No. 09-89

In the Supreme Court of the United States

HUMANITARIAN LAW PROJECT, ET AL.

CROSS-PETITIONERS

V.

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

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

REPLY BRIEF FOR CONDITIONAL CROSS-PETITIONERS

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ARGUMENT

Plaintiffs' cross-petition is only conditional. Plaintiffs oppose the grant of the government's own petition, which seeks review of the court of appeals' narrow holding that three provisions of 18 U.S.C. § 2339B are vague as applied to plaintiffs' specific proposed pure speech. Pet. App. 5a n.1 (specifying the narrow scope of plaintiffs' intended speech activities at issue). In opposing plaintiffs' cross-petition, the government stresses that plaintiffs' contention "that the statute is vague as applied to their desired conduct … is the only issue that was reached by the court below" in ruling on vagueness. U.S. Opp. 16. That is a good argument for denying the government's petition, because the court's limited as-applied ruling leaves the statute facially valid, cannot offer plaintiffs or anyone else protection for any conduct other than the pure speech specifically identified, and thus threatens none of the national security interests that the government invokes.[1] But if the Court decides to grant review of the three provisions the court of appeals invalidated as applied, the government has offered no sound reason why it should not also grant review of the cross-petition, which challenges two other closely related and overlapping provisions of the same statute on the same grounds.

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[1] As-applied vagueness challenges are by definition limited to the specific conduct at issue. *See Kolender v. Lawson*, 461 U.S. 352, 370 (1983); *Parker v. Levy*, 417 U.S. 733, 756 (1974); *Farrell v. Burke*, 449 F.3d 470, 490 (2d Cir. 2006) (per Sotomayor, J.). The court of appeals neither read the injunction (which covers only the plaintiffs) as broader than the conduct described at Pet. App. 5a n.1 nor upheld it more broadly, leaving open for future cases any constitutional challenges relating to any other conduct plaintiffs or others may propose.

1. The government first asserts that the upholding of the criminal proscriptions on "advice … derived from scientific [or] technical … knowledge" and on providing "personnel" should not be reviewed because it involves only "the application of settled law." U.S. Opp. 9. The government cites a number of decisions (*id.* at 10-11) and suggests that courts have routinely rejected plaintiffs' challenges. In fact, none of those cases even *addressed* the validity of the "personnel" or "expert advice" provision as applied to speech in support of lawful, nonviolent activity. Rather, every cited case that even involved Section 2339B alleged materially different conduct – either the donation of money or support intended to further *unlawful violent* activities.[2]

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[2] *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004), vacated on other grounds, 543 U.S. 1097, reinstated in relevant part, 405 F.3d 1034 (4th Cir. 2005) (donation of money); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238 (D.C. Cir. 2003) (organization's challenge to designation); *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) (private suit, involving sending funds); *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157 (E.D.N.Y. 2008) (defendant accused of being "part of the leadership council" of a terrorist organization and assisting directly in its operations); *United States v. Warsame*, 537 F. Supp. 2d 1005 (D. Minn. 2008) (defendant sent money and attended al Qaeda training camps; court explains that a mere allegation of teaching English would *not* survive an as-applied vagueness challenge); *United States v. Shah*, 474 F. Supp. 2d 492 (S.D.N.Y. 2007) (defendant accused of providing medical assistance to wounded al Qaeda fighters, helping return them to fight, with intent to further al Qaeda's illegal objectives); *United States v. Awan*, 459 F. Supp. 2d 167 (E.D.N.Y. 2006) (defendant provided currency and personnel, and was prosecuted under a *different* statute, 18 U.S.C. § 2339A, which requires proof of intent to support illegal terrorist activities); *United States v. Assi*, 414 F. Supp. 2d 707 (E.D. Mich. 2006) (defendant transported equipment, including global positioning satellite device, night vision goggles, and thermal imaging camera intended to support Hizballah militant operations); *United States v. Marzook*, 383 F. Supp. 2d 1056 (N.D. Ill. 2005) (defendant, *inter alia*, provided money and scouted locations for terrorist attacks).

In the government's principal circuit-court case, *United States v. Hammoud*, the court pointedly noted that only money was involved and that a more demanding constitutional standard would apply if speech were at issue.[3] And in the only case of which we are aware where the government did include pure speech within a Section 2339B prosecution, the district court held the statute's "personnel" provision vague as applied (before the 2004 addition of a definition, but discussing a similar definition proposed by the government). *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003). The government did not even appeal that decision, but instead re-indicted the defendants under a separate statute for intentional support of terrorist activities. Conspicuously, the government does not even cite *Sattar*.

Thus, the Ninth Circuit's upholding of these provisions as applied to plaintiffs' pure speech is in no sense "settled law." Indeed, no other cited authority holds that human rights advocacy can be criminally proscribed by a content-based prohibition on "expert advice" and an association-based prohibition on "personnel."

2. The government argues that plaintiffs' cross-petition challenges are not sufficiently related to the government's own challenge to warrant review together. U.S. Opp. 11-14. In fact, *all* of the arguments that plaintiffs have advanced with respect to the three provisions at issue in the government's petition – vagueness and non-vagueness alike – are equally applicable to the two provisions at issue on the cross-petition. And the provisions are interrelated and

[3] 381 F.3d at 328 n.3, 330 n.4.

overlapping, making review of some without review of the others necessarily incomplete.

With respect to vagueness, the government acknowledges that the "specialized knowledge" and "scientific [or] technical … knowledge" parts of the "advice" definition are intertwined; indeed, they are all part of the same *clause*. U.S. Opp. 13-14. The government suggests that the Court "can" nonetheless assume the latter terms' constitutionality and, on that basis, assess the vagueness of the former; and it suggests that the Court could in any event hold the cross-petition as to the latter to await a decision on the former. U.S. Opp. 14 & n.3. But neither course is sensible compared to the alternative of considering the "advice" definition as a whole, as Congress wrote it – and as plaintiffs must confront it.

The government admits that the three terms defining "expert advice" "inform" each others' meaning, making consideration of the full "advice" definition a sounder basis for decision. U.S. Opp. 13. And in the Federal Rule of Evidence 702 context, where a similar (but not identical) phrase appears, this Court has recognized the artificiality of drawing distinctions among the three categories, as the government itself recognizes. U.S. Opp. 15, discussing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

The vagueness of the "personnel" provision is also interrelated with the vagueness of the provisions at issue in the government's petition. As a practical matter, for plaintiffs to engage in much of the speech they propose, they may have to coordinate and consult with the designated organizations. The "personnel"

provision provides plaintiffs and other ordinary citizens no guidance as to what kinds of coordination and consultation might be charged as criminal. And the terms' vagueness is exacerbated by their interconnections. Thus, while the "personnel" provision says that "entirely independent" activity will not be prosecuted, the government has contended that any activity done "for the benefit of" a designated group is a proscribed "service." The combination of these provisions renders it impossible to determine whether advocacy that benefits the Kurdistan Workers' Party will be seen as a proscribed "service" or permitted "entirely independent" activity. In short, the fact that plaintiffs must navigate all five overlapping and potentially contradictory definitions heightens the vagueness of each. This Court should therefore consider all five provisions if it decides to review the three provisions at issue in the government's petition.

Plaintiffs' non-vagueness challenges to the "scientific and technical knowledge" and "personnel" provisions are also interrelated with the issues in the government's petition, No. 08-1498. Plaintiffs' non-vagueness challenges are already present in that case, as alternative defenses of the judgment. Beyond that, the government itself recognized the interrelationship of the non-vagueness and vagueness issues when it affirmatively addressed First Amendment issues other than vagueness in its petition. Pet. 19-23. Moreover, as the court of appeals properly recognized, the stringency of vagueness review itself clearly depends on whether First Amendment interests are implicated. *See* Plaintiffs' Opp. in No. 08-1498, at 22-23; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 499 (1982); *Farrell v. Burke*, 449 F.3d at 485.

Plaintiffs' non-vagueness challenges to the two provisions upheld and the three provisions invalidated are closely interrelated. Thus, "advice" "derived from … other specialized knowledge" and "advice" "derived from scientific [or] technical … knowledge" both discriminate based on content; whether any particular advice is forbidden turns on an assessment of its content. Similarly, the "personnel" prohibition and the prohibitions on "training," "services," and "expert advice" derived from "specialized knowledge" all discriminate based on protected association and on the identity of the intended audience. Each provision prohibits speech only when it is communicated to or expressed in association with a proscribed group.

In short, for vagueness and non-vagueness grounds alike, the petition and cross-petition are interlinked and should be considered together if at all.

3. The government's merits defenses of the two rulings challenged in the cross-petition (U.S. Opp. 14-19) only highlight the errors in those rulings.

The government tacitly confesses the inadequacy of the court of appeals' vagueness reasoning with respect to "advice … derived from scientific [or] technical … knowledge." The government does not mention, much less attempt to defend, the court's mere reliance, without analysis, on the fact that "scientific" and "technical" appear on elementary-school vocabulary lists. U.S. Opp. 15-17.

The government asserts that the "expert advice" definition is not vague because that definition appears in Fed. R. Evid. 702 (the very same argument it makes

in its petition). U.S. Opp. 15-16. That is doubly incorrect. First, in vagueness law, a *criminal prohibition* on *speech* addressed to ordinary citizens is judged under an especially demanding standard, one not remotely applicable to the Rules of Evidence, addressed to lawyers and judges and without sanctions. The government's blindness to context would mean that a law criminalizing the publication of news reflecting "scientific, technical, or other specialized knowledge" would survive a vagueness challenge simply because it mirrored Rule 702. That is contrary to the settled law that criminal proscriptions of speech trigger sterner vagueness standards. *See* page 5, *supra*.

Second, Rule 702 is limited to scientific, technical, and specialized knowledge itself; it does not call for a determination of what information is "*derived from*" such knowledge – a far more open-ended and indeterminate inquiry. The government insists that the "derived from" standard must proscribe something less than "all knowledge," Opp. 16, but offers no explanation of how to determine which knowledge the "derived from" standard encompasses.

With respect to the "personnel" prohibition, the government concedes that it cannot answer any of the questions plaintiffs raised about where one draws the line between "direction or control" and "entirely independently." Thus, it cannot say whether consulting with a designated group regarding an op-ed and accepting a suggested edit would violate the law or not. It contends that these are merely factual questions to be resolved at trial, U.S. Opp. 14-15, but that response confirms, rather than answers, the vagueness

problem. Either accepting the edit violates the standard or it does not – and the government cannot say. If the standards themselves cannot be specified, no amount of factual development will resolve the issue.

The government notes that not all uncertainties about the scope of these provisions affect the particular speech plaintiffs propose. U.S. Opp. 16. But ample uncertainties do. Plaintiffs must guess at whether speech on human rights, the negotiation of peace treaties, or requests for humanitarian assistance in any way derive from "scientific" or "technical" knowledge including matters of complicated economics, political science, and natural resource allocations. And the provision of virtually any assistance will require some coordination with the designated groups, risking prosecution under the "personnel" standard if plaintiffs guess wrong as to how much coordination is permitted.

The government's responses to plaintiffs' non-vagueness challenges fare no better. It asserts that the provisions are not content-based, U.S. Opp. 17, but cannot explain how one could even begin to assess whether speech is derived from "scientific" or "technical" knowledge *without* examining its content. Content that is not derived from such knowledge is permitted, while content so derived is proscribed. This is the very definition of content-based discrimination. *FCC v. League of Women Voters of California*, 468 U.S. 364, 383 (1984).

The government asserts that the statute is "not aimed at speech." U.S. Opp. 17. That claim fails on its face where, as here, a statute expressly targets

"advice" and "training" for criminal proscription. The express listing of speech as a criminal activity is not altered by the fact that other activity is *also* criminalized, or by the assertion of a speech-neutral *purpose* (which may enter into assessment of potential justifications, but does not eliminate the need for strict First Amendment scrutiny where speech is targeted). *See Simon and Schuster v. State Crime Victims Bd.*, 502 US 105, 117 (1991) (rejecting argument that neutral purpose saves statute targeting speech from First Amendment invalidation); *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000) (quoted in Plaintiffs' Opp. in No. 08-1498 at 25-26). And given the statute's plain terms, it is manifestly false to suggest the statute directly proscribes only "conduct," as distinct from speech. U.S. Opp. 17.

The government asserts that individuals are free to "express their solidarity with any designated group" or "express virulent messages of support for the group's terrorist activity," and claims that this "ability to speak removes any possibility that the government is targeting speech or viewpoint, instead of action." U.S. Opp. 17-18. But it is not even clear that the law permits such speech – if it is deemed to be "for the benefit of" a designated group, it will constitute a proscribed "service," according to the government's definition of that term, and if it is coordinated, it may constitute proscribed "personnel." Plaintiffs' Opp. in No. 08-1498 at 20-22, 29-30. In any event, the two kinds of speech identified as permissible by the government are not remotely the only kinds of speech the Constitution protects. That a statute permits some forms of speech does not save it from First Amendment scrutiny where it criminally prohibits other forms,

such as speech *to* members of the organizations, especially where, as here, it does so on the basis of content.

In addition, the prohibitions plaintiffs challenge criminalize speech based on its target audience. The very same speech (expert advice, or training for the benefit of a designated group) is *permitted* when offered to one audience, such as the (nondesignated) Palestine Liberation Organization, but *proscribed* when communicated to another, say the Kurdistan Workers' Party. The First Amendment generally bars the government from dictating a speaker's chosen audience. *See FCC v. League of Women Voters of California*, 468 U.S. at 384 (ban on editorializing denies "the right to address *their chosen audience* on matters of public importance") (emphasis added); *McConnell v. FEC*, 540 U.S. 93, 335 (2003) (Kennedy, J., concurring in part and dissenting in part) (a law "that would allow a speaker to say anything he chooses, so long as his intended audience could not hear him," would be "unconstitutional under any known First Amendment theory").

The government asserts that, if the intermediate scrutiny standard applies, the provisions of Section 2339B, including those at issue here, pass muster under the standard. U.S. Opp. 18. In doing so, it retreats to the generality that the statute is aimed "at stopping aid to terrorists." *Id.* But it never says what interest Congress had, or even asserted, when the particular aid takes the form of pure speech, like plaintiffs' proposed speech, that, among other things, positively promotes reduction of terrorist activities. Nor does it explain how such a restriction of pure

speech is either "unrelated to the suppression of free expression" or "no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The government argues that the statute avoids imposing guilt by association because it forbids aid only to organizations designated as engaging in terrorist activity, and requires that the individual act with knowledge that the organization has been so designated. U.S. Opp. 18-19. But the same was true of the many anti-Communist laws this Court invalidated, or construed to require proof of specific intent to further unlawful activities. Cross-Petition at 11 n.10. The government does not explain how, as a practical matter, one can square the right to associate with a designated group and the "personnel" clause's prohibition on acting in any way under its "direction or control" or the "expert advice" prohibition on all speech *to* the group that derives from "technical" or "scientific" knowledge.

The government closes its opposition with the assertion that "there can be no serious argument that providing *direct support* to known or designated terrorists" cannot be "'otherwise innocent conduct.'" U.S. Opp. 19 (emphasis added). But that assertion, stopping at the statutory term "support," ignores the actual reach of the *defined* coverage of that term, which includes pure speech aimed at encouraging only nonviolent, peaceful activities, and discouraging resort to violence. The government offers no reason why *that* conduct is anything but "otherwise innocent." It is only such pure speech that is at issue here.

CONCLUSION

For all of the above reasons, the cross-petition for a writ of certiorari should be granted if the Court grants the petition in No. 08-1498.

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Respectfully submitted,

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