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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

16	HUMANITARIAN LAW PROJECT,)	CV-03-6107 ABC
17	<i>et al.</i> ,)	
18	Plaintiffs,)	BRIEF OF <i>AMICI CURIAE</i>
19	v.)	AMERICAN CIVIL LIBERTIES
20	U.S. DEPARTMENT OF JUSTICE,)	UNION, GLOBAL EXCHANGE,
21	<i>et al.</i> ,)	JERUSALEM FUND FOR
22	Defendants.)	EDUCATION & COMMUNITY
23)	DEVELOPMENT, MIDDLE EAST
24	_____)	CHILDREN’S ALLIANCE, AND
25)	OPERATION USA
26)	Date: To Be Set By the Court
27)	Time: 10 am
28)	Ctrm: Roybal 650
)	(Hon. Audrey B. Collins)
) Case Nos. CV-98-1971 ABC	

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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 he 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. § 1189.¹ 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 the American Civil Liberties Union Foundation (ACLU) and

¹“Terrorist activity” is defined extremely broadly. The term includes, for example, 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)(iv).

1 a diverse coalition of humanitarian organizations that share a profound concern
2 about the implications of this statute for their efforts to aid civilian populations in
3 conflict zones. While each of the *amici* emphatically opposes violence, providing
4 effective humanitarian assistance sometimes requires humanitarian organizations
5 to work with and through groups that engage in unlawful as well as lawful
6 activities. In some areas of the world, such groups effectively operate as
7 governments and control schools, orphanages, medical clinics, hospitals, and
8 refugee camps. In other areas, the consent or cooperation of such groups may be
9 necessary in order to ensure the safety of humanitarian workers. In still other
10 areas, it is only such groups that can facilitate the distribution of aid. A broad
11 reading of the material support provision would effectively foreclose
12 humanitarian organizations from dealing with such groups and would jeopardize
13 their ability to serve desperately needy civilian populations.

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20 As discussed herein, the Fifth Amendment does not permit the material
21 support provision to be construed in this way. Implicit in the guarantee of due
22 process – indeed, *central* to that guarantee – is the principle that criminal
23 sanctions may not be imposed without proof of “personal guilt.” This principle
24 forecloses the government from imposing criminal sanctions for material support
25 without proof that the defendant specifically intended to further a designated
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1 organization's terrorist activity.

2 The government's proposed construction of the statute disregards this
3 foundational principle. Under the government's construction, a humanitarian
4 organization could be in violation of the law if it secured the cooperation of an
5 FTO to distribute food during a famine, or to distribute medical equipment during
6 an epidemic. It could be in violation of the law if it provided children's books for
7 use in schools run by an FTO. Indeed, it could be in violation of the law if, after
8 a tsunami such as the one that devastated Southeast Asia in December 2004, it
9 provided expert advice on how to dig survivors from the rubble or protect
10 survivors from starvation and disease. While *amici* will comply with the law
11 however it is construed, *amici* urge this Court to reject a construction of the
12 statute that would preclude them from providing urgently needed humanitarian
13 aid.
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15 As *amici* explain below, the government's goal of ensuring that
16 humanitarian aid is not misdirected to nefarious ends can be accomplished
17 without abandoning well-settled Fifth Amendment principles. Consistent with
18 the Fifth Amendment, the government may prosecute those who provide material
19 support with the specific intent of furthering unlawful activity. It may also
20 prosecute those who provide support to known FTOs with reckless disregard for
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1 how their support is actually used, as in some contexts reckless disregard will be
2 a factor supporting an inference of intent. However, the Fifth Amendment
3 forecloses the government from prosecuting a humanitarian organization that
4 intends to support only lawful activity and takes reasonable precautions to ensure
5 that its support is used only for lawful ends. For the reasons discussed herein,
6 section 2339B must be construed to require proof of specific intent to further a
7 designated organization's unlawful activities.
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11 **INTEREST OF *AMICI CURIAE***

12 American Civil Liberties Union Foundation

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14 The **American Civil Liberties Union Foundation** (ACLU) is a
15 nationwide, nonprofit, nonpartisan organization with more than 400,000
16 members dedicated to the principles of liberty and equality embodied in the U.S.
17 Constitution. One of the ACLU's central concerns today is the effect of national
18 security policy on civil liberties. Since September 2001, the ACLU has litigated
19 numerous challenges to government attempts to restrict civil liberties in the name
20 of national security.
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24 Humanitarian Organizations

25 **Global Exchange** is an international human rights organization dedicated
26 to promoting environmental, political, and social justice. It monitors and reports
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1 on human rights and elections and promotes internal and external support for
2 democracy in conflict areas. Working with local groups, Global Exchange
3 gathers information and educates about country conditions. It supports both local
4 and global initiatives to reduce injustice.
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7 The **Jerusalem Fund for Education and Community Development** is an
8 independent, non-profit organization that has provided educational and
9 humanitarian assistance to Palestinians for nearly 30 years. The Jerusalem Fund
10 extends grants in the fields of education, health, food, and shelter, primarily to
11 Palestinians in the West Bank and Gaza. It also supports educational and cultural
12 programs designed to build bridges between the Middle East and the United
13 States.
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17 The **Middle East Children's Alliance** (MECA) is a non-governmental
18 organization working for peace and justice in the Middle East. MECA advocates
19 for the human rights of all people in the region, focusing on the rights of children.
20 It supports projects that aid and empower communities, and it encourages
21 peaceful conflict resolution. It has supported projects designed to lead to
22 reconciliation and understanding between Palestinian and Israeli children.
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26 **Operation USA** is a 25-year old American relief and development agency
27 that has worked throughout the world providing disaster relief and development
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1 assistance. Operation USA was the first U.S. non-governmental organization to
2 work in Cambodia and Vietnam after the end of the Vietnam War; at the time,
3 such activities required a license from the U.S. government. Operation USA does
4 not seek or accept U.S. government funding for its programs but it endeavors to
5 cooperate with civilian U.S. government agencies where appropriate to better
6 focus its humanitarian aid programs.
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9 10 ARGUMENT

11 **I. A criminal prosecution under 18 U.S.C. § 2339B requires the** 12 **government to prove that the defendant specifically intended to** 13 **further the terrorist activities of a designated organization.** 14

15 Plaintiffs in this case, legal and social service organizations that seek to
16 support the non-violent humanitarian and political activities of certain designated
17 FTOs, sought an injunction barring enforcement of 18 U.S.C. § 2339B against
18 them. One of the questions now before this Court is what *mens rea* is required to
19 sustain a conviction under 18 U.S.C. § 2339B. The statute provides:
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23 Whoever knowingly provides material support or resources to a
24 foreign terrorist organization, or attempts or conspires to do so, shall
25 be fined under this title or imprisoned not more than 15 years, or
26 both, and, if the death of any person results, shall be imprisoned for
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1 any term of years or for life.

2 18 U.S.C. § 2339B(a)(1).² *Amici* submit that the Fifth Amendment requires that
3 the statute be construed to require proof that the defendant specifically intended
4 to further a designated organization’s terrorist activity.
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7 As the Supreme Court has emphasized, “in our jurisprudence guilt is
8 personal.” *Scales v. United States*, 367 U.S. 203, 224 (1961). What this means in
9 practice is that,
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11 when the imposition of punishment on a status or on conduct can
12 only be justified by reference to the relationship of that status or
13 conduct to other concededly criminal activity . . . that relationship
14 must be sufficiently substantial to satisfy the concept of personal
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17 ² The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L.
18 No. 108-458, 118 Stat. 3638 (Dec. 17, 2004) (“2004 Act”), added the following
19 proviso: “To violate this paragraph, a person must have knowledge that the
20 organization is a designated terrorist organization . . . that the organization has
21 engaged or engages in terrorist activity . . . or that the organization has engaged
22 or engages in terrorism” *Id.* The 2004 Act also amended the definition of
“material support or resources.” As amended, that term means:

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

28 18 U.S.C. § 2339A(b)(1).

1 guilt in order to withstand attack under the Due Process clause.
2
3 *Id.* at 224-25. Thus, in *Aptheker v. Sec. of State*, 378 U.S. 500 (1964), the
4 Supreme Court struck down as unconstitutional a statute that made it unlawful for
5 any member of a registered communist-action organization to apply for or use a
6 United States passport. *See id.* at 501-02. In *Wieman v. Updegraff*, 344 U.S.
7 183, 186 (1952), the Court struck down an Oklahoma statute requiring all state
8 officers and employees to swear that they were “not affiliated directly or
9 indirectly with the Communist Party.” In each of these cases, the Supreme Court
10 determined that the nexus between the conduct punished and the harm intended
11 to be prevented was too attenuated to satisfy the Fifth Amendment’s requirement
12 of personal guilt. As the Ninth Circuit has said, the Fifth Amendment dictates
13 that Congress may not criminalize conduct merely because of a tenuous
14 connection to other conduct that is concededly criminal. Rather, the connection
15 “between the conduct or status punished and the evil intended . . . to be prevented
16 [must be] sufficiently close or substantial.” *Brown v. United States*, 334 F.2d
17 488, 496 (9th Cir. 1964).

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24 In 2004, Congress amended the material support statute to make clear that
25 a donor cannot be criminally sanctioned under the statute unless she knew of the
26 relevant organization’s FTO status or terrorist activities. As the Supreme Court
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1 has made clear, however, the Fifth Amendment requires not only *knowledge* but
2 *intent*. Thus in *Aptheker*, the Court found that the passport restriction was invalid
3 because it effectively imputed to all members of the Communist Party a specific
4 intent to further the Party's illegal aims. *See Aptheker*, 378 U.S. at 510-11.
5 Similarly, in *Hellman v. United States*, 298 F.2d 810, 814 (9th Cir. 1961), this
6 Court found that a defendant's activities in support of the Communist Party were
7 insufficient to support a conviction under the Smith Act because it could not
8 permissibly be inferred that he acted with the "specific intent to bring about the
9 violent overthrow of the government as speedily as circumstances would permit."
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14 The government's proposed construction of the material support statute
15 disregards the personal guilt principle and would expose moral innocents to the
16 most severe criminal penalties, as other courts have observed. *See Boim v.*
17 *Quranic Literacy Institute*, 291 F.3d 1000, 1023 (7th Cir. 2002); *United States v.*
18 *Al-Arian*, 308 F.Supp.2d 1322, 1337-38 (M.D.Fl. 2004) (expressing concern that,
19 under the government's construction of the material support statute, "a cab driver
20 could be guilty for giving a ride to a FTO member to the UN" and "a hotel clerk
21 in New York could be committing a crime by providing lodging to [an] FTO
22 member"). *See also United States v. Hammoud*, 381 F.3d 316, 378-79 (4th Cir.
23 2004) (Gregory, J. and Michael, J., dissenting). In fact, the government's
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1 construction would render the statute manifestly unconstitutional. The statute
2 cannot be upheld unless construed to require proof of specific intent. *See Boim*,
3 291 F.3d at 1028; *Al-Arian*, 308 F.Supp.2d at 1340 (“To avoid Fifth Amendment
4 personal guilt problems, this Court concludes that the government must show . . .
5 that the defendant knew (had a specific intent) that the support would further the
6 illegal activities of the FTO”); *Hammoud*, 381 F.3d at 371 (Gregory, J. and
7 Michael, J., dissenting) (“to save the statute, one must apply the *mens rea*
8 requirement to the entire ‘material support’ provision such that the government
9 must prove that . . . the defendant had a specific intent that the support would
10 further the FTO’s illegal activities”).³

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There is no merit to the argument, advanced by the government at earlier
stages of this litigation, that the “personal guilt” doctrine protects only
membership and association (“status”), not conduct. *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”) (emphasis added). Moreover, since *Scales*, both this Court and the
Supreme Court have reaffirmed that the personal guilt doctrine protects conduct

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³*See also Baggett v. Bullitt*, 377 U.S. 360, 368 (1964) (loyalty oath unconstitutional because it required “forswearing of an undefined variety of guiltless knowing behavior”); *Elfbrandt v. Russell*, 384 U.S. 11, 16 (1966) (noting the “hazard of being prosecuted for knowing but guiltless behavior”).

1 as well as status. In *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886
2 (1982), for example, the Court considered whether a participant in a boycott
3 accomplished in part through violent means could be held liable for the damages
4 caused even if he had not himself engaged in or endorsed the violent aspects of
5 the boycott. The Court held that a person could not be held liable without proof
6 of “specific intent to further” the unlawful activity. *Id.* at 920.⁴
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10 In *Hellman*, this Court extended the protection of the personal guilt
11 doctrine to a Smith Act defendant whose activities included organizing new
12 members of the Party, teaching Communist principles to students and members,
13 and soliciting contributions. As noted above, the Court held that the conviction
14 could not be sustained without proof of specific intent. *See Hellman*, 298 F.2d at
15 814. Other courts have extended the Fifth Amendment’s protection to conduct in
16 a diverse array of contexts. *See, e.g., St. Ann v. Palisi*, 495 F.2d. 423 (5th Cir.
17 1974); *Tyson v. New York City Housing Auth.*, 369 F.Supp. 513 (S.D.N.Y. 1974);
18 *United States v. One 1971 Ford Truck*, 346 F.Supp. 613 (C.D.Cal. 1972).
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22 The Fifth Amendment thus dictates that the material support provision be
23 construed to require proof not only of knowledge but of specific intent. As *amici*
24 discuss below, a broader reading of the statute could undermine their capacity to
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27 ⁴ Although *Claiborne* was decided under the First Amendment, it squarely
28 applied *Scales’* personal guilt doctrine to conduct.

1 provide humanitarian aid to the very civilian populations that are most in need of
2 it.⁵
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4 **II. Construing 18 U.S.C. § 2339B to allow conviction without proof**
5 **of “specific intent” would have profound implications for**
6 **humanitarian organizations that work in conflict zones.**
7

8 Each of the *amici* humanitarian organizations adheres strictly to certain
9 universal principles of humanitarian assistance. These principles require all
10 providers of aid to draw sharp lines between humanitarian activities, which they
11 support, and military activities, which they do not. It is an inescapable fact,
12 however, that humanitarian organizations must work within a context of war and
13 armed conflict, because it is within this context that humanitarian aid is most
14 urgently needed. Because they must work within contexts of armed conflict,
15 humanitarian organizations must be prepared to deal with individuals and groups
16 that do not share their commitment to non-violence. *See, e.g.*, Thomas G. Weiss
17 and Cindy Collins, *Humanitarian Challenges and Intervention* 119 (2000)
18 (recognizing that humanitarian organizations must be prepared to contend with
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25 ⁵ *Amici* concur with plaintiffs’ arguments as to the vagueness of the terms
26 “personnel,” “training,” “expert advice or assistance,” and “services.” Because
27 these terms do not make clear what conduct is proscribed, humanitarian
28 organizations are forced to discontinue a great deal of aid that Congress may
never have intended to proscribe.

1 “politically motivated belligerents under the control of political and military
2 leaders, militiamen, mercenaries, organized criminals, petty criminals, unarmed
3 combatants, [and] armed noncombatants”).

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5 There are a variety of reasons why humanitarian organizations may find it
6 necessary to deal with groups that engage in unlawful as well as lawful activity.
7 A civilian population may be located within an area controlled by such a group
8 and the official government may not have the ability to facilitate the provision of
9 humanitarian aid. Or, the government may refuse to facilitate the provision of aid
10 because it seeks to use the denial of food or medicine as a political tool to
11 influence the behavior of the civilian population. *See* Leon Gordenker and
12 Thomas G. Weiss, “Humanitarian Emergencies and Military Help: Some
13 Conceptual Observations,” *in* Humanitarian Emergencies and Military Help in
14 Africa 4 (Thomas G. Weiss ed., 1990); F.T. Liu, “The Significance of Past
15 Peacekeeping Operations in Africa to Humanitarian Relief,” *in* Humanitarian
16 Emergencies and Military Help in Africa 29 (Thomas G. Weiss ed., 1990).

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18 A humanitarian organization may need to deal with groups that engage in
19 unlawful activity in order to create “safe zones” for civilians.

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21 In 1990, the [International Committee of the Red Cross] reached an
22 agreement with the Sri Lankan military and the Tamil Tigers to
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1 declare the Jaffna Teaching Hospital in the northern peninsula an
2 'ICRC protected area.' No military activity would take place from
3 within or near the hospital area, the border of the area would be
4 clearly identifiable from the air and ground, and no military weapons
5 or personnel would be permitted inside it.
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8 Mark Frohardt, *et al.*, "Protecting Human Rights: The Challenge to Humanitarian
9 Organizations," Occasional Paper #35, Thomas J. Watson Jr. Institute for
10 International Studies, at 47 (1999). Creating zones of safety, safe houses, or safe
11 hospitals for civilians in areas controlled by violent groups necessarily requires
12 negotiation and interaction with such groups. *See id.* at 46.
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15 A humanitarian organization may also need to work with groups that
16 engage in unlawful activity if those groups control social infrastructure. In Sri
17 Lanka, for example, the Tamil Tigers (LTTE) "ha[ve] effective control on the
18 ground in large sections of the north and east of the country and operate[] a
19 parallel administration that includes schools, hospitals, courts, and police and
20 other law enforcement personnel." *See* "Sri Lanka," *in* Freedom in the World
21 2004: The Annual Survey of Political Rights and Civil Liberties (Freedom
22 House, 2004).⁶ Practically speaking, it would be very difficult to provide
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27 ⁶ Available at
28 www.freedomhouse.org/research/freeworld/2004/countryratings/sri-lanka.htm.

1 humanitarian aid to many of the civilian populations in northern or eastern Sri
2 Lanka without dealing with the LTTE; humanitarian organizations must deal with
3 the LTTE or abandon the civilian populations within the area controlled by the
4 group. Indeed, such was the choice that some humanitarian organizations
5 confronted in attempting to provide humanitarian aid after the December 2004
6 tsunami. *See, e.g.,* Gady A. Epstein, *Maryland MD Struggles for Tamil Patients*,
7 Baltimore Sun (Jan. 23, 2005) (noting difficulty of providing humanitarian aid to
8 tsunami victims in areas controlled by the LTTE); Letta Tayler, *No Reprieve*
9 *From Conflict: Rebels in tsunami-ravaged Aceh Province try to recover from the*
10 *horrors of the natural disaster while continuing the battle with Indonesia's army*,
11 *Newsday* (Feb 3., 2005).⁷

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17 The realities of humanitarian aid dictate that *amici*—and, indeed, any
18 group that provides aid to the victims of war—must be able at times to deal with
19 individuals and groups that engage in unlawful activity, including violence. The
20 alternative would be to abandon innocent civilians whose lives are disrupted by
21 armed conflict.
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25 ⁷ The situation in Sri Lanka is far from unique. *See, e.g.,* U.S. Dep't of
26 State, Country Reports on Human Rights Practices 2003: Somalia, *available at*
27 www.state.gov/g/drl/rls/hrrpt/2003/27751.htm; U.S. Dep't of State, Country
28 Reports on Human Rights Practices 2003: Sudan, *available at*
www.state.gov/g/drl/rls/hrrpt/2003/27753.htm.

1 Experience substantiates *amici's* concerns. To take just a handful of
2
3 examples:

- 4 • In 1989, the World Council of Churches provided humanitarian
5 assistance to several liberation movements in Southern Africa that
6 were engaged in illegal as well as legal resistance to South Africa's
7 white minority rule. *See* Yves Beigbeder, *The Role and Status of*
8 *International Humanitarian Volunteers and Organizations* 233
9 (1991). Notably, the United States for many years listed one such
10 revolutionary group, the African National Congress, on its list of
11 terrorist organizations. *See, e.g.,* U.S. Dep't of State, *Patterns of*
12 *Global Terrorism: 1988*, 82 (March 1989).
13
14 • Eritrea, then a small, extremely poor area within Ethiopia, was
15 wracked by civil war and by the droughts and famines suffered by
16 the rest of Ethiopia from the mid 1970s until the early 1990s. *See*
17 *generally*, Dan Connell, *Against All Odds: A Chronicle of the*
18 *Eritrean Revolution* (1993). Throughout the famine, the only way to
19 deliver aid to the innocent victims of both political and natural
20 devastation was to work through insurgent groups including the
21 Eritrean Peoples Liberation Front (EPLF). Groups like Lutheran
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1 World Relief worked with the Eritrean Relief Association, an arm of
2 the EPLF, to funnel aid to rural peasants in Eritrea. *See id.* at 213-
3 226. Only late in the famine did the United States and Ethiopia
4 governments agree to permit two private relief agencies, World
5 Vision and the Catholic Relief Services, to distribute relief directly
6 in the war zones. *See id.* at 221.
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- 10 • In southern Sudan, constant fighting and widespread poverty have
11 caused tremendous suffering, especially among women, children,
12 and the elderly. Humanitarian groups were able to supply aid only
13 with the assistance of warring rebel groups. *See* Abdul Mohammed,
14 “Responses of Non-Governmental Organizations to Conflict
15 Situations,” *in* Humanitarian Emergencies and Military Help in
16 Africa, 103-04 (Thomas G. Weiss ed., 1990).
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20 Construing the material support statute to permit convictions without proof
21 of specific intent would seriously jeopardize the capacity of *amici* and other
22 humanitarian organizations to serve civilian populations in conflict zones.
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24 Without a requirement that the government prove specific intent, an organization
25 could be prosecuted even though it opposed the terrorist activities of the
26 designated group; intended its support to be used only for humanitarian purposes;
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1 took precautions to ensure that its support was used only for those purposes; and
2 could prove that its support was in fact used only for those purposes. A broad
3 construction of the statute would therefore have serious implications for *amici*
4 and other humanitarian organizations that work in conflict zones. More
5 important, it would have devastating implications for the needy civilian
6 populations that *amici* serve.
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10 **III. The government’s goal of ensuring that humanitarian aid is not**
11 **misdirected to nefarious ends can be accomplished without**
12 **abandoning well-settled Fifth Amendment principles.**
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14 The government’s compelling interest in reducing terrorism does not
15 require this Court to abandon decades of Fifth Amendment jurisprudence.
16 Because they oppose violence, humanitarian organizations have found ways of
17 minimizing the risk that their resources will be used for unlawful activity and
18 have developed sophisticated methods to ensure that their aid is used as it is
19 meant to be used. Consequently, the government’s interest in ensuring that
20 humanitarian aid is not diverted to terrorism does not require a rule that
21 altogether forecloses humanitarian organizations from dealing with groups that
22 engage in unlawful as well as lawful activity.
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27 Like other humanitarian organizations, *amici* meticulously monitor the use
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1 of the aid that they supply. They do this for a number of reasons. They oppose
2 violence and do not want their resources to be directed to violent activities. They
3 must be accountable to their members, funders, and employees. They must also
4 be accountable to the Internal Revenue Service. For these and other reasons,
5 *amici* and other humanitarian organizations use multiple methods to ensure that
6 their resources are not diverted.
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10 Depending on the context, these methods may include: (i) conducting a
11 thorough assessment of local partners' track records in delivering past aid
12 shipments; (ii) requiring potential partners to submit narrative and financial
13 reports; (iii) assessing potential partners' internal financial controls; (iv)
14 establishing whether past shipments were properly distributed by interviewing
15 civilians who were the intended beneficiaries of the aid; (v) establishing whether
16 past shipments were properly distributed by assessing the *amount* of aid that was
17 actually distributed (in order to determine whether aid was lost or misdirected);
18 (vi) requiring detailed receipts for items purchased with donated funds; (vii)
19 obtaining written acknowledgements from aid beneficiaries; (viii) ensuring that
20 personnel are present when aid is distributed; and (ix) documenting the
21 distribution of aid.
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27 Because humanitarian organizations have developed such methods of
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1 monitoring and tracking humanitarian aid, the government's interest in ensuring
2 that such aid is not diverted to terrorism can be accommodated without
3 jettisoning well-settled constitutional commitments. Rather, the question whether
4 ostensibly humanitarian aid was in fact intended for illegal ends can be asked and
5 answered on a case-by-case basis. Requiring case-by-case analysis would not
6 undermine the government's ability to prosecute those who actually provide
7 support to terrorism. It would accommodate the government's interest, however,
8 without jeopardizing the critically necessary work of legitimate humanitarian
9 organizations.
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14 Nor would construing the statute to require proof of specific intent leave
15 the government powerless to prosecute an organization simply because the
16 organization *claims* that its support was meant for humanitarian or other
17 legitimate ends. Where an organization supplies material support to an FTO with
18 reckless disregard for the way that the support is ultimately used, a court might
19 infer that the organization acted with the requisite specific intent. *See Al-Arian*,
20 308 F. Supp. 2d at 1339. There would be no basis for such an inference,
21 however, where an organization was meticulous in its efforts to ensure that aid
22 was used only for humanitarian ends. What *amici* suggest, and what the Fifth
23 Amendment demands, is that criminal penalties should not be imposed without a
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1 fact-specific inquiry into the donor’s actual intent. *Cf. Bowen v. Kendrick*, 487
2 U.S. 589, 612 (1988) (noting, in course of Establishment Clause analysis, that
3 “when the aid is to flow to religiously affiliated institutions that [are] not
4 pervasively sectarian . . . [the Court has] *refused to presume* that it would be used
5 in a way that would have the primary effect of advancing religion”) (emphasis
6 added).
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10 *Amici* acknowledge the concern that aid given to an FTO’s lawful activities
11 may free up resources that can be used for terrorist acts. In the experience of
12 *amici*, however, this fear is misplaced. As a factual matter, humanitarian
13 organizations generally do not provide aid that would otherwise be provided by
14 local groups. Accordingly, their aid does not free up resources that can be used
15 for unlawful activity; indeed, their aid does not free up resources at all. The aid
16 simply means that needy civilian populations that would not otherwise receive
17 help will receive it. *See, e.g.,* Larry Minear, *The Humanitarian Enterprise:
18 Dilemmas and Discoveries* 157 (2002) (stating that fears about the fungibility of
19 humanitarian aid “ha[ve] been substantially overblown” and that “humanitarian
20 aid is seldom a determining factor in the calculations of belligerents”).
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25 In sum, the government’s legitimate interest in ensuring that humanitarian
26 aid is not diverted to terrorism does not require this Court to abandon or dilute
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1 the Fifth Amendment's "personal guilt" doctrine. The material support statute is
2 susceptible to a construction that would accommodate the government's
3 legitimate interest without damaging constitutional principle or undermining the
4 capacity of *amici* and other humanitarian organizations to provide aid to civilian
5 populations in conflict zones.
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8 **CONCLUSION**
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10 For the foregoing reasons, *amici* respectfully urge that this Court construe
11 18 U.S.C. § 2339B to require that the government prove that the defendant
12 specifically intended to further an FTO's terrorist activities. In the alternative,
13 *amici* respectfully urge that the Court find the statute unconstitutional under the
14 Fifth Amendment.
15

16
17 DATED: May 13, 2005

18 Respectfully submitted,
19 AMERICAN CIVIL LIBERTIES UNION
20 FOUNDATION
21 -and-
22 DILAN A. ESPER

23 By _____
24 DILAN A. ESPER
25 Attorney for amici curiae
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CERTIFICATE OF SERVICE

I am employed in Los Angeles County, California. I am over the age of 18 and not a party to this action; my business address is:

6100 Wilshire Blvd.– Ste. 1250
Los Angeles, CA 90048

On May __, 2005, I served the foregoing document described as: BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, GLOBAL EXCHANGE, JERUSALEM FUND FOR EDUCATION & COMMUNITY DEVELOPMENT, MIDDLE EAST CHILDREN’S ALLIANCE, AND OPERATION USA on the interested parties in this action by enclosing true copies thereof in sealed envelopes addressed as follows:

David Cole, Esq.
c/o Georgetown University Law Center
600 New Jersey Ave., NW
Washington, DC 20001

Shayana Kadidal, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
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US Department of Justice
Civil Division
20 Massachusetts Ave NW, Rm 7344
Washington, DC 20001

(BY FEDEX) I deposited such envelopes in Los Angeles California with FedEx with instructions that they be delivered no later than the close of business on the next business day.

I declare under penalty of perjury under California law that the foregoing is true. I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed May __, 2005

CHRISTINE CUBAS