Nos. 08-1498 & 09-89

IN THE
Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,

Petitioners,

v.

HUMANITARIAN LAW PROJECT, *et al.*,

Respondents.

HUMANITARIAN LAW PROJECT, *et al.*,

Cross-Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR ACADEMIC RESEARCHERS AND THE CITIZEN MEDIA LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are academic researchers and a professional association representing the interests of journalists who work in fields requiring professional contact with a wide variety of foreign groups, some of which have been or may be designated as foreign terrorist organizations by the United States government pursuant to 8 U.S.C. § 1189(a)(1). Sustained verbal communication with, or concerning, such groups is often essential to the successful performance of these researchers' and journalists' professional responsibilities, which in turn enhances public understanding on issues of vital international importance. If this Court endorses the government's position concerning the broad reach and constitutionality of 18 U.S.C. § 2339B, which criminalizes the provision of "material support or resources" to proscribed groups, these individuals will be forced to carry out their professional activities in a climate of fear and uncertainty because, given the statute's vague and amorphous prohibitions, it is impossible to predict whether a given well-intentioned communication might be construed by the government as falling within the statutory prohibition.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to its preparation or submission.

Amici urge the Court to provide effective and constitutionally adequate protection for speakers whose professional duties require them to communicate with, or about, proscribed groups for purely lawful purposes. Such protection could be provided by construing the ban on "material support or resources" to apply only to communications that are (1) intended to advance the proscribed groups' unlawful activities; and (2) likely to have such an effect. If the Court finds that the statute's text resists such a saving construction, it should invalidate the statute's application to the speech at issue in this case as violative of the First and Fifth Amendments to the United States Constitution.

Amici include the following:

Lori Allen is Lecturer in Contemporary Middle Eastern Politics and Society in the Department of Middle Eastern Studies, University of Cambridge, UK. She is currently an Academy Scholar at the Harvard Academy for International and Area Studies, where she is writing a book about human rights and the politics of suffering in Palestinian nationalism entitled *Victims of Politics: Human Rights Contradictions and the Paradox of Palestine.* In addition to a number of articles published in *Middle East Report*, recent publications include articles in *Cultural Anthropology*, *American Ethnologist*, and *Arab Studies Journal*. Her research has been supported by grants and fellowships from Brown University, the United States Institute of Peace, the Harry Frank Guggenheim Foundation, the Woodrow Wilson National Fellowship

Foundation, the Social Science Research Council, and the British Academy, among others.

Danny Hoffman is an Assistant Professor of Anthropology at the University of Washington in Seattle. Dr. Hoffman's ethnographic research focuses on youth and contemporary militia movements in Sierra Leone and Liberia. His work has been published in European and American journals devoted to African Studies, Anthropology, Cultural Studies and Political Science. In 2006, Dr. Hoffman served as an expert witness for the United Nations war crimes tribunal in Sierra Leone following fieldwork with that country's Civil Defense Forces militia.

Louis Kriesberg is Professor Emeritus of Sociology, Maxwell Professor Emeritus of Social Conflict Studies, and founding director of the Program on the Analysis and Resolution of Conflicts (1986–1994), all at Syracuse University. In addition to over 125 book chapters and articles, his published books include: *Conflict Transformation and Peacebuilding* (co-ed., 2009); *Constructive Conflicts* (1998, 2003, 2007); *International Conflict Resolution* (1992); *Timing the De-Escalation of International Conflicts* (co-ed., 1991); *Intractable Conflicts and Their Transformation* (co-ed., 1989); *Social Conflicts* (1973, 1982); *Social Inequality* (1979); *Mothers in Poverty* (1970); *Social Processes in International Relations* (ed., 1968); and *Research in Social Movements, Conflicts and Change* (ed., Vols. 1-14, 1978-1992). He was President of the Society for the Study of Social Problems (1983–1984), and he

lectures, consults, and provides training regarding conflict resolution, security issues, and peace studies.

Carolyn Nordstrom is Professor of Anthropology at the University of Notre Dame. Her principle areas of interest are political violence and peace, transnational extra-legal economies, and globalization. She has conducted extensive in-site fieldwork in war zones worldwide, with long-term interests in Southern Africa and South Asia. Her books include: *Global Outlaws: Crime, Money, and Power in the Contemporary World* (2007)*; Shadows of War: Violence, Power and International Profiteering in the 21st Century* (2004); *A Different Kind of War Story* (1997)*;* and the edited volumes: *Fieldwork Under Fire: Contemporary Stories of Violence and Survival* (1996)*;* and *The Paths to Domination, Resistance, and Terror* (1992). She has authored dozens of scholarly articles, won several teaching awards, and has recently been awarded John D. and Catherine T. MacArthur and John Simon Guggenheim Fellowships.

Mary Ellen O'Connell holds the Robert and Marion Short Chair in Law and is Research Professor of International Dispute Resolution—Kroc Institute for Peace Studies at the University of Notre Dame. Professor O'Connell chairs the Use of Force Committee of the International Law Association. She came to Notre Dame from The Ohio State University, where she held a joint appointment in the law school and the Mershon Center for International Security Studies. She has also taught

for the United States Department of Defense at the George C. Marshall European Center for Security Studies in Garmisch-Partenkirchen, Germany and the Johns Hopkins University Nitze School for Advanced International Studies in Bologna, Italy. She is the author of, among other works, *International Law and the Use of Force, Cases and Materials* (2d ed. 2009); *The Power and Purpose of International Law* (2008); and *Redefining Sovereignty: The Use of Force After the Cold War* (with M. Bothe and N. Ronzitti, 2005).

William Reno is an Associate Professor of Political Science at Northwestern University. He studies the organization and behavior of insurgent groups in Sub-Saharan Africa, and has conducted recent field research in Sudan and Somalia. He is the author of the books *Corruption and State Politics in Sierra Leone* (1995) and *Warlord Politics and African States* (1999). In addition, he is the author of multiple articles and book chapters on the subject of collapsing states and warfare in post-state societies.

Robert A. Rubinstein is Professor of Anthropology and International Relations at the Maxwell School of Syracuse University, where from 1994-2005 he directed the Program on the Analysis and Resolution of Conflicts. His research focuses on the dynamics of peacekeeping, stability operations, post-conflict reconstruction, and conflict management. He is the author of *Peacekeeping Under Fire: Culture and Intervention* (2008), and co-editor of the collections *The Social Dynamics of Peace and Conflict: Culture in International Security* (1988) and *Peace and War:*

Cross-Cultural Perspectives (1986). In addition, he has published 100 journal articles and book chapters, and has authored or edited eight books. His work has been supported by numerous foundations, including the Ford Foundation, National Science Foundation, the John and Flora Hewlett Foundation, the United States Institute of Peace, and the Wenner-Gren Foundation for Anthropological Research.

Robert D. Sloane is Associate Professor of Law at the Boston University School of Law. His current research focuses on the laws of war and the use and limits of criminal law concepts in international law. He has published in the fields of public international law, human rights, international criminal law, asylum law, and international arbitration. As a practitioner, he worked for the International Committee of Lawyers for Tibet (now known as Tibet Justice Center), in which capacity he led fact-finding missions to Nepal, India, and Tibet, wrote submissions for the U.N. Commission on Human Rights and human rights treaty bodies, represented asylum seekers, and published several reports and law journal articles on human rights.

The Citizen Media Law Project ("CMLP") provides legal assistance, education, and resources for individuals and organizations involved in online and citizen media. CMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development; and the Center for Citizen Media, an initiative to enhance and expand grassroots media.

CMLP is an unincorporated association hosted at Harvard Law School, a non-profit educational institution. CMLP has previously appeared as *amicus curiae* in several cases concerning legal issues of importance to the media.

INTRODUCTION AND SUMMARY OF ARGUMENT

The world has become increasingly and irreversibly globalized. In nearly every aspect of public life—our environment, our economy, our communications, our security—actions and events in far-flung places may have significant impact on the lives of Americans, and *vice versa*. A crisis in Wall Street banks spurs precipitous drops in European and Asian financial markets and bankruptcy in Iceland. Hatred and incitement in Afghanistan leads to murderous attacks in New York. The razing of South American rain forests and the industrialization of developing nations combine with the West's own pollution to increase carbon emissions and lead to ever more devastating hurricane seasons on the American Gulf Coast. Deterioration of nuclear security in the former Soviet Union raises concerns within this country over nuclear proliferation and bombs in the hands of non-state actors.

In the face of these varied and daunting transnational challenges, it has never been more important for the members of our self-governing society to have access to information about the events, entities, and persons that are shaping those

challenges. Only a well-informed public can engage in reasoned debates about foreign relations, national security policy, climate change legislation, or financial regulation. This means learning not only about the views and actions of foreign leaders, but also about those of their opponents—whether those opponents are the youth of Iran pressing for a more open society, or extremist religious fanatics pressing for a more oppressive one.

Academic researchers and journalists play a crucial role in the collection, analysis, and dissemination of this vital information. Only with the facts and perspectives that their work provides can we understand the forces at play in remote and unfamiliar places. In providing this information, they not only enrich public discourse; they facilitate the development of more effective national policy, foreign policy, and counterterrorism efforts. They must therefore be permitted to travel, to interact responsibly with people from all sectors of society, and to report freely on what they discover without the specter of criminal prosecution hanging over their heads.

The outcome of this case will affect the ability of researchers and journalists to do their vital work. In furtherance of their professional duties, *Amici* and their colleagues must communicate with or about groups that are or may become designated foreign terrorist organizations.[2] Absent a narrowing construction, the statute provides insufficient clarity

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[2] In the case of organizational *Amicus*, the communication is on the part of the organization's members and beneficiaries.

for these individuals to ascertain with confidence whether a given communication could be construed as falling within the statute's prohibition. If this Court upholds the vague and extremely broad terms of the statute, many researchers and journalists will feel compelled to err on the side of caution, restricting their lawful communications and diluting the public discourse. Moreover, significant potential exists for the government to exploit the statute's vagueness to target disfavored scholarship or reporting. This combined risk of self-censorship and selective application of the statute cannot be squared with the dictates of the First and Fifth Amendments to the U.S. Constitution.

Even aside from the statute's unconstitutional vagueness, applying it to pure speech that has neither the purpose nor likely effect of furthering a designated terrorist group's unlawful ends would run afoul of the First and Fifth Amendments. This Court has acknowledged that the government may not curtail pure speech unless there is a close causal nexus between the speech and an extremely serious harm the government is empowered to prevent. No plausible nexus has been posited between pure speech, of the kind in which Respondents/Cross-Petitioners and *Amici* engage, and the ability of terrorist groups to do harm. Moreover, where an individual associates with a group that engages in both lawful and unlawful activities, such association cannot be punished absent a specific intent on the part of the individual to further the group's unlawful aims. A contrary holding would offend the First and Fifth Amendments and threaten the very basis of *Amici*'s academic and journalistic pursuits.

Accordingly, *Amici* urge the Court to resolve the constitutional infirmities of the statute through a narrowing construction that allows speech to be penalized only where it has the purpose and likely effect of furthering the illegal activities of designated terrorist groups. The lower courts' assessment that such a narrowing construction is unnecessary was based on a misreading of *Scales v. United States*, 367 U.S. 203 (1961), which in fact provides strong support for such an approach here. If such a narrowing construction is deemed impossible, the Court should declare the statute unconstitutional as applied to speech that lacks the purpose and likely effect of advancing a proscribed group's unlawful ends.

ARGUMENT

I. THE MATERIAL SUPPORT STATUTE IS UNCONSTITUTIONALLY VAGUE AND COULD CHILL PROTECTED SPEECH

Respondents/Cross-Petitioners challenge several provisions of the material support statute as being unconstitutionally vague, while the United States argues that these provisions provide tolerably fair notice of the statute's scope. The courts below split the difference, holding that certain terms give fair notice, and certain terms do not. Parsing each challenged prohibited category and sub-category, the courts distinguished particularly amorphous categories like "service," "training," and "expert advice" based on "specialized knowledge" from marginally less amorphous categories like

"personnel" and "expert advice" based on "scientific" or "technical" knowledge, and enjoined the United States from enforcing the more amorphous categories against Respondents'/Cross-Petitioners' proposed speech. *See Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 927-31 (9th Cir. 2009).

With respect, however, the lower courts did not sufficiently heed their own exhortation regarding how First Amendment considerations should affect the void-for-vagueness analysis. When, as here, a statute may touch on protected speech,[3] it must do more than "clearly delineate the conduct [it] proscribe[s]," *Humanitarian Law Project*, 552 F.3d at 928; it must do so "with narrow specificity." *Foti v. City of Menlo Park*, 146 F.3d 629, 638-39 (9th Cir. 1998) (citing *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)). The purpose of this heightened specificity requirement is twofold: (1) to avoid the risk of widespread self-censorship caused by uncertainty and fear; and (2) to prevent the United States from exercising virtually unfettered discretion over which speech should be prosecuted. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967) (self-censorship); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (same); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (prosecutorial discretion); *cf. City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750,

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[3] The First Amendment vagueness doctrine is triggered whenever "a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment." *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

757 (1988) (parallel dangers in standardless licensing scheme).

These risks clearly are present here. As a threshold matter, scholars in many disciplines must be able to communicate with the subjects of their study in order to perform responsible research. Anthropology is a primary example. The discipline of anthropology is aimed at illuminating other cultures, ranging from small, geographically distinct units (such as a particular tribe) to broader cultural phenomena (such as war itself). *See generally* Serena Nanda & Richard L. Warms, *Cultural Anthropology* (9th ed. 2006). The primary vehicle for achieving this aim is ethnographic research, or fieldwork involving the collection of primary data. And while there are many tools that may be involved in such research, one of the most important tools is direct personal observation of—and extended interactive interviews with—members of the culture being studied. *See* H. Russell Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches* 342, 347, 368-69 (4th ed. 2006); Michael Genzuk, *A Synthesis of Ethnographic Research* (Occasional Paper Series, Center for Multilingual, Multicultural Research, Rossier School of Education, University of Southern California, 2003), *available at* http://www-rcf.usc.edu/~genzuk/Ethnographic_Research.html. It is, indeed, a longstanding and fundamental tenet of anthropology that direct, sustained contact is vital to gaining a full and accurate understanding of the culture in question. *See* Clifford Geertz, *The Interpretation of Cultures* 22 (1973)

("Anthropologists don't study villages . . . they study *in* villages.") (emphasis in original).

Journalists similarly must be able to communicate with the persons and groups about whom they report. The competent, ethical practice of journalism requires reporters to make every effort to ensure that "news content is accurate, free from bias and in context, and that all sides are presented fairly." American Society of News Editors' Statement of Principles, Art. IV. This means making efforts to "[t]alk to sources on all sides of a deal, dispute, negotiation or conflict." Reuters, Handbook of Journalism 3 (2008), *available at* http://handbook.reuters.com/extensions/docs/pdf/handbookofjournalism.pdf. When a story paints an individual in a negative light or deals with controversial issues, this principle is especially important. *See, e.g.*, Hearst Newspapers: Statement of Professional Principles ("We must make a particular effort to seek comment from those portrayed in a critical manner."); Society of Professional Journalists, Code of Ethics (1996) ("Journalists should . . . [d]iligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing."); Associated Press Managing Editors, Statement of Ethical Principles ("The newspaper should strive for impartial treatment of issues and dispassionate handling of controversial subjects.").

Accordingly, in order to study or report competently on terrorism or terrorist groups, academic researchers and journalists must be able to

communicate with those groups or their members. There can be no serious question regarding the importance of this work. Among other things, a rich understanding of the phenomenon of modern terrorism is vital to our own government's ability to develop effective responses to the terrorist threat. If the Court were to uphold the statutory terms at issue in this case, however, *Amici* would be left to guess whether activities like the following could conceivably fall within the statute's ambit:

- *Amici* include an anthropologist who studies peacekeeping missions and the effect of both internal and external culture on the missions' success. In order to determine how local culture affects any given peacekeeping mission, this researcher engages in in-depth interviews and "participant observation" of the local population, ranging from those who support the mission to those who may engage in armed opposition as part of an organized insurgency. In communicating his findings through scholarly writings, he routinely presents the views of the people and groups whom he has studied. This individual's work has been of direct benefit to the U.S. government and he has been invited to the U.S. Army War College as a "distinguished visitor." Yet if the armed insurgents whom he studies were to be classified as foreign terrorist organizations by the U.S. government, could his extended interactions with them and his presentation of their views be construed by the government as the provision of a "service" or "personnel"?

- One major U.S. daily newspaper published a series of articles about jihadists, aiming to "examine how they are working to expand the reach of radical Islam." *Inside the Jihad: Coverage by Michael Moss and Sauad Mekhennet*, N.Y. Times, *available at* http://topics.nytimes.com/topics/news/international/series/insidethejihad/index.html. An article in the series focused on a foundering militant group, currently designated by the U.S. government as a foreign terrorist organization, that reached out to Al Qaeda for support and resources. *See* Souad Mekhennet, Michael Moss, Eric Schmitt, Elaine Sciolino, & Margot Williams, *Ragtag Insurgency Gains a Lifeline From Al Qaeda*, N.Y. Times, July 1, 2008, at A1. This reporting required significant contact with the militants, and it included stories from inside the organization regarding members' motivations, activities, and political views. The online version of the story included a link to audio clips from an interview with the militant group's leader, Abdelmalek Droukdal. Could the government deem the airing of this interview, and the presentation of the group's views, to be a "service" provided to the organization?

- *Amici* include an anthropologist who does intensive field research in conflict zones. He has studied the Civil Defense Forces (CDF) and the Revolutionary United Front (RUF) in Sierra Leone and Liberians United for Reconciliation and Democracy (LURD) in Liberia, among other groups. As an integral part of his research, he has spent extended periods of time with the

combatants he has studied, including living with them on occasion in order to maximize his observational opportunities. His work has resulted in important insights on why some groups target civilians for attack, and he served as an expert witness for the United Nations at the Special Court in Sierra Leone. Yet the groups of greatest interest to his work include those that arguably meet the government's definition of foreign terrorist organizations and are likely candidates for designation under 8 U.S.C. § 1189(a)(1). Could he run afoul of the "personnel" or "service" provisions of the material support statute by virtue of his extended and close interactions with them?

- Media associations regularly organize international newsgathering trips to countries of interest. These trips permit the associations' members to extend the reach of their international coverage beyond what otherwise would be possible, thus enriching their reporting to the public. The association arranges a series of interview sessions in the destination country, including interviews with the nation's leadership. Trips to Cuba and Venezuela have included meetings or press conferences with Fidel Castro and Hugo Chavez, respectively. Should such an excursion be arranged in Lebanon, and should the participants interview, write about, and quote members of Hezbollah, would they be exposing themselves to criminal liability for knowingly providing a "service" to Hezbollah?

- *Amici* include an anthropologist who developed one of the first contemporary ethnographies of war. She spent years on the front lines of various conflicts, conducting extensive interviews with members of groups such as the LTTE (the "Tamil Tigers"), the Irish Republican Army (IRA), and the Palestine Liberation Organization (PLO). Her research has enabled her to predict accurately the course of a wide range of contemporary armed conflicts—an ability of obvious and significant public value. But this ability is the result of close and continuous interaction with groups that include designated foreign terrorist organizations, and she is deeply concerned about the possible effect of the material support statute on her future work.

- Media outlets regularly post or broadcast documents and videos produced and distributed by designated foreign terrorist organizations. *See, e.g.*, Andrea Elliott, *A Call to Jihad Answered in America*, N.Y. Times, July 12, 2009, at A1 (link to propaganda film by a Somali terror sect on online version of article), *available at* http://www.nytimes.com/2009/07/12/us/12somalis.html; *'New' al Qaeda Tape May Contain Old Clip of bin Laden*, CNN.com, July 15, 2007 (story about Osama bin Laden videotape includes link to the video), *available at* http://www.cnn.com/2007/WORLD/meast/07/14/bin.laden.video/index.html#cnnSTCVideo. U.S. newspapers also occasionally publish opinion pieces of informational value to the public written by representatives of designated foreign terrorist organizations. *See, e.g.*, Mousa Abu Marzook,

Hamas Speaks, L.A. Times, Jan. 6, 2009, at A15 (Deputy of the Political Bureau of Hamas); Mahmoud al-Zahar, *No Peace Without Hamas*, Wash. Post, Apr. 17, 2008, at A23 (a founder of Hamas); Ahmed Yousef, *What Hamas Wants*, N.Y. Times, June 20, 2007, at A19 (political adviser to Prime Minister Ismail Haniya); Ahmed Yousef, *Engage With Hamas; We Earned Our Support*, Wash. Post, June 20, 2007, at A19 (same). In light of the fact that the government has successfully prosecuted at least one Al Qaeda member under the material support statute for creating and disseminating a propagandist videotape, *see* Press Release, U.S. Dep't of Defense, Detainee Convicted of Terrorism Charge At Military Commission Trial (Nov. 3, 2008), *available* at http://www.defenselink.mil/releases/release.aspx?releaseid=12329, can journalists be confident that they may broadcast clips of such videos or otherwise provide a forum in which terrorist groups air their views without risking criminal prosecution?

- *Amici* include an anthropologist who studies the manner in which ordinary Palestinians respond to the pervasive, ongoing violence that surrounds them. As part of her research, she has walked alongside marchers in so-called "martyr funerals," public events honoring those who have died in the Israeli-Palestinian conflict, including suicide bombers. By walking alongside the marchers, rather than simply observing from afar, she is able to engage in frank conversation with the participants and to overhear their conversations with one another. As a result, she

> has learned that there is a deep wave of cynicism and apathy about the conflict among the general population. This information is of clear value in shaping our country's own approach to the conflict. Yet to the extent some of these funerals may be organized by Hamas or other designated terrorist groups, could the government decide that she is providing "personnel" by virtue of walking alongside the marchers?

The limitations that Congress has added to the statute do little to allay the concerns of the individuals or groups engaged in these or similar activities because those limitations provide inadequate assistance in determining the statute's scope. The knowledge requirement added by Congress[4] sheds light on the statute's substantive terms, such as "service," only if it is interpreted to require a specific intent to further the terrorist organization's illegal aims (*see* Part III, *infra*). As for Congress's instruction that the statute should not be construed to apply to speech protected by the

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[4] This provision states:

> 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).

18 U.S.C. § 2339B(a)(1).

First Amendment,[5] this provision is scant solace to a prospective speaker who is uncertain about whether his or her speech falls outside the not-always-obvious parameters of First Amendment protection. These parameters are indeed contested by the parties in this case, each of which is represented by learned counsel. Academic researchers and journalists who communicate with or about foreign terrorist organizations cannot be expected to enjoy any greater certainty.

Nor do Congress's definitions of the statutory terms at issue provide much assistance. When it comes to support in the form of "personnel," for example, Congress has specified that this provision applies to those who work "under th[e] terrorist organization's direction or control or [who] organize, manage, supervise, or otherwise direct the operation of that organization," and it has exempted speakers operating "entirely independently" from the organization.[6] But the specification is itself

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[5] The proviso states: "Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States." 18 U.S.C. § 2339B(i).

[6] The provision states in full:

> 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

hopelessly vague, especially when applied to scholars and reporters engaged in research and reporting that entail substantial interaction with members of a proscribed group. Does a newspaper act "entirely independently" when it performs the work of editing an op-ed submitted by a terrorist leader, if the leader retains ultimate control over the content of the piece? Does a researcher act "entirely independently" when she attends an event organized by a terrorist group in order to observe and interview its members, given that the event itself takes place under the group's "direction or control"? Moreover, since the "entirely independently" limitation applies only to material support in the form of "personnel," any researcher or journalist who acts "entirely independently" when providing anything that could be deemed a "service" or "expert advice or assistance"—including any "specialized knowledge"—still risks criminal prosecution.

The government's construction of the term "service" is even less illuminating. In the briefing for this case, the government has pointed to the definitions of "service" contained in Webster's Dictionary: "[A]n act done for the benefit or at the command of another" or "useful labor that does not produce a tangible commodity." Pet. at 17 (citing *Webster's Third New International Dictionary of the English Language* 2075 (1993)). These definitions raise more questions than answers. If the leader of a

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> 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).

terrorist group dictates the time and place at which a journalist can meet him for an interview, is the act of showing up at the appointed time and place "an act done . . . at the command of another"? If a cultural anthropologist writes an article about a lesser-known terrorist group and thus raises the group's profile, could the act of writing the article constitute "useful labor"?

As the above examples show, it is impossible for prospective speakers to know whether a broad range of innocent communications with, or concerning, a designated group will be deemed the provision of material support. If the vague terms of the statute are allowed to stand, some researchers and journalists presumably will continue their work out of a sense of public duty and professional integrity. Without question, however, there will be others who conclude that the risks are simply too great. Such a result will not only harm the speakers themselves; it will result in an impoverished public understanding and discourse regarding some of the most important issues of our day—including the issue of terrorism.

Equally troubling, the vagueness inherent in the statute gives the United States virtually unfettered discretion to target disfavored speech as the provision of forbidden material support to a proscribed group. For example, the government could decide to construe the term "service" to include a news outlet's reporting of a terrorist leader's views—but only where the government perceives that the news outlet in question has given the government's policies unfavorable coverage in the

past. Similarly, a scholar whose studies suggest that dialogue with terrorist groups is an effective method of deterring violence might be more likely, when compared to a scholar whose studies reach the opposite conclusion, to find her communications targeted by a government intent on combating terrorist groups through a controversial armed conflict.

This Court has not hesitated to invalidate statutes under analogous circumstances. In *Herndon v. Lowry*, 301 U.S. 242 (1937), the Court vacated the conviction of a Communist Party organizer under a Georgia statute criminalizing the act of inciting violent overthrow of the government. The Court ruled that the statute was unconstitutionally vague because it failed to distinguish sufficiently between advocacy and incitement, thus vesting prosecutors and the jury with undue discretion to criminalize a broad swath of speech. *See Herndon*, 301 U.S. at 261-64. Similarly, in *Smith v. Goguen*, 415 U.S. 566 (1974), the Court struck down as unconstitutionally vague a Massachusetts statute that forbade any person to "treat[] contemptuously" the American flag—in large part because "[s]tatutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith*, 415 U.S. at 575.

None of the challenged categories in the material support statute can survive analysis under *Herndon* and *Smith*, or the dozens of Supreme Court cases applying their teaching. In the end, the threat of

self-censorship and unfettered prosecutorial discretion to single out disfavored speech for criminal prosecution combine to generate a toxic speech climate that violates the First Amendment vagueness doctrine.

II. THE APPLICATION OF THE STATUTE TO PURE SPEECH THAT HAS NEITHER THE PURPOSE NOR EFFECT OF AIDING TERRORIST GROUPS' UNLAWFUL ACTIVITIES VIOLATES THE FIRST AND FIFTH AMENDMENTS

The key to modern free speech protection is the shift from a willingness in the first quarter of the 20th century to suppress controversial speech merely because it had a perceived tendency to lead to harmful behavior, to the current requirement that the government demonstrate a direct causal nexus between the target speech and an extremely serious harm that the government is empowered to prevent. *See, e.g., Herndon*, 301 U.S. at 255-59; *Bridges v. California*, 314 U.S. 252, 261-63 (1941); *Dennis v. United States*, 341 U.S. 494, 526-27 (1951) (Frankfurter, J., concurring); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969); *Texas v. Johnson*, 491 U.S. 397, 409 (1989). While communication with the predictable effect of advancing the unlawful ends of a violent terrorist organization may be suppressed because it poses a genuine threat of imminent and serious harm, communication seeking to learn and convey information about such a group, divert the group from violence, or mitigate human suffering in areas under the group's control cannot be suppressed

because there is no causal nexus between such innocent speech and a sufficiently serious harm.

This Court has recognized an additional requirement under the First and Fifth Amendments when the government seeks to prosecute someone for speech or association with a group that engages in unlawful conduct: the person must have a specific intent to further the group's unlawful ends. *See Dennis*, 341 U.S. at 499-50; *Scales*, 367 U.S. at 221-24; *Elfbrandt v. Russell*, 384 U.S. 11, 15-16 (1966). This requirement of specific intent is particularly important where individuals seek to associate in some manner with groups (like those at issue in this case[7]) that engage in both lawful and unlawful activities:

> [Q]uasi-political parties or other groups that may embrace both legal and illegal aims differ from a technical conspiracy, which is defined by its criminal purpose, so that *all* knowing association with the conspiracy is a proper subject for criminal proscription as far as First Amendment liberties are concerned. If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but the membership clause, as here construed . . . does not make criminal all association with an organization which has been shown to engage

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[7] The PKK and LTTE engage in both lawful and unlawful pursuits. *See Humanitarian Law Project*, 552 F.3d at 921.

> in illegal advocacy. There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.' Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite specific intent . . . .

Scales, 367 U.S. at 229-30 (emphasis in the original) (citation omitted).

The United States seeks to avoid full First Amendment review by mischaracterizing Respondents'/Cross-Petitioners' speech as a form of "conduct" subject to the less stringent standard of review used in *United States v. O'Brien*, 391 U.S. 367 (1968), to measure the constitutionality of draft card burning. The *O'Brien* test is triggered by prohibitions on non-speech behavior that incidentally affect expressive elements of the conduct. *See O'Brien*, 391 U.S. at 376-77. But the proposed communications of Respondents/Cross-Petitioners are pure speech. The government cannot transform them into conduct simply by labeling them "support" or "resources" and asserting that they will result in some concrete harm (here, aiding terrorist groups). The speech/conduct distinction does not turn on the effects of the communication.

Any other interpretation would threaten, not only the provision of human rights counseling that Respondents/Cross-Petitioners propose to undertake, but the academic freedom and freedom of the press upon which researchers and journalists in all areas

of inquiry rely. If the provision of human rights counseling can be characterized as "conduct" based on its practical application, so, too, could academic research that motivates an economic competitor of the U.S. to change its policies, or investigative reporting that leads to a decline in the stock market.

In any event, the material support statute, as applied to the pure speech proposed by Respondents/Cross-Petitioners (and the speech in which *Amici* routinely engage), cannot satisfy even the diluted review standard in *O'Brien* because it does not further an "important or substantial governmental interest," and is far "greater than is essential to the furtherance of" any such interest. *O'Brien*, 391 U.S. at 377.

The government's only plausible interest in limiting speech with, or about, proscribed groups is to avoid advancing their lawless activities. The government contends that providing resources of any kind to terrorist groups—whatever the purpose—frees up other resources for them to pursue their illegal aims. But even if one were to accept that providing tangible property or money to proscribed groups for innocent purposes, like hospitals and orphanages, could free up property or money for illegal uses, that rationale does not carry over to pure speech. Unlike money or weapons, information is not fungible. Learning about non-violent alternatives does not enhance the ability to make bombs; nor does communication with a researcher or journalist who seeks to expand the store of public information about the group. The United States

accordingly has not identified any plausible governmental interest, much less a compelling one, that would justify censoring innocent speech concerning, or with, a proscribed group.

III. THE COURT SHOULD READ THE MATERIAL SUPPORT STATUTE, WHEN APPLIED TO PURE SPEECH, TO REQUIRE BOTH A SPECIFIC INTENT TO FURTHER AN UNLAWFUL END AND A LIKELIHOOD OF HARM

If possible, a statute should be construed to avoid raising substantial constitutional issues. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). This canon of constitutional avoidance is often deployed to narrow statutes in tension with the First Amendment. *See, e.g., Edward J. DeBartolo v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). For example, in order to avoid serious First Amendment concerns, this Court construed a federal statute allowing customs agents to seize obscene materials to require "intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court," despite the fact that the statute itself contains no time limitations. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-74 (1971). Judicial application of the avoidance canon respects Congress's equal commitment to constitutional values, *see Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998); *Public Citizen v. U.S. Dep't of*

Justice, 491 U.S. 440, 466 (1989), while leaving Congress the option to enact a broader statute subject to judicial review for constitutional soundness.

Application of the avoidance canon is particularly appropriate in this case. First, no doubt exists that the prospect of criminalizing Respondents'/Cross-Petitioners' proposed speech triggers the canon. Prior to the Court's decision in *United States v. Del. & Hudson Co.*, 213 U.S. 366, 407-08 (1909), the avoidance canon was applied only after a finding that a statute was, in fact, unconstitutional. In the modern era, however, the Court deploys the canon if the statute's application to proposed speech would raise a serious constitutional issue. *See* Adrian Vermeule, *Saving Constructions*, 85 Geo. L. J. 1945, 1949, 1958-59 (1997). As discussed in Parts I and II, *supra*, significant constitutional concerns would be raised if the statute's vague terms could be interpreted to apply to pure speech that is not intended or likely to further the unlawful aims of designated organizations.

Second, the statute is amenable to a narrowing construction, as demonstrated by this Court's rulings in *Scales v. United States*, 367 U.S. 203 (1961), and *Yates v. United States*, 354 U.S. 298 (1957). The statutory provision at issue in *Scales* made it a crime to become a member of any group that advocated violent overthrow of the U.S. government, "knowing the purposes thereof"—*i.e.*, knowing that the group espoused violent overthrow. 18 U.S.C. § 2385. The Court construed the statute to apply only to active

members possessing a specific intent to further the organization's illegal aims. *See Scales*, 367 U.S. at 221-24. Although the Court did not specify the precise textual hook on which it hung this interpretation, later cases confirmed that the key to the Court's narrowing construction was the knowledge requirement. *See Aptheker v. Secretary of State*, 378 U.S. 500, 511 n.9 (1964); *United States v. Robel*, 389 U.S. 258, 262 (1967). Thus, even though the plain language of that provision required knowledge only of the organization's illegal aims, the Court construed the provision to require a specific intent to further those aims.[8]

The Ninth Circuit panel below deemed *Scales* distinguishable on the ground that "the statute in *Scales* . . . was silent with respect to requisite mens rea," while the material support statute "exposes one to criminal liability only where the government proves that the donor defendant acted with culpable intent—knowledge." *Humanitarian Law Project*, 552 F.3d at 926. In fact, the statute at issue in *Scales* not only contained a knowledge requirement; it contained a knowledge requirement very similar to the one in the material support statute, *i.e.*, knowledge of the organization's illegal aims or activities. The Court in *Scales* found that this

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[8] The Court in *Scales* was not called upon to address whether membership could be criminalized absent any likelihood that such membership would lead to a sufficiently serious harm. *See Scales*, 367 U.S. at 230 n.21 ("As both sides appear to agree that the 'clear and present danger' doctrine . . . reaches the membership clause of the Smith Act, and since the petition for certiorari tenders no issue as to the method of applying it here, we do not consider either question.").

knowledge requirement could—and must—be read to include a requirement of specific intent.

In addition to the specific intent requirement, a statute restricting protected speech must be construed, if possible, to apply only to speech that is likely to cause to a particularly serious harm, given that the statute otherwise would violate the First Amendment. *See* Part II, *supra*. In *Yates*, the Court considered a statutory provision making it a crime "to knowingly or willfully advocate . . . or teach" violent overthrow of the U.S. government. *Yates*, 354 U.S. at 301 n.1. The Court acknowledged that advocating merely the *idea* of forcible overthrow would satisfy the "ordinary dictionary definitions" of "advocate" and "teach." *Id.* at 319. It nonetheless held that such advocacy, even "if engaged in with the intent to accomplish overthrow," was "too remote from concrete action" to justify criminal sanction, *id.* at 321, and it refused to "assume that Congress chose to disregard a constitutional danger zone so clearly marked." *Id.* at 319. The Court therefore construed the statute to apply only to "advocacy of action, not ideas," *id.* at 320, noting that such advocacy is not constitutionally protected when the audience is "of sufficient size and cohesiveness, is sufficiently oriented toward action, and other circumstances are such as reasonably to justify apprehension that action will occur." *Id.* at 321.

The material support statute similarly should be construed to apply to pure speech only where that speech is likely to produce the concrete harm that the statute is intended to prevent. The term

"material support" itself is readily interpreted to incorporate such a limitation. In light of the clear purpose of the statute—*i.e.*, to "prevent and punish acts of terrorism," H.R. Rep. No. 104-518, at 1 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 944, 944—"material support" may fairly -be construed as support that is likely to enhance the designated organization's ability to engage in terrorist acts.[9]

These constructions are plausible readings, not only of the statutory language, but of congressional intent. In 2004, Congress added a provision to the material support statute limiting its scope to persons who act with "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)(1). Although this provision does not expressly require specific intent to further the organizations' unlawful activities, Congress was presumptively aware that the Court in *Scales* construed a substantially equivalent provision to contain such a requirement. *See Abuelhawa v. United States*, 129 S. Ct. 2102, 2106 (2009) ("[W]e presume legislatures act with case law in mind."); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute."). Moreover, Congress at the same time

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[9] *Amici* do not argue that the Court must adopt such a narrowing interpretation in all applications of the statute. Rather, under the canon of constitutional avoidance, a narrowing construction need apply only in those contexts where it is necessary to avoid serious constitutional concerns.

added a provision prohibiting any construction or application of the statute that would abridge the exercise of First Amendment rights. *See* 18 U.S.C. § 2339B(i). It did so against the backdrop of the longstanding, well-settled case law cited in Part II, *supra*, establishing both the "specific intent" requirement and the requirement of a close causal connection between the restricted speech and a sufficiently serious harm.

CONCLUSION

Fifty years ago, confronted with a totalitarian communist threat to the very existence of our political and social order, this Court insisted on distinguishing innocent speech from speech with the purpose and effect of advancing imminent lawlessness and violence. *See, e.g., Elfbrandt*, 384 U.S. at 11; *Robel*, 389 U.S. at 264 ("For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties."). If we are to preserve scholarship and journalism of extraordinary value to all of us in our modern society, we can do no less today. Accordingly, *Amici* urge the Court to rule in favor of Respondents/Cross-Petitioners.

Respectfully submitted,

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