No. 09-89

In the Supreme Court of the United States

HUMANITARIAN LAW PROJECT, ET AL.,
PETITIONERS

v.

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

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 2339B(a)(1), which prohibits the knowing provision of material support to designated foreign terrorist organizations, violates the Due Process Clause or the First Amendment insofar as it prohibits the provision of "personnel" or "expert advice or assistance" "derived from scientific [or] technical * * * knowledge," 18 U.S.C. 2339A(b)(1) and (3).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Case—Continued: Page

Constitution, statutes and rule:

Statutes and rule—Continued: Page

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OPINIONS BELOW

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

[1] References to "Pet." and "Pet. App." are to the petition and appendix filed in No. 08-1498; references to "Cross-Pet." are to the conditional cross-petition filed in No. 09-89.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2007. A petition for rehearing was denied on January 5, 2009 (Pet. App. 3a). The conditional cross-petition was filed on July 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves constitutional challenges to key provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, that are important elements of America's 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), aff'd, 205 F.3d 1130 (9th Cir. 2000), cert. denied, 532 U.S. 904 (2001). 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). Both groups have engaged in deadly terrorist activities. Pet. 4-5.

3. Cross-petitioners 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. Pet. App. 4a. They brought two separate actions, eventually consolidated in the district court, challenging the constitutionality of the material-support statute.

a. In the first action, cross-petitioners raised several constitutional challenges to the statute, including an assertion that the material-support statute impermissibly violated their First Amendment association rights. The district court rejected that claim, noting that the statute does not directly target First Amendment interests because a terrorist designation is "not founded on the political viewpoints or subject matter that the organizations promote. Rather, the designation is based on whether the organization engages in terrorist activity." *Humanitarian Law Project*, 9 F. Supp. 2d at 1191. "More importantly," the court held, the material-support statute "does not criminalize *mere* association with designated terrorist organizations" and "does not prevent

[cross-petitioners] from affiliating with or advocating on behalf of the PKK or LTTE." *Id.* at 1191-1192. Instead, it "limits the permissible *ways* in which [cross-petitioners] can associate with the PKK and LTTE, rather than punishing [their] ability to exercise their First Amendment right to associate with the PKK and LTTE altogether." *Id.* at 1192.

The district court also rejected cross-petitioners' argument that the statute violates their First Amendment speech rights. The court began by stating that it would "appl[y] the intermediate level of scrutiny" to the material-support statute because its "restrictions are content-neutral and are directed at the noncommunicative elements of [cross-petitioners'] actions." *Humanitarian Law Project*, 9 F. Supp. 2d at 1192. The statute survives that scrutiny, the court concluded, because it is within the constitutional power of the federal government to enact; it furthers an important and substantial government interest (protecting national security); it is "not directed at suppressing [cross-petitioners'] political speech or advocacy of the PKK's and LTTE's political agenda," but "aimed at precluding material support to terrorist organizations that divert funds raised for political and humanitarian resources to their terrorist activities"; and "restricts [cross-petitioners'] First Amendment freedoms no more than is essential." *Id.* at 1192-1195.

The district court, however, agreed with cross-petitioners that the term "personnel," as it was then defined in the statute, was unconstitutionally vague. *Humanitarian Law Project*, 9 F. Supp. 2d at 1203. On the basis of that holding, the court entered a preliminary injunction prohibiting the government from enforcing the term "personnel" in the material-support statute against

cross-petitioners or their members. *Id.* at 1205. 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. CV98-1971 ABC (BQRx), 2001 WL 36105333 (C.D. Cal. Oct. 2, 2001). A panel of the court of appeals affirmed that judgment in relevant part as well. *Humanitarian Law Project* v. *United States Dep't of Justice*, 352 F.3d 382 (9th Cir. 2003).

The court of appeals granted the government's petition for rehearing en banc, and Congress subsequently enacted the IRTPA amendments. The en banc court then affirmed the panel's rejection of cross-petitioners' First Amendment arguments. *Humanitarian Law Project* v. *United States Dep't of Justice*, 393 F.3d 902 (9th Cir. 2004) (en banc). It also vacated the panel's judgment and injunction and "decline[d] to reach any other issue urged by the parties." *Id.* at 903. The en banc court remanded to the district court to consider the case in light of the new statutory amendments. *Ibid.*

b. In the second action, cross-petitioners focused on the term "expert advice or assistance," arguing that it too was unconstitutional. The district court rejected the argument that the term is overbroad, explaining that the statute "is aimed at furthering a legitimate state interest," and that cross-petitioners had "failed to demonstrate" that its "application to protected speech is 'sub-

stantial' both in an absolute sense and relative to the scope of the law's plainly legitimate applications." *Humanitarian Law Project* v. *Ashcroft*, 309 F. Supp. 2d 1185, 1202-1203 (C.D. Cal. 2004). But the court agreed with cross-petitioners that the term was unconstitutionally vague. *Id.* at 1198-1201. 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. Relying on the reasoning of its earlier decision, the court held that the material-support statute is not overbroad. Pet. App. 70a. The court also rejected cross-petitioners' assertion that the term "personnel" was unconstitutionally vague as applied. *Id.* at 68a-69a. The court reasoned that as amended, the statute "sufficiently identifies the prohibited conduct such that persons of ordinary intelligence can reasonably understand and avoid such conduct." *Id.* at 69a. And the district court held that cross-petitioners had not challenged the vagueness of the material support statute insofar as it reaches "expert advice or assistance" that is "derived from scientific [or] technical * * * knowledge." *Id.* at 66a n.23.

The district court agreed with cross-petitioners, however, that the terms "training" and "service" are unconstitutionally vague, and that "expert advice or assistance" is also unconstitutionally vague insofar as it is defined to include "other specialized knowledge." Pet. App. 62a-68a. The court therefore entered an injunction barring the enforcement of the statute against cross-petitioners. *Id.* at 75a.

4. The court of appeals affirmed in relevant part. Pet. App. 1a-32a. The court agreed that the term "personnel" is not vague. It 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. The court also held that the term "expert advice or assistance," is not vague insofar as it reaches "advice or assistance derived from scientific [or] technical * * * knowledge," 18 U.S.C. 2339A(b)(3), because "the meaning of 'technical' and 'scientific' is reasonably understandable to a person of ordinary intelligence." Pet. App. 24a. In accord with the district court, however, the court of appeals concluded that "training," "service" and the "other specialized knowledge" component of "expert advice or assistance" are unconstitutionally vague. *Id.* at 20a-25a.

Finally, the court of appeals agreed with the district court that the material-support statute is not overbroad. "[B]ecause the statute is not aimed primarily at speech," the court observed, "an overbreadth challenge is more difficult to show." Pet. App. 28a. Moreover, the statute's "ban on provision of 'material support or resources' to designated foreign terrorist organizations undoubtably has many legitimate applications," and can "legitimately be applied to criminalize facilitation of terrorism in the form of providing foreign terrorist organizations with income, weapons, or expertise in constructing ex-

plosive devices." *Ibid.* "[A]lthough [cross-petitioners] may be able to identify particular instances of protected speech that may fall within the statute," the court continued, "those instances are not substantial when compared to the legitimate applications of [S]ection 2339B(a)." *Id.* at 29a. Accordingly, the court held that the statute is not overbroad. *Ibid.*

ARGUMENT

Cross-petitioners renew their claims (Cross-Pet. 6-15) that the material-support statute is unconstitutionally vague and violates the First Amendment to the extent that it prohibits the provision of "personnel" or "expert advice or assistance" "derived from scientific [or] technical * * * knowledge" to designated foreign terrorist organizations. 18 U.S.C. 2339A(b)(1) and (3). The court of appeals correctly rejected those claims, and that aspect of its decision does not conflict with any decision of this Court or any other court of appeals. Although the government has petitioned for a writ of certiorari to review other aspects of the decision below, the issues raised in the cross-petition are not so closely related to the issues in the government's petition that it is necessary to grant both petitions in order to resolve the case. Further review is not warranted.

1. The question presented in the cross-petition involves only the application of established principles of First Amendment law and the due-process vagueness doctrine. While a lower court's invalidation of part of an Act of Congress ordinarily warrants this Court's review, see Pet. 10, the application of settled law to uphold a federal statute does not normally require this Court's attention. That is precisely the case here. Cross-petitioners do not contend that the decision below

conflicts with any decision of this Court or any other court of appeals. To the contrary, the arguments advanced by cross-petitioners have been resoundingly and repeatedly rejected by lower courts.

Eleven judges of the Ninth Circuit, sitting en banc, unanimously rejected cross-petitioners' First Amendment speech and association arguments. See *Humanitarian Law Project* v. *United States Dep't of Justice*, 393 F.3d 902 (2004) (en banc). Likewise, the Fourth Circuit, also sitting en banc, has rejected exactly the same claims. In *United States* v. *Hammoud*, 381 F.3d 316 (2004) (en banc), vacated on other grounds, 543 U.S. 1097, reinstated in relevant part, 405 F.3d 1034 (2005), the court held that the material-support statute is a "facially neutral statute [that] restricts some expressive conduct," and that it is therefore subject to intermediate scrutiny, which it satisfies. *Id.* at 329. The court specifically rejected the same First Amendment right-to-associate claim made here, and it concluded that the statute is not overbroad. *Id.* at 329-330.[2] The District of Columbia and Seventh Circuits have expressly rejected similar claims. *People's Mojahedin Org. of Iran* v. *Department of State*, 327 F.3d 1238, 1244-1245 (D.C. Cir. 2003) (material-support statute does not violate First Amendment speech and association rights); *Boim* v. *Quranic Literacy Inst.*, 291 F.3d 1000, 1025-1027 (7th Cir. 2002) (same); *Boim* v. *Holy Land Found.*, 549 F.3d 685, 700 (7th Cir. 2008) (en banc) ("If the financier knew that the organization to which it was giving money engaged in terrorism, penalizing him would not violate the

[2] The sole dissenter on that issue in *Hammoud* relied on arguments not advanced by cross-petitioners here and on an analysis of the statute as it read before it was amended by IRTPA. 381 F.3d at 371 (Gregory, J., dissenting).

First Amendment. Otherwise someone who during World War II gave money to the government of Nazi Germany solely in order to support its anti-smoking campaign could not have been punished for supporting a foreign enemy."), petition for cert. pending, No. 08-1441 (filed May 1, 2009).

Cross-petitioners' various challenges to the material-support statute have likewise been overwhelmingly rejected by the federal district courts. See, *e.g.*, *United States* v. *Taleb-Jedi*, 566 F. Supp. 2d 157, 180-184 (E.D.N.Y. 2008) (holding that "personnel" is not vague and rejecting overbreadth challenge); *United States* v. *Warsame*, 537 F. Supp. 2d 1005, 1014-1018 (D. Minn. 2008) (holding that "personnel" not vague and rejecting First Amendment right-to-associate and overbreadth claims); *United States* v. *Shah*, 474 F. Supp. 2d 492, 497 (S.D.N.Y. 2007) (holding that "personnel" and "expert advice or assistance" are not vague); *United States* v. *Awan*, 459 F. Supp. 2d 167, 177-181 (E.D.N.Y. 2006) (holding that "personnel" is not vague and rejecting overbreadth challenge); *United States* v. *Assi*, 414 F. Supp. 2d 707, 712-717 (E.D. Mich. 2006) (rejecting First Amendment right-to-associate and overbreadth claims); *United States* v. *Marzook*, 383 F. Supp. 2d 1056, 1063-1068 (N.D. Ill. 2005) (holding that "personnel" is not vague and rejecting First Amendment right-to-associate claim). The absence of conflict among the lower courts obviates the need for this Court's consideration of the claims in the cross-petition.

2. Cross-petitioners suggest (Cross-Pet. 6) that the question presented in the cross-petition is intertwined with the question presented in the government's petition in No. 08-1498. That is incorrect. As to the First Amendment speech, association, and overbreadth

arguments, those issues are plainly distinct from the question whether the statutory terms are void for vagueness under the Due Process Clause. Indeed, one of the principal errors below—addressed in the government's petition (at 18-19)—was the lower court's failure to separate the distinct issues of vagueness and overbreadth. That the court of appeals confused the issues does not mean that they are, in fact, so related that this Court's review of one issue should necessarily call for review of the other. The government's petition does discuss the First Amendment speech and overbreadth questions, Pet. 19-23, but only because the lower court's confusion necessitated a careful parsing of the differences between those issues and the vagueness question, and why, in any event, all such claims fail on the merits. The First Amendment questions are not, however, independently worthy of this Court's review.

As for the cross-petition's vagueness arguments, those too are entirely separate from the vagueness questions raised in the government's petition. Cross-petitioners argue that the term "personnel" is unconstitutionally vague. The statute provides:

> 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). The issues in the government's petition, however, involve wholly different statutory terms: "training," defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and "expert advice or assistance" defined, in relevant part, as "advice or assistance derived from scientific [or] technical * * * knowledge." 18 U.S.C. 2339A(b)(2) and (3). Whether those statutory definitions are or are not readily understood by a person of ordinary intelligence, see *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972), has nothing to do with whether the an ordinary person would or would not understand the statute's specification of what "personnel" means. The point is illustrated by cross-petitioners themselves, whose brief in opposition to the government's petition (08-1498 Br. in Opp. 17-19) attempts to demonstrate the vagueness of "training" by discussing whether the term includes teaching geography, but without mentioning "personnel" or the arguments raised in the cross-petition.

Cross-petitioners also argue that "expert advice or assistance" is vague insofar as it is defined to include "advice or assistance derived from scientific [or] technical * * * knowledge." 18 U.S.C. 2339A(b)(3). There is a somewhat closer relationship between that claim and the question presented in the government's petition—whether "expert advice or assistance" is vague insofar as it includes "advice or assistance derived from * * * other specialized knowledge." For example, the terms "scientific" and "technical" inform the meaning of the term "other specialized knowledge." Pet. 16-17. But this Court need not grant review of the former terms in

order to consider the latter term. As discussed below, see pp. 15-16, *infra*, "scientific" and "technical" are plainly not vague, and this Court can assume as much and assess the validity of "other specialized knowledge" accordingly without granting the cross-petition.[3]

3. The court of appeals correctly rejected the claims asserted in the cross-petition.

a. "Personnel," as defined in 18 U.S.C. 2339B(h), is not unconstitutionally vague. To be convicted under that provision, a defendant must knowingly provide one or more person "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). Furthermore, the statute specifies 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." *Ibid.* A person of ordinary intelligence could easily understand what the statute prohibits.

Cross-petitioners argue (Cross-Pet. 12) that "direction or control" could "mean many things," but even if there were some cases presenting a close question of whether a person is acting independently, that would not mean that the statute is vague. Instead, the ques-

[3] Alternatively, if the Court believes that its analysis of the "other specialized knowledge" component of the "expert advice or assistance" definition might shed light on the appropriate analysis of the "scientific [or] technical * * * knowledge" component of the definition, it would be appropriate—particularly in light of the fact that there has been no disagreement on the question among the various courts of appeals—to hold the cross-petition pending resolution of the merits of the government's petition. At that time, the Court could determine whether to deny the cross-petition or to grant, vacate, and remand to the court of appeals.

tion whether a defendant has acted independently is a factual issue to be resolved by the jury in a particular case. See *United States* v. *Williams*, 128 S. Ct. 1830, 1846 (2008) ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."). That is why the hypotheticals raised by cross-petitioners (Cross-Pet. 13) are difficult to answer in the abstract: whether a defendant has acted independently is a fact-dependent and context-specific question, defying cross-petitioners' attempt to boil the answer down to the limited facts presented in their hypotheticals. But the fact-sensitive nature of the inquiry in contexts where the call is a close one does not make the statute impermissibly vague.

Similarly, the statute's prohibition on providing "expert advice or assistance" that is "derived from scientific [or] technical * * * knowledge" is readily understandable by a person of ordinary intelligence. That definition is drawn from Federal Rule of Evidence 702, a standard with a readily understood meaning applied routinely by the courts. See *Daubert* v. *Merrell Dow Pharms. Inc.*, 509 U.S. 579, 589-590 (1993) (noting ordinary definitions of terms "scientific" and "knowledge"). In *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999), moreover, the Court explained that the category of scientific, technical, and other specialized knowledge—as a whole—refers generally to "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. A person of ordinary intelligence

will in most (if not all) instances know whether particular information is or is not common knowledge among the public.

Cross-petitioners' speculations (Cross-Pet. 7-9) about whether high school algebra is or is not "technical" knowledge, whether economics and psychology are "scientific" subjects, or whether the statute would bar giving terrorist groups expert advice on cooking and cleaning are all beside the point. Cross-petitioners allege that the statute is vague as applied to their desired conduct, and that is the only issue that was reached by the court below. Cross-Pet. 6; Pet. App. 22a n.6. Accordingly, whether the statute is vague as to other conduct is irrelevant. See *Village of Hoffman Estates* v. *Flipside Hoffman Estates, Inc*, 455 U.S. 489, 495 (1982) ("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.").

Cross-petitioners also argue (Cross-Pet. 9) that "[v]irtually all knowledge" derives from scientific or technical knowledge, rendering the statute "fundamentally incoherent." That contention, if correct, would mean that Rule 702 itself is hopelessly vague, which, of course, is not the case. Moreover, their argument (*ibid.*) that the statute "can probably be said in some sense" to bear the meaning they suggest does not mean it must be so construed. 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.") (quoting *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). To the contrary, by making the statute cover all of human knowledge, petitioners' read-

ing would make the words "scientific, technical, or other specialized knowledge" superfluous. But see *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)).

b. Cross-petitioner's First Amendment arguments similarly lack merit. All of their First Amendment arguments—whether based on free speech, the right to association, or overbreadth—begin with the premise that the material-support statute involves "[c]ontent-based discrimination" that "triggers strict scrutiny." Cross-Pet. 10. Every court to have addressed the issue, including the courts below, has correctly rejected that premise. See pp. 10-11, *supra*. The material-support statute is not a content-based restriction. "The principal inquiry in determining content neutrality, in speech cases generally * * * is whether the government has adopted a regulation of speech *because of disagreement with the message it conveys*." *Hill* v. *Colorado*, 530 U.S. 703, 719 (2000) (emphasis added) (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)). The material-support statute, by contrast, is not aimed at speech or adopted because of a disagreement with the message of terrorist groups or their donors. Not does it prohibit the mere act of associating with a designated group. Instead, it is aimed at conduct—namely, the provision of material support or resources to designated terrorist organizations whose activities pose a risk to national security. Under the statute, individuals may express their solidarity with any designated group, and they may express virulent messages of support for the group's terrorist

activity. That ability to speak removes any possibility that the government is targeting speech or viewpoint, instead of action. Because the statute is not a content-based restriction, strict scrutiny is inapplicable, and the law must be analyzed under the intermediate scrutiny of *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

As every court to have faced the issue has concluded, the material-support statute easily survives intermediate scrutiny. The statute promotes an important government interest and is within Congress's power to enact; it is aimed at stopping aid to terrorists, rather than at suppressing free expression or association rights; and it is reasonably tailored, especially considering the wide latitude afforded to the government in areas such as this one that touch upon foreign policy considerations. Accordingly, it does not violate cross-petitioners' First Amendment free speech or association rights. And because the statute does not violate those rights, it follows that it is not overbroad either—a conclusion, once again, agreed upon by every court to consider the question.

c. In passing, cross-petitioners suggest (Cross-Pet. 11 & n.10) that the material-support statute imposes "guilt by association" in violation of the Due Process Clause because it lacks a specific-intent requirement as to each of its elements. The court below correctly rejected that claim. Pet. App. 13a-19a. Not every criminal statute requires specific intent throughout the statute. Instead, "[t]he presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter* v. *United States*, 530 U.S. 255, 269 (2000) (quoting *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994)). Indeed, in many cases, "a general intent requirement suffices" to achieve

that purpose. *Ibid.* The statute at issue here forbids direct support given to designated foreign terrorist organizations, which are so designated because they engage in terrorist activity threatening United States nationals or the national security of this country. 8 U.S.C. 1189(a)(1). And it expressly prohibits such conduct only where a defendant *knowingly* gives support to a group designated as a foreign terrorist organization, or knows that the group engages in terrorism. 18 U.S.C. 2339B(a)(1). A knowledge requirement is a very high *mens rea* standard. Moreover, there can be no serious argument that providing direct support to known or designated terrorists can be described as "otherwise innocent conduct" that requires Congress to impose a higher specific-intent requirement before it may punish such acts.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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