UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 12-1461

TAREK MEHANNA,

Defendant-Appellant

v.

UNITED STATES,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF DEFENDANT-APPELLANT TAREK MEHANNA AND REVERSAL OF THE JUDGMENT BELOW

Amna Akbar
C/o Ohio State University
Moritz College of Law
55 W. 12th Avenue
Columbus, Ohio 43201
(614) 292-5432
akbar.20@osu.edu

Pardiss Kebriaei, Bar No. 1156928
Baher Azmy
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6452
pkebriaei@ccrjustice.org

Counsel for *Amicus Curiae*, Center for Constitutional Rights

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel for proposed *amicus curiae* the Center for Constitutional Rights ("CCR") disclose that CCR is a nonprofit organization and not a publicly held entity. It is not a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity. Accordingly, no parent companies or publicly held companies have a 10% or greater ownership in CCR.

STATEMENT PURSUANT TO FED. R. APP. P. 29(c)(5)

Pursuant to Fed. R. App. P. 29(c)(5), the *amicus curiae* states as follows: no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparation or submission of the brief; and no person other than the *amicus curiae* contributed money that was intended to fund preparation or submission of the brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The Center for Constitutional Rights ("CCR") is a national, not-for-profit legal, educational and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has since litigated numerous cases on behalf of individuals accused by the government of posing a threat to national security, including the landmark warrantless wiretapping case, *United States v. United States District Court* (Keith), 407 U.S. 297 (1972), and cases securing access to habeas corpus for men detained without charge in Guantanamo Bay. *See Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008).

CCR was co-counsel to the plaintiffs in *Humanitarian Law Project v. Holder*, 130 S. Ct. 2705 (2010), in proceedings in the lower court and in the Supreme Court, which is at the heart of Tarek Mehanna's appeal to this Court. As such, CCR is well positioned to advise this Court about *Humanitarian Law Project* and its limited applicability to the prosecution at hand.

CCR has litigated numerous other significant First Amendment cases, *see National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998),

including the landmark flag-burning cases, *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990). CCR also appeared as counsel to *amici curiae* civil rights and police accountability groups before this Court, in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), which held that individuals have a clearly-established First Amendment right to videotape police activity.

SUMMARY OF ARGUMENT

At the heart of the government's prosecution of Appellant Tarek Mehanna under the federal material support statute is his speech. The government relied upon evidence that Mehanna translated a religious text and subtitled a publicly available video and posted them to the internet, and that he engaged in religious and political debate online through instant messages, emails and website postings. The government argued at trial that through his speech Mehanna had provided and conspired to provide material support to Al Qaeda, a designated foreign terrorist organization. But the government conceded that Mehanna did not translate or speak under Al Qaeda's direction, and it presented no evidence that he acted at the group's request, or even that he ever met or communicated with anyone from Al Qaeda. Indeed, the government offered no evidence that Mehanna provided

material support "*to*" that designated organization, as the plain text of the statute requires. 18 U.S.C. § 2339B.

The government's prosecution of Mehanna for material support, therefore, appears to turn largely on his attempts to convince others to support opinions the United States government finds objectionable and that it wishes to remain unexpressed. Such a content-based regulation of speech, no matter how controversial the expression, runs afoul of a deeply entrenched First Amendment tradition borne out of a world war fought nearly a century ago. *See Abrams v. United States,* 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) ("Congress certainly cannot forbid all effort to change the mind of the country."); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) ("[T]he path of safety lies in the opportunity to discuss freely supposed grievances.").[1]

Neither the material support statute nor the Supreme Court's decision in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), alters this tradition or permits the prosecution of Mehanna for his independent speech,

---

[1] In an era of wartime repression of dissent under the federal Espionage Act of 1917 and state law anti-syndicalism statutes, Justices Holmes and Brandeis articulated powerful defenses of an individual's First Amendment right to engage in advocacy of unlawful conduct or "seditious" speech. Their dissenting and concurring opinions in *Abrams* and *Whitney* were ultimately vindicated, and became firmly established First Amendment doctrine by the time the Supreme Court issued its opinion in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

even if such speech endorses or propagates some views consistent with a designated organization's messages. As the legislative history of the material support statute demonstrates, Congress intended to prohibit a narrow category of activity—essentially finances, physical resources and logistical support for foreign terrorist organizations. It did not intend for the statute to be used to prosecute political speech and association rights of the sort at stake here. Indeed, the statute itself makes no mention of the government's theory—repeated in the district court's jury instruction—that speech in "coordination" with a foreign terrorist organization can be prosecuted. To the contrary, Congress amended the statute to make explicit that it must be construed in accordance with the First Amendment.

Moreover, as the Supreme Court in *Humanitarian Law Project* took pains to make clear, that decision reaches no further than the specific facts of the case—the direct provision of teaching and training to members of foreign terrorist organizations. The decision recognizes that Congress may criminalize speech that conveys something of value (*e.g.*, training and expert advice) apart from its political or ideological content, but only when the speaker is directly engaged with, or under the direction or control of a designated organization. The Court expressly found that the material support statute neither proscribes membership in a foreign terrorist

organization, nor independent advocacy that vigorously promotes or even benefits the organization's goals. *Humanitarian Law Project*, therefore, does not support the prosecution of an individual such as Mehanna who, inspired by his own conscience, engages in political speech that sometimes coincides with a designated organization's messages.

While *Humanitarian Law Project* does mention "coordination" with a foreign terrorist organization, under the statute's terms and the Supreme Court's own reasoning, that term cannot be read to prohibit protected speech absent the type of face-to-face engagement at issue in that case. Reading the statute more broadly, as the government and district court appeared to do, would run afoul of the constitutional values that have historically protected core political speech and associational rights. Accordingly, this Court should hold that the district court erred in instructing the jury that mere "coordination" with a foreign terrorist organization—absent at least direct engagement with, or acting at the direction or control of that entity—could support a conviction under the material support statute.[2]

---

[2] *Amicus curiae* CCR does not address the government's argument that Mehanna conspired to provide material support to Al Qaeda by traveling to Yemen. Critically, however, the trial judge denied Mehanna's request for a special verdict form to show whether the jury had based verdicts on his speech. This Court, therefore, cannot determine whether the jury relied on Mehanna's speech to support its conviction. Where, as here, a conviction may rest on protected First Amendment activity, and a general verdict does

The government's highly attenuated theory of "coordination" risks equating political dissent on major issues of the day with material support for terrorism. Left to stand, the government's theory could, for example, justify the prosecution of an individual who defends the rights of suspected members of Al Qaeda or challenges U.S. drone strikes against such individuals. A newspaper editor who "coordinates" with a member of Hamas in publishing and providing expert editorial feedback on an opinion-editorial could face criminal sanctions. This dangerously compromised view of the First Amendment, and the prosecution of Mehanna that depends upon it, should not stand.

ARGUMENT

I. THE MATERIAL SUPPORT STATUTE PROSCRIBES ONLY A NARROW CATEGORY OF ACTIONS CLOSELY CONNECTED TO FOREIGN TERRORIST ORGANIZATIONS, NOT MERE "COORDINATION."

Two provisions in the criminal code penalize "material support or resources" to foreign terrorist organizations, so designated by the Secretary of State in consultation with the Secretary of Treasury and Attorney General: 18 U.S.C. § 2339A and § 2339B. *See* 8 U.S.C. §§ 1189(a)(1), (d)(4). Section 2339A makes it a federal crime to conspire or provide material or

---

not permit the Court to rule out that possibility, the conviction should be reversed in its entirety.

other resources, knowing or intending that they are to be used in preparation for, or in carrying out terrorist crimes. 18 U.S.C. § 2339A(a). Section 2339B makes it a federal crime to knowingly provide material support or resources to a foreign terrorist organization. 18 U.S.C. § 2339B(a)(1). Placed against the background of First Amendment protections, these provisions are designed to limit an individual's ability to provide direct support to the operation of a foreign terrorist organization; they are not intended to punish independently expressed ideological support for a foreign terrorist organization's goals.

The text and legislative history of the material support ban make clear that Congress intended to prohibit a narrow category of activity—essentially finances, physical resources, and logistical support to foreign terrorist organizations—not core speech and association rights. The statutory scheme defines material support or resources to include provision of:

> 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.

§ 2339A(b)(1); § 2339B(g)(4). The plain meaning of the text is clearly focused on prohibiting the provision of property and actual services "*to*"

foreign terrorist organizations. Significantly, the statute nowhere uses the term "coordination," a dangerously ambiguous term that the district court below repeatedly instructed the jury would justify conviction, without defining the term.

The legislative history of the material support statute confirms that Congress was primarily concerned with limiting forms of direct support other than speech, such as financing. The main window into congressional intent are Congress' findings when it enacted § 2339B in 1996—the only findings Congress has made in support of the statute, and the same as those the Supreme Court relied on in *Humanitarian Law Project*. There are two specific findings that are illuminating, listed back-to-back in the relevant subsection in § 2339B: first, that some foreign terrorist organizations "raise significant funds within the United States;" and, second, that foreign terrorist organizations "are so tainted by their criminal conduct that any *contribution* to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301, 110 Stat. 1214, 1247 (1996) (emphasis added). Section 2339B was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996, and these findings, along with the material support and foreign terrorist organization designation provisions of § 2339B, are all included under a subpart of the Act entitled,

"Prohibition on International Terrorist Fundraising." *Id*. at §§ 301-303. Moreover, in introducing the conference report in the Senate, Senator Orrin Hatch explained that the material support and designation provisions of the Act were "aimed at cutting off the dollars and, thus, the lifeblood of foreign terrorist organizations . . . ." 142 Cong. Rec. S3352-01 S7548, 7556 (daily ed. Apr. 16, 1996) (statement of Sen. Hatch).[3]

Congress also consistently demonstrated a commitment to protect speech and associational rights in relation to the statute. In 1996, Senator Hatch explained on the Senate floor: "We have worked hard to make sure [§ 2339B] does not . . . place inappropriate restrictions on cherished first amendment [sic] freedoms." *Id.* A key House Report stresses that Congress did not intend for the statute to reach core speech or associational freedoms, and that the concern was with financing for terrorism:

> The prohibition is on the act of donation. *There is no proscription on one's right to think, speak, or opine in concert with, or on behalf of,*

---

[3] Reflecting Congress' core concern with fundraising in support of foreign terrorist organizations, in 1996 Congress also amended the definition of material support (originally defined in 1994 with the enactment of § 2339A) to narrow the exception in the definition from "humanitarian assistance" to "medicine or religious materials." 1 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1255 (1996); *see* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 120005, 108 Stat. 1796, 2022 (1994) (codified as amended at 18 U.S.C. § 2339A), *reprinted in* 2 Bernard D. Reams Jr. The Omnibus Anti-Crime Act: A Legislative History of the Violent Crime Control and Law Enforcement Act of 1994, 227-28 (1997).

> *such an organization.* The basic protection of free association afforded individuals under the First Amendment remains in place. *The First Amendment's protection of the right of association does not carry with it the "right" to finance terrorist, criminal activities.*

H.R. Rep. No. 104-383, at 43-45 (1995) (emphasis added).

Then, in 2004 Congress amended key terms in the statute to address the constitutional deficiencies identified by federal courts. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 6603, 118 Stat. 3638, 3761-64 (2004) (codified as amended at 18 U.S.C. § 2339B), *reprinted in* 1 Bernard D. Reams Jr. & Michael P. Forrest, A Legislative History of the Intelligence Reform and Terrorism Prevention Act of 2004 (2006). Critically, Congress clarified that the statute did not reach independent activity. In defining "personnel," Congress specified that such support requires working under the "direction or control" of a foreign terrorist organization—a far stricter standard than the nebulous term of "coordination"—and that "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." § 2339B(h). Significantly, Congress also added a new "[r]ule of construction" making explicit that "[n]othing in this section shall be construed or applied so as to abridge the exercise of rights

guaranteed under the First Amendment to the Constitution of the United States." 18 U.S.C. § 2339B(i).

II. *HUMANITARIAN LAW PROJECT* IS A NARROW DECISION THAT DOES NOT SUPPORT THE GOVERNMENT'S BROAD "COORDINATION" THEORY OF MATERIAL SUPPORT.

A. *Humanitarian Law Project* is Deliberately Narrow.

In *Humanitarian Law Project*, the Supreme Court considered the constitutionality of § 2339B in the context of a pre-enforcement challenge and on the basis of facts dissimilar from those in which the statute is typically deployed. 130 S. Ct. 2705. The plaintiffs (a retired judge, a medical doctor, a human rights organization, and several nonprofit groups) sought to directly engage with the Kurdish Workers Party (PKK) and the Tamil Tigers (LTTE), designated foreign terrorist organizations, over a sustained period of time, and to provide face-to-face services to those organizations. *Id.* at 2720-21. The plaintiffs challenged § 2339B as violating their First Amendment rights to speech and association as applied to their specific proposed activities, and as unconstitutionally vague in violation of the Fifth Amendment Due Process Clause.

Seeking to teach and train members of the PKK and LTTE, the plaintiffs essentially stipulated to facts in the pre-enforcement challenge. The Supreme Court issued a narrow First Amendment ruling, finding only

that Congress may criminalize speech that conveys something of value (*e.g.*, training and expert advice) apart from its political or ideological content, when the speaker is directly engaged with, or under the direction and control of, a foreign terrorist organization. *Id.* at 2728.[4]

The Court emphasized that its decision in this pre-enforcement context—absent a developed factual record—was limited and would not necessarily support subsequent prosecutions that, like Mehanna's, do not involve the type of direct engagement stipulated in *Humanitarian Law Project*. *See id.* at 2712 ("We conclude that the material support statute is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue. We do not … address the resolution of more difficult cases that may arise under the statute in the future."); *id.* at 2730 ("All this is not to say that any future applications of the material support statute to speech or advocacy will survive First Amendment scrutiny."). The Court further cautioned, "'gradations of fact or charge would make a difference as to criminal liability,' and so 'adjudication of the reach of the

[4] The Supreme Court rejected the plaintiffs' Fifth Amendment vagueness challenge, finding their proposed activities were clearly covered by the limited terms of the statute and, therefore, that the statute raised no constitutional notice problem as applied to those activities. *Id.* at 2719-21.

constitutionality of the statute must await a concrete fact situation.'" *Id*. at 2722 (quoting *Zemel v. Rusk*, 381 U.S. 1, 20 (1965)).

Taking the Supreme Court's cue, courts of appeal have construed *Humanitarian Law Project* narrowly, essentially limiting the holding to its facts. *See Al Haramain Islamic Foundation, Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 995-1001 (9th Cir. 2011) ("[W]e are hesitant to apply that decision to facts far beyond those at issue in that case."); *United States v. Augustin*, 661 F.3d 1105, 1120 (11th Cir. 2011) ("*Humanitarian Law Project* does not control our determination of whether the conduct at issue here constituted material support").

B. *Humanitarian Law Project* Does Not Support a Prosecution based on Protected Speech Absent At Least Direct Engagement with, or Action Taken under the Direction and Control of, a Foreign Terrorist Organization.

The Court in *Humanitarian Law Project* upheld the material support statute only as applied to the direct teaching and training at issue in that case, 130 S. Ct. at 2729-30, while it repeatedly and emphatically stressed that the statute cannot be deployed to punish "independent advocacy." *Id.* at 2721-23, 2730. Although the Court mentioned—without analyzing—the term "coordination" with foreign groups, it declined to define "coordination" or otherwise decide what facts would support prosecution under such a theory; nothing in the Supreme Court's treatment of the face-to-face engagement at

issue in that pre-enforcement challenge could be construed to support prosecution of speech outside of a relationship of direct engagement with a foreign terrorist organization. Indeed, the Court's opinion demonstrates that an active and close relationship with a foreign terrorist organization would be required. Moreover, in light of *Humanitarian Law Project's* narrow holding and the constitutional backdrop that informed the decision, the government's loose theory of "coordination" in this case is unconstitutional, as described in Part III, *infra*.[5]

In *Humanitarian Law Project*, the plaintiffs sought to teach and train members of foreign terrorist organizations, through direct and sustained personal engagement, in how to use humanitarian and international law to resolve disputes, and how to petition bodies like the United Nations for

---

[5] *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965 (9th Cir. 2011), is one of the only post-*Humanitarian Law Project* decisions from the courts of appeal to meaningfully engage with the Court's analysis. The Ninth Circuit determined that *Humanitarian Law Project* governed its consideration of a First Amendment challenge to the International Emergency Economic Powers Act, which creates a scheme parallel to the material support ban prohibiting the provision of services to a broader set of designated terrorist entities. Nonetheless, the Ninth Circuit limited *Humanitarian Law Project*'s holding to its particular facts, and underlined the open question of what types of coordinated advocacy can constitutionally be prohibited. The court ultimately found that the government's content-based prohibitions on speech did not meet strict scrutiny. The plaintiff was entitled to engage in coordinated advocacy with the designated entity. *Id.* at 995-1001.

relief. Both types of speech lent something of value to the organizations, apart from the political or ideological content of the speech, that they could use concretely to advance their organizational goals. For example, Congress could proscribe the proposed activity of teaching to petition for relief, because such relief "could readily include monetary aid," *id.*—the very type of support the material support statute was intended to prevent. Moreover, both types of speech were undertaken in direct engagement with, or under the direction and control of, the foreign terrorist organizations. *See id*. at 2730 ("We simply hold that, in prohibiting *the particular forms of support* that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.") (emphasis added).

In reasoning that § 2339B was constitutional as applied to the plaintiffs' proposed activities, the Court was careful to ensure a balance between deference to the political branches in matters of foreign affairs and national security on the one hand, and basic First Amendment protections on the other. Thus, while the Court deferred to congressional and executive findings in holding that the plaintiffs' proposed teaching and training could be banned despite the plaintiffs' lawful intent, *id.* at 2725-28, it made clear that the First Amendment continues to limit the statute's reach to speech that may otherwise be supportive of foreign terrorist organizations. As the Court

emphasized, Congress did not criminalize "independent advocacy," but was concerned with direct support provided to a limited number of designated organizations. *Id.* at 2728. The Court made clear that independent advocacy encompasses a broad spectrum of activity, including being a member of a foreign terrorist organization or "vigorously promoting and supporting the political goals of the group," even if such advocacy benefits the organization. *Id.* at 2730 ("In particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations."); *see also United States v. Farhane*, 634 F.3d 127, 137 (2d Cir. 2011) (emphasizing that *Humanitarian Law Project* does not punish independent advocacy or membership or association with foreign terrorist organizations). In contrast to the broad scope of independent speech permitted under the statute, the Court emphasized that the statute's prohibitions are "carefully drawn to cover only a narrow category of speech," and that material support under the statute "most often does not take the form of speech at all." *Humanitarian Law Project*, 130 S. Ct. at 2723.

In addition to teaching and training services, the plaintiffs sought to undertake "political advocacy" for Kurds and Tamils. However, because the

plaintiffs failed "[to] specify their expected level of coordination" with the foreign terrorist organizations, the Court declined to rule on whether the statute could constitutionally be applied to such activity. *Id*. at 2729-30; *id.* at 2722 (noting plaintiffs also failed to explain "what exactly their 'advocacy' would consist of."). As such, nothing in the Court's opinion can be read to support the government's proposition that the statute could constitutionally prohibit speech undertaken in a more attenuated relationship with a foreign terrorist organization, beyond the directed engagement the plaintiffs' proposed teaching and training entailed.

Despite the Court's refusal to delineate expressly a point at which "coordination" could conceivably be punishable under the statute, the Court's opinion makes clear that a very close relationship would be required, akin to working in concert with or under the direction and control of a foreign terrorist organization. In making sense of the statute as a whole, the Court relied on the plain meaning of its terms to suggest that all types of activity mentioned in the statute require an element of direct engagement to constitute material support. *Id.* at 2721-22 (explaining that the statute's prohibition on service "*to* a foreign terrorist organization" indicated a required "connection between the service and the foreign group") (emphasis in original). Moreover, in construing the term "service" to require

"concerted activity," the Court incorporated elements of the statute's more explicit definition of "personnel," which prohibits the provision of support under the "direction or control" of a foreign terrorist organization and otherwise exempts independent activity. *See id*. at 2721-22 (citing 18 U.S.C. § 2339B(h)). The Court also observed that other types of support identified in the statute, such as lodging, weapons, explosives and transportation, could not be provided independently of a foreign terrorist organization, *id.* at 2722, further suggesting that the statute requires at least direct engagement for an activity to constitute material support.

A proper reading of *Humanitarian Law Project* thus does not support the prosecution of Mehanna on the basis of his speech. The Supreme Court interpreted the material support statute only so far as to authorize the prosecution of speech where that speech is undertaken at the direction or control of a foreign terrorist organization, or is otherwise the product of direct (and likely sustained) engagement with a designated organization.

Mehanna's speech was not at the direction or behest of Al Qaeda, or with any level of direct engagement with that organization. Indeed, the government offered no evidence that Mehanna ever met or communicated with anyone from Al Qaeda. Nor by placing materials on the Internet for the English-speaking world to see did Mehanna provide any support "to" that

organization in the way the material support statute contemplates or the First Amendment tolerates. His speech may have had the effect of advancing Al Qaeda's ideological message (even as he rejected some of Al Qaeda's views), but such a benefit does not make his speech criminal, as the Court made clear in *Humanitarian Law Project*. No matter how troubling the government considers Mehanna's views or their dissemination and effects to be, neither the material support statute nor *Humanitarian Law Project* authorize the government to imprison Mehanna for espousing them.

III. BECAUSE THE GOVERNMENT'S OPEN-ENDED THEORY OF "COORDINATION" RAISES SERIOUS FIRST AMENDMENT CONCERNS, IT CANNOT SUPPORT CRIMINAL PROSECUTION FOR DEFENDANT'S SPEECH.

Political speech and association lie at the heart of the First Amendment's broad protections. *See, e.g.*, *Mills v. Alabama*, 384 U.S. 214, 218 (1966). They are privileged because of the belief that "speech concerning public affairs is more than self-expression [but] the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). That "silence coerced by law [is] the argument of force in its worst form." *Whitney v. California,* 274 U.S. 357, 375-376 (1927) (Brandeis, J., concurring). Against this background of "a profound national commitment" to "uninhibited, robust, and wide-open" debate on public issues, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), the Supreme Court has

subjected government restrictions on political speech and association to exacting scrutiny, and delineated only limited categories that are beyond First Amendment protection. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). As the Court has recognized, "the line between speech unconditionally guaranteed and speech which may legitimately be … punished is finely drawn," and "[e]rror in marking that line exacts an extraordinary cost." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 817 (2000) (internal citations and quotations omitted); *see also NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 916-17 (1982) ("precision of regulation is demanded" when political speech and association are at stake) (internal citation omitted).

The Court has viewed the costs of abridging freedom of speech as far less tolerable than the risks of its misuse. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("[P]olitical speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse."). Indeed, in the context of criminal proscriptions on political speech and association, the historical development of our First Amendment doctrine reveals a deliberate rejection of prohibitions on advocacy of unpopular, objectionable, even unlawful activity—even in the "wartime"

context—in favor of maximum protection of dissent, up to point of intentional advocacy of imminent lawlessness. Compare *Debs v. United States*, 249 U.S. 211 (1919) (upholding prosecution under Espionage Act of 1917, of socialist Presidential candidate Eugene Debs for speech merely endorsing evasion of the draft), with *Abrams*, 250 U.S. at 626-31 (Holmes, J., dissenting and Brandeis, J., dissenting) (rejecting attenuated theory of prosecution for incitement articulated in *Debs*), and *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (adopting Holmes' and Brandeis' narrow grounds for punishing incitement). The government's theory of prosecution would take us back into territory long rejected by the Supreme Court.

A. First Amendment Doctrine Prohibits Criminal Prosecution Based Loosely on Coordinated Advocacy.

First Amendment doctrine relevant to the issues at hand reflects a common principle flouted by the government's attenuated prosecution theory, and left dangerously unexplained by the district court's jury instructions: the need for a tight relationship between the expression at issue and subsequent harm, or between the government action burdening speech and the government's objective, so as to minimize the burden on speech. This principle is apparent in the Court's approach to reviewing expression and association advocating unlawful conduct, its strict scrutiny of laws that burden political speech or differentiate on the basis of content, and its

overbreadth doctrine, which permits invalidation of laws that burden substantially more speech than the Constitution allows.

Incitement. The requirement of a close nexus is most prominently reflected in decisions leading up to and after *Brandenburg v. Ohio* and *Scales v. United States*, which establish that speech and association remain protected unless and until they cross the line to incitement of imminent unlawful action. *Brandenburg*, 395 U.S. 444, 449. In *Brandenburg*, the Court affirmed the principle that even speech advocating the use of force or a violation of the law remains protected except when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Restrictions that fail to distinguish between advocating for a resort to violence on the one hand, and the different matter of "preparing a group for violent action and steeling it to such action," impermissibly infringe on the First Amendment by reaching protected speech. *Id.* at 448 (internal citation and quotations omitted); *see also Whitney*, 274 U.S. at 376-77 (Brandeis, concurring) ("The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind."). *Brandenburg* rejected an embryonic First Amendment analysis developed by the Court during World War I, which upheld prosecutions under the

Espionage Act of 1917 for advocacy that the government feared could disrupt war-fighting and recruitment efforts, *see, e.g. Schenck v. United States*, 249 U.S. 47 (1919) (upholding prosecution of pamphleteer urging draft resistance), in favor of the Court's most speech-protective standard to date, which continues to hold. *See Brandenburg,* 395 U.S. at 447 (holding that World War I cases upholding criminal prohibitions on advocacy of violent means to effect political change, without more, has been "thoroughly discredited"); *see also, e.g.*, *Claiborne Hardware Co.*, 458 U.S. at 918-19 (holding that political speech and association remain protected even when they cause or threaten violence, unless they are the direct and proximate cause of such harm).

Associational Freedom. In cases involving association with organizations advocating both lawful and unlawful ends, the Court's decisions prior to *Scales* required at least a "meaningful association" with a group before permitting a conviction to stand. *Rowoldt v. Perfetto*, 355 U.S. 115, 120 (1957). In *Scales*, the Court went further, construing the Smith Act to require active, knowing and "purposive membership"—specific intent to further the organization's unlawful ends—to sustain a criminal conviction. 367 U.S. 203, 209 (1961). The Court made clear that "active" membership meant more than "nominal, passive, inactive or purely technical"

membership, *id.* at 208, 220, and would include "significant action in its support or [] commitment to undertake such action." *Id.* at 228. A more attenuated theory of liability would "cut deeper into the freedom of association than is necessary to deal with the substantive evils that Congress has a right to prevent" and present "a real danger that legitimate political expression or association would be impaired." *Id.* at 229 (internal quotations and citations omitted); *see also Claiborne Hardware*, 458 U.S. at 919-21 (applying *Scales* and its progeny); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (even in pursuit of legitimate ends, the government may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

As the Court recognized in *Scales,* attenuated theories of association also threaten the fundamental due process protection against guilt by association. The Court famously explained, "[i]n our jurisprudence guilt is personal." 367 U.S. at 224; *see also Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (Murphy, concurring) ("The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence."). In our constitutional republic, the First and Fifth Amendments cohere to ensure that lawful advocacy and association—*i.e.*, advocacy and association that do not

imminently and materially advance unlawful ends—are constitutionally protected from government prosecution.

Content-Based Restrictions. Similarly, the Court's employs strict scrutiny to test government action that burdens political speech based on its content, in order to ensure the tightest fit between the government's interest and the means employed to achieve that interest. *See Texas v. Johnson*, 491 U.S. 397 (1989). Such scrutiny examines whether the government has presented sufficient proof that the means are necessary—the least restrictive alternative—to achieve a compelling purpose. *See, e.g.*, *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). In deploying strict scrutiny, the Court seeks to ensure that only the highest government interests are acceptable, and limits the government to using the least restrict method possible to achieve its ends, all in order to limit the possibility of regulating speech simply because of governmental disapproval of the message. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

Indeed, the Court in *Humanitarian Law Project* applied strict scrutiny to evaluate the content-based regulation of plaintiffs' proposed activities, and concluded that regulation under those circumstances, where the plaintiffs sought to teach and train members of foreign terrorist organizations, would be a narrowly tailored means to advance the

government's compelling interest in combatting terrorism. *See* 130 S. Ct. at 2723-24. On the other hand, regulation of independent advocacy such as Mehanna's would fail *Humanitarian Law Project's* strict scrutiny analysis, since punishment of such advocacy restricts more speech than necessary to advance the government's compelling interest.

Overbreadth. In the same vein, the Court's overbreadth doctrine reflects the Court's intolerance for restrictions on speech and association that fail to respect the close fit the First Amendment requires between the government's means and its ends. Under the doctrine, where a law is "substantially overbroad" and not susceptible to an adequate narrowing construction, it is subject to the "strong medicine" of invalidation. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973); *see also Houston v. Hill*, 482 U.S. 451, 466-467 (1987) (invalidating a law because it was susceptible to "regular application" to protected speech and afforded the authorities "unconstitutional discretion" in enforcement); *Massachusetts v. Oakes*, 491 U.S. 576, 584-85 (1989) ("Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression."). Accordingly, the Supreme Court has recently invalidated entire statutes because they chilled more protected expression than was necessary to accomplish the valid objectives of the statute. *See Brown v. Entm't Merch.*

Ass'n, 131 S. Ct. 2729 (2011) (invalidating statute banning "violent video games"); *United States v. Stevens*, 130 S. Ct. 1577 (2010) (invalidating entire statute prohibiting "depictions of animal cruelty" because of its potential to restrict protected activity).

B. This Court Should Reject the Government's Proposed Coordination Theory of Prosecution in Order to Avoid Serious Constitutional Problems.

The government's loose theory of prosecution of activities in "coordination" with a foreign terrorist organization is far more attenuated than the close nexus these First Amendment doctrines require, burdens far more speech and association than they would tolerate, and is unconstitutional as applied to Mehanna. Where there is "serious doubt" about the constitutionality of a statute, the courts should avoid the constitutional difficulty if a narrowing construction is "fairly possible." *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Boos v. Barry*, 485 U.S. 312, 331 (1988). It is "incumbent on [the courts] to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress." *United States v. X-Citement Video*, 513 U.S. 64, 78 (1994).

This Court can avoid a constitutional problem by construing coordination narrowly (and consistently with the principles articulated in *Humanitarian Law Project*) to require, at a minimum, direct engagement

with, or acting under the direction or control of, a foreign terrorist organization, akin to the relationship at issue in *Humanitarian Law Project*.[6] In so doing, this Court would have to conclude that the district court's instruction to the jury—that Mehanna could be prosecuted for acting in "coordination" with Al Qaeda, without a limiting instruction defining the narrow contours of the term—was in error.[7]

Indeed, in the context of other prosecutions under the material support statute, courts have construed the statute to require a close nexus between the defendant and the foreign terrorist organization, and the direct provision of services to the organization, to avoid constitutional problems. *See, e.g., United States v. Uzair Paracha*, 2006 U.S. Dist. LEXIS 1 (S.D.N.Y. Jan. 3, 2006) (avoiding question of material support statute's constitutionality by reading statue to criminalize "conduct," not "mere association," and thus "properly focus[ing] on the personal action of the individual"); *United States v. Abu-Jihaad*, 600 F. Supp. 2d 362, 394-402 (D. Conn. 2009) (acquitting

---

[6] *Amicus* does not suggest that this construction would be constitutionally adequate or avoid the constitutional difficulty in all instances, but it would avoid the problem here.

[7] *See Brandenburg*, 395 U.S. at 448-49 ("[The statute … sweeps within its condemnation speech which our constitution has immunized from governmental control. … Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.").

defendant of conviction under § 2339A where government's theory of material support was far too attenuated for any reasonable jury to conclude that defendant provided material support to terrorism).

Likewise, cases upholding prosecutions under the material support statute involve the type of directed and controlled activity contemplated by *Humanitarian Law Project*. In *United States v. Augustin*, the defendants had photographed federal buildings, discussed the photographs and possible methods of attack, and taken an oath to Al Qaeda. 661 F.3d at 1111-14, 19-22. The court found that the evidence was sufficient for the jury to conclude that the defendants had "volunteer[ed] themselves to serve under the direction and control of Al Qaeda." *Id*. at 1119. In *United States v. Farhane*, the court found the defendant's offer to serve as a doctor for a foreign terrorist organization clearly fell within the contours of the statute. 634 F.3d at 140-41; *see also, e.g.*, *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 166-68 (E.D.N.Y. 2008) (rejecting a First Amendment challenge to a § 2339B charge where the defendant was part of the leadership council for the foreign terrorist organization and made important decisions on its behalf); *United States v. Assi*, 414 F. Supp. 2d 707, 715-16 (E.D. Mich. 2006) (rejecting a First Amendment challenge to a § 2339B charge where defendant was alleged to have provided the foreign terrorist organization

with night vision goggles, global positioning satellite modules, and a thermal imaging camera).

* * *

In this case, the government presented no evidence that Tarek Mehanna had any direct engagement or direct contact with Al Qaeda, let alone that he was under Al Qaeda's direction or control. The prosecution appears largely to rest, rather, on the content of his speech. But troubling as it may have been to the government, Mehanna's speech was protected. Any rule that would criminalize independent speech that is supportive of the ideological or political aims of an unlawful organization, even if the speech would tend, as a result, to benefit that organization's aims, would undermine decades of First Amendment doctrine, including doctrine articulated in *Humanitarian Law Project*. Consistent with its traditional role in protecting First Amendment values, this Court should not ratify such a rule, or a criminal prosecution that depends upon it. As Justice Black explained in his dissent to the much discredited majority opinion in *Dennis v. United States*, 341 U.S. 494, 581(1951) (Black, J., dissenting), "Public opinion being what it now is, few will protest the conviction of these [] petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment

liberties to the high preferred place where they belong in a free society."[8]

Tarek Mehanna's conviction should be overturned.

CONCLUSION

The Court should reverse the order of conviction imposed on Appellant, Tarek Mehanna.

Dated: December 26, 2012

Respectfully submitted,

/s/ Pardiss Kebriaei

Pardiss Kebriaei, Bar No. 1156928
Baher Azmy
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 11201
(212) 614-6452
pkebriaei@ccrjustice.org

Amna Akbar
c/o Ohio State University
Moritz College of Law
55 W. 12th Avenue
Columbus, OH 43201
(614) 292-5432
akbar.20@osu.edu

[8] In *Dennis*, the Court upheld the convictions of Communist Party USA members under the federal Smith Act, for teaching Marxist-Leninist doctrines, even though that teaching fell far short of advocating direct or imminent action to overthrow the U.S. government. 341 U.S. at 516-17. As First Amendment scholar Geoffrey Stone explains, "Over time, the Court and the nation came to regard *Dennis* as an embarrassment, or worse." Geoffrey Stone, *Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism* 410 (2004).

Counsel for *Amicus Curiae*,
Center for Constitutional Rights

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,768 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point type.

Dated: December 26, 2012

/s/ Pardiss Kebriaei
Pardiss Kebriaei

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2012, I filed the foregoing document with the United States Court of Appeals for the First Circuit by using the ECF system. I certify that counsel of record are registered as ECF Filers and that they will be served by the ECF system, as identified on the Notice of Electronic Filing (NEF).

/s/ Pardiss Kebriaei
Pardiss Kebriaei