

**12-1461**

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**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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UNITED STATES,

*Appellee,*

v.

TAREK MEHANNA,

*Defendant-Appellant.*

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ON APPEAL FROM A JUDGMENT OF THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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**Brief of Amici Curiae  
American Civil Liberties Union and  
American Civil Liberties Union of Massachusetts,  
Supporting Appellant and Reversal  
(filed with the consent of both parties)**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Local Rule 26.1, each amici individually certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICI.....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	6
I. <i>Humanitarian Law Project</i> does not authorize the punishment of pure political advocacy based on mere coordination.....	7
II.   Supreme Court precedent mandates clear limits on the government’s authority to punish political advocacy. ....	11
A.   Political advocacy may not be criminalized except under the standards set forth in <i>Scales</i> and <i>Brandenburg</i> .....	12
B.   The rationale of <i>Humanitarian Law Project</i> cannot be extended to criminalize pure political advocacy. ....	15
III.  The district court erred in instructing the jury that it could punish Mehanna for pure political advocacy absent “incitement” or “active membership.” .....	23
CONCLUSION.....	26

## TABLE OF AUTHORITIES

### Cases

<i>Al Haramain Islamic Found., Inc. v. U.S. Dep’t of the Treasury</i> , 686 F.3d 965 (9th Cir. 2012).....	17
<i>Ashcroft v. Free Speech Coal.</i> , 535 U.S. 234 (2002).....	5, 12, 19
<i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2001) .....	12, 18
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969).....	passim
<i>Bridges v. California</i> , 314 U.S. 252 (1941).....	13
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	22, 23
<i>Cox v. Louisiana</i> , 379 U.S. 536 (1965) .....	12
<i>De Jonge v. Oregon</i> , 299 U.S. 353 (1937) .....	14, 25
<i>Healy v. James</i> , 408 U.S. 169 (1972) .....	20
<i>Holder v. Humanitarian Law Project</i> , 130 S. Ct. 2705 (2010) .....	passim
<i>Martin v. City of Struthers, Ohio</i> , 319 U.S. 141 (1943) .....	14
<i>McConnell v. Fed. Election Comm’n</i> , 540 U.S. 93 (2003).....	22
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982).....	15, 18
<i>Noto v. United States</i> , 367 U.S. 290 (1961).....	12, 14, 21
<i>Scales v. United States</i> , 367 U.S. 203 (1961) .....	passim
<i>Snyder v. Phelps</i> , 131 S. Ct. 1207 (2011) .....	6
<i>Stromberg v. California</i> , 283 U.S. 359 (1931) .....	24
<i>Terminiello v. Chicago</i> , 337 U.S. 1 (1949).....	13
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989) .....	6

*Thomas v. Collins*, 323 U.S. 516 (1945)..... 18, 21

*United States v. Ochs*, 842 F.2d 515 (1st Cir. 1988) .....24

*United States v. Robel*, 389 U.S. 258 (1967) ..... 14, 25

*Yates v. United States*, 354 U.S. 298 (1957).....24

*Zemel v. Rusk*, 381 U.S. 1 (1965) .....9

**Statutes**

18 U.S.C. § 2339A.....1, 2

18 U.S.C. § 2339B .....2, 8

## INTEREST OF AMICI

Amici file this brief with the consent of the parties in support of the appellant's challenge to the constitutionality of 18 U.S.C. §§ 2339A–B as applied in his criminal case.

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil-rights laws. The ACLU of Massachusetts is the Massachusetts affiliate of the ACLU. Since its founding in 1920, the ACLU has frequently appeared before this Court and others, both as direct counsel and as amicus curiae, in numerous cases involving the First Amendment. In particular, the ACLU and its members have especially and long been concerned about efforts by the government to prohibit unpopular expression. The ACLU filed an amicus brief in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), and the ACLU of Massachusetts attempted to file an amicus brief in the district court in this case, although the district court denied the motion for leave to file that brief.<sup>1</sup>

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for amici state that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

Tarek Mehanna was convicted of three counts of providing material support to al Qaeda in violation of 18 U.S.C. §§ 2339A–B, largely on the basis of evidence that he translated publicly available al Qaeda propaganda from Arabic to English and that he sought to persuade others to share his extreme ideology. The district court instructed the jury that it could convict Mehanna for that political speech if it determined that the speech was “coordinated” with al Qaeda, without any regard to the level of coordination or the nature of Mehanna’s advocacy. That instruction, which did not attempt to define or constrain the term “coordination,” was incorrect. It directly contradicted decades of Supreme Court precedent, it misunderstood the Court’s recent decision in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), and, in doing so, it authorized the jury to convict Mehanna for speech protected by the First Amendment.

Mehanna’s trial spanned thirty-five days, but the vast majority of it focused on Mehanna’s views on global politics, war, and religion. In support of its theory that Mehanna sought to “inspire” others to embrace those views, the government relied heavily upon Mehanna’s translation of several texts from Arabic to English, including one religious document entitled *39 Ways to Serve and Participate in Jihad*. The government also submitted hundreds of examples to the jury of videos that Mehanna watched, speeches that he gave, and conversations in which he

engaged. Appellant’s Br. 11–17. Although the government never claimed that Mehanna was a member of al Qaeda, it alleged that all of this evidence—concerning his speech and the speech he listened to—revealed “what inspired him” and how he sought to “inspire and incite” others. Tr. of Trial 66:15–66:17, 144:24–144:25, Dec. 16, 2011, ECF No. 419. Thus, the government based its prosecution on the theory that Mehanna’s speech amounted to illegal material support because it sought “to spread [al Qaeda’s] message.” *Id.* at 69:18.

The district court endorsed that expansive theory and instructed the jury, based on an erroneous application of *Humanitarian Law Project*, that the material-support prohibition “already accommodates [the First Amendment] guarantee by punishing only conduct that is done in coordination with or at the direction of a foreign terrorist organization.” *Id.* at 24:14–24:19. Thus, the court instructed the jury, in effect, that a material-support conviction resting on *any* degree of coordination between a speaker and a designated terrorist organization would be constitutional. This was wrong. The district court’s instructions misapprehended the holding of *Humanitarian Law Project*, the scope of the First Amendment, and the diminishment of liberty inherent in prosecuting pure political speech, even if nominally coordinated with organizations that engage in both speech and crimes.

The district court’s suggestion that, in *Humanitarian Law Project*, the Supreme Court upheld the constitutionality of criminalizing political advocacy



coordinated with terrorist organizations is simply incorrect. In that case, the Supreme Court held that Congress may punish the provision of training and expert advice to foreign terrorist organizations because the training and advice would directly impart a specific skill that would further the organizations' illegal ends in "wholly foreseeable" ways. The Court did *not*, however, approve the punishment of political advocacy, whether coordinated with a terrorist group or not. Instead, it made clear that—contrary to the district court's instruction to the jury—Congress's authority to punish political advocacy depended on the "level of coordination" with a terrorist organization and the nature of the advocacy.

It is hardly surprising that *Humanitarian Law Project* does not support the district court's instructions because, for more than half a century, the Supreme Court has imposed clear and stringent limits on efforts to criminalize political advocacy. Those limits developed in times of real and perceived national crisis, when political majorities sought to isolate disfavored and sometimes criminal groups through restrictions on their associations and their expressive advocacy. The Court responded to those restrictions by distinguishing protected speech, even if abhorrent and caustic, from unprotected incitement to imminent lawlessness. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). And it responded by distinguishing protected membership in a criminal group from unprotected "active

membership” with the specific intent to further the group’s illegal ends. *Scales v. United States*, 367 U.S. 203 (1961).

These cases make clear that pure political advocacy may be punished only when it constitutes incitement under *Brandenburg* or when the “level of coordination” constitutes “active membership” under *Scales*. This is so because, unlike the training at issue in *Humanitarian Law Project*, pure political advocacy such as Mehanna’s does not convey anything of value apart from its political or ideological content. It is rhetorical support, not material support. Proscribing it absent a showing of incitement or “active membership” would censor speech based solely on its tendency to persuade, overruling the most basic precept of the Supreme Court’s First Amendment jurisprudence: “The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

The district court’s contrary instructions authorized Mehanna’s jury to punish his pure political advocacy based on bare “coordination,” a term that the jury was free to define expansively because the district court did not define it at all. Because the jury rendered general verdicts of guilt, it is impossible to rule out the

possibility that the jury convicted Mehanna based on speech protected by the First Amendment.<sup>2</sup>

### ARGUMENT

Mehanna's views would shock many Americans, as did those of the funeral protesters in *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011) ("God Hates the USA/Thank God for 9/11"). But the First Amendment does not allow the government to punish odious or even violent speech. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The Supreme Court's defense of that basic premise has been unwavering. To ensure adequate breathing room for disfavored speech and associations, the Court has imposed clear limits on the authority of the government to punish political or ideological advocacy or membership.

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<sup>2</sup> In this brief, amici focus on the constitutional limitations on Congress's authority to criminalize political advocacy. They do not address the statutory scope of the material-support prohibition. On that question, amici agree with amicus curiae Center for Constitutional Rights that the material-support statute does not proscribe political advocacy absent at least direct engagement with a foreign terrorist organization. Even then, there are constitutional lines, which amici set forth below, that the government may not cross and that the courts must vigilantly protect.

The district court ignored that precedent and premised its instructions to the jury, instead, on a misreading of the Supreme Court’s decision in *Humanitarian Law Project*. In that case, the Supreme Court held that Congress may criminalize the direct training of a terrorist organization as “material support” when the training would further the organization’s criminal ends in “wholly foreseeable” ways. But the Court never questioned its precedent protecting pure political advocacy—as opposed to the direct provision of training—through the standards articulated in *Brandenburg* and *Scales*. Thus, *Humanitarian Law Project* left intact the Court’s vigilant protection of political advocacy, even if coordinated with a criminal organization, unless (1) the advocacy is intended and likely to incite imminent lawlessness or (2) the advocate’s “level of coordination” amounts to membership in a criminal organization and the advocate specifically intends to further the organization’s unlawful ends.

**I. *Humanitarian Law Project* does not authorize the punishment of pure political advocacy based on mere coordination.**

Although the vast majority of the evidence against Mehanna concerned his views on global politics, war, and religion, the district court took the unusual step of instructing the jury not to “worry about” the First Amendment. Tr. of Trial 24:14, Dec. 16, 2011. It reasoned that, “according to [*Humanitarian Law Project*],”

the First Amendment permits criminalizing even pure political speech “done in coordination with” a terrorist organization. *Id.* at 24:16–24:18. This was wrong.

In *Humanitarian Law Project*, the Supreme Court held that the material-support statute may constitutionally be applied to criminalize the direct training of, and the provision of expert advice or assistance to, foreign terrorist organizations. The case concerned several humanitarian organizations and individuals who desired to directly train and provide expert advice to two designated terrorist organizations—the Kurdistan Workers’ Party (“PKK”) and the Liberation Tigers of Tamil Eelam (“LTTE”). 130 S. Ct. at 2714. Fearing criminal prosecution, those organizations and individuals brought a preenforcement challenge to the material-support statute, 18 U.S.C. § 2339B, arguing that they had a First Amendment right to directly train the PKK and the LTTE. The Supreme Court disagreed, holding that Congress had a compelling interest in prohibiting the plaintiffs’ proposed training because it would impart a specific skill upon the PKK and LTTE that would further those organizations’ violent and unlawful ends in “wholly foreseeable” ways. *Id.* at 2729.

That holding was limited in at least three critical ways, which the district court failed to take into account.

First, the Supreme Court considered only the constitutionality of criminalizing the specific activities proposed by the plaintiffs: the direct training

of, and the provision of expert advice or assistance to, two terrorist organizations. *Id.* at 2729 (“We turn to the particular speech plaintiffs propose to undertake.”). The Court expressly declined to address whether “any future applications of the material-support statute to speech or advocacy [would] survive First Amendment scrutiny.” *Id.* at 2730. And in rejecting the plaintiffs’ preenforcement challenge, the Court relied heavily on its finding that “[i]t is wholly foreseeable that the PKK could use the ‘specific skill[s]’ that plaintiffs propose to impart as part of a broader strategy to promote terrorism.” *Id.* at 2729 (alteration in original) (citation omitted). The Court premised that finding on the “real” possibility that “[t]he PKK could, for example, pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks,” *id.*, and that “[a] foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt,” *id.* In other words, the Supreme Court’s application of First Amendment scrutiny in *Humanitarian Law Project* was case-specific and narrow, as the Court has repeatedly cautioned it should be. *See, e.g., id.* (“Plaintiffs’ proposals are phrased at such a high level of generality that they cannot prevail in this preenforcement challenge.”); *Zemel v. Rusk*, 381 U.S. 1 (1965). At a fundamental level, therefore, the district court’s

understanding of the ruling as having fully resolved the constitutional boundaries of the material-support statute was incorrect.

Second, the Supreme Court indicated in *Humanitarian Law Project* that, whatever Congress's power to criminalize the direct training of designated organizations, Congress could not criminalize "independent advocacy." Under the material-support statute, the Court noted, "plaintiffs may say anything they wish on any topic." *Humanitarian Law Project*, 130 S. Ct. at 2722–23; *id.* at 2723 ("They may speak and write freely about the PKK and the LTTE, the governments of Turkey and Sri Lanka, human rights, and international law."). And in discussing the constitutional concerns with the statute, the Court noted that, "most importantly, Congress has avoided any restriction on independent advocacy." *Id.* at 2728. Thus, the Court "in no way suggest[ed] that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations." *Id.* at 2730.

Third, the Court declined to address whether *any* "political advocacy"—as opposed to directly providing training and expert advice—may be criminalized, even if coordinated. It suggested, however, that the answer would depend on the "expected level of coordination" with a foreign terrorist organization and the nature of the advocacy. *Id.* at 2729 ("[P]laintiffs do not specify their expected level

of coordination with the PKK or LTTE or suggest what exactly their ‘advocacy’ would consist of.”).

Those three aspects of the Supreme Court’s ruling contradict the basic premise of the district court’s jury instructions: that the constitutional line between unprotected and protected speech is coterminous with the line between coordinated and independent advocacy. Tr. of Trial 24:14–24:19, Dec. 16, 2011. It is not. Though the direct training of a foreign terrorist organization may be criminalized if it conveys a specific skill that furthers the organization’s criminal ends in “wholly foreseeable” ways, Congress’s authority to criminalize pure political advocacy depends on the expected level of coordination and the nature of that advocacy.

**II. Supreme Court precedent mandates clear limits on the government’s authority to punish political advocacy.**

The Supreme Court in *Humanitarian Law Project* did not elaborate on what level of coordination would subject pure political advocacy to criminalization, but it did not have to. The Court answered that question decades ago. Even coordinated political advocacy is protected by the First Amendment unless the level of coordination constitutes “active membership” plus specific intent, under *Scales v. United States*, 367 U.S. 203 (1961), or the advocacy itself is intended and likely to incite imminent lawlessness, under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). By authorizing the jury to convict Mehanna based on a contrary view—*i.e.*, that *any* coordinated advocacy may be proscribed as material support—the district



court overlooked not only *Humanitarian Law Project* but also decades of settled Supreme Court precedent.

**A. Political advocacy may not be criminalized except under the standards set forth in *Scales* and *Brandenburg*.**

The Supreme Court has never deviated from the fundamental proposition that Congress may not criminalize extreme or even violent advocacy “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447. This is so because “[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it,” *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001), and because the “mere abstract teaching of . . . the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action,” *Noto v. United States*, 367 U.S. 290, 297–98 (1961); *see also Cox v. Louisiana*, 379 U.S. 536, 550–51 (1965) (rejecting notion that peaceful protest activity could be prohibited for fear it would provoke violence from others). In other words, “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” *Free Speech Coal.*, 535 U.S. at 253; *see also id.* (“The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”).

Rather, “the Court’s First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.” *Id.* In *Brandenburg*, for example, the Supreme Court reversed the conviction of a member of the Ku Klux Klan under Ohio’s criminal syndicalism statute, which forbade teaching the “duty, necessity, or propriety” of the violent overthrow of the government. 395 U.S. at 444–48. That statute, the Court held, swept too broadly by punishing “mere advocacy not distinguished from incitement to imminent lawless action.” *Id.* at 449.

The buffer for free speech provided by *Brandenburg* would mean little, moreover, if not afforded to unpopular expression:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment . . . .

*Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (citations omitted). Indeed, “it is a prized American privilege to speak one’s mind, although not always with perfect good taste.” *Bridges v. California*, 314 U.S. 252, 270 (1941).

This maxim applies no less strongly when measured against the nation’s defense. In fact, much of the Supreme Court’s First Amendment doctrine arose in response to anti–Communist Party legislation aimed at protecting the nation’s

security. *See, e.g., Noto*, 367 U.S. 291–97; *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (“The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion . . . .”); *United States v. Robel*, 389 U.S. 258, 263 (1967) (“the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit”).

In hindsight, the attempts at suppression of Communist Party rhetoric may seem disproportionate to the evil foreseen. But crisis by its nature makes risk difficult to assess. Our founders knew that tendency well and so withdrew from the majority the power to silence unpopular views:

The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.

*Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943); *see also Robel*, 389 U.S. at 264 (“Implicit in the term ‘national defense’ is the notion of defending those values and ideals which set this Nation apart.”).

The Constitution protects not only the expression of unpopular views but *membership* in unpopular groups, *Scales*, 367 U.S. at 224–30, even terrorist ones,

*Humanitarian Law Project*, 130 S. Ct. at 2723.<sup>3</sup> Congress may not outlaw mere membership, even in a criminal organization, because “a ‘blanket prohibition of association with a group having both legal and illegal aims’ would present ‘a real danger that legitimate political expression or association would be impaired.’”

*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982) (quoting *Scales*, 367 U.S. at 229). To safeguard against that possibility, the Court has prohibited the criminalization of “passive” or nominal membership in an organization with unlawful goals. Only “active” members who intend to further those unlawful goals may be punished. *Scales*, 367 U.S. at 228.

The clear rule from those two lines of precedent is this: political advocacy may not be criminalized unless it constitutes either “incitement” under *Brandenburg* or “active membership” under *Scales*.

**B. The rationale of *Humanitarian Law Project* cannot be extended to criminalize pure political advocacy.**

The district court overlooked the decisions discussed above, however, and extended *Humanitarian Law Project* far beyond its facts and its holding to allow

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<sup>3</sup> This principle has dual constitutional origins. The First Amendment expressly protects associational freedom, while the Fifth Amendment’s guarantee of due process requires that guilt be “personal.” Association with a group engaging in unlawful conduct may yield criminal liability only when an individual possesses “a guilty knowledge and intent,” but not on the basis of “merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.” *Scales*, 367 U.S. at 224, 228.

the criminalization of pure political advocacy based on bare “coordination.” There are fundamental problems with interpreting *Humanitarian Law Project* to extend beyond its narrow reach.

First and foremost, the rationale of *Humanitarian Law Project*—which focused on the fungible and legitimating nature of direct training—simply does not apply to pure political advocacy, coordinated or not. Political advocacy is not a form of fungible support in the way that direct training and expert advice arguably are. It does not impart any skill that would further the unlawful ends of a foreign terrorist organization in “wholly foreseeable” ways. Its only value is in its political or ideological content. There is a difference, in other words, between *training* a terrorist organization and *expressing political views* akin to those of the organization. Though both are speech, only the former is potentially fungible, such that the government has an arguable interest in restricting it. *See id.* at 2729 (“[T]raining and advising a designated foreign terrorist organization on how to take advantage of international entities might benefit that organization in a way that facilitates its terrorist activities.”); *id.* at 2730 (“Training and advice on how to work with the United Nations could readily have helped the PKK in its efforts to use the United Nations camp as a base for terrorist activities.”).

Moreover, to the extent pure political advocacy lends legitimacy to a foreign terrorist organization, it does so irrespective of the level of coordination. *Cf. Al*

*Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 1000 (9th Cir. 2012) (“We see only a small difference, for purposes of determining the legitimizing effect, between a vigorous independent advocacy campaign and a coordinated advocacy campaign.”); *see also Humanitarian Law Project*, 130 S. Ct. at 2736 (Breyer, J., dissenting) (“The [legitimacy] argument applies as strongly to ‘independent’ as to ‘coordinated’ advocacy.”).

In any event, the Supreme Court in *Humanitarian Law Project* did not lean heavily on the legitimacy rationale, and it did not rely upon it at all in its discussion of whether Congress could criminalize the training and expert advice proposed by the plaintiffs. *Id.* at 2729–30. This is understandable. The “legitimacy” rationale is simply too sweeping to justify criminalizing pure speech. On its own, that rationale would expose pure speech to punishment precisely because it endorses, and therefore legitimates, disfavored ideas or groups. It would justify application of the material-support prohibition to all speech, including simple membership and even independent advocacy, and it would apply most strongly to the most effective speech, turning the First Amendment on its head. The Supreme Court did not intend what would be a revolution in First Amendment doctrine through its narrow decision in *Humanitarian Law Project*.

Mehanna’s case illustrates the problem with interpreting *Humanitarian Law Project* as though it had authorized proscribing pure political advocacy. The

government's theory appears to be that Mehanna's translations and other speech aided al Qaeda through their potential to persuade. Tr. of Trial 66:16–66:17, Dec. 16, 2011 (Mehanna used videos “to inspire and incite.”); *id.* at 67:9–67:10 (“Mehanna was careful in how he would seek to indoctrinate people into the Salafi–Jihadi mindset.”); *id.* at 69:17–69:18 (“[T]he videos were ‘to spread the message of al Qa’ida.’”). But political advocacy, persuasive though it might be, does not further the illegal ends of criminal organizations in ways that are “wholly foreseeable,” as that term was used by the Supreme Court: It does not impart a skill that terrorist organizations may use to their benefit, *see Humanitarian Law Project*, 130 S. Ct. at 2729, and it does not directly displace costs so as to effectively subsidize a terrorist organization's illegal efforts, *id.* (“Money is fungible . . .”).

It is true, of course, that ideas may motivate action. But that is the essential character of the expression that our Constitution protects: “‘Free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.” *Thomas v. Collins*, 323 U.S. 516, 537 (1945); *see also Claiborne Hardware*, 458 U.S. at 928 (“An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause.”). To allow the criminalization of the simple publication of ideas without more would nullify the principle that the “normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.” *Bartnicki*, 532

U.S. at 529; *see also Free Speech Coal.*, 535 U.S. at 253 (“The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”).

There is another fundamental problem with interpreting *Humanitarian Law Project* to criminalize coordinated political advocacy. While there was an arguable distinction in that case between independent advocacy and direct training—because the plaintiffs proposed to provide specific skills to foreign terrorist organizations—the distinction between independent and coordinated political advocacy is either difficult to ascertain or completely illusory. Ideas are of inherently uncertain provenance. Attempting to distinguish between the independent publication of pure political speech and the simple adoption by one person of another’s views would be a futile endeavor.

That task is made more complicated when, as in this case, a jury is given no definition of the term “coordination.” Without instruction, a jury would be free to convict a defendant simply for disseminating the views of terrorist organizations. Indeed, at its broadest, the term “coordination” threatens to criminalize the everyday dissemination of information by the media. For example, the media frequently publishes translations of the propaganda of designated foreign terrorist



organizations.<sup>4</sup> And the media has repeatedly published even the writings of representatives of those organizations.<sup>5</sup>

To be sure, most members of the media disagree with the views of terrorist organizations. But Congress's authority to criminalize those views has never turned on whether the speaker agreed with them. Instead, the Supreme Court has always insisted that the level of coordination with a criminal organization equate to "active membership" under *Scales* before that association—and not the speech in furtherance of that association—may be criminalized. *See, e.g., Healy v. James*, 408 U.S. 169, 185–86 (1972) (“[T]he Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen’s association with an unpopular organization. . . . The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.”).

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<sup>4</sup> *See, e.g.,* Peter Baker, *Recovered Bin Laden Letters Show a Divided Al Qaeda*, N.Y. Times, May 3, 2012, <http://nyti.ms/WlnsbK> (publishing translations of al Qaeda letters); Transcript: Interview with Khaled Meshal of Hamas, N.Y. Times, May 5, 2009, <http://nyti.ms/12x1EJN> (publishing a translated transcript of an interview with the leader of Hamas, relaying Hamas’s “Goals,” views “On President Obama,” and “Decision to Stop Firing Rockets”).

<sup>5</sup> *See, e.g.,* Ahmed Yousef, *What Hamas Wants*, N.Y. Times, June 20, 2007, <http://nyti.ms/WloZOP> (op-ed of a political adviser of Hamas); Ahmed Yousef, *Engage with Hamas*, Wash. Post, June 20, 2007, <http://wapo.st/WlpcSc> (same); *see also* William Glaberson, *Publication of Unabomber’s Tract Draws Mixed Response*, N.Y. Times, Sept. 20, 1995, <http://nyti.ms/12o1FRd>.

Even were it possible to distinguish in some cases between independent and coordinated political advocacy, allowing courts or juries to do so in determining whether to imprison those with unpopular beliefs would irreparably erode the freedom of expression. The very essence of core political speech and expressive freedom is the formulation of ideas, the persuasion of others, and the persuasion *by* others. It is constitutionally irrelevant, in other words, whether one arrives at certain political beliefs after ascetic introspection or through spirited exchange. The First Amendment protects the right to persuade, not merely to deliver facts. *Thomas*, 323 U.S. at 537. And it protects the right to listen, not simply to speak. *Martin*, 319 U.S. at 143 (“This freedom embraces the right to distribute literature, and necessarily protects the right to receive it.” (citation omitted)).

For this reason, it was irrelevant in *Brandenburg* that the defendant’s advocacy likely derived from the views of the Ku Klux Klan. 395 U.S. at 444–48. And it was likewise insignificant in the Communist Party cases that the defendants’ views parroted those of the Communist Party. Those cases focused not on the genesis of the advocacy but rather its ability to incite, the status of the speaker, and his or her specific intent. *See, e.g., Noto*, 367 U.S. 297–98; *Scales*, 367 U.S. at 224–29.

The Supreme Court has hewed closely to that fundamental understanding, allowing the punishment of pure political advocacy only when the speech

effectively constituted unlawful conduct, or, as in *Humanitarian Law Project*, when the speech directly and intentionally conveyed to a foreign terrorist organization a service that held value apart from its political or ideological content and that would foreseeably further the organization's illegal ends. But the Court has never suggested that pure political advocacy—as distinct from the provision of direct training—would lose its protected character by virtue of simple coordination. The only difference between independent and coordinated advocacy is precisely an act of protected association. To criminalize the same political speech for simple association would be to punish that association. The Supreme Court has accordingly required much more before allowing Congress to punish speech by virtue of association with criminal organizations. The coordination must essentially rise to the level of criminal conspiracy: membership in the conspiracy plus the specific intent to support its criminal ends.<sup>6</sup>

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<sup>6</sup> In the campaign-finance cases, the Supreme Court has distinguished between independent and coordinated political advocacy, *see, e.g., McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 203 (2003), but its rationale for doing so extended from the initial distinction it drew in *Buckley v. Valeo*, 424 U.S. 1 (1976), between expenditures (which are protected) and contributions (which may be limited). The Court held that restrictions on either triggered heightened First Amendment scrutiny, but it considered the ceiling on contributions to be less invasive of First Amendment rights and more closely tailored to the state's compelling interest in avoiding corruption. *Id.* at 46–47. To prevent an end-run around the limitation on contributions, the Court also allowed Congress to treat coordinated expenditures as contributions. That same rationale does not apply, however, in the material-support context. The campaign-finance cases applied only to monetary expenditures, *id.* at 12–14, not to pure speech, which the Court never suggested could be limited. And

**III. The district court erred in instructing the jury that it could punish Mehanna for pure political advocacy absent “incitement” or “active membership.”**

The district court fundamentally misapplied *Humanitarian Law Project* by instructing the jury that it could convict Mehanna for coordinated political advocacy without satisfying the standards set forth in *Brandenburg* or *Scales*. See Tr. of Trial 24:14–24:19, Dec. 16, 2011. That error infected the jury’s verdict and must not be repeated in other cases.

In this case, the district court’s erroneous instruction authorized the jury to convict Mehanna for pure political speech whose only value stemmed from its apparent ability to persuade. And it permitted the government to argue that even nominal coordination between Mehanna and al Qaeda transformed protected advocacy into punishable material support. It did this, moreover, without any explanation to the jury of the meaning of “coordination.” With that license, the government delivered a muddled vision of *its* theory of coordination to the jury: The fact that Mehanna translated videos “produced by al Qa’ida” proved that they were “translated for al Qa’ida,” that they were “distributed on behalf of al Qa’ida,”

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the Court upheld only a *ceiling* on coordinated expenditures, not an outright ban. *Id.* at 21 (“A limitation on the *amount* of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.” (emphasis added)).

and that Mehanna knew he was “coordinating with al Qa’ida to produce this message and get it out there.” *Id.* at 145:7–145:11.

Unlike the plaintiffs in *Humanitarian Law Project*, Mehanna appeared to have no direct contact whatsoever with any foreign terrorist organizations. And unlike the speech proposed by those plaintiffs (which would have imparted a specific skill directly upon foreign terrorist organizations in a manner that foreseeably furthered terrorism), Mehanna’s speech was purely political. As even the government presented it, Mehanna’s speech had value only insofar as it might have persuaded others to believe as he did. *See, e.g., id.* 144:24–144:25 (“He knew the videos worked because that’s what inspired him.”).

Because the district court improperly instructed the jury, its conviction of Mehanna rested on an unconstitutional understanding of the law and must be reversed. *See* Appellant’s Br. 36 (citing *Yates v. United States*, 354 U.S. 298, 312 (1957)); *Stromberg v. California*, 283 U.S. 359, 367–68 (1931); *United States v. Ochs*, 842 F.2d 515, 520 (1st Cir. 1988). In reversing Mehanna’s conviction, this Court should direct district courts presiding over similar criminal trials to instruct jurors to return a verdict of guilty only if the defendant was an active member of a foreign terrorist organization and specifically intended to support its illegal ends.

\* \* \*

The rule of law set forth in this appeal will have consequences that extend far beyond Mehanna’s case. Our nation’s history painfully documents the tendency of government to suppress dissent and unpopular expression in times of crisis only to regret it later. When we empower a jury to imprison fellow citizens for their thoughts and expressions—however offensive and crude—we risk “sanction[ing] the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.” *Robel*, 389 U.S. at 264. That risk is particularly severe when we attempt to assess the lawfulness of unpopular speech layered on top of unpopular association. As in Mehanna’s case, questions of “coordination” require distinctions that the Supreme Court has been loath to draw except in accordance with the clear guidance provided over four decades ago in *Brandenburg* and *Scales*.

Even before *Brandenburg* and *Scales*, the Supreme Court appealed to calmer minds in uncertain times. The greater the perceived threat to our way of life, it warned, “the more imperative is the need to preserve inviolate” our ideals of free expression. *De Jonge*, 299 U.S. at 365. For those ideals ensure “that government may be responsive to the will of the people,” and “[t]herein lies the security of the Republic, the very foundation of constitutional government.” *Id.*

## CONCLUSION

For these reasons, amici urge reversal of Tarek Mehanna's material-support convictions.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,926 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Dated: December 26, 2012



**CERTIFICATE OF SERVICE**

I certify that this brief was filed electronically on December 26, 2012.

Notice of this filing will be sent by operation of this Court's electronic filing system to all parties.

/s/ Alex Abdo

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Dated: December 26, 2012