No. 00-1077

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL, ET AL.,
CROSS-PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's entry of a preliminary injunction barring enforcement of a federal statutory ban on the knowing provision of "personnel" or "training" to entities designated by the Secretary of State as foreign terrorist organizations.

PARTIES TO THE PROCEEDINGS

The cross-petitioners in this case are Janet Reno, as Attorney General of the United States; the United States Department of Justice; Madeleine Albright, as United States Secretary of State; and the United States Department of State. The cross-respondents are Humanitarian Law Project; Ralph Fertig; Ilankai Thamil Sangam; Tamils of Northen California; Tamil Welfare and Human Rights Committee; Federation of Tamil Sangams of North America; World Tamil Coordinating Committee; and Nagalingam Jeyalingam.

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The Solicitor General, on behalf of the Attorney General of the United States, the United States Department of Justice, the United States Secretary of State, and the United States Department of State, respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[*] is reported at 205 F.3d 1130. The opinion of the district court (Pet. App. 17a-84a) is reported at 9 F. Supp. 2d

[*] References to "Pet. App." are to the appendix to the petition for a writ of certiorari in *Humanitarian Law Project* v. *Reno*, No. 00-910.

1176. The district court's findings of fact and conclusions of law (Pet. App. 85a-110a) are reported at 9 F. Supp. 2d 1205.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. A petition for rehearing was denied on September 1, 2000 (Pet. 1; see Pet. App. 111a-112a). The petition for a writ of certiorari in *Humanitarian Law Project* v. *Reno*, No. 00-910, was filed on November 29, 2000, and was placed on this Court's docket on December 4, 2000. This conditional cross-petition is being filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The facts and proceedings below are fully set forth in the government's brief in opposition in *Humanitarian Law Project* v. *Reno*, No. 00-910. In brief, this case involves a constitutional challenge to provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA or the Act), Pub. L. No. 104-132, 110 Stat. 1214. Section 302 of AEDPA authorizes the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to designate an entity as a "foreign terrorist organization" if she finds that: "(A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in [8 U.S.C.] 1182(a)(3)(B) * * *); and (C) the terrorist activity 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) (Supp. IV 1998).

Designation of a group as a "foreign terrorist organization" under AEDPA has three legal consequences. First, United States financial institutions possessing or

controlling any funds in which a designated foreign terrorist organization or its agent has an interest are required to block all financial transactions involving those funds. 18 U.S.C. 2339B(a)(2) (Supp. IV 1998). Second, representatives and specified members of a designated foreign terrorist organization are inadmissible to this country. 8 U.S.C. 1182(a)(3)(B) (Supp. IV 1998). Third, it is illegal for persons within the United States or subject to its jurisdiction to "knowingly" provide "material support or resources" to a designated foreign terrorist organization. 18 U.S.C. 2339B(a)(1) (Supp. IV 1998). The Act defines "material support or resources" to mean "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. 2339A(b) (1994 & Supp. IV 1998); see also 18 U.S.C. 2339B(g) (4) (Supp. IV 1998).

Two United States citizens and six domestic organizations brought suit in federal district court, challenging the constitutionality of the relevant provisions of AEDPA. Those plaintiffs are the petitioners in No. 00-910 and the cross-respondents in this case. One citizen (Nagalingam Jeyalingam) and five of the organizations alleged that they wish to provide cash and various other types of support to the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers). The other citizen plaintiff (Ralph Fertig) and the remaining plaintiff organization (the Humanitarian Law Project) alleged that they wish to provide cash and other support to the Kurdistan Workers' Party (PKK). Both the Tamil Tigers and the PKK were among 30 entities designated by the Secretary of State as foreign terror-

ist organizations pursuant to AEDPA, 62 Fed. Reg. 52,650 (1997), and both were redesignated in October 1999, see 64 Fed. Reg. 55,111 (1999), when their original designations expired under the terms of the Act. The plaintiffs contended that the AEDPA restrictions on material support to the Tamil Tigers and the PKK violate the First and Fifth Amendments.

The district court denied cross-respondents' request for preliminary injunctive relief with respect to most of the challenged AEDPA provisions, but granted a preliminary injunction against enforcement of two of the Act's provisions. Pet. App. 17a-84a (opinion), 85a-110a (findings of fact and conclusions of law). The court concluded that as a general matter, the AEDPA ban on the provision of material support to designated foreign terrorist organizations is constitutional because it serves a substantial governmental interest, is not directed at the content of political expression, and leaves would-be donors free to engage in alternative forms of political advocacy and association. *Id.* at 32a-79a. The court held, however, that cross-respondents had demonstrated a probability of success on their contention that the terms "personnel" and "training," which are included within the statutory definition of "material support or resources," are too vague to satisfy constitutional requirements because they do not adequately inform reasonable people as to the range of conduct forbidden by the statute. *Id.* at 79a-83a. The district court entered a preliminary injunction barring the enforcement of 18 U.S.C. 2339B (Supp. IV 1998) against any of the named cross-respondents or their members for providing "training" or "personnel" to the Tamil Tigers or the PKK. Pet. App. 83a-84a n.31, 109a-110a.

Both sides appealed from the portions of the district court's ruling that were adverse to them. The court of appeals affirmed the district court's judgment in its entirety. Pet. App. 1a-16a. With respect to AEDPA's ban on the provision of "training" and "personnel" to designated organizations, the court of appeals affirmed the district court's entry of a preliminary injunction in favor of the cross-respondents. *Id.* at 13a-15a. The court concluded that "[b]ecause [cross-respondents] have demonstrated that they are likely to succeed on the merits of their claim with respect to the terms 'training' and 'personnel,' * * * the district court did not abuse its discretion in issuing its limited preliminary injunction." *Id.* at 15a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

As our brief in opposition in No. 00-910 explains, the court of appeals correctly upheld most of the relevant provisions of AEDPA that are at issue in this case. As the court of appeals recognized, there is no right protected by the Constitution to donate cash or goods to terrorist organizations outside the United States. That aspect of the court of appeals' decision does not warrant this Court's review.

If this Court does grant the petition in No. 00-910, however, its review of AEDPA's constitutionality should also encompass the court of appeals' affirmance of the district court's grant of a preliminary injunction barring enforcement against cross-respondents and their members of the Act's ban on the provision of "personnel" or "training" to designated foreign terrorist organizations. The district court found that cross-respondents had demonstrated a probability of success on their contention that those two provisions are

unconstitutionally vague. The court of appeals upheld the preliminary injunction, finding that the district court had not abused its discretion. However, the district court's ruling on that point presented a pure question of law; the court of appeals erred in declining to accept the government's narrowing construction of the term "personnel," and in ruling that cross-respondents had established a probability of success on their contention that the term "training" is unconstitutionally vague because of occasional potentially problematic applications of that term.

1. As a basic principle of due process, criminal prohibitions must give a person of ordinary intelligence "fair warning" as to the range of conduct that is prohibited, and must establish adequate guidance to govern the exercise of discretion by executive officials in order to avoid arbitrary and discriminatory enforcement. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). To satisfy that requirement, the Government need not define an offense with "mathematical certainty" (*id.* at 110), but must only provide "relatively clear guidelines as to prohibited conduct." *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 525 (1994). And because some exercise of enforcement discretion is inevitable, *Grayned*, 408 U.S. at 114, Congress need only "establish minimal guidelines to govern law enforcement," *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974)).

Although greater statutory precision is required when the government imposes criminal sanctions or when the statute "abut[s] upon sensitive areas of basic First Amendment freedoms" (*Grayned*, 408 U.S. at 109 (quoting *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964)), even in those contexts "due process does not require

'impossible standards' of clarity." *Kolender*, 461 U.S. at 361. Moreover, where, as here, the statute includes a scienter requirement ("[w]hoever * * * knowingly provides material support or resources," 18 U.S.C. 2339B(a)(1) (Supp. IV 1998)), vagueness concerns may be mitigated, "especially with respect to the adequacy of notice . . . that [the] conduct is proscribed." *Posters 'N' Things, Ltd.*, 511 U.S. at 526 (quoting *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)). And if a class of offenses can be made constitutionally definite by a reasonable construction of the statute, the courts are under a "duty to give the statute that construction." *United States* v. *Harriss*, 347 U.S. 612, 618 (1954). Such a construction is possible here.

2. AEDPA's ban on the provision of "personnel" to designated foreign terrorist organizations is clearly aimed at denying such organizations the human resources necessary to carry out their objectives. The term "personnel" generally describes employees or others working under the direction or control of a specific entity. See *Webster's Ninth New Collegiate Dictionary* 878 (1989) ("a body of persons usu. employed (as in a factory, office, or organization)"). Moreover, AEDPA prohibits giving "personnel" "*to*" designated foreign terrorist organizations. See 18 U.S.C. 2339A(b) (1994 & Supp. IV 1998); 18 U.S.C. 2339B(a)(1) (Supp. IV 1998) (emphasis added). That proscription covers situations in which individuals have submitted themselves to the direction or control of a foreign terrorist organization. It is not naturally understood to apply to independent actions, such as writing letters on one's own to support or further the aims of an organization. Such independent advocacy of a desig-

nated organization's interests or agenda is outside the coverage of the statute.

So construed, the term "personnel" would give constitutionally adequate notice to the public of what is prohibited and would not implicate a substantial amount of constitutionally protected activity. Rather, the primary effect of such a ban is to prevent the provision of mercenaries, terrorists, and many other actors whose activities do not even arguably implicate the First Amendment. Any independent speech in favor or on behalf of a foreign terrorist organization would not be prohibited by the statute. By contrast, speech that is conducted under the control or direction of a foreign terrorist organization is either entitled to no First Amendment protection at all (*e.g.*, writing ransom demands or threatening the lives of civilians), or at most receives only limited First Amendment protection, since the speaker has by definition agreed to subordinate his own views to those of the foreign entity. See *Palestine Info. Office* v. *Shultz*, 853 F.2d 932, 939 (D.C. Cir. 1988) (upholding State Department order closing Palestine Liberation Organization (PLO) office in Washington, D.C., and preventing a United States citizen from representing the PLO).

Even assuming, arguendo, that a particular application of the ban to a person speaking under the direction or control of a foreign terrorist organization might raise significant First Amendment questions, that prospect does not warrant facial invalidation of the term "personnel" or the granting of an injunction that apparently precludes prosecution of cross-respondents or their members under Section 2339B for the provision of mercenaries or suicide bombers to the PKK or LTTE (Pet. App. 109a-110a). See *Hill* v. *Colorado*, 120 S. Ct. 2480, 2498 (2000) ("speculation about possible

vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications'").

The court of appeals did not hold that the term "personnel" would be impermissibly vague, or that it would trench unduly upon constitutionally protected activities, if the statutory ban were limited to persons acting under the direction or control of foreign terrorist organizations. Rather, it refused to accept that limiting construction because it believed that the district court's entry of a preliminary injunction was subject to a deferential standard of review, and because it regarded that limiting construction as effectively rewriting the statute. See Pet. App. 14a-15a. In fact, however, the limiting construction is wholly reasonable and should therefore be adopted—particularly if the alternative is facial invalidation of the "personnel" prohibition. Moreover, the concerns expressed by the court of appeals about AEDPA's potential effect on independent advocacy (*id.* at 14a) are obviated by our limiting construction, which clearly and definitively excludes independent advocacy from the scope of the criminal prohibition.

3. The court of appeals similarly upheld the district court's preliminary injunction barring enforcement against cross-respondents or their members of AEDPA's ban on the provision of "training" to designated foreign terrorist organizations. However, the term "training" is readily intelligible to the average person, and the statutory ban does not so "significantly compromise recognized First Amendment protections" as to merit facial invalidation. See *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

The verb "train" is commonly understood to mean: "to teach so as to make fit, qualified, or proficient." *Webster's Ninth New Collegiate Dictionary* 1251 (1989). As a general matter, helping foreign terrorists achieve proficiency obviously is not a protected First Amendment activity. Thus, the statutory ban quite properly precludes the training of foreign terrorists on how to use weapons, build bombs, evade surveillance, or launder funds. There is simply no reasonable argument that most "training" is protected First Amendment activity.

The court of appeals hypothesized two examples of training that might raise First Amendment concerns: instructing members of a designated organization on how to petition the United Nations, and teaching international law to such members. Pet. App. 15a. But neither the possibility of such applications, nor the presence in this particular case of the unusual plaintiff who wishes to "train" a designated foreign terrorist organization in political advocacy and the use of international law, provides an adequate basis for the court of appeals' judgment. To begin with, it is far from clear that the statutory ban on the provision of "training" would be unconstitutional even as applied to the activities identified by the court of appeals. As with the provision of cash or goods, support through "training" even of a foreign terrorist organization's seemingly innocuous activities may have the effect of making other resources available for violent acts.

In any event, AEDPA's ban on the provision of "training" to designated organizations is surely constitutional in the vast majority of its intended applications, see *Hill* v. *Colorado*, 120 S. Ct. at 2498, and this Court has "never held that a statute should be held invalid on its face merely because it is possible to

conceive of a single impermissible application," *City of Houston* v. *Hill*, 482 U.S. 451, 458 (1987) (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting)). Since "the general class of offenses to which the statute is directed is plainly within its terms," the prohibition on training should not "be struck down as vague even though marginal cases could be put where doubts might arise." *Harriss*, 347 U.S. at 618. That is particularly true here, because AEDPA's ban on the provision of training, personnel, and other material support to designated foreign terrorist organizations serves compelling national security and foreign policy interests, and because facial invalidation would apparently preclude prosecution under Section 2339B for training foreign terrorists on how to build bombs or use explosives.

CONCLUSION

If the petition for a writ of certiorari in No. 00-910 is granted, this cross-petition should also be granted. If the Court denies the petition in No. 00-910, this cross-petition should be denied.

Respectfully submitted.

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