Nos. 05-56753, 05-56846

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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HUMANITARIAN LAW PROJECT, ET AL.,
Plaintiffs/Appellees/Cross-Appellants,

v.

MICHAEL B. MUKASEY, as Attorney General of the United States, ET AL.,
Defendants/Appellants/Cross-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

____

CROSS-APPELLEES' PETITION FOR REHEARING AND REHEARING *EN BANC*

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Pursuant to Federal Rules of Appellate Procedure 35 and 40, defendants the Attorney General, *et al.*, hereby petition this Court to rehear this case, and seek rehearing *en banc* if the panel does not grant rehearing.

STATEMENT OF THE ISSUE AND ITS IMPORTANCE

A panel of this Court has struck as unconstitutionally vague key provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("the Antiterrorism Act"), prohibiting persons from knowingly providing "material support" in the form of "training," "expert advice or assistance" or "service" to foreign terrorists. 18 U.S.C. 2339A(b), 2339B(g)(4). In so ruling, the panel misunderstood the significant

difference between the constitutional doctrines of vagueness and overbreadth. This decision is important because it hamstrings the Government in fighting international terrorism. As of January 16, 2008, the Government has charged more than 145 defendants with material support violations; the panel decision casts doubt on the validity of many of these investigations and prosecutions. Accordingly, this case presents a question of exceptional importance: whether the terms "training," "expert advice or assistance," and "service" are unconstitutionally vague.

This Court has already granted rehearing *en banc* in this case once before, see 382 F.3d 1154 (9th Cir. 2004), after the panel held that the term "training" was vague. The *en banc* court vacated that judgment and remanded for consideration in light of the Intelligence Reform and Terrorism Prevention Act of 2004, which provided new definitions of the terms "training" and "expert advice or assistance." 393 F.3d 902 (9th Cir. 2004) (en banc). On remand, the panel has held that these terms – even with their new definitions – are unconstitutionally vague. The reasons for granting rehearing now apply with even greater force, given that Congress has responded to this Court's prior constitutional concerns by clarifying the statutory terms.

STATEMENT OF THE CASE

A. The Antiterrorism Act. In 1996, Congress and the President acted to "strictly prohibit terrorist fundraising in the United States," and make clear that this

country is not to "be used as a staging ground for those who seek to commit acts of terrorism against persons in other countries." H.R. Rep. No. 104-383, at 43 (1995).

Congress banned the provision of a broad array of support to terrorists because "the fungibility of financial resources and other types of material support," permits individuals "to supply funds, goods, or services to an organization," which, "help[] defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities." *Id.* at 81. Accordingly, Congress determined that "[t]here is no other mechanism, other than an outright prohibition on contributions, to effectively prevent such organizations from using funds raised in the United States to further their terrorist activities abroad." *Id.* at 43. Congress saw a prohibition on material support for terrorist organizations as "absolutely necessary to achieve the government's compelling interest in protecting the nation's safety from the very real and growing terrorist threat." *Id.* at 45.

Accordingly, the Antiterrorism Act authorized the Secretary of State to designate an organization as a "foreign terrorist organization" (an "FTO") if she finds that: "(A) the organization is a foreign organization; (B) the organization engages in terrorist activity * * * or retains the capability and intent to engage in terrorist activity or terrorism; and (C) 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(a)(1). Designated organizations may seek judicial review in the District of Columbia Circuit within 30 days after publication of the designation. 8 U.S.C. 1189(c). The designations remain effective until they are revoked by the Secretary or an Act of Congress, or set aside by the D.C. Circuit. 8 U.S.C. 1189(a)(4).

The Antiterrorism Act makes it illegal for persons to knowingly provide "material support or resources" to any FTO. 18 U.S.C. 2339B(a)(1). The statute defines "material support or resources," to mean:

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

18 U.S.C. 2339A(b); 2339B(g)(4) (emphasis added). Plaintiffs have contended, *inter alia*, that the terms "personnel," "training," "expert advice or assistance," and "service" are vague.

Before passing the Antiterrorism Act, Congress was careful to examine the various constitutional issues raised by a ban on material support. The House of Representatives report explained that "[t]he First Amendment protects one's right to

associate with groups that are involved in both legal and illegal activities." H.R. Rep. No. 104-383, at 43. That report emphasized that the contemplated ban on material support "does not attempt to restrict a person's right to join an organization. Rather, the restriction only affects one's contribution of financial or material resources to a foreign organization that has been designated as a threat to the national security of the United States." *Id.* at 44. After discussing applicable Supreme Court precedent, the report observed:

> The ban does not restrict an organization's or an individual's ability to freely express a particular ideology or political philosophy. Those inside the United States will continue to be free to advocate, think, and profess the attitudes and philosophies of the foreign organizations. They are simply not allowed to send material support or resources to those groups, or their subsidiary groups, overseas.

Id. at 45.

B. Intelligence Reform and Terrorism Prevention Act of 2004. In 2004, Congress enacted the Intelligence Reform and Terrorism Prevention Act ("IRTPA"). IRTPA amended the statutory definition of "material support or resources" to include any "service." Pub. L. No. 108-458 § 6603(b), 118 Stat. 3638, 3762 (amending 18 U.S.C. 2339A(b)). IRTPA also amended the Antiterrorism Act by defining the term "training" to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," by defining "expert advice or assistance" to mean

"advice or assistance derived from scientific, technical or other specialized knowledge." *Ibid.* (codified at 18 U.S.C. 2339A(b)(2), (3)).

C. The Relevant Designations by the Secretary of State. In October 1997, the Secretary of State designated the Kurdistan Workers' Party (also known as the PKK), and the Liberation Tigers of Tamil Eelam (also known as the LTTE or Tamil Tigers) as FTOs. 62 Fed. Reg. 52,650-51 (Oct. 8, 1997). The Tamil Tigers sought review of this designation in the D.C. Circuit, which upheld the Secretary's action. *People's Mojahedin Organization of Iran v. Secretary of State*, 182 F.3d 17 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000).

The record here amply supports these designations. The Tamil Tigers – which plaintiffs wish to support through donations of money and other means – have used suicide bombings and political assassinations to kill hundreds of civilians in the past decade. ER 22-25. Among other actions, the Tamil Tigers murdered the President of Sri Lanka, the Security Minister, and the Deputy Defense Minister, ER 24, and exploded truck bombs killing 100 people and injuring more than 1,400 in one incident and 100 people (including seven U.S. citizens) in another. ER 23.

Similarly, the PKK has waged a violent terrorist campaign in Turkey, an important ally of the United States, claiming over 22,000 lives since 1984. ER 20. In the 1990s, the PKK conducted terrorist attacks on Turkish diplomatic and

commercial facilities in Western European cities, and, in an announced attempt to damage Turkey, bombed tourist sites and hotels, and kidnaped foreign tourists. ER 20-22.

C. This Litigation. Plaintiffs – two citizens and six organizations – claim a constitutional right to provide cash and other types of support to the Tamil Tigers and the PKK, despite the FTO designations.

In 1998, plaintiffs filed a complaint arguing, *inter alia*, that the terms "personnel" and "training" in 18 U.S.C. 2339A(b)(1) are unconstitutionally vague, and raising other constitutional challenges to the Antiterrorism Act. While the district court largely rejected plaintiffs' claims, it preliminarily enjoined application of these two terms as unconstitutionally vague. 9 F. Supp.2d 1176, 1203-04 (C.D. Cal. 1998). On cross-appeals, this Court affirmed the district court's preliminary injunction. 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

This case then resumed in the district court, which again largely denied plaintiffs' constitutional claims, but issued a limited final injunction against the "personnel" and "training" provisions for the two terrorist organizations involved. A panel of this Court affirmed the district court's ruling, rejecting plaintiffs' primary attack on the statutory scheme, but upholding the final injunction against the terms "personnel" and "training." 352 F.3d 382, 403-05 (9th Cir. 2003). With regard to

"training," the panel reiterated that this term is vague because it could include the plaintiffs' desire to instruct the relevant groups on how to petition the United Nations. *Id.* at 404.

This Court granted the Government's petition for rehearing *en banc*. 382 F.3d 1154 (2004). Prior to the *en banc* ruling, however, Congress enacted the IRTPA, providing a fuller definition of various terms including "personnel" and "training." The *en banc* court vacated the panel's judgment and remanded for consideration of the new statute. 393 F.3d 902 (2004).

Meanwhile, in 2003, the same plaintiffs filed a separate complaint in the district court, alleging, *inter alia*, that the term "expert advice or assistance" in 18 U.S.C. 2339A(b)(1) is also too vague. The district court agreed, and issued a limited injunction against that provision. 309 F. Supp.2d 1185. The Government appealed, and a panel of this Court vacated the district court's judgment and remanded for reconsideration of IRTPA's new definition of the term "expert advice or assistance."

On remand, the district court consolidated the two cases, and the plaintiffs added a new claim that the term "service" – recently added to the definition of "material support or resources" by IRTPA – is also unconstitutionally vague. The district court again rejected the majority of plaintiffs' constitutional challenges, but held that the terms "training" and "service" are unconstitutionally vague, and that the

term "expert advice or assistance" is vague in part. See 380 F. Supp. 2d 1134, 1150-52 (C.D. Cal. 2005).

A panel of this Court affirmed. See __ F.3d __, 2007 WL 4293310 (2007) (copy of opinion attached). The panel first held that the term "training" – even as newly defined to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," 18 U.S.C. 2339A(b)(2) – is vague because a person of ordinary intelligence would not be able to tell whether petitioning international bodies or the United Nations for aid is a "specific skill" or "general knowledge." Op. 16157. In the alternative, even if a person of ordinary intelligence could make that distinction, the panel found "training" to be vague because it "could still be read to encompass speech and advocacy protected by the First Amendment." *Ibid.*

The court also held that the term "expert advice or assistance" – defined as "advice or assistance derived from scientific, technical or other specialized knowledge," 18 U.S.C. 2339A(b)(3) – was vague in part. As the Government observed, that definition is modeled on Federal Rule of Evidence 702, which also refers to "scientific, technical, or other specialized knowledge," and which has a clearly recognized and established meaning. The panel agreed that the phrase "expert advice or assistance" is ***not*** vague (and thus constitutional) to the extent it applied to "scientific" or "technical" knowledge, because the meaning of those words "is

reasonably understandable to a person of ordinary intelligence." Op. 16159. However, the panel held the phrase "other specialized knowledge" ***is*** vague, because the established meaning of Rule 702 would not clarify the term "for the average person with no background in law," Op. 16158, and because the phrase "other specialized knowledge" continues "to cover constitutionally protected advocacy," Op. 16159.

Finally, the panel held that the term "service" is vague "because it is easy to imagine protected expression that falls within the bounds of the term 'service,'" such as providing advice on how to lobby the United Nations, or providing training on how to use international law to resolve disputes. Op. 16160. The court agreed, however, that the new statutory definition of the term "personnel" cured any vagueness problem. Op. 16160-61.

REASONS FOR GRANTING REHEARING

The Prohibitions Against Providing "Training," "Expert Advice or Assistance," or a "Service" To Foreign Terrorist Organizations Are Not Unconstitutionally Vague.

Rehearing is warranted here because the panel improperly struck down important parts of the Antiterrorism Act as vague, even though the statutory definitions can be reasonably understood by a person of ordinary intelligence. Furthermore, the panel's holding – that the terms "training," "service," and "expert

advice or assistance" (in part) are too vague because they might prohibit constitutionally protected expression – erroneously confuses vagueness with overbreadth and First Amendment law. Accordingly, the panel erred by resting its vagueness holding on a concern that has nothing to do with vagueness. Moreover, as discussed below, the statute does not, in fact, violate the First Amendment, nor is it overbroad, and can be construed to avoid any constitutional concern that might arise were the prohibition to reach independent advocacy.

A. Criminal prohibitions must give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). Congress need not define an offense with "mathematical certainty," *id*. at 110, but must provide "relatively clear guidelines as to prohibited conduct," *Posters N' Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994).

B. The Antiterrorism Act's ban on the knowing provision of "any * * * training" to designated terrorist groups is in no way vague. Congress amended the Antiterrorism Act to specify that "training" means "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. 2339A(b)(2). This definition, on its face, is sufficiently clear to be understood by a person of ordinary intelligence who, in the overwhelming percentage of realistic situations, can

distinguish between what is common or general knowledge and what is not. Even the ordinary dictionary definition of the term is reasonably and sufficiently clear: the verb "train" is commonly understood to mean: "to teach so as to make fit, qualified, or proficient." *Webster's Ninth New Collegiate Dictionary* 1251 (1989).

Nor is the term "expert advice or assistance" – statutorily defined as "advice or assistance derived from scientific, technical or other specialized knowledge," 18 U.S.C. 2339A(b)(3) – unconstitutionally vague. The phrase "scientific, technical, or other specialized knowledge" is based upon Federal Rule of Evidence 702, and provides a clearly recognized and established meaning that a person of common intelligence would comprehend. The panel believed that Rule 702's established meaning would provide no guidance "for the average person with no background in law," Op. 16158, but the Supreme Court has explained that the rule's meaning is not derived from an obscure source known exclusively to attorneys, but from ordinary dictionary definitions. See *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 589-90 (1993).

Furthermore, it is difficult to explain how the panel could hold that part of the phrase – "scientific [or] technical . . . knowledge" – is not vague, Op. 16159,while "other specialized knowledge" is, since the phrase "other specialized knowledge" plainly draws its meaning from the surrounding (non-vague) terms "scientific" and

"technical." See, *e.g.*, *Microsoft Corp. v. CIR*, 311 F.3d 1178, 1184 (9th Cir. 2002) ("Words that can have more than one meaning are given content, however, by their surroundings.") (alteration and citation omitted).

Nor, finally, is the term "service" vague. "Service" means "an act done for the benefit or at the command of another." *Webster's New International Dictionary* 2075 (3d ed. 1993). A person of ordinary intelligence would understand what that word means, and this Court has held that a similar phrase – "honest services" in the federal mail fraud statute, 18 U.S.C. 1346 – is not unconstitutionally vague. See *United States v. Frega*, 179 F.3d 793, 803 (9th Cir. 1999). Indeed, the same district judge who struck down "service" in this case upheld a virtually identical term – "services" – in a case involving another scheme designed to combat international terrorist financing. 463 F. Supp.2d 1049, 1062-64 (C.D. Cal. 2006).

C. The panel also believed that the relevant terms are vague because they might prohibit independent advocacy protected under the First Amendment. Op. 16157, 16159-60. That analysis is flawed for three reasons: (1) it confuses vagueness with First Amendment and overbreadth questions; (2) even if First Amendment and overbreadth principles were relevant, the conduct in question – providing material support to terrorists – is not constitutionally protected; and (3) the statute, properly

construed, does not reach the type of independent advocacy with which the panel was concerned.

1. The panel's vagueness holding rested on its view that the statutory terms might reach speech or expressive conduct, and therefore a ban on such training might prohibit some conduct protected by the First Amendment. One might argue (incorrectly, as discussed below) that the statute could be unconstitutional as applied to some situations, or that the potential number of such applications might be great enough to justify facial invalidation. But whatever the answer to those questions might be, they are questions of substantive First Amendment law and overbreadth, not vagueness.

As explained above, the statutory terms themselves are clear and understandable to a person of ordinary intelligence. Whether the law might be applied in ways to prohibit protected expression is constitutionally relevant, but it is not a question of vagueness. There is no doubt that the relevant terms are broad in scope: the statute applies to "***any***" training, expert advice or assistance, or service, 18 U.S.C. 2339A(b)(1) (emphasis added), and the"specific skills" and "scientific, technical, or other specialized knowledge" that qualify under the statute, as well as the "service[s]" that are prohibited under the statute, range from the intrinsically blameworthy (teaching how to build a bomb) to acts that in other circumstances might

be benign (instruction on international law). But it does not follow that because the terms are broad, they are also vague. To the contrary, while the terms are broad, their breadth is clear, they are not vague.[1]

2. The statutory ban on knowingly providing material support or resources to terrorists is also consistent with the First Amendment, even where the prohibited material support comes in the form of both words and conduct, such as the ban on providing training and expert advice or assistance. As this Court previously held in this case, a ban on providing aid directly to foreign terrorist groups is a reasonable, content-neutral restriction because the prohibition "is not aimed at interfering with the expressive component" of such support, "but at stopping aid to terrorist groups."

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[1] Because the terms "training," "expert advice or assistance," and "service" clearly apply to the conduct plaintiffs wish to engage in – such as providing terrorist groups with training in international law, political advocacy, and how to petition the United Nations and legislative bodies, see ER 11-12, 44-45 – plaintiffs cannot complain that the statute is vague as applied to them. *Village of Hoffman Estates* v. *Flipside*, 455 U.S. 489, 495 (1992) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

Nor could they complain that the statute is vague on its face, for doing so would require showing, at a minimum, that the statute reaches a "substantial amount of legitimate speech," *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001), because "uncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes in the vast majority of its intended applications," *id.* at 1151. That standard is plainly not met here, for the same reasons that the statute neither violates the First Amendment nor is overbroad.

205 F.3d 1130, 1135 (9th Cir. 2000). The statute bans "the act of giving material support" that aids a terrorist group, whether or not that support contains an expressive component; such a ban is permissible because "there is no constitutional right to facilitate terrorism by giving terrorists" aid that might assist them in "carry[ing] out their grisly missions," *id.* at 1133. That decision – affirmed by this Court sitting *en banc*, see 393 F.3d 902 (9th Cir. 2004) – applies fully to the ban on providing material support to a foreign terrorist organization, even where the support comes in the form of words used in the activity of training, such as teaching members of the Tamil Tigers to shoot, or raise money, or build roads.

Likewise, the statute is not impermissibly overbroad, as even the panel agreed. Op. 16161-63. To be overbroad, a statute must apply to a "substantial" amount of protected expression, judged in absolute terms and in relation to the law's plainly legitimate sweep. *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003). Under that standard, the material support statute is not overbroad because, for the reasons discussed above, plaintiffs are unable to show that the statute reaches constitutionally protected expression at all. And even if they could, those instances would not be "substantial" in absolute number, or in relation to the numerous plainly legitimate applications of the statute (such as banning training on how to build a bomb, use a weapon, fly a plane, or launder money).

3. Finally, the statute, as properly construed, does not reach the kind of independent advocacy with which the panel was concerned. Surrounding terms and statutory context make clear that the prohibition on giving "training," "expert advice or assistance," or "service" to a terrorist group does not reach a person's independent advocacy, but only reaches direct support provided to a foreign terrorist organization. The statute's prohibition on knowingly providing training "***to***" a foreign terrorist organization, 18 U.S.C. 2339A(b)(1), 2339B(a)(1) (emphasis added), makes this limitation clear, as a person who acts independently is not generally considered to have knowingly provided anything "to" another person or group.

The same limitation is evident in a central purpose of the statute – to prevent a person from giving material support to a terrorist organization because it defrays the costs of running the organization, thereby freeing that entity's own resources to conduct terrorism. See *supra* at 3. Congress sensibly targeted support given directly to terrorist groups, because such support constitutes the primary mischief with which the statute is concerned. Independent advocacy, by contrast, has only an attenuated link to the statute's animating purpose, and, if such independent activities were banned, the statute would potentially apply to conduct whose connection to terrorist activity is speculative or borders on the metaphysical. Such Congressional intent

should not be lightly presumed, particularly where Congress suggested an otherwise solicitous attitude toward protecting First Amendment rights. See *supra* at 4-5.

Likewise, the statute only prohibits providing "***material*** support or resources" to an FTO, 18 U.S.C. § 2339B(a)(1) (emphasis added), and the word "material" operates to limit the scope of the statutory terms it modifies – here,"training," "expert advice or assistance," and "service." In the present context, "material" means that the support or resources provided must have a "natural tendency" to affect the activities of a foreign terrorist group, *Kungys v. United States*, 485 U.S. 759, 772 (1988), and as explained above, the most natural tendency to affect the terrorist activities of such a group is through direct support rather than independent advocacy. Additionally, the word "service" is ordinarily defined to mean "an act done * * * at the command of another," Webster's New International Dictionary at 2075 (3d ed. 1993), which strongly suggests that independent advocacy is not covered by that term.

Furthermore, after this Court expressed concern that the statute might reach independent advocacy through the term "personnel," Congress responded by amending the statute to make it clear that the word "personnel" does not apply to "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives." 18 U.S.C. 2339B(h). As the panel in this case agreed, that amendment cured any vagueness problem with respect to "personnel" by

making clear that it did not reach independent advocacy. Op. 16160-61. Although that amendment pertains to the term "personnel," it would be odd to conclude that Congress intended to address this Court's constitutional concern with respect to the word "personnel," but nonetheless intended to target precisely the same independent advocacy through the words "training," "expert advice or assistance," and "service."

Finally, because the statute is plainly susceptible to a construction that permits independent advocacy, the Court should adopt such a construction if it will preserve the constitutionality of an Act of Congress. See, *e.g.*, *United States v. Vargas-Amaya*, 389 F.3d 901, 906 (9th Cir. 2004).

CONCLUSION

For the foregoing reasons, this Court should grant rehearing and vacate that part of the panel's opinion enjoining prosecutions for any "training," "service," or "expert advice or assistance."

Respectfully submitted,

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January 23, 2008

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing and rehearing en banc is proportionately spaced, has a typeface of 14 points or more, and contains 4196 words.

____
Douglas N. Letter

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January 2008, I filed the foregoing petition for rehearing and for rehearing *en banc* with the Clerk of this Court by Federal Express service, and served it on each counsel as noted:

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