06-5015-cr(L)

06-5031-cr(CON), 06-5093-cr(CON), 06-5131-cr(XAP), 06-5135-cr(XAP), 06-5143-cr(XAP)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee/Cross-Appellant,

v.

LYNNE STEWART, MOHAMMED YOUSRY,
and AHMED ABDEL SATTAR,
Appellants/Cross-Appellees,

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE, URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. Neither WLF nor AEF has a parent corporation or any stock owned by a publicly held company.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE, URGING AFFIRMANCE

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation (WLF) and Allied Educational Foundation (AEF) are set forth more fully in the accompanying motion for leave to file this brief.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Boumediene v. Bush*, No. 06-1195 (dec. pending, U.S. S. Ct.); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *DeMore v. Kim*, 538 U.S. 510 (2003).

In particular, WLF has devoted substantial resources over the years to supporting government efforts to prevent those within the United States from providing support to organizations that engage in terrorism, whether overseas or within the United States. *See, e.g., Reno v. American-Arab Anti-Discrimination*

Committee, 525 U.S. 471 (1999); *Humanitarian Law Project v. Gonzales*, No. 05-56753 (dec. pending, 9th Cir.).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are submitting this brief with respect to the appeals by Appellants Lynne Stewart and Mohammed Yousry from their convictions on Counts IV and V of the November 2003 superseding indictment. *Amici* are concerned that those appeals, if successful, could significantly impair the federal government's ability to counter the threat to national security posed by foreign terrorist groups. Congress has determined that the threat posed by such groups is magnified by the support they have been able to garner from within the United States; it has adopted legislation designed to cut off such support. *Amici* believe that Congress is acting well within its powers by authorizing the imposition of criminal sanctions on those who provide material support to overseas groups, knowing or intending that the support is to be used in carrying out terrorism – regardless of the form in which that support is given. *Amici* also believe that Congress has

provided adequate notice of the conduct it intended to prohibit.

This brief focuses solely on Appellants' Fifth Amendment void-for-vagueness claims and First Amendment claims. It does not address other claims, including whether the evidence at trial was sufficient to establish the requisite mens rea and whether the sentences imposed on Appellants were appropriate.

STATEMENT OF THE CASE

In February 2005, Appellants were found guilty by a jury on each of the counts in which they were charged in the seven-count indictment. WLF mentions only those counts relevant to this brief. Appellant Ahmed Abdel Sattar was convicted of conspiring to murder and kidnap persons in a foreign country, in violation of 18 U.S.C. § 956 (Count II). Stewart and Yousry were convicted of providing and concealing material support to the terrorist conspiracy described in Count II, in violation of 18 U.S.C. § 2339A (Count V), and of conspiring to violate § 2339A, in violation of 18 U.S.C. § 371 (Count IV).

The Count II conspiracy involved the activities of the Islamic Group (IG), a group based in Egypt that has been designated by the Attorney General since 1997 as a foreign terrorist organization (FTO). For many years, Sheikh Omar Abdel Rahman has served as the spiritual leader of IG. Since his conviction in 1996 for his role in terrorist acts, including the bombing of the World Trade

Center, Abdel Rahman has been serving a life sentence in federal prison. Because of his continuing role as leader of IG, federal authorities determined that national security considerations required that he be prohibited from communicating with those outside prison. They imposed SAMs (Special Administrative Measures) on Abdel Rahman that limited him to communicating with his attorneys, and only with respect to legal matters. Stewart (one of Abdel Rahman's attorneys) and Yousry (who served as a translator for Stewart) were among the very few non-prison personnel with access to Abdel Rahman. Before prison visits, Stewart was required to sign affirmations stating that she would abide by the terms of the SAMs and would not use her meetings with Abdel Rahman to pass messages between him and third parties, including the news media.

Evidence at trial demonstrated that the IG has a long history of terror activity. Most notoriously, it was responsible for the 1997 massacre of 58 foreign tourists and four Egyptians visiting an archeological site in Luxor, Egypt. Before leaving the scene, the six assassins scattered leaflets espousing their support of the IG and warning that more attacks would follow unless their demands – including the release of Abdel Rahman – were met. Certain factions of the IG thereafter entered into a cease-fire, whereby they suspended terrorist

activities within Egypt itself, in hopes of persuading the Egyptian government to release IG leaders from prison. One of the IG leaders in Egypt was Ahmad Taha Musa ("Taha"). In order to strengthen his position within the IG, he sought to correspond with Abdel Rahman in order to obtain Abdel Rahman's support for his proposed course of action for the IG.

The evidence showed that Taha would not have been able to conspire with Abdel Rahman in this manner without the assistance of Stewart and Yousry. They smuggled letters written by Taha (and provided to them by Sattar) into prison during prison visits ostensibly scheduled to permit Stewart to discuss legal issues with her client. Yousry read the letters to Abdel Rahman while Stewart sought to conceal what was going on by pretending to be discussing legal issues. In turn, Abdel Rahman was able to communicate his responses to the Taha letters back to other IG conspirators by using Yousry and Stewart as messengers. Among the responses Yousry and Stewart helped to disseminate: that Abdel Rahman supported Taha's efforts to end the cease-fire and resume terrorist activities within Egypt (or at the very least, no longer supported a cease-fire), and that IG members should give a greater leadership role within the IG to Taha. On one occasion, when some IG members doubted that Taha was accurately reporting Abdel Rahman's views, Stewart went the extra mile on

behalf of the co-conspirators: she issued a press release in June 2000 announcing that Abdel Rahman had withdrawn his support for a cease-fire. In the fall of 2000, Taha and Sattar wrote a *fatwah* in Abdel Rahman's name, mandating the killing of Jews "wherever they are," and they distributed the *fatwah* worldwide. There was substantial evidence at trial – including the fact that Stewart and Yousry were fully aware of the content of the terrorism-planning communications they were passing back and forth – that they knew that their activities were being used to carry out the Count II conspiracy.

In 2004, the district court denied Appellants' motions to dismiss the indictment. *United States v. Sattar* ["*Sattar II*"], 314 F. Supp. 2d 279 (S.D.N.Y. 2004). Among other rulings, the court denied Stewart's and Yousry's claims that Counts IV and V should be dismissed because § 2339A was unconstitutionally vague as applied to them, *id.* at 299-304, and because application of § 2339A violated their First Amendment rights. *Id.* at 304-05. Following the jury's verdict, the court denied Appellants' motions for judgment of acquittal and for a new trial. *United States v. Satter*, ["*Sattar III*"], 395 F. Supp. 2d 79 (S.D.N.Y. 2005). In rejecting Stewart's and Yousry's challenge to the convictions under Counts IV and V, the court again found no merit to their vagueness claims, *id.* at 100-01, and their First Amendment claims. *Id.* at 100-

104.

SUMMARY OF ARGUMENT

A statute is impermissibly vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. The words adopted by Congress in § 2339A easily meet that standard, both on their face and as applied to Appellants. Congress quite clearly has prohibited the provision of significant direct assistance to others, where one knows or intends that one's assistance is to be used in preparation for, or in carrying out terrorism or other enumerated crimes. Congress also has prohibited the concealment of such assistance. The statutory list of activities that constitute such direct assistance is comprehensive, and the words included in that list are common words such that it is highly unlikely that those reading the statute would not understand what is prohibited. Even a casual reader would take away the message that there are few, if any, forms of significant direct assistance that, when provided with the requisite knowledge or intent, are not prohibited.

Appellants contend that the word "personnel" – one of the many enumerated forms of "material support or resources" listed in § 2339A(b)(1) – is unconstitutionally vague as applied to them. They contend that they were not on notice that providing a communications link between Abdel Rahman and his IG

co-conspirators constituted the provision of "personnel" (in the form of Abdel Rahman himself) to the Count II criminal conspiracy. That contention is without merit. The word "personnel" is generally understood to mean any manpower employed in any work or service. Using that definition, to "provide" personnel must be understood to mean to provide the services of one or more people – a meaning that describes precisely the assistance that Stewart and Yousry provided to the Count II conspiracy. Given § 2339A's extraordinarily broad definition of "material support," there is no reason to suspect that Congress intended to define "providing . . . personnel" any more narrowly than the commonly understood meaning described above. Accordingly, a person of ordinary intelligence would readily understand that the actions of Stewart and Yousry – *i.e.*, creating a communications link that made Abdel Rahman available to his co-conspirators for the purpose of deciding on future acts of terrorism – were proscribed by § 2339A.

Any possibility of vagueness is eliminated by the scienter requirement imposed by the statute. As the district court charged the jury, one may not be convicted under § 2339A for providing "personnel" unless one "know[s]" or "intend[s]" that the personnel will be used in preparing for, or in carrying out, the underlying criminal conduct. Accordingly, there is no possibility that an

individual might inadvertently violate § 2339A by, for example, delivering a package for a friend without knowledge of its content. In light of § 2339A's scienter requirement and its very broad definition of "material support," no person of ordinary intelligence would think that he had stayed within the bounds of the law if: (1) he provided others access to any type of manpower to which they otherwise lacked access; and (2) he was fully aware that the others planned to use that manpower to prepare for engaging in terrorism or other serious criminal activity.

Nor does § 2339A violate the First Amendment, whether challenged facially under an overbreadth analysis, or as applied to Appellants' conduct. Appellants assert that the First Amendment immunizes their efforts to provide assistance to a criminal conspiracy so long as their activity is limited to assisting in the dissemination of written or spoken words. That assertion has never been accepted by courts in this country. It has never been deemed an abridgement of freedom of speech to make a course of conduct illegal merely because the conduct was initiated, evidenced, or carried out by means of language, either spoken or written. While careful First Amendment analysis is warranted whenever a statute is alleged to touch on free speech rights, the constitutional protection afforded speakers who engage in "mere advocacy" has no application

when, as here, the speakers have entered into a conspiracy to engage in criminal behavior.

Congress has determined that international terrorism "threatens the vital interests of the United States" and that direct material support to international terrorist groups must be prohibited because *any* such support to terrorist groups facilitates their terrorism. *See* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-243, Title III, Subtitle A, § 301(a)(1) & (7), 110 Stat. 1247, *codified at* 18 U.S.C. § 2339B *note*. Some – including the district court in this case – have expressed concern that such prosecutions under § 2339B can raise serious First Amendment issues because they could be used to prosecute those who advocate in support of a designated terrorist group without any understanding that their advocacy actually assists the group in carrying out its mission of terrorism. But a prosecution under § 2339A – with its strict scienter requirement – raises no such concerns. Criminal liability is reserved for those, such as Stewart and Yousry, who engage in speech-related activity with full knowledge that their activity is providing material support that is to be used in preparing for or carrying out significant criminal activity.

ARGUMENT

I. SECTION 2339A'S BAN ON PROVIDING "PERSONNEL" IS NOT IMPERMISSIBLY VAGUE AS APPLIED TO APPELLANTS

A. The Challenged Term Provides People of Ordinary Intelligence a Reasonable Opportunity to Understand What Conduct It Prohibits

A statute is impermissibly vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado,* 530 U.S. 703, 732 (2000).[1] Courts have stressed that because no set of words will convey precisely the same meaning to all people, all that is required to survive a vagueness challenge is that "it is clear what the ordinance *as a whole* prohibits." *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972) (emphasis added). Because we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Id.*

The language employed by Congress in prohibiting significant direct support for designated criminal conspiracies,[2] when taken as a whole, easily

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[1] A statute can also be impermissibly vague "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Id.* However, *amici* do not believe that this second prong of vagueness analysis is seriously at issue here. *Amici* briefly discuss this second prong *infra*, in Section I.C.

[2] Including, in this instance, conspiracies to kill, kidnap, maim, or injure persons or damage property in a foreign country, in violation of 18 U.S.C. § 956.

meets the vagueness test described above. Section 2339A(a) prohibits providing "material support or resources," or concealing or disguising the nature, location, source, or ownership of material support or resources, "knowing or intending" that they are to be used in preparation for, or in carrying out, a violation of designated criminal statutes. "Material support or resources" in turn was defined as meaning:

> 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, transportation, and other physical assets, except medicine or religious materials.

18 U.S.C. § 2339A(b)(1) (1996).[3]

In view of the comprehensive nature of the definition of "material support or resources" contained in § 2339A(b)(1), Congress's overall intent is readily apparent to people of ordinary intelligence: Congress intended to prohibit virtually *all* direct significant support for others, where one knows or intends that one's assistance is to be used in preparation for, or in carrying out terrorism or

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[3] Section 2339A(b)(1) was amended in 2004, after the events giving rise to this case, to include within the definition of "material support or resources" "any property, tangible or intangible, or service," and to further define the term "personnel" to make explicit that it includes "1 or more individuals who may be or include oneself." *Amici* do not believe that the 2004 amendments are relevant to the vagueness issue raised herein.

other enumerated crimes. Given the overall tenor of the statute, Plaintiffs' challenge to "personnel," an individual components of the definition of "material support or resources" seems somewhat silly. While there obviously is no "mathematical certainty" regarding the precise scope of the term "personnel," a reader of ordinary intelligence would readily conclude – in light of the sweeping nature of § 2339A(b)(1)'s definition of "material support or resources" – that Congress intended "personnel" to be accorded its everyday, broad meaning.

Amici readily accept Appellant Yousry's dictionary definition of "personnel": "persons employed in any work, enterprise, service, establishment, etc." Yousry Br. at 89 (quoting *Webster's New 20th Century Dictionary of the English Language* (2d ed. 1969)). Accordingly, to "provide" personnel to others would mean, to the person of ordinary intelligence, to provide the services of one or more people to those others. The evidence at trial indicates that that is precisely what occurred here: Stewart and Yousry provided the services of Abdel Rahman to the Count II conspiracy by providing a communications link between Abdel Rahman and his co-conspirators. Because of the SAMs imposed by federal prison authorities on Abdel Rahman, he had no means of establishing such a link without the assistance of his lawyer and her translator. Accordingly, Stewart and Yousry had every reason to conclude that the conduct in which they

engaged constituted the provision of "personnel" (and thus "material support and resources") within the meaning of 18 U.S.C. § 2339A.

B. Any Possible Vagueness Is Eliminated by the Scienter Requirement Imposed by § 2339A

As the district court held, "§ 2339A applies only when the defendant provides material support or resources 'knowing or intending' that they are to be used in preparation for, or in carrying out, specific violent crimes, in this case a conspiracy to kill or kidnap persons in a foreign country." *Sattar II*, 314 F. Supp. 2d at 301. Thus, there is no possibility that law-abiding citizens will inadvertently be caught up in a criminal prosecution based on conduct that they had no reasonable way of knowing was prohibited. The "knowing or intending" requirement ensures that prosecution will be limited to those with complete awareness that they are assisting a criminal enterprise.

The existence of the "knowing or intending" requirement eliminates whatever plausibility Appellants' void-for-vagueness argument might otherwise have had. As this Court has explained, "[A] scienter requirement may save a statute which might otherwise have to be condemned for vagueness." *United States v. Curcio*, 712 F.2d 1532, 1543 (2d Cir. 1983) (Friendly, J.). A "scienter requirement may mitigate a law's vagueness, especially with respect to the

adequacy of notice that [the] conduct is proscribed." *United States v. Strauss*, 999 F.2d 692, 698 (2d Cir. 1993). *See also Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (the constitutionality of an allegedly vague statute "is closely related to whether that standard incorporates a requirement of mens rea"). The United States introduced substantial evidence at trial that Stewart and Yousry were aware that, by providing the Count II conspiracy with access to Abdel Rahman and vice versa, they were assisting the co-conspirators in carrying out their criminal enterprise. Based on the letters they read from Taha, for example, they knew full well that a pronouncement from the spiritual leader of the IG that he no longer supported the cease fire, that he supported Taha's leadership, and that he supported the killing of all Jews would assist Taha in his efforts to mobilize the IG membership into acts of terrorism. Such knowledge would have provided more than ample notice to persons of ordinary intelligence that their activities were running afoul of § 2339A's prohibition against providing "material support or resources" in the form of "personnel."

The district court was legitimately concerned by the sweep of the term "personnel" as it was applied in the initial indictment, which charged Stewart and Yousry with a violation of § 2339B. Section 2339B prohibits the knowing provision of "material support or resources" to a designated foreign terrorist

organization (FTO), and adopts § 2339A(b)(1)'s definition of "material support or resources" (*e.g.*, it includes a prohibition against the provision of "personnel"). The district court dismissed the initial indictment on vagueness grounds, expressing a concern that the absence of a meaningful mens rea requirement (*e.g.*, a requirement that an individual knew that his support was advancing the FTO's criminal activities) created a danger that § 2339B could be applied to a wide range of seemingly innocent, and even constitutionally protected, activity. For example, the court worried that prosecutors could invoke § 2339B to prosecute Stewart (and Abdel Rahman's other lawyers) for the mere act of providing criminal representation to leaders of the IG charged with a crime, or to lawyers representing an FTO in a challenge to its FTO designation:

> The Government accuses Stewart of providing personnel, including herself, to IG. In doing so, however, the Government fails to explain how a lawyer, acting as an agent of her client, an alleged leader of an FTO, could avoid being subject to criminal prosecution as a "quasi-employee" allegedly covered by the statute. At the argument on the motions, the government expressed some uncertainty as to whether a lawyer for an FTO would be providing personnel to the FTO before the Government suggested that the answer may depend on whether the lawyer was "house counsel" or an independent counsel – distinctions not found in the statute.
>
> The Government concedes that the statute does not prohibit mere membership in an FTO, and indeed mere membership could not constitutionally be prohibited without a requirement that the Government prove the defendants' specific intent to further the FTO's unlawful ends. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). . . .

> The government attempts to distinguish the provision of "personnel" by arguing that it applies only to providing "employees" or "quasi-employees" and those acting under the control of the FTO. But the terms "quasi-employee" or "employee-like operative" or "acting at the direction and control of the organization" are terms that are nowhere found in the statute or reasonably inferable from it.

United States v. Sattar ["*Sattar I*"], 272 F. Supp. 2d 348, 359 (S.D.N.Y. 2003).[4]

The prosecution of Stewart and Yousry under § 2339A totally eliminates the vagueness problems identified by the district court in connection with a § 2339B prosecution. The statute's "knowing or intending" requirement eliminates any possibility that lawyers will be prosecuted for their normal representation of FTOs and/or FTO leaders in American courts. While such representation could be deemed to benefit the FTO itself, it would be virtually impossible for such representation to be useful in preparing for or carrying out the FTO's criminal activities; and if, based on some extremely unusual set of

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[4] Congress subsequently fixed the problem identified by the district court in § 2339B cases alleging unlawful provision of "personnel." In 2004, Congress amended the definition of "personnel" for purposes of § 2339B cases by providing that no one should be prosecuted in connection with the term "personnel" unless he knowingly provided an FTO with one or more individuals "to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization." 18 U.S.C. § 2339B(h). Significantly, the activities engaged in by Stewart and Yousry would (had they occurred after 2004) easily have met this new, more restrictive definition of "personnel." Their actions provided the IG with access to its spiritual leader, who thereby was placed in a position to "organize, manage, supervise, or otherwise direct" the IG's activities.

circumstances, the lawyer became aware that his/her representation was, in fact, advancing the FTO's criminal schemes, (s)he would have fair notice that his/her conduct was prohibited. Certainly in this case, a person of ordinary intelligence in Stewart's position would have been well aware that her conduct violated the prohibitions of § 2339A.[5]

Stewart and Yousry complain that the district court improperly charged the jury, by permitting conviction based on evidence that they either knew *or* intended that their conduct would advance the IG's Count II conspiracy. They insist that the government should have been required to demonstrate that they both knew that their conduct would advance the conspiracy *and* that they intended their conduct to have that effect. Yousry Br. 92-101; Stewart Br. 153-158. But any such jury instruction would have been directly contrary to the explicit language of § 2339A(a), which permits the government to establish scienter based on evidence that the defendant either knew *or* intended that his/her actions would further the criminal conspiracy. Appellants contend that

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[5] Stewart cites *Humanitarian Law Project v. Reno* ["*HLP*"], 205 F.3d 1130, 1137-38 (9th Cir. 2000), for the proposition that the term "personnel" is void for vagueness. But *HLP* was issued in the context of potential criminal prosecutions under § 2339B, not § 2339A. Any such prosecution arises under an entirely different statutory scheme, including the absence of the substantial scienter requirement imposed in all § 2339A cases by § 2339A's "knowing or intending" language.

the jury instruction was somehow inconsistent with the district court's *Sattar II* opinion that denied the motions to dismiss the superseding indictment. But a fair reading of *Sattar II* makes clear that the district court was fully aware that the government could obtain a conviction based on evidence of either knowledge *or* intent. *See, e.g., Sattar II*, 314 F. Supp. 2d at 301 ("§ 2339A applies when the defendant provides material support or resources 'knowing or intending' that they are to be used in preparation for, or in carrying out, specific violent crimes, in this case a conspiracy to kill or kidnap persons in a foreign country.").

C. § 2339A Provides Adequate Standards for Enforcement

A statute can also be void for vagueness if it defines a criminal offense with insufficient definiteness such that it "'encourage[s] arbitrary and discriminatory enforcement.'" *United States v. Rahman*, 189 F.3d 88, 116 (2d Cir. 1999) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). But this due process test is not particularly demanding; all that is required is that the statute "establish minimal guidelines" for enforcement. *Kolender*, 461 U.S. at 358. In light of § 2339A's strict scienter requirement, the likelihood of arbitrary and discriminatory enforcement is minimal. Prosecutors seeking to bring § 2339A prosecutions bear a heavy evidentiary burden; they must demonstrate that the defendant not only intended to provide "material support or resources" to

criminal conspirators, but also that she did so "knowing or intending" that the material support or resources would advance the conspiracy. Those standards are sufficiently clear that it is not left to prosecutors to write their own set of guidelines regarding whom they will prosecute. Moreover, the occasions on which that evidentiary burden could be met are sufficiently rare that it is unlikely that a prosecutor would ever be in a position to adopt arbitrary standards regarding whom he planned to target for prosecution.

Stewart suggests that prosecutors' decision to indict her under § 2339A but not to indict Ramsey Clark (another one of Abdel Rahman's attorneys who allegedly engaged in activity similar to Stewart's) is evidence that § 2339A is prone to arbitrary enforcement. Stewart Br. 174-75. But evidence that prosecutors exercised discretion not to seek an indictment in another case is not evidence that a statute is prone to arbitrary and discriminatory enforcement, at least not in the absence of vague statutory wording. As noted above, the meaning of the word "personnel" is sufficiently clear, particularly when coupled with a strict scienter requirement, to provide adequate standards for enforcement. Moreover, prosecutors have pointed to a major factual difference between Ramsey Clark's conduct and that of Stewart: unlike Stewart, he refused Abdel Rahman's request that he announce publicly that Abdel Rahman had withdrawn

his support for the cease-fire. While Clark allegedly passed along other information communicated to him by Abdel Rahman, word that Abdel Rahman was encouraging a resumption of terrorist activity within Egypt was the information most likely to advance the Count II conspiracy. The decision not to prosecute Clark under § 2339A is fully explainable by that factual distinction.

II. PROSECUTION OF STEWART AND YOUSRY UNDER § 2339A DOES NOT VIOLATE THEIR FIRST AMENDMENT RIGHTS

Stewart also contends that her conduct amounted to nothing more than the facilitation of Abdel Rahman's speech and, as such, is protected by the First Amendment. She insists that Abdel Rahman's speech cannot "constitute the substance of the offense" with which she is charged, in the absence of evidence from the government that his speech was "directed to inciting or producing imminent lawless action and [was] likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Stewart seem to be working under the assumption that any expressive conduct that takes the form of language is entitled to absolute constitutional protection, and that the government is permitted to do no more than make use of speech as evidence of some nonspeech misconduct. Stewart Br. 60. That assertion has never been accepted by the courts in this country. As Justice

Black, never known to be shy in espousing broad First Amendment protections, wrote more than 50 years ago in rejecting a First Amendment challenge to an injunction forbidding union picketing:

> It is true that the agreements and course of conduct here were in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech to make a course of conduct illegal merely because the conduct was initiated, evidenced, or carried out by means of language, either spoken, written, or printed.

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

Similarly, this Court has held:

> It rarely has been suggested that the constitutional freedom of speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. Put another way, speech is not protected by the First Amendment when it is the very vehicle of the crime itself. *E.g.*, 18 U.S.C. §§371-372 (1964) (Conspiracy).

United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir. 1990) (internal citations omitted).

The United States introduced evidence that the speech by Taha, Sattar, and Abdel Rahman was part of a conspiracy to murder and kidnap persons in a foreign country. Because that speech was an integral part of a criminal conspiracy, it is entitled to no First Amendment protection. Actions taken by Stewart and Yousry to facilitate that conspiratorial speech thus cannot possibly lay claim derivatively to First Amendment protection. As this Court held in

upholding Abdel Rahman's seditious conspiracy conviction, "Words of this nature – ones that instruct, solicit, or persuade others to commit crimes of violence – violate the law and may properly be prosecuted regardless of whether they are uttered in private, or in a public speech, or in administering the duties of a religious ministry." *United States v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000).

Had Abdel Rahman merely requested on his own that Stewart and Yousry publicize his calls to violence, then Appellants might have had a valid First Amendment defense. Under those circumstances, the government could not prosecute Abdel Rahman and Appellants without meeting the demanding standard imposed by *Brandenburg* for suppression of speech that incites violence. But the evidence showed that Abdel Rahman's speech was, instead, part of an on-going criminal conspiracy and was in response to letters addressed to him by his co-conspirators. *See, e.g., United States ex rel. Epton v. Nenna*, 446 F.2d 363, 368 (2d Cir. 1971) (when a defendant is convicted of conspiracy to commit an unlawful act, "it is not the speech that is made criminal, but rather the agreement, and whether the overt act is constitutionally protected speech would be irrelevant"). Accordingly, Stewart and Yousry cannot lay claim to First Amendment protection for their roles in facilitating and concealing that speech.

Congress has determined that international terrorism "threatens the vital interests of the United States" and that direct material support to international terrorist groups must be prohibited because *any* such support to terrorist groups facilitates their terrorism. *See* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-243, Title III, Subtitle A, § 301(a)(1) & (7), 110 Stat. 1247, *codified at* 18 U.S.C. § 2339B *note*. Some – including the district court in this case – have expressed concern that such prosecutions under § 2339B can raise serious First Amendment issues because they could be used to prosecute those who advocate in support of a designated terrorist group without any understanding that their advocacy actually assists the group in carrying out its mission of terrorism. But a prosecution under § 2339A – with its strict scienter requirement – raises no such concerns. Criminal liability is reserved for those, such as Stewart and Yousry, who engage in speech-related activity with full knowledge that their activity is providing material support that is to be used in preparing for or carrying out significant criminal activity.

CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court affirm the judgment of the district court.

Respectfully submitted,

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Dated: October 12, 2007

CERTIFICATE OF COMPLIANCE

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Richard A. Samp

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