Nos. 08-1498 and 09-89

IN THE

Supreme Court of the United States

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

—v.—

HUMANITARIAN LAW PROJECT, ET AL.,
Respondents.

HUMANITARIAN LAW PROJECT, ET AL.,
Cross-Petitioners,

—v.—

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

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

BRIEF *AMICUS CURIAE* OF THE CARTER CENTER, CHRISTIAN PEACEMAKER TEAMS, GRASSROOTS INTERNATIONAL, HUMAN RIGHTS WATCH, INTERNATIONAL CRISIS GROUP, THE INSTITUTE FOR CONFLICT ANALYSIS AND RESOLUTION AT GEORGE MASON UNIVERSITY, THE KROC INSTITUTE FOR INTERNATIONAL PEACE STUDIES AT NOTRE DAME UNIVERSITY, OPERATION USA, AND PEACE APPEAL FOUNDATION IN SUPPORT OF HUMANITARIAN LAW PROJECT, ET AL.

MELISSA GOODMAN
Counsel of Record
STEVEN R. SHAPIRO
JAMEEL JAFFER
LAURENCE M. SCHWARTZTOL
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York, 10004
(212) 549-2500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI*

Amici file this brief in support of plaintiffs' as applied challenge to the constitutionality of 18 U.S.C. § 2339B. *Amici* are a diverse coalition of conflict resolution, human rights, humanitarian aid, academic, and advocacy organizations that share a profound concern about the implications of the material support statute for their efforts to foster peace, further human rights, and alleviate human suffering around the world.[1]

The challenged statute makes it a crime punishable by up to 15 years in prison to provide "material support or resources" to an organization the Secretary of State has designated a "foreign terrorist organization" (FTO). 18 U.S.C. § 2339B(a)(1); *see also* 8 U.S.C. § 1189. These severe criminal penalties attach whether or not the provider of "material support" intends to further the designated organization's violent or unlawful aims. Under the statute, it is enough that the provider knows "that the organization is a designated terrorist organization [or] has engaged or engages in terrorist activity." 18 U.S.C. § 2339B(a)(1). Thus, a provider can be held criminally liable even if he or she opposes the terrorist activities of the designated

[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members or their counsel made a monetary contribution to its preparation or submission.

group and even if the support is intended to further entirely peaceful, lawful objectives. Moreover, "material support" is defined broadly to include, among other things, any "service," "training," "expert advice or assistance," or "personnel." *Id.* at § 2339A(b)(1). Each of these terms is vague and sweeping, and potentially proscribes a wide range of speech and advocacy that is protected by the First Amendment and necessary to *amici's* work.

Amici emphatically oppose terrorism. However, peace-making, conflict resolution, human rights advocacy, and the provision of aid to needy civilians sometimes requires direct engagement with groups and individuals that resort to or support violence, including some that are, have been, or might in the future be designated as FTOs. For example, effective conflict resolution often requires negotiating and mediating with armed actors, and providing each side to a conflict with strategic advice or expertise. Effective advocacy for peace often requires direct persuasion and lobbying of armed actors to choose non-violent means to achieve their ends. Effective human rights advocacy often requires directly persuading the perpetrators of abuses to cease their rights-violating practices, explaining to the perpetrators their obligations under human rights and humanitarian law, and advising the perpetrators how to comply with those obligations. Similarly, effective aid distribution, disaster relief, and development efforts in conflict zones where violent actors dominate may require advising, sharing expertise, and negotiating with

local partners, some of whom may personally support or be members of groups that engage in violence.

All of this work is intended to further lawful ends, not terrorism. However, as a result of the breadth and vagueness of the material support statute's terms, it is unclear to *amici* whether these kinds of activities – many, if not all, of which are protected by the First Amendment – could expose them to the risk of severe criminal penalties if they involve a group or members of a group that the U.S. government has, or may in the future, designate as an FTO.

The Carter Center, in partnership with Emory University, is guided by a fundamental commitment to human rights and the alleviation of human suffering. It seeks to prevent and resolve conflicts, enhance freedom and democracy, and improve health. Founded in 1982 by former U.S. President Jimmy Carter and former First Lady Rosalynn Carter, the Center has helped to improve the quality of life for people in more than 70 countries.

Christian Peacemaker Teams (CPT) arose from a call in 1984 for Christians to devote the same discipline and self-sacrifice to nonviolent peacemaking that armies devote to war. Committed to nonviolent alternatives to war, CPT places violence-reduction teams in crisis situations and militarized areas around the world at the invitation of local peace and human rights workers. With a diverse membership of Catholics, Baptists, Presbyterians, Mennonites, Brethren and Quakers, CPT's peacemaking emphasizes creative public

witness, nonviolent direct action and protection of human rights.

Grassroots International (GRI) is a human rights and international development organization that promotes global justice through partnerships with social change organizations. GRI works around the world to advance political, economic, and social rights and supports development alternatives through grantmaking, education, and advocacy.

Human Rights Watch (HRW) is one of the world's leading independent organizations dedicated to defending and protecting human rights. HRW stands with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice. HRW investigates and exposes human rights violations and holds abusers accountable. HRW challenges governments and non-state actors to end abusive practices and respect international human rights law. HRW currently monitors human rights abuses in over 80 countries.

International Crisis Group (ICG) is an independent, non-profit, non-governmental organization, with approximately 130 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict worldwide. ICG is widely recognized as the world's leading independent, non-partisan source of analysis and advice to governments and intergovernmental bodies on the prevention and resolution of deadly conflict. ICG actively monitors over 60 conflicts and potential conflicts around the globe.

The Institute for Conflict Analysis and Resolution at George Mason University (ICAR) is committed to the development of theory, research, and practice that interrupts cycles of violence. ICAR advances the understanding of deeply rooted conflicts all over the world through research, teaching, practice, and outreach.

The Kroc Institute for International Peace Studies at Notre Dame University is one of the world's principal centers for the study of the causes of violent conflict and strategies for sustainable peace. Faculty conduct research on war, genocide, terrorism, ethnic and religious conflict, and violation of human rights; teach students earning doctoral, masters and bachelor degrees in peace studies; and, contribute to on-the-ground peace-building worldwide through consultation, facilitation and research.

Operation USA helps communities alleviate the effects of disasters, disease and endemic poverty throughout the world by providing privately-funded relief, reconstruction and development aid. Operation USA provides material and financial assistance to grassroots organizations that promote sustainable development, leadership and capacity building, and income generating activities; provides education and health services; and advocates on behalf of vulnerable people.

Peace Appeal Foundation (PAF) supports peace and conflict resolution processes globally through interventions (typically establishing dialogue and negotiations support structures) designed to achieve agreed, fair and just outcomes.

The cornerstone of PAF's work is comprised of direct, sustained mediation, facilitation and advisory services in some of the world's most intractable conflicts. PAF also works collaboratively with local and international partners to develop and disseminate innovative tools, methodologies, educational materials and programs in support of peace and conflict resolution efforts.

SUMMARY OF ARGUMENT

The material support statute's prohibitions on "service," "training," "personnel," and "expert advice or assistance" are unconstitutionally vague as applied to the kind of peaceful, non-violent speech and advocacy in which both plaintiffs and *amici* engage. *Amici,* like plaintiffs, are left hopelessly guessing – at the risk of grave penalty – whether their advocacy for peace or human rights, their engagement in or facilitation of peace-making dialogue, or the expressive components of their humanitarian aid work crosses the line from constitutionally protected to criminally proscribed.

To the extent that the vague terms of the statute do, in fact, proscribe this kind of speech and advocacy, the statute suffers two independently fatal flaws under the First and Fifth Amendments. First, it proscribes speech and advocacy that is intended to further only lawful, non-violent activity – and which in no way incites others to imminent lawless action – merely because the recipient or beneficiary of that speech has been unilaterally designated as a terrorist organization by the Executive Branch. Second, it punishes association with a group even

where the association is not intended to further the group's unlawful activities and is, in fact, intended to *dissuade* the group from engaging in unlawful activities.

ARGUMENT

I. THE STATUTE'S PROHIBITIONS ON "SERVICE[S]," "TRAINING," "EXPERT ADVICE AND ASSISTANCE," AND "PERSONNEL" ARE UNCONSTITUTIONALLY VAGUE AS APPLIED TO PLAINTIFFS AND THREATEN TO CRIMINALIZE ACTIVITIES THAT ARE PROTECTED BY THE FIRST AMENDMENT

The challenged terms are unconstitutionally vague under the Fifth Amendment.

While vague laws are always suspect, courts harbor the least tolerance for vague laws that carry criminal penalties. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). Criminal laws are unconstitutionally vague if they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In other words, a law is unconstitutionally vague if it fails to provide adequate notice of proscribed conduct. *See id.* ("an enactment is void for vagueness if its prohibitions are not clearly defined"); *see also Smith v. Goguen*, 415 U.S. 566, 572 (1974) (the vagueness doctrine "incorporates notions of fair notice or warning"); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)

(a law is vague if it tethers individual liability to "an unasertainable standard," leaving persons "of common intelligence [to] guess at its meaning" (internal quotation marks omitted)). Because "we assume that a [person] is free to steer between lawful and unlawful conduct," he or she has to be given enough clear direction to "act accordingly." *Grayned*, 408 U.S. at 108.

Criminal laws are also unconstitutionally vague if they authorize or encourage "arbitrary and discriminatory enforcement." *Chicago v. Morales*, 527 U.S. 41, 56 (1999). Laws must "provide explicit standards for those who apply them" in order to avoid the "dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-109. They cannot "delegate[ ] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Id.*; *see also Smith*, 415 U.S. at 575 ("Statutory language [with] standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of criminal law.").

Vague criminal laws are especially problematic where they "abut[ ] upon sensitive areas of basic First Amendment freedoms" and "operate[ ] to inhibit the exercise of (those) freedoms." *Grayned*, 104 U.S. at 109 (internal quotation marks omitted). The vagueness doctrine incorporates a special solicitude for First Amendment concerns because statutes that have uncertain meanings inevitably lead people to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas

were clearly marked." *Id.* (internal quotation marks omitted). Statutes that have uncertain meanings also increase the risk that individuals will be targeted for punishment because of unpopular speech or expression. *See, e.g., Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). For this reason, a heightened level of clarity is required of criminal statutes that threaten to encroach upon First Amendment-protected activities. *See Smith*, 415 U.S. at 573 ("Where a statute's literal scope . . . is capable of reaching expressions sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.").

In this case, the Court of Appeals correctly held that the criminal prohibitions on "service," "training," and "expert advice or assistance derived from . . . specialized" knowledge are fatally void for vagueness as applied to plaintiffs' intended speech. *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 928-30 (9th Cir. 2009). The Court of Appeals erred, however, in holding that "expert advice and assistance derived from . . . scientific or technical" knowledge and "personnel" survived vagueness scrutiny. *Id.* at 930-931.

The prohibition on "training" fails to convey to a person of common intelligence which activities are prohibited and which are not. "[T]raining" is defined to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b). Nothing in the statute explains how to distinguish "instruction designed to impart a specific skill" from instruction bestowing "general knowledge." Nor does common usage illuminate that

distinction. Several *amici* here provide teaching and direction in conflict resolution, non-violence, and humanitarian aid. But they cannot meaningfully discern whether the skills or information they impart are general (in which case their conduct would be permitted) or specific (in which case it would not be). *See infra* 12-14, 23.

The phrase "expert advice or assistance" similarly fails to provide meaningful notice of what conduct is prohibited. "[E]xpert advice and assistance" is defined to mean "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3). Nothing in the statute provides a firm sense of what that definition encompasses. Not only does the statute fail to give any guidance how to distinguish "technical" knowledge from non-technical knowledge, or how to distinguish knowledge that is "specialized" from knowledge that is general, it is utterly unclear what it means for information to be "derived from" technical or specialized knowledge. The government's interpretation of these terms underscores the problem. For example, the government has asserted that lawyers could be providing "expert advice or assistance" by filing an *amicus* brief in support of a designated organization. *Humanitarian Law Project*, 552 F.3d at 930. *Amici* cannot meaningfully ascertain whether, for example, sharing expertise about international law, conflict resolution strategies, or how to rebuild a village after a natural disaster could constitute unlawful provision of "specialized," "technical," or "scientific" knowledge. *See infra* 13-15, 20-23, 26-27.

The term "service," which is not defined in the material support statute at all, presents similar concerns. The government has interpreted the term to encompass any "act done for the benefit of" a designated group. Petition for Writ of Certiorari at 17, *Holder v. Humanitarian Law Project*, No. 08-1498 (S. Ct. June 4, 2009). This interpretation, however, gives no meaningful notice of the conduct that is proscribed. A substantial amount of *amici's* work could be perceived to be "for the benefit" of designated groups, even though this work encourages peace and non-violence, not terrorism. *See infra* 13-14, 16-18, 23-25.

The prohibition on "personnel" also fails to provide concrete guidance regarding what is prohibited. Provision of "personnel" entails, among other things, "knowingly" providing one or more persons (including oneself) "to work under that terrorist organization's direction or control." 18 U.S.C. § 2339B(h). The definition excludes "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives." *Id.* Its sweep is limited only by the elastic concept of working "entirely independently" of a designated group, a concept undefined by the statute.

The vagueness of the challenged terms is especially problematic because the terms can fairly be construed to reach activity that is protected by the First Amendment. Indeed, the challenged terms potentially implicate a great deal of the First Amendment-protected speech and advocacy in which *amici* engage in the course of their peace-building,

human rights-promoting, and humanitarian work, whether it be teaching or instruction, *see infra* 12-14; communicating ideas and discussing ways to forge peace, *see infra* 15-18; or advocacy to further human rights, the rule of law, or non-violence, *see infra* 18-25.[2]

A. Teaching And Instruction In Peace-Building Skills

Several of *amici* pursue their humanitarian or peace-building agendas by providing instruction in

---

[2] *See generally,* Brief of Respondents/Cross-Petitioners at 23-24, *Holder v. Humanitarian Law Project,* Nos. 08-1498 and 09-89 (filed Nov. 16, 2009); *see also Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (the right of "free speech" and "the right to teach" are "fundamental rights"); *Dennis v. United States*, 341 U.S. 494, 574 (1951) (Goldberg, J., concurring) (the First Amendment protects "teaching" and "advocacy"); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) (the First Amendment protects "tutoring"); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 141-42 (1943) (the First Amendment protects one's ability to "communicate ideas"); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (the First Amendment protects "communication of information" and "the advocacy of causes"); *NAACP v. Button,* 371 U.S. 415, 429 (1963) (the First Amendment "protects vigorous advocacy . . . of lawful ends"); *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (the "right to free speech . . . includes the right to attempt to persuade others to change their views"); *Griswold v. Connecticut.,* 381 U.S. 479, 482 (1965) ("The right of freedom of speech . . . includes . . . the right to distribute [information], the right to receive [information] . . . and freedom to teach."); *NAACP v. State of Ala. ex rel. Patterson,* 357 U.S. 449, 460 (1958) (the First Amendment protects one's ability to associate for the "advancement of beliefs and ideas").

non-violence. This activity falls comfortably within the First Amendment's zone of protection. *See supra* 12 n.2. Yet the statute fails to supply sufficient clarity in its definitions to allow *amici* to determine whether this activity violates § 2339B.

1. In order to reduce violence around the world, Christian Peacemaker Teams (CPT), places violence-reduction teams in conflict zones. Such teams currently operate in Northern Iraq, Colombia, and the West Bank. These teams provide, among other things, reconciliation and non-violence training at the request of local non-governmental organizations (NGOs). Participants may include individuals who are members of groups that engage in violence. The aim of these trainings is to educate participants about the history of various non-violent social change movements; explain the benefits, effectiveness, and legitimacy of non-violent approaches; teach specific techniques of non-violent resistance and reconciliation; and advise participants on how to put these techniques to concrete use.

It is unclear whether this activity – to the extent that members of any proscribed group might participate – might be construed as prohibited training or expert advice because it is unclear whether CPT is imparting information derived from specialized knowledge or specific skills, or general knowledge. It is also unclear whether this activity might be construed as a prohibited service on the theory that the trainings are done "for the benefit of" the participants.

CPT also occasionally provides non-violence trainings at the request of armed actors themselves.

For example, long before the material support statute existed, the armed wing of Fatah (a faction of the PLO) approached CPT and requested a training, which CPT provided. Like all of CPT's non-violence trainings, the training was intended to convince the group to renounce violence and adopt non-violent resistance techniques instead. It was not intended to further terrorism. Had Fatah been a designated group, however, CPT's activities might have constituted prohibited training, expert advice derived from specialized knowledge, or a service.

2. The Carter Center, among its many activities to resolve and prevent violent conflicts around the world, helps regional organizations build capacity for peaceful conflict resolution. To this end, the Carter Center uses creative means to teach organizations and individuals peaceful conflict resolution techniques. In furtherance of its mission, the Carter Center would like to launch a project to teach peaceful conflict resolution in universities in Gaza through the formation of a student "parliament," where students could come to voice concerns and be trained to adjudicate disputes. The goal would be to make students accustomed to solving disputes through peaceful dialogue rather than violence. Although this activity is plainly intended to end terrorism, not support it, the Carter Center is unsure if it can initiate this program without running afoul of the material support statute, if at least some of the students participating are known or likely to be members of Hamas or other designated FTOs. It is unclear whether the program could be construed as a prohibited service, or

whether some aspects of the program might entail the provision of prohibited training or expert advice derived from specialized knowledge.

B. Conflict Resolution and Mediation

Some *amici* directly engage with parties to violent hostilities in order to peacefully resolve conflicts. These activities implicate important First Amendment concerns, requiring increased clarity of the statute's operative terms. *See supra* 12 n.2. But, again, *amici* must navigate these inherently delicate situations in the face of vague statutory language.

1. For example, the Carter Center, through its Conflict Resolution Program, monitors and mediates conflicts, helps implement peace agreements, strengthens rule of law, and facilitates dialogue to ease tensions. When democracy backslides or diplomacy fails, the Carter Center offers mediation and facilitation expertise for peace-making in Africa, the Middle East, Latin America, and Asia, and tries to fill the space between official diplomacy and unofficial grassroots peace efforts. This work, by necessity, requires meeting with all sides to a conflict. The Carter Center engages all parties – elected leaders, political party officials, international bodies, diplomats, NGOs, the media, and independent analysts – in its advocacy for peaceful solutions. In the course of resolving or preventing conflicts, Carter Center staff will meet with violent actors – some of whom may be or may in the future be designated as FTOs – to persuade them to cease violent activity and discuss specific paths to peace. Sometimes the Carter Center will directly

mediate between parties to help negotiate a cessation of hostilities. In the course of these meetings, the Carter Center may discuss peace-facilitating strategies. The Carter Center may also advise groups on their obligations under international law. The Carter Center has engaged in this kind of conflict resolution activity with, among others, the PLO, Fatah, Hamas, Hezbollah, the SPLN in Sudan, the Lord's Resistance Army in Uganda, and the Maoists in Nepal. The intent, of course, is to further peace, not terrorism.

It is unclear, however, whether any advice or expertise that may be communicated during these dialogues might be construed as specialized, as opposed to general, advice or assistance. Moreover, it is unclear whether the facilitation of these dialogues, or even the dialogues themselves, might be construed as a prohibited service to the extent that this activity is done at least in part for the benefit of the parties to a conflict. The statute gives no guidance on structuring this peace-promoting activity in a way that steers clear of criminal sanction.

2. Similarly, Peace Appeal Foundation (PAF) engages with all parties to violent conflicts to help them design and implement dialogue and negotiation support structures that underlie peacemaking efforts. PAF also conducts research; analyzes the parties' positions and areas of common ground; and then makes that information available to all parties – sometimes through collaborative, but confidential, computer networks – in order to equip stakeholders with information necessary to engage in

meaningful dialogue. PAF has found that providing this kind of platform for dialogue is a critical element of establishing relationships and building trust among antagonists for the purpose of ending violence.

PAF has engaged in this kind of work where parties to a conflict include groups that have been or may in the future be designated as FTOs. For example, in Sri Lanka PAF established a confidential dialogue process called the One Text Initiative (which was supported by funding from USAID), through which all parties to the violence in Sri Lanka communicated. When the LTTE (otherwise known as the Tamil Tigers) assigned a proxy representative to participate in the One Text Initiative, however, U.S. support for the process was called into question and ultimately withdrawn, dealing a severe blow to the effectiveness of the talks among all parties. PAF and its partners were forced to restructure their activities due to fear of potential liability under the material support statute. In Nepal, PAF helped establish the Nepal Transitions to Peace Initiative, which involved creating a physical space where stakeholders from Nepal's political parties meet regularly in support of the peace process to resolve Nepal's violent conflict. This initiative required PAF to engage directly with the CPN-Maoists. The Maoists' participation was vital; because they controlled half of Nepal's territory, no peace-building initiative could have plausibly succeeded if they were excluded.

These activities are solely intended to promote peace, not terrorism. However, it is unclear whether

equipping parties to violent conflicts with tools to facilitate peace, or providing them with advice and technical assistance to this end, might be construed as prohibited services or expert advice or assistance derived from specialized or technical knowledge.

3. CPT also occasionally serves as a mediator in violent conflicts. For example, in 1990, CPT provided assistance to members of the Mohawk nation during the "Oka Crisis." Oka is a town in Quebec, Canada. What began as a peaceful protest of plans to expand a golf course on land the Mohawks considered sacred soon escalated into a months-long, occasionally violent standoff between Mohawk protesters, some armed, and Canadian police and soldiers. At the request of the Mohawk protesters, CPT went behind the lines to mediate a peaceful solution. CPT's aim was to help bring the standoff to a speedy and peaceful end. Had CPT provides these same mediation services to a designated organization, however, it is unclear whether these activities would constitute a prohibited service, or expert advice or assistance derived from specialized knowledge.

C. Advocacy Directed at Violent Actors

Some *amici* engage in human rights, rule of law, and peace advocacy activities directed specifically towards violent actors. This advocacy aims to persuade groups to cease human rights violations, comply with international laws, reject violence, and pursue their ends through peaceful and legal means. Nothing implicates the First Amendment more directly than advocacy. *See supra*

12 n.2. Section 2339B's vague terms, however, leave *amici* foundering to determine whether their advocacy activities are permissible.

1. The Carter Center, for example, engages in democracy and election-related advocacy, sometimes with groups that engage in violence but also hold considerable, and formal, political power. Through its Democracy Program, the Carter Center has conducted election monitoring in 30 countries, with the consent or at the request of all major parties to an election. Before an election, Carter Center teams monitor the registration and campaign process, meet with elected officials and party leaders to discuss any problems, and advise officials how to ensure fair and impartial electoral procedures; occasionally, the Carter Center will mediate election disputes. On election day, Carter Center observers track every stage of the process from the opening of polling places to ballot counting; throughout the day, observers will speak with polling site officials and citizens who have encountered problems. Where irregularities occur, Carter Center teams continue their dialogue with government and party officials to advise them about potential improvements for future elections, mediate any remaining disputes, and, where applicable, help facilitate the peaceful transfer of power. In 2009, Carter Center teams observed elections in Lebanon. In 1996, 2005, and 2006, Carter Center teams observed elections in the Palestinian Territories. In both Lebanon and the Palestinian Territories, President Carter himself led the observation missions. In the course of their election monitoring activities, observer teams will

occasionally meet with members of Hezbollah's or Hamas' political wing – both of which have members who are elected representatives and, thus, participate directly in the electoral process.

This advocacy and advising activity is intended to ensure fair elections that represent the true will of the people. It is unclear, however, whether this activity might be construed as prohibited expert advice derived from specialized or technical knowledge.

2. Human Rights Watch (HRW) investigates human rights abuses in the field, documents its findings in human rights reports, and advocates with the perpetrators of those abuses to cease their unlawful actions. HRW also advises governments and non-state actors on their legal obligations under international law, and lobbies them to comply with those obligations. Over the years, HRW has put considerable effort into documenting human rights violations committed by militant groups, some of which have been designated as terrorist organizations by the United States. For example, HRW has extensively documented human rights violations committed by the FARC, ELN, Hamas, Hezbollah, and the LTTE.[3] As part of their advocacy,

[3] *See, e.g.,* Human Rights Watch, *Trapped and Mistreated: LTTE Abuses against Civilians in the Vanni* (Dec. 2008); Human Rights Watch, *Civilians under Assault Hezbollah's Rocket Attacks on Israel in the 2006 War* (Aug. 2007); Human Rights Watch, *Living in Fear: Child Soldiers and the Tamil Tigers in Sri Lanka* (Nov. 2004); Human Rights Watch, *"You'll Learn Not To Cry": Child Combatants in Colombia* (Sept. 2003); Human Rights Watch, *Erased in a Moment: Suicide Bombing Attacks Against Israeli Civilians* (Oct. 2002); Human Rights

HRW staff members have met with senior officials of these groups about their human rights violations. In meetings like this, in addition to urging the groups to cease their abusive practices, HRW may also educate them on their specific obligations under international human rights and humanitarian law and advise them on the particular steps the groups must take to bring their actions into compliance with the law.

All of this activity, of course, is intended to further human rights, not terrorism. It is unclear, however, whether any aspect of the communication of practical advice or legal expertise that occurs in these kinds of meetings might be construed as prohibited expert advice derived from specialized knowledge. The statute fails to provide any guidance whether sharing expertise on international human rights law might be construed as specialized knowledge (which is prohibited) or general knowledge (which is permitted).

3. International Crisis Group (ICG), as part of its conflict analysis, prevention, and resolution work, also engages in advocacy with both violent non-state actors and governments engaged in or supporting violent hostilities. ICG issues detailed analyses of existing or emerging conflicts, and makes specific recommendations that non-state actors or governments should adopt to prevent further violence. ICG may then meet with the relevant parties to urge them to adopt ICG's recommended actions. In the course of such meetings, ICG might

---

Watch, *Beyond Negotiation: International Humanitarian Law and its Application to the Conduct of the FARC-EP* (Aug. 2001).

explain to the participants their obligations under international law or international agreements, and might provide advice as to how participants can adopt ICG's recommendations in practice.

This kind of advocacy and dialogue is intended to further peace and compliance with international law, not terrorism. If it were to occur with a group that is or may in the future be designated, however, it is unclear whether some aspects of this crisis resolution activity might be construed as prohibited expert advice derived from specialized knowledge.

4. Similarly, the Carter Center, as part of its human rights monitoring activity in conflict zones, engages in advocacy meetings with political leaders of, among other groups, Hamas and Hezbollah. Like HRW, the Carter Center advocates for the cessation of human rights abuses, and may, in the process, share its expertise on international law and suggest ways to comply with the law. This advocacy is intended to further human rights, not terrorism. Again, it is unclear, however, whether the aspects of this advocacy that involve the sharing of knowledge and expertise might be construed as prohibited expert advice derived from specialized knowledge.

5. In its efforts to advocate for peaceful resolution of the Israeli/Palestinian conflict, and as part of its work in the West Bank, CPT often meets with local town councils and local government officials, and attends town meetings, to discuss the benefits of non-violence and advise on ending the conflict. CPT also arranges for delegations of non-violent peace groups from around the world to visit

the West Bank; occasionally, these delegations meet with local officials. Some of the elected officials with whom CPT and its delegations meet are members of Hamas' political wing.

These meetings are intended to advocate for peace, not to further terrorism. It is unclear, however, whether any of this advocacy might be construed as expert advice derived from specialized knowledge or whether having delegations meet with these officials might be construed as a prohibited service.

6. CPT also engages armed actors in one-on-one efforts to convince them to renounce violence. When CPT staff encounters individuals on the street, in villages, or on the farms they visit as they travel throughout Colombia, Iraq, or the West Bank, and when they believe an individual might be affiliated with paramilitaries, civilian armed militias, or a rebel group, CPT staff discuss the benefits of nonviolence and advise them to cease their violent activities and to stop threatening local populations.

This personalized, face-to-face advocacy is intended to promote peace, not terrorism. To the extent that any of these individuals are known or suspected to be members of proscribed groups, however, it is unclear whether CPT's provision of advice and teaching could be perceived as constituting prohibited expert advice, training, or a service.

D. Independent Advocacy That Could Be Perceived as "For the Benefit of" Others

Some *amici* also engage in advocacy activities that might be construed as providing a "service," insofar as the activities could be perceived as done "for the benefit of" a designated group or its members.

1. Christian Peacemaker teams in Iraq, for example, engaged in significant advocacy on behalf of individuals detained by the U.S. government at Abu Ghraib prison in the early years of the Iraq war. At the request of family members of individuals whose loved ones had disappeared, presumably into U.S. custody, CPT routinely sought information about prisoners' whereabouts from the Iraqi Assistance Center, and lodged complaints about abuse of particular prisoners. Some of the detainees on whose behalf CPT advocated may have been members of designated groups.

CPT's advocacy was intended to promote and enforce the rule of law, not terrorism. It is unclear, however, whether CPT's advocacy on behalf of particular individuals could have been construed as a prohibited service or the prohibited provision of personnel.

2. CPT also engages in extensive advocacy to call attention to the plight of civilian victims of a violent conflict between Turkey and Kurdish separatists who reside in Northern Iraq. In the course of that work, CPT visits refugee camps to discuss with refugees, some of whom reside in what are unofficially considered "PKK" camps, non-violent

ways to end the conflict. CPT will sometimes help call attention to non-violent protest activities in the region. For example, CPT recently called attention to a peaceful march planned by Kurdish refugees. The march reportedly included some members or supporters of the PKK. The group marched from the refugee camp in Iraq to the Turkish border and offered peace to the Turkish government. In its advocacy, CPT has also called attention to a recent and under-reported PKK cease-fire. Although CPT is engaged in independent advocacy, it is unclear whether some of this activity could be wrongly perceived as prohibited service done "for the benefit of" the PKK.

3. Similarly, the Carter Center, in its advocacy efforts to achieve peace between Palestinians and Israelis, publicly calls for inclusion of Hamas in peace talks because Hamas represents a sizeable portion of the population and the Carter Center believes that true peace is not achievable without their active participation. The Carter Center's advocacy in this regard is intended to ensure an effective peace process and is wholly independent of Hamas. Nonetheless, it is unclear whether even this type of advocacy could be viewed as a prohibited service because it could be construed as action taken "for the benefit of" Hamas as Hamas would presumably derive some benefit from inclusion in the peace process.

E. Humanitarian Aid

Provision of humanitarian aid often requires working with and providing expert advice and technical assistance to local actors. Each of the

amici that provide humanitarian aid adhere strictly to certain universal principles of humanitarian assistance. These principles require all providers of aid to draw sharp lines between humanitarian activities, which they support, and military activities, which they do not. However, in the context of war zones, particularly in geographic areas controlled or dominated by designated groups, some form of engagement with these groups, their members, or their supporters is sometimes inevitable. When *amici* provide instruction or guidance to local groups to further humanitarian aid operations, they engage in First Amendment-protected activity. *See supra* 12 n.2. The challenged provisions of § 2339B, however, do not clearly delineate the space available for *amici* to conduct on-the-ground humanitarian aid activities.

1. For example, Operation USA engaged in significant disaster relief and rebuilding efforts in Sri Lanka after a tsunami devastated wide swaths of the country in 2004. The north and east of the country – Tamil areas largely controlled by the rebel group LTTE until their defeat in May 2009 – were particularly affected. Operation USA partnered with local NGOs to rebuild Kallady, a fishing village on the east coast of Sri Lanka where homes and infrastructure had been entirely destroyed by the tsunami. By 2006, Operation USA had completed its work overseeing the rebuilding of 163 homes, a health center, a community center, a primary school, and a pre-school. As a part of this work, Operation USA provided significant amounts of advice and assistance to local actors regarding reconstruction

plans and the rebuilding process itself, including technical medical, water, sanitation, hydrology, and education expertise.

One of Operation USA's many local partners was a local Tamil relief organization that had been granted legal status (and even given awards) by the Sri Lankan government. In 2007 (long after Operation USA's work in Kallady was completed), however, a new Sri Lankan administration decided the relief organization was affiliated with the LTTE and shut it down. The U.S. Treasury Department subsequently designated the organization. Operation USA no longer works with this particular organization, which is now defunct.

None of Operation U.S.A.'s provision of advice or technical assistance was in any way intended to support terrorism or violence perpetrated by the LTTE; it was intended to alleviate the suffering of Tamil civilians. Had the Tamil relief organization been designated at the time, however, it is unclear whether the kind of expert and technical rebuilding assistance Operation USA provided might be construed as prohibited expert advice or assistance derived from specialized, technical, or even scientific knowledge, or might be construed as a prohibited service or training.

2. Others working in Sri Lanka following the tsunami faced even more acute dilemmas. A huge number of tsunami victims lived in territory then controlled by the LTTE. A number of doctors and public health professionals who went to Sri Lanka in the immediate aftermath of the crisis had to decide whether providing critical public health

information to the people running the refugee camps would be illegal if the recipients of that information were LTTE medical officials. As a result of the material support laws, some doctors who would otherwise have provided such assistance were deterred from doing so. *See* Gady A. Epstein, *Maryland MD Struggles for Tamil Patients*, Balt. Sun, Jan. 23, 2005; Ahilan T. Arulanantham, *Testimony at Oversight Hearing on Amendments to the Material Support for Terrorism Laws: Section 805 of the USA PATRIOT Act and Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary* (May 10, 2005).[4]

None of the work described above was intended – in any conceivable way – to further terrorism. It is intended to reduce it or end it altogether. Nonetheless, plaintiffs, *amici*, and others who engage in similar missions are left guessing which aspects of their work remain permissible and which may be prohibited. Especially where a criminal statute potentially reaches clearly established First Amendment interests, the Constitution does not permit such profound uncertainty. The potential impact of the statute on *amici* reinforces plaintiffs' central claim that the challenged provisions of § 2339B are unconstitutionally vague as applied to plaintiffs' humanitarian activities.

---

[4] The transcript is available at http://www.aclu.org/national-security/aclu-testimony-material-support-terrorism-laws-section-805-patriot-act-and-section.

II. TO THE EXTENT THAT THE STATUTE DOES PUNISH SPEECH AND ADVOCACY INTENDED TO FURTHER LAWFUL ACTIVITY, THE STATUTE VIOLATES THE FIRST AMENDMENT

To the extent that the vague terms in § 2339B apply to the kinds of First Amendment-protected activities engaged in by groups like *amici* or plaintiffs, those provisions violate the First Amendment. As construed by the government, the material support statute proscribes speech that is intended to further only lawful, non-violent activity. It also impermissibly punishes association intended to dissuade an organization from engaging in unlawful activity. It is axiomatic, however, that the government cannot sanction advocacy unless it incites imminent lawless activity. Likewise, well-established First and Fifth Amendment principles prohibit the government from punishing association with a group that engages in illegal activity unless the association is intended to further the group's illegal aims. The material support statute, as construed by the government, offends both of these principles. In doing so, it threatens the speech and association of internationally recognized organizations whose mission is to promote peace and humanitarian ends rather than violence.[5]

[5] *Amici* also agree with plaintiffs that the challenged provisions violate the First Amendment to the extent that they impose a complete ban on pure political speech and discriminate on the basis of the content of speech without being narrowly tailored to a compelling government interest.

A. The Government May Not Punish Speech Based On Fear Of A Third-Party's Potential Unlawful Conduct Unless The Speaker Intends To Incite Imminent Unlawful Conduct

Amici's humanitarian, human rights, and peace-promoting work is quintessential speech and advocacy for First Amendment purposes. *See supra* at 12 n.2. There is no question that the First Amendment protects "vigorous advocacy," *NAACP v. Button*, 371 U.S. 415, 429 (1963), as well as the free discussion of "public questions," *N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964).

The First Amendment generally does not permit the government to punish otherwise protected speech solely because it wants to punish or deter conduct by the *listener* or *recipient* of speech. "The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. . . . [I]t would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001); *see also Cox v. State of La.* 379 U.S. 536, 550-51 (1965) (rejecting notion that peaceful protest activity could be prohibited for fear it would provoke violence from others).

Indeed, the First Amendment sets a very high bar for restrictions on speech based solely on fear of illegal activity perpetrated by the *recipients* of

speech. Even where the speaker himself advocates violent or unlawful conduct, the Court has held that speech may not be suppressed "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *cf. Virginia v. Black*, 538 U.S. 343, 363 (2003) (upholding Virginia cross-burning regulation because it is a "form of intimidation" that tends to signal "impending violence" but striking down provision creating presumption that cross-burning is intended to promote violence). Thus, even speech that is *supportive* of violent or illegal action is fully protected – and cannot be proscribed – unless it reaches the line of incitement.

Here, by contrast, *amici* – like plaintiffs – face the threat of prosecution for engaging in speech designed to *counteract* violence. As described above, *amici's* work includes human rights advocacy, *see supra* 18-25; promotion and facilitation of democratic practices, *see supra* 18; direct intervention aimed at resolution of violent conflicts, *see supra* 12-18; and expressive activity that furthers the provision of humanitarian aid, *see supra* 26-27. Such activities lie far beyond the narrow bounds of proscribable speech contemplated in *Brandenburg*. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 929 (1982) ("[when an advocate's] appeals do not incite lawless action, they must be regarded as protected speech").

There is no question that *amici's* peaceful speech and advocacy could not be proscribed if it were directed at Congress, *The New York Times* editorial board, or another human rights or peace

group. The only thing that distinguishes *amici's* otherwise protected speech is that it is provided to or directed at groups that may engage in unlawful conduct. But this alone does not render the speech unprotected. If a U.S. human rights organization issues a report that documents the LTTE's use of child soldiers, condemns the practice, lists a set of concrete recommendations it believes the LTTE should adopt to cease the abuse, and provides specific advice as to how the LTTE should implement the recommendations in practice, there is surely no doubt that this activity is fully protected by the First Amendment. The mere fact that it is communicated to the LTTE (an entity engaged in some illegal conduct) rather than *The New York Times* editorial board cannot remove this kind of peaceful speech and advocacy from constitutional protection.

Nor does constitutional protection vanish simply because *amici* choose to engage violent actors directly in face-to-face discussion rather than advocate from afar through the written word. It makes no difference – as a First Amendment matter – whether the human rights group described above presents its advocacy in person or in writing. *See City of Struthers*, 319 U.S. at 141-42 (recognizing "freedom to distribute information" and advocate through variety of means, including face-to-face, at meetings, or through leaflets); *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 452 (1938) (same); *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (myriad forms of advocacy "to persuade to action" protected by the First Amendment); *see also De Jonge v. State of Or.*, 299 U.S. 353 (1937) (finding, in the context of

Communist Party meetings, that "[t]he holding of meetings for peaceable political action cannot be proscribed" and "[t]hose who assist in the conduct of such meetings cannot be branded as criminals on that score").

If the government is concerned that speech directed at terrorist organizations will incite them (or others) to imminent lawless action, or if the government fears a speaker is conspiring to commit crime, it can punish that speech. The material support statute, however, sweeps much more broadly. It impermissibly suppresses speech that not only falls far short of incitement but is actually aimed at promoting peace and human rights, based solely on the fact that the *recipient* may engage in unlawful conduct unrelated to the speech provided. *Cf. Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253-254 (2002) (striking down ban on virtual child pornography, because the statute did not punish "attempt, incitement, solicitation, or conspiracy" and holding that the government could not "prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct"). As construed by the government, the broad sweep of § 2339B thus "impermissibly intrudes upon the freedoms guaranteed by the First Amendment." *Brandenburg*, 395 U.S. at 448.

B. This Constitutional Violation Cannot Be Cured Simply By Making It Contingent On Association With A Designated Group

Implicit in the government's arguments below was the proposition that expressive activity that

would otherwise be protected by the First Amendment becomes unprotected when engaged in with a group that the executive branch has designated. Under this Court's well-established precedents, however, association with a group that engages in unlawful activity cannot be punished unless it is intended to further the group's unlawful aims. Hinging application of the statute on a disfavored association only compounds the constitutional problem by layering an impermissible restriction on the right to association upon an impermissible restriction on speech. "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Claiborne Hardware*, 458 U.S. at 920. [6]

The material support statute, however, punishes speech "by reason of association alone," whether or not it is intended to further a designated group's unlawful aims. Indeed, it subjects speakers

---

[6] This principle has dual constitutional origins. In addition to the associational freedoms protected by the First Amendment, the Fifth Amendment's guarantee of due process mandates that, in criminal law, "guilt is personal," and that association with a group engaging in unlawful conduct may impute criminal liability only when an individual possesses "a guilty knowledge and intent," but not on the basis of "merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action." *Scales v. United States*, 367 U.S. 203, 224, 228 (1961). *Amici* agree with plaintiffs that the material support statute violates the Fifth Amendment personal guilt requirement as well.

to severe criminal penalties even if they vehemently oppose the group's unlawful ends and speak and associate with the group in order to convince it to cease its illegal activities. While the Constitution does not immunize direct participation in violence, "it is a different matter" when, instead of prosecuting that violence directly, the government "seizes upon mere participation in a . . . lawful . . . discussion as the basis for a criminal charge." *De Jonge*, 299 U.S. at 365; *See also Healy v. James*, 408 U.S. 169, 185-86 (1972). By "establish[ing] guilt by association alone," without any need to show an intent to further an FTO's unlawful conduct, § 2339B impermissibly imposes "[an] inhibiting effect on the exercise of First Amendment rights." *United States v. Robel*, 389 U.S. 258, 265 (1967).

The Court's opinion in *Claiborne Hardware* provides useful guidance. In that case, the Mississippi Supreme Court had held jointly and severally liable the NAACP and several dozen individuals who had supported a boycott designed to combat pervasive racial discrimination, because some small number of boycott-supporters had engaged in violence. *Claiborne Hardware*, 458 U.S. at 889-96. In reversing that decision, the Court found that the imposition of such blanket liability infringed upon the right to associate guaranteed by the Constitution. The Court's analysis proceeded from the premise that the boycott was composed mainly of "speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* at 907. Measured against those core constitutional freedoms, the state's authority to

regulate the economic sphere – though far from trivial – could not justify suppression of the nonviolent, First Amendment-protected elements of the boycott. *Id.* at 914-915. The Court explained that, while nothing prevented a state from using tort liability to combat business losses caused by violence, "[w]hen such conduct occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded." *Id.* at 916 (quoting *NAACP*, 371 U.S. at 438). To satisfy that demand, the Court ruled, a showing of specific intent to further violence is a necessary ingredient of liability predicated on association with a group which includes some members engaged in violent acts. *Id.* at 920.

Amici and plaintiffs, like the majority of boycotters in *Claiborne Hardware*, pursue their objectives through nonviolent advocacy and expression lying at the core of the First Amendment's domain. Just as the boycotters in *Claiborne Hardware* faced massive liability for engaging in protected conduct deemed tainted by the violent conduct of third parties, *amici* and plaintiffs face the risk of serious criminal liability for engaging in otherwise protected, non-violent, First Amendment activity with groups that may be engaged in violence. And just as the boycotters set out to employ protected First Amendment freedoms in the service of social justice – "[t]hrough speech, assembly, and petition – rather than through riot or revolution," *id.* at 912 – *amici* and plaintiffs try to achieve change by fostering peace, furthering human rights, and alleviating human suffering.

Amici do not question the government's compelling interest in combating terrorism, or its interest in stemming support that furthers unlawful, violent acts. But the Constitution requires a "precision of regulation" in pursuing that mission: the government must distinguish between confederates of criminal groups who seek to facilitate the group's unlawful aims, and individuals whose legitimate First Amendment expression and advocacy brings them into association with designated groups. To the extent that § 2339B would collapse that distinction, it cannot withstand constitutional scrutiny. While national security is undoubtedly a compelling state interest, the government has not shown that criminalizing pure political speech advocating peaceful, lawful aims is necessary to further that interest.

CONCLUSION

For the reasons stated above, the Court should affirm the court of appeals' judgment with respect to the provisions it held unconstitutionally vague as applied to plaintiffs' speech and reverse the court's judgment with respect to the provisions it upheld.

Respectfully submitted,

Melissa Goodman
Counsel of Record
Steven R. Shapiro
Jameel Jaffer
Laurence M. Schwartztol
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500