UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMANITARIAN LAW PROJECT, et al.,	)	Appeal No.07-55893
Plaintiffs-Appellants	)	
	)	(Dist. Ct. No. CV 05-08047 ABC (RC) Central District of California)
v.	)	
U.S. DEPT. OF THE TREASURY, et al.,	)	
Defendants-Appellees	)	

ON APPEAL FROM THE ORDER GRANTING IN PART AND DENYING IN PART CROSS MOTIONS FOR SUMMARY JUDGMENT ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, HON. AUDREY B. COLLINS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the International Emergency Economic Powers Act, which defendants interpret to empower the President to designate disfavored groups and individuals, freeze their assets, and prohibit transactions with them, without charges, a hearing, or a statement of reasons, violates the First and Fifth Amendments.

2. Whether Executive Order 13224 and its implementing regulations, which authorize the Secretary of State to designate and effectively close down domestic political organizations without charges, a hearing, or a statement of reasons, violate the First and Fifth Amendments.

3. Whether Executive Order 13224's ban on providing "services" to or "for the benefit of" designated groups violates the First and Fifth Amendments.

4. Whether the civil and criminal penalties authorized by IEEPA and Executive Order 13224 for providing support to designated entities violate the First and Fifth Amendments because they can be imposed without findings of knowledge or intent.

5. Whether the licensing scheme that defendants have implemented by regulation under E.O. 13224 violates the First and Fifth Amendments for failing to incorporate any of the constitutional requirements that apply to such licensing schemes.

6. Whether IEEPA should be construed, consistent with its language, purpose, and history, to avoid the above constitutional infirmities by limiting it to its intended purpose – imposing sanctions on foreign nations as a tool of nation-to-nation diplomacy, and on "nationals thereof" only as an incident to the embargo on the foreign nation.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §1331, because plaintiffs' constitutional and statutory challenge presents a federal question. The district court order appealed from grants defendant's motion to dismiss and for summary judgment, and constitutes a final order. This Court therefore has jurisdiction pursuant to 28 U.S.C. §1291. On November 21, 2006, the district court initially granted in part and denied in part both plaintiffs' motion for summary judgment and defendants' motions to dismiss and for summary judgment. ER 26-71. On April 20, 2007, the district court granted defendants' motion for reconsideration in light of defendants' promulgation of an intervening regulation in response to the court's decision. The district court entered a final judgment disposing of all claims on April 24, 2007. ER 23. Plaintiffs timely filed a notice of appeal on June 15, 2007. ER 1.

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs challenge a statutory and regulatory scheme that, as interpreted by defendants, vests the executive branch with sweeping discretion to single out political organizations and individuals in the United States, freeze their assets, and criminalize all transactions with them. Under defendants' interpretation and implementation of the International Emergency Economic Powers Act (IEEPA),[1] the executive branch has shut down numerous domestic political groups without a hearing, without charges of any legal infraction or wrongdoing, often on the basis of secret evidence, and without even providing a statement of reasons. While defendants have used this authority to designate and penalize many "specially designated global terrorists," IEEPA itself contains no such term, and indeed never mentions the word "terrorism."

Plaintiffs are several domestic nonprofit organizations, a retired federal administrative law judge, and a physician. They seek to support the lawful activities of two organizations that have been designated under this legal scheme as "specially designated global terrorists" (SDGTs) – the Kurdistan Workers' Party (PKK) in Turkey, and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka. Retired Judge Ralph Fertig and the Humanitarian Law Project, for example, seek

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[1] P.L. 95-223, Title II, 91 Stat. 1626 (Dec. 28, 1977), *codified at* 50 U.S.C. §§ 1701-1707.

to advocate on behalf of the PKK and to train and assist it in human rights advocacy.

If plaintiffs engage in such advocacy, however, they risk being designated as SDGTs themselves – without charges, without a hearing, on the basis of secret evidence, and without any statement of reasons. Indeed, under IEEPA defendants can freeze their assets and criminalize transactions with them merely by opening an investigation into whether they should be designated, that is, without any designation at all. In addition, plaintiffs risk severe civil and criminal penalties for the same advocacy.

Plaintiffs challenged this authority on First and Fifth Amendment grounds. The district court initially held unconstitutional two aspects of the scheme – an executive order provision authorizing designation for mere association, and IEEPA's grant to the President of unfettered authority to designate individuals and groups without any substantive standards whatsoever. ER 70-72. It rejected plaintiffs' other legal challenges. Defendants then issued a new regulation defining the "otherwise associated" provision, and moved for reconsideration. The district court ruled that the regulation cured the defects in the "otherwise associated" provision, and that plaintiffs lacked standing to challenge the President's designation authority. It therefore granted summary judgment to defendants. ER 78-71, 85-87. This appeal followed.

B. Statement of Facts

1. Statutory and Regulatory Scheme

The International Emergency Economic Powers Act (IEEPA) was enacted in 1977 to codify and regulate the President's use of economic sanctions against foreign nations as a tool of nation-to-nation diplomacy. It vests the President with the power to impose economic sanctions on other countries when he declares a national emergency. To that end, it authorizes the President to "regulate, or prohibit" various financial transactions with "any foreign country or a national thereof." *Id.* § 1702(a)(1)(A). It also authorizes him to "block..., regulate, ... nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, or with respect to any property, subject to the jurisdiction of the United States...." *Id.* § 1702(a)(1)(B). The classic instance of an IEEPA regulation is a ban on economic transactions with Iran and Iranian businesses. *See, e.g.,* Executive Order 12959, 60 Fed. Reg. 24757 (1995).

Presidents often employed economic sanctions against foreign countries before IEEPA was enacted. They had never, however, used such powers against

disfavored individuals or political organizations unconnected to a sanction on a foreign nation. IEEPA was designed to curtail the President's traditional sanctions powers, not to expand them in wholly unprecedented ways. For the first seventeen years that IEEPA was on the books, executive practice conformed to the historical practice of sanctions targeted at nations.

In 1995, however, President Bill Clinton for the first time invoked IEEPA to impose economic sanctions not on a country and "nationals thereof" as a part of nation-to-nation diplomacy, but on disfavored political organizations without any nexus to a country-targeted sanction. He designated ten Palestinian organizations and two Jewish groups, froze any U.S. assets they had, and forbade transactions with them. E.O. 12947, 60 Fed. Reg. 5079 (1995). Pursuant to the same Executive Order, the Treasury Department designated other groups and individuals, including Mohammad Salah, a U.S. citizen now living in Chicago. 60 Fed. Reg. 41152 (Aug. 11, 1995). Without a hearing, a trial, or formal charges of any kind, Mr. Salah was declared a "specially designated terrorist" and subjected to an economic embargo in his own country. It became a crime for anyone in the United States to enter into any economic transaction with him, or even to donate anything of value to him. Without obtaining licenses, wholly discretionary with OFAC, Mr. Salah would have starved to death, as the law made it a crime for anyone to sell or give

him a loaf of bread, for a doctor to treat him, for an employer to hire him, or for a police officer to answer his emergency call for help.

Shortly after the terrorist attacks of September 11, 2001, President Bush similarly invoked IEEPA, freezing the assets of twenty-seven political organizations and individuals, again without any nexus to a sanction directed against a nation. Exec. Order 13224, 66 Fed. Reg. 49079 ("E.O. 13224"). The Executive Order included an Annex listing the twenty-seven groups and individuals, but offered no explanation or criteria as to why any of the groups and individuals were named.[2] The Executive Order contained no finding that any of the entities had engaged in any wrongdoing.

In addition, the Order authorized the Secretary of the Treasury to add to the list of designated entities groups or individuals determined, *inter alia*, "to act for or on behalf of [others on the list], to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to" others on the list; or to be "otherwise associated with" others on the list. E.O. 13224, Sec. 1 (b)-(d). Those on the list are denominated "specially designated global terrorists," or SDGTs. *See* 31 C.F.R. § 594.310 (defining "specially designated global terrorist" as anyone "listed in the Annex or designated pursuant to Executive Order 13224");

[2] While some designations might be said to need no explanation -- such as those of Usama bin Laden and al Qaeda -- many of the groups and individuals are quite obscure (e.g., Al Rashid Trust, Islamic Movement of Uzbekistan).

see also OFAC, "Specially Designated Nationals and Blocked Persons," posted at http://www.ustreas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf (listing designated persons and groups).

Designation as an SDGT has the effect of immediately blocking all of the designee's property and interests in property within the United States or in the control of U.S. persons. E.O. 13224, §1. In addition, the Order prohibits all transactions with designated entities or individuals, including "the making or receiving of any contribution of funds, goods, or services to or for the benefit of those persons." *Id.* §2(a). While humanitarian aid is ordinarily exempted from such sanctions, the Executive Order specifically prohibits all "humanitarian" donations. *Id.* §4.[3] Accordingly, the designation of a group within the United States has the practical effect of shutting it down, as it can engage in no transactions and has no access to its own property. As the example of Mohammad Salah illustrates, designation of a person is even more onerous, for it creates a kind

[3] The Executive Order's prohibitions apply "[e]xcept to the extent required by section 203(b) of IEEPA (50 U.S.C. 1702(b)), or provided in regulations, orders, directives, or licenses that may be issued pursuant to this order." E.O. 13224, §2. IEEPA § 203(b) exempts from IEEPA prohibitions: communications "not involv[ing] a transfer of anything of value," 50 U.S.C. § 1702(b)(1); "donations ... of articles … intended to be used to relieve human suffering, *id*. (b)(2); informational materials (consistent with the 1994 Free Trade in Ideas Act), *id*. (b)(3); and travel-related transactions, *id*. (b)(4). The President, however, invoked an exception to IEEPA § 203(b)(2) to prohibit humanitarian donations. E.O. 13224, as amended by a subsequent executive order, E.O. 13372, 70 Fed. Reg. 8499 (Feb. 16, 2005), at §1.

of internal economic exile, leaving the individual without access to property, unable to work, barred from purchasing or selling anything, and barred from receiving even charitable donations.

The Treasury Department promulgated regulations implementing E.O. 13224 on June 6, 2003. 68 Fed. Reg. 34196. *See* 31 C.F.R. Part 594. 31 C.F.R. § 594.406 states that the "prohibitions on transactions or dealings involving blocked property" apply to "services performed in the United States or by U.S. persons, wherever located," and states that "U.S. persons may not … provide legal … transportation, public relations, educational, or other services to a person whose property or interests in property are blocked."

The regulations set forth extensive procedures for imposing civil penalties. *See* 31 C.F.R. §§ 594.702-594.704. By contrast, neither the statute, the Executive Order, nor the regulations set forth any procedural guidelines for the initial designation process itself. Designations are conducted by the Office of Foreign Assets Control (OFAC). 31 C.F.R. § 594.802. If an organization has property in the United States, the courts have held that it has a due process right to notice of the designation and an opportunity to respond, in writing, to the designation. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 163-64 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004). However, OFAC can rely on classified evidence for its designation, and need not disclose that evidence to the designated

entity. *Id;* 50 U.S.C. § 1702(c). Designated entities are not entitled to a hearing or to present or confront witnesses. *Id.* And OFAC issues no administrative decision setting forth the charges, the evidence, or its reasoning, but simply announces that an entity or individual has been designated.

In addition, OFAC is authorized to impose all the effects of a designation – including freezing an organization's assets indefinitely and criminalizing all transactions with it – without designating it, but simply by opening an investigation into *whether* it should be designated. *See* 50 U.S.C. § 1702(a)(1)(B) (allowing blocking "during the pendency of an investigation"). There is no time limit on how long an investigation, and its attendant sanctions, may last.

31 C.F.R. §§ 594.501 and 594.502 establish a licensing process by which persons may seek permission from the Director of OFAC to engage in otherwise-prohibited transactions in property or services with a designated terrorist group. Neither section provides any substantive standards or procedural safeguards for issuing such licenses. Instead, these sections make reference to a generic OFAC licensing provision, 31 C.F.R. § 501.801, which imposes no limits or standards whatsoever on OFAC for granting or denying licenses, and creates no procedural safeguards for the licensing process.

Violations of any regulation or order issued pursuant to IEEPA are subject to a civil penalty of up to $250,000. 50 U.S.C. §§ 1705(b); *see also* 31 C.F.R.

§ 594.701. Willful violations are subject to criminal penalties, including incarceration. 50 U.S. C. §1705(c).

2. Plaintiffs' Intended Support

Plaintiffs seek to associate with and provide support to the PKK and the LTTE.[4] On November 2, 2001, the PKK and the LTTE were designated under the authority granted in E.O. 13224. *See* Press Statement, Spokesman Richard Boucher, U.S. Dept. of State (Nov. 2, 2001). The PKK and the LTTE continue to be listed as SDGTs to this day.

Among the types of support plaintiffs seek to provide to the PKK and the LTTE are political advocacy in the United States and abroad, human rights training, peacemaking negotiation assistance, medical services and advice, the distribution of literature, economic development assistance, and humanitarian aid to orphanages and other social service centers. *See* ER 100-102, 116, 120, 127-28, 136-185. It is undisputed that the PKK and the LTTE both engage in a wide range of lawful and nonviolent activities, and that plaintiffs seek to support only those lawful activities. ER 27; *see also HLP v. Mukasey*, 2007 U.S. App. LEXIS 28470,

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[4] This Court is already familiar with the facts regarding plaintiffs and their intentions to support the lawful activities of the PKK and the LTTE, and has twice affirmed injunctions in related cases on the basis of undisputed facts regarding plaintiffs and the groups in question. *Humanitarian Law Project (HLP) v. Mukasey*, 2007 U.S. App. LEXIS 28470 (9th Cir. Dec. 10, 2007); *HLP v. Reno*, 205 F.3d 1130 (9th Cir. 2000).

at *3.

Plaintiffs Ralph Fertig and the Humanitarian Law Project ("HLP") seek to advocate for the PKK in the interest of protecting the human rights of the Kurds in Turkey, and to provide the PKK and persons associated with them with training and assistance in human rights advocacy and peacemaking negotiation. They also seek to provide humanitarian aid to the lawful activities of the PKK. As Judge Fertig describes, the Kurds in Turkey continue to be the victims of substantial human rights abuses. ER 47-130.

The Tamil plaintiffs seek to associate with the LTTE in the interest of assisting the Tamils in Sri Lanka, and seek to provide humanitarian aid and services and political support to the LTTE. They seek to provide legal, medical, and psychological services, and to distribute LTTE literature. ER 136, 143, 145, 147, 150-51. The LTTE-governed areas of Sri Lanka were among those hardest hit by the tsunami of December 26, 2004, and relief efforts continue to be desperately needed in these regions. ER 155, 160. Because the LTTE governs these regions, and runs the hospitals, health care centers, and economic development organs there, aid must go through or be coordinated with the LTTE, and any aid to that area could be said to "for the benefit of" the LTTE as the area's governing body. ER 156-57.

All of the plaintiffs oppose terrorism and seek to associate with and support

only the lawful, nonviolent activities of the PKK and the LTTE. Yet they are deterred from doing so by IEEPA and E.O. 13224, because any activities in conjunction with or for the benefit of the PKK or the LTTE might cause them to be designated or subject to investigation. Because the statute authorizes their assets to be frozen merely as a consequence of an investigation, and when designated, on the basis of secret evidence, without a hearing, and without a statement of reasons, they are especially chilled, as they may never be afforded a fair opportunity to defend themselves, clear their names, or even learn the basis for having their assets frozen.

3. Prior Litigation Under AEDPA

This Court has previously considered several appeals concerning plaintiffs' constitutional challenge to a related statute, 18 U.S.C. § 2339B, enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA), P.L. No. 104-132, 110 Stat. 1214 (1996). AEDPA authorizes the Secretary of State to designate an organization as a "foreign terrorist organization" after making specific findings that the organization engages in terrorist activity. *See* 8 U.S.C. § 1189(a)(1). Once an organization is designated as a "foreign terrorist organization," AEDPA makes it a crime for anyone to provide it with material support or resources. 18 U.S.C. § 2339B.

On October 8, 1997, the Secretary of State designated 30 organizations as

"foreign terrorist organizations," including the PKK and the LTTE. *See* 62 Fed. Reg. 52,650-51. Plaintiffs brought suit in March 1998, challenging AEDPA as an unconstitutional infringement on their right to support the lawful, nonviolent activities of the PKK and LTTE.

In that litigation this Court has held that AEDPA's prohibition on the provision of "training," "expert advice and assistance," and "services" are unconstitutionally vague because they could be read to criminalize a wide range of fully protected First Amendment activities. *HLP v. Reno*, 205 F.3d 1130 (declaring prohibition on "training" and "personnel" unconstitutionally vague); *HLP v. Mukasey*, 2007 U.S. App. LEXIS 28470, *23-*34 (declaring bans on providing "services," "expert advice and assistance," and "training," as amended in 2004, are still unconstitutionally vague).

Despite this Court's rulings, plaintiffs face substantial penalties under IEEPA if they engage in any activity that might be deemed a "service" to or "for the benefit of" the PKK or the LTTE. Indeed, they cannot engage in precisely the conduct this Court found was constitutionally protected, because if they do they face severe sanctions, including designation as an SDGT.

4. District Court Decision

Plaintiffs moved for summary judgment, and defendants moved to dismiss and for summary judgment. The district court initially found two constitutional defects in the IEEPA scheme. It held the President's designation authority unconstitutional, because it lacks any substantive criteria whatsoever, and permits designations for "associating" or for "no reason at all." ER 56-57. And it declared unconstitutional Section 1(d)(ii) of E.O. 13224, which authorizes the Secretary to designate groups or individuals based on a finding that they are "otherwise associated with" another designated group. The district court held that this provision was unconstitutionally vague and overbroad, for it penalized mere association. ER 63-64. [5]

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[5] Defendants offered no defense on the merits to the "otherwise associated" provision, instead arguing only that plaintiffs lacked standing to challenge it. In support of their motion, they filed a declaration containing false information under oath. The declaration of Barbara Hammerle informed the Court that the "otherwise associated" provision had never been the sole basis for a designation. ER 231 [Hammerle Dec.¶19]. Only after plaintiffs raised questions about these representations at oral argument, and the court ordered supplemental briefing, did defendants admit that this was false. In a second declaration, Ms. Hammerle stated that when she actually conducted a review of the designations, she identified two instances in which entities were designated solely on the basis of the "otherwise associated" provision, and other instances in which she could not even determine the basis for the designation ER 241-242 [Hammerle Dec. II ¶¶5-6]. In seeking reconsideration, defendants admitted in a footnote that Ms. Hammerle's second declaration was also false. *See* Def. Mem. In Supp. of Mot. for Recon. at 7 n.3 (stating that OFAC had "recently identified one additional instance beyond the two reported to the Court in which the 'otherwise associated with' provision was identified as the sole legal basis for designation"). Yet they submitted no

Defendants then issued a regulation defining "otherwise associated," and moved for reconsideration on the ground that as amended by the regulation, the provision was no longer unconstitutional. They also asked the district court to reconsider its ruling on the President's designation power, improperly advancing numerous arguments for the first time that could have been made in the original briefing.

The district court granted defendants' motion for reconsideration. It found that the new regulation cured the constitutional defects in the "otherwise associated" provision, and it ruled that plaintiffs lacked standing to challenge the President's designation authority. ER 82,86.

SUMMARY OF ARGUMENT

The IEEPA-based prohibitions challenged here, as interpreted by defendants, give the President the power to designate and shut down political organizations and individuals in the United States at will, without a hearing, without charges or findings of any wrongdoing, and without any connection to terrorism. The Executive Order issued pursuant to IEEPA further authorizes the Secretary of the Treasury to penalize, designate and shut down other political

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declaration to correct the record, and again offered no explanation for the misrepresentation. Thus, the record as it now stands contains two admittedly false declarations by Ms. Hammerle.

organizations and individuals for merely attempting to provide "services" to or "for the benefit of" another designated group, again without any hearing, charges, or connection to a terrorist group. Indeed, defendants may freeze a group or individual's assets indefinitely simply by declaring that it is under investigation, without any designation whatsoever.

Plaintiffs have previously challenged in this Court a separate statute, AEDPA, which prohibits "material support" to organizations designated as "foreign terrorist organizations" by the Secretary of State. *See HLP v. Mukasey,* 2007 U.S. App. LEXIS 28470; *HLP v. Reno*, 205 F.3d 1130. AEDPA, unlike IEEPA, contains a definition of "foreign terrorist organizations," and authorizes designation only of foreign groups that have actually engaged in terrorist acts. This Court nonetheless found AEDPA constitutionally infirm because it could prohibit plaintiffs from engaging in constitutionally protected speech and advocacy, and therefore enjoined defendants from enforcing against plaintiffs AEDPA's prohibitions on the provision of "training," "expert advice or assistance," and "service."

Despite this Court's ruling in *HLP v. Mukasey,* plaintiffs are not free to provide services, training, or expert advice and assistance to the PKK or the LTTE, because they would risk severe penalties under the independent IEEPA-based prohibitions challenged here. IEEPA and E.O. 13224 share some of the very

infirmities this Court identified in AEDPA, but because they grant even more sweeping power, they are unconstitutional for a variety of reasons that this Court found inapplicable to AEDPA.

First, IEEPA grants the President an unconstitutional "blank check" to designate any group or individual he chooses, regardless of any nexus to terrorism, giving the President an unprecedented and unconstitutional power to shut down disfavored political organizations at will. Plaintiffs have standing to challenge that authority because their intended support of the PKK and the LTTE is precisely the kind of activity that the President has stated, in E.O. 13224, warrant IEEPA sanctions. This Court upheld the AEDPA designation authority because it required findings of specific terrorist activities, and therefore did not authorize designation of such groups as the International Red Cross. 205 F.3d at 1137. IEEPA contains no such requirements, and under defendants' reading would permit designation of the International Red Cross.

Second, Executive Order 13224 violates the First and Fifth Amendments, because while it establishes some criteria for further designations by the Secretary of the Treasury, those criteria still give government officials far too much discretion to penalize groups and individuals for constitutionally protected speech and association. The Executive Order authorizes designation of groups and individuals who have never engaged in or supported any terrorist act or any

terrorist organization.

Third, the Executive Order impermissibly authorizes designation based on the provision of "services," a vague and overbroad term that, as defined by regulation, includes any activity done "for the benefit of" a designated entity, even if it is undertaken entirely independently. Thus, advocating for the PKK or the LTTE in the United States, or writing a report lauding the PKK for its defense of human rights of the Kurds, could all be deemed "services" "for the benefit of" the PKK, and subject plaintiffs to designation as SDGTs.

Fourth, neither designation as an SDGT nor the imposition of a civil penalty of up to $250,000 requires proof that an individual or group "knowingly" provided support to a designated entity. Thus, plaintiffs could be shut down, have all their assets frozen, or face severe civil penalties, for aiding individuals or organizations, perhaps connected to the PKK or the LTTE, that they do not know have been designated. This Court has held that such a "knowledge" requirement is constitutionally required under AEDPA, yet IEEPA omits it. In addition, civil and criminal penalties, including designation, may be imposed under IEEPA without proof that an individual intended to further any kind of terrorist activities. While this Court has held that such a "specific intent" requirement is not required under AEDPA, that statute is far more narrowly tailored, and the same conclusion is not appropriate for the sweeping authority defendants have presumed under IEEPA.

Finally, the Court can avoid all or many of the above constitutional questions by ruling that defendants' IEEPA-based prohibitions are not authorized by statute. Under the doctrine of "constitutional avoidance," courts are obligated to avoid serious constitutional questions whenever a statutory construction makes avoidance possible. IEEPA was enacted to empower the President to impose economic sanctions on foreign nations. Its classic application is the embargo on trade with Libya or Iran. Defendants, however, have applied the statute not to the foreign nations that Congress contemplated as its targets, but to individuals and organizations, irrespective of their connection to any embargoed nation. The serious constitutional questions raised here counsel against interpreting IEEPA to authorize such targeting of individuals and groups absent a much clearer indication from Congress that it sought to do so.

Enjoining defendants from using IEEPA in this way, as a tool to target and shut down disfavored political groups and individuals, will not in any way undermine the nation's legitimate interest in fighting terrorism. AEDPA, which this Court has largely upheld, provides adequate authority to designate "terrorist organizations" and penalize the provision of material support to them. Moreover, it and other criminal statutes demonstrate that the task of fighting terrorist financing can be furthered through much more carefully tailored measures. Defendants should not be permitted to do an end-run around those measures by

invoking a statute that was never designed for this purpose, that does not even mention the word "terrorism," and that contains none of the safeguards and limits that this Court found essential in upholding AEDPA.

ARGUMENT

I. THE PRESIDENT'S DESIGNATION AUTHORITY VIOLATES THE FIRST AND FIFTH AMENDMENTS BECAUSE IT IS VAGUE AND OVERBROAD

As interpreted by defendants, IEEPA gives the President unprecedented power to single out and shut down domestic political organizations. IEEPA, the government contends, authorizes the President to designate literally any organization or person in the world with a foreign interest – without even an allegation, much less a finding, of any wrongdoing, on the basis of secret evidence, without any reference to terrorism, and without adhering to any statutory substantive standard.

It is one thing to give the President open-ended authority to impose embargoes on foreign nations – IEEPA's initial purpose. But when such open-ended authority is transformed by unilateral executive interpretation from a tool of nation-to-nation diplomacy into a weapon for penalizing disfavored political groups and individuals, without any connection to nation-to-nation diplomacy, it becomes a sweeping censorship power, raising substantial First and Fifth Amendment concerns.

The district court agreed that the President's authority was unconstitutional, but found that plaintiffs lacked standing to challenge it. Where, as here, laws threaten to deter the exercise of constitutionally protected rights, plaintiffs may challenge those laws before they are applied so long as they face a credible threat that the laws will be applied to them. Because they seek to engage in precisely the kinds of activities that the President targeted in E.O. 13224, plaintiffs face a credible threat that they, too, will be designated by the President if they engage in any of their intended activities. On the merits, the district court was correct – the First and Fifth Amendments do not permit the issuance of this blank check to the President to shut down disfavored groups at will.

A. Plaintiffs Have Standing to Challenge the President's Designation Authority

Plaintiffs credibly fear that if they engage in any activities that might be deemed to benefit or be associated with the PKK or the LTTE, they risk being designated by the President under IEEPA. As the district court recognized, the President's designation authority is literally unchecked: "[Plaintiffs] may be subject to designation under the President's authority for any reason, including for associating with the PKK and the LTTE, for associating with anyone listed in the Annex [to E.O. 13224], or for no reason." ER 57. The district court initially held that plaintiffs had standing to challenge this authority because "the President has used his designation authority in the past, and because there is no apparent limit on

his ability to continue to do so." *Id.* On reconsideration, however, the Court reasoned that because the IEEPA authority is not targeted at speech per se, plaintiffs are not entitled to establish standing under the more liberal approach appropriate where First Amendment rights are at stake. The court then found that plaintiffs failed to satisfy the more rigorous standing requirements that it deemed applicable where First Amendment interests are not implicated. ER 83-85. In fact, the First Amendment standing doctrine is fully applicable here, and plaintiffs have standing to sue.[6]

Plaintiffs have standing because they face a credible threat of enforcement of a law raising First Amendment concerns. *Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003). In the very same act, the President simultaneously designated twenty-seven entities and individuals, and expressly

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[6] As a threshold matter, the district court improperly considered defendants' arguments regarding the President's designation authority on a motion for reconsideration, as all of defendants' arguments could have been made in the original briefing. "A Rule 59(e) motion may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000))(emphasis in original). With the exception of a single paragraph addressing a new regulation establishing administrative review of presidential designations, Def. Mem. at 20-21, *everything else* in defendants' motion to reconsider regarding the President's designation authority could and should have been argued before the district court ruled on the parties' cross-motions, but was not. While this Court has an independent responsibility to determine that there is a case or controversy, all of defendants' arguments on the merits of the President's designation authority are waived.

instructed the Secretary of the Treasury to designate others based on, among other things, associations with or activities undertaken for the benefit of other designated entities. Because plaintiffs seek to associate with and undertake activities for the benefit of two particular designated entities, the very kinds of conduct the President singled out for disfavor, they face a credible threat that they will be subject to the President's designation authority.[7]

As this Court has held:

> 'A plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute. Not if it clearly fails to cover his conduct, of course. But if it arguably covers it, and so may deter constitutionally protected expression because most people are frightened of violating criminal statutes especially when the gains are slight, as they would be for people seeking only to make a political point and not themselves political operatives, there is standing.'

Cal. Pro-Life Council, Inc., 328 F.3d at 1095 (quoting *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003).[8]

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[7] Defendants' bare-bones assertion in their brief below that the twenty-seven groups and individuals had "clear ties to international terrorism," Def. Mem. In Supp. of Motion for Recon. at 9, a criterion found in no law, executive order, or regulation, only underscores the credible threat that plaintiffs face. That criterion expressly turns on associations, or "ties." Defendants do not explain what "clear ties" consist of, or why associating with the PKK or the LTTE, as plaintiffs seek to do, would not be considered "clear ties" by the President.

[8] This rationale is not limited to First Amendment cases. Courts have granted pre-enforcement standing in cases not raising First Amendment concerns, so long as the plaintiff faced a credible threat that the statute would be enforced against

The district court found that because the President's designation authority was unguided by any substantive criteria, rather than being explicitly targeted at speech or association itself, it raised no First Amendment concerns. But a statute that gives a government official authority to shut down political groups at will without any substantive criteria *by definition* strikes at the heart of the right of association by empowering the government to ban the association itself.

Comparison of this case with prior pre-enforcement standing cases makes clear that plaintiffs have standing. In *Cal. Pro-Life Council*, 328 F.3d at 1093, a pro-life advocacy group was granted standing to challenge a state law authorizing the election commission to require disclosure of campaign contributions and expenditures, even though the law had not been enforced against the group. It was sufficient that the law "arguably" covered the group's intended activities. *Id.* Under the district court's analysis, however, a statute giving an election commission much more extensive *carte blanche* power to shut down political parties at will, without any findings of wrongdoing, and without any statutory criteria, could not be challenged in a pre-enforcement setting, even by groups who sought to engage in activity that the election commission had already indicated was

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him. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 187 (1973) (pre-enforcement standing to challenge criminal abortion statute); *Compassion in Dying v. Washington*, 79 F.3d 790, 795-96 (9th Cir. 1996) (en banc) (pre-enforcement challenge to assisted suicide ban), *rev'd on other grounds*, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding statute on the merits).

disfavored.

Similarly, the Supreme Court has held that a municipal ordinance giving a mayor unbridled discretion to grant or deny permits for newspaper distribution racks could be challenged prior to its enforcement. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). The Court reasoned that because of the risks of self-censorship, "a facial vagueness challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.* at 759. Just as the Lakewood ordinance's grant of unbridled discretion allowed the mayor to discriminate against "disliked speakers," so IEEPA's grant of unbridled discretion allows the President to discriminate against "disliked" organizations or individuals. If anything, the President's power is much greater, as the Lakewood mayor did not have the power to shut down disliked organizations or speakers altogether.

Moreover, because under IEEPA as defendants have interpreted and applied it, the President need not provide *any explanation* for a specific designation, and has not provided any reasons for his past designations, the chilling effect is even greater here. Plaintiffs must guess at what might spark the President to issue further designations. And if plaintiffs engage in activity that the President dislikes, plaintiffs may not only find their assets frozen and their transactions criminalized,

but they may never even learn what they did or said to incur the President's displeasure. The absence of process or public justification for the President's designations means that plaintiffs must steer far wider of the prohibited zone than they would if there were clear rules and a public process.

Had IEEPA expressly authorized the President to shut down any political group whose associations or speech he disliked, there would be no question that plaintiffs would have standing to challenge that authority in a pre-enforcement setting. The fact that IEEPA gives the President *even broader* authority to shut down disfavored political organizations or individuals for any or no reason at all should not immunize it from pre-enforcement challenge, where the act of shutting an organization down itself directly raises First Amendment concerns.[9]

B. The President's Designation Authority Under IEEPA is Unconstitutionally Vague and Overbroad

As construed by defendants, IEEPA permits the President to designate – and

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[9] The district court relied on *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764 (9th Cir. 2006), and *San Diego County Gun Rights Comm. v Reno*, 98 F.3d 1121 (9th Cir. 1996), but both are plainly distinguishable. In *Sacks*, the Court denied standing to challenge a ban on providing medical donations to Iraq, where the plaintiff had not been prosecuted for doing so, the statute of limitations had apparently run on his potential past violations, and the ban itself had been lifted, so the plaintiff's future conduct would not be affected. 466 F.3d at 774-75. Here by contrast, the authority remains in place, and plaintiffs have expressed a concrete desire to engage in conduct that might subject them to designation in the future. In *San Diego County Gun Rights Comm.*, the plaintiff had never been prosecuted, counsel admitted that "none of the plaintiffs are under any threat of prosecution," and there had been no prior enforcement of the statute. 98 F.3d at 1127-28. Here, by contrast, there has been prior enforcement, and plaintiffs seek to engage in the very conduct that the President has identified as warranting designation.

block all transactions with – literally anyone he chooses, so long as a foreign national has any interest in the designee's property or transactions 50 U.S.C. § 1702(a)(1)(B). This authority is in no way limited to terrorism or terrorist groups. In fact, IEEPA never even uses the term "terrorism." E.O. 13224 illustrates the vast sweep of this power, for in issuing it the President designated twenty-seven individuals and entities *without any explanation* for why they were designated. The Executive Order simultaneously established additional criteria, again wholly by executive fiat and constrained by *nothing* in the U.S. Code, for the designation of others. These criteria authorize designation for mere association, may be changed at any time, and impose no constraint on the President's independent designation authority.

The President's IEEPA authority is far more sweeping than the power to designate "foreign terrorist organizations" under AEDPA previously upheld by this Court. AEDPA authorized designation only of foreign organizations that meet specific statutory criteria expressly requiring findings of terrorist activity that threatens our national security. Indeed, this Court upheld AEDPA precisely because it "does not grant the Secretary unfettered discretion in designating the groups to which giving material support is prohibited." *Humanitarian Law Project v. Reno*, 205 F.3d at 1137. For example, the Court insisted, the Secretary could not designate "the International Red Cross" as a terrorist organization. *Id.*

Rather, "the Secretary must have reasonable grounds to believe that an organization has engaged in terrorist acts – assassinations, bombings, hostage-taking, and the like – before she can place it on the list." *Id*

IEEPA, by contrast, does give the President "unfettered discretion in designating the groups to which giving material support is prohibited." *Id.* Once he declares an emergency, he can block the assets of and bar transactions with any entity or individual in whose transactions a foreign national has an interest – without any finding that the individual or organization engaged in or supported terrorism. Nothing in IEEPA stops him from designating the International Red Cross. In short, IEEPA gives the President the very "unfettered discretion" that this Court emphasized AEDPA did not afford. As construed by defendants, therefore, IEEPA falls distinctly on the unconstitutional side of the line this Court drew in *HLP v. Reno* and *HLP v. Mukasey*.

II. THE TREASURY SECRETARY'S DESIGNATION AUTHORITY UNDER E.O. 13224 IS VAGUE, OVERBROAD, AND VIOLATES THE FIRST AND FIFTH AMENDMENTS

The Secretary of the Treasury's designation authority under E.O. 13224 is also unconstitutional. While the Executive Order, unlike IEEPA, articulates standards for designation by the Secretary, those standards give the Secretary discretion to penalize and shut down individuals and groups on the basis of

constitutionally protected activities, without any type of scienter, and leave plaintiffs guessing as to what, if anything, they can do in conjunction with or on behalf of the LTTE and the PKK.

A. The Treasury Secretary's Authority to Designate Groups That Have Never Engaged in Terrorist Activity Is Unconstitutionally Vague and Overbroad.

The Executive Order's grant of authority to the Secretary to designate individuals and organizations, while more bounded than the President's, is nonetheless also vague and overbroad. The power to shut down domestic political organizations must be carefully regulated and constrained lest it become a tool for political censorship. Yet the Executive Order grants the Secretary designation authority almost as sweeping as that the President himself exercises. The Secretary may designate domestic groups for constitutionally protected advocacy, even where that advocacy does not support an organization that has engaged in terrorist activity, and may do so without providing a hearing, a statement of reasons, or any finding of illegal conduct. Because this authority is so sweeping, it is constitutionally invalid.

As with the President's designation authority, this Court's analysis of AEDPA's designation authority in *HLP v. Reno*, 205 F.3d at 1137, compels the conclusion that E.O. 13224's authority is unconstitutional. As noted above, the Court in *HLP v. Reno* found it essential that AEDPA authorized the designation

only of foreign entities, and that "the Secretary must have reasonable grounds to believe that an organization has engaged in terrorist acts – assassinations bombings, hostage-taking, and the like – before she can place it on the list." *Id.* AEDPA allowed the Secretary to designate only (a) foreign organizations; (b) that have engaged in terrorist activity; (c) where that activity threatens our national security. 8 U.S.C. § 1189.

The Treasury Secretary's authority under E.O. 13224 is not tailored in any of these ways. First, the Executive Order authorizes the Secretary to designate domestic individuals and groups, not only foreign organizations. As a result, plaintiffs as U.S. organizations and residents must fear designation themselves.

Second, the Executive Order authorizes designation of persons and organizations that have *never* engaged in or even supported any terrorist activity or group engaged in terrorism. A group or individual can be designated for having provided services or having attempted to do anything of assistance for anyone on the President's initial Annex, even though there has never been any finding that any of those entities or individuals engaged in terrorism.

Third, a group or individual can be designated for activity that is many steps removed from any terrorist activity. For example, plaintiffs risk designation not only for doing anything that might benefit the PKK itself, but also for attempting to assist anyone else who has in turn been designated merely for providing assistance

to the PKK, even if that group or person has never engaged in any terrorism itself. The Secretary's designation authority allows for a literally infinite regression of designations: individual A may be designated for attempting to assist individual B who was designated for having once written an op-ed for entity C, which is in turn on the list for having once provided humanitarian aid to group D, which was designated for having once provided services to group E that once engaged in terrorism. Under the principle of "six degrees of separation," E.O. 13224 would quickly authorize designation of the entire world.[10]

Fourth, the constitutional infirmities posed by the sweep of the Secretary's designation authority are amplified by the procedures employed for designation. The Secretary has designated many individuals and organizations since E.O. 13224 was issued. When he does so, OFAC lists the designation in the Federal Register, and sometimes issues a press release. However, it provides the designated entity with no statement of reasons or charges, and publishes no administrative decision justifying its action. To make matters worse still, designations are typically predicated on classified information. Thus, there is no way for an organization to determine what sorts of activities have prompted designations in the past, nor to

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[10] Harvard sociologist Stanley Milgram established the "six degrees of separation" principle in an experiment in the 1960s that found that on average, any two people will be connected through six degrees of mutual associations. *See* Stanley Milgram, "The Small World Problem," *Psychology Today*, May 1967, at 60-67.

determine what activities led to its own designation. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (noting risk that "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' ... uncertain measures inevitably lead citizens to 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked") (internal citations omitted).

In short, E.O. 13224 and its implementing regulations, like the President's designation authority directly under IEEPA, sweep far more broadly than AEDPA, and thereby grant the Secretary unconstitutional discretion to designate groups and individuals.

B. The Ban on "Services" Is Unconstitutionally Vague and Overbroad

The ban on "services" imposed by E.O. 13224 and its implementing regulations is at least as invalid as the bans on "services," "training," and "expert advice and assistance" in AEDPA, which this Court has already declared unconstitutional. In *HLP v. Mukasey*, this Court held that these terms are unconstitutionally vague because they are unclear and could "be read to encompass speech and advocacy protected by the First Amendment." 2007 U.S. App. LEXIS 28470, at *27. The specific term "services," the Court held, is invalid because "'it is easy to imagine protected expression that falls within the bounds; of the term

‘service.’” *Id.* at *31 (quoting *HLP v. Gonzales*, 380 F. Supp.2d 1134, 1152 (C.D. Cal. 2005)).

The same is true of the prohibition on “services” in E.O. 13224 and its implementing regulations. Indeed, because the “services” ban in E.O. 13224 is even broader than that in AEDPA, it is invalid on overbreadth grounds as well.

1. The Ban on “Services” is Void for Vagueness

A law is impermissibly vague if it “cause[s] persons of common intelligence ... necessarily [to] guess at its meaning and [to] differ as to its application.'" *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). A central purpose underlying the due process and First Amendment prohibition on vague statutes is to “avoid subjective enforcement of the laws based on “arbitrary and discriminatory enforcement' by government officers.” *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). "The requirement of clarity is enhanced when criminal sanctions are at issue or when the statute abuts upon sensitive areas of basic First Amendment freedoms.” *Information Providers’ Coalition for the Defense of the First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991) (internal quotation marks and citations omitted).[11]

[11] While IEEPA and E.O. 13224 impose civil as well as criminal sanctions, the

The "services" ban at issue here is even more vague than the AEDPA ban already deemed unconstitutional, for two reasons. First, while AEDPA applies only to services provided "to" a designated entity, E.O. 13224 and its implementing regulations also prohibit any services done "for the benefit of" a designated entity. E.O. 13224, § 2(a); 31 C.F.R. §§ 504.204, 594.409, 594.506. In upholding AEDPA's amended prohibition on the provision of "personnel" to designated groups, this Court found it critical that AEDPA preserved plaintiffs' right to engage in advocacy "entirely independently of the foreign terrorist organization to advance its goals or objections." *HLP v. Mukasey*, 2007 U.S. App. LEXIS 38470, at *33 (quoting 18 U.S.C. § 2339B(h)). The Court had previously declared the

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same stringent vagueness standard applies to both, for two reasons. First, stringent standards are required by civil laws that affect First Amendment rights: "the requirement of clarity is enhanced … when the statute abuts upon sensitive areas of First Amendment freedoms." *Information Providers' Coalition*, 928 F.2d at 874; *see also Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) ("perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights").

Second, stringent vagueness standards apply to civil laws that impose "quasi-criminal" penalties or have "prohibitory and stigmatizing effects." *Hoffman Estates*, 455 U.S. at 499. The civil provisions at issue here are not designed to compensate the government, but explicitly to penalize. 18 U.S.C. § 1705(a) (authorizing a "civil *penalty*") (emphasis added). And the designation sanction, effectively a death knell for an organization, is in many respects more draconian than a criminal penalty. Organizations can generally survive the imposition of criminal penalties. But an organization designated as terrorist is effectively closed down. Thus, both the effects on First Amendment rights and the severity of the civil sanctions here require the application of the most stringent vagueness standards even to the civil provisions of IEEPA and EO 13224.

"personnel" prohibition unconstitutional precisely because it failed to provide such assurance. *HLP v. Reno*, 205 F.3d at 1137-38. Unlike the amended AEDPA provision, E.O. 13324 and its implementing regulations do not preserve that right; any service, no matter how independent, is prohibited if deemed to be "for the benefit" of a designated entity.

Second, while AEDPA punishes "services" exclusively through the criminal process, and therefore requires proof of guilt beyond a reasonable doubt in a public trial, E.O. 13224 and its implementing regulations impose even more devastating sanctions – the effective closure of an entity – through a closed administrative process, relying on secret evidence, without even a statement of reasons. As noted above, these factors dramatically exacerbate uncertainty about the scope of the law, and effectively require individuals and entities to steer clear of any activity that might even conceivably fall within its scope.

The district court upheld the Executive Order ban on "services," despite having declared the very same term unconstitutional in AEDPA. ER 24. It concluded that the ban's regulatory definition, which specifies that the ban applies to all "medical," "educational," "legal," "and other" services, unquestionably covers plaintiffs' intended activities, including assistance and training in human rights advocacy and peacemaking, and therefore is not vague as applied. ER. 17. And it held that while the provision may be vague in some hypothetical contexts, it

is sufficiently clear in the vast majority of its applications to withstand plaintiffs' facial vagueness challenge. ER 22.

The district court's analysis cannot be squared with this Court's invalidation of AEDPA's bans on "services," "training," and "expert advice and assistance." This Court held the AEDPA terms invalid because they potentially "could be read to encompass speech and advocacy protected by the First Amendment," 2007 U.S. App. LEXIS 28470, at *27-*28. The Court specifically noted that the provisions might be interpreted to apply to plaintiffs' desire to instruct members of a designated group "on how to petition the United Nations.'" *Id.* at *27 (quoting *HLP v. Reno*, 205 F.3d at 1138). Yet the district court *upheld* the "services" ban precisely because it read it to clearly prohibit just such constitutionally protected conduct.

Integral to the district court's conclusion was its erroneous determination that the ban on "services" could *not* be read to ban independent advocacy undertaken for the benefit of a designated entity. ER 23. (Plaintiffs have alleged that they would like to engage in advocacy in the United States and before the United Nations for the benefit of the PKK and the LTTE, but are deterred from doing so by the challenged law). In fact, the definition of proscribed "services" expressly includes any services done "for the benefit of" a designated entity. 31 C.F.R. §§ 594.204, 594.406, 594.409. Thus, if Judge Fertig or the HLP were to

write a report or op-ed lauding the PKK's defense of Kurdish human rights, they could be deemed to have provided a service "for the benefit of" the PKK, and therefore be subject to civil penalties or designation.

The district court rejected this possibility – which appears to be compelled by the Executive Order and regulatory language -- not by citing to any limiting language in IEEPA, the Executive Order, or the implementing regulations, but merely by quoting defendants' statement in a brief, *unsupported by any citation*, that "E.O. 13224 is quite obviously not intended to apply to independent advocacy in support of designated groups." ER (quoting Def's Mem. at 16-17). Even if this assertion found any support in the governing legal language, which it does not, it only underscores the vagueness of the "services" ban. On its face the law appears to ban independent advocacy if done "for the benefit of" a designated group, yet defendants' lawyers have somehow construed it not to apply to such advocacy. Given the conflict between the law as written and defendants' counsel's statement, a person of common intelligence is left to guess what he can or cannot do to support a designated group, even where his conduct consists of fully protected First Amendment activity such as teaching human rights advocacy, writing a human rights report, or engaging in public relations advocacy.

2. The Ban on "Services" is Overbroad

Even if the Court were to agree with the district court that the ban on "services" is sufficiently clear, it is unconstitutionally overbroad. A law is overbroad if it punishes a "substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113, 118 (2003); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Under E.O. 13224 and the regulations, *every* form of speech done "for the benefit of" a designated group would potentially constitute a "service." Writing an op-ed, lobbying, providing legal representation, petitioning the UN, providing medical counseling, volunteering to teach reading in a daycare center, and distributing an organization's literature, are all prohibited "services" if done "for the benefit of" the group. Yet all such conduct is unquestionably constitutionally protected. If AEDPA's ban on "services" was unconstitutional because it *could be read* to ban protected speech, surely the much broader Executive Order's ban on services, which on its face bans all such protected speech, is overbroad.

Moreover, the forms of advocacy banned by this provision are not isolated instances; the ban would apply to teaching or advocacy on any subject at all, from remedial reading to housing construction to healthcare to human rights. While the provisions may justifiably bar a small subset of services that would be unprotected – for example, training in how to use explosives for terrorist purposes -- the vast

majority of the speech proscribed by the "services" ban is constitutionally protected. Thus, the provision is "substantially overbroad."

The overbreadth of the "services" prohibition is underscored by comparing it to AEDPA. In *HLP v. Mukasey*, this Court rejected an overbreadth challenge to AEDPA, reasoning that it principally prohibited material support, not speech or advocacy, and that the instances in which the statute reached protected speech were not substantial when compared to the statute's legitimate applications. 2007 U.S. App. LEXIS 28470, at *35-*36. But the Court had already invalidated AEDPA's provisions banning training, expert advice and assistance, and services – *i.e,* those provisions most likely to apply to speech. *Id.* at *25-*33. And the Court had also already determined that AEDPA "does not prohibit … vigorously promoting and supporting the political goals of [a designated] group." 205 F.3d at 1133. This was critical, because, as the Court noted, "advocacy is always protected under the First Amendment whereas making donations is protected only in certain contexts." *Id.* at 1134. Thus, AEDPA was not overbroad because the Court interpreted it not to apply to advocacy, and had invalidated those parts of the statute that most plainly put speech and advocacy at risk.

By contrast, according to both the district court and the government below, the "services" ban of E.O. 13224 and its regulations prohibits the very advocacy that this Court previously deemed protected – training designated groups in how to

petition the United Nations or other forms of human rights advocacy, international law, and peacemaking. 2007 U.S. App. LEXIS 28470, at *27, *31; 205 F.3d at 1137-38.

The "services" ban is also broader than AEDPA in terms of the entities to which its bar applies. As noted above, in upholding AEDPA, this Court emphasized that it barred material support only to groups found to have actually engaged in "terrorist activity" that threatens the "national security" of the United States. *HLP v. Reno*, 205 F.3d at 1137 ("the statute authorizes the Secretary to designate only those groups that engage in terrorist activities"). By contrast, E.O. 13224 authorizes the designation of entities and individuals who have *never engaged in any terrorist activity*. *See* Point II.A., *supra.* Unlike AEDPA, which this Court found was tailored to cutting off funds to organizations that actually engage in terrorism, the "services" provision bars a much wider range of activity having no connection to terrorism, simply because it was done for the benefit of an entity on the designated list, even if that entity itself never engaged in any terrorism.[12]

[12] The regulation defendants promulgated in response to the district court's invalidation of the "otherwise associated" provision further increases the scope of the ban on "services," rendering it even more vague and overbroad. It authorizes designation for those who "attempt" to provide any service to a designated entity. 31 CFR § 594.316 (published as final rule at 72 Fed. Reg. 4206, 4207 (Jan. 25, 2007)). Literally *any* associational activity in conjunction with a designated organization could be deemed an "attempt" to act "on behalf of" or "for the benefit

3. The Ban on "Services" is Unconstitutionally Vague and Overbroad As Applied to Plaintiffs' Intended Activities

Even if the Court were to conclude that the "services" ban is not facially invalid, it should declare it unconstitutional as applied to the specific "services" plaintiffs intend to offer. This Court has held that "there is no constitutional right to facilitate terrorism by giving terrorists" aid that might assist them in "carry[ing] out their grisly missions." *HLP v. Reno*, 205 F.3d at 1133. But none of the conduct plaintiffs seek to engage in for the benefit of the PKK and LTTE – whether advocacy, literature distribution, medical services, or the like – is linked in any way to the carrying out of terrorist activity. While the government certainly has a legitimate interest in prohibiting services intended to further terrorist activity, it has no legitimate interest whatsoever in banning plaintiffs' activities, which are not only not intended to further terrorism, but are incapable of furthering terrorism.

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of" that organization, and as we have shown above, even entirely independent activity can be seen as a service "for the benefit" of a designated group. Thus, attempting to write an op-ed praising the PKK now renders the would-be writer vulnerable to designation. And filling out a membership card or communicating with a designated organization about its interests and goals might be seen as "attempting" to act "on behalf of" the organization. This is precisely the kind of speech and associational activity that this Court has deemed protected in prior decisions. *HLP v. Reno*, 205 F.3d at 1134 (noting that plaintiffs have a constitutional right to "advocate[e] the goals of the foreign terrorist organization, espous[e] their views, or even be[come] members of such groups").

C. IEEPA's Penalties Violate the First and Fifth Amendments Because They Can be Imposed Without Sufficient *Mens Rea*

The IEEPA scheme imposes three types of penalties – designation, civil penalties, and criminal penalties. Designation and civil penalties require neither a showing that an individual knew that the recipient was a designated group nor that the individual intended to further any terrorist or other illegal activities of the recipient. The criminal penalty requires a willful violation, but does not expressly require intent to further the illegal ends of the group. Without these requirements, all of these penalties violate the First and Fifth Amendments.

1. Designation and the Civil Penalties Violate the Fifth Amendment Because They Do Not Require Knowledge That the Recipient is Designated

This Court in *HLP v. Mukasey* found it essential to the constitutionality of AEDPA that it penalized only those who provided support with knowledge that the recipient was designated or had engaged in terrorist activities. 2007 U.S. App. LEXIS 28470, at *16-*20. Neither designation nor the civil penalties triggered by IEEPA, the Executive Order, and the regulations, require such knowledge. Nothing on the face of the Executive Order requires proof of knowing support to authorize designation or civil penalties. While these penalties are formally civil, as noted above, they are properly viewed as quasi-criminal because they are severe, they are aimed to penalize, and they have substantial stigma attached. *See supra* note 11. If it offends due process to impose a criminal penalty on an organization

for unknowing support, so, too, it offends due process to shut an entity down or fine it $250,000 based on unknowing support. Accordingly, unless the Court interprets the designation and civil penalty provisions to require proof of knowledge, these provisions are unconstitutional.

2. The Civil and Criminal Penalties Violate the First and Fifth Amendments Because They Do Not Require Proof of Specific Intent to Further a Designated Entity's Terrorist or Illegal Activities

None of the sanctions authorized by the IEEPA scheme expressly require proof that an individual intended to further the recipient entity's terrorist or illegal ends, and to that extent they violate the First and Fifth Amendment's prohibition on guilt by association.

In *Scales v. United States*, 367 U.S. 203 (1961), the Supreme Court held that the Fifth Amendment requirement of personal guilt independently precludes the imposition of punishment based on an individual's "status or conduct" in connection with a group, unless the government also shows that the individual specifically intended to further the group's illegal activities. The Court wrote:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Scales, 367 U.S. at 224.

This Court rejected a similar challenge to AEDPA, reasoning that that statute does not run afoul of either the First or Fifth Amendments because it punishes "material support" rather than "association" itself. *HLP v. Reno,* 205 F.3d at 1134. However, even accepting for purposes of this stage of review the conclusion that AEDPA penalties are constitutional without specific intent, the much broader IEEPA-based prohibitions must fall.[13]

In rejecting plaintiffs' First Amendment challenge to AEDPA, this Court emphasized that individuals were free to advocate vigorously on behalf of designated groups, and that groups could be designated only on the basis of a finding that they had engaged in terrorist activities. 205 F.3d at 1133 ("The statute does not prohibit … vigorously promoting and supporting the political goals of the [designated] group."); *id.* at 1134 (plaintiffs are free to "advocate the goals of the foreign terrorist organization [and] espous[e] their views" without "fear of

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[13] Plaintiffs respectfully disagree with the Court's analysis in this regard, and preserve the issue if this case or *HLP v. Mukasey* reach a further level of review. Plaintiffs' position is that the same First and Fifth Amendment principles apply whether a penalty is predicated on the "status" of membership in or association with a group, or the "conduct" of support to the group. Were the rule otherwise, the right of association and the principle of individual culpability, both central to the American system of justice, would be meaningless formalities, because any prohibition on membership or association can easily be recast as a prohibition on providing anything of value (including oneself or one's own services) to a proscribed group.

penalty"); *id.* at 1137 ("the statute authorizes the Secretary to designate only those groups that engage in terrorist activities"). At the same time, the Court invalidated those provisions of AEDPA that could be read to reach protected speech. 205 F.3d at 1137-38; *HLP v. Mukasey*, 2007 U.S. App. LEXIS 28470, at *23-*32.

IEEPA contains no such safeguards. Unlike AEDPA, a designation under IEEPA and E.O. 13224 need not be based on a finding that the entity engaged in any terrorist activity, or even illegal activity. And unlike AEDPA, the Executive Order and its regulations penalize advocacy and other constitutionally protected speech, if it is done "for the benefit of" a designated entity. As such, IEEPA lacks the safeguards this Court found critical in upholding the material support statute against a First and Fifth Amendment challenge, and is therefore invalid.

III. IEEPA'S LICENSING SCHEME VIOLATES THE FIRST AND FIFTH AMENDMENTS BECAUSE IT CONTAINS NONE OF THE SAFEGUARDS CONSTITUTIONALLY REQUIRED

The regulations implementing E.O. 13224 establish a licensing scheme that gives the Director of OFAC unregulated discretion to grant or deny exemptions from IEEPA prohibitions. 31 C.F.R. §§ 501.801, 594.501, 594.502. These provisions contain none of the procedural safeguards constitutionally required for licensing schemes of this type. They do not require any statement of reasons for a denial. *Cf. Forsyth County v. The Nationalist Movement,* 505 U.S. 123, 133 (1992)

(absence of statement of reasons contributes to constitutional invalidity of licensing scheme). They impose no time limits for deciding whether to grant approval. *Cf. FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 226 (1990) ("a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible"). The regulations do not provide for prompt judicial review, and do not place the burden of justifying the denial on the Director during any such judicial review, both of which are constitutionally required. *See Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965).

This Court previously rejected a challenge to a licensing provision in AEDPA. *HLP v. Mukasey*, 2007 U.S. App. LEXIS, 28470, at *37-*41. In doing so, however, the Court explained that AEDPA regulated material support, not speech or advocacy, and that because the Court had already "enjoined enforcement of those provisions of the statute we hold vague," plaintiffs were "already immune from prosecution for protected speech." *Id.* at *40.

By contrast, here the government has maintained, and the district court held, that E.O. 13224 and the implementing regulations prohibit the precise speech that this Court in *Mukasey* said plaintiffs had a constitutional right to engage in. Thus, this licensing scheme, at least when applied to plaintiffs' intended speech activities, violates the First and Fifth Amendments.

IV. THE COURT CAN AVOID THESE CONSTITUTIONAL DIFFICULTIES BY CONSTRUING IEEPA NOT TO AUTHORIZE THE DESIGNATION OF "SPECIALLY DESIGNATED GLOBAL TERRORISTS"

As set forth above, the IEEPA-based prohibitions raise a multitude of serious constitutional questions. No other law grants the executive such unbounded power to blacklist and shut down entities and individuals at will, without hearings, findings, or determinations of illegality. All of these constitutional issues can be avoided, however, if the Court construes IEEPA, consistent with its language, history, and purpose, to authorize the designation of organizations and individuals only as an incident to an economic sanction against a foreign country. Such a ruling would invalidate the designations of the PKK and the LTTE (but leave their designations under AEDPA unaffected), and thereby avoid all the constitutional questions plaintiffs' suit presents.

Wherever possible, statutes should be construed to avoid serious constitutional questions. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems"); *Zadvydas v. Davis,* 533 U.S. 678 (2001) (same); *Scales*, 367 U.S. at 220-28 (interpreting statute criminalizing membership to include an implicit limitation of liability to those who specifically intend to further the group's illegal activity); *Nadarajah v. Gonzales*,

443 F.3d 1069, 1076 (9th Cir. 2006).

The statutes at issue in *St. Cyr*, *Zadvydas*, *Scales,* and *Nadarajah* contained no limiting language on their face, but the courts nonetheless read limitations into the statutes to avoid the serious constitutional questions that would otherwise have been presented. In *Nadarajah* and *Zadvydas*, the courts interpreted detention statutes with no express time limit to incorporate a presumptive six-month limitation. In *St. Cyr*, the Court interpreted a statute that appeared to preclude all judicial review of certain removal decisions not to bar review by habeas corpus. And in *Scales*, the Court read a "specific intent" standard into a statute that included no such requirement on its face. Thus, courts have typically gone to great lengths to interpret statutes narrowly to avoid constitutional questions.

IEEPA's language is far more susceptible to a saving construction than any of the above statutes. The provisions of IEEPA relied upon by the President here consistently authorize actions against any "foreign country or a national thereof." Thus, 50 U.S.C. § 1702(a)(1)(B) empowers the President, *inter alia*, to "prevent or prohibit, any … transactions involving any property in which *any foreign country or a national thereof* has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." (emphasis added). Similarly, 50 U.S.C. § 1702(a)(1)(A)(ii) empowers the President to block "transfers or payments [to the extent they] involve any interest of *any foreign*

country or a national thereof " (emphasis added). Notably, here and elsewhere in the original language of IEEPA, the statute *never* refers to foreign nationals generally, absent a connection to foreign countries, but *always* uses the phrase "foreign country or a national *thereof*." The word "thereof" indicates the need for a nexus between a sanction against a national and a sanction against his country. An economic sanction on Libya, for example, might require the prohibition of transactions not only with the Libyan state, but also with Libyan businesses or individuals, *i.e.*, Libya and "nationals thereof." But there is no indication whatsoever that IEEPA was designed to give the President a new and unprecedented power to blacklist political organizations or individuals, wholly apart from a nation-targeted sanction. IEEPA should be read to authorize the targeting of foreign individuals or organizations only as an incident to the President's authority to target a foreign nation, and not as a freewheeling power to blacklist individuals and organizations without any nexus to an embargo on a foreign country.

This interpretation makes sense from a constitutional perspective. It is well-established that the President has far broader leeway in imposing sanctions on foreign nations than on political groups. Thus, in *Regan v. Wald*, 468 U.S. 222, 241-42 (1984), the Supreme Court upheld a general ban on travel to Cuba, but carefully distinguished restrictions on travel imposed "on the basis of political

belief or affiliation," which the Court had previously invalidated in both *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), and *Kent v. Dulles*, 357 U.S. 116, 127-29 (1958); *see also Zemel v. Rusk*, 381 U.S. 1, 13, 17-18 (1965) (same).

This interpretation of IEEPA is also consistent with its original purpose and history. IEEPA was designed to codify and rein in the longstanding practice of economic sanctions on foreign nations. Presidents had historically used that power, and Congress merely sought to exercise some oversight over that traditional authority. All the discussion in IEEPA's legislative history concerns sanctions on nations. Never before had a President imposed an embargo on political groups or individuals, wholly apart from a nation-based economic sanction, and therefore if Congress were contemplating granting the President such unprecedented authority, one would expect to see some discussion of it. There is none.

On the contrary, Congress presumed that the targets of the executive's actions under IEEPA would be foreign nations, as the discussions about how the law might be implemented all refer to nations as the targets of the economic measures. For example, in the Subcommittee on Economic Policy and Trade Report of Recommendations, Committee Chairman Bingham was asked to give an example of a national emergency unrelated to war that would fall within IEEPA. Bingham responded:

> A very obvious example would be a case where the United States was engaged in hostilities where there was no declaration of war, such as

> the war in Korea, or the war in Vietnam. . . . [T]he President could declare an emergency and take certain action if there were a sudden drain on the resources of the United States through such a serious imbalance of trade as to require emergency action.[14]

Bingham also agreed that an oil embargo would constitute a non-war national emergency, and affirmatively answered that the power then conferred on the president would be to freeze the assets of the country that established the oil embargo. *Id.* Bingham further opined that pursuant to the powers conferred by the IEEPA, the President would be permitted to establish an embargo on exports to that country. *Id.* No one, in any of the debates on IEEPA, even mentioned the possibility that it would empower the President to target disfavored political organizations and individuals, without any nexus to an embargo on a foreign country. Given that silence, it makes no sense to read the statute to create such an unprecedented and constitutionally dubious power. As the Supreme Court said of another statute, "this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted." *Church of Scientology v. IRS,* 484 U.S. 9, 17-18 (1987).

Other statutes reinforce this reading. If IEEPA is as sweeping as defendants

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[14] Markup Before the Committee on International Relations, House of Representatives, 95th Congress, 1st Sess. p. 4 (June 17, 1977) (Rep. Bingham).

say it is, AEDPA would be largely superfluous. Where Congress sought to empower the executive branch to designate foreign terrorist organizations and criminalize material support to them, it did so explicitly. In sharp contrast to IEEPA, AEDPA expressly refers to terrorist organizations, sets forth an objective definition of which organizations may be designated, requires periodic redesignations, and creates review mechanisms in the courts and Congress. *See* 18 U.S.C. § 2339B; 8 U.S.C. § 1189. If IEEPA were as broad as defendants have treated it, AEDPA, passed in 1996 long after IEEPA was on the books, would not have been necessary. The Court should not construe a statute that does not even mention terrorism or terrorist organizations to afford the President far more expansive powers than those explicitly set forth in AEDPA, particularly where doing so raises a plethora of difficult constitutional questions.

Similarly, in the USA PATRIOT Act, P.L. No. 107-56, 115 Stat. 272 (2001), enacted shortly after the terrorist attacks of September 11, 2001, Congress amended IEEPA, adding a provision that expressly authorized the President, when the nation has been attacked, to confiscate the property of "any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in … attacks against the United States." 50 U.S.C. § 1702(a) (1)(C). That provision, evidently prompted by the fact that we were attacked by a non-state actor, for the first time expressly authorizes action against

foreign organizations or persons, tied not to any particular country, but limited instead by the requirement that they be found to have participated in or supported an armed attack against us. By contrast, the provisions at issue here, 50 U.S.C. §§ 1702(a)(1)(A) and (B), extend sanctions authority vis-à-vis "a foreign country or a national thereof," without reference to armed attack, terrorism, or any other offense.

When IEEPA is read to apply only to economic sanctions against foreign nations, it raises none of the constitutional problems presented in this litigation. All indications are that Congress intended to authorize only nation-targeted sanctions when it enacted IEEPA, and to authorize actions against "nationals thereof" only as an incident to a nation-targeted sanction. This Court can and should interpret IEEPA, consistent with its language, history, and purpose, to be so limited, and avoid the many constitutional concerns that defendants' unprecedented reading and application of it have raised. [15]

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[15] An alternative statutory construction would also avoid most of the constitutional questions presented here. If the IEEPA designation authority and prohibitions were read to incorporate the "specific intent" requirement that the Supreme Court read into the Smith Act in *Scales v. United States*, the First and Fifth Amendment questions presented by imposing guilt by association would be avoided. Neither IEEPA, the Executive Order, nor the implementing regulations expressly require "specific intent to further the illegal activities" of a blocked group, but neither did the Smith Act. Here, as in the Smith Act, nothing in IEEPA's text *precludes* such an interpretation, and therefore the Court should adopt it to avoid the serious First and Fifth Amendment questions that the IEEPA prohibitions otherwise present.

CONCLUSION

For the reasons stated herein, the Court should reverse the district court and declare the designation authority provided by IEEPA and E.O. 13224 unconstitutional on their face and as applied to plaintiffs' intended conduct.

DATED: January 7, 2008

Respectfully submitted,

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* Counsel express their gratitude to Seema Ahmad and Edwin Swan, law students at Georgetown University Law Center, for their assistance with this brief.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the all applicable rules. It was produced in 14 point type, and consists of a total of 11,289 words, excluding all tables.

Dated: January 7, 2008

CAROL A. SOBEL

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 429 Santa Monica Boulevard, Ste. 550, Santa Monica, CA 90401.

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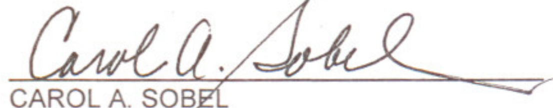
I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed on January 7, 2008 at Santa Monica, California.



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