1	IN THE SUPREME COURT OF THE UNITED STATES
2	x
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. :
16	x
17	Washington, D.C.
18	Tuesday, February 23, 2010
19	
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:
24	DAVID D. COLE, ESQ., Washington, D.C.; for Humanitarian
25	Law Project, et al.

1	GEN.	, ELENA .	KAGAN,	ESQ.,	SOLIC	ICOI	Gene	ίαΙ,	Departi	ment of
2	J	Justice,	Washi	ngton,	D.C.;	for	Eric	н.	Holder,	Jr.,
3	P	Attorney	Gener	al, et	al.					
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1	PROCEEDINGS
2	(10:09 a.m.)
3	CHIEF JUSTICE ROBERTS: We will 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.
_0	MR. COLE: Mr. Chief Justice, and may it
.1	please the Court:
_2	This as-applied challenge asks whether the
_3	government can make it a crime for Ralph Fertig and the
_4	Humanitarian Law Project to speak in association with
-5	the Kurdistan Workers Party. Specifically, they seek to
<b>.</b> 6	advocate for legal reform in Congress and the UN, to
_7	write and distribute articles supportive of Kurdish
8_	rights, to inform the Kurds of their international human
_9	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.
- 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 --
- JUSTICE STEVENS: Mr. Cole, don't you agree
- 11 that some of the speech could be regulated?
- 12 MR. COLE: Some of my client's speech?
- 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: If all of the speech at
- 21 issue is protected?
- 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. This is 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.
- 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?
- 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. And 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 in --

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 it 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.
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
L7	close, then maybe it could. But the
18	JUSTICE SOTOMAYOR: Well, why can't there
19	be
20	JUSTICE KENNEDY: Then what's the test?
21	What is 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 JUSTICE ALITO: What applies from --
- 3 CHIEF JUSTICE ROBERTS: What if it goes to
- 4 the mere existence of a group? Let's say you have the
- 5 Nazi Party and you are talking about advice or speech on
- 6 some purely mundane issue. The Nazis have a hospital
- 7 and you are giving them advice on how to run the
- 8 hospital, but the government decides that anything that
- 9 legitimizes the Nazi Party, you know, promotes that
- 10 group's terrorist activities. Can the government make
- 11 that kind of determination?
- 12 I'm thinking of something like Regan v.
- 13 Wald --
- MR. COLE: Right.
- 15 CHIEF JUSTICE ROBERTS: -- where they say,
- 16 look, you can't travel to Cuba because we don't want to
- 17 do anything that legitimizes the regime.
- 18 MR. COLE: Right. Well, two answers.
- Does your question refer to the Nazi Party
- 20 today or the Nazi Party during World War II?
- 21 CHIEF JUSTICE ROBERTS: No, I meant during
- 22 World War II. I am just trying to find an example that
- 23 doesn't implicate the particulars of the issue today.
- 24 MR. COLE: Right, right. So I think the
- 25 reason I ask, Your Honor, is that it may make a

- 1 difference if we are at war. The law of treason
- 2 prohibits aid --
- 3 CHIEF JUSTICE ROBERTS: No, I didn't -- my
- 4 hypothetical was confusing. I didn't mean to suggest we
- 5 were at war. I meant to hypothesize a group that the
- 6 government could reasonably determine should not be
- 7 supported in any way --
- 8 MR. COLE: Right.
- 9 CHIEF JUSTICE ROBERTS: -- because it
- 10 legitimizes it. It's going to make their hospital run
- 11 better. People are going to like their hospital. So
- 12 the party, the group, will be legitimized.
- MR. COLE: Right. Well, I think all the
- 14 Court held in Regan and Zemel was that it is permissible
- 15 for the government to regulate conduct -- not speech --
- 16 travel, and economic transactions, not speech. Those
- 17 were essentially O'Brien cases.
- 18 And in fact, in Regan the Court
- 19 distinguished a prohibition on travel to Cuba across the
- 20 board from a prohibition directed at a group, the
- 21 Communist Party, in the Kent and Aptheker cases, where
- 22 the Court held that --
- 23 JUSTICE GINSBURG: But if you can't travel
- 24 there, suppose you want to travel there so that you can
- 25 meet with and discuss lawful activities with people

- 1 there. If you can't get there, you can't speak.
- 2 MR. COLE: That's right, Your Honor. But
- 3 that -- but that's essentially an O'Brien situation.
- 4 The prohibition is on a conduct, whether it's
- 5 draft card-burning or travel. The individual who seeks
- 6 to engage in that conduct says, I want to do it for
- 7 speech purposes. The Court says the government has a
- 8 freer hand in regulating conduct than speech, and
- 9 therefore, as long as you are regulating the
- 10 non-expressive element of the conduct, we'll apply
- 11 O'Brien. But what this Court has said is that when --
- 12 JUSTICE SOTOMAYOR: Could the government
- 13 stop you from meeting anywhere with the terrorists?
- 14 MR. COLE: From meeting? No, I don't think
- 15 --
- JUSTICE SOTOMAYOR: Just meeting, traveling
- 17 to one of these countries to actually do your teaching
- 18 to a terrorist -- let's say the law said you're
- 19 prohibited from traveling to meet any of these
- 20 individuals. How would that be different than the Cuba
- 21 situation?
- MR. COLE: Well, then, if it's -- if it's
- 23 traveling for the purpose of association, then it would
- 24 be targeted at association, not at the conduct of
- 25 travel.

- 1 JUSTICE SOTOMAYOR: But it's no different
- 2 than the Cuba situation.
- 3 MR. COLE: No, but the whole point of the
- 4 Cuba -- the Cuba travel cases is that, again as this
- 5 Court said, it was an across the board ban. It did not
- 6 apply to different political groups. It applied to
- 7 anyone who sought to travel to Cuba. And it was about
- 8 travel.
- JUSTICE KENNEDY: Well, suppose it's a ban
- 10 just for travel to meet with terrorist organizations,
- 11 Justice Sotomayor's hypothetical.
- 12 MR. COLE: Right. Well, then I think -- i
- 13 think that's different from this case, because this
- 14 case -- suppose it's a ban on speech wherever it occurs.
- 15 JUSTICE KENNEDY: What about the -- what
- 16 about the hypothetical?
- 17 MR. COLE: Right. Well, with respect to the
- 18 hypothetical, I think the question, Your Honor, would be
- 19 whether the government's interest in banning that travel
- 20 is unrelated to the associational or speech purposes.
- 21 JUSTICE KENNEDY: It's what the Chief
- 22 Justice says: In any context, support ultimately will
- 23 inure to the benefit of a terrorist organization and we
- 24 have a governmental interest in not allowing that.
- 25 MR. COLE: There's no dispute, Your Honor,

- 1 that the government has a compelling interest in cutting
- 2 off aid to terrorism. The question is whether it can do
- 3 so by criminalizing pure speech.
- 4 JUSTICE SCALIA: It hasn't criminalized
- 5 speech. It has criminalized providing aid and
- 6 assistance to these organizations. Most of that aid and
- 7 assistance that is prohibited is not in the form of
- 8 speech, but it happens to include speech as well.
- 9 MR. COLE: Right, but Justice Scalia --
- 10 JUSTICE SCALIA: And I think that is quite
- 11 different from a law that is directed explicitly at
- 12 speech.
- MR. COLE: Well, I think it's not in this
- 14 sense, Justice Scalia. Imagine the statute that banned
- 15 aid to overthrow the United States Government. And it
- 16 had three provisions: One, you can't assassinate the
- 17 president; two, you can't provide bombs and weapons to
- 18 groups attempting to overthrow the government; three,
- 19 you can't advocate overthrow of the government. If that
- 20 were applied to someone for speaking in advocacy, we
- 21 wouldn't say it's a regulation of--
- JUSTICE SCALIA: That's not the right --
- 23 that's not the right number three. The right number
- 24 three is you cannot advise and assist an organization
- 25 that is seeking to overthrow the government. That's

- 1 what at issue here, not independently promoting the
- 2 objectives of these terrorist organizations. Your --
- 3 your clients are free to do that. But when they assist
- 4 the organization by providing advice, that's a different
- 5 matter.
- 6 MR. COLE: Well, the government says if
- 7 they -- even if they speak in conjunction with the group
- 8 and they are providing a benefit to the government,
- 9 that's prohibited. So for example --
- 10 JUSTICE SCALIA: When they provide a
- 11 benefit.
- MR. COLE: So, for example, under that view,
- 13 the New York Times, Washington Post, and the L.A. Times,
- 14 all of which published op-eds by Hamas spokespersons --
- 15 Hamas on the list -- thereby providing a benefit to
- 16 Hamas, working with the Hamas spokesperson, they are all
- 17 criminals. President Carter --
- 18 JUSTICE SCALIA: We can cross that bridge
- 19 when we come to it. This is an as-applied challenge and
- 20 we are talking about the kind of advice and assistance
- 21 that your clients want to give.
- MR. COLE: Right, and, Your Honor, there's
- 23 no --
- 24 JUSTICE SCALIA: It's not a New York Times
- 25 editorial.

- 1 MR. COLE: Well, it is, though. It is, Your
- 2 Honor. I mean, Ralph Fertig is not the New York Times
- 3 and he's not President Carter, but it's the same sort of
- 4 support. President Carter --
- 5 JUSTICE KENNEDY: No, no, no. I thought
- 6 that he was -- he wants to meet with the people. The
- 7 New York Times didn't meet with Hamas to tell them how
- 8 great their editorial was.
- 9 MR. COLE: No, but it's not about -- it's
- 10 not about whether you meet with them. It's about
- 11 whether you coordinate with them, and they've certainly
- 12 coordinated with the Hamas spokesperson in editing and
- 13 accepting and then publishing his editorial. That is --
- 14 that would be providing a service.
- 15 JUSTICE SCALIA: It depends on what
- 16 "coordinating" means, doesn't it? And we can determine
- 17 that in the next case.
- 18 MR. COLE: Well, let me -- let me also
- 19 answer it this way, Justice Scalia. If you look at the
- 20 specific speech which our clients seek to engage, it
- 21 includes writing and distributing literature in
- 22 conjunction with the Kurdistan Workers Party in the
- 23 United States advocating their support. How is that
- 24 different from --
- 25 JUSTICE BREYER: Supposing that -- what you

- 1 say is you want to engage in political advocacy on
- 2 behalf of the Kurds. That's your words. Suppose -- and
- 3 these are two hypotheticals. Hypothetical one, your
- 4 clients, let's say, or some other people, know that what
- 5 the Kurds' hypothetical plan is, is to pretend they're a
- 6 political advocacy organization, but to go around
- 7 shooting the people who don't agree with them. Okay?
- 8 Case one, the hypothetical defendant knows it. In case
- 9 two, he doesn't know it, but it's true.
- 10 MR. COLE: Well, I think -- I think if
- 11 you -- if you specifically intend and know that your aid
- 12 will further the group in its terrorist activities, then
- 13 it's not protected speech. But if you're -- if you
- 14 don't know that and you don't intend that, and in this
- 15 case --
- 16 JUSTICE ALITO: That goes for all forms of
- 17 training? No form of training or expert assistance can
- 18 be prohibited unless the individual specifically intends
- 19 to further -- that the training will be used to carry
- 20 out terrorist activities?
- 21 MR. COLE: Justice Alito, this is an
- 22 as-applied challenge. So the question is whether
- 23 training in what international rights consist of, how to
- 24 advocate for international human rights and how to
- 25 advocate politically in Congress and other bodies.

- 1 That's the speech that's at issue here.
- JUSTICE ALITO: Just out of curiosity, I
- 3 thought your position was that no form of training or
- 4 assistance can be prohibited -- -
- 5 MR. COLE: No, i was --
- 6 JUSTICE ALITO: -- consistent with the First
- 7 Amendment. That's not your position?
- 8 MR. COLE: No. I think again it depends
- 9 upon the form of speech. There may be some forms of
- 10 training that are so closely connected to the end that
- 11 Congress seeks to, legitimately seeks to proscribe, like
- 12 training in bomb-making or training in military
- 13 exercises.
- 14 JUSTICE SCALIA: The end that Congress seeks
- 15 to proscribe is the existence of these terrorist
- 16 organizations. And the theory of the legislation is
- 17 that when you aid any of their enterprises you are
- 18 aiding the organization. Hamas for example gained
- 19 support among -- among the Palestinians by activities
- 20 that are perfectly lawful, perhaps running hospitals,
- 21 all sorts of things. But that is what fosters the
- 22 terrorist organization and enables the terrorist
- 23 activities. Why isn't that a reasonable connection?
- 24 Any assistance you provide to these organizations cannot
- 25 be separated from assistance to their terrorist

- 1 activities.
- 2 MR. COLE: All right. Well, Your Honor,
- 3 that is precisely the argument that the United States
- 4 made to this Court in Scales. And here I am quoting
- from the government's brief: "Active membership can be
- 6 proscribed even though the activity be expended along
- 7 lines not otherwise illegal, since active support of any
- 8 kind aids the organization in achieving its own illegal
- 9 purposes."
- 10 That was with respect to an organization
- 11 that Congress spent ten years studying, made findings
- 12 that it was an international conspiracy directed and
- 13 controlled by the Soviet Union with the aim of
- 14 overthrowing the United States by force and violence,
- 15 using terrorism. And nonetheless this Court in Scales
- 16 held you've got to distinguish between that aid and
- 17 support and membership which is furthering the lawful
- 18 activities and that which is furthering the illegal
- 19 activities; otherwise you are penalizing the exercise of
- 20 lawful speech. The Court said the same thing in De
- 21 Jonge.
- JUSTICE GINSBURG: As I remember, Scales
- 23 upheld a conviction.
- MR. COLE: It did, Justice Ginsburg, but
- 25 only because it interpreted the statute to be -- to be

- limited to specific -- to members -- active membership
- 2 that is specifically intended to further the illegal
- 3 ends of the group.
- 4 JUSTICE KENNEDY: But it was not a statute
- 5 which involves banning financial or other tangible
- 6 support, and page 17 of your brief made -- this is a
- 7 difficult case for me. And the second paragraph, page
- 8 17, you say: "The narrow focus of plaintiffs' claims in
- 9 this Court means that the case does not involve the
- 10 propriety of banning financial or other tangible
- 11 support." Then you say: "Nor does it involve speech
- 12 advocating or teaching criminal or violent activity."
- 13 But it does involve speech, let's say arguendo, that is
- 14 tantamount to material support.
- MR. COLE: Well, right --
- 16 JUSTICE KENNEDY: Suppose the speech is
- 17 tantamount to material support in that it legitimizes,
- 18 encourages, or strengthens the organization.
- MR. COLE: Well, two things in response to
- 20 that, Justice Kennedy. First, that is what the United
- 21 States argued in Scales. And again, the Court, not only
- 22 in Scales but in a host of cases striking down the
- 23 Communist Party statute, said you have to distinguish
- 24 between aid that is intended to further lawful activity
- 25 and aid that is intended to further illegal activity

- 1 when it's in the form of protected activity --
- 2 association, here speech and association.
- 3 And secondly --
- 4 JUSTICE STEVENS: In those cases the real
- 5 question was whether membership was enough.
- 6 MR. COLE: Active membership, which the
- 7 government says constitutes more than mere nominal
- 8 membership.
- 9 JUSTICE KENNEDY: And this is support. It's
- 10 different.
- 11 MR. COLE: Well, Your Honor, in De Jonge,
- 12 one of these cases, one of this Court's first First
- 13 Amendment cases, the government argued that Mr. De Jonge
- 14 aided the Communist Party in its illegal ends by
- 15 conducting a meeting for them and being their lead
- 16 speaker at the meeting. And this Court said: We've got
- 17 to look at what he did, and yes, he conducted the
- 18 meeting, yes, he was a member of the Communist Party,
- 19 yes, he solicited people to join the Communist Party,
- 20 but what did he do? He advocated lawful peaceable
- 21 activities. And this Court has said --
- JUSTICE KENNEDY: But there wasn't a statute
- 23 on the books that prohibited material support --
- 24 MR. COLE: Well, I don't think it was --
- 25 JUSTICE KENNEDY: And here there is and this

- 1 is in aid of that prohibition.
- 2 MR. COLE: But Your Honor, what would -- if
- 3 Congress came along after the Communist Party cases and
- 4 said, okay, you've said we can't make it a crime to
- 5 criminalize membership in the Communist Party, we are
- 6 now going to make it a crime to speak in conjunction
- 7 with the Communist Party, do you think the decisions
- 8 would have come out any differently? I don't think so,
- 9 because this Court has said that speech is different
- 10 from money.
- 11 JUSTICE SCALIA: I think it's very
- 12 unrealistic to compare these terrorist organizations
- 13 with the Communist Party. Those cases involved
- 14 philosophy. The Communist Party was -- was -- was more
- 15 than a -- than an organization that -- that had some
- 16 unlawful ends. It was also a philosophy of -- of -- of
- 17 extreme socialism. And -- and many people subscribe to
- 18 that philosophy.
- I don't think that Hamas or any of these
- 20 terrorist organizations represent such a philosophical
- 21 organization.
- MR. COLE: Your Honor, this -- this Court
- 23 accepted Congress's findings. Congress's findings were
- 24 not that this was a philosophical debating society, but
- 25 that it was an international criminal conspiracy

- 1 directed by our enemy to overthrow us through terrorism.
- 2 JUSTICE SCALIA: That may be, but people
- 3 joined it for philosophical reasons.
- 4 MR. COLE: Oh, sure --
- 5 JUSTICE SCALIA: They joined it for
- 6 philosophical reasons. These terrorist organizations
- 7 have very practical objectives. And the only reason for
- 8 joining them or assisting them is to assist those
- 9 practical objectives.
- 10 MR. COLE: Well, I don't think that's -- I
- 11 don't think that's fair, Justice Scalia. The
- 12 Humanitarian Law Project has no interest in furthering
- 13 terrorism, but the Kurdistan Workers Party are the
- 14 principal representatives of the -- of the Kurds in
- 15 Turkey. They do have an interest in protecting the
- 16 rights of the Kurds. They do have an interest in
- 17 encouraging the Kurdistan Workers Party to -- to disavow
- 18 violence and engage in lawful peaceful means of
- 19 resolving their disputes.
- JUSTICE GINSBURG: Mr. Cole, would you
- 21 distinguish -- I think this came up in the court of
- 22 appeals. There are a lot of groups on the list. I
- 23 think the Al-Qaeda was one instance that was mentioned
- 24 and, at least according to the briefs, you conceded that
- 25 if you wanted to do just what you describe with respect

- 1 to the Kurdish group or the Tamil group, the ban would
- 2 be permissible, if the group were Al-Qaeda, and I will
- 3 throw in the Taliban.
- 4 MR. COLE: Yes. We didn't actually concede
- 5 that, Your Honor. That's a misstatement on the part of
- 6 the government. If you look at --
- 7 JUSTICE GINSBURG: Well, then -- then as --
- 8 suppose the group is not the two that we have here, but
- 9 Al-Qaeda and the Taliban?
- MR. COLE: What we said, for the record, is
- 11 that it would pose a very different constitutional
- 12 question. And I think there are two reasons why it
- 13 might pose a different constitutional question. One is,
- 14 and that was, picking up on my question back to
- 15 Mr. Chief Justice, is it during wartime or not? And
- 16 during wartime, Congress has broader powers pursuant to
- 17 the treason --
- 18 JUSTICE STEVENS: I want to be sure I
- 19 understand that point. You think the issue in this case
- 20 would be different if we were at war?
- 21 MR. COLE: I think it might be different if
- 22 we were at war, with these --
- 23 JUSTICE STEVENS: And if that's true, why
- 24 aren't we now at war with regard to our opposition to
- 25 these organizations?

- 1 MR. COLE: Well --
- 2 JUSTICE STEVENS: What is the difference, is
- 3 the --
- 4 MR. COLE: Well -- well, two things, Your
- 5 Honor. With respect to -- it might be different if
- 6 you -- if you are talking about treason. Tokyo Rose,
- 7 for example, was engaged in speech, but she was doing so
- 8 with -- with the purpose of aiding the enemy and the
- 9 specific intent of betraying the United States. And
- 10 that's what's required. And what the Supreme Court has
- 11 said is that the -- the aid has to be --
- 12 JUSTICE STEVENS: But my question that I
- 13 want to be sure you are focused on, the issues in this
- 14 very case --
- MR. COLE: Right.
- JUSTICE STEVENS: -- would they be different
- if we were now at war?
- 18 MR. COLE: I think it would depend, Your
- 19 Honor, because the -- what -- what treason requires is
- 20 aid to the enemy and aid might be in the form of speech.
- 21 But it also requires a specific intent to betray the
- 22 United States. And when you aid someone with whom we
- 23 are at war, there is an -- there may well be an intent
- 24 to betray the United States. There is no betrayal of
- 25 the United States here.

1 And, number two --2 JUSTICE SCALIA: In a way there is. What 3 about -- what about aiding organizations that are acting 4 criminally, killing innocent civilians with regard to 5 one of our allies? And we are seeking to gain the 6 assistance of these allies against those terrorists who 7 aim their terrorism at us, and yet --8 MR. COLE: Right. 9 JUSTICE SCALIA: -- we -- we are supposed to allow our citizens to assist the terrorist organizations 10 11 that are directing their violence against them? 12 MR. COLE: Well --13 JUSTICE SCALIA: Why isn't that a sufficiently serious reason for the government to do 14 15 what it's done here. MR. COLE: I think the question, Your Honor, 16 is there -- is there any realistic nexus between writing 17 18 an op-ed, advocating before Congress, urging a group to 19 use lawful nonviolent means to resolve its disputes, and 20 killing Americans. And there just isn't. 21 CHIEF JUSTICE ROBERTS: Well, you've 22 picked -- you've picked hypotheticals that are very easy 23 for you. What about personnel? Is there a connection 24 between providing personnel that participate in legal

activity on behalf of a terrorist organization, and the

25

- 1 organization can then say, well, because you are
- 2 providing this personnel, we can take them out and shift
- 3 them to bomb making?
- 4 MR. COLE: Right. And -- and I guess
- 5 my answer to that would be it would depend upon whether
- 6 the -- the -- what is being prohibited is speech. If
- 7 what is being prohibited is speech, I'm not sure that it
- 8 would be permissible for the government to say we are
- 9 going to criminalize your speech, even though it is
- 10 advocating lawful activities, because --
- 11 CHIEF JUSTICE ROBERTS: Well, one of the
- 12 things that is being prohibited here that you challenge
- is providing personnel.
- 14 MR. COLE: That's right. And -- and that's
- 15 exactly what De Jonge was essentially charged with. And
- 16 the Communist Party was, again, found to be engaged in
- 17 criminal activity, to be a criminal syndicate,
- 18 essentially, by the Oregon statute. The Court didn't
- 19 question that. At that time it was illegal to even
- 20 advocate illegal activity.
- 21 He was charged with providing his person,
- 22 personnel, by conducting a meeting under the auspices of
- 23 the Communist Party and providing the lead speech there.
- 24 And the Court said, even though the argument was --
- 25 CHIEF JUSTICE ROBERTS: Now, is your

- 1 argument limited to personnel that engages in speech, or
- 2 does it cover personnel that -- a nurse at one of the,
- 3 if there are any, Hamas hospitals?
- 4 MR. COLE: Our argument, Your Honor, is --
- 5 again, this is an as-applied challenge with respect to
- 6 the particular speech that our client seek to engage in,
- 7 so it would not -- it would not require the Court to
- 8 decide whether any nonspeech assistance could be
- 9 proscribed. In fact --
- JUSTICE SOTOMAYOR: When -- but the way you
- 11 define the speech that you want protected is speech that
- 12 is advocating some lawful activity.
- MR. COLE: Right.
- 14 JUSTICE SOTOMAYOR: So what is unlawful
- 15 about teaching people medicine and how to cure people
- 16 from infection?
- 17 MR. COLE: If -- if that were what they were
- 18 doing, Your Honor, if it was teaching, then it would be
- 19 protected by the First Amendment. But if -- I took
- 20 Chief Justice Roberts' question --
- 21 JUSTICE SOTOMAYOR: So you see no
- 22 difference -- you are not advocating a difference in
- 23 this case between training that could reasonably be used
- 24 in terrorist activities, because teaching people how to
- 25 care for the ill could be used to teach people how to

- 1 care for the wounded.
- 2 MR. COLE: Right. Right.
- JUSTICE SOTOMAYOR: All right. And the
- 4 political speech that your group is advocating, i.e.,
- 5 the petitioning; you are not willing to draw a
- 6 distinction?
- 7 MR. COLE: No, no. I --
- 8 JUSTICE SOTOMAYOR: You are saying to us the
- 9 case stands and falls on whether or not we accept that
- 10 this statute regulates conduct as opposed to speech?
- MR. COLE: No. Justice Sotomayor, what I'm
- 12 suggesting is, number one, the statute regulates speech.
- 13 It regulates speech because of what it conveys.
- 14 Therefore --
- 15 JUSTICE SOTOMAYOR: No, it regulates
- 16 training. And the question I asked you --
- MR. COLE: Yes.
- 18 JUSTICE SOTOMAYOR: -- was whether there was
- 19 a way in your challenge, or whether you are advocating
- 20 any difference in the nature of the speech, that it's --
- 21 this is an as-applied challenge.
- MR. COLE: Exactly. And that's --
- 23 JUSTICE SOTOMAYOR: And so the question --
- 24 because the only answer you have given us is if it's
- 25 lawful speech it's protected.

1 MR. COLE: No, I -- I think -- I think, Your 2 Honor, that the answer -- maybe I wasn't clear in 3 responding to Justice Alito. But with respect to speech 4 advocating solely lawful activity of the type at issue 5 here, I think the connection between the government --6 JUSTICE SOTOMAYOR: So give me an analytical 7 framework to address that question. 8 MR. COLE: All right. 9 JUSTICE SOTOMAYOR: The government says 10 under O'Brien even the speech that you want -- forget about the tsunami aid speech. Let's just talk about the 11 political petitioning speech, the petitioning for --12 13 MR. COLE: Right. 14 JUSTICE SOTOMAYOR: Is there a difference 15 and under what analytical framework would --16 MR. COLE: Well, I think the question -- the question at the -- at the bottom would be 17 18 whether there is a sufficient connection between the 19 speech which is being expressed and the government's 20 compelling interest. And if -- certainly there would be 21 if it's -- meets Brandenburg. I think there might be if it's specifically intended or known that it will further 22 23 terrorist activity. But where -- with respect to our 24 speech there's really no realistic likelihood that the

speech that's being expressed here will --

25

- 1 JUSTICE KENNEDY: We have to be conscious of
- 2 the white light. I have just one -- one question.
- 3 The old equity rule was that you don't
- 4 enjoin a criminal statute, you wait until something
- 5 happens. And the reason is then we have specific facts.
- 6 And if we said that here you would say oh, you are
- 7 chilling speech.
- 8 What's your best case in the precedents of
- 9 this Court for our entertaining an challenge that --
- 10 this is not really -- we usually talk about as-applied
- 11 after the fact. Coates, there was a conviction.
- 12 MR. COLE: Right. Federal Election --
- JUSTICE KENNEDY: What's your -- what's your
- 14 best case?
- 15 MR. COLE: Federal Election Commission v.
- 16 Wisconsin Right to Life was a pre-enforcement,
- 17 as-applied challenge to the provisions of the BCRA.
- 18 If I could reserve the rest of my time.
- 19 JUSTICE GINSBURG: Do you want to give an
- 20 answer to the Taliban and the Al-Qaeda?
- 21 MR. COLE: Oh, I'm sorry -- I'm sorry,
- 22 Justice Ginsburg. I thought I was maybe -- but the
- 23 answer would be we are in a military conflict with the
- 24 Al-Qaeda and the Taliban. This Court has recognized
- 25 that. It is authorized by the authorization to use

- 1 military force. Therefore treason law might be
- 2 applicable, number one.
- Number two, it is not clear that Al-Qaeda
- 4 engages in any lawful activities at all, and the -- the
- 5 principle this Court established with respect to the
- 6 Communist Party, a group that clearly engaged in illegal
- 7 activities of a very, very dangerous kind, but also
- 8 engaged in lawful activities, is that that -- is that
- 9 the group has to be a dual purpose group. And here
- 10 there is absolutely no dispute that the Kurdistan
- 11 Workers Party and the LTTE engage in a wide variety of
- 12 lawful activities, and that all our clients seek to do
- is support those lawful activities.
- 14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cole.
- 15 General Kagan.
- 16 ORAL ARGUMENT OF GEN. ELENA KAGAN
- ON BEHALF OF ERIC H. HOLDER, JR., ET AL.
- 18 GENERAL KAGAN: With your permission,
- 19 Mr. Chief Justice, this may take some time.
- 20 (Laughter.)
- 21 GENERAL KAGAN: I'm sure it will on the
- 22 other side, too.
- 23 Mr. Chief Justice, and may it please the
- 24 Court:
- The material support statute is a vital

- 1 weapon in this nation's continuing struggle against
- 2 international terrorism. The statute prohibits, in
- 3 terms that ordinary people can understand, the provision
- 4 of material resources, material resources of all kinds,
- 5 to foreign groups that engage in terrorist acts that
- 6 threaten the security of the United States or its
- 7 citizens.
- 8 The statute does not prohibit in any way
- 9 Petitioners' independent advocacy. Petitioners can say
- 10 or write whatever they wish about the PKK or the LTTE,
- 11 and all their activities both legal and illegal. What
- 12 the Petitioners --
- 13 JUSTICE SOTOMAYOR: If a terrorist was
- 14 arrested in the United States from one of these groups,
- 15 would they be barred under the statute from serving as
- 16 their attorney in a U.S. court?
- 17 GENERAL KAGAN: Justice Sotomayor, if -- if
- 18 there are --
- JUSTICE SOTOMAYOR: Isn't that material
- 20 support under the definition that you have been
- 21 advocating?
- 22 GENERAL KAGAN: Justice Sotomayor, I believe
- 23 that that would be excluded from the, statute, should be
- 24 excluded from the statute, and indeed even Petitioners
- 25 have never suggested --

1	JUSTICE SOTOMAYOR: But I'm asking you why.
2	GENERAL KAGAN: Because I think that there
3	the canon of constitutional avoidance would clearly come
4	into play. If there is a criminal defendant, even a
5	civil defendant where there may be Sixth Amendment
6	issues, where there may be due process issues, it
7	would
8	JUSTICE SOTOMAYOR: And so can I can I
9	ask you something? I mean, part of the First Amendment
10	is the right for the to petition the government for
11	redress of grievances. Putting aside all of the other
12	aid they are claiming, the tsunami aid, the training and
13	other things, can the statute constitutionally be read
14	to bar them from petitioning legitimate agencies,
15	legitimate government agencies, to peacefully, using the
16	words of the Constitution, to effect legal change?
17	GENERAL KAGAN: It can
18	JUSTICE SOTOMAYOR: Thatthat's part of
19	what they are claiming their speech involves
20	GENERAL KAGAN: The statute
21	JUSTICE SOTOMAYOR: training and doing
22	that.
23	GENERAL KAGAN: The statute cannot
24	legitimately be read to to include their independent
25	advocacy. But the statute in fact does not cover their

- 1 independent advocacy. Judge Fertig and all the rest of
- 2 the Petitioners can lobby Congress, can lobby
- 3 international organizations --
- 4 JUSTICE SOTOMAYOR: But that doesn't --
- 5 GENERAL KAGAN: -- as they see fit.
- 6 JUSTICE SOTOMAYOR: -- answer, what is the
- 7 right of the people peaceably to assemble? Now, mind
- 8 you, I understand this is the right of U.S. citizens in
- 9 the United States. But what in the First Amendment or
- 10 even in this statute could justify Congress from barring
- individuals to petition peacefully United -- world
- 12 agencies or even U.S. agencies --
- 13 GENERAL KAGAN: Again the statute --
- 14 JUSTICE SOTOMAYOR: -- for the recognition
- of a -- of a legitimate goal?
- 16 GENERAL KAGAN: Again, the statute does not
- 17 prohibit the Petitioners from petitioning peacefully.
- 18 What the statute does is to prohibit Petitioners from
- 19 giving support to foreign terrorist organizations in
- 20 their ability to petition international organizations.
- 21 And that's a very different thing. It's a different
- 22 thing for several reasons.
- 23 First, remember that these are foreign
- 24 organizations and as several of you have suggested, the
- 25 ability of Congress and of the Executive Branch to

- 1 regulate the relationships between Americans and foreign
- 2 governments or foreign organization has long been
- 3 acknowledged by this Court. It was acknowledged in
- 4 cases like Regan and Zemel and others, not only with
- 5 respect to nations with which we are at war, but with
- 6 respect to foreign nations and other entities as well --
- 7 foreign nationals.
- And in fact, the Petitioners' supposed First
- 9 Amendment claims really are not speech claims at all.
- 10 They are all association claims. Petitioners can do
- 11 whatever independent advocacy they wish. What
- 12 Petitioners cannot do is to provide support to a foreign
- 13 terrorist organization. And there indeed, the
- 14 government's position is that the Association Clause
- 15 does not extend that far to give Americans, American
- 16 citizens, the ability to deal in whatever way they wish
- 17 with foreign nations --
- 18 JUSTICE GINSBURG: But it isn't--
- 19 GENERAL KAGAN: -- or foreign organizations.
- JUSTICE GINSBURG: -- whatever way they
- 21 wish. They are making clear that it's only in
- 22 connection with lawful activity of the group, and indeed
- 23 it's to train them in using lawful means to achieve
- 24 their end.
- 25 And I thought you went further than saying

- 1 there has to be strictly independent advocacy. You
- 2 recognized in your brief that they could meet with
- 3 members of these terrorist organizations. They could
- 4 meet and communicate with them, but they can't
- 5 communicate advice on how to pursue their goals through
- 6 lawful means?
- 7 GENERAL KAGAN: Justice Ginsburg, you are
- 8 exactly right that, in addition to engaging in
- 9 independent advocacy, Petitioners can meet with members
- 10 of the foreign terrorist organizations, can join the
- 11 foreign terrorist organizations, that membership is not
- 12 prohibited by the statute. What the statute does
- 13 prohibit is active support of all kinds, both
- 14 material --
- 15 JUSTICE KENNEDY: Can they -- can they
- 16 advocate to the association? There are many kinds of
- 17 advocacy. You can advocate to the world that they are
- 18 right. Can you had advocate to the association that you
- 19 should change your ways, that you should use Lexis to
- 20 find international law precedents, et cetera?
- 21 GENERAL KAGAN: Absolutely, Justice Kennedy.
- 22 If -- if Judge Fertig or the other Petitioners wanted to
- 23 say to these organizations, you should change your ways,
- 24 nothing in the statute --
- JUSTICE KENNEDY: And suppose the

- 1 organization's board of directors agrees with that and
- 2 wants them to address the general membership on that
- 3 point? And they are doing it with the blessing of the
- 4 organization.
- 5 GENERAL KAGAN: Justice Kennedy, I want
- 6 first -- I am going to answer your question, and I am
- 7 going to say that that's still not covered, but I want
- 8 also to make a general point, which is that this Court
- 9 can exhaust all the hypotheticals that it has in this
- 10 case, and it will be irrelevant to the case at hand, and
- 11 that would be so for two reasons.
- 12 First, because with respect to overbreadth,
- 13 all of those uncertain or even unconstitutional
- 14 applications will be but a thimbleful, compared to the
- 15 ocean full of completely legitimate applications of this
- 16 statute. And second, because those hypotheticals have
- 17 nothing to do with this case.
- 18 Mr. Cole said several times, I heard, this
- is an as-applied challenge, this is an as-applied
- 20 challenge. And to the extent that the Court thinks that
- 21 there are certain categories of activity that the
- 22 statute could not prohibit that would raise serious
- 23 constitutional concerns -- which I must say I -- I
- 24 disagree with, but there may be some. To the extent
- 25 that that's true, the Court can -- can put those off to

- 1 another day, another --
- JUSTICE BREYER: Well, wait. They want to
- 3 apply. They want to do -- they say in this case that
- 4 they want to provide training in the issue of
- 5 humanitarian international law, and they want to provide
- 6 training and expert advice and assistance in respect to
- 7 how you petition the UN.
- Now focusing on those two things, and going
- 9 back to Justice Sotomayor's question, why -- what is the
- 10 government's interest in the following? Under O'Brien
- 11 or any other test, you look at it and say, does teaching
- 12 have a First Amendment interest -- training? Yes. And
- 13 what about teaching about advocacy? That's what they
- 14 are doing, teaching about a certain kind of advocacy.
- 15 Yes. Therefore there is a First Amendment interest
- 16 implicated, seriously.
- 17 Now, when that is seriously implicated,
- 18 there is also a government interest, on the other side,
- 19 in not having terrorism. But there is a less
- 20 restrictive alternative which they suggest, that in that
- 21 situation, what they're entitled to read this statute as
- 22 saying is that, if they believe and a person reasonably
- 23 would believe, that their teaching, assistance,
- 24 training, would not significantly aid this organization
- in its unlawful ends, then they are not guilty.

1 Now, what is the government's interest in 2 not accepting that interpretation? The First Amendment 3 is hurt; there is an interest; but there is what they 4 describe as -- and what I have narrowed -- a less 5 restrictive way of going about it. And they have to be 6 reasonable in what they think. Now, what's the 7 objection to that? 8 GENERAL KAGAN: Justice Breyer, I think the 9 objection is exactly what Justice Kennedy suggested with 10 his hypothetical, because his hypothetical is actually 11 perfectly aligned with this case. You can't give 12 tsunami aid, but the question is: Can you instruct 13 these organizations about how to get tsunami aid. 14 And then these organizations get tsunami 15 aid, and they, in fact, use that aid in such a way that 16 they also have more money to --JUSTICE BREYER: I'm sorry. 17 I am not talking about tsunami aid. I am talking about the 18 19 instance where the teaching is itself teaching about how 20 to do something and that something is the kind of thing 21 that the First Amendment protects. GENERAL KAGAN: Well, that something, which 22 23 is the teaching the foreign terrorist organization how 24 to petition international bodies in order to get various

kinds of support, financial or otherwise, that will

25

- 1 strengthen those organizations in everything that they
- 2 do. With conduct --
- JUSTICE BREYER: Fine, and if a reasonable
- 4 person would know that, that it's going to help them,
- 5 then it is unlawful, if it's going to help them and a
- 6 reasonable person would think it was going to help them
- 7 in their unlawful activities. But we're not --
- 8 GENERAL KAGAN: Congress is the reasonable
- 9 person here. And Congress reasonably decided that when
- 10 you help a terrorist -- foreign terrorist organization's
- 11 legal activities, you are also helping the foreign
- 12 terrorist organization's illegal activities.
- 13 Hezbollah builds bombs. Hezbollah also
- 14 builds homes. What Congress decided was when you help
- 15 Hezbollah build homes, you are also helping Hezbollah
- 16 build bombs. That's the entire theory behind this
- 17 statute, and it's a reasonable theory for exactly the
- 18 kinds of reasons that Justice Kennedy was suggesting by
- 19 that hypothetical.
- 20 JUSTICE ALITO: And doesn't that lead to,
- 21 kind of logically lead to the conclusion that mere
- 22 membership could be prohibited? Could you explain how
- 23 someone could be a member of one of these organizations
- 24 without providing a service to the organization? Simply
- 25 by lending one's name as a member; that might be

- 1 regarded as a service. If you attended a meeting and
- 2 you helped to arrange the chairs in advance or clean up
- 3 afterwards, you would be providing a service to the
- 4 organization.
- 5 GENERAL KAGAN: I -- I actually don't
- 6 think -- I mean, Congress clearly did not mean to
- 7 include that. And I think that the normal words that
- 8 Congress used make that pretty clear. When you think
- 9 about personnel, when you think about training, when you
- 10 think about expert advice and assistance, even when you
- 11 think about service, you -- the notion that I am serving
- 12 a terrorist organization simply by the act of membership
- 13 I think would not be correct. And --
- 14 JUSTICE SCALIA: Why do you say Congress
- 15 clearly did not intend that? You know, I would have
- 16 guessed that you are providing a service or personnel
- 17 when you make yourself a member of the organization.
- 18 Why do you say Congress clearly did not intend it?
- 19 GENERAL KAGAN: That is certainly not the
- 20 way the government reads the statute, and that's not the
- 21 way the government has ever read the statute. And
- indeed, the government, as we discussed in our brief,
- 23 believes that there are certain kinds of joint
- 24 activities that would be allowed by the statute.
- Now, that's not to say that Congress could

- 1 not have gone farther. In this specific context, where
- 2 one is regulating dealings with a foreign organization,
- 3 it's possible that Congress could have gone further.
- 4 But we understand the statute and -- and I think there's
- 5 a -- I think, quite reasonably, as providing only
- 6 material support, a true service, something that will
- 7 help the foreign organization in whatever it does.
- 8 JUSTICE BREYER: Well, but petitioning the
- 9 United Nations -- and that's what you are teaching them
- 10 -- does not, on its face, seem to me to be something
- 11 that reasonably you would think was going to aid them in
- 12 their unlawful objectives, but for the realm of ideas.
- 13 Now --
- 14 GENERAL KAGAN: This would be --
- JUSTICE BREYER: -- and then Congress put a
- 16 thing in here which says: Don't construe this statute
- 17 in a way that will abridge First Amendment rights. So
- 18 it's aware of the problem of First Amendment rights.
- 19 GENERAL KAGAN: And I think you are exactly
- 20 right about that.
- 21 JUSTICE BREYER: Is there any evidence that
- 22 something like that would, in fact, but for the realm of
- 23 ideas, help this organization commit its terrorist acts?
- 24 GENERAL KAGAN: Justice Breyer, I believe
- 25 that the legislative record is quite clear that Congress

- 1 thought that various kinds of aid given to the legal and
- 2 legitimate activities of the terrorist organization, in
- 3 fact, further the aims of the -- in fact, further the
- 4 illegal and illegitimate goals.
- 5 Congress made findings about the fungibility
- 6 of these resources. Congress said over and over that
- 7 these organizations have no firewalls, no organizational
- 8 firewalls, no financial firewalls.
- 9 JUSTICE GINSBURG: You say that the -- not
- 10 only the membership, but they can meet and they can
- 11 discuss. And I don't understand the line between
- 12 meeting with these terrorist organizations, discussing
- 13 things with them, and instructing them on how they can
- 14 pursue their goals through lawful means.
- 15 GENERAL KAGAN: Justice Ginsburg, I agree
- 16 with you that there may be some hard cases that are at
- 17 the borderline between the two, as there are in most
- 18 statutes; that there may be hard cases. This is not one
- 19 of them.
- 20 And I think it would -- it's very
- 21 instructive for the Court -- I'm sure you have all done
- 22 this -- but to actually go back and look at the
- 23 Petitioner's complaints in this case and look at Judge
- 24 Fertig's declarations in this case, because what they
- 25 show is the extensiveness of the activities that they --

- of the services that they wish to offer to these foreign
- 2 terrorist organizations and the value that those
- 3 services are going to give those foreign terrorist
- 4 organizations.
- 5 CHIEF JUSTICE ROBERTS: General, you've
- 6 talked about -- there has been a lot of discussion about
- 7 the legitimate activities allowing -- facilitating
- 8 illegitimate activities by freeing up personnel and all
- 9 that, and legitimizing the group.
- 10 Is that an argument you've made before this
- 11 Court or below? I looked at your briefs and I thought
- 12 It's almost all about: This is O'Brien, this is
- 13 conduct, this is not speech. I didn't see the argument
- 14 that we've spent a lot of time talking about, which is
- 15 the legitimate activities allow the illegitimate
- 16 activities to take place.
- 17 GENERAL KAGAN: No, I believe we -- we have,
- 18 Mr. Chief Justice, although if we didn't emphasize it
- 19 enough, I -- I will plead error, because I think that it
- 20 is an -- a crucial point to this case. But I think in
- 21 the part of our brief --
- 22 CHIEF JUSTICE ROBERTS: Do you have -- I
- 23 don't mean to -- do you have particular references to
- 24 where in your brief you made the argument?
- 25 GENERAL KAGAN: Yes. In the part of our

- 1 brief where we discuss the application of the O'Brien
- 2 standard and we say, what are the governmental interests
- 3 here.
- 4 CHIEF JUSTICE ROBERTS: Yes. It seems to me
- 5 your case is all about O'Brien. I'm not sure you have
- 6 an answer to whether or not strict scrutiny is
- 7 satisfied. If we disagree with you and think that some
- 8 of this activity is speech, I don't see the argument
- 9 that you've presented on strict scrutiny.
- 10 GENERAL KAGAN: I think that is right,
- 11 Mr. Chief Justice, that we have not specifically
- 12 addressed the strict scrutiny argument. I think this
- 13 would pass a strict scrutiny standard, but I actually
- 14 think that to the extent that the Court thought a strict
- 15 scrutiny standard were appropriate, a remand might be in
- 16 order that no Court has ever actually gone off on that
- 17 ground.
- 18 JUSTICE ALITO: Why is O'Brien the correct
- 19 standard? How can you argue that training and providing
- 20 advice is not speech?
- 21 GENERAL KAGAN: Justice Alito, I think that
- 22 the -- the training and advice clauses are, of course,
- 23 part of a statute which regulates material support and
- 24 resources of all kinds, and to the extent that what
- 25 you're saying is, you know, training and advice, those

- 1 are always speech restrictions if you find them in the
- 2 statute, I think that that's not right.
- I mean, if you think about the range of
- 4 things that training could involve: Training how to
- 5 build a bomb, training how to fly a plane, training how
- 6 to use sophisticated communications equipment and
- 7 training how to engage --
- 8 JUSTICE GINSBURG: How about what's involved
- 9 here? I think they said that they want to train them
- 10 how to do lawful things, how to pursue their goals in a
- 11 lawful, rather than a terrorist, way. And that is
- 12 speech. It is not conduct. They want to engage in
- 13 advocacy of peaceful means of achieving the goals of
- 14 these groups.
- 15 GENERAL KAGAN: Congress, of course, allowed
- 16 them to engage in all the advocacy that they wish on
- 17 behalf of these groups. Indeed, Congress did not --
- 18 JUSTICE GINSBURG: But they want to
- 19 communicate, and you said they can communicate. And I
- 20 still am having trouble with the line of what they can
- 21 communicate and what they can't.
- 22 GENERAL KAGAN: Well, I think if they are
- 23 engaged in just discussion of ideas, this statute does
- 24 not prohibit that. What the statute prohibits is the
- 25 provision of actual support: Services to the

- 1 organizations that the organization can use in its
- 2 activities, both legal and illegal.
- 3 JUSTICE KENNEDY: Do you stick with the
- 4 argument made below that it's unlawful to file an amicus
- 5 brief?
- 6 GENERAL KAGAN: Justice Kennedy --
- 7 JUSTICE KENNEDY: I think I'm right in
- 8 saying it that way, argument below.
- 9 GENERAL KAGAN: Yes, that I think that would
- 10 be a service. In other words, not an amicus brief just
- 11 to make sure that we understand each other. The
- 12 petitioners can file amicus briefs in a case that might
- involve the PKK or the LTTE for themselves, but to the
- 14 extent that a lawyer drafts an amicus brief for the PKK
- 15 or for the LTTE, that that's the amicus party, then that
- indeed that would be prohibited. That's the kind of
- 17 service that --
- JUSTICE STEVENS: Then it says to me that
- 19 your opponent's argument here today is prohibited.
- GENERAL KAGAN: No, no, no, because
- 21 Petitioners here are arguing for themselves. What I'm
- 22 suggesting is Petitioners can do all the advocacy they
- 23 want, can engage in courts in any way they wish. The
- 24 only thing that's prohibited is if the PKK hired a
- 25 lawyer to write an amicus brief on its behalf. On that

1 point --2 JUSTICE SOTOMAYOR: General, I understand --I could be wrong, that many petitioners or respondents 3 4 go out to the industry and say we need some amicus 5 briefs, and they flood in from all sides. Would that be 6 illegal? Because the -- the organization --7 GENERAL KAGAN: Well, if the PKK --8 JUSTICE SOTOMAYOR: -- came out and said we 9 need a brief -- amicus briefs from law professors? 10 From --11 GENERAL KAGAN: If -- if the PKK or the LTTE 12 or Al-Qaeda or any of the other organizations on this list said we want amicus briefs, and somebody provided 13 14 an amicus brief --15 JUSTICE SOTOMAYOR: Without pay. GENERAL KAGAN: -- for themselves -- for 16 themselves, there would be no problem. The only problem 17 18 is if somebody drafted an amicus brief --19 JUSTICE SOTOMAYOR: How can we can ever --20 GENERAL KAGAN: -- for the PKK itself. 21 JUSTICE SOTOMAYOR: Under the definition of 22 this statute, teaching these members to play the 23 harmonica would be unlawful. You are teaching --24 training them in a lawful -- in a specialized activity.

So how do we -- there has to be something more than

25

- 1 merely a congressional finding that any training is bad.
- 2 GENERAL KAGAN: Well, I think here we have a
- 3 -- the congressional definition of what kind of training
- 4 is bad, and that definition focuses on training in
- 5 specialized activities. Now you say well, maybe
- 6 training a -- playing a harmonica is a specialized
- 7 activity. I think the first thing I would say is there
- 8 are not a whole lot of people going around trying to
- 9 teach Al-Qaeda how to play harmonicas.
- 10 JUSTICE SCALIA: Well, Hamid Hatah and his
- 11 harmonica quartet might tour the country and make a lot
- 12 of money. Right?
- 13 GENERAL KAGAN: I'm sorry --
- 14 (Laughter.)
- 15 GENERAL KAGAN: But I don't mean to make fun
- of the hypothetical at all, Justice Sotomayor, because I
- 17 think you are raising an important point, but it's
- 18 really a point that goes to how to sensibly read a
- 19 statute. What Congress did, when in response to some
- 20 lower court decisions, it further clarified and defined
- 21 the word training and the word expert advice and
- 22 assistance, I have to say I think that Congress's own
- 23 responses here -- I mean, Congress is both responsive
- 24 and responsible, that it really took into account court
- 25 decisions and tried to go back to the statute and --

1 JUSTICE BREYER: In that -- just forget the 2 harmonica for a second; I'm more worried about the 3 lawyer. You are saying that a -- a group abroad which 4 may have some American citizens in it, let's assume they 5 do, want to hire a lawyer. And this lawyer is supposed to file some amicus briefs and do other activities. You 6 7 are saying Congress has forbidden that in this statute, 8 and that's constitutional? 9 GENERAL KAGAN: Well, first of all, Justice Breyer, I want to sort of repeat what I -- what 10 I said about the need to find a substantial amount of 11 12 uncertain or unconstitutional applications, or with respect to any kind of facial challenge or with respect 13 14 to this case --15 JUSTICE BREYER: I want to know if that's what you are saying, what I just said: that an 16 organization that has American citizens engaged in 17 18 terrible stuff, that they are not entitled under the 19 Constitution to have a lawyer in the United States who 20 does legal work like filing amicus briefs. 21 GENERAL KAGAN: To the extent that there is 22 any constitutional claim that they would be entitled to 23 representation, whether it's a Sixth Amendment claim or 24 a due process claim that might exist in criminal cases,

that might exist in habeas cases, that might exist in

25

- 1 civil cases, then the government believes that the
- 2 statute should be read so as not to include that.
- 3 JUSTICE SCALIA: Why do these hypotheticals
- 4 make any difference? This is an as-applied challenge.
- 5 We should look to the activities that this organization
- 6 wants to conduct, unless -- unless you think there is an
- 7 overbreadth problem. And that seems to me, I'm not even
- 8 sure that the Petitioners assert that here.
- 9 Clearly the -- the broad scope of this
- 10 statute is -- is constitutional, and whatever aspects of
- 11 speech it may run afoul of are -- are minimal. That
- 12 being the case, of what relevance are these
- 13 hypotheticals? It's a lot of fun and it's very
- 14 interesting, but we can deal with all of that when the
- 15 situations arise, can't we?
- 16 GENERAL KAGAN: Well, I -- I do think that
- 17 the answer to that is yes, Justice Scalia.
- 18 JUSTICE GINSBURG: The answer on the other
- 19 side is, all we want to do is speak about lawful
- 20 activity. You are not supplying any guns, any
- 21 communicating equipment. We just want to speak about
- 22 lawful activities.
- I go back to my failure to understand the
- 24 line between yes, you could communicate with these
- 25 people, but you can't communicate about going about

- 1 their aims through peaceful means.
- 2 GENERAL KAGAN: No, I think my line is you
- 3 can communicate, but you can't provide material support.
- 4 You can't make a donation, whether it's tangible or
- 5 intangible.
- 6 JUSTICE KENNEDY: I'm sorry, you can
- 7 communicate on -- I don't mean to interrupt. You can
- 8 communicate on your own, but you can't communicate with
- 9 them?
- 10 GENERAL KAGAN: No, I mean, you can
- 11 communicate with -- on your own, for sure. Independent
- 12 advocacy of all kinds is not touched by this statute.
- 13 In addition to that --
- 14 JUSTICE KENNEDY: But Justice Ginsburg's
- 15 question is can you advocate peaceful means -- and let's
- 16 assume that if they embrace peaceful means, they get
- 17 more interest in their organization, the organization
- 18 becomes stronger for all purposes. Can you do that,
- 19 that was Justice Ginsburg's question.
- 20 GENERAL KAGAN: Can you say to an
- 21 organization, look, you guys really should lay down your
- 22 arms.
- 23 JUSTICE KENNEDY: And here's how to do it.
- 24 And here's how to go to the U.N., and here's how to
- 25 apply for aid and here's how to file an amicus brief.

- 1 GENERAL KAGAN: Well, now you can't.
- 2 Because when you tell people, here's how to apply for
- 3 aid and here's how to represent yourself within
- 4 international organizations or within the U.S. Congress,
- 5 you've given them an extremely valuable skill that they
- 6 can use for all kinds of purposes, legal or illegal.
- 7 And it's not sufficient for the Petitioners --
- 8 JUSTICE GINSBURG: So you can -- you can
- 9 communicate, but the communications are censored. That
- 10 you said you can meet with -- you can be a member, you
- 11 can attend meetings, you can discuss things, but there
- 12 only -- there is a certain point at which the discussion
- 13 must stop, right?
- 14 GENERAL KAGAN: The discussion must stop
- 15 when you -- when you go over the line into giving
- 16 valuable advice, training, support to these
- 17 organizations. At that point --
- 18 JUSTICE STEVENS: Let me ask a sort of basic
- 19 question, that I have had trouble with throughout the
- 20 whole argument. We are talking about whether this is an
- 21 as-applied challenge or on its face. And what the
- 22 district judge did was held part of the statute
- 23 unconstitutional as being too vague: The words training
- 24 and advice, et cetera. Why isn't that a facial
- 25 decision?

1 GENERAL KAGAN: Well, both the lower courts, 2 I think the district court and the court of appeals I 3 think had a kind of confused analysis here. Which is 4 that they said well, it's vague as applied. The court 5 of appeals specifically said it's not vague on its face, 6 and there is no facial vagueness claim here, and yet 7 they appeared to incorporate aspects of overbreadth 8 analysis into their as-applied claim. 9 JUSTICE SCALIA: Unless you're in an overbreadth situation, a vagueness challenge can be an 10 11 as-applied challenge. A statute can be vague as applied 12 to certain conduct, although the core conduct that it 13 covers is clearly covered. 14 GENERAL KAGAN: No, that's --15 JUSTICE SCALIA: We have cases like that. 16 GENERAL KAGAN: That's exactly right, Justice Scalia, and -- and -- and with respect to the 17 as-applied vagueness claim, the government's position is 18 19 there's -- there's -- there -- it's not vague, because 20 you can go through these declarations, you can go 21 through these complaints and you can know exactly what's included within --22 23 JUSTICE KENNEDY: But -- but I have the 24 same --25 GENERAL KAGAN: -- the statute and what's

- 1 not.
- 2 JUSTICE KENNEDY: I had the same question as
- 3 Justice Stevens. It's a very odd as-applied challenge
- 4 because there hasn't been a prosecution. And vagueness
- 5 as applied, I think as Professor Cole can answer, is, it
- 6 seems to me, if you know it applies, it isn't vague. I
- 7 understand that. But --
- 8 GENERAL KAGAN: Well, it --
- JUSTICE KENNEDY: I -- I can't -- I can't
- 10 think of a case in which the Court, pre-prosecution in a
- 11 declaratory judgment, has said that it's improper as
- 12 applied to certain things. Or maybe I'm wrong. Maybe I
- 13 am missing some case.
- 14 GENERAL KAGAN: No, I -- I don't think
- 15 you are wrong, Justice Kennedy, and especially with
- 16 respect to a case where all the activity is -- clearly
- 17 fits in one box or the other. In other words, you can
- 18 go through the complaints, you can go through the
- 19 declarations and know exactly what is covered and what's
- 20 not covered. All the --
- 21 CHIEF JUSTICE ROBERTS: Well, I'm not -- I'm
- 22 not sure that's right. I mean, expert advice or
- 23 assistance, I don't know sitting down that I could tell,
- 24 you know, how to advocate for peaceful, you know,
- 25 resolution or whatever. Is that expert advice? Is that

- 1 specialized knowledge? And I understand training,
- 2 service, personnel, but that one's a little hard to --
- 3 to --
- 4 GENERAL KAGAN: Well, as I said,
- 5 Mr. Chief Justice, there will be some hard cases, there
- 6 always are when it comes to applying statutes. The
- 7 question is never are there hard cases.
- 8 CHIEF JUSTICE ROBERTS: No, my -- my point
- 9 is --
- 10 GENERAL KAGAN: The question is the
- 11 determinacy.
- 12 CHIEF JUSTICE ROBERTS: My point is that
- 13 even knowing what they intend to do, it's kind of hard
- 14 to decide whether that's based on specialized knowledge
- 15 or not.
- 16 GENERAL KAGAN: I think it -- it actually is
- 17 pretty clear in this case. If you read the declarations
- 18 and if you read the complaints, the expertise of these
- 19 parties actually shines through. Judge Fertig is proud
- 20 of his expertise, justifiably so.
- 21 JUSTICE GINSBURG: This isn't what -- what
- 22 these plaintiffs are seeking to do. Does it have any
- 23 resemblance to the 150 prosecutions that you have
- 24 brought under this Act? It was my understanding that
- 25 those were for supplying weapons, supplying other

- 1 equipment. Are there any prosecutions that are -- that
- 2 aim at training to pursue the organization's aims
- 3 through peaceful means?
- 4 GENERAL KAGAN: Justice Ginsburg, I think
- 5 that this is not the typical case. This is, of course,
- 6 a case that might never have reached this Court, except
- 7 that it was brought as a declaratory judgment action.
- 8 For the most part, what the government prosecutes are
- 9 cases which involve a wide variety of support to foreign
- 10 terrorist organizations.
- 11 JUSTICE STEVENS: Specifically, does this
- 12 particular man have to be prosecuted?
- 13 GENERAL KAGAN: I'm sorry?
- 14 JUSTICE STEVENS: Is this particular
- 15 individual in risk of being prosecuted if he makes the
- 16 speech to the United Nations?
- 17 GENERAL KAGAN: Justice Stevens, I do
- 18 believe that this individual can make whatever speeches
- 19 he wants to the United Nations. To the extent that he
- 20 is acting as a representative or as an agent of the PKK,
- 21 he does fall within the contours of the statute. That's
- 22 a different thing.
- 23 JUSTICE STEVENS: And is there evidence that
- 24 he would be prosecuted if he --
- 25 GENERAL KAGAN: Of course, that's a

- 1 different thing as to how prosecutorial judgment is used
- 2 to decide which are the high priority cases and which
- 3 are the low priority cases.
- 4 JUSTICE STEVENS: But in essence, this is an
- 5 action to enjoin a potential prosecution against
- 6 somebody for making a potential speech? That's really
- 7 what we are fighting about, I think.
- 8 GENERAL KAGAN: Again, the government did
- 9 not bring this action. Judge Fertig and the petitioners
- 10 brought this action to try to get a declaratory
- 11 judgment. As applied to them the statute does indeed
- 12 covers their various efforts or proposed activities of
- 13 being an agent of, of representing the PKK and LTTE,
- 14 that falls within the statute and I think makes the
- 15 as-applied claim here not vague at all.
- 16 CHIEF JUSTICE ROBERTS: Thank you, General.
- 17 Mr. Cole, we will give you five minutes.
- 18 REBUTTAL ARGUMENT OF DAVID D. COLE
- ON BEHALF OF HUMANITARIAN LAW PROJECT, ET AL.
- 20 MR. COLE: Thank you, Mr. Chief Justice.
- I want to start by addressing the question
- 22 of strict scrutiny. The -- the -- Justice Kennedy, you
- 23 asked and a number of the justices asked, doesn't it
- 24 make a difference that what they've done is prohibited a
- 25 wide range of conduct and just some of that is speech?

- 1 Well, that's precisely an accurate
- 2 description of the breach of the peace statute in Cohen
- 3 v. California. It forbade breaches of the peace through
- 4 loud noises, through horse racing in the streets,
- 5 through any kind of offensive conduct. But when
- 6 California applied that statute to the words on Mr.
- 7 Cohen's jacket, and then argued because we are not
- 8 interested in the words on his jacket, we are interested
- 9 in preserving the peace, however it is breached, O'Brien
- 10 should apply, the Court said no. We deal here with the
- 11 conviction resting solely upon speech, not upon any
- 12 separately identifiable conduct.
- JUSTICE KENNEDY: I -- I agree. And that
- 14 was as applied to a conviction.
- MR. COLE: That's right.
- 16 JUSTICE KENNEDY: I just haven't seen an
- 17 as-applied challenge on declaratory relief. The
- 18 government doesn't seem to object to that procedure.
- MR. COLE: No. Well, the government doesn't
- 20 object because there are actually many cases, and FEC v.
- 21 Wisconsin Right to Life is only the most recent. But,
- 22 again, the notion is somebody who is told you can meet
- 23 with a group, you can discuss with a group -- in fact,
- 24 the House report says that you are free to speak with
- 25 and on behalf of a designated group.

- 1 But then you have a statute that says, if
- 2 you advocate in any coordinated way, if you tell them
- 3 anything that is derived from specialized knowledge, if
- 4 you tell them anything of specific skill, you're --
- 5 you're engaged in a crime and you can go to jail for
- 6 15 years.
- 7 That's why the Humanitarian Law Project came
- 8 to me. They said, we have been doing this kind of
- 9 lawful activity. We think it's our right, but we are
- 10 not going to risk going to jail for 15 years for to do
- 11 it.
- 12 The government has spent a decade arguing
- 13 that our clients cannot advocate for peace, cannot
- 14 inform about international human rights.
- JUSTICE SOTOMAYOR: If O'Brien applies, what
- 16 remains of your case?
- 17 MR. COLE: If O'Brien applies, then I think
- 18 the Court would still be applying the scrutiny that
- 19 asks, is there a reasonable fit -- is there a reasonable
- 20 fit between the specific speech that's at issue here,
- 21 speech on issues of public concern, advocating only
- 22 lawful activity, and the -- and that the government
- 23 legitimately seeks to further, which is stopping support
- 24 for terrorism.
- 25 JUSTICE SOTOMAYOR: That analysis of the

- 1 activities that you are proposing has not been done by
- 2 the lower courts, correct?
- 3 MR. COLE: Well, the lower courts struck --
- 4 JUSTICE SOTOMAYOR: They -- they haven't --
- 5 they struck it on vagueness grounds, but --
- 6 MR. COLE: Right.
- 7 JUSTICE SOTOMAYOR: -- none of the courts
- 8 either subjected this to strict scrutiny or the
- 9 reasonable fit.
- MR. COLE: No, in fact, the government has
- 11 never even attempted to defend the statute under strict
- 12 scrutiny, because I think it clearly could not satisfy
- 13 strict scrutiny. And under this -- under Cohen strict
- 14 scrutiny is what must be applied here.
- 15 In addition --
- 16 CHIEF JUSTICE ROBERTS: So, why don't -- why
- 17 don't we remand it to the lower courts to apply strict
- 18 scrutiny if we agree with you that O'Brien doesn't apply
- 19 here?
- 20 MR. COLE: I think it would be appropriate
- 21 to remand for -- for application of strict scrutiny if
- 22 you read it O'Brien doesn't apply.
- O'Brien also doesn't apply if the statute is
- 24 not content neutral. This is a statute that doesn't bar
- 25 all aid, it doesn't even bar all speech. It permits

- 1 unlimited provision of religious materials, even if they
- 2 advocate jihad but proscribes any secular material, even
- 3 if they are advocating peace.
- So -- so there are -- the -- the lower
- 5 court, again, found that the statute was vague, that our
- 6 clients were reasonably chilled, that they had a right
- 7 to engage in this activity. I think you can reach that
- 8 result either through vagueness, or you can reach it by
- 9 applying strict scrutiny, or I think because the fit is
- 10 so poor here, and because -- and the vagueness, in fact,
- 11 undermines the fit, because people are chilled from
- 12 engaging even in speech that the government doesn't want
- 13 to prohibit.
- 14 All right, if I am told you -- you -- you
- 15 will go to jail if you tell them anything, Mr. Rogers --
- JUSTICE SOTOMAYOR: Mr. Cole, there were
- 17 congressional findings that money is fungible for -- for
- 18 terrorist groups. That if you give them money for
- 19 legitimate means, that it's going to be syphoned off and
- 20 used for illegitimate means.
- MR. COLE: Right.
- JUSTICE SOTOMAYOR: Why isn't that enough
- 23 under strict scrutiny or under a lesser standard,
- 24 reasonable fit standard, to say that you can't teach
- 25 these groups how to get money?

- 1 MR. COLE: Right. Well, one -- we are -- we
- 2 are not teaching them how to get money. We are seeking
- 3 to teach them how to advocate for lawful human rights
- 4 or --
- 5 JUSTICE SOTOMAYOR: No, one of your -- one
- 6 of your stated aims, at least one of the groups is to
- 7 teach them how to get aid for tsunami relief.
- 8 MR. COLE: Right. That -- that claim has
- 9 been mooted because the LTTE is no longer -- has no role
- 10 in Sri Lanka. So what is left is solely -- has nothing
- 11 to do with money.
- 12 Secondly, Congress only made a finding about
- 13 money. At the same time that it made a finding about
- 14 money is fungible, it said and this is a statute -- and
- 15 this is from the House report -- only affects one
- 16 contribution of financial and material resources and
- 17 does not prohibit speaking in concert with and on behalf
- 18 of designated groups.
- 19 Well, that suggests that Congress thought
- 20 that what our clients want to do should be protected.
- 21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- MR. COLE: And we suggest that you should,
- 23 therefore interpret the statute in -- consistent with
- 24 that. Thank you.
- 25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1	The case is submitted.
2	(Whereupon, at 11:13 a.m., the case in the
3	above-entitled matter was submitted.)
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