered by the ban because, under a common sense reading of § 2339B(a)(1), the support would not be deemed to have been given “to” the organization. For example, Plaintiffs express a desire to provide expert advice and training in Tamil language, literature, arts, cultural heritage, and history. Nothing in § 2339B prevents Plaintiffs from doing so, even if some of those receiving the training happen also to be members of the LTTE. Such expert advice and training could not reasonably be deemed to have been provided “to” the LTTE

unless the training sessions at issue were being run under the auspices of the LTTE or the LTTE had arranged for such sessions in order to gain knowledge that would further the goals of the LTTE. Thus, those wishing to impart their knowledge to the Tamil of Sri Lanka (including knowledge regarding international law, tsunami relief, or gaining United Nations support for the Tamil cause) have an easy way of doing so without running afoul of § 2339B: just make sure that one's actions are not being undertaken under the auspices of the LTTE.

Section 2339B's scienter requirement (limiting the statute's reach to those who "knowingly" provide material support to others they know to be terrorist groups or to have been designated as such by the Attorney General) provides additional assurance that the statute could be applied to those who failed to understand its reach. Of course, Plaintiffs are well aware that the PKK and the LTTE have been designated as terrorist organizations and that § 2339B broadly prohibits providing material support to those groups. Accordingly, there is little reason to be sympathetic to their claims that there may be some hypothetical situations to which § 2339B's application may be unclear. The statute is broad, and its application to the support they wish to provide is clear.

**B. The District Court Misapplied the Vagueness Doctrine in Striking Down Several of the Challenged Terms**

The district court's decision to strike down the prohibitions against "training," "expert advice or assistance," and "service" was based on a misunderstanding of the vagueness doctrine. The district court started with the assumption that Congress could not possibly have intended to prohibit speech that is fully protected by the First Amendment. It then determined that the prohibitions against "training," "expert advice or assistance," and "service" *could* rationally be interpreted as covering "material support" provided in the form of what the court deemed constitutionally protected speech – *e.g.*, Plaintiffs' expressed desire to train terrorist groups regarding how to petition the United Nations to seek redress. *HLP VI*, 380 F. Supp. 2d at 1150-52. Based on that determination, it concluded that the challenged terms must be impermissibly vague if rational people could interpret those terms as prohibiting actions that Congress (based on its aversion to violating the First Amendment) could not possibly have intended to prohibit. *Id.*

That approach to constitutional analysis is not a vagueness analysis at all, but rather is a disguised First Amendment analysis. One properly begins a vagueness analysis by determining whether a challenged statute fails to provide

people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. If the statute provides such an opportunity, it is not impermissibly vague, regardless whether it arguably infringes on free speech rights. Any such argument should be determined based on a First Amendment analysis, not on a vagueness analysis.

One searches the district court opinion in vain for an explanation of how any of the disputed statutory language, in the court's view, is capable of multiple reasonable interpretations. Instead, with respect to each of the three statutory terms it deemed impermissibly vague, the court simply stated that the term could reach areas the court deemed protected by the First Amendment. The court said that "training" was "impermissibly vague because it easily encompasses protected activity and advocacy, such as teaching international law for peacekeeping resolutions or how to petition the United Nations to seek redress for human rights violations." *Id.* at 1150. The district court is exactly right: § 2339B does "easily encompass" such training when provided for the benefit of and/or under the auspices of a foreign terrorist organization. But the issue raised thereby is whether the statute violates the First Amendment, not whether the application of a statute to expressive conduct arguably protected by the First Amendment renders the statute impermissibly vague.

Similarly, the court held that the term “expert advice or assistance” (further defined by § 2339A(b)(3) to mean “advice or assistance derived from scientific, technical or other specialized knowledge”) is “impermissibly vague because ‘specialized knowledge’ includes the same protected activities that ‘training’ covers, such as teaching international law for peacekeeping resolutions or how to petition the United Nations to seek redress for human rights violations.” *Id.* at 1151. Again, if so, that raises a First Amendment issue, not a vagueness issue.

Similarly, in striking down “service” on vagueness grounds, the court said, “Like ‘training’ and ‘expert advice or assistance,’ it is easy to imagine protected expression that falls within the bounds of the term ‘service.’” *Id.* at 1152 (citation omitted). If the ban on “service” encompasses expressive conduct that is entitled to First Amendment protection, then it is subject to challenge on First Amendment grounds, not vagueness grounds.<sup>4</sup>

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<sup>4</sup> The court also professed not to understand the distinction between a “service” consisting of expressive conduct and undertaken “for the benefit of” of a foreign terrorist organization (which the government has repeatedly asserted is not prohibited by § 2339B so long as one is acting independently of the organization), and “service” undertaken “on behalf of” the organization (which the government contends is banned by the statute). *Id.* The distinction that eluded the district court is one commonly understood in everyday language. One who acts “on behalf of” another is generally understood to be acting as the other’s agent, while one acting “for the benefit of” another very often acts

In sum, this case simply does not raise significant “impermissible vagueness” concerns, and the courts should not reach out to find a vagueness concern as a means of avoiding what may be difficult First Amendment issues.

**II. § 2339B DOES NOT VIOLATE THE FIRST AMENDMENT, WHETHER CHALLENGED FACIALLY UNDER AN OVER-BREADTH ANALYSIS, OR AS APPLIED TO SPECIFIC TYPES OF ACTIVITIES THAT PLAINTIFFS WISH TO UNDERTAKE**

The district court rejected Plaintiffs’ First Amendment overbreadth challenge to § 2339B.<sup>5</sup> The court held that the challenge failed because “as the prohibitions [against providing material support or resources] are content-neutral and their purpose of deterring and punishing the provision of material support to foreign terrorist organizations is legitimate.” *Id.* at 1153. The court held that the challenge failed for the additional reason that “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.” *Id.* The court found that, as an alternative to application of the “strong medicine” of the overbreadth

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independently. Thus, for example, WLF and AEF are filing this *amicus* brief “for the benefit of” the Court and the Executive Branch, but most certainly not “on behalf of” either.

<sup>5</sup> Plaintiffs contended 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.” *HLP VI*, 380 F. Supp. 2d at 1153.

doctrine, “as-applied litigation will provide a sufficient safeguard for any potential First Amendment violation.” *Id.*

The district court was exactly correct in its rationale for rejecting the overbreadth challenge. In the absence of persuasive evidence from Plaintiffs that § 2339B proscribes a substantial amount of speech activity in violation of the First Amendment, invocation of the overbreadth doctrine to permit a facial challenge to the statute is wholly inappropriate. As the Supreme Court has explained, although overbreadth adjudication serves an important function of ensuring that overbroad laws are not permitted to “chill” constitutionally protected speech by those unwilling to risk prosecution under the law:

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. To ensure that these costs do not swallow the social benefits of declaring a law “overbroad,” we have insisted that a 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 overbreadth invalidation.

*Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 613 (1973)). Striking down the challenged statutory provisions on overbreadth grounds would have enormous negative impact on national security: it would deprive the federal government of the authority, for

example, to criminally prosecute not only those who provide “expert advice or assistance” to terrorist groups by teaching them how to build bombs but also those who provide “expert advice or assistance” by actually building the bombs. *Amici* do not understand Plaintiffs to argue that such expert advice or assistance is entitled to any constitutional protection; yet the result of the relief they seek would be to provide legal protection to such individuals.

The district court’s conclusion that § 2339B’s application to constitutionally protected speech is not “substantial” was made easier, of course, by its previous determination that the statute does not apply to Plaintiffs’ desire to engage in such expressive conduct as teaching international law for peacemaking resolutions and how to petition the United Nations to seek redress for human rights violations. *See, e.g., HLP VI*, 380 F. Supp. 2d at 1155:

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 Humanitarian Law Project*, 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.

For the reasons stated above, that is an incorrect reading of the statute; § 2339B quite clearly *does* apply to any and all training that individuals provide directly to a foreign terrorist organization, including training that includes a significant

expressive component – such as how to petition the United Nations to seek redress for human rights violations. Accordingly, any First Amendment analysis needs to begin by acknowledging the full scope of § 2339B, not the truncated version of the statute recognized by the district court.

Plaintiffs are likely to argue (as the district court seemed to believe) that this Court already held, in *HLP II*, that the First Amendment would not permit Congress to prohibit individuals from training a foreign terrorist organization in how to petition the United Nations. Any such claim is a significant stretch from what actually occurred. Rather, during the course of determining that the district court had not abused its discretion in granting a preliminary injunction against enforcement of § 2339B’s “training” provision, the Court said:

[I]t 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 result would be different if the term “training” were qualified to include only military training or training in terrorist activities.

*HLP II*, 205 F.3d at 1138.

The Court’s discussion arose in the context of a void-for-vagueness challenge. Accordingly, any statements regarding the scope of First Amendment protections made in the course of discussing vagueness issues can only be

deemed *dicta*. Moreover, the Court went out of its way to note that it was holding no more than that the “district court did not abuse its discretion in issuing its limited preliminary injunction.” *Id.* Accordingly, this panel should feel free to address the issue anew.

Plaintiffs seem to be working under the assumption that any expressive conduct that takes the form of language is entitled to absolute constitutional protection, at least to the extent that it does not directly facilitate criminal acts (*e.g.*, teaching terrorists how to build bombs). That assertion has never been accepted by the courts in this country. As Justice Black, never known to be shy in espousing broad First Amendment protections, wrote more than 50 years ago in rejecting a First Amendment challenge to an injunction forbidding union picketing:

It is true that the agreements and course of conduct here were in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech to make a course of conduct illegal merely because the conduct was initiated, evidenced, or carried out by means of language, either spoken, written, or printed.

*Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Similarly, this Court held, “The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes, including that of aiding and abetting, frequently involve the use of

speech as part of the criminal transaction.” *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982). The federal government regularly charges individuals with being accessories after the fact, in violation of 18 U.S.C. § 3, for providing advice to fleeing felons regarding how to evade capture. Such advice is no more inherently blameworthy than providing human rights training to the avowed enemies of the United States; in each instance, the speech, while innocuous in itself, thwarts the efforts of the United States to subdue criminals.

Congress has determined that international terrorism “threatens the vital interests of the United States” and that direct material support to international terrorist groups must be prohibited because *any* such support to terrorist groups facilitates their terrorism. *See* Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), P.L. 104-243, Title III, Subtitle A, § 301(a)(1) & (7), 110 Stat. 1247, *codified at* 18 U.S.C. § 2339B *note*. As the Court determined when this case was before it in 2000, donations to a terrorist organization – even donations intended to further the organization’s non-terroristic activities – can be prohibited because donated resources used to cover the costs of non-terroristic activities free up other resources and thereby permit the organization to divert those other resources to terrorism. *HLP II*, 205 F.3d at 1134. That analysis does not change when the donor chooses to express his support not by giving money

but by imparting skills (through spoken or written words) that provide the terrorist group with resources for which it has an organizational need; in both cases, the donor has provided the terrorist group with a resource that facilitates its core institutional mission: to conduct terrorism. Just as it does not matter that the donor of money has earmarked his gift for humanitarian purposes, so too it does not matter that specialized skills provided by a donor have no direct connection to terrorism. In both cases, by providing the terrorist organization with a resource for which it had a need, the donor has freed the organization from having to appropriate other assets to procure the resource – thereby permitting the organization to devote more of its assets to terrorism. Congress quite rationally determined that American national security interests would be served by cutting off all such material support.

In restricting individuals from speaking in a manner that directly facilitates terrorism, Congress has acted in a content-neutral fashion that only narrowly touches on First Amendment values. Section 2339B broadly prohibits providing material support for international terrorism organizations; it does not discriminate based on the subject matter or point-of-view of the expressive activity at issue. Moreover, it leaves Americans with ample alternative opportunities to express their views on relevant issues. For example, speech that

is unaffected by § 2339B's prohibition includes expressions of support for a terrorist organization; independent advocacy in support of the organization; and dialogue with the organization so long as communications do not take the form of "training," "expert advice or assistance," "service," or "personnel" (as those terms are defined in the statute). Under those circumstances, § 2339B should not be deemed to violate First Amendment rights. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) (rejecting First Amendment challenge, under an intermediate standard of review, to content-neutral attempts to regulate expressive conduct that has both "speech" and "nonspeech" elements).

## CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court reverse the judgment below to the extent that it invalidated a portion of § 2339B on vagueness grounds, and affirm the remainder of the judgment.

Respectfully submitted,

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Daniel J. Popeo

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Dated: April 13, 2006

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 9.0), the word count of the brief is 6,021, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

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Richard A. Samp

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13th day of April, 2006, I deposited two copies of the *amicus curiae* brief of the Washington Legal Foundation, *et al.*, in the U.S. Mail, First Class postage prepaid, addressed to the following:

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