No. 08-1498

In the Supreme Court of the United States

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

v.

HUMANITARIAN LAW PROJECT, ET AL.

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

REPLY BRIEF FOR PETITIONERS

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The decision of the court of appeals warrants this Court's review because it declares portions of an Act of Congress unconstitutionally vague under the Fifth Amendment. Respondents attempt to minimize the significance of the decision by pointing out that Congress could enact a new statute, but the question warranting review is whether the statute that Congress actually enacted is constitutional.

Review is particularly appropriate here because the statute at issue, 18 U.S.C. 2339B, which prohibits the knowing provision of material support to designated foreign terrorist organizations, is a vital part of the Nation's effort to fight international terrorism. Respondents suggest that the decision below creates only a limited exception to the statute, but the injunction in this case in fact sweeps broadly. It bars any prosecution

based on the provision of *any* form of "training," "expert advice or assistance" derived from "specialized knowledge," or "service" to the terrorist groups respondents wish to aid. If others wishing to aid terrorist groups sought similar injunctions, prosecutions based on these important components of the material-support statute—such as the indictments listed in the government's petition (at 11)—would become impossible. That result warrants correction by this Court.

Respondents' efforts to defend the merits of the decision below fare little better. The court of appeals held that three components of the statutory definition of material support—"training," "expert advice or assistance," and "service"—are unconstitutionally vague. In fact, each of those terms has an established meaning and is readily understandable by persons of ordinary intelligence. Respondents suggest various hypothetical situations in which the application of the statutory terms might be unclear, but they cannot show any vagueness in the application of the statute to their own proposed conduct.

Finally, respondents repeat the error of the court of appeals when they suggest that the terms at issue are vague because they could be construed to prohibit speech that is protected by the First Amendment. That argument rests on a confusion between the vagueness and overbreadth doctrines. In any event, the statute in question regulates conduct, not speech, and does not violate the First Amendment.

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

As explained in the petition (at 10), this Court normally reviews lower-court decisions holding a federal

law unconstitutional, even in the absence of a circuit conflict. Review is likewise warranted here.

1. Contrary to respondents' contention (Br. in Opp. 11-13), the usual presumption in favor of review when a lower court holds a federal statute unconstitutional applies when a court invalidates statutory terms on grounds of vagueness. See, *e.g.*, *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513 (1994). Respondents assert (Br. in Opp. 15-16) that this Court's review is unwarranted when a federal statute is invalidated for this reason because Congress could amend the statute to make it clearer. But Congress can always amend federal laws that are held unconstitutional. The question warranting this Court's review is whether the statute as currently enacted is constitutional. That Congress might someday enact a different statute does not diminish the importance of the lower court's holding that the statute is invalid.

Respondents' own suggestion for making the statute clearer in fact would deprive it of much of its force. Respondents recommend (Br. in Opp. 16) that the statutory prohibition be rewritten to reach only support for specifically enumerated terrorist techniques. Such an amendment would leave unaddressed any novel or unanticipated techniques that might be used in the future. And it would do nothing to accomplish Congress's stated objective of prohibiting *any* material support to terrorist groups—whether for legal or illegal activities—because all support to such groups ultimately facilitates terrorism, even if only by freeing resources that can be devoted to violent ends. See Pet. 11-12.

2. Respondents make little effort to dispute the importance of Section 2339B generally to the Nation's fight against international terrorism. Instead, they ar-

gue (Br. in Opp. 12, 14) that the decision below prevents application of the section only to the "limited activities" in which these particular respondents wish to engage. In fact, the injunction prohibits the government "from enforcing 18 U.S.C. § 2339B's prohibition on providing 'training'; 'expert advice or assistance' in the form of 'specialized knowledge'; or 'service' to the [Kurdistan Workers' Party (PKK)] or the [Liberation Tigers of Tamil Eelam (LTTE)] against any of the named [respondents] or their members." Pet. App. 75a-76a. The injunction on its face therefore enables respondents—who have hundreds of members, see C.A. E.R. 4-6—to provide *any* kind of training, expert advice or assistance, or service to designated terrorist groups. The injunction is not limited to the specific types of aid that respondents claim they wish to provide, nor is it limited (Br. in Opp. 14) to what they term "pure speech." Instead, the injunction would include, among other things, "training" in military tactics, "expert advice" in making bombs, and the "service" of transporting weapons, all to facilitate terrorism.

Moreover, under the decision below, any other, similar membership organization in the Ninth Circuit presumably could secure an equivalent injunction permitting its members to provide training, service, or expert advice or assistance to terrorist groups. The sweep of the decision below will not be confined only to respondents, but will extend to any organizations that allege similar goals. This Court's review need not be postponed until after the statute's prohibitions have been so far eroded; the Ninth Circuit's invalidation of crucial provisions of Section 2339B warrants correction now.

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

1. The statutory terms are not vague

As explained in the petition (at 13-18), the challenged statutory terms—"training," "expert advice or assistance," and "service"—are not unconstitutionally vague. Respondents' arguments to the contrary lack merit.

a. Even before Congress amended and clarified the meaning of "training," in 2004, see Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(b), 118 Stat. 3762, the term was sufficiently clear to satisfy the Due Process Clause. "Train" is defined as "to teach or exercise (someone) in an art, profession, trade, or occupation" or to "give instruction to," *Webster's Third New International Dictionary of the English Language* 2424 (1993) (*Webster's*), and a person of ordinary intelligence would easily understand what it means to teach or instruct members of a terrorist organization. As amended by IRTPA, the statute further clarifies that "training" means "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. 2339A(b)(2). That definition is clear on its face: in real-world situations, a person of ordinary intelligence can distinguish between what is commonly or generally known and what is a skill possessed by a relative few.

Respondents counter (Br. in Opp. 18) with various hypotheticals about teaching geography. But respondents' desired conduct, none of which involves teaching geography, Pet. App. 5a n.1, constitutes "training" within both the ordinary meaning and the statutory definition of the term. Because the law is clear as it applies to respondents' conduct, their vagueness challenge must

fail, whether or not the statute might be vague in other, hypothetical situations. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

More broadly, respondents' arguments (Br. in Opp. 18, 19, 21-22), demonstrate only that under this statute, as under any statute, "imagination can conjure up hypothetical cases" in which there is uncertainty. *American Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 412 (1950). Respondents have not come close to showing that the statute fails to give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972).

b. As the petition explained (at 15-17), the ordinary dictionary definitions of the words in the statutory phrase "expert advice or assistance" are also well understood, and the statute further clarifies that the phrase means "advice or assistance derived from scientific, technical or other specialized knowledge," 18 U.S.C. 2339A(b)(3), a definition drawn from Federal Rule of Evidence 702. That courts routinely apply Rule 702 belies respondents' assertion (Br. in Opp. 19) that there is no way to distinguish between general and specialized knowledge. If respondents' arguments had force, Rule 702 itself would be hopelessly vague. But it is not. This Court has applied it, as courts every day apply it, based on the ordinary meaning of its words. See *Daubert* v. *Merrell Dow Pharms. Inc.*, 509 U.S. 579, 589-590 (1993).

In an effort to blur the commonsense distinction between general and specialized knowledge, respondents observe (Br. in Opp. 19) that all general knowledge was once specialized knowledge and thus in some sense is "derived from" such knowledge. But the statute applies to advice derived from what is *currently* specialized

knowledge—not to what is now general knowledge but was specialized knowledge at some point in the past. Conversely, respondents attempt to argue (*ibid.*) that all specialized knowledge "derives from" general knowledge. That line of reasoning, whatever its metaphysical validity, conflates two phrases that any ordinary person would understand as opposed to each other—and in the process implies that "expert advice or assistance" derived from specialized knowledge is a null set, an interpretation as contrary to ordinary rules of statutory construction as to common sense.

c. Finally, the term "service" is not unconstitutionally vague. "Service" means "an act done for the benefit or at the command of another." *Webster's* 2075. As noted in the government's petition (at 17-18), lower courts have found the same or similar terms to be sufficiently clear in other contexts.

Respondents contend (Br. in Opp. 20-21) that the term "service" makes the statute "more confusing" because it could cover support not prohibited by other statutory terms such as "training," "expert advice or assistance," or "personnel." That argument lacks merit. That one statutory provision might reach conduct that another statutory provision does not—in other words, that one statutory provision is broader than another—sheds no light on whether either provision is vague. Like the court below, Pet. 18-19, respondents confuse the separate and distinct concepts of the statute's breadth and the statute's clarity.

Respondents also assert (Br. in Opp. 21-22) that the term "service" is vague because it fails to cordon off independent advocacy from the provision of assistance to terrorists. But as noted in the petition (at 22), a natural reading of the word "service" as "an act done * * * at

the command of another" draws precisely this distinction. Like the court of appeals, respondents go out of their way to create, rather than avoid, possible constitutional problems. But see *Jones* v. *United States*, 526 U.S. 227, 239 (1999) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") (internal quotation marks and citation omitted).

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

The court of appeals' vagueness holding was based in large part on the notion that the challenged statutory terms could "be read to encompass speech and advocacy protected by the First Amendment." Pet. App. 22a; see also *id.* at 24a-25a. As noted in the petition (at 18-19), that analysis confuses vagueness with overbreadth. Whether the statute violates the First Amendment in any of its applications is distinct from the question whether the statute is unconstitutionally vague.

Respondents attempt to defend the reasoning of the court of appeals by suggesting (Br. in Opp. 27 n.16) that the court simply applied a heightened vagueness standard for statutes that potentially reach protected speech. That is incorrect. The court of appeals expressly held that "[e]ven if persons of ordinary intelligence could discern" the meaning of the term "training," the court nevertheless would "hold that the term 'training' would remain impermissibly vague" because it "could still be read to encompass speech and advocacy protected by the First Amendment." Pet. App. 22a. So even if the challenged terms were perfectly clear, said the court of appeals, it would still find them vague be-

cause they might reach protected First Amendment activities. There is no support in this Court's cases for holding that a fully intelligible statute can be voided *on vagueness grounds* because it encompasses some protected First Amendment speech.

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

a. As explained in the petition (at 19-21), the material-support statute does not violate the First Amendment in any of its applications. The statute is not aimed at speech, but at conduct—namely, the provision of aid to terrorist groups. Because it regulates conduct and only incidentally restricts speech, the statute is subject to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). And the statute passes this scrutiny: it promotes an important governmental interest; it is aimed at stopping aid to terrorists, rather than suppressing free expression; and it is reasonably tailored, especially considering the latitude afforded to the government in areas touching upon foreign-policy considerations. Pet. 20; see Pet. App. 28a; *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1135-1136 (9th Cir. 2000), cert. denied, 532 U.S. 904 (2001); *United States* v. *Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (en banc), vacated on other grounds, 543 U.S. 1097 (2005), reinstated in relevant part, 405 F.3d 1034 (2005).

Contrary to respondents' argument (Br. in Opp. 24), the First Amendment analysis is not altered because the statute prohibits "training" and "expert advice," which usually are accomplished through the use of words. Bribery is accomplished through words; so too extortion. The prohibition on material support to terrorists that consists of training and expert advice is no more consti-

tutionally problematic. As respondents admit, the relevant question in determining whether the *O'Brien* standard applies is whether the statute incidentally restricts speech or instead targets speech because of its content. See *Hill* v. *Colorado*, 530 U.S. 703, 719 (2000). For the reasons stated in the petition (at 19-21), the material-support statute, in prohibiting aid to terrorist organizations, does only the former; that some such aid involves the use of language does not change the analysis.

b. Respondents' assertion (Br. in Opp. 27) that the statute unconstitutionally penalizes constitutionally protected "association" is meritless. The statute prohibits the provision of material support, including training, expert advice or assistance, or service, to terrorist organizations. Respondents' hypotheticals about the Kiwanis and the Rotary Clubs notwithstanding, these terrorist organizations are not designated because of their beliefs or expression, but because the Secretary of State finds that they "engage[] in terrorist activity" that threatens "national security." 8 U.S.C. 1189(a)(1). The designation of these groups and the prohibition of material support to them is reasonably tailored to an important governmental interest unrelated to free expression. No associational rights stand in the way of such legislation.

Respondents' reliance (Br. in Opp. 25-26) on *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640 (2000), is misplaced. The Court determined that the Boy Scouts was "an expressive association," and that by forbidding its exclusion of gays and lesbians from membership, the statute at issue in that case would "significantly affect its expression." *Id.* at 656. Accordingly, the Court concluded that the statute "directly and immediately affect[ed] associational rights," making the *O'Brien* standard inapplicable. *Id.* at 659. The material-support statute, by

contrast, is not aimed at regulating the membership of any organization, expressive or otherwise. Nor does the statute compel any organization to convey a message at odds with its fundamental beliefs, as the Court found the statute in *Dale* to do. See *id.* at 653-654. The statute prohibits only the provision of aid to terrorists, and to the extent it restricts speech, it does so only incidentally.

c. Even if Section 2339B has unconstitutional applications, they are insufficiently substantial, either in absolute number or in relation to the statute's plainly legitimate sweep, to render the statute unconstitutionally overbroad. Even the court below recognized this point in another part of its analysis, Pet. App. 27a-29a, and respondents make almost no effort to argue to the contrary. Their sole argument (Br. in Opp. 26-27 n.16) appears to proceed on the premise that heightened scrutiny applies to the statute. For the reasons explained above, however, that analysis is flawed. The statute at issue here regulates conduct, divorced from any relation to the content of expression; and the vast majority of its applications do not even arguably implicate the First Amendment.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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AUGUST 2009