

Nos. 05-56753, 05-56846

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMANITARIAN LAW PROJECT, et al.,

Plaintiffs-Cross-Appellants,

v.

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

Defendants-Appellants.

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

FIRST CROSS-APPEAL BRIEF
FOR APPELLANTS

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JURISDICTIONAL STATEMENT

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1361. Excerpts of Record ("ER") 3, 33. On July 27, 2005, the district court granted partial summary judgment to plaintiffs, ER 51-92, and entered a final judgment disposing of all claims on September 16, 2005, ER 93-94.

Defendants filed a notice of appeal on November 10, 2005, within the 60-day period permitted under Fed. R. App. P. 4(a)(1)(B). ER 95-97. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether a federal statutory ban on the knowing provision of, inter alia, any "training," or "expert advice or assistance," or "service" to entities designated by the Secretary of State as foreign terrorist organizations is unconstitutionally vague.

STATEMENT OF THE CASE

In two consolidated suits, plaintiffs contend that a federal statute prohibiting any person from knowingly providing any "training," "expert advice or assistance," or "service" to designated foreign terrorist organizations is unconstitutionally vague. The district court agreed, granted summary judgment in part to plaintiffs, and enjoined defendants from enforcing these portions of the federal statute against the plaintiffs with respect to the designated foreign terrorist organizations at issue in plaintiffs' complaints. Defendants now appeal.

STATEMENT OF FACTS¹

I. STATUTORY BACKGROUND

Section 302 of the Antiterrorism and Effective Death Penalty Act of 1996 (the "Antiterrorism Act"), Pub. L. No. 104-132, 110 Stat. 1214, 1248, as amended, authorizes the Secretary of State, in consultation with the Secretary of the Treasury and the

¹ The facts recounted in this brief are limited to those relevant to the Government's appeal. Facts and prior proceedings relevant to plaintiffs' cross-appeal will be set forth in the Government's response to plaintiffs' cross-appeal brief.

Attorney General, to designate an entity as a "foreign terrorist organization." To do so, the Secretary of State must find that: "(A) the organization is a foreign organization; (B) the organization engages in terrorist activity . . . or terrorism . . . , or retains the capability and intent to engage in terrorist activity or terrorism; and (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1).

It is a criminal offense for any person to "knowingly provide[] material support or resources to a foreign terrorist organization." 18 U.S.C. § 2339B(a)(1). The statute defines "material support or resources" to mean:

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

18 U.S.C. § 2339A(b)(1) (emphasis added); see 18 U.S.C. § 2339B(g)(4).

In the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 § 6603, 118 Stat. 3638, 3762-63 (the "Terrorism Prevention Act"), Congress amended the statute in four respects relevant to this case. First, the Terrorism Prevention

Act clarifies that the term "training" means "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b) (2). Second, the statute clarifies that "expert advice or assistance" means "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b) (3). Third, the new statute amended the definition of "material support or resources" to specify that such support includes any "service" provided to a foreign terrorist organization. 18 U.S.C. § 2339A(b) (1). Finally, the Terrorism Prevention Act specifies that the crime of providing "personnel" to a foreign terrorist organization requires proof that the defendant

has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

18 U.S.C. § 2339B(h).

The statutory prohibition on providing material support or resources was prompted by Congress' recognition that terrorist organizations "have established footholds within ethnic or resident alien communities in the United States" and "operate under the cloak of a humanitarian or charitable exercise . . ."

H.R. Rep. No. 104-383, at 43 (Dec. 5, 1995).² Moreover, Congress determined that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” Antiterrorism Act § 301(a)(7) (emphasis added), 18 U.S.C. § 2339B note. Accordingly, the statute bans a broad array of different types of support because “the fungibility of financial resources and other types of material support,” permits individuals “to supply funds, goods, or services to an organization,” which, in turn “helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities.” H.R. Rep. No. 104-383, at 81. Thus, Congress explained that “[t]here is no other mechanism, other than an outright prohibition on contributions, to effectively prevent such organizations from using funds raised in the United States to further their terrorist activities abroad.” Id. at 45.

The law was carefully drafted, however, to ensure that it does not infringe upon constitutional rights. Recognizing that “[t]he First Amendment protects one’s right to associate with groups that are involved in both legal and illegal activities,” id. at 43, Congress noted that the statutory ban “only affects

² This report pertained to a bill that was a predecessor to the Antiterrorism Act.

one's contribution of financial or material resources" to a foreign terrorist organization, a ban that is permissible because "[t]he First Amendment's protection of the right of association does not carry with it the 'right' to finance terrorist, criminal activities," id. at 44. But "[t]he basic protection of free association afforded individuals under the First Amendment remains in place" even under the statutory prohibition, because it does not prohibit "one's right to think, speak, or opine in concert with, or on behalf of, such an organization." Ibid. See also id. at 45 ("Those inside the United States will continue to be free to advocate, think, and profess the attitudes and philosophies of the foreign organizations.").

II. FACTS AND PRIOR PROCEEDINGS

A. The Foreign Terrorist Organizations.

Two entities relevant to this case have been designated by the Secretary of State as foreign terrorist organizations: the Kurdistan Workers Party ("Partiya Karkeran Kurdistan" or "PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). See 68 Fed. Reg. 56,860 (Oct. 2, 2003); 62 Fed. Reg. 52,650 (Oct. 8, 1997).³

³ A designated terrorist organization may seek judicial review directly in the D.C. Circuit of the Secretary's determination. See 8 U.S.C. § 1189. PKK never sought such review, see Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1180 (C.D. Cal. 1998); ER 8-9, 39, and LTTE's challenge was rejected, see People's Mojahedin Org. of Iran v. Department of State, 182 F.3d 17 (D.C. Cir. 1999).

1. The PKK was founded in 1974, for the purpose of establishing an independent Kurdish state in southeastern Turkey. ER 20. Since its inception, the organization has waged a violent terrorist insurgency in Turkey, claiming over 22,000 lives since 1984. Ibid.

In the 1990s, the PKK moved beyond rural-based insurgent activities and embraced terrorism; it thus conducted terrorist attacks on Turkish diplomatic and commercial facilities in West European cities, and, in an announced attempt to damage Turkey's tourist industry, bombed tourist sites and hotels, and kidnaped foreign tourists. ER 20-22.

For instance, in September 1996, PKK members hijacked a local bus in Turkey and kidnaped two passengers, one of whom was a U.S. citizen. ER 21. Earlier, the PKK claimed responsibility for a series of bombings in downtown Istanbul, killing two people and wounding at least ten others, including a U.S. citizen. Ibid. In November 1993, the PKK firebombed five sites in London, England. ER 22. And, in October 1993, this organization kidnaped tourists from the United States and New Zealand, and held them hostage. Ibid. These activities are in addition to a series of bombings in Turkey that killed or injured many Turkish police officers and civilians. ER 21.

2. The Tamil Tigers were founded in 1976, for the purpose of creating an independent Tamil state in Sri Lanka. ER 22. The

organization has used suicide bombings and political assassinations to prosecute its campaign for independence, and in the process killed hundreds of civilians in the 1990s. ER 22-25 (summarizing a portion of the terrorist attacks committed by the Tamil Tigers).

For example, in January 1996, the Tamil Tigers carried out the most deadly terrorist incident in the world for that year, exploding a truck bomb at the Central Bank in the capital of Sri Lanka, killing 100 people and injuring more than 1,400. ER 23. Then, in October 1997, one hundred people, including seven U.S. citizens, were injured when the Tamil Tigers detonated another truck bomb near the World Trade Center in central Colombo. Ibid. In March 1998, a Tamil Tiger suicide bomber exploded a car bomb in Maradana, Sri Lanka, killing 37 people and injuring more than 238 others. ER 22.

Throughout the 1990s, the Tamil Tigers attacked Sri Lankan government officials, killing in various incidents the President of Sri Lanka, the Security Minister, and the Deputy Defense Minister. ER 24. And, in June 1995, the organization exploded a bomb on a ship chartered by the International Committee of the Red Cross. ER 23.

B. Plaintiffs and Their Material Support.

Plaintiffs are six organizations and two U.S. citizens, see ER 3-6, 33-36,⁴ who "wish to provide material support to the lawful humanitarian, and political activities" of the PKK and LTTE, ER 2, 32. Specifically, plaintiffs want to provide the following aid to these terrorist groups:

(1) "engage in political advocacy" on their behalf;

(2) contribute cash, clothing, food, and educational materials to those groups;

(3) provide them "with training and written publications on how to engage in political advocacy on their own behalf and on how to use international law to seek redress for human rights violations";

(4) "write and distribute publications" supporting those groups;

(5) "advocate for freedom of political prisoners";

(6) "assist" those groups "at peace conferences and other meetings";

(7) "provide lodging" to members of those groups;

(8) "advis[e]" the groups "on recent developments in international human rights law, the procedures for seeking review by the newly established International Criminal Court,

⁴ The plaintiffs are the same in both consolidated cases, except that the Tamils of Northern California did not join plaintiffs' 2003 litigation.

peacemaking negotiations skills, and advocacy of [their] rights . . . before the Human Rights Subcommission of the United Nations and legislative bodies throughout the world, including the United States Congress”;

(9) give “expert medical advice and assistance,” including “expert advice on how to improve the delivery of health care” to the organizations;

(10) provide “expertise in the fields of politics, law, and economic development” as well as expertise in “information technology”; and

(11) provide “expert advice or assistance” in the fields of “Tamil language, literature, arts, cultural heritage, and history.”

ER 11-16, 44-47.

C. Plaintiffs’ 1998 Suit.

Plaintiffs commenced this litigation in 1998 by filing a complaint in the District Court for the Central District of California.⁵ ER 1-18. Plaintiffs argued, inter alia, that the material support statute violated their First Amendment right to free speech and association by prohibiting them from donating money – a form of political expression – to foreign terrorist organizations. Plaintiffs further argued that terms “training”

⁵ The complaint named as defendants the Attorney General, the Secretary of State, the Department of Justice, and the Department of State. See ER 6.

and "personnel" in 18 U.S.C. § 2339A(b)(1) were unconstitutionally vague. The district court rejected plaintiffs' First Amendment argument, but agreed that the relevant terms are vague and preliminarily enjoined the Government from enforcing that part of the statute against plaintiffs. See Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176 (C.D. Cal. 1998); Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1205 (C.D. Cal. 1998).

This Court affirmed. See Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000). The Court's First Amendment analysis relied on a distinction between support that a person gives directly to a foreign terrorist organization and efforts a person makes independently, but which might have an indirect beneficial effect for a terrorist group. The Court believed that the material support statute would be unconstitutional were it to prohibit the activities of an "independent advocate," because "advocacy is pure speech protected by the First Amendment." Id. at 1137 (emphasis added). But, the Court concluded, the prohibition on providing material support survives First Amendment scrutiny - even for restrictions on a money contribution that "is itself both political expression and association," id. at 1134 - because it does not restrict the independent "expression of those who advocate or believe the ideas that the groups support," but instead "restricts the

actions of those who wish to give material support to the [terrorist] groups.” Id. at 1135. Thus, while the First Amendment precludes the Government from banning independent speech that might indirectly benefit a terrorist group, the First Amendment does not prohibit the Government from banning support provided directly to foreign terrorist groups, even where that support is itself expressive activity.

The same distinction controlled the Court’s vagueness analysis. The term “personnel,” according to the Court, was vague precisely because it was unclear whether that term would apply only to those working directly under the control of a foreign terrorist organization, or whether that term would also apply to an “independent advocate” for such a group. Id. at 1137. Likewise, the term “training” was vague because it was uncertain whether that term covers someone “who wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group.” Id. at 1138. In short, the Court distinguished between direct support to a terrorist group (which can be banned consistent with the Constitution) and independent activities that might indirectly support a terrorist group (which cannot be banned). Because it was unclear whether the statutory terms “personnel” and “training” were limited to direct support for terrorist organizations or also included independent and indirect support,

those terms were impermissibly vague.

On remand, the district court entered a permanent injunction. This Court affirmed the permanent injunction as well, reaffirming its earlier holdings that the statute did not violate the First Amendment and but that terms "training" and "personnel" were impermissibly vague. See Humanitarian Law Project v. Department of Justice, 352 F.3d 382 (9th Cir. 2003).

This Court granted the Government's petition for en banc review. See Humanitarian Law Project v. Department of Justice, 382 F.3d 1154 (9th Cir. 2004). Congress subsequently enacted the Terrorism Prevention Act which, inter alia, clarified the statutory definitions of "training" and "personnel." See supra at 3-4. In light of the intervening statutory change, the en banc Court vacated the district court's judgment and injunction regarding those terms and remanded for further proceedings. See Humanitarian Law Project v. Department of Justice, 393 F.3d 902 (9th Cir. 2004) (en banc).

D. Plaintiffs' 2003 Suit.

In 2003, plaintiffs filed a separate complaint in the same district court, alleging, inter alia, that the term "expert advice or assistance" in 18 U.S.C. § 2339A(b)(1), as it existed at that time, was also unconstitutionally vague.

The district court again agreed and enjoined the Government from enforcing that provision against plaintiffs. See

Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185 (C.D. Cal. 2004). The district court followed this Court's distinction between direct and independent support, holding that it was unclear whether the statutory prohibition on providing "expert advice or assistance" to a foreign terrorist organization was limited to direct support for the organization, or whether it would reach independent support such as "assist[ing] the PKK by advocating on its behalf." Id. at 1199.

The Government appealed, and this Court stayed briefing pending the en banc decision in plaintiffs' other case. In light of the Terrorism Prevention Act's clarification of the meaning of the term "expert advice or assistance," a panel of this Court followed course of the en banc Court by vacating and remanding the district court's injunction and its judgment that the phrase "expert advice or assistance" was unconstitutionally vague.

E. The Consolidated Decision Below.

On remand, the district court consolidated both cases, and Plaintiffs added an additional argument that the term "service" - added by the Terrorism Prevention Act to the definition of "material support or resources" - is likewise unconstitutionally vague.

The district court agreed in part with plaintiffs' arguments, holding that the material support statute was vague in three respects. See Humanitarian Law Project v. Gonzales, 380 F.

Supp. 2d 1134 (C.D. Cal. 2005) (ER 51-92). First, the court held that the term "training," as amended by the Terrorism Prevention Act, is vague:

Even as amended, the term "training" is not sufficiently clear so that persons of ordinary intelligence can reasonably understand what conduct the statute prohibits. Moreover, the [2004] amendment leaves the term "training" impermissibly vague because it easily encompasses protected speech and advocacy, such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations.

380 F. Supp. 2d at 1150 (ER 79-80).

Second, the court found the term "expert advice or assistance" to be vague in part. The Terrorism Prevention Act clarified that the term means "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3). The district court held that the phrase was vague insofar as it applied to "other specialized knowledge," 380 F. Supp. 2d at 1151 (ER 82), but not vague insofar as it extends to "scientific [or] technical . . . knowledge," *id.* at 1151 n.23 (ER 82 n.23). The court reasoned that:

Similar to the Court's discussion of "training" above, "expert advice or assistance" remains impermissibly vague because "specialized knowledge" includes the same protected activities that "training" covers, such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations.

380 F. Supp. 2d at 1151 (ER 82).

Third, the district court held that the term "service" is

impermissibly vague, because "it is easy to imagine protected expression that falls within the bounds of the term 'service.'" Id. at 1152 (ER 84).

Finally, the district court held that the term "personnel," as amended by the Terrorism Prevention Act, was not vague. Following this Court's distinction between direct and independent support, the district court explained that the term "personnel," as amended, "[l]imit[ed] the provision of personnel to those working under the 'direction or control' of a foreign terrorist organization" and that clarification "sufficiently identifies the prohibited conduct such that persons of ordinary intelligence can reasonably understand and avoid such conduct." Id. at 1152-53 (ER 85).

The district court entered an injunction that barred the Government from enforcing the assertedly vague statutory provisions against the named plaintiffs and only with respect to material support given to the PKK or LTTE. Id. at 1156 (ER 92).

The district court entered final judgment on September 16, 2005, and the Government filed a timely notice of appeal.

SUMMARY OF ARGUMENT

I. The ordinary definition of the term "training" - "to teach so as to make fit, qualified, or proficient" - is sufficiently clear to a person of common intelligence. Surrounding terms and statutory context, moreover, clarify the

term by narrowing it to apply only to training knowingly provided directly to terrorist organizations, and not to independent activities that might indirectly benefit such groups. That limitation is evident in various statutory provisions: the statute's requirement that aid be given knowingly "to" a terrorist organization; the word "training" itself, which implies some form of collaboration; the statute's central purpose to prevent support that would facilitate criminal terrorist acts by freeing the terrorists' own resources to engage in such acts; the requirement that the support be "material"; the statutory specification that providing "personnel" is prohibited only for people acting under a terrorist group's direction or control, which implies a similar limitation for the statute as a whole; and the ordinary interpretive principle of construing a statute to avoid constitutional doubts.

Further, Congress has clarified and narrowed the statute by specifying that the term "training" means "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," a definition comprehensible by a person of ordinary intelligence. In the overwhelming majority of cases, persons of ordinary intelligence should be able to distinguish between what is common or general knowledge, and what is not. And Congress' addition of a scienter requirement only further serves to narrow the statute and cure any alleged vagueness.

Other than those limitations, the term "training" remains broad. It is not limited to any particular subject matter, and therefore applies to any training, whether it is intrinsically blameworthy (how to build a bomb) or not (how to petition the United Nations), so long as the training meets the otherwise applicable statutory limitations (it must be given to a terrorist group; pertain to a specific skill; and meet the scienter requirement). The statute, thus, covers a range of subject matters, but that fact does not render the term vague, for its breadth is obvious and plain to a person of ordinary intelligence.

So understood, the statute prohibits the plaintiffs' desire to train terrorist groups in international law, political advocacy, and how to petition the U.N., because such activities are obviously "training"; because it is provided to a terrorist group; and because such training covers topics that are specific skills, and not general or common knowledge. But the statute does not prohibit advocating on behalf of a terrorist group via independent petitioning, because advocacy is not "training" and because nothing is being provided directly to the organization.

Because the term "training" gives relatively clear guidance as to what is prohibited - and that is all the Constitution requires - any hypothetical that might be a close call under the statute simply does not render the term vague. And even where a

statute might implicate First Amendment concerns, it is not facially invalid on vagueness grounds unless a plaintiff can show, at a minimum, that the law is vague in a substantial number of its applications. Plaintiffs cannot meet that standard here as the term "training" is clear in the vast majority of situations, such as training in how to build a bomb, use a weapon, evade surveillance, fly a plane, launder money, make a presentation on international law, etc.

The district court's holding - that the term "training" is vague because it might prohibit constitutionally protected expression - erroneously confused vagueness with overbreadth. Vagueness deals with whether or not the statutory term is sufficiently clear. The concern identified by the district court - that the statute could be applied to prohibit protected expression - is not a vagueness concern at all, but a question of substantive First Amendment law or overbreadth. Accordingly, the district court erred by finding the term "training" to be vague under a standard that has nothing to do with vagueness.

Moreover, the prohibition on providing "training" to terrorist groups does not violate the First Amendment because it is a reasonable, content-neutral restriction aimed not at barring any expressive component of "training," but at eliminating support given to terrorist groups that could free the organization's own resources to be used to facilitate the group's

criminal acts. That analysis holds even where the material support takes the form of words. Likewise, the material support statute is not overbroad because, even if there were some unconstitutional applications of the "training" prohibition, those instances are substantial neither in absolute number, nor in comparison to the overwhelming number of plainly legitimate applications of statute.

II. "Expert advice or assistance" is also not vague, as a person of ordinary intelligence would understand the dictionary definition of each term in that phrase. Moreover, the limitations on the term "training" apply with equal force for "expert advice or assistance" and hence serve to clarify that phrase. Congress further narrowed the phrase by specifying that it means "advice or assistance derived from scientific, technical or other specialized knowledge." That phrase is based on Federal Rule of Evidence 702, which has a clear standard that applies to knowledge derived from experiences that are not common to the general public.

Again, a person of ordinary intelligence will in most (if not all) cases know whether information is or is not common knowledge among the public. For instance, plaintiffs' desire to provide terrorist groups with expertise in medicine, politics, law, economic development, and information technology all come within the statutory prohibition, because giving such expertise

is obviously "advice" or "assistance" within the ordinary meaning of those words; because the advice is clearly "expert" in the sense of being derived from specialized knowledge outside the common experiences of the public at large; because it is given directly to a terrorist group; and because it otherwise meets the scienter requirement.

III. The term "service" is also not vague, as a person of ordinary intelligence would understand its common definition as "an act done for the benefit or at the command of another." Again, that term is also limited by the same principles clarifying the term "training" and the phrase "expert advice or assistance."

The district court nevertheless held that, if the term "service" means something done "for the benefit" of a terrorist group, then the Antiterrorism Act would also seem to prohibit plaintiffs from advocating "on behalf of" a terrorist group, even though the Government has and does concede that such advocacy is permissible under the statute. But the district court's rationale overlooks the fact that "service" - like the other forms of material support or assistance discussed above - is prohibited only when the support is given to a terrorist group. Accordingly, regardless of the word choice used to describe the service in question - whether it is said to be done "for the benefit" of a terrorist group or "on behalf of" such an

organization - what matters under the material support statute is whether the service consists of direct support to the foreign terrorist organization (prohibited) or independent advocacy or activity that only indirectly benefits a terrorist group (permitted).

STANDARD OF REVIEW

This Court reviews de novo whether a statute is unconstitutionally vague. See, e.g., United States v. Wyatt, 408 F.3d 1257, 1260 (9th Cir. 2005).

ARGUMENT

THE MATERIAL SUPPORT STATUTE IS NOT UNCONSTITUTIONALLY VAGUE

To satisfy due process, a criminal prohibition such as the material support statute must be sufficiently clear to give a person of "ordinary intelligence a reasonable opportunity to know what is prohibited." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); see Foti v. City of Menlo Park, 146 F.3d 629, 638 (9th Cir. 1998). To satisfy this requirement, the Government need not define an offense with "mathematical certainty," Grayned, 408 U.S. at 110, but must provide only "relatively clear guidelines as to prohibited conduct," Posters N' Things, Ltd. v. United States, 511 U.S. 513, 525 (1994).

The district court held that the terms "training," "expert advice or assistance," and "service" are unconstitutionally vague. The court erred, however, because each term is

sufficiently well-defined, and their respective meanings should be recognizable by a person of ordinary intelligence. And, contrary to the district court's conclusion, in light of the Terrorism Prevention Act's statutory amendments, each term is confined to direct support knowingly given to a foreign terrorist organization, thus clearly demarcating between what the statute covers (impermissible direct aid to terrorists) and what it does not (independent advocacy). Accordingly, none of the challenged terms is vague.

The district court thought the challenged terms were vague because, in its view, it is unclear whether those terms cover only direct support of foreign terrorist organizations or also extend to independent advocacy that indirectly aids such groups. See 380 F. Supp. 2d at 1150 ("'training' [is] impermissibly vague because it easily encompasses protected speech and advocacy") (ER 80); id. at 1151 ("'expert advice or assistance' [is] vague . . . because [it] could be construed to include First Amendment protected activities") (ER 81); id. at 1152 ("it is easy to imagine protected expression that falls within the bounds of the term 'service'") (ER 84). For the reasons set forth below, we think the statute clearly reaches only direct, as opposed to independent, support. But even if that were unclear, the issue identified by the district court would be no more than an ordinary instance of statutory ambiguity that must be resolved by

a court; ambiguity does not render a statute void for vagueness. Were it otherwise, every ambiguous statute whose meaning is resolved under the second step of Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), would necessarily be void for vagueness. That, obviously, is not the law.

More fundamentally, the district court erred by confusing vagueness with overbreadth. Specifically, the district court held that the challenged terms are vague not because their meaning is unclear, but because the terms might apply to prohibit constitutionally protected conduct. See supra at 23. Whether a statute "punishes a 'substantial' amount of protected free speech," however, is a question of overbreadth, Virginia v. Hicks, 539 U.S. 113, 118 (2003), not vagueness, as the district court believed.

Nor, for that matter, are the terms here overbroad, because they do not prohibit a substantial amount of protected speech, judged in either absolute terms or in relation to the statute's plainly legitimate sweep. See Hicks, 539 U.S. at 119. Rather, the statute predominantly targets activity such as teaching terrorists how to use a weapon or build a bomb, how to evade surveillance, or how to launder money - none of which is constitutionally protected activity. Indeed, the material support statute does not prohibit any protected speech at all. As discussed below, the statute only prohibits support given

directly to a designated foreign terrorist organization, and that support can be prohibited consistent with the Constitution because there is no right to provide aid to foreign terrorist groups, even where that aid takes the form of both words and conduct. See Humanitarian Law Project, 205 F.3d at 1133 (“there is no constitutional right to facilitate terrorism by giving terrorists” support “with which to carry out their grisly missions”).

As a result of the district court’s errors, it enjoined the Government from enforcing the purportedly vague provisions against plaintiffs with respect to the terrorist groups at issue. That injunction, however, not only permits plaintiffs to provide the PKK and LTTE with training and expert advice on how to petition the United Nations, but also permits plaintiffs to provide any type of training or expert advice to those groups, including, for example, training or expert advice on how to build a bomb. This Court should reverse and vacate that erroneous injunction.

I. “TRAINING” IS NOT VAGUE

The meaning of the term “training” is readily intelligible to the average person. The verb “train” is defined as “to teach so as to make fit, qualified, or proficient,” Webster’s New Collegiate Dictionary 1251 (9th ed. 1989), and a person of ordinary intelligence would easily understand what it means to

teach someone. In fact, this Court has held that a similar term, "instruction," is not unconstitutionally vague, even though First Amendment concerns were implicated by that term. See California Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1151 (9th Cir. 2001) ("It is sufficient to note that 'instruction' . . . [is a] word[] of common understanding . . .").⁶ Thus, the statutory ban clearly and properly prohibits a person from teaching any number of topics to a foreign terrorist organization, such as how to use a weapon or build a bomb, how to evade surveillance, or how to launder money.

A. The Meaning of "Training" Is Narrowed By Other Statutory Terms and Context.

1. "Training" Applies to Direct Support of Designated Foreign Terrorist Organizations.

Surrounding terms and statutory context narrow the prohibition on providing "training." First, the statute reaches only direct support provided to a foreign terrorist organization. The statute's prohibition on knowingly providing training "to" a foreign terrorist organization, 18 U.S.C. §§ 2339A(b)(1), 2339B(a)(1) (emphasis added), makes this limitation clear. It is also implicit in the word "training" itself, which implies some form of collaboration between a defendant and the terrorist

⁶ Even plaintiffs seem to understand the basic meaning of the word "training," as they have used that very word to describe some of the support they wish to provide to terrorist groups. ER 12.

group; a person who acts independently is not generally considered to have knowingly provided anything "to" a terrorist organization. That limitation is also evident in a central purpose of the statute - to prevent a person from giving material support to a terrorist organization because it defrays the costs of running the organization, thereby freeing the organization's own resources to conduct criminal activities. See supra at 5. Congress sensibly targeted support given directly to terrorist groups, because such support constitutes the primary mischief with which the statute is concerned. Independent activities, by contrast, have only an attenuated link to the statute's animating purpose, and, if such indirect support were banned, the statute would potentially apply to conduct whose connection to terrorist activity is highly speculative or borders on the metaphysical. Congress should not be presumed to have adopted such an approach absent a clearer statement doing so, particularly where the evidence suggests Congress had no intention of reaching such independent activity. See supra at 5-6.

The same narrowing is accomplished through the statute's term "material." The statute prohibits providing "material support or resources" to a foreign terrorist organization, 18 U.S.C. § 2339B(a)(1) (emphasis added), and providing "training" is but one of the forbidden types of "material support." The word "material" usually operates to limit the scope of the

statutory terms it modifies, and in the present context “material” means that the support or resources provided must have a “natural tendency” to affect the activities of a foreign terrorist group. Kungys v. United States, 485 U.S. 759, 772 (1988). And, as explained above, the most natural tendency to affect the terrorist activities of such a group is through direct rather than independent support.

Congress also specifically narrowed the statute to eliminate the constitutional concerns previously identified by this Court - that is, Congress clearly delineated between knowing direct support for terrorists (which is covered by the statute) and independent, indirect support (which is not). Specifically, through the Terrorism Prevention Act Congress clarified that “[i]ndividuals who act entirely independently of the foreign terrorist organization” do not fall within the prohibition on providing “personnel,” and that the term extends only to defendants who “work under that terrorist organization’s direction or control.” 18 U.S.C. § 2339B(h). While that clarification pertains specifically to “personnel,” it seems unlikely that Congress would have responded to this Court’s constitutional concern regarding direct versus independent support by expressly limiting the scope of the term “personnel,” while prohibiting such independent activities in the “training” prohibition of the same law. See also Sierra Club v. Forest

Serv., 93 F.3d 610, 613 (9th Cir. 1996) (because "a word is known by the company it keeps," court should "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress") (internal quotation marks and citation omitted).

Were there any remaining doubt that "training" is limited to direct support to a foreign terrorist organization, this Court should so interpret the statute in order to preserve rather than undermine the constitutionality of the material support prohibition. That approach is mandated by the general rule that statutes should be construed if possible in a manner that avoids constitutional difficulties. See, e.g., United States v. Vargas-Amaya, 389 F.3d 901, 906 (9th Cir. 2004). It is also consistent with 18 U.S.C. § 2339B(i), which was added to the statute in 2004, and provides that "[n]othing in [Section 2339B] shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States."

2. "Training" Is Limited To Specific Skills.

Aside from narrowing "training" to apply only to direct knowing support to terrorist groups, Congress narrowed the term in another respect. It amended the definition of "training" to clarify that it means "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C.

§ 2339A(b) (2); see supra at 3-4. This definition, on its face, is sufficiently clear to be understood by a person of ordinary intelligence; a person of ordinary intelligence can, in most cases, distinguish between what is common knowledge and what is not.

3. "Training" Has A Scierter Requirement.

Congress also amended the statute to clarify the scierter requirement: "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 . . ." 18 U.S.C. § 2339B(a) (1). Such a scierter requirement "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

B. "Training" Applies to All Subject Matters.

Other than the above narrowing limitations, the term "training" remains broad. The word "training" by itself does not differentiate among subject matters that may be taught, and the statute expressly states that it applies to "any" training. See 18 U.S.C. § 2339A(b) (1) (emphasis added). Thus, the statutory prohibition applies to training in any subject -

whether the conduct is intrinsically blameworthy (such as teaching how to build a bomb) or might in other circumstances be benign (such as instruction on international law) - so long as that training also meets the other statutory limitations (that it is provided directly to the terrorist group, that it pertains to a specific skill rather than general knowledge, and that the scienter requirement is satisfied). But it bears emphasizing that, as broad as the range of subject matters covered by term "training" is, that breadth does not make the statute vague, for it is readily apparent to a person of ordinary intelligence that the word "training" does cover such a broad array of topics. And, of course, whatever the breadth of the word "training" standing alone, that term is narrowed by surrounding terms and statutory context.

In short, the statute is readily understandable by a person of ordinary intelligence. It applies to all kinds of training - whether it be training to make a bomb or how to best petition the United Nations. At the same time, it plainly is limited to training in "specific skills," as opposed to general knowledge - a distinction understood by the average person in most cases. It is also confined to those who know that the group is a designated foreign terrorist organization or that the group engages in terrorism or terrorist activity. And the statute is further limited to training knowingly given to a foreign terrorist

organization.

C. "Training" Clearly Applies to Plaintiffs' Planned Conduct.

Whether the statute applies to a particular context is clear in most if not all cases, including plaintiffs' own planned conduct. For example, the statute prohibits plaintiffs' desire to provide terrorist groups with training in international law, political advocacy, and how to petition the United Nations and legislative bodies, see ER 11-12, 44-45, because that activity is indisputably within the ordinary understanding of the word "training"; because it is provided directly to the terrorist groups; and because training in political advocacy, international law, and petitioning the United Nations are specific skills, not general or common knowledge. Indeed, even the district court tacitly acknowledged that the law is generally clear with respect to plaintiffs' own conduct, by correctly observing that training a terrorist group to petition the United Nations is "easily encompassed" by the statute, 380 F. Supp. 2d at 1150.

By contrast, the statute does not prohibit "engag[ing] in political advocacy" on behalf of those groups, by independently petitioning the United Nations or Members of Congress, see ER 11, 43-44, because advocacy is not training (positions are advocated, but no one is being taught how to be proficient in anything), and because nothing is provided directly to the terrorist groups.

The district court found "training" to be vague, reasoning

that an “enhanced requirement of clarity” applies because the term “implicates” protected expression such as teaching a terrorist group how to petition the United Nations, and because it imposes criminal sanctions. See 380 F. Supp. 2d at 1150 (ER 81).

Even under a higher standard, however, the statute is not vague. See Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989) (“[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.”). As explained above, what it means to “train” someone knowingly is clear to a person of ordinary intelligence. And the limitations on the statute’s scope – that the training must be directly given, that it excludes training on subjects of common or general knowledge, and that the scienter requirement must be met – are plain. Moreover, the only asserted vagueness previously identified by this Court, see 205 F.3d at 1137–38, is addressed by the direct support requirement described above.

D. Vagueness in Marginal, Hypothetical Situations Is Irrelevant.

Plaintiffs will likely argue, as they have earlier in this litigation, that in certain hypothetical situations it might be difficult to distinguish between specific skills (covered by the statute) or general knowledge (exempted), or that it might be hard to differentiate between direct support provided to a terrorist organization (prohibited) and independent support

(permitted). Such criticism only proves the point that "there is little doubt that imagination can conjure up hypothetical cases" to test the limits of any statutory term. Hill v. Colorado, 530 U.S. 703, 733 (2000) (citations and alterations omitted). But the Constitution does not turn on such academic musings, nor does it require "mathematical certainty" in order to dispel any whiff of ambiguity in an Act of Congress. Ibid. Rather, the Constitution requires only "relatively clear guidelines as to prohibited conduct." Posters N' Things, 511 U.S. at 525.

Because the statute is clear that it applies to the support plaintiffs want to provide, furthermore, plaintiffs may not succeed on a vagueness challenge predicated on hypothetical situations unrelated to their own activities. Village of Hoffman Estates v. Flipside, 455 U.S. 489, 495 (1992) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."); see Parker v. Levy, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); see also Regan v. Time, Inc., 468 U.S. 641, 649-50 (1984) (rejecting vagueness challenge where statute clearly applied to plaintiff, despite statute's implication of first amendment concerns).

The district court nevertheless agreed with plaintiffs' vagueness challenge, reasoning that "[p]laintiffs do not seek

injunctive relief as to hypothetical activities, but as to their own.” 380 F. Supp. 2d at 1141 (ER 62); see also id. at 1149 n.21 (ER 77 n.21). But this statement misses the point. Of course these plaintiffs want an injunction as to their own conduct. Nevertheless, their legal basis for injunctive relief is a claim that the law is vague, but they cannot point to any vagueness as to their own conduct. They can point only to vagueness in hypothetical situations.

But even if a facial vagueness challenge were permitted when the law is clear as to a plaintiff’s own conduct, “[t]he touchstone of a facial vagueness challenge in the First Amendment context . . . is not whether some amount of legitimate speech will be chilled; it is whether a substantial amount of legitimate speech will be chilled.” California Teachers Ass’n v. State Bd. of Educ., 271 F.3d 1141, 1152 (9th Cir. 2001). In other words, “uncertainty at a statute’s margins will not warrant facial invalidation if it is clear what the statute proscribes ‘in the vast majority of its intended applications.’” Id. at 1151 (quoting Hill v. Colorado, 530 U.S. at 733). Inherent in that standard, and in the general principle that courts are obligated to uphold statutes where possible, is that plaintiffs cannot prevail on a facial vagueness challenge merely by positing fantastic, obscure, or unrealistic hypotheticals bearing no reasonable relationship to the plain sweep and import of the

statute. Under that standard, and assuming plaintiffs' have brought a facial challenge,⁷ the term "training" is sufficiently clear in the vast majority of its intended applications - training to build a bomb, to evade surveillance, to fly a plane, to launder money, to submit proposals to the United Nations, etc. - even if its application might be uncertain in some hypothetical situations.⁸

E. The District Court Confused Vagueness With Overbreadth.

At its core, the district court's constitutional concern was that training and teaching might involve speech or expressive conduct, and therefore a ban on such training might "implicat[e]"

⁷ Plaintiffs do not specify in their complaints whether their vagueness challenges are facial or as applied, see ER 17, 49, although both complaints focus heavily on the precise conduct in which plaintiffs wish to engage, see supra at 9-10. Of course, if plaintiffs' challenge is only as applied to their conduct, the district court should have limited its injunction accordingly.

⁸ Furthermore, in the Government's view, for a law to be facially invalid, it must be invalid in all its applications. See, e.g., United States v. Salerno, 481 U.S. 739 (1987). The only exception is for First Amendment facial overbreadth challenges, see, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973), not for vagueness. Therefore a plaintiff who cannot show that a law is vague as to his conduct cannot bring a facial vagueness challenge, whether or not the statute implicates constitutionally protected activity.

This Court has suggested that an exception also exists for vagueness in the First Amendment context, see California Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1152 (9th Cir. 2001), but in the Government's view the better and correct rule is that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," Flipside, 455 U.S. at 495.

the First Amendment. 380 F. Supp. 2d at 1150. One might argue (incorrectly in our view) that the statute could be unconstitutional as applied to some situations, or that the potential number of such applications might be great enough to justify facial invalidation of the statutory ban. But whatever the answer to those questions might be, it is important to recognize that they are questions of substantive First Amendment law and overbreadth, not vagueness. As already explained above, the "training" prohibition itself is not vague, but clear and understandable to a person of ordinary intelligence. Whether the clear law might be applied in ways to prohibit protected expression is constitutionally relevant, but it is not a question of vagueness.

Moreover, the challenged terms do not violate substantive First Amendment law, nor are they overbroad. Those issues will presumably be raised by plaintiffs in their cross-appeal, and the Government will then fully address them in its third cross-appeal brief. It is worth noting here, however, that the terms suffer from no such constitutional infirmity.

A ban on knowingly providing "training" directly to foreign terrorist organizations does not violate the First Amendment, even where that "training" comes in the form of both words and conduct. As this Court previously held, a ban on providing aid directly to foreign terrorist groups is a reasonable, content-

neutral restriction because the prohibition “is not aimed at interfering with the expressive component” of such support, “but at stopping aid to terrorist groups.” Humanitarian Law Project, 205 F.3d at 1135. What the prohibition bans “is the act of giving material support” that aids a terrorist group, whether or not that support contains an expressive component; such a ban is permissible because “there is no constitutional right to facilitate terrorism by giving terrorists” aid that might assist them in “carry[ing] out their grisly missions,” id. at 1133.

Nor is the statutory ban impermissibly overbroad, for the reasons stated by the district court. See 380 F. Supp. 2d at 1153. To be overbroad, a statute must apply to a “substantial” amount of protected expression, judged in absolute terms and in relation to the law’s plainly legitimate sweep. Hicks, 539 U.S. at 119–20 (“[W]e have insisted that a law’s application to protected speech be ‘substantial,’ not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications, before applying the ‘strong medicine’ of overbreadth invalidation.”); see also id. at 124 (“Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).”). Under that standard, the material support statute is not overbroad. First, plaintiffs are unable to show

that the statute reaches constitutionally protected expression; even where direct support for terrorist groups takes the form of words, as just explained, a ban on that support is not unconstitutional. But even if plaintiffs could show some cases in which the statute would ban protected speech, those instance would not be "substantial" in absolute number, nor would they be "substantial" in relation to the numerous plainly legitimate applications of the statute (such as banning training on how to build a bomb, use a weapon, fly a plane, launder money, etc.). Accordingly, the statute is not overbroad.

II. "EXPERT ADVICE OR ASSISTANCE" IS NOT VAGUE

The phrase "expert advice or assistance" has a clearly understood meaning and is also not vague. See Webster's Collegiate Dictionary 409 (10th ed. 1997) (defining "expert" as "having, involving, or displaying special skill or knowledge derived from training or experience"); id. at 18 (defining "advice" as a "recommendation regarding a decision or course of conduct"); id. at 70 (defining "assistance" as "the act of assisting or the help supplied" and defining "assist" as "to give support or aid").

Like the term "training," a person of ordinary intelligence would easily understand what this phrase means. And, in fact, plaintiffs themselves apparently understand the phrase's core meaning, having used it repeatedly to describe their own conduct.

See ER 45 (plaintiffs wish to provide "their expert medical advice and assistance"), ER 46 (plaintiffs wish to provide "expert advice on how to improve the delivery of health care"), ER 46 (plaintiffs "wish to provide expert advice and assistance to the LTTE toward the goals of achieving normalcy . . . and negotiating a permanent peace agreement"), ER 46 ("expert advice and assistance" in Tamil language, literature, arts, cultural heritage, and history), ER 47 ("expert advice and assistance" in "economic development and information technology").

Furthermore, as noted above, the same limitations that apply to the term "training" apply with equal force to the phrase "expert advice or assistance." Specifically, both terms apply only to direct support provided to terrorist groups. That limitation is evident in the statutory terms "to" and "material"; the statute's central purpose; the significance derived from Congress' express limitation on "personnel" to activities under the group's direction and control; and the general rule that statutes should be construed to avoid constitutional doubts. See supra at 26-29. The statute's scienter requirement likewise narrows the scope of its terms. See supra at 30.

Moreover, as noted above, Congress has further narrowed the phrase "expert advice or assistance" to mean "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3). That phrase is

based upon Federal Rule of Evidence 702 (referring to "scientific, technical, or other specialized knowledge"), as providing a clearly recognized and established meaning based on the ordinary definitions of those words that a person of common intelligence would comprehend. See Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 589-90 (1993) (relying on dictionary definitions of "scientific" and "knowledge"). In Kumho Tire Co. v. Carmichael, 526 U.S. 137, 148-49 (1999), the Court explained that the general category of scientific, technical, and other specialized knowledge - as a whole - refers generally to "specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case" that is based upon experiences "foreign in kind" to those of the population in general.

In short, the defining characteristic of "scientific, technical, or other specialized knowledge" is that it is derived from experiences not common to the general public. A person of ordinary intelligence will in most (if not all) instances know whether particular information is or is not common knowledge among the public.

For instance, plaintiffs' desire to provide "expert medical advice and assistance" to the terrorist groups plainly falls within the statute - it obviously constitutes "advice" or

"assistance" (by plaintiffs' own concession); it is clearly "expert" in the sense of being derived from specialized knowledge or experience, namely, medical training or education not commonly or generally known by the public at large. The same analysis holds for plaintiffs' other conduct, such as providing "expertise in the fields of politics, law, and economic development," as well as expert assistance in "information technology," and "expert advice or assistance" on various points of Tamil culture. ER 45-47.

As noted earlier (supra at 33-36), plaintiffs will undoubtedly suggest hypothetical situations that might be close calls as to whether they constitute "expert advice or assistance." But plaintiffs cannot succeed on a facial vagueness challenge merely by pointing to a few minor cases of ambiguity; to succeed, they must show that there is vagueness in a substantial number of instances. But plaintiffs cannot meet that standard because the statute is sufficiently clear in a vast majority of instances (including for plaintiffs' own conduct).

The district court, however, believed that the phrase "expert advice or assistance," borrowed from Rule 702, did not clarify the statute "for the average person with no background in law." 380 F. Supp. 2d at 1151. The established meaning of that phrase, however, was not derived from an obscure source known exclusively to attorneys, but from ordinary dictionary

definitions. Daubert, 509 U.S. at 589-90.

Furthermore, it is difficult to explain how the district court could hold that part of the phrase - "scientific [or] technical . . . knowledge" - is not vague, 380 F. Supp. 2d at 1151 n.23, while "other specialized knowledge" is. After all, the phrase "specialized knowledge" takes its meaning from the surrounding terms (non-vague) "scientific" and "technical." See, e.g., Microsoft Corp. v. CIR, 311 F.3d 1178, 1184 (9th Cir. 2002) ("Words that can have more than one meaning are given content, however, by their surroundings.") (alteration and citation omitted); see also Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001) (under the maxim eiusdem generis, "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words").

Moreover, Kumho Tire makes the point that the entire phrase - including "other specialized knowledge" - generally and collectively refers to knowledge based on experiences not usually shared by the general public. That understanding, which applies to all parts of the phrase "expert advice or assistance," is easily understood by a person of ordinary intelligence. That is all the Constitution requires.

The district court also held that the phrase "specialized

knowledge" is vague because it could include "protected activities . . . such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations." 380 F. Supp. 2d at 1151. The district court is plainly correct that such activity is covered by the phrase "expert advice or assistance," because it is provided directly to terrorist groups; because it clearly constitutes "advice or assistance"; and because the topics of international law or petitioning the United Nations are obviously topics of "specialized knowledge" outside of the knowledge of most of the population at large. That much is clear on the face of the statute.

But that fact does not render the statute vague. Far from it: the fact that plaintiffs' support is so clearly covered by the statute is precisely why the law is not vague. As discussed above (supra at 36-37), to the extent the law might be unconstitutional as applied to certain situations, or that the potential number of such applications were great enough to justify facial invalidation of the statutory ban, those are questions of substantive First Amendment law and overbreadth, not vagueness. And, for the reasons previously noted, supra at 37-39, the phrase "expert advice or assistance" is neither overbroad nor, as applied, does it violate the First Amendment.

III. "SERVICE" IS NOT VAGUE

The term "service" is also not unconstitutionally vague. "Service" means "an act done for the benefit or at the command of another" and "useful labor that does not produce a tangible commodity." Webster's New International Dictionary 2075 (3d ed. 1993). A person of ordinary intelligence would understand what that word means, and this Court has held that a similar phrase - "honest services" in the federal mail fraud statute, 18 U.S.C. § 1346 - is not unconstitutionally vague. See United States v. Frega, 179 F.3d 793, 803 (9th Cir. 1999). And, furthermore, all the same limiting principles applicable to "training" and "expert advice or assistance" apply with equal force to "service." (Those limitations, discussed at length above, need not be repeated here.) It bears noting, in addition, that the ordinary definition of "service" itself contains an express limitation on the scope of the word, to apply only to direct knowing support that is done "at the command of another."

The district court held that the term "service" is vague because "it is easy to imagine protected expression that falls within the bounds of the term 'service.'" 380 F. Supp. 2d at 1152 (citation omitted). But, here, the district court makes the same mistake it made with respect to "training" and "expert advice or assistance," namely that, whether the statute prohibits protected expression is a question of substantive First Amendment

law and overbreadth, not a question of vagueness. And the statute is not vague, because the meaning of "service" is easily understood by a person of ordinary intelligence.

The district court also held that, if "service" means some act done "for the benefit of" a terrorist group, that definition would seemingly prohibit plaintiffs from advocating "on behalf of" a terrorist group, even though the Government has (and still does) concede that such advocacy is permitted under the statute. The district court, perceiving an irreconcilable contradiction in the Government's positions, found the statute to be vague. 380 F. Supp. 2d at 1152.

There is no contradiction. It must be recalled that "service" - like the terms "training" and "expert advice or assistance" - is limited by surrounding statutory terms and context to mean support knowingly given directly to terrorist groups, and does not include independent advocacy that might indirectly benefit such organizations. Plaintiffs' planned advocacy done "on behalf of" terrorist groups, by contrast, appears to be an activity contemplated to be undertaken independently from the terrorist groups, with only indirect benefits for the organization. Therefore, it does not fall within the statutory prohibition. The district court missed that crucial distinction - a distinction drawn by this Court earlier in this litigation, see supra at 11-12 - between direct support

to a terrorist organization (prohibited) and independent activities that might indirectly support terrorist groups (permitted).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court insofar as it held the terms "training," "expert advice or assistance," and "service" to be unconstitutionally vague.

Respectfully submitted,

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APRIL 2006

**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)
AND NINTH CIRCUIT RULE 32-1**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1, I certify that the attached First Cross-Appeal Brief for Appellants complies with Fed. R. App. P. 32(a)(7)(C) because it is a principal brief of no more than 10,001 words.

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CERTIFICATE OF SERVICE

I certify that on April 3, 2006, I served two copies of the foregoing First Cross-Appeal Brief for Appellants and one copy of the accompanying Excerpts of Record by causing them to be sent by overnight Federal Express to:

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I also certify that on April 3, 2006, I filed an original and 15 copies of the foregoing First Cross-Appeal Brief for Appellants and five copies of the accompanying Excerpts of Record by causing them to be sent by overnight Federal Express to:

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that there are no related cases in this Court.

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