

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ERIC H. HOLDER, JR., :

4 ATTORNEY GENERAL, ET AL., :

5 Petitioners : No. 08-1498

6 v. :

7 HUMANITARIAN LAW PROJECT, ET AL. :

8 - - - - - x

9 And

10 - - - - - x

11 HUMANITARIAN LAW PROJECT, ET AL., :

12 Petitioners :

13 v. : No. 09-89

14 ERIC H. HOLDER, JR., :

15 ATTORNEY GENERAL, ET AL. :

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17 Washington, D.C.

18 Tuesday, February 23, 2010

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20 The above-entitled matter came on for oral
21 argument before the Supreme Court of the United States
22 at 10:09 a.m.

23 APPEARANCES:

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1 P R O C E E D I N G S

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 08-1498,
5 Holder v. Humanitarian Law Project and the
6 cross-petition.

7 Mr. Cole.

8 ORAL ARGUMENT OF DAVID D. COLE
9 ON BEHALF OF HUMANITARIAN LAW PROJECT, ET AL.

10 MR. COLE: Mr. Chief Justice, and may it
11 please the Court:

12 This as-applied challenge asks whether the
13 government can make it a crime for Ralph Fertig and the
14 Humanitarian Law Project to speak in association with
15 the Kurdistan Workers Party. Specifically, they seek to
16 advocate for legal reform in Congress and the UN, to
17 write and distribute articles supportive of Kurdish
18 rights, to inform the Kurds of their international human
19 rights and remedies, and to advise them on peaceful
20 conflict resolution. It is undisputed that the
21 Kurdistan Workers Party engages in a wide range of
22 lawful activities and that plaintiffs seek to support
23 only lawful ends.

24 The government has a concededly compelling
25 interest in combatting terrorism, yet it has not even

1 tried to defend these prohibitions under strict
2 scrutiny. Instead, it rests its entire case on the
3 proposition that criminalizing plaintiffs' speech is a
4 regulation of conduct, not speech, and therefore can be
5 upheld under O'Brien.

6 That view is mistaken for two fundamental
7 reasons. First, as this Court has already held, O'Brien
8 is inapplicable where the government prohibits pure
9 speech --

10 JUSTICE STEVENS: But, Mr. Cole, don't you
11 agree that some of the speech could be regulated?

12 MR. COLE: Some of my clients' speech?

13 JUSTICE STEVENS: Some of the speech of your
14 client.

15 MR. COLE: I don't think -- I don't think
16 any of it could be prohibited, Your Honor, unless the
17 government can satisfy the stringent scrutiny that this
18 Court applies when Congress seeks to prohibit pure
19 speech. So, no, I don't -- I --

20 JUSTICE STEVENS: You think all of the speech at
21 issue is protected?

22 MR. COLE: I think that certainly all of the
23 speech that I've just identified, which is the core --

24 JUSTICE STEVENS: You identified quite a
25 bit.

1 MR. COLE: Right. Yes. It's core -- and
2 I think the reason, Your Honor, is it is core political
3 speech on issues of public concern. It is advocating
4 only lawful, peaceable activities. This Court has never
5 upheld the criminal prohibition of lawful speech on
6 issues of public concern.

7 JUSTICE KENNEDY: Well, could the
8 government, I assume -- I assume you will say "yes" --
9 could the government forbid any NGO or other
10 organization or person from giving tsunami aid to one of
11 these organizations, from giving them money?

12 MR. COLE: I think money is different, Your
13 Honor.

14 JUSTICE KENNEDY: Could they -- could the
15 government prohibit that?

16 MR. COLE: I think money is different
17 because it's -- it's conduct, not speech.

18 JUSTICE KENNEDY: Okay. Let's assume the
19 government could prohibit that. Then the next question
20 is: Could the government prohibit speech instructing
21 the terrorist organization how to get the tsunami aid?

22 MR. COLE: Right. And I think -- - I think,
23 Your Honor, that the answer is no, for the -- unless the
24 government can meet the higher standard of scrutiny that
25 applies when you're regulating speech.

1 JUSTICE KENNEDY: Brandenburg?

2 MR. COLE: Well, I don't know whether it
3 would necessarily be Brandenburg. I think for -- in
4 order to apply -- to decide this case, Your Honor,
5 all the Court has to find is that when the speech
6 advocates solely lawful, peaceable activities of the
7 sort advocated here, that's not sufficient. I think
8 specific -- we've suggested a specific intent standard,
9 which is lower than Brandenburg, would be appropriate --

10 JUSTICE KENNEDY: But -- but if you get
11 tsunami money, that frees up your other assets for
12 terrorist money. So why can't the government forbid
13 teaching how to get that money?

14 MR. COLE: Well, again, Your Honor, that --
15 if the government -- if the connection between the
16 speech and the government's concern were sufficiently
17 close, then maybe it could. But the problem --

18 JUSTICE SOTOMAYOR: So why can't there
19 be --

20 JUSTICE KENNEDY: Then what's the test?
21 Is it -- you say it's not Brandenburg?

22 MR. COLE: I think the test is whether the
23 -- whether the speech -- when it's speech, I think the
24 test is whether the speech has been provided with
25 specific intent or knowledge that it will further

1 unlawful, terrorist ends of the group.

2 CHIEF JUSTICE: What if it goes --

3 JUSTICE ALITO: And that applies --

4 CHIEF JUSTICE ROBERTS: What if it goes to
5 the mere existence of a group? Let's say you have the
6 Nazi Party, and you are talking about advice or speech on
7 some purely mundane issue. The Nazis have a hospital,
8 and you are giving them advice on how to run a
9 hospital, but the government decides that anything that
10 legitimizes the Nazi Party, you know, promotes that
11 group's terrorist activities. Can the government make
12 that kind of determination?

13 I'm thinking of something like *Regan v.*
14 *Wald* --

15 MR. COLE: Right.

16 CHIEF JUSTICE ROBERTS: -- where they say,
17 look, you can't travel to Cuba because we don't want to
18 do anything that legitimizes the regime.

19 MR. COLE: Right. Well, two answers.

20 Does your question refer to the Nazi Party
21 today or the Nazi Party during World War II?

22 CHIEF JUSTICE ROBERTS: No, I meant during
23 World War II.

24 MR. COLE: Okay.

25 CHIEF JUSTICE ROBERTS: I'm just trying to find

1 an example that doesn't implicate the particulars of
2 the issue today.

3 MR. COLE: Right, right. So I think -- the
4 reason I ask, Your Honor, is that it may make a
5 difference if we are at war. The law of treason
6 prohibits aid --

7 CHIEF JUSTICE ROBERTS: No, I didn't -- my
8 hypothetical was confusing. I didn't mean to suggest we
9 were at war.

10 MR. COLE: Okay.

11 CHIEF JUSTICE ROBERTS: I meant to hypothesize
12 a group that the government could reasonably determine
13 should not be supported in any way --

14 MR. COLE: Right.

15 CHIEF JUSTICE ROBERTS: -- because it
16 legitimizes it. It's going to make their hospital run
17 better. People are going to like their hospital. So
18 the party, the group, will be legitimized.

19 MR. COLE: Right. Well, I think all the
20 Court held in *Regan* and *Zemel* was that it is permissible
21 for the government to regulate conduct -- not speech --
22 travel, and economic transactions, not speech. Those
23 were essentially *O'Brien* cases.

24 And, in fact, in *Regan* the Court
25 distinguished a prohibition on travel to Cuba across the

1 board from a prohibition directed at a group, the
2 Communist Party, in the Kent and Aptheker cases, where
3 the Court held that --

4 JUSTICE GINSBURG: But if you can't travel
5 there -- suppose you want to travel there so that you can
6 meet with and discuss lawful activities with people
7 there. If you can't get there, you can't speak.

8 MR. COLE: That's right, Your Honor. But
9 that -- but that's essentially an O'Brien situation.
10 The prohibition is on a conduct, whether it's
11 draft card burning or travel. The individual who seeks
12 to engage in that conduct says, I want to do it for
13 speech purposes. But the Court says the government has
14 a freer hand in regulating conduct than speech, and,
15 therefore, as long as you're regulating the
16 non-expressive element of the conduct, we'll apply
17 O'Brien. But what this Court has said is that when --

18 JUSTICE SOTOMAYOR: Could the government
19 stop you from meeting anywhere with the terrorists?

20 MR. COLE: From meeting? No, I don't think
21 --

22 JUSTICE SOTOMAYOR: Just meeting, traveling
23 to one of these countries to actually do your teaching
24 to a terrorist -- let's say the law said you're
25 prohibited from traveling to meet any of these

1 individuals. How would that be different than the Cuba
2 situation?

3 MR. COLE: Well, then, if it's -- if it's
4 traveling for the purpose of association, then it would
5 be targeted at association, not at the conduct of
6 travel. The whole --

7 JUSTICE SOTOMAYOR: But it's no different
8 than the Cuba situation.

9 MR. COLE: No, but the whole point of the
10 Cuba -- the Cuba travel cases is that -- again, as this
11 Court said, it was an across-the-board ban. It did not
12 apply to different political groups. It applied to
13 anyone who sought to travel to Cuba. And it was about
14 travel.

15 JUSTICE KENNEDY: Well, suppose it's a ban
16 just for travel to meet with terrorist organizations,
17 Justice Sotomayor's hypothetical.

18 MR. COLE: Right. Well, then I think -- I
19 think that's -- that's different from this case, right,
20 because this case -- suppose it's a ban on speech
21 wherever it occurs.

22 JUSTICE KENNEDY: But what about the -- what
23 about the hypothetical?

24 MR. COLE: Right. Well, with respect to the
25 hypothetical, I think the question, Your Honor, would be

1 whether the government's interest in banning that travel
2 is unrelated to the associational or speech purposes.

3 JUSTICE KENNEDY: It's what the Chief
4 Justice says: In any context, support ultimately will
5 inure to the benefit of a terrorist organization, and we
6 have a governmental interest in not allowing that.

7 MR. COLE: There's no -- there's no dispute,
8 Your Honor, that the government has a compelling interest
9 in cutting off aid to terrorism. The question is whether
10 it can do so by criminalizing pure speech.

11 JUSTICE SCALIA: Well, it hasn't criminalized
12 speech. It has criminalized providing aid and
13 assistance to these organizations. Most of that aid and
14 assistance that is prohibited is not in the form of
15 speech, but it happens to include speech as well.

16 MR. COLE: Right, but, Justice Scalia --

17 JUSTICE SCALIA: I think that's quite
18 different from a law that is directed explicitly at
19 speech.

20 MR. COLE: Well, I don't -- I think it's not
21 in this -- in this sense, Justice Scalia. Imagine a
22 statute that banned aid to overthrow the United States
23 Government. And it had three provisions: One, you can't
24 assassinate the president; two, you can't provide bombs and
25 weapons to groups attempting to overthrow the government;

1 three, you can't advocate overthrow of the government.
2 If that were applied to someone for speaking in advocacy,
3 we wouldn't say it's a regulation of speech.

4 JUSTICE SCALIA: That's not the right --
5 that's not the right number three. The right number
6 three is you cannot advise and assist an organization
7 that is seeking to overthrow the government. That's
8 what is at issue here, not --

9 MR. COLE: Well, but --

10 JUSTICE SCALIA: -- not independently promoting
11 the objectives of these terrorist organizations. Your --
12 your clients are free to do that.

13 MR. COLE: Well --

14 JUSTICE SCALIA: But when they assist
15 the organization by providing advice, that's a different
16 matter.

17 MR. COLE: Well, the government says if
18 they -- even if they speak in conjunction with the group,
19 they -- and they're providing a benefit to the government,
20 that's prohibited. So, for example --

21 JUSTICE SCALIA: Okay. When they provide a
22 benefit, right?

23 MR. COLE: So, for example, under that view,
24 the New York Times, the Washington Post, and the L.A. Times,
25 all of which published op-eds by Hamas spokespersons --

1 Hamas is on the list -- thereby providing a benefit to
2 Hamas, working with the Hamas spokesperson, they're all
3 criminals. President Carter --

4 JUSTICE SCALIA: Well, we -- we can cross
5 that bridge when we come to it.

6 MR. COLE: But --

7 JUSTICE SCALIA: This is an as-applied
8 challenge, and we are talking about the kind of advice
9 and assistance that your clients want to give.

10 MR. COLE: Right, and, Your Honor, there's
11 no --

12 JUSTICE SCALIA: It's not a New York Times
13 editorial.

14 MR. COLE: Well, it is, though. It is, Your
15 Honor. I mean, it's -- Ralph Fertig is not the New York
16 Times, and he's not President Carter, but it's the same
17 sort of support, right? President Carter --

18 JUSTICE KENNEDY: No, no. No, no. I thought
19 that he was -- he wants to meet with the people. The
20 New York Times didn't meet with Hamas to tell them how
21 great their editorial was.

22 MR. COLE: No, but it's not about -- it's
23 not about whether you meet with them. It's about
24 whether you coordinate with them, and they've certainly
25 coordinated with the Hamas spokesperson in editing and

1 accepting and then publishing his editorial. That is --
2 that would be providing a service. It would --

3 JUSTICE SCALIA: It depends on what
4 "coordinating" means, doesn't it? And we can determine
5 that in the next case.

6 MR. COLE: Well, let me -- let me also
7 answer it this way, Justice Scalia: If you look at the
8 specific speech which our clients seek to engage in, it
9 includes writing and distributing literature in
10 conjunction with the Kurdistan Workers Party in the
11 United States advocating their support. How is that
12 different from the New York Times?

13 JUSTICE BREYER: Supposing that -- what you
14 say is you want to engage in political advocacy on
15 behalf of the Kurds. That's your words. All right.
16 Suppose -- and these are two hypotheticals. Hypothetical
17 one, your clients, let's say, or some other people,
18 know that what the Kurds' hypothetical plan is, is to
19 pretend they're a political advocacy organization,
20 but to go around shooting the people who don't agree
21 with them. Okay? Case one, the hypothetical defendant
22 knows it. In case two, he doesn't know it, but it's true.

23 MR. COLE: Well, I think -- I think if
24 you -- if you specifically intend and know that your aid
25 will further the group in its terrorist activities, then

1 it's not protected speech. But if you're -- if you
2 don't know that and you don't intend that, and in this
3 case --

4 JUSTICE ALITO: And that goes for all forms of
5 training? No form of training or expert assistance can
6 be prohibited unless the individual specifically intends
7 to further -- that the training will be used to carry
8 out terrorist activities?

9 MR. COLE: Well, Justice Alito, this is an
10 as-applied challenge. So the question simply is whether
11 training in what international human rights consist of,
12 in how to advocate for international human rights, and
13 how to advocate politically in Congress and other bodies.
14 That's the speech that's at issue here.

15 JUSTICE ALITO: Well, just out of curiosity,
16 I thought your position was that no form of training or
17 assistance could be prohibited -- -

18 MR. COLE: No, I was just --

19 JUSTICE ALITO: -- consistent with the First
20 Amendment. That's not your position?

21 MR. COLE: No. I think -- I think, again,
22 it depends upon the form of speech. There may be some forms
23 of training that are so closely connected to the -- to
24 the end that Congress seeks to -- legitimately seeks to
25 proscribe, like training in bombmaking or training in

1 military exercises.

2 JUSTICE SCALIA: The end that Congress seeks
3 to proscribe is the existence of these terrorist
4 organizations. And the theory of the legislation is
5 that when you aid any of their enterprises you're
6 aiding the organization. Hamas, for example, gained
7 support among -- among the Palestinians by activities
8 that are perfectly lawful, perhaps running hospitals,
9 all sorts of things.

10 MR. COLE: Right.

11 JUSTICE SCALIA: But that is what fosters the
12 terrorist organization and enables the terrorist
13 activities. Why isn't that a reasonable connection?
14 Any assistance you provide to these organizations cannot
15 be separated from assistance to their terrorist
16 activities.

17 MR. COLE: Right. Well, Your Honor,
18 that is precisely the argument that the United States
19 made to this Court in Scales. And here I'm quoting
20 from the government's brief: "Active membership can be
21 proscribed even though the activity be expended along
22 lines not otherwise illegal, since active support of any
23 kind aids the organization in achieving its own illegal
24 purposes."

25 That was with respect to an organization

1 that Congress spent 10 years studying, made findings
2 that it was an international conspiracy directed and
3 controlled by the Soviet Union with the aim of
4 overthrowing the United States by force and violence,
5 using terrorism. And, nonetheless, this Court in Scales
6 held you've got to distinguish between that aid and
7 support and membership which is furthering the lawful
8 activities and that which is furthering the illegal
9 activities; otherwise you are penalizing the exercise of
10 lawful speech. The Court said the same thing in De
11 Jonge.

12 JUSTICE GINSBURG: Mr. Cole, as I remember,
13 Scales upheld a conviction, wasn't --

14 MR. COLE: It did, Justice Ginsburg, but
15 only because it interpreted the statute to be -- to be
16 limited to specific -- to members -- active membership
17 that is specifically intended to further the illegal
18 ends of the group, precisely --

19 JUSTICE KENNEDY: But it didn't -- it was not
20 a statute which involves banning financial or other tangible
21 support, and page 17 of your brief made -- this is a
22 difficult case for me. And the second paragraph, page
23 17, you say: "The narrow focus of plaintiffs' claims in
24 this Court means that the case does not involve the
25 propriety of banning financial or other tangible

1 support."

2 MR. COLE: Right.

3 JUSTICE KENNEDY: Then you say: "Nor does it
4 involve speech advocating or teaching criminal or violent
5 activity."

6 But it does involve speech, let's say arguendo,
7 that is tantamount to material support.

8 MR. COLE: Well, I -- right, but --

9 JUSTICE KENNEDY: Suppose the speech is
10 tantamount to material support in that it legitimizes,
11 encourages, or strengthens the organization.

12 MR. COLE: Well, two things in response to
13 that, Justice Kennedy. First, that is what the United
14 States argued in Scales. And, again, the Court, not only
15 in Scales but in a host of cases striking down
16 Communist Party statute, said you have to distinguish
17 between aid that's intended to further lawful activity
18 and aid that's intended to further illegal activity
19 when it's in the form of protected activity --
20 association, here speech and association.

21 And, secondly --

22 JUSTICE STEVENS: In those cases, the real
23 question was whether membership was enough, wasn't it?

24 MR. COLE: Active membership --

25 JUSTICE STEVENS: Yes.

1 MR. COLE: -- which the government says
2 constitutes more than mere nominal membership.

3 JUSTICE KENNEDY: And this is support. It's
4 different.

5 MR. COLE: Well, Your Honor, in De Jonge,
6 one of these cases, one of this Court's first First
7 Amendment cases, the government argued that Mr. De Jonge
8 aided the Communist Party in its illegal ends by
9 conducting a meeting for them and being their lead
10 speaker at the meeting. And this Court said: We've got
11 to look at what he did, and what -- yes, he conducted the
12 meeting; yes, he was a member of the Communist Party;
13 yes, he solicited people to join the Communist Party.
14 But what did he do? He advocated lawful peaceable
15 activities. And this Court said --

16 JUSTICE KENNEDY: But there wasn't a statute
17 on the books that prohibited material support --

18 MR. COLE: Well, I don't think it would --

19 JUSTICE KENNEDY: And here there is, and this
20 is in aid of that prohibition.

21 MR. COLE: Right, but Your Honor, what would
22 -- if Congress came along after the Communist Party cases
23 and said, okay, you've said we can't make it a crime to
24 criminalize membership in the Communist Party; we are
25 now going to make it a crime to speak in conjunction

1 with the Communist Party -- do you think the
2 decisions would have come out any differently?
3 I don't think so, because this Court has said that
4 speech is different from money, that it --

5 JUSTICE SCALIA: I think it's very
6 unrealistic to compare these terrorist organizations
7 with the Communist Party. Those cases involved
8 philosophy. The Communist Party was -- was -- was more
9 than a -- than an organization that -- that had some
10 unlawful ends. It was also a philosophy of -- of -- of
11 extreme socialism. And -- and many people subscribed to
12 that philosophy.

13 I don't think that Hamas or any of these
14 terrorist organizations represent such a philosophical
15 organization.

16 MR. COLE: Your Honor, this -- this Court
17 accepted Congress's findings. Congress's findings were
18 not that this was a philosophical debating society, but
19 that it was an international criminal conspiracy
20 directed by our enemy to overthrow us through terrorism.

21 JUSTICE SCALIA: That may be, but people
22 joined it for philosophical reasons.

23 MR. COLE: Oh, sure --

24 JUSTICE SCALIA: They joined it for
25 philosophical reasons. These terrorist organizations

1 have very practical objectives. And the only reason for
2 joining them or assisting them is to assist those
3 practical objectives.

4 MR. COLE: Well, I don't think that's -- I
5 don't think that's fair, Justice Scalia. The
6 Humanitarian Law Project has no interest in furthering
7 terrorism, but the Kurdistan Workers Party are the
8 principal representatives of the -- of the Kurds in
9 Turkey. They do have an interest in protecting the
10 rights of the Kurds. They do have an interest in
11 encouraging the Kurdistan Workers Party to -- to disavow
12 violence and engage in lawful peaceful means of
13 resolving their disputes --

14 JUSTICE SOTOMAYOR: Mr. Cole --

15 JUSTICE GINSBURG: Mr. Cole, would you
16 distinguish -- I think this came up in the court of
17 appeals. There are a lot of groups on the list. I
18 think the Al-Qaeda was one instance that was mentioned,
19 and, at least according to the briefs, you conceded that
20 if you wanted to do just what you describe with respect
21 to the Kurdish group or the Tamil group, the ban would
22 be permissible, if the group -- if the group were Al-Qaeda,
23 and I'll throw in the Taliban.

24 MR. COLE: Yes. We didn't actually concede
25 that, Your Honor. That's a misstatement on the part of

1 the government. If you look at the --

2 JUSTICE GINSBURG: Well, then -- then as --
3 suppose the group is not the two that we have here --

4 MR. COLE: Right.

5 JUSTICE GINSBURG: -- but Al-Qaeda and
6 the Taliban?

7 MR. COLE: Right. What we said, for the
8 record, is that it would pose a very different
9 constitutional question. And I think there are two
10 reasons why it might pose a different constitutional
11 question. One is -- and that was -- I'm picking up on my
12 question back to Mr. Chief Justice, is it during wartime
13 or not? And during wartime, Congress has broader powers
14 pursuant to the treason --

15 JUSTICE STEVENS: But I want to be sure I
16 understand that point. You think the issue in this case
17 would be different if we were at war?

18 MR. COLE: I think it might be different if
19 we were at war with these groups.

20 JUSTICE STEVENS: And if that's true, why
21 aren't we now at war, with regard to our opposition to
22 these organizations?

23 MR. COLE: Well --

24 JUSTICE STEVENS: What is the difference,
25 as a practical matter?

1 MR. COLE: Well -- well, two things, Your
2 Honor. With respect to -- it might be different if
3 you -- if you're talking about treason. Tokyo Rose,
4 for example, was engaged in speech, but she was doing so
5 with -- with the purpose of aiding the enemy and the
6 specific intent of betraying the United States. And
7 that's what's required. And what the Supreme Court has
8 said is that the -- the aid has to be to --

9 JUSTICE STEVENS: But my question that I
10 want to be sure you are focusing on --

11 MR. COLE: Yes.

12 JUSTICE STEVENS -- but in the issues in this
13 very case --

14 MR. COLE: Right.

15 JUSTICE STEVENS: -- would they be different
16 if we were now at war?

17 MR. COLE: I think it would depend, Your
18 Honor, because the -- what -- what treason requires is
19 aid to the enemy, and aid might be in the form of speech.
20 But it also requires a specific intent to betray the
21 United States. And when you aid someone with whom we
22 are at war, there is an -- there may well be an intent
23 to betray the United States. There is no betrayal of
24 the United States here.

25 And, number two --

1 JUSTICE SCALIA: Well, in a way there is.
2 What about -- what about aiding organizations that are
3 acting criminally, killing innocent civilians, with regard
4 to one of our allies? And we're seeking to gain the
5 assistance of these allies against those terrorists who
6 aim their terrorism at us, and yet --

7 MR. COLE: Right.

8 JUSTICE SCALIA: -- we -- we are supposed to
9 allow our citizens to assist the terrorist organizations
10 that are directing their violence against them?

11 MR. COLE: Well --

12 JUSTICE SCALIA: Why isn't that a
13 sufficiently serious reason for the government to do
14 what it's done here?

15 MR. COLE: I think the question, Your Honor,
16 is there -- is there any realistic nexus between writing
17 an op-ed, advocating before Congress, urging a group to
18 use lawful nonviolent means to resolve its disputes, and
19 killing Americans? And there just isn't.

20 CHIEF JUSTICE ROBERTS: Well, you've
21 picked -- you've picked hypotheticals that are very easy
22 for you. What about personnel? Is there a connection
23 between providing personnel that participate in legal
24 activity on behalf of a terrorist organization, and the
25 organization can then say, well, because you are

1 providing this personnel, we can take them out and shift
2 them to bombmaking?

3 MR. COLE: Right. And -- and -- and I guess
4 my answer to that would be it would depend upon whether
5 the -- the -- what is being prohibited is speech. If
6 what is being prohibited is speech, I'm not sure that it
7 would be permissible for the government to say we're
8 going to criminalize your speech, even though it's
9 advocating lawful activities, because --

10 CHIEF JUSTICE ROBERTS: Well, one of the
11 things that's being prohibited here that you challenge
12 is providing personnel.

13 MR. COLE: That's right. And -- and that's
14 exactly what De Jonge was essentially charged with. And
15 the Communist Party was, again, found to be engaged in
16 criminal activity, to be a criminal syndicate,
17 essentially, by the Oregon statute. The Court didn't
18 question that. At that time it was illegal to even
19 advocate illegal activity.

20 He was charged with providing his person,
21 personnel, by conducting a meeting under the auspices of
22 the Communist Party and providing the lead speech there.
23 And the Court said, even though the argument was --

24 CHIEF JUSTICE ROBERTS: Well, is your
25 argument limited to personnel that engages in speech, or

1 does it cover personnel that -- a nurse at one of the --
2 if there are any, Hamas hospitals?

3 MR. COLE: Right. Our argument, Your Honor,
4 is -- again, this is an as-applied challenge with respect to
5 the particular speech that our clients seek to engage in,
6 so it would not -- it would not require the Court to
7 decide whether any nonspeech assistance could be
8 proscribed. In fact --

9 JUSTICE SOTOMAYOR: When -- but the way you
10 define the speech that you want protected is speech that
11 is advocating some lawful activity.

12 MR. COLE: Right.

13 JUSTICE SOTOMAYOR: So what's unlawful
14 about teaching people medicine and how to cure people
15 from infection?

16 MR. COLE: If -- if that were what they were
17 doing, Your Honor, if it was teaching, then it would be
18 protected by the First Amendment. But if -- I took
19 Chief Justice Roberts's question --

20 JUSTICE SOTOMAYOR: So you see no
21 difference -- you're not advocating a difference in
22 this case between training that could reasonably be used
23 in terrorist activities, because teaching people how to
24 care for the ill could be used to teach people how to
25 care for the wounded.

1 MR. COLE: Right. Right.

2 JUSTICE SOTOMAYOR: All right? And the
3 political speech that your group is advocating, i.e.,
4 the petitioning -- you're not willing to draw a
5 distinction?

6 MR. COLE: No, no. I --

7 JUSTICE SOTOMAYOR: You are saying to us the
8 case stands and falls on whether or not we accept that
9 this statute regulates conduct as opposed to speech?

10 MR. COLE: No. Justice Sotomayor, what I'm
11 suggesting is, number one, the statute regulates speech.
12 It regulates speech because of what it conveys.
13 Therefore, the --

14 JUSTICE SOTOMAYOR: No, it regulates
15 training. And what -- the question I asked you --

16 MR. COLE: Yes.

17 JUSTICE SOTOMAYOR: -- was whether there was
18 a way in your challenge, or whether you are advocating
19 any difference in the nature of the speech, that it's --
20 this is an as-applied challenge.

21 MR. COLE: Yes. Exactly. And that's --

22 JUSTICE SOTOMAYOR: And so the question --
23 because the only answer you have given us is if it's
24 lawful speech, it's protected.

25 MR. COLE: No, I -- I think -- I think, Your

1 Honor, that the answer -- maybe I wasn't clear in
2 responding to Justice Alito. But with respect to speech
3 advocating solely lawful activity of the type at issue
4 here, I think the connection between the government's --

5 JUSTICE SOTOMAYOR: So give me an analytical
6 framework to address that question.

7 MR. COLE: All right. Well, I --

8 JUSTICE SOTOMAYOR: The government says
9 under O'Brien even the speech that you want -- forget
10 about the tsunami aid speech. Let's just talk about the
11 political petitioning speech, the petitioning for --

12 MR. COLE: Right.

13 JUSTICE SOTOMAYOR: Is there a difference
14 and under what analytical framework would we reach it?

15 MR. COLE: Well, I think the question -- the
16 question at the -- at the -- at the bottom would be
17 whether there is a sufficient connection between the
18 speech which is being expressed and the government's
19 compelling interest. And if -- certainly there would be
20 if it's -- meets Brandenburg. I think there might be if
21 it is specifically intended or known that it will further
22 terrorist activity. But where -- with respect to our
23 speech, there's really no realistic likelihood that the
24 speech that's being expressed here will further --

25 JUSTICE KENNEDY: We have to be conscious of

1 the white light. I have just one -- one question.

2 The old equity rule was that you don't
3 enjoin a criminal statute; you wait until something
4 happens. And the reason is then we have specific facts.
5 And if we said that here, you would say, oh, you're
6 chilling speech.

7 What's your best case in the precedents of
8 this Court for our entertaining an challenge that --
9 this is not really -- we usually talk about as-applied
10 after the fact. Coates, there was a conviction.

11 MR. COLE: Right. Federal Election --

12 JUSTICE KENNEDY: What's your -- what's your
13 best case?

14 MR. COLE: Federal Election Commission v.
15 Wisconsin Right to Life was a pre-enforcement,
16 as-applied challenge to the provisions of the BCRA.

17 If I could reserve the rest of my time.

18 JUSTICE GINSBURG: Do you want to give an
19 answer to the Taliban and the Al-Qaeda?

20 MR. COLE: Oh, I'm sorry -- I'm sorry,
21 Justice Ginsburg. I thought I was, and maybe --
22 but the answer would be we are in a military conflict
23 with the Al-Qaeda and the Taliban. This Court has
24 recognized that. It's authorized by the authorization
25 to use military force. Therefore, treason law might be

1 applicable, number one.

2 Number two, it's not clear that the Al-Qaeda
3 engages in any lawful activities at all, and the -- the
4 principle this Court established with respect to the
5 Communist Party, a group that clearly engaged in illegal
6 activities of a very, very dangerous kind, but also
7 engaged in lawful activities, is that that's -- that that
8 the group has to be a dual-purpose group. And here
9 there's absolutely no dispute that the Kurdistan
10 Workers Party and the LTTE engage in a wide variety of
11 lawful activities and that all our clients seek to do
12 is support those lawful activities. Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cole.
14 General Kagan.

15 ORAL ARGUMENT OF GEN. ELENA KAGAN

16 ON BEHALF OF ERIC H. HOLDER, JR., ET AL.

17 GENERAL KAGAN: With your permission,
18 Mr. Chief Justice. This may take some time.

19 (Laughter.)

20 GENERAL KAGAN: I'm sure it will on the
21 other side, too.

22 Mr. Chief Justice, and may it please the
23 Court:

24 The material support statute is a vital
25 weapon in this nation's continuing struggle against

1 international terrorism. The statute prohibits, in
2 terms that ordinary people can understand, the provision
3 of material resources, material resources of all kinds,
4 to foreign groups that engage in terrorist acts that
5 threaten the security of the United States or its
6 citizens.

7 The statute does not prohibit in any way
8 Petitioners' independent advocacy. Petitioners can say
9 or write whatever they wish about the PKK or the LTTE,
10 and all their activities both legal and illegal. What
11 Petitioners --

12 JUSTICE SOTOMAYOR: If a terrorist was
13 arrested in the United States from one of these groups,
14 would they be barred under the statute from serving as
15 their attorney in a U.S. court?

16 GENERAL KAGAN: Justice Sotomayor, if -- if
17 there are --

18 JUSTICE SOTOMAYOR: Isn't that material
19 support under the definition that you have been
20 advocating?

21 GENERAL KAGAN: Justice Sotomayor, I believe
22 that that would be excluded from the statute -- should be
23 excluded from the statute, and indeed even Petitioners
24 have never suggested --

25 JUSTICE SOTOMAYOR: No, but I'm asking you why.

1 GENERAL KAGAN: Because I think that there
2 the canon of constitutional avoidance would clearly come
3 into play. If there is a criminal defendant, even a
4 civil defendant where there may be Sixth Amendment
5 issues, where there may be due process issues, it
6 would --

7 JUSTICE SOTOMAYOR: And so can I -- can I
8 ask you something? I mean, part of the First Amendment
9 is the right for the -- to petition the government for
10 redress of grievances. Putting aside all of the other
11 aid they are claiming, the tsunami aid, the training and
12 other things, can the statute constitutionally be read
13 to bar them from petitioning legitimate agencies,
14 legitimate government agencies, to peacefully, using the
15 words of the Constitution, to effect legal change?

16 GENERAL KAGAN: It can --

17 JUSTICE SOTOMAYOR: And that -- that's part of
18 what they're claiming their speech involves --

19 GENERAL KAGAN: The statute --

20 JUSTICE SOTOMAYOR: -- training and doing
21 that.

22 GENERAL KAGAN: The statute cannot
23 legitimately be read to -- to include their independent
24 advocacy. But the statute, in fact, does not cover their
25 independent advocacy. Judge Fertig and all the rest of

1 the Petitioners can lobby Congress, can lobby
2 international organizations --

3 JUSTICE SOTOMAYOR: But that doesn't --

4 GENERAL KAGAN: -- as they see fit.

5 JUSTICE SOTOMAYOR: -- answer -- what is the
6 right of the people peaceably to assemble? Now, mind
7 you, I understand this is the right of U.S. citizens in
8 the United States. But what in the First Amendment or
9 even in this statute could justify Congress from barring
10 individuals to petition peacefully United -- world
11 agencies or even U.S. agencies --

12 GENERAL KAGAN: Again, the statute --

13 JUSTICE SOTOMAYOR: -- for the recognition
14 of a -- of a legitimate goal?

15 GENERAL KAGAN: Again, the statute does not
16 prohibit the Petitioners from petitioning peacefully.
17 What the statute does is to prohibit Petitioners from
18 giving support to foreign terrorist organizations in
19 their ability to petition international organizations.
20 And that's a very different thing. It's a different
21 thing for several reasons.

22 First, remember that these are foreign
23 organizations, and as several of you have suggested, the
24 ability of Congress and of the Executive Branch to
25 regulate the relationships between Americans and foreign

1 governments or foreign organization has long been
2 acknowledged by this Court. It was acknowledged in
3 cases like Regan and Zemel and others, not only with
4 respect to nations with which we are at war, but with
5 respect to foreign nations and other entities as well --
6 foreign nationals.

7 And in fact, the Petitioners' supposed First
8 Amendment claims really are not speech claims at all.
9 They are all association claims. Petitioners can do
10 whatever independent advocacy they wish. What
11 Petitioners cannot do is to provide support to a foreign
12 terrorist organization. And there, indeed, the
13 government's position is that the Association Clause
14 does not extend that far to give Americans, American
15 citizens, the ability to deal in whatever way they wish
16 with foreign nations --

17 JUSTICE GINSBURG: But it isn't--

18 GENERAL KAGAN: -- or foreign organizations.

19 JUSTICE GINSBURG: -- whatever way they
20 wish. They're making clear that it's only in
21 connection with lawful activity of the group, and indeed
22 it's to train them in using lawful means to achieve
23 their end.

24 And I thought you went further than saying
25 there has to be strictly independent advocacy. You

1 recognized in your brief that they could meet with
2 members of these terrorist organizations. They could
3 meet and communicate with them, but they can't
4 communicate advice on how to pursue their goals through
5 lawful means?

6 GENERAL KAGAN: Justice Ginsburg, you're
7 exactly right that, in addition to engaging in
8 independent advocacy, Petitioners can meet with members
9 of the foreign terrorist organizations, can join the
10 foreign terrorist organizations, that membership is not
11 prohibited by the statute. What the statute does
12 prohibit is active support of all kinds, both
13 material --

14 JUSTICE KENNEDY: Can they -- can they
15 advocate to the association? There are many kinds of
16 advocacy. You can advocate to the world that they are
17 right. Can you advocate to the association that you
18 should change your ways, that you should use Lexis to
19 find international law precedents, et cetera?

20 GENERAL KAGAN: Absolutely, Justice Kennedy.
21 If -- if Judge Fertig or the other Petitioners wanted to
22 say to these organizations, you should change your ways,
23 nothing in the statute --

24 JUSTICE KENNEDY: And suppose the
25 organization's board of directors agrees with that and

1 wants them to address the general membership on that
2 point, and they are doing it with the blessing of the
3 organization.

4 GENERAL KAGAN: Justice Kennedy, I want
5 first -- I'm going to answer your question, and I'm
6 going to say that that's still not covered, but I want
7 also to make a general point, which is that this Court
8 can exhaust all the hypotheticals that it has in this
9 case, and it will be irrelevant to the case at hand, and
10 that would be so for two reasons.

11 First, because with respect to overbreadth,
12 all of those uncertain or even unconstitutional
13 applications will be but a thimbleful, compared to the
14 ocean full of completely legitimate applications of this
15 statute. And, second, because those hypotheticals have
16 nothing to do with this case.

17 Mr. Cole said several times, I heard, this
18 is an as-applied challenge, this is an as-applied
19 challenge. And to the extent that the Court thinks that
20 there are certain categories of activity that the
21 statute could not prohibit that would raise serious
22 constitutional concerns -- which I must say I -- I
23 disagree with, but there may be some. To the extent
24 that that's true, the Court can -- can put those off to
25 another day, another --

1 JUSTICE BREYER: Well, wait. They want to
2 apply. They want to do --

3 GENERAL KAGAN: I'm sorry.

4 JUSTICE BREYER: They say in this case that
5 they want to provide training in the issue of
6 humanitarian international law, and they want to provide
7 training and expert advice and assistance in respect to
8 how you petition the UN.

9 Now focusing on those two things, and going
10 back to Justice Sotomayor's question, why -- what is the
11 government's interest in the following? Under O'Brien
12 or any other test, you look at it and say, does teaching
13 have a First Amendment interest -- training? Yes. And
14 what about teaching about advocacy? That's what they
15 are doing, teaching about a certain kind of advocacy.
16 Yes. Therefore there is a First Amendment interest
17 implicated, seriously.

18 Now, when that is seriously implicated,
19 there is also a government interest, on the other side,
20 in not having terrorism. But there is a less
21 restrictive alternative which they suggest, that in that
22 situation, what they're entitled to read this statute as
23 saying is that, if they believe and a person reasonably
24 would believe that their teaching, assistance,
25 training, would not significantly aid this organization

1 in its unlawful ends, then they are not guilty.

2 Now, what is the government's interest in
3 not accepting that interpretation? The First Amendment
4 is hurt; there is an interest; but there is what they
5 describe as -- and what I have narrowed -- a less
6 restrictive way of going about it. And they have to be
7 reasonable in what they think. Now, what's the
8 objection to that?

9 GENERAL KAGAN: Justice Breyer, I think the
10 objection is exactly what Justice Kennedy suggested with
11 his hypothetical, because his hypothetical is actually
12 perfectly aligned with this case. You can't give
13 tsunami aid, but the question is: Can you instruct
14 these organizations about how to get tsunami aid?

15 And then these organizations get tsunami
16 aid, and they, in fact, use that aid in such a way that
17 they also have more money to --

18 JUSTICE BREYER: I'm sorry. I'm not
19 talking about tsunami aid. I am talking about the
20 instance where the teaching is itself teaching about how
21 to do something, and that something is the kind of thing
22 that the First Amendment protects.

23 GENERAL KAGAN: Well, that something, which
24 is the teaching the foreign terrorist organization how
25 to petition international bodies in order to get various

1 kinds of support, financial or otherwise, that will
2 strengthen those organizations in everything that they
3 do. What Congress decided --

4 JUSTICE BREYER: Fine, and if a reasonable
5 person would know that, that it's going to help them,
6 then it is unlawful, if it's going to help them and a
7 reasonable person would think it was going to help them
8 in their unlawful activities. But we're not --

9 GENERAL KAGAN: Congress was the reasonable
10 person here. And Congress reasonably decided that when
11 you help a terrorist -- foreign terrorist organization's
12 legal activities, you're also helping the foreign
13 terrorist organization's illegal activities.

14 Hezbollah builds bombs. Hezbollah also
15 builds homes. What Congress decided was when you help
16 Hezbollah build homes, you are also helping Hezbollah
17 build bombs. That's the entire theory behind this
18 statute, and it's a reasonable theory for exactly the
19 kinds of reasons that Justice Kennedy was suggesting by
20 that hypothetical.

21 JUSTICE ALITO: And doesn't that lead to --
22 kind of logically lead to the conclusion that mere
23 membership could be prohibited? Could you explain how
24 someone could be a member of one of these organizations
25 without providing a service to the organization? Simply

1 by lending one's name as a member -- that might be
2 regarded as a service. If you attended a meeting and
3 you helped to arrange the chairs in advance or clean up
4 afterwards, you'd be providing a service to the
5 organization.

6 GENERAL KAGAN: I -- I actually don't
7 think -- I mean, Congress clearly did not mean to
8 include that. And I think that the normal words that
9 Congress used make that pretty clear. When you think
10 about personnel, when you think about training, when you
11 think about expert advice and assistance, even when you
12 think about service, you -- the notion that I am serving
13 a terrorist organization simply by the act of membership
14 I think would not be correct. And --

15 JUSTICE SCALIA: Why do you say Congress
16 clearly did not intend that? You know, I would have
17 guessed that you are providing a service or personnel
18 when you make yourself a member of the organization.
19 Why do you say Congress clearly did not intend it?

20 GENERAL KAGAN: That is certainly not the
21 way the government reads the statute, and that's not the
22 way the government has ever read the statute. And,
23 indeed, the government, as we discussed in our brief,
24 believes that there are certain kinds of joint
25 activities that would be allowed by the statute.

1 Now, that's not to say that Congress could
2 not have gone farther. In this specific context, where
3 one is regulating dealings with a foreign organization,
4 it's possible that Congress could have gone further.
5 But we understand the statute and -- and I think there's
6 a -- I think, quite reasonably, as providing only
7 material support, a true service, something that will
8 help the foreign organization in whatever it does.

9 JUSTICE BREYER: Well, but petitioning the
10 United Nations -- and that's what you are teaching them
11 -- does not, on its face, seem to me to be something
12 that reasonably you would think was going to aid them in
13 their unlawful objectives, but for the realm of ideas.
14 Now --

15 GENERAL KAGAN: This would be --

16 JUSTICE BREYER: -- and then Congress put a
17 thing in here which says: Don't construe this statute
18 in a way that will abridge First Amendment rights. So
19 it's aware of the problem of First Amendment rights.

20 GENERAL KAGAN: And I think you are exactly
21 right about that.

22 JUSTICE BREYER: And is there any evidence that
23 something like that would, in fact, but for the realm of
24 ideas, help this organization commit its terrorist acts?

25 GENERAL KAGAN: Justice Breyer, I believe

1 that the legislative record is quite clear that Congress
2 thought that various kinds of aid given to the legal and
3 legitimate activities of the terrorist organization, in
4 fact, further the aims of the -- in fact, further the
5 illegal and illegitimate goals.

6 Congress made findings about the fungibility
7 of these resources. Congress said over and over that
8 these organizations have no firewalls, no organizational
9 firewalls --

10 JUSTICE GINSBURG: But you -- but you --

11 GENERAL KAGAN: -- no financial firewalls.

12 JUSTICE GINSBURG: You say that the -- not
13 only the membership, but they can meet and they can
14 discuss. And I don't understand the line between
15 meeting with these terrorist organizations, discussing
16 things with them, and instructing them on how they can
17 pursue their goals through lawful means.

18 GENERAL KAGAN: Justice Ginsburg, I agree
19 with you that there may be some hard cases that are at
20 the borderline between the two, as there are in most
21 statutes; that there may be hard cases. This is not one
22 of them.

23 And I think it would -- it's very
24 instructive for the Court -- I'm sure you've all done
25 this -- but to actually go back and look at the

1 Petitioners' complaints in this case and look at Judge
2 Fertig's declarations in this case, because what they
3 show is the extensiveness of the activities that they --
4 of the services that they wish to offer to these foreign
5 terrorist organizations and the value that those
6 services are going to give those foreign terrorist
7 organizations.

8 CHIEF JUSTICE ROBERTS: General, you've
9 talked about -- there has been a lot of discussion about
10 the legitimate activities allowing -- facilitating
11 illegitimate activities by freeing up personnel and all
12 that, and legitimizing the group.

13 Is that an argument you've made before this
14 Court or below? I looked at your briefs, and I thought
15 it's almost all about: This is O'Brien, this is
16 conduct, this is not speech. I didn't see the argument
17 that we've spent a lot of time talking about, which is
18 the legitimate activities allow the illegitimate
19 activities to take place.

20 GENERAL KAGAN: No, I believe we -- we have,
21 Mr. Chief Justice, although if we didn't emphasize it
22 enough, I -- I will plead error, because I think that it
23 is an -- a crucial point to this case. But I think in
24 the part of our brief --

25 CHIEF JUSTICE ROBERTS: Do you have -- I

1 don't mean to -- do you have particular references to
2 where in your brief you made the argument?

3 GENERAL KAGAN: Yes. In the part of our
4 brief where we discuss the application of the O'Brien
5 standard, and we say what are the governmental interests
6 there.

7 CHIEF JUSTICE ROBERTS: Yes, I know. It seems
8 to me your case is all about O'Brien. I'm not sure you have
9 an answer to whether or not strict scrutiny is
10 satisfied. If we disagree with you and think that some
11 of this activity is speech, I don't see the argument
12 that you've presented on strict scrutiny.

13 GENERAL KAGAN: I think that that's right,
14 Mr. Chief Justice, that we have not specifically
15 addressed the strict scrutiny argument. I think this
16 would pass a strict scrutiny standard, but I actually
17 think that to the extent that the Court thought a strict
18 scrutiny standard were appropriate, a remand might be in
19 order, that no Court has ever actually gone off on that
20 ground, that --

21 JUSTICE ALITO: Why is O'Brien the correct
22 standard? How can you argue that training and providing
23 advice is not speech?

24 GENERAL KAGAN: Justice Alito, I think that
25 the -- the training and advice clauses are, of course,

1 part of a statute which regulates material support and
2 resources of all kinds, and to the extent that what
3 you're saying is, you know, training and advice, those
4 are always speech restrictions if you find them in a
5 statute, I think that that's not right.

6 I mean, if you think about the range of
7 things that training can involve: Training how to
8 build a bomb, training how to fly a plane, training how
9 to use sophisticated communications equipment, and
10 training how to engage --

11 JUSTICE SOTOMAYOR: How about training to --

12 JUSTICE GINSBURG: What's involved
13 here -- I think they said that they want to train them
14 how to do lawful things, how to pursue their goals in a
15 lawful, rather than a terrorist, way. And that is
16 speech. It is not conduct. They want to engage in
17 advocacy of peaceful means of achieving the goals of
18 these groups.

19 GENERAL KAGAN: Congress, of course, allowed
20 them to engage in all the advocacy that they wish on
21 behalf of these groups. Indeed, Congress did not
22 prohibit --

23 JUSTICE GINSBURG: But they want to
24 communicate, and you say they can communicate. And I
25 still am having trouble with the line of what they can

1 communicate and what they can't.

2 GENERAL KAGAN: Well, I think if they are
3 engaged in just discussion of ideas, this statute does
4 not prohibit that. What the statute prohibits is the
5 provision of actual support, services to the
6 organizations that the organization can use in its
7 activities, both legal and illegal.

8 JUSTICE KENNEDY: Do you stick with the
9 argument made below that it's unlawful to file an amicus
10 brief?

11 GENERAL KAGAN: Justice Kennedy --

12 JUSTICE KENNEDY: I think I'm right in
13 saying it that that was the argument below.

14 GENERAL KAGAN: Yes, I think that would
15 be a service. In other words, not an amicus brief just
16 to make sure that we understand each other. The
17 Petitioners can file amicus briefs in a case that might
18 involve the PKK or the LTTE for themselves, but to the
19 extent that a lawyer drafts an amicus brief for the PKK
20 or for the LTTE, that that's the amicus party, then that
21 indeed would be prohibited. That's the kind of
22 service that --

23 JUSTICE STEVENS: Then it seems to me that
24 your opponent's argument here today is prohibited.

25 GENERAL KAGAN: No, no, no, because

1 Petitioners here are arguing for themselves. What I'm
2 suggesting is Petitioners can do all the advocacy they
3 want, can engage in courts in any way they wish. The
4 only thing that's prohibited is if the PKK hired a
5 lawyer to write an amicus brief on its behalf. At that
6 point --

7 JUSTICE SOTOMAYOR: General, I understand,
8 I could be wrong, that many petitioners or respondents
9 go out to the industry and say we need some amicus
10 briefs, and they flood in from all sides. Would that be
11 illegal? Because the -- the organization --

12 GENERAL KAGAN: Well, if the PKK --

13 JUSTICE SOTOMAYOR: -- came out and said we
14 need a brief -- amicus briefs from law professors?
15 From --

16 GENERAL KAGAN: If -- if the PKK or the LTTE
17 or Al-Qaeda or any of the other organizations on this
18 list said we want amicus briefs, and somebody provided
19 an amicus brief --

20 JUSTICE SOTOMAYOR: Without pay.

21 GENERAL KAGAN: -- for themselves -- for
22 themselves, there would be no problem. The only problem
23 is if somebody drafted an amicus brief --

24 JUSTICE SOTOMAYOR: How can we can ever
25 separate --

1 GENERAL KAGAN: -- for the PKK itself.

2 JUSTICE SOTOMAYOR: Under the definition of
3 this statute, teaching these members to play the
4 harmonica would be unlawful. You are teaching --
5 training them in a lawful -- in a specialized activity.
6 So how do we -- there has to be something more than
7 merely a congressional finding that any training is bad.

8 GENERAL KAGAN: Well, I think here we have
9 the congressional definition of what kind of training
10 is bad, and that definition focuses on training in
11 specialized activities. Now, you say, well, maybe
12 training a -- playing a harmonica is a specialized
13 activity. I think the first thing I would say is there
14 are not a whole lot of people going around trying to
15 teach Al-Qaeda how to play harmonicas.

16 JUSTICE SCALIA: Well, Mohammed Atta and his
17 harmonica quartet might tour the country and make a lot
18 of money. Right?

19 GENERAL KAGAN: I'm sorry. I --

20 (Laughter.)

21 GENERAL KAGAN: But I don't mean to make fun
22 of the hypothetical at all, Justice Sotomayor, because I
23 think you're raising an important point, but it's
24 really a point that goes to how to sensibly read a
25 statute. What Congress did, when in response to some

1 lower court decisions, it further clarified and defined
2 the word "training" and the word "expert advice and
3 assistance," I have to say I think that Congress's own
4 responses here -- I mean, they -- Congress was both
5 responsive and responsible, that it really took into
6 account court decisions and tried to go back to the
7 statute and --

8 JUSTICE BREYER: Well, in that -- on the --
9 just forget the harmonica for a second; I'm more worried
10 about the lawyer. You're saying that a -- a group abroad
11 which may have some American citizens in it -- let's assume
12 they do -- want to hire a lawyer. And this lawyer is supposed
13 to file some amicus briefs and do other activities. You're
14 saying Congress has forbidden that in this statute,
15 and that's constitutional?

16 GENERAL KAGAN: Well, first of all,
17 Justice Breyer, I want to sort of repeat the -- what I
18 -- what I said about the need to find a substantial amount
19 of uncertain or unconstitutional applications, or with
20 respect to any kind of facial challenge or with respect
21 to this challenge --

22 JUSTICE BREYER: But I want to know if that's
23 what you're saying, what I just said: that an
24 organization has American citizens, engages in
25 terrible stuff, but they are not entitled under the

1 Constitution to have a lawyer in the United States who
2 does legal work like filing amicus briefs.

3 GENERAL KAGAN: To the extent that there is
4 any constitutional claim that they would be entitled to
5 representation, whether it's a Sixth Amendment claim or
6 a due process claim that might exist in criminal cases,
7 that might exist in habeas cases, that might exist in
8 civil cases, then the government believes that the
9 statute should be read so as not to include that.

10 JUSTICE SCALIA: Why do these hypotheticals
11 make any difference? This is an as-applied challenge.
12 We should look to the activities that this organization
13 wants to conduct, unless -- unless you think that there
14 is an overbreadth problem. And that seems to me -- I'm
15 not even sure that the Petitioners assert that here.

16 Clearly, the -- the broad scope of this
17 statute is -- is constitutional, and whatever aspects of
18 speech it may run afoul of are -- are minimal. That
19 being the case, of what relevance are these
20 hypotheticals? It's a lot of fun, and it's very
21 interesting, but we can deal with all of that when the
22 situations arise, can't we?

23 GENERAL KAGAN: Well, I -- I do think that
24 the answer to that is yes, Justice Scalia.

25 JUSTICE GINSBURG: The answer on the other

1 side is: All we want to do is speak about lawful
2 activities. We're not supplying any guns, any
3 communication equipment. We just want to speak about
4 lawful activities.

5 And I go back to my failure to understand your
6 line between, yes, you can communicate with these
7 people, but you can't communicate about going about
8 their aims through peaceful means.

9 GENERAL KAGAN: No, I think my line is you
10 can communicate, but you can't provide material support.
11 You can't make a donation, whether it's tangible or
12 intangible.

13 CHIEF JUSTICE ROBERTS: I'm sorry. You can
14 communicate on -- I don't mean to interrupt. But you
15 can communicate on your own, but you can't communicate
16 with them?

17 GENERAL KAGAN: No --

18 CHIEF JUSTICE ROBERTS: Oh, okay.

19 GENERAL KAGAN: -- you can communicate with --
20 on your own, for sure. Independent advocacy of all kinds
21 is not touched by this statute. In addition to that --

22 JUSTICE KENNEDY: But Justice Ginsburg's
23 question is: Can you advocate peaceful means? And let's
24 assume that if they embrace peaceful means, they get
25 more interest in their organization, the organization

1 becomes stronger for all purposes. Can you do that?

2 That was Justice Ginsburg's question.

3 GENERAL KAGAN: Can you say to an
4 organization: Look, you guys really should lay down your
5 arms. And two things --

6 JUSTICE KENNEDY: And here's how to do it.
7 And here's how to go to the U.N., and here's how to
8 apply for aid, and here's how to file an amicus brief.

9 GENERAL KAGAN: Well, now you can't,
10 because when you tell people here's how to apply for
11 aid and here's how to represent yourself within
12 international organizations or within the U.S. Congress,
13 you've given them an extremely valuable skill that they
14 can use for all kinds of purposes, legal or illegal.
15 And it's not sufficient for the Petitioners --

16 JUSTICE GINSBURG: So you can -- you can
17 communicate, but the communications are censored. That's
18 -- you said you can meet with -- you can be a member, you
19 can attend meetings, you can discuss things, but there
20 are only -- there's a certain point at which the discussion
21 must stop, right?

22 GENERAL KAGAN: The discussion must stop
23 when you -- when you go over the line into giving
24 valuable advice, training, support to these
25 organizations. At that point --

1 JUSTICE STEVENS: May I ask a sort of basic
2 question that I've had trouble with throughout the
3 whole argument? We're talking about whether this is an
4 as-applied challenge or on its face. And what the
5 district judge did was hold part of the statute
6 unconstitutional as being too vague: the words "training"
7 and "advice," et cetera. Why isn't that a facial
8 decision?

9 GENERAL KAGAN: Well, the -- both the
10 lower courts -- I think the district court and the
11 court of appeals, I think, had a kind of confused analysis
12 here, which is that they said, well, it's vague as applied.
13 The court of appeals specifically said it's not vague
14 on its face, and there is no facial vagueness claim here,
15 and yet they appeared to incorporate aspects of overbreadth
16 analysis into their as-applied claim. I think --

17 JUSTICE SCALIA: Unless you're in an
18 overbreadth situation, a vagueness challenge can be an
19 as-applied challenge. A statute can be vague as applied
20 to certain conduct, although the core conduct that it
21 covers is clearly covered.

22 GENERAL KAGAN: No, that's --

23 JUSTICE SCALIA: We have cases like that.

24 GENERAL KAGAN: That's exactly right,
25 Justice Scalia, and -- and -- and with respect to the

1 as-applied vagueness claim, the government's position is
2 there's -- there's -- there -- it's not vague, because
3 you can go through these declarations, you can go
4 through these complaints, and you can know exactly what's
5 included within --

6 JUSTICE KENNEDY: But -- but I have the
7 same --

8 GENERAL KAGAN: -- the statute and what's
9 not.

10 JUSTICE KENNEDY: I had the same question as
11 Justice Stevens. It's a very odd as-applied challenge
12 because there hasn't been a prosecution. And vagueness
13 as applied, I think as Professor Cole can answer, is, it
14 seems to me, if, you know, that it applies, it isn't vague.
15 I don't understand that, but --

16 GENERAL KAGAN: Well, it --

17 JUSTICE KENNEDY: I -- I can't -- I can't
18 think of a case in which the Court, pre-prosecution in a
19 declaratory judgment, has said that it's improper as
20 applied to certain things. Or maybe I'm wrong. Maybe I
21 am missing some case.

22 GENERAL KAGAN: No, I -- I -- I don't think
23 you are wrong, Justice Kennedy, and especially with
24 respect to a case where all the activity is -- clearly
25 fits in one box or the other. In other words, you can

1 go through the complaints, you can go through the
2 declarations, and know exactly what is covered and what's
3 not covered. All the independent --

4 CHIEF JUSTICE ROBERTS: Well, but that's -- I'm
5 not -- I'm not sure that's right. I mean, expert advice or
6 assistance -- I don't know sitting down that I could tell,
7 you know, how to advocate for peaceful, you know,
8 resolution or whatever. Is that expert advice? Is that
9 specialized knowledge? And I understand training,
10 service, personnel, but that one's a little hard to --

11 GENERAL KAGAN: Well, as I said,
12 Mr. Chief Justice, there will be some hard cases, there
13 always are when it comes to applying statutes. The
14 question is never are there hard cases.

15 CHIEF JUSTICE ROBERTS: No, my -- my point
16 is that this --

17 GENERAL KAGAN: The question is the
18 indeterminacy.

19 CHIEF JUSTICE ROBERTS: Yes. My point is that
20 even knowing what they intend to do, it's kind of hard
21 to decide whether that's based on specialized knowledge
22 or not.

23 GENERAL KAGAN: I think it -- it actually is
24 pretty clear in this case. If you read the declarations,
25 if you read the complaints, the expertise of these

1 parties actually shines through. Judge Fertig is proud
2 of his expertise, justifiably so. He has --

3 JUSTICE GINSBURG: Does this -- what --
4 what these plaintiffs are seeking to do -- does it have
5 any resemblance to the 150 prosecutions that you have
6 brought under this Act? It was my understanding that
7 those were for supplying weapons, supplying other
8 equipment. Are there any prosecutions that are -- that
9 aim at training to pursue the organization's aims
10 through peaceful means?

11 GENERAL KAGAN: Justice Ginsburg, I think
12 that this is not the typical case. This is, of course,
13 a case that might never have reached this Court, except
14 that it was brought as a declaratory judgment action.
15 For the most part, what the government prosecutes are
16 cases which involve a wide variety of support to foreign
17 terrorist organizations.

18 JUSTICE STEVENS: Specifically, does this
19 particular man have to be prosecuted?

20 GENERAL KAGAN: I'm sorry?

21 JUSTICE STEVENS: Is this particular
22 individual in risk of being prosecuted if he makes the
23 speech to the United Nations?

24 GENERAL KAGAN: Justice Stevens, I do
25 believe that this individual can make whatever speeches

1 he wants at the United Nations. To the extent that he
2 is acting as a representative or as an agent of the PKK,
3 he does fall within the contours of the statute. That's
4 a different thing.

5 JUSTICE STEVENS: And is there evidence that
6 he would be prosecuted if he --

7 GENERAL KAGAN: Of course, that's a
8 different thing as to how prosecutorial judgment is used
9 to decide which are the high-priority cases and which
10 are the low-priority cases.

11 JUSTICE STEVENS: But in essence, this is an
12 action to enjoin a potential prosecution against
13 somebody for making a potential speech? That's really
14 what we are fighting about, I think.

15 GENERAL KAGAN: Again, the government did
16 not bring this action. Judge Fertig and the Petitioners
17 brought this action to try to get a declaratory
18 judgment. As applied to them, the statute indeed
19 covers their various efforts or proposed activities of
20 being an agent of, of representing the PKK and the LTTE,
21 that falls within the statute and I think makes the
22 as-applied claim here not vague at all.

23 CHIEF JUSTICE ROBERTS: Thank you, General.
24 Mr. Cole, we'll give you 5 minutes.

25 REBUTTAL ARGUMENT OF DAVID D. COLE

1 ON BEHALF OF HUMANITARIAN LAW PROJECT, ET AL.

2 MR. COLE: Thank you, Mr. Chief Justice.

3 I want to start by addressing the question
4 of strict scrutiny. The -- the -- Justice Kennedy, you
5 asked, and a number of the Justices asked, doesn't it
6 make a difference that what they've done is prohibited a
7 wide range of conduct and just some of that is speech?

8 Well, that's precisely an accurate
9 description of the breach of the peace statute in Cohen
10 v. California. It forbade breaches of peace through
11 loud noises, through horse racing in the streets,
12 through any kind of offensive conduct. But when
13 California applied that statute to the words on Mr.
14 Cohen's jacket and then argued because we are not
15 interested in the words on his jacket, we are interested
16 in preserving the peace, however it's breached, O'Brien
17 should apply, the Court said no. We deal here with the
18 conviction resting solely upon speech, not upon any
19 separately identifiable conduct.

20 JUSTICE KENNEDY: I -- I agree. And that
21 was as applied to a conviction.

22 MR. COLE: That's right.

23 JUSTICE KENNEDY: I just haven't seen an
24 as-applied challenge on declaratory relief. The
25 government doesn't seem to object to that procedure.

1 MR. COLE: No. Well, the government doesn't
2 object because there are actually many cases, and FEC v.
3 Wisconsin Right to Life is only the most recent. But,
4 again, the notion is somebody who is told you can meet
5 with a group, you can discuss with a group -- in fact,
6 the House report says that you are free to speak with
7 and on behalf of a designated group.

8 But then you have a statute that says, if
9 you advocate in any coordinated way, if you tell them
10 anything that's derived from specialized knowledge, if
11 you tell them anything of specific skill, you're --
12 you're engaged in a crime and you could go to jail for
13 15 years.

14 That's why the Humanitarian Law Project came
15 to me. They said: We've been doing this kind of
16 lawful activity. We think it's our right, but we're
17 not going to risk going to jail for 15 years to do
18 it.

19 The government has spent a decade arguing
20 that our clients cannot advocate for peace, cannot
21 inform about international human rights.

22 JUSTICE SOTOMAYOR: If O'Brien applies, what
23 remains of your case?

24 MR. COLE: If O'Brien applies, then I think
25 the Court would still be applying the scrutiny that

1 asks, is there a reasonable fit -- is there a reasonable
2 fit between the specific speech that's at issue here,
3 speech on issues of public concern, advocating only
4 lawful activity, and the -- and that the government
5 legitimately seeks to further, which is stopping support
6 for terrorism? Now --

7 JUSTICE SOTOMAYOR: That analysis of the
8 activities that you are proposing has not been done by
9 the lower courts, correct?

10 MR. COLE: Well, the lower courts struck --

11 JUSTICE SOTOMAYOR: They -- they haven't --
12 they struck it on vagueness grounds, but none --

13 MR. COLE: Right. The --

14 JUSTICE SOTOMAYOR: -- none of the courts
15 either subjected this to strict scrutiny or the
16 reasonable fit --

17 MR. COLE: No, and, in fact, the government
18 has never even attempted to defend the statute under strict
19 scrutiny, because I think it clearly could not satisfy
20 strict scrutiny. And under this -- under Cohen, strict
21 scrutiny is what must be applied here.

22 In addition --

23 CHIEF JUSTICE ROBERTS: Well, why don't -- why
24 don't we remand it to the lower courts to apply strict
25 scrutiny if we agree with you that O'Brien doesn't apply

1 here?

2 MR. COLE: I think it would be appropriate
3 to remand for -- for application of strict scrutiny if
4 you read it that O'Brien doesn't apply.

5 O'Brien also doesn't apply if the statute is
6 not content neutral. This is a statute that doesn't bar
7 all aid; it doesn't even bar all speech. It permits
8 unlimited provision of religious materials, even if they
9 advocate jihad, but proscribes any secular material, even
10 if they are advocating peace.

11 So -- so there are -- the -- the lower
12 court, again, found that the statute was vague, that our
13 clients were reasonably chilled, that they had a right
14 to engage in this activity. I think you can reach that
15 result either through vagueness, or you can reach it by
16 applying strict scrutiny, or I think because the fit is
17 so poor here, and because -- and the vagueness, in fact,
18 undermines the fit, because people are chilled from
19 engaging even in speech that the government doesn't want
20 to prohibit.

21 All right, if I am told you -- you -- you'll
22 go to jail if you tell them anything that's derived from
23 special --

24 JUSTICE SOTOMAYOR: Mr. Cole, there were
25 congressional findings that money is fungible first for

1 terrorist groups, like -- that if you give them money for
2 legitimate means, that it's going to be siphoned off and
3 used for illegitimate means.

4 MR. COLE: Right.

5 JUSTICE SOTOMAYOR: So, why isn't that enough,
6 either under strict scrutiny or a lesser standard,
7 reasonable fit standard, to say that you can't teach
8 these groups how to get money?

9 MR. COLE: Right. Well, one -- well, we're not
10 -- we're not teaching them how to get money. We're seeking
11 to teach them how to advocate for lawful human rights
12 or --

13 JUSTICE SOTOMAYOR: No, one of your -- one
14 of your stated aims, at least of one of the groups is to
15 teach them how to get aid for tsunami relief.

16 MR. COLE: Right. That -- that claim has
17 been mooted because the LTTE is no longer -- has no role
18 in Sri Lanka. So what's left is solely -- has nothing
19 to do with money.

20 Secondly, Congress only made a finding about
21 money. At the same time that it made a finding that
22 money is fungible, it said this is a statute -- and
23 this is from the House report -- only affects one's
24 contribution of financial and material resources and
25 does not prohibit speaking in concert with and on behalf

1 of designated groups.

2 Well, that suggests that Congress thought
3 that what our clients want to do is -- should be protected.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MR. COLE: And we have suggested that you should,
6 therefore, interpret the statute in -- consistent with
7 that. Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 11:13 a.m., the case in the
11 above-entitled matter was submitted.)

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