No.

In the Supreme Court of the United States

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

v.

HUMANITARIAN LAW PROJECT, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

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

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

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

OPINIONS BELOW

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

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT

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

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

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

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

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

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

> No person may be prosecuted under this section in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization

> with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

18 U.S.C. 2339B(h).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Amendment, as applied to plaintiffs' conduct or otherwise.

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

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

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

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

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

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

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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

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