Nos. 08-1498 & 09-89

In the Supreme Court of the United States

ERIC HOLDER, ATTORNEY GENERAL, ET AL.,

Petitioners/Cross-Respondents,

v.

HUMANITARIAN LAW PROJECT, ET AL.,

Respondents/Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CONSTITUTION PROJECT AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

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QUESTION PRESENTED

The *amici curiae* will address the following question:

Whether the provisions of the Antiterrorism and Effective Death Penalty Act that prohibit providing "service," "training," "expert advice," and "personnel" to designated terrorist organizations (18 U.S.C. §§ 2339A, 2339B) should be severed from the statute as unconstitutionally overbroad because they directly criminalize and incidentally chill a substantial range of protected speech and association.

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BRIEF OF THE CONSTITUTION PROJECT AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amicus the Constitution Project (the Project) is an independent, nonprofit organization that brings together legal and policy experts from across the political spectrum to promote and defend constitutional safeguards. After the tragic events of September 11, 2001, the Project created its Liberty and Security Committee (the Committee), a blue-ribbon, bipartisan committee of prominent Americans, to address the importance of preserving civil liberties as we work to enhance our Nation's security. The Committee develops policy recommendations on issues such as U.S. policies for prosecuting suspected terrorists and governmental surveillance, and emphasizes the need for all three branches of government to play a role in preserving constitutional rights.

Since 2003, following the release of the Committee's *Report on First Amendment Issues*,[2] the Project

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for respondents, David Cole, is co-chair of the Constitution Project's Liberty and Security Committee, but this brief has been drafted entirely by outside counsel and staff for *amici*, and Mr. Cole has neither drafted this brief in whole or in part nor has he provided any monetary assistance for its preparation. The parties have submitted letters to the clerk granting blanket consent to the filing of *amicus* briefs.

[2] This and all other Committee and Project publications dis-

has focused on urging the government to formulate counter-terrorism measures that promote openness, robust political dialogue, and freedom of association. For example, in its 2008 report *The Use and Abuse of Immigration Authority as a Counterterrorism Tool*, the Committee condemned the application of the material support laws in the immigration context in ways that impinge on free speech rights. The committee explained that "[d]eporting and excluding people for their political views and affiliations undermines fundamental First Amendment principles." *Id*. at 12.

In November 2009, the Committee issued a statement, *Reforming the Material Support Laws: Constitutional Concerns Presented by Prohibitions on Material Support to "Terrorist Organizations."* In it, the Committee analyzed how, in their current form, the material support laws raise serious constitutional issues under the First, Fourth, and Fifth Amendments. The bipartisan group of signers (listed in the appendix to this brief) recognized that "cutting off support of terrorist activity is an important and legitimate part of the United States' counter-terrorism strategy," but urged that, "in providing the legal authority to prohibit and punish such conduct, it is essential that the law respect constitutional freedoms." *Id.* at 1. In particular, the Committee condemned the application of the material support laws to criminalize pure speech—and especially speech that is intended to further only lawful, peaceful, and nonviolent activities.

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cussed in this brief are available on the Project's web site, *www.constitutionproject.org*; specific web addresses are provided in the table of authorities.

Amicus The Rutherford Institute is an international civil liberties organization that was founded in 1982 by John W. Whitehead, who remains its President. The Rutherford Institute specializes in providing pro bono legal representation to individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues. During its 27-year history, attorneys affiliated with The Rutherford Institute have represented numerous parties before this Court. The Rutherford Institute has also filed *amicus* briefs in numerous cases dealing with critical constitutional issues arising from the current efforts to combat terrorism, including *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008), *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), and *Rasul* v. *Bush*, 542 U.S. 466 (2004).

This case is of considerable importance to both *amici*, each of which has worked diligently to preserve the principles of free expression placed in jeopardy by the material support bar. Both *amici* recognize that a balance can and must be struck between the government's pursuit of national security and the Constitution's protection of free speech and association. The *amici* accordingly are filing this brief to assist the Court in its consideration of the important First Amendment issues presented by this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case affords the Court a much-needed opportunity to clarify the constitutional limits on Congress's power to forbid American citizens from advocating on behalf of and directly participating in organizations the government deems a threat to the national security.

The so-called "material support bar" prohibits anyone from providing, in relevant part, "service, * * * training, expert advice or assistance, * * * [or] personnel [including 'oneself']" (18 U.S.C. § 2339A(b)(1)) to any group "designated as a terrorist organization" (18 U.S.C. § 2339B(g)(6)). The Secretary of State is authorized to designate any foreign group as a "terrorist organization" if she, in her sole discretion, finds that "the organization engages in terrorist activity or terrorism, or retains the capability and intent to engage in terrorist activity or terrorism" and "the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(d)(2) (parentheticals omitted).

The term "terrorist activity" is broadly defined to include virtually any unlawful use of, or threat to use, a weapon against person or property. The only exception from this definition of terrorism is unlawful use of or threats to use a weapon for mere personal monetary gain. "National security" is also broadly defined to mean the "national defense, foreign relations, or economic interests of the United States." 8 U.S.C. § 1189(a)(1).

So conceived, the material support bar is extraordinarily broad—it prohibits (among other things) association with, advocacy on behalf of, legal advice to, and humanitarian aid for any group unilaterally deemed by the government to be a threat to U.S. national defense, foreign relations, or economic interests. It is doubtful that any law of the United States has so expansively limited citizens' rights to speech and association since the Alien and Sedition Acts of 1798.

To be sure, limiting financial and other support of terrorist activities is an important and legitimate element of the government's counter-terrorism strategy. Congress and the President should have the tools necessary to apprehend and punish not just terrorist leaders, but also those who work to facilitate and enable acts of terrorism. But the government's national-security prerogatives are not the only weighty constitutional values at stake in the fight against terrorism: While "[s]ecurity depends upon a sophisticated intelligence apparatus," it "subsists, too, in fidelity to freedom's first principles" (*Boumediene* v. *Bush*, 128 S. Ct. 2229, 2277 (2008)), including the protection of free expression critical to the maintenance of our democratic society. As this Court explained long ago:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

De Jonge v. *Oregon*, 299 U.S. 353, 365 (1937).

In Section A of this brief, we explain how the "service," "training," "expert advice," and "personnel" provisions of the material support bar are unconstitutionally overbroad, overtly encroaching upon the freedoms guaranteed by the First Amendment. There

is simply no disputing, for example, that provisions of the material support bar criminalize pure speech and pure association in a content-sensitive manner. These restrictions are so broadly written, moreover, that they even apply to speech or conduct intended to *reduce* a group's resort to violence, and even when that speech or conduct can be shown to have precisely this beneficial effect. Thus the substantial overbreadth of the material support bar's challenged provisions, set against the comparatively narrow range of legitimate applications not covered by the remainder of the law's provisions, exceeds well-defined constitutional limits.

To support facial invalidation, however, a law must be overbroad, not just in its "'text,'" but also in "'actual fact'" *Virginia* v. *Hicks*, 539 U.S. 113, 122 (2003) (quoting *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 14 (1988)). In Section B, we therefore show that the direct burdens and chilling effect upon free expression in this case are not abstract legal hypotheses: to the contrary, the material support bar is having a real and serious impact on free expression throughout the nation. Recognizing that prosecutions under the challenged terms can burden free expression, district courts have dismissed certain elements of indictments (see *United States* v. *Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003)) or issued limiting jury instructions (see Susan Schmidt, *Saudi Acquitted of Internet Terror*, WASH. POST, June 11, 2004, at A3). And in this very case, the government has defended application of the material support bar to prohibit a U.S. human rights group's efforts to provide training in human rights advocacy and assistance in peacemaking to a designated group. Not only are these applications themselves at loggerheads with the First Amend-

ment, but—especially given the frequency with which federal prosecutors are using the material support bar—there is simply no doubt that these provisions are preventing others from exercising their rights to free speech and association, for fear of similar prosecution.

Thus while *amici* fully agree with the Humanitarian Law Project and the other respondents/cross-petitioners (collectively HLP) that the terms of the material support bar are unconstitutionally vague—an independently sufficient ground for holding the material support bar to be unconstitutional as applied to the HLP—we argue that the Court can and should go further. The "service," "training," "expert advice," and "personnel" provisions of the material support bar are so fundamentally in conflict with traditional First Amendment protections that they directly criminalize and are inevitably chilling wide swaths of constitutionally protected speech and association. Accordingly, not only should this Court affirm that portion of the court of appeal's decision holding the material support bar unconstitutional as applied, it should sever the law's overbroad provisions as facially unconstitutional.[3]

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[3] This argument has been fully preserved for review and is addressed in the parties' briefing before this Court. See HLP Br. at 42–43.

ARGUMENT

The "Service," "Training," "Expert Advice," And "Personnel" Provisions Of The Material Support Bar Are Unconstitutionally Overbroad.

This Court has long recognized that certain laws directed at concededly legitimate ends can, by virtue of an "overbroad" reach, threaten protected speech and association in a way that unconstitutionally "chills" free expression. See, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611–12 (1973); *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). The overbreadth doctrine "is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'" *New York* v. *Ferber*, 458 U.S. 747, 768–69 (1982) (quoting *Gooding* v. *Wilson,* 405 U.S. 518, 521 (1972), and citing *Vill. of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 634 (1980)). Thus the concept of chilling follows from "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612.

Whether overbreadth warrants invalidating a law or regulation depends on a balancing of the costs "in permitting some unprotected speech to go unpunished" against "the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of [the] overly broad statute[]." *Broadrick*, 413 U.S. at 612; see also *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008) ("The [overbreadth] doctrine seeks

to strike a balance between competing social costs.") (citing *Hicks*, 539 U.S. at 119–20).

In setting these two concerns against one another, the Court should invalidate any law whose overreach is both "real [and] substantial * * *, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. The law's overreach must be clear, in other words, "'from the text of [the statute] and from actual fact.'" *Hicks*, 539 U.S. at 122 (quoting *New York State Club Ass'n*, 487 U.S. at 14). Both of these conditions—overbreadth in law and overbreadth in fact—is manifestly present here.

A. The material support law is overbroad as written.

This Court has been most willing to strike down laws under the First Amendment when the government attempts to regulate pure speech on the basis of its content. See, *e.g.*, *Boos* v. *Barry*, 485 U.S. 312 (1988); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765 (1978). Thus a statute's overbreadth is most likely to be "substantial" in the context of laws directly regulating "spoken words." *Broadrick*, 413 U.S. at 612.

The overbreadth of the material support statute's "service," "training," "expert advice," and "personnel" provisions is plainly "substantial," both standing alone and when judged against their legitimate ends. First, as we explain in Section 1, these provisions are directed at pure speech and pure association; they also draw distinctions between permissible and impermissible conduct based on content. Accordingly, the terms at issue here are precisely the kind of direct government incursion upon free expression this Court has previously concluded chills large catego-

ries of constitutionally protected conduct. See, *e.g.*, *Vill. of Schaumburg*, 444 U.S. at 633–34.

Second, as we show in Section 2, the overreach of the challenged portions of the law must be set against the relatively narrow range of situations in which these provisions may legitimately be applied. To be sure, the government has a critical interest in inhibiting support of terrorist organizations, but the range of conduct legitimately prohibited by the challenged provisions is dwarfed in comparison with the vastness of those provisions' overbreadth. The challenged provisions of the material support bar are, in short, substantially overbroad.

1. The material support bar's burdens upon protected speech and association are substantial.

It is well settled that a statute's overbreadth will render it "invalid if it prohibits a *substantial* amount of protected speech." *Williams*, 128 S. Ct. at 1838 (emphasis added). Overbreadth is most likely to be substantial when the statute burdens "pure" speech and "pure" association (*Broadrick*, 413 U.S. at 615–16), and particularly when the law imposes grave criminal consequences (*Ferber*, 458 U.S. at 773). The relevant portions of the material support bar regulate speech in precisely such an impermissible way.

1. The material support bar burdens pure speech and pure association. By its terms, the law prohibits anyone from providing designated organizations with "service" (§ 2339A(b)(1)) or "expert advice * * * derived from scientific, technical or other specialized knowledge" (§ 2339A(b)(3)). In ordinary usage, *to give advice* means to provide "recommendations" or "information," while *service* means "the act of furnish-

ing" something "useful" or "desired." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 18, 1070 (10th ed. 1996); see also BLACK'S LAW DICTIONARY 59, 1399 (8th ed. 2004) (defining "advice" as "[g]uidance offered by one person * * * to another" and "service" as "[t]he act of doing something useful for a person or company for a fee"). These two extremely broad terms would therefore encompass virtually any kind of speech-based interaction with a designated group, including human-rights counseling and political consultation or advocacy. Thus, for example, the material support bar's "service" provision appears to prohibit any individual from lobbying the Secretary of State to reconsider her designation of a group as a terrorist organization, even though this Court has held that political lobbying is protected by the First Amendment. See *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983).

The law's impermissible reach extends beyond advocacy on behalf of designated organizations. For instance, the statute prohibits "training * * * designed to impart a specific skill" (§ 2339A(b)), which ostensibly covers a broad range of pure speech activity, such as any effort to instruct or teach professional skills—even training intended to *reduce* the designated group's reliance on violence, as in this very case. This Court has affirmed that the First Amendment protects "'the right to teach'" (*McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995) (quoting *Whitney* v. *California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)); the material support bar's training provision nevertheless appears to prohibit human rights workers from providing any designated organization with any training whatsoever, even in peaceful dispute resolution.

The "personnel" provision also directly burdens pure speech. It forbids anyone from "work[ing] under [a] terrorist organization's direction or control" (§ 2339B(h)), and would encompass virtually any sort of legal or political consultation. The personnel provision thus forbids lawyers retained by designated organizations from following their client's instructions in the course of their advocacy on their clients' behalves, despite this Court's instruction that attorneys have a First Amendment right to advocate on behalf of their clients, unfettered from government interference and regardless who their clients might be (*Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 536 (2001)). See, *e.g.*, *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000) ("Someone who advocates the cause of [a designated group] could be seen as supplying them with personnel.").

Because the "personnel" provision also prohibits providing personnel to designated organizations, "including oneself" (§ 2339B(h)), the material support bar also categorically forbids pure association with any designated group. Of particular note, the personnel provision does not include an express *scienter* element requiring the individual to share or act with the organization's intent to commit terrorism; it therefore appears to punish pure association without more.[4] The material support bar's prohibition of join-

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[4] Earlier in this litigation, the Ninth Circuit concluded that the personnel clause does not criminalize pure association because it "does not prohibit being a member of one of the designated groups," and instead prohibits only "the act of giving material support." *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000). The purported distinction between "giving material support" and "being a member" of a designated group is utterly meaningless—the point is that the former con-

ing any political party unilaterally designated by the Secretary of State to be a terrorist threat to U.S. security, diplomatic, or economic interests (8 U.S.C. § 1189) accordingly appears in clear conflict with this Court's holding that "the First Amendment, among other things, protects the right of citizens 'to band together in promoting among the electorate candidates who espouse their political views'" (*Clingman* v. *Beaver*, 544 U.S. 581, 586 (2005) (quoting *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000)).

In these ways, the material support bar indisputably burdens pure speech and pure association. As this Court has reiterated time and again, such "regulation[s] of pure speech" (*McIntyre*, 514 U.S. at 345) must be treated with special skepticism by the courts. See, *e.g.*, *Bartnicki* v. *Vopper*, 532 U.S. 514, 527–28 (2001).

2. It is equally clear that the burdens on speech and association from the "service," "training," "expert advice," and "personnel" provisions are content sensitive. A statute is content sensitive if "the content of the speech * * * determines whether it is within or without the statute's blunt prohibition." *Carey* v. *Brown*, 447 U.S. 455, 462 (1980). Thus, as Justice Kennedy has said, "a statute of broad application is not content neutral if its terms control the substance of a speaker's message." *Hill* v. *Colorado*, 530 U.S. 703, 767 (2000) (Kennedy, J., dissenting).

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sists, in part, of the latter. No matter whether one calls it "material support" or "bananas," providing "oneself" as "personnel" equates with pure association.

The material support bar does just that: First, individuals are prohibited from providing material support unless such support falls within two narrow categories: "medicine or religious materials." 18 U.S.C. § 2339A(b)(1). "Medicine" is "the science and art dealing with the maintenance of health and the prevention, alleviation, or cure of disease." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 722 (10th ed. 1996). Thus it seems that a lawyer's provision of legal services is prohibited, whereas a doctor's provision of medical services is not. Similarly, individuals are also prohibited from proving any "property" or "service[s]" of any kind, unless such property or services constitute "religious materials." 18 U.S.C. § 2339A(b)(1). Accordingly, a human rights worker's political aid is prohibited, whereas a priest's religious aid is not.

Second, expert advice is also impermissible only insofar as it derives from "scientific, technical, or other specialized knowledge," but not general knowledge. 18 U.S.C. § 2339A(b)(3). Thus advice from a political consultant concerning "specialized knowledge" of localized political conditions is prohibited, whereas advice in "general" political principles is not. Under these circumstances, the content of speech and conduct plainly determines whether it falls within or without the material support bar's prohibition.

3. Finally, the material support bar imposes grave criminal consequences upon its violators. This Court has explained that when the regulation at issue is "a criminal prohibition," the "penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial." *Ferber*, 458 U.S. at 773. Here, the consequences of running afoul of the

material support bar are enormously burdensome. "[K]nowingly provid[ing] material support or resources to a foreign terrorist organization, or attempt[ing] or conspir[ing] to do so" is enough—*without more*—to subject an individual to fifteen years imprisonment and a fine of $50,000. 18 U.S.C. § 2339B(a)(1), (b). The likelihood, therefore, that the material support bar will chill protected speech falling (or even only *possibly* falling) within its broad and dangerous scope is very great.

In short, there is simply no denying that the law's "service," "training," "expert advice," and "personnel" provisions are content-based restrictions upon pure speech and pure association. The scope of these restrictions is, moreover, extraordinarily expansive, reaching a wide range of speech and association ranging from legal representation and public advocacy to private association and human-rights training. And the consequences for violating the law are exceptionally grave, potentially subjecting individuals to lengthy prison terms for exercising their First Amendment rights. Accordingly, there is little doubt that the material support statute's overbreadth is substantial standing alone.

2. The range of legitimate applications of the challenged provisions is comparatively narrow.

In order to support an overbreadth challenge, "a statute's overbreadth [must] be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838 (citing *Bd. of Tr. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 485 (1989)) (emphasis omitted); see also *Broadrick*, 413 U.S. at 615). Here, there are comparatively few legitimate applications of the offend-

ing portions of the material support bar that would not independently be criminalized by the law's surviving, legitimate, provisions. Thus, the statute's impermissible overbreadth is all the more certain.

A law's permissible applications are those that reflect "legitimate state interests in [regulating] harmful, constitutionally *un*protected conduct." *Hicks*, 539 U.S. at 119 (quoting *Broadrick*, 413 U.S. at 615) (emphasis added). Precisely because the challenged provisions here overtly burden pure speech and pure association in a content-sensitive manner, there are precious few legitimate applications that might save them from constitutional invalidation.

At the outset, we note that the overbreadth balancing test should take into account the legitimate sweep only of the challenged terms, and not the entire material support bar. In rejecting HLP's overbreadth challenge below, the Ninth Circuit mistakenly believed that finding the challenged terms overbroad would require invalidating the material support law *in toto*. Thus the court weighed the overbreadth of the challenged provisions against the "legitimate applications" of *other* provisions not at issue here. In particular, the panel worried that holding the terms "service," "training," "expert advice or assistance" and "personnel" to be overbroad would prevent the government from "legitimate[ly]" enforcing the material support bar to prevent individuals from "providing foreign terrorist organizations with income, weapons, or expertise in constructing explosive devices." Pet. App. 28a.

The overbreadth doctrine does not require such a dramatic result, however, and calls for facial invalidation only of those particular provisions that are themselves overbroad—that is, it calls for severance

of those provisions from the remainder of the statute. To be sure, if this Court finds the challenged provisions to be overbroad, it will be declaring them "facially" unconstitutional. But *facial* invalidation is an alternative to *as-applied* (not *partial*) invalidation: Whereas an as-applied challenge asserts that a statute or regulation "by its own terms, infringe[s] constitutional freedoms in the circumstances of the particular case" (*United States* v. *Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 565 (1972) (per curiam)), a facial overbreadth challenge alleges that "no set of circumstances exists under which the [a]ct would be valid" (*United States* v. *Salerno*, 481 U.S. 739, 745 (1987)) because "requiring that challenges to an overbroad statute * * * proceed on [an as-applied] basis will chill" free exercise (Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 271 (1994)). Thus to strike down a provision as impermissibly overbroad on its face means only that it is unconstitutional as applied to *anyone*, not that the law within which the provision is located is invalid *in toto*. In this way, facial invalidation is fully compatible with partial invalidation, or severance.

Severance is surely the proper remedy here. As this Court has said before, "[a] statute is not to be declared unconstitutional in its entirety unless 'the invalid provisions are unseverable and * * * the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes.'" *Brockett* v. *Spokane Arcades*, 472 U.S. 491, 506 (1985). Here, the challenged provisions can, and thus should, be "excised from the statute without altering the statute's intended purpose." *United States* v. *Kaczynski*, 551 F.3d 1120, 1125 (9th Cir. 2009) (citing *United States* v. *Jackson*, 390 U.S.

570, 585–90 (1968)). Thus in considering whether to sever the terms "service," "training," "expert advice or assistance" and "personnel" from the material support bar, the Court should weigh their substantial overbreadth against the "legitimate" applications, not of the *entire* material support statute, but only of those specific provisions.

What is more, because the overbreadth balancing test requires consideration of the costs "in permitting some unprotected speech *to go unpunished*" (*Broadrick*, 413 U.S. at 612 (emphasis added)), the Court should consider only those legitimate applications not covered by other, non-challenged terms of the material support bar. From within this framework, severance would pose a very low "social cost[]" indeed (*Williams*, 128 S. Ct. at 1838): it appears that most (if not all) legitimate applications of the challenged provisions would be subsumed by the law's remaining terms. For example, "service," "training," and "expert advice" could consist of *money-laundering* services, *weapons* training, or *bomb-making* expertise—activities legitimately subject to regulation. But such activities are already captured by other provisions of the material support bar, including those forbidding the provision of "financial services," support ("tangible or intangible") concerning "weapons, lethal substances, [and] explosives" (§ 2339A(b)(1)), "funds" (§ 2339C(a)), and any "service" used in "preparation for" or to "carry[] out" specific terrorism-related crimes (§ 2339A(a)).

Thus invalidation of the "service," "training," and "expert advice" provisions would *not* let such activi-

ties go unpunished.[5] There is also little doubt that any of the narrow range of circumstances in which pure speech or pure association may legitimately be criminalized—such as speech amounting to incitement to crime (see *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1967)) or association with specific intent to further a group's illegal ends (*Scales* v. *United States*, 367 U.S. 203, 222 (1961))—would similarly be covered by the surviving portions of the statute. See 18 U.S.C. §§ 2339A, 2339B, 2339C. Accordingly, there is every reason to think that the "legitimate" applications of these provisions not separately criminalized by other provisions of the law are "dwarf[ed]" by "impermissible" applications. *Ferber*, 458 U.S. at 773.

Judged against the legitimate applications of the challenged provisions alone, there is little doubt that the statute's criminalization of "service," "training," "expert advice or assistance" and "personnel" *is* substantially overbroad. On the one hand, these provisions impose overt burdens upon pure speech and pure association based in part on content, and the penalties for violating them are grave. On the other hand, the range of legitimate applications of these provisions of the statute that would not otherwise be covered by other provisions of the material support bar are exceedingly narrow, if not non-existent. Ac-

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[5] To the extent that other terms that are not themselves constitutionally suspect are sufficient to capture such conduct, the challenged provisions are almost certainly not "narrowly tailored" to that conduct. See, *e.g.*, *Boy Scouts* v. *Dale*, 530 U.S. 640, 659 (2000) (content-sensitive regulations of pure expression must be narrowly tailored to achieve a compelling governmental interest).

cordingly, the challenged provisions are substantially overbroad as written.

B. The material support law is overbroad in actual fact.

In order to justify facial invalidation, the material support bar's overbreadth must be clear "'from the text of [the law] *and* from actual fact'" (*Hicks*, 539 U.S. at 121 (quoting *New York State Club Ass'n*, 487 U.S. at 14) (emphasis added). The challenged terms plainly *are* overbroad in "actual fact."

Several specific examples demonstrate the material support bar's alarming encroachment on constitutionally protected speech. In one case, federal prosecutors invoked the material support bar's "expert advice and assistance" provision to prosecute Sami Omar Hussayen, a computer science doctoral student at the University of Idaho, for running a web site that included links to jihadist rhetoric by individuals associated with designated groups. See Susan Schmidt, *Saudi Acquitted of Internet Terror*, WASH. POST, June 11, 2004, at A3. The indictment against Hussayen alleged (among other things) that he had provided and conspired to provide material support to terrorist organizations in Chechnya and Israel on the basis that his website aided the groups "in general." *Ibid*. The prosecutor in the case was quoted as saying that mere "use of the Internet" alone can be sufficient to trigger a material support violation. *Ibid*. The jury ultimately acquitted Hussayen, apparently (according to one juror) because they concluded that his website activities were protected by the First Amendment. *Ibid*.

In another case, federal prosecutors charged Javed Iqbal with material support under § 2339A(b)

for providing television broadcasting services to a foreign television station designated as a terrorist organization. See Benjamin Weiser, *A Guilty Plea in Providing Satellite TV for Hezbollah*, N.Y. TIMES, Dec. 23, 2008. The district court rejected Iqbal's argument that his company's broadcasting of the Al Manar television station was protected by the First Amendment. *Ibid.* Iqbal, a respected Staten Island businessman, subsequently pleaded guilty to the charges for fear of receiving a greater sentence at trial. *Ibid.*

Similarly, in *United States* v. *Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003), the government charged Lynne Stewart with, among other things, providing "personnel" (herself) to a designated terrorist organization, Islamic Gama'at. *Id.* at 353. The organization's leader, Sheikh Abdel Rahman, had earlier been charged with and convicted of committing certain crimes; Stewart represented him during his criminal trial and subsequently after his conviction. *Ibid.* In part on the basis of her continued representation of Rahman after his conviction, the government sought to prosecute her for providing Islamic Gama'at with "personnel." *Id.* at 359. In dismissing the certain portions of the original indictment on unconstitutional vagueness grounds, the district court observed that the government's theory of the material support bar's prohibition of providing "personnel" would "subject to criminal prosecution" any lawyer "acting as an agent of her client," where the client is either a designated organization or "an alleged leader" of a designated organization. *Id.* at 359.

On appeal, the Second Circuit agreed that "[t]he initial ['personnel'] charges raised the possibility * * * that under the government's reading of the sta-

tute," attorneys could be criminally liable for representing designated organizations. *United States* v. *Sattar*, No. 06-5015, 2009 WL 3818860, at *19 (2d Cir. Nov. 17, 2009). The court observed that the government's overbroad application of the material support bar had "created a situation in which the defendants could be punished for, in effect, providing themselves to speak out in support of the program or principles of a foreign terrorist organization, an activity protected by the First Amendment." *Ibid*.[6]

Finally, the facts of this very case are themselves telling. The HLP, a well-respected human rights organization with consultative status to the United Nations, had long been providing, through protected speech activities, human rights advocacy and peacemaking support to the Kurdistan Worker's Party (PKK). (HLP Br. at 10). In the mid-1990s, the Secretary of State designated the PKK—the principal political organization representing the Kurds in Turkey, an ethnic minority subjected to substantial discrimination and human rights violations—as a terrorist organization. *Id.* at 10–11. It is undisputed that the HLP intends to support only the lawful and nonviolent activities of the PKK, and that they will do so through pure speech and association. Nevertheless, they have spent the last decade in a legal battle with the United States government concerning their right to do what the Constitution guarantees them the freedom to do. *Id.* at 12. There is thus no doubt that "the threat of enforcement of [the material sup-

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[6] Steward ultimately was convicted pursuant to a superseding indictment under the material support statute for disseminating her client's messages abroad. The Second Circuit upheld that conviction. See *Sattar*, 2009 WL 3818860, at *52.

port bar is] deter[ing] people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas." *Williams*, 128 S. Ct. at 1838.

In the face of these prosecutions—which have, according to both judges and juries, encroached upon the First Amendment—there can be no serious doubt that the material support bar is preventing "those who desire to engage in legally protected expression * * * from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett*, 472 U.S. at 503. At the very least, these prosecutions show that the material support bar has directly burdened the constitutional rights of the specific defendants. Hussayen's and Stewart's prosecutions are particularly troubling because they demonstrate that the government is, indeed, using the material support bar to prosecute pure speech. Given the broad publicity surrounding both prosecutions, moreover, there can be little doubt that others have refrained from exercising their protected First Amendment rights, and the material support bar is generating precisely the sort of chilling effect the overbreadth doctrine is meant to correct.

This conclusion is reinforced by the frequency with which the government is utilizing the material support bar: Individuals' self-censorship for fear of prosecution will necessarily be more pervasive when the government is diligently enforcing the law giving rise to the chilling effect. The Center on Law and Security reports, for example, that in the seven years between September 11, 2001 and September 11, 2008, the federal government brought 492 prosecutions for violations of the material support provisions, with conviction rates well above 50%. See The Center on Law and Security, N.Y.U. Sch. of Law,

Terrorist Trial Report Card: September 11, 2008 (2008).[7] Moreover, the average sentence for convictions under both statutes was greater than eleven years in prison. *Ibid*. These prosecutions were brought most often against American citizens with no known or alleged affiliation with any designated terrorist organization. *Ibid*.

To be sure, the vast majority of these prosecutions have not been directed at pure speech or association. Although these prosecutions under the material support bar would thus be available regardless whether this Court invalidates the challenged terms as overbroad, there is little doubt that the great frequency with which the government has employed the material support bar *generally*, in combination with even a small sample of well-publicized unconstitutional prosecutions, is chilling protected expression as a matter of fact.[8]

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[7] Available online at http://www.lawandsecurity.org/publications/Sept08TTRCFinal.pdf.

[8] The Court need not be concerned that invalidating the challenged terms of the material support bar as unconstitutional (on either overbreadth or vagueness grounds) would interfere with Congress's ability to legislate in this arena. As the Constitution Project explained in its report, *Reforming the Material Support Laws*, Congress can and should remedy the vagueness problems raised in this litigation by, for example, expanding the category of support or resources exempt from the definition of material support to include such humanitarian aid items as medical services, civilian public health services, and, if provided to noncombatants, food, water, clothing, and shelter. Similarly, Congress could have avoided the overbreadth issues discussed in the text by simply omitting the challenged provisions of the statute, whose application to any given conduct is either duplicative of other provisions of the statute or constitutionally suspect.

* * * * *

It is clear "'from the text of [the law] and from actual fact'" (*Hicks*, 539 U.S. at 122 (quoting *New York State Club Ass'n*, 487 U.S. at 14), that the material support bar's "service," "training," "expert advice," and "personnel" provisions are substantially overbroad. As a matter of law, they are content-based restrictions upon pure speech and pure association, and they apply directly to a wide range of speech and association, potentially subjecting individuals to life in prison for exercising their First Amendment rights. As a matter of fact, the law is being used to prosecute protected speech, and there is little doubt that citizens across the Nation are refraining from undertaking protected speech and association, such as legal representation of a designated group in a challenge to their designation, for fear of similar prosecution. Accordingly, this Court should hold these provisions of the statute to be facially invalid and sever them from the material support bar.

CONCLUSION

The Court should hold that the Antiterrorism and Effective Death Penalty Act's prohibition of providing "service," "training," "expert advice," and "personnel" to designated terrorist organizations (18 U.S.C. §§ 2339A, 2339B) is unconstitutionally overbroad and sever these provisions from the statute.

Respectfully submitted.

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APPENDIX:
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