

Nos. 05-56753, 05-56846

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

HUMANITARIAN LAW PROJECT, *et al.*,

Plaintiffs-Appellees,

v.

ALBERTO R. GONZALES,  
Attorney General of the United States, *et al.*,

Defendants-Appellants.

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**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION  
*ET AL.* IN SUPPORT OF PLAINTIFFS-APPELLEES**

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**American Civil Liberties Union Foundation  
Global Exchange  
Grassroots International  
Jerusalem Fund for Education and Community Development  
Middle East Children's Alliance  
Operation USA  
Oxfam America  
Unitarian Universalist Service Committee**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the following *amici curiae* certify that they do not have a parent corporation, nor do any publicly held corporations own 10% or more of their stock:

American Civil Liberties Union Foundation

Global Exchange

Grassroots International

Jerusalem Fund for Education and Community Development

Middle East Children's Alliance

Operation USA

Oxfam America

Unitarian Universalist Service Committee

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## PRELIMINARY STATEMENT

This case concerns the constitutionality and proper interpretation of 18 U.S.C. § 2339B, which makes it a crime punishable by up to life in prison to provide “material support or resources” to an organization designated by the Secretary of State as a “foreign terrorist organization” (FTO). The Secretary of State may designate an organization as an FTO if she finds that the organization is foreign; that it engages in “terrorist activity”; and that its activities threaten the national defense, foreign relations, or economic interests of the United States. *See* 8 U.S.C. § 1189. “Terrorist activity” is defined sweepingly to include the use of any “weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.” *Id.* § 1182(a)(3)(B)(iii).

From the outset of this litigation, the government has argued that those who provide support to designated groups run afoul of the law – and expose themselves to extraordinarily severe criminal penalties – even if they oppose the unlawful activities of the designated group, intend their support to be used only for humanitarian purposes, take precautions to ensure that

their support is used only for these purposes, and indeed can prove that their support was in fact used only for these purposes. *Amici* include a diverse coalition of humanitarian organizations that share a profound concern about the implications of this statute for their efforts to aid civilian populations in conflict zones. While each of the *amici* emphatically opposes violence, providing effective humanitarian assistance sometimes requires humanitarian organizations to work with and through groups that engage in unlawful as well as lawful activities. In some areas of the world, such groups control schools, orphanages, medical clinics, hospitals, and refugee camps. In other areas, the consent or cooperation of such groups may be necessary in order to ensure the safety of humanitarian workers. In still other areas, it is only such groups that can facilitate the distribution of aid to particular civilian populations. A broad reading of the material support provision would effectively foreclose humanitarian organizations from dealing with such groups and would jeopardize their ability to serve desperately needy civilian populations.

As discussed herein, the Fifth Amendment does not permit the material support provision to be construed in this way. Implicit in the guarantee of due process – indeed, central to that guarantee – is the principle



that criminal sanctions may not be imposed without proof of “personal guilt.” This principle forecloses the government from imposing criminal sanctions for material support without proof that the defendant specifically intended to further a designated organization’s terrorist activity.

The government’s proposed construction of the statute – adopted by the district court below, *see Humanitarian Law Project v. Gonzales*, 380 F.Supp.2d 1134, 1142-48 (C.D.Cal. 2005) – disregards this foundational principle. Under the government’s construction, a humanitarian organization would be in violation of the law if it secured the cooperation of an FTO to distribute food during a famine, or to distribute medical equipment during an epidemic. It would be in violation of the law if it provided children’s books for use in schools run by an FTO. It would be in violation of the law if, after an earthquake, it provided expert advice on how to dig survivors from the rubble. While *amici* will comply with the law however it is construed, *amici* urge this Court to reject a construction of the statute that would preclude them from providing urgently needed humanitarian aid.

As *amici* explain below, the government’s goal of ensuring that humanitarian aid is not misdirected to nefarious ends can be accomplished

without abandoning well-settled Fifth Amendment principles. Consistent with the Fifth Amendment, the government may prosecute those who provide material support with the specific intent of furthering unlawful activity. It may also prosecute those who provide support to known FTOs with reckless disregard for how their support is actually used, as specific intent may be inferred from the facts. However, the Fifth Amendment forecloses the government from prosecuting a humanitarian organization that intends to support only lawful activity and takes reasonable precautions to ensure that its support is used only for lawful ends. For the reasons discussed herein, section 2339B must be construed to require proof of specific intent to further a designated organization's unlawful activities.

### **INTEREST OF AMICI CURIAE**

#### American Civil Liberties Union Foundation

The **American Civil Liberties Union Foundation (ACLU)** is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. One of the ACLU's central concerns today is the effect of national security policy on civil liberties. Since September 2001, the ACLU has litigated numerous challenges to government attempts to restrict

civil liberties in the name of national security.

### Humanitarian Organizations

**Global Exchange** is an international human rights organization dedicated to promoting environmental, political, and social justice. It monitors and reports on human rights and elections and promotes internal and external support for democracy in conflict areas. Working with local groups, Global Exchange gathers information and educates about country conditions. It supports both local and global initiatives to reduce injustice.

**Grassroots International (GRI)** is a 23-year old human rights and international development organization that promotes global justice through partnerships with social change organizations. GRI works around the world to advance political, economic, and social rights and supports development alternatives through grantmaking, education, and advocacy. GRI's international grantmaking – which is focused on resource rights, primarily, the rights to food, water, land, seeds and other natural resources – covers sustainable livelihood and community development, leadership development and capacity building, and human rights monitoring and defending. GRI's domestic education and advocacy complements its international work by educating U.S. audiences on global issues and advocating for resource rights

for all.

**The Jerusalem Fund for Education and Community Development** is an independent, non-profit organization that has provided educational and humanitarian assistance to Palestinians for nearly 30 years. The Jerusalem Fund extends grants in the fields of education, health, food, and shelter, primarily to Palestinians in the West Bank and Gaza. It also supports educational and cultural programs designed to build bridges between the Middle East and the United States.

**The Middle East Children's Alliance (MECA)** is a non-governmental organization working for peace and justice in the Middle East. MECA advocates for the human rights of all people in the region, focusing on the rights of children. It supports projects that aid and empower communities, and it encourages peaceful conflict resolution. It has supported projects designed to lead to reconciliation and understanding between Palestinian and Israeli children.

**Operation USA** is a 27-year old American relief and development agency that has worked throughout the world providing disaster relief and development assistance. Operation USA was the first U.S. non-governmental organization to work in Cambodia and Vietnam after the end

of the Vietnam War; at the time, such activities required a license from the U.S. government. Operation USA does not seek or accept U.S. government funding for its programs but it endeavors to cooperate with civilian U.S. government agencies where appropriate to better focus its humanitarian aid programs.

**Oxfam America** is a non-profit organization that works to end global poverty through saving lives, strengthening communities, and campaigning for change. Oxfam America subscribes to the Humanitarian Charter which affirms the belief that all possible steps should be taken to prevent or alleviate human suffering arising out of conflict or calamity and that civilians so affected have a right to protection and assistance.

The **Unitarian Universalist Service Committee (UUSC)** originated over 65 years ago, when its founders went to Europe to rescue victims of Nazi persecution. Today, the UUSC works in the United States and around the world, engaging members and supporters to actively work for social justice; partnering with communities and organizations confronting unjust power structures; and challenging oppressive policies. An independent human rights organization, UUSC responds to disasters by working to promote and protect human rights in the context of humanitarian relief

efforts. UUSC has active human rights programs in humanitarian relief areas affected by the tsunami in Sri Lanka and Thailand, the earthquake area in Pakistan, and the victims of Katrina in the Gulf Coast states in the US. UUSC also works world wide to eradicate economic injustice, promote environmental justice and defend civil liberties.

## ARGUMENT

- I. A CRIMINAL PROSECUTION UNDER 18 U.S.C. § 2339B REQUIRES THE GOVERNMENT TO PROVE THAT THE DEFENDANT SPECIFICALLY INTENDED TO FURTHER THE TERRORIST ACTIVITIES OF A DESIGNATED ORGANIZATION.

Plaintiffs in this case, legal and social service organizations that seek to support the non-violent humanitarian and political activities of certain designated FTOs, sought an injunction barring enforcement of 18 U.S.C. § 2339B against them. One of the questions now before this Court is what *mens rea* is required to sustain a conviction under 18 U.S.C. § 2339B. The statute provides:

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

18 U.S.C. §2339B(a)(1).<sup>1</sup> *Amici* submit that the Fifth Amendment requires that the statute be construed to require proof that the defendant specifically intended to further a designated organization's terrorist activity.

As the Supreme Court has emphasized, "in our jurisprudence guilt is personal." *Scales v. United States*, 367 U.S. 203, 224 (1961). What this means in practice is that,

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 . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process clause.

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<sup>1</sup> The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004) ("2004 Act"), added the following proviso: "To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism . . . ." *Id.* The 2004 Act also amended the definition of "material support." As amended, that term means:

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

18 U.S.C. § 2339A(b)(1).

*Id.* at 224-25. Thus, in *Aptheker v. Sec. of State*, 378 U.S. 500 (1964), the Supreme Court struck down as unconstitutional a statute that made it unlawful for any member of a registered communist-action organization to apply for or use a United States passport. *See id.* at 501-02. In *Wieman v. Updegraff*, 344 U.S. 183, 186 (1952), the Court struck down an Oklahoma statute requiring all state officers and employees to swear that they were “not affiliated directly or indirectly with the Communist Party.” In each of these cases, the Supreme Court determined that the nexus between the conduct punished and the harm intended to be prevented was too attenuated to satisfy the Fifth Amendment’s requirement of personal guilt. As the Ninth Circuit has said, the Fifth Amendment dictates that Congress may not criminalize conduct merely because of a tenuous connection to other conduct that is concededly criminal. Rather, the connection “between the conduct or status punished and the evil intended . . . to be prevented [must be] sufficiently close or substantial.” *Brown v. United States*, 334 F.2d 488, 496 (9th Cir. 1964).

In 2004, Congress amended the material support statute to make clear that a donor cannot be sanctioned unless she knew that the organization is a designated FTO or knew of the organization’s unlawful activities. In



amending the statute, Congress did not address whether the statute should be construed to require specific intent. As the Supreme Court has made clear, however, the Fifth Amendment requires not only knowledge, however, but intent. Thus in *Aptheker*, the Court found that the passport restriction was invalid because it effectively inferred to all members of the Communist Party a specific intent to further the Party's illegal aims. *See Aptheker*, 378 U.S. at 510-11. Similarly, in *Hellman v. United States*, 298 F.2d 810, 814 (9th Cir. 1961), this Court found that a defendant's activities in support of the Communist Party were insufficient to support a conviction under the Smith Act because it could not permissibly be inferred that he acted with the "specific intent to bring about the violent overthrow of the government as speedily as circumstances would permit."

The government's proposed construction of the material support statute disregards the personal guilt principle and would expose moral innocents to the most severe criminal penalties, as other courts have observed. *See Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1023 (7th Cir. 2002); *United States v. Al-Arian*, 308 F.Supp.2d 1322, 1337-38 (M.D.Fl. 2004) (expressing concern that, under the government's construction of the material support statute, "a cab driver could be guilty for

giving a ride to a FTO member to the UN” and “a hotel clerk in New York could be committing a crime by providing lodging to [an] FTO member”). *See also United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004) (Gregory, J. and Michael, J., dissenting). In fact, the government’s construction would render the statute manifestly unconstitutional. The statute cannot be upheld unless construed to require proof of specific intent. *See Boim*, 291 F.3d at 1028; *Al-Arian*, 308 F.Supp.2d at 1340 (“To avoid Fifth Amendment personal guilt problems, this Court concludes that the government must show . . . that the defendant knew (had a specific intent) that the support would further the illegal activities of the FTO”); *Hammoud*, 381 F.3d at 371 (Gregory, J. and Michael, J., dissenting) (“to save the statute, one must apply the *mens rea* requirement to the entire ‘material support’ provision such that the government must prove that . . . the defendant had a specific intent that the support would further the FTO’s illegal activities”).

The district court incorrectly concluded that the “personal guilt” doctrine protects only membership and association (“status”), not conduct. *See Humanitarian Law Project*, 380 F.Supp.2d at 1143-44. In fact, *Scales* itself made no distinction between status and conduct in this context. *See Scales*, 367 U.S. at 224 (expressing concern with “imposition of punishment

on a status or on conduct”). Moreover, since *Scales*, both this Court and the Supreme Court have reaffirmed that the personal guilt doctrine protects conduct as well as status. In *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), for example, the Court considered whether a participant in a boycott accomplished in part through violent means could be held liable for the damages caused even if he had not himself engaged in or endorsed the violent aspects of the boycott. The Court held that a person could not be held liable without proof of “specific intent to further” the unlawful activity. *Id.* at 920.<sup>2</sup>

In *Hellman*, this Court extended the protection of the personal guilt doctrine to a Smith Act defendant whose activities included organizing new members of the Party, teaching Communist principles to students and members, and soliciting contributions. As noted above, the Court held that the conviction could not be sustained without proof of specific intent. See *Hellman*, 298 F.2d at 814. This Court has extended the Fifth Amendment’s protection to conduct in a diverse array of contexts. See, e.g., *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002) (holding that defendant could not be held criminally liable under anti-gang law absent evidence of intent to incite illegal activity); *Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir.

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<sup>2</sup> Although *Claiborne* was decided under the First Amendment, it squarely applied *Scales*’ personal guilt doctrine to conduct.

1997) (holding that gang member could not be held criminally liable for gang's criminal activity without "proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting"). Other courts have done likewise. *See, e.g., Sawyer v. Sandstrom*, 615 F.2d 311, 317 (5th Cir. 1980) (reversing conviction under anti-gang ordinance where liability was not predicated on "active participation in any criminal act"); *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940) (holding that individual cannot be held criminally liable for acts of others unless he has "in some sense promot[ed] their [illegal] venture himself, ma[d]e it his own"), *aff'd*, 311 U.S. 205 (1940); *St. Ann v. Palisi*, 495 F.2d. 423 (5th Cir. 1974); *Tyson v. New York City Housing Auth.*, 369 F.Supp. 513 (S.D.N.Y. 1974); *United States v. One 1971 Ford Truck*, 346 F.Supp. 613 (C.D.Cal. 1972).

As these cases make clear, the requirement of "personal guilt" is fundamental to our conception of criminal responsibility. But the requirement is of particular importance in the instant context because this Court has held that individuals charged under the material support statute cannot challenge the FTO designation that brings their support within the ambit of the statute in the first place. *See United States v. Afshari*, 426 F.3d

1150, 1156-59 (9th Cir. 2005). To now hold that the government may prosecute an individual without a showing of specific intent would lead to the absurd and deeply problematic result that an individual who intended to support only lawful activity could be prosecuted for providing purely humanitarian support – schoolbooks, medicine, or food, for example, or “training in political advocacy,” *see* Govt. Cross-Appeal Br. at 32 – *to an organization that does not engage in unlawful activity at all*. In light of this Court’s holding in *Afshari*, giving effect to the Fifth Amendment’s “specific intent” requirement is especially crucial.

The Fifth Amendment dictates that the material support provision be construed to require proof not only of knowledge but of specific intent. As *amici* discuss below, a broader reading of the statute could undermine their capacity to provide humanitarian aid to the very civilian populations that are most in need of it.<sup>3</sup>

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<sup>3</sup> A specific intent requirement is of particular importance here because the statute fails to state clearly what kinds of conduct are proscribed. *Amici* concur with plaintiffs’ arguments as to the vagueness of the terms “personnel,” “training,” “expert advice or assistance,” and “services.”

II. CONSTRUING 18 U.S.C. § 2339B TO ALLOW CONVICTION WITHOUT PROOF OF “SPECIFIC INTENT” WOULD HAVE PROFOUND IMPLICATIONS FOR HUMANITARIAN ORGANIZATIONS THAT WORK IN CONFLICT ZONES.

Each of the *amici* humanitarian organizations adheres strictly to certain universal principles of humanitarian assistance. These principles require all providers of aid to draw sharp lines between humanitarian activities, which they support, and military activities, which they do not. It is an inescapable fact, however, that humanitarian organizations must work within a context of war and armed conflict, because it is within this context that humanitarian aid is most urgently needed. Because they must work within contexts of armed conflict, humanitarian organizations must be prepared to deal with individuals and groups that do not share their commitment to non-violence. *See, e.g.,* Thomas G. Weiss and Cindy Collins, *Humanitarian Challenges and Intervention* 119 (2000) (recognizing that humanitarian organizations must be prepared to contend with “politically motivated belligerents under the control of political and military leaders, militiamen, mercenaries, organized criminals, petty criminals, unarmed combatants, [and] armed noncombatants”).

There are a variety of reasons why humanitarian organizations may find it necessary to deal with groups that engage in unlawful as well as

lawful activity. A particular civilian population may be located within a geographic area controlled by such a group; the official government may not have the ability to facilitate the provision of humanitarian aid to this civilian population. Or, the government may refuse to facilitate the provision of aid because it seeks to use the denial of food or medicine as a political tool to influence the behavior of the civilian population. *See* Leon Gordenker and Thomas G. Weiss, "Humanitarian Emergencies and Military Help: Some Conceptual Observations," in *Humanitarian Emergencies and Military Help in Africa 4* (Thomas G. Weiss ed., 1990); F.T. Liu, "The Significance of Past Peacekeeping Operations in Africa to Humanitarian Relief," in *Humanitarian Emergencies and Military Help in Africa 29* (Thomas G. Weiss ed., 1990).

A humanitarian organization may need to deal with groups that engage in unlawful activity in order to create "safe zones" for civilians. In 1990, the [International Committee of the Red Cross] reached an agreement with the Sri Lankan military and the Tamil Tigers to declare the Jaffna Teaching Hospital in the northern peninsula an 'ICRC protected area.' No military activity would take place from within or near the hospital area, the border of the area would be clearly identifiable from the air and ground, and

no military weapons or personnel would be permitted inside it. Mark Frohardt, *et al.*, “Protecting Human Rights: The Challenge to Humanitarian Organizations,” Occasional Paper #35, Thomas J. Watson Jr. Institute for International Studies, at 47 (1999). Creating zones of safety, safe houses, or safe hospitals for civilians in areas controlled by violent groups necessarily requires negotiation and interaction with such groups. *See id.* at 46.

A humanitarian organization may also need to work with groups that engage in unlawful activity if those groups control social infrastructure. In Sri Lanka, for example, the Tamil Tigers (LTTE) “ha[ve] effective control on the ground in large sections of the north and east of the country and operate[] a parallel administration that includes schools, hospitals, courts, and police and other law enforcement personnel.” *See* “Sri Lanka,” in *Freedom in the World 2004: The Annual Survey of Political Rights and Civil Liberties* (Freedom House, 2004).<sup>4</sup> Practically speaking, it has become very difficult to provide humanitarian aid to civilian populations in northern or eastern Sri Lanka without dealing with the LTTE; humanitarian organizations must deal with the LTTE or abandon the civilian population within the area controlled by the group. Indeed, such was the choice that

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<sup>4</sup> Available at [www.freedomhouse.org/research/freeworld/2004/countryratings/sri-lanka.htm](http://www.freedomhouse.org/research/freeworld/2004/countryratings/sri-lanka.htm).



some humanitarian organizations confronted in attempting to provide humanitarian aid after the December 2004 tsunami. *See, e.g.*, Gady A. Epstein, Maryland MD Struggles for Tamil Patients, *Baltimore Sun* (Jan. 23, 2005) (“Arriving as a medical volunteer here inevitably means cooperating in some way, even if indirectly, with the Tigers, who are considered a terrorist organization by the United States and other countries.”); *Oversight Hearing on Amendments to the Material Support for Terrorism Laws: Section 805 of the USA PATRIOT Act and Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary* (May 10, 2005) (statement of Ahilan T. Arulanantham) (discussing how material support of terrorism laws undermined urgent humanitarian relief operations to tsunami victims in Sri Lanka).<sup>5</sup>

The realities of humanitarian aid dictate that *amici*—and, indeed, any group that provides aid to the victims of war—must be able at times to deal with individuals and groups that engage in unlawful activity, including

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<sup>5</sup> The situation in Sri Lanka is far from unique. *See, e.g.*, U.S. Dep’t of State, Country Reports on Human Rights Practices –2005: Somalia, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61592.htm>; U.S. Dep’t of State, Country Reports on Human Rights Practices –2005: Sudan, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61594.htm>; U.S. Dep’t of State, Country Reports on Human Rights Practices –2005: Indonesia, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61609.htm>.

violence. The alternative would be to abandon innocent civilians whose lives are disrupted by armed conflict.

Experience substantiates *amici's* concerns. To take just a handful of examples:

- In 1989, the World Council of Churches provided humanitarian assistance to several liberation movements in Southern Africa that were engaged in illegal as well as legal resistance to South Africa's white minority rule. See Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations* 233 (1991). Notably, the United States for many years listed one such revolutionary group, the African National Congress, on its list of terrorist organizations. See, e.g., U.S. Dep't of State, *Patterns of Global Terrorism: 1988*, 82 (March 1989).
- Eritrea, then a small, extremely poor area within Ethiopia, was wracked by civil war and by the droughts and famines suffered by the rest of Ethiopia from the mid 1970s until the early 1990s. See generally, Dan Connell, *Against All Odds: A Chronicle of the Eritrean Revolution* (1993). Throughout the famine, the only way to deliver aid to the innocent victims of both political and natural devastation was to work through insurgent groups including the Eritrean Peoples Liberation Front (EPLF). Groups like Lutheran World Relief worked with the Eritrean Relief Association, an arm of the EPLF, to funnel aid to rural peasants in Eritrea. See *id.* at 213-226. Only late in the famine did the United States and Ethiopia governments agree to permit two private relief agencies, World Vision and the Catholic Relief Services, to distribute relief directly in the war zones. See *id.* at 221.
- In southern Sudan, constant fighting and widespread poverty have caused tremendous suffering, especially among women, children, and the elderly. Humanitarian groups were able to supply aid only with the assistance of warring rebel groups. See Abdul Mohammed, "Responses of Non-Governmental Organizations to Conflict Situations," in *Humanitarian Emergencies and Military Help in*

Africa, 103-04 (Thomas G. Weiss ed., 1990).

Construing the material support statute to permit convictions without proof of specific intent would seriously jeopardize the capacity of *amici* and other humanitarian organizations to serve civilian populations in conflict zones. Without a requirement that the government prove specific intent, a humanitarian organization could be prosecuted even though it opposed the terrorist activities of the designated group; intended its support to be used only for humanitarian purposes; took precautions to ensure that its support was used only for those purposes; and could prove that its support was in fact used only for those purposes. And given this Court's decision in *Afshari*, a humanitarian organization could be prosecuted even if the designated group was designated inappropriately and in fact did not engage in terrorist activity at all. A broad construction of the material support statute would therefore have serious implications for *amici* and other humanitarian organizations that work in conflict zones. More important, it would have corresponding implications for the needy civilian populations that *amici* serve.

III. THE GOVERNMENT'S GOAL OF ENSURING THAT HUMANITARIAN AID IS NOT MISDIRECTED TO NEFARIOUS ENDS CAN BE ACCOMPLISHED WITHOUT ABANDONING WELL-SETTLED FIFTH AMENDMENT PRINCIPLES.

The government's compelling interest in reducing terrorism does not require this Court to abandon decades of Fifth Amendment jurisprudence. Because they oppose violence, humanitarian organizations have found ways of minimizing the risk that their resources will be used for unlawful activity and have developed sophisticated methods to ensure that their aid is used as it is meant to be used. Consequently, the government's interest in ensuring that humanitarian aid is not diverted to terrorism does not require a rule that altogether forecloses humanitarian organizations from dealing with groups that engage in unlawful as well as lawful activity.

Like other humanitarian organizations, *amici* meticulously monitor the use of the aid that they supply. They do this for a number of reasons. They oppose violence and do not want their resources to be directed to violent activities. They must be accountable to their members, funders, and employees. They must also be accountable to the Internal Revenue Service. For these and other reasons, *amici* and other humanitarian organizations use multiple methods to ensure that their resources are not diverted.

Depending on the context, these methods may include: (i) conducting a thorough assessment of local partners' track records in delivering past aid shipments; (ii) requiring potential partners to submit narrative and financial reports; (iii) assessing potential partners' internal financial controls; (iv) establishing whether past shipments were properly distributed by interviewing civilians who were the intended beneficiaries of the aid; (v) establishing whether past shipments were properly distributed by assessing the amount of aid that was actually distributed (in order to determine whether aid was lost or misdirected); (vi) requiring detailed receipts for items purchased with donated funds; (vii) obtaining written acknowledgements from aid beneficiaries; (viii) ensuring that personnel are present when aid is distributed; and (ix) documenting the distribution of aid.

Because humanitarian organizations have developed such methods of monitoring and tracking humanitarian aid, the government's interest in ensuring that such aid is not diverted to terrorism can be accommodated without jettisoning well-settled constitutional commitments. Rather, the question whether ostensibly humanitarian aid was in fact intended for illegal ends can be asked and answered on a case-by-case basis. Requiring case-by-case analysis would not undermine the government's ability to prosecute

those who actually provide support to terrorism. It would accommodate the government's interest, however, without jeopardizing the critically necessary work of legitimate humanitarian organizations.

Nor would construing the statute to require proof of specific intent leave the government powerless to prosecute an organization simply because the organization claims that its support was meant for humanitarian or other legitimate ends. Where an organization supplies material support to an FTO with reckless disregard for the way that the support is ultimately used, a court might infer that the organization acted with the requisite specific intent. *See Al-Arian*, 308 F.Supp.2d at 1339. There would be no basis for such an inference, however, where an organization was meticulous in its efforts to ensure that aid was used only for humanitarian ends. What *amici* suggest, and what the Fifth Amendment demands, is that criminal penalties should not be imposed without a fact-specific inquiry into the donor's actual intent. *Cf. Bowen v. Kendrick*, 487 U.S. 589, 612 (1988) (noting, in course of Establishment Clause analysis, that "when the aid is to flow to religiously affiliated institutions that [are] not pervasively sectarian . . . [the Court has] refused to presume that it would be used in a way that would have the primary effect of advancing religion") (emphasis added).

*Amici* acknowledge the concern that aid given to an FTO's lawful activities may "free[] up resources that can be used for terrorist acts." *HLP I*, 205 F.3d at 1136. In the experience of *amici*, however, this fear is misplaced. As a factual matter, humanitarian organizations do not provide aid that would otherwise be provided by local groups. Accordingly, their aid does not free up resources that can be used for unlawful activity; indeed, their aid does not free up resources at all. The aid simply means that needy civilian populations that would not otherwise receive help will receive it. *See, e.g.*, Larry Minear, *The Humanitarian Enterprise: Dilemmas and Discoveries* 157 (2002) (stating that fears about the fungibility of humanitarian aid "ha[ve] been substantially overblown" and that "humanitarian aid is seldom a determining factor in the calculations of belligerents"). Indeed, while Congress expressed concerns about "fungibility," the statute it ultimately enacted does not adopt a strict prohibition on material support. Rather, the statute expressly permits donations – *unlimited* donations – of medicine and religious materials. Thus, the statute itself recognizes, albeit implicitly, that not all support to designated organizations is likely to further unlawful activity. *See also* 18 U.S.C. § 2339(B)(j) (allowing Secretary of State to issue licenses for

material support that will not “be used to carry out terrorist activity”).

In sum, the government’s legitimate interest in ensuring that humanitarian aid is not diverted to terrorism does not require this Court to abandon or dilute the Fifth Amendment’s “personal guilt” doctrine. The material support statute is susceptible to a construction that would accommodate the government’s legitimate interest without damaging constitutional principle or undermining the capacity of amici and other humanitarian organizations to provide aid to civilian populations in conflict zones.

### CONCLUSION

For the foregoing reasons, *amici* respectfully urge that this Court construe 18 U.S.C. § 2339B to require that the government prove that the defendant specifically intended to further an FTO’s unlawful activities. In the alternative, *amici* respectfully urge that the Court find the statute unconstitutional under the Fifth Amendment.

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May 19, 2006

CERTIFICATE OF COMPLIANCE  
PURSUANT TO CIRCUIT RULE 32-1

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points, and, excluding tables, contains 5,341 words according to the word count of the word processing system used to prepare this brief.

A handwritten signature in black ink, appearing to read "Melissa Goodman", written over a horizontal line.

Melissa Goodman  
American Civil Liberties Union  
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## CERTIFICATE OF SERVICE

I certify that on May 19, 2006, I caused an original and 15 (fifteen) copies of the brief of *Amici Curiae* American Civil Liberties Union, *et al.*, to be sent, *via* Federal Express, to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94110-3939, and copies to be sent, *via* Federal Express, to each of the following:

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