UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA

V. 06-CR-652

ZEINAB TALEB-JEDI,

Defendant
----------X

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION AND
NEW YORK CIVIL LIBERTIES UNION
IN SUPPORT OF DEFENDANT

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PRELIMINARY STATEMENT

Amici curiae the American Civil Liberties Union ("ACLU") and the New York Civil Liberties Union ("NYCLU") submit this brief in support of Zeinab Taleb-Jedi's motion to dismiss her criminal indictment. Defendant's Motion to Dismiss Indictment, *United States v. Zeinab Taleb-Jedi*, 06-CR-652, Docket Item ("Def.'s Mot. to Dismiss"). Ms. Taleb-Jedi faces up to 15 years in prison for providing material support, in the form of herself, to Mojahedin el-Khalq ("MEK"),[1] a "foreign terrorist organization" ("FTO") designated as such by the Secretary of State. Ms. Taleb-Jedi's indictment is fatally flawed under the First and Fifth Amendments because: (i) the statutory scheme under which she is charged does not require the government to show she had specific intent to engage in illegal activity, and (ii) the statutory scheme prohibits her from challenging the designation of MEK as an FTO, even though, but for the designation, her activity would be lawful and protected by the First Amendment.

First, the material support statute at issue in this case, 18 U.S.C. § 2339B, runs afoul both of the First Amendment's right of freedom of association and of the Fifth Amendment's Due Process Clause because it does not require the government to show that a defendant intends to support the criminal activity of a designated FTO.

The First Amendment protects a broad range of associational activity that Section 2339B prohibits, including "organizing, managing or supervising" an organization. In a line of cases going back to the late 1930s, the Supreme Court has held that associational support otherwise protected by the First Amendment may be criminalized only if the government shows both (i) that the defendant *knows* the organization with which she associates engages in illegal activity, and (ii) that the defendant *intends* to engage in the illegality or to further it. Section 2339B does

[1] The Mojahedin el-Khalq is also known as the People's Mojahedin of Iran ("PMOI").

not require the second showing. In violation of the First Amendment, therefore, a person could be found guilty under Section 2339B simply for associating with a group of people who have come together to advance political goals, some of whom engage in illegal activity. This is true even if the defendant's own goals and activities are legitimate and lawful. Broad and indiscriminate criminalization of mere membership or association is at the core of First Amendment prohibitions.

Section 2339B is also flawed on Fifth Amendment grounds because it automatically ascribes the illegal activity and intent of others to a defendant. Again, this would be true even if the defendant in fact has no illegal intent. The statute thus imposes vicarious criminal liability and fails to meet the basic due process requirement that the government must prove personal guilt before it can hold an individual criminally liable.

The second constitutional flaw in the material support statutory scheme arises from a provision that specifically prohibits a defendant from challenging, in her own criminal trial, the blacklisting of the organization to which she is accused of providing material support – even though the blacklisting is what renders her otherwise constitutionally-protected activity criminal. 8 U.S.C. § 1189(a)(8). The provision violates long-established Supreme Court precedent which requires that if a prior determination criminalizes otherwise protected First Amendment activity, the defendant must have the right to challenge that determination in her own criminal trial. To permit otherwise – especially where, as here, Ms. Taleb-Jedi's activity in support of MEK would be protected by the First Amendment but for MEK's designation – would violate Ms. Taleb-Jedi's right of free association and deny the process due to her under the Fifth Amendment. This provision should be struck because it is unconstitutional and Ms. Taleb-Jedi should be permitted to challenge MEK's designation.

INTEREST OF *AMICI*

The ACLU is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. One of the ACLU's central concerns today is the effect of national security policies on civil liberties. It has in numerous contexts challenged impermissible restrictions on First Amendment rights in the context of national security. The ACLU has previously filed *amicus* briefs detailing the impact of material support statutes on First and Fifth Amendment rights and the constitutional ramifications of these laws, including amicus briefs filed in the *Humanitarian Law Project, et al., v. Gonzales* litigation. The NYCLU is the New York State affiliate of the ACLU. As such, it is equally devoted to the protection and enhancement of fundamental rights and liberties. The First Amendment rights of association and the Fifth Amendment right to due process of law are among the most fundamental of constitutional rights. As noted above, those rights are deeply implicated here.

ARGUMENT

I. MS. TALEB-JEDI'S INDICTMENT SHOULD BE DISMISSED BECAUSE THE MATERIAL SUPPORT STATUTE CRIMINALIZES FIRST AMENDMENT-PROTECTED ACTIVITY WITHOUT THE CONSTITUTIONALLY-REQUIRED SHOWING OF SPECIFIC INTENT TO FURTHER ILLEGAL ACTS.

It is a fundamental requirement of the American criminal justice system that "guilt is personal." *Scales v. United States*, 367 U.S. 203, 224 (1961). This core principle is reflected both in the First Amendment's right to freedom of association, which protects a broad range of associational activity, and the Fifth Amendment's Due Process Clause, which requires criminal responsibility to be individual and not vicarious. The material support statute at issue in Ms. Taleb-Jedi's case violates both of these constitutional provisions.

Under the material support statute,

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

18 U.S.C. § 2339B(a)(1).[2] In 2004, Congress broadly defined "personnel," the form of material support Ms. Taleb-Jedi is accused of providing under the statutory scheme, as: "1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization." 18 U.S.C. § 2339B(h). As *amici* describe below, each of the types of activity encompassed in the personnel definition, including working for, organizing, managing, supervising and directing operations, is a First Amendment-protected form of associational

[2] Before 2004, the statute did not require *scienter*. In December 2004, Congress amended it through the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA") to, among other things, require the person know the organization was a designated foreign terrorist organization or that it had engaged in terrorist activity. Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004). The 2004 amendments did not require the government to show specific intent.

support. Criminal liability may not be imposed for this kind of protected activity without a *mens rea* showing that the defendant specifically intended either to commit illegal acts or to further illegal activity. To permit otherwise would impose criminal liability based simply on association.

Contrary to constitutional requirements, the indictment against Ms. Taleb-Jedi alleges simply that she "knowingly" provided "material support and resources… including personnel (herself), to a foreign terrorist organization." Indictment, *United States v. Zeinab Taleb-Jedi*, 06-CR-652 (Docket Item 20) ("Indictment"). Neither the indictment nor the affidavit in support of her arrest warrant suggests that Ms. Taleb-Jedi provided this support with the intent to engage in or further unlawful activity. In fact, there is no allegation that Ms. Taleb-Jedi intended to further any unlawful aim of MEK. At most, the affidavit establishes that Ms. Taleb-Jedi served on a leadership council of MEK, Affidavit in Support of an Arrest Warrant, *United States v. Zeinab Taleb-Jedi*, 06-CR-652 (Docket Item 1) ("Affidavit"), which, without more, is activity protected by the First Amendment and cannot be criminalized.

Amici respectfully urge this Court to construe 18 U.S.C. § 2339B to require that the government prove Ms. Taleb-Jedi specifically intended to further MEK's unlawful activities. *See United States v. X-Citement Video*, 513 U.S. 64, 69-70 (1994). In the alternative, *amici* respectfully urge the Court to find the statute unconstitutional under the First and Fifth Amendments.

A. Freedom of Association is Core to the First Amendment's Protections and Cannot Be Criminalized Absent a Showing of Specific Intent to Further Illegal Aims.

One of the bedrock principles of American democracy is the right of individuals to join together to pursue common political goals or personal beliefs by lawful means. *NAACP v.*

Claiborne Hardware Co., 458 U.S. 886, 933 (1982); *Healy v. James*, 408 U.S. 169, 181 (1972) (individuals have the right "to associate to further their personal beliefs"); *see also De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) ("The right of peaceful assembly is a right cognate to those of free speech and free press and is equally fundamental."). The Supreme Court has repeatedly affirmed the right of individuals "to engage in association for the advancement of beliefs and ideas." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *see also Sweezy v. New Hampshire*, 354 U.S. 235, 250 (1957) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association."). Even – and especially – during times of national turmoil, including the Cold War when Communism was thought to threaten the very fabric of the Republic, the Supreme Court has refused to sanction government encroachment on the freedom of association without strict safeguards. For example, in *United States v. Robel*, the Court struck down a statutory provision that made it illegal for Communist organization members to work in defense facilities because "the statute quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government." 389 U.S. 258, 265 (1967).

Freedom of association encompasses a wide range of activity and conduct. It extends well beyond passive membership or attending a meeting or carrying a membership card, although these activities are certainly included within the First Amendment's protections. *De Jonge*, 299 U.S. at 364; *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *United States v. Robel*, 389 U.S. 258 (1967). The First Amendment also ensures an individual's right to join with others in a variety of active ways, including: serving as an employee, *NAACP v. Button*, 371 U.S. 430 (1964); soliciting new members and organizing others, *Thomas v. Collins*, 323 U.S. 516 (1945); engaging in picketing or in publicity campaigns, *Thornhill v. Alabama*, 310 U.S. 88

(1940); *Edwards*, 372 U.S. at 235, *Claiborne*, 458 U.S. at 906, 910; participating in decision-making, *Claiborne*, 458 U.S at 926; serving in a leadership capacity, *De Jonge*, 299 U.S. 353, *Yates v. United States*, 354 U.S. 298, 330 (1957), *Claiborne*, 458 U.S at 926; and donating money, *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 295-96 (1981). Cutting across each of these contexts is the principle that political association receives broad protection under the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam) (recognizing that free discussion and the interchange of ideas through political association plays an indispensable role in facilitating democracy).

So important is freedom of political association to the exercise of First Amendment rights, the courts have held it protects associational support not just for organizations with lawful goals, but also for organizations that have unlawful aims or engage in unlawful activity. *Scales* is one of a line of cases that are particularly instructive here because they concern associational support for the Communist Party, thought to be the greatest national security threat to the United States in the 1920s and 1930s and the latter part of the 20th Century. *See* Internal Security Act of 1950, Pub. L. No. 831, 81st Cong., 2d Sess. (Sept. 23, 1950) § 2 (Communism is "a clear and present danger to the security of the United States and to the existence of free American institutions.").

In *Scales*, the Supreme Court considered the constitutionality of the Smith Act, in which Congress criminalized, among other things, membership in an organization – the Communist Party – that advocated the overthrow of the government of the United States by force or violence.[3] The Court held that the government may not penalize membership, even active

[3] The Smith Act made it unlawful:

(i) to "knowingly or willfully" advocate the desirability of overthrowing any government in the United States by force; or

membership, in an organization that engages both in lawful and unlawful activity unless the government demonstrates a member's knowledge of illegality and of specific intent to further it. *Scales*, 367 U.S. at 209. Similarly, in *Elfbrandt v. Russell*, the Court struck down a law that assumed criminal intent based on group association because it "threatened the cherished freedom of association protected by the First Amendment." 384 U.S. 11 (1966).

Key to all these decisions is the Court's recognition that an individual may truly believe an organization that engages in illegal conduct might also advance legitimate goals: "Such a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal." *Scales*, 367 U.S. at 230. In a companion case issued the same day as *Scales*, the Court held that the associational support of a person "in sympathy with the legitimate aims of the Commmunist Party" was protected by the First Amendment, even if the Communist Party had other, unlawful purposes, because the fact that the organization had an illegal purpose did not mean the individual shared it. *Noto v. United States*, 367 U.S. 290, 299-300 (1961); *see also Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 246 (1957) ("Assuming that some members of the Communist Party during the period from 1932 to 1940 had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct."). More recently, the Court reemphasized that "The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."

(ii) "with intent to cause the overthrow or destruction of any government in the United States," to print or circulate any written matter advocating the desirability of overthrowing any government in the United States by force; or

(iii) to "organize or help to organize" any group of persons who encourage the overthrow of any government in the United States by force, or to become a member of such a group.

18 U.S.C. § 2385.

Claiborne, 458 U.S. at 908. To permit a "blanket prohibition of association with a group having both legal and illegal aims" would, as the Court reasoned in *Scales*, result in "a real danger that legitimate political expression or association would be impaired" because of the resulting chilling effect. *Scales*, 367 U.S. at 229 (distinguishing such groups from conspiracies, which are defined by their criminal purpose).[4]

Even associational support for the use of force or violence is protected by the First Amendment as long as it does not incite or produce imminent lawlessness. For example, in *Brandenburg v. Ohio*, the Supreme Court struck down an act that subjected to criminal prosecution people who, among other things, "advocate or teach" violence, or "voluntarily assemble with a group" to do so because the statute "purport[ed] to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described action." 395 U.S. 444, 448-49 (1969) The Court's decision echoed its earlier holding in a 1937 case, *De Jonge*, in which the Court overturned an indictment under a statute that prohibited the advocacy of "crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution" because, the Court said, "mere" participation, or speech or assembly could not be enough for a criminal charge; the government had to show that the defendant abused these rights, with the purpose of engaging in illegality. 299 U.S. at 357, 364-65. Finally, even in the civil context, in *Claiborne*, the Court decided that a leader who advocated an economic boycott that was accomplished in part through

[4] The only two cases to have addressed Section 2339B charges of providing oneself as "personnel" suggest that some associational activity is so extreme that the nexus between it and criminality is patent. *See United States v. Shah*, 474 F. Supp. 2d 492, 498-99 (S.D.N.Y. 2007) (defendant "volunteered as a medic for the al Qaeda military" to treat wounded fighters); *United States v. Lindh*, 212 F. Supp. 2d 541, 549 (E.D.Va. 2002) (defendant enlisted in al Qaeda, received combat training, and served in an al Qaeda combat unit). These cases do not suggest that all provision of "personnel" falls outside First Amendment protections and are distinguishable from Ms. Taleb-Jedi's case, in which she is charged with providing herself as support to MEK, an organization that engages in political advocacy work, Def.'s Mot. to Dismiss at 14-17, and that may be working with the United States, *id*. at 21-25.

violent means could not be held liable for the resulting damages if he had not himself engaged in the violent aspects of the boycott. 458 U.S. 886 (1982).

Freedom of association is not, of course, an unlimited right. Courts have held that First Amendment-protected associational support is validly criminalized if the government proves the defendant has: "[1] a knowing affiliation with an organization pursuing unlawful aims and goals, and [2] a specific intent to further those illegal aims." *Healy*, 408 U.S. at 186 (quoting *Robel*, 389 U.S. at 265); *see also Claiborne*, 458 U.S. at 920 ("For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967) (invalidating statute that barred employment in state university system of Communist Party members for "[m]ere knowing membership without specific a intent to further the unlawful aims of an organization is not a constitutionally adequate basis").

Courts that have rejected the application of the specific intent requirement in material support cases have only done so in the context of monetary donations. *See, e.g.*, *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000); *United States v. Hammoud*, 381 F.3d 316, 329 (2004), *vacated on other grounds* by *Hammoud v. United States*, 543 U.S. 1097 (2005); *see also Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1143-44 (C.D. Cal. 2005); *United States v. Marzook*, 383 F.Supp 2d 1056, 1067 (N.D. Ill. 2005).[5] Not only is that

[5] *Amici* do not believe these cases were correctly decided on First Amendment grounds (and they are in any event distinct from Ms. Taleb-Jedi's case on factual and Fifth Amendment due process grounds). The Supreme Court has found the First Amendment to protect an individual's right to contribute money to political groups. *See, e.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 134-36 (2003); *FEC v. Colorado Republican Fed. Campaign Comm'n*, 533 U.S. 431, 440 (2001) (stating that contributions of money fall within the First Amendment's protection of speech and political association); *Citizens Against Rent Control*, 454 U.S. at 295-96 (holding that financial contributions to a group are "collective expression" protected by the First Amendment right of association); *Buckley*, 424 U.S. at 65-66; *NAACP*

premise profoundly inconsistent with Supreme Court precedent extending to *Buckley*, even these courts recognize that specific intent is required when association or membership is at issue. For example, in *Humanitarian Law Project v. Reno*, the Ninth Circuit held that the provision of funds to an FTO did not require specific intent under the First Amendment but was careful to distinguish funding from associational activity: "Plaintiffs here do not contend they are prohibited from advocating the goals of the foreign terrorist organizations, espousing their views or even being members of such groups. They can do so without fear of penalty right up to the line established in *Brandenburg*." 205 F.3d 1130; *see also Hammoud*, 381 F.3d at 328 ("Any statute prohibiting association with [an organization that has both legal and illegal goals] must require a showing that the defendant specifically intended to further the organization's unlawful goals.").

Although Congress amended the material support statute in 2004 to make clear a defendant must either have knowledge that an organization is a designated "foreign terrorist organization" or know of the organization's unlawful activities, Congress did not address whether the statute should be construed to require specific intent. As decades of Supreme Court jurisprudence requires, however, without a showing of *both* knowledge and specific intent, the

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v. Alabama, 357 U.S. 449. Even though a less rigorous standard of review is applied to monetary contributions, they are still afforded a high level of First Amendment protection. *See Buckley*, 424 U.S. at 25 ("Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.") (citations omitted); *see also United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1342-43 (M.D. Fla. 2004) (applying *Buckley* and holding that Section 2339B may withstand a First Amendment challenge because it can be construed to require proof of specific intent and is therefore "closely drawn"). Whether monetary donations are protected under the First Amendment turns, therefore, on two issues: 1) if the organization is, in fact, a terrorist organization; and 2) if the individual donating funds specifically intended they be used to further terrorist activity. *See Hammoud*, 381 F.3d at 371-72 (Gregory, J., and Michael, J., *dissenting*).

government may not criminalize generalized associational support protected by the First Amendment.

B. The Fifth Amendment's Due Process Clause Independently Requires the Government to Show Personal Guilt Through Evidence of Specific Intent.

The Fifth Amendment's guarantee of due process requires that criminal sanctions may be imposed only upon proof of personal guilt. This is to ensure that guilt is based on concrete personal involvement in illegality, and not imputed based simply on association with other alleged wrongdoers. The Supreme Court explained this principle in *Scales*, when it said,

> when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process clause.

367 U.S. at 224-25. The Second Circuit has long recognized that an individual's particular conduct may not be criminalized merely because of a tenuous connection to other conduct that is concededly criminal. *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940). Rather, the connection "between the conduct or status punished and the evil intended . . . to be prevented [must be] sufficiently close or substantial." *Brown v. United States*, 334 F.2d 488, 496 (9th Cir. 1964).

As it has in the First Amendment context, the Supreme Court has made clear that the Fifth Amendment requires both knowledge *and* intent. In *Aptheker v. Secretary of State*, the Court struck down as unconstitutional on its face a law that made it a felony for a "registered" communist organization member to apply for or use a U.S. passport because it effectively imputed to all members of the Communist Party a specific intent to further the Party's illegal aims. 378 U.S. 500, 511-12 (1964); s*ee also Hellman v. United States*, 298 F.2d 810, 814 (9th Cir. 1961) (defendant's activities in support of the Communist Party were insufficient to support

a Smith Act conviction because it was impermissible to infer he had the "specific intent to bring about the violent overthrow of the government.").

Unless Section 2339B is construed to require specific intent, it is manifestly unconstitutional. *See Al-Arian*, 308 F. Supp. 2d at 1337-38 (expressing concern that, under the government's construction of the material support statute, "a cab driver could be guilty for giving a ride to an FTO member to the UN" and "a hotel clerk in New York could be committing a crime by providing lodging to [an] FTO member"); *Hammoud*, 381 F.3d at 371-372 (Gregory, J., dissenting) ("to save the statute, one must apply the *mens rea* requirement to the entire 'material support' provision such that the government must prove that . . . the defendant had a specific intent that the support would further the FTO's illegal activities"); *Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1028 (7th Cir. 2002); *see also United States v. Sattar*, 272 F. Supp. 2d 348, 359 (S.D.N.Y. 2003) ("indeed mere membership could not constitutionally be prohibited without a requirement that the Government prove the defendants' specific intent to further the FTO's unlawful ends."). To permit otherwise disregards the personal guilt principle and would expose moral innocents to the most severe criminal penalties.

As described above, the First Amendment cases that rejected a specific intent requirement did not consider associational support and examined only specific intent in the factually distinguishable funding context. See *supra* at 10-11. Furthermore, those cases failed even to consider application of the Fifth Amendment personal guilt requirement. Only a few cases have rejected the specific intent requirement after considering the Fifth Amendment personal guilt doctrine. *Humanitarian Law Project*, 380 F. Supp. 2d 1134; *Marzook*, 383 F. Supp. 2d at 1056. Not only were those cases wrongly decided, significantly, they gave short shrift to the fact that, in *Scales*, the Supreme Court explicitly referenced the personal guilt

doctrine's application to *both* associational status and associational conduct; in so doing, the Court implicitly recognized that the line between an individual's mere membership in an organization and her associational activities in support of it, is an elusive one. *Scales*, 367 U.S. at 224-25.

Key also in this context is the body of Fifth Amendment jurisprudence that prohibits vicarious liability for the allegedly wrongful acts of others. The Second Circuit has extended the Fifth Amendment's protection to conduct and activity in a diverse array of contexts. *See, e.g.*, *United States v. Falcone*, 109 F.2d 579 (refusing to find criminal liability for one who knowingly sold sugar and yeast to the operator of illegal stills without a stake in the venture); *United States v. Cianchetti*, 315 F.2d 584 (2d Cir. 1963) (holding knowledge of conspiracy without furthering its success or stake in the outcome cannot support criminal liability); *see also Tyson v. New York City Housing Auth*., 369 F.Supp. 513 (S.D.N.Y. 1974). Other courts have done likewise. *See, e.g., McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002) (defendant could not be criminally liable under anti-gang law absent evidence of intent to incite illegal activity); *Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir. 1997) (gang member could not be criminally liable for gang's criminal activity without "proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting"); *Sawyer v. Sandstrom*, 615 F.2d 311, 317 (5th Cir. 1980) (reversing conviction under anti-gang ordinance where liability was not predicated on "active participation in any criminal act"); *St. Ann v. Palisi*, 495 F.2d. 423 (5th Cir. 1974).

These cases make clear that the requirement of "personal guilt" is fundamental to our conception of criminal responsibility. The requirement is of particular importance in the context of the material support statutory scheme because, as discussed below, defendants charged under

the statute cannot challenge the foreign terrorist organization designation that brings their support within the ambit of the statute in the first place. 8 U.S.C. § 1189(a)(8); *see also United States v. Afshari*, 426 F.3d 1150, 1156-59 (9th Cir. 2005). To permit the government to prosecute a person without a showing of specific intent would lead to the deeply problematic result that someone who intended to provide only First Amendment-protected associational support could be criminally liable based on the association alone.[6] This is not and cannot be the law; the Fifth Amendment dictates that the material support provision be construed to require proof not only of knowledge but of specific intent.

The government's goal of prosecuting individuals who engage in terrorist activities does not have to be at odds with well-settled First and Fifth Amendment principles. Instead, consistent with the First and Fifth Amendments, the government may prosecute those who provide associational support with the specific intent of furthering unlawful activity. However, the First and Fifth Amendments foreclose the government from prosecuting a person simply for her association with a disfavored or blacklisted group.[7] For criminal liability to attach to Ms.

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[6] Although we do not brief it here, *amici* support Ms. Taleb-Jedi's argument that the term "personnel" in Section 2339B is impermissibly vague and broad in violation of the Fifth Amendment. Def.'s Mot. to Dismiss at 96. Due process requires that the law give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). There is nothing in the plain language of the material support statute, even after Congress amended it in 2004 by adding subsections (h) and (i), to suggest what conduct under the guise of "personnel" is prohibited. Unlike "personnel" as used in Section 2339A, which can reasonably be read to prohibit the provision of personnel to be used in preparing for or carrying out various enumerated crimes, *United States v. Sattar*, 314 F. Supp. 2d at 298 (S.D.N.Y. 2004), the prohibition on providing personnel under Section 2339B criminalizes being "personnel" in an FTO, regardless of whether that associational support furthers any criminal ends. Subsection (i) regarding "Rule of Construction", which states: "Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States," does not cure this constitutional defect.

[7] Neither the First Amendment nor the Fifth Amendment contemplate that the judiciary abdicate its role of reviewing executive action challenged on civil liberties grounds, even in cases involving national security. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (stating that the Constitution "envisions a role for all three branches when individual liberties are at stake"); *Detroit Free Press v. Ashcroft*, 303

Taleb-Jedi, therefore, the government must show she knew of MEK's illegal aims and intended to further them. *See Al-Arian*, 308 F. Supp. 2d at 1340 (construing Section 2339B to require specific intent to further illegal activity to avoid First and Fifth Amendment concerns).

II. MS. TALEB-JEDI'S CONSTITUTIONAL RIGHTS TO FREEDOM OF ASSOCIATION AND DUE PROCESS REQUIRE THAT SHE BE AFFORDED THE OPPORTUNITY TO CHALLENGE MEK'S DESIGNATION AS A FOREIGN TERRORIST ORGANIZATION.

Ms. Taleb-Jedi's prosecution hinges on the government's administrative designation of MEK as a foreign terrorist organization under 8 U.S.C. § 1189. Without the designation, Ms. Taleb-Jedi's associational activity, whether in the form of membership, leadership or another type of advocacy, would be protected by the First Amendment; there is nothing inherently wrong or criminal about it. Because of the designation, the otherwise protected support has resulted in Ms. Taleb-Jedi's criminal prosecution and possible imprisonment. Simply put, the government's designation is the predicate that determines whether Ms. Taleb-Jedi's behavior is lawful or not. It is also an element of the offense with which she is charged. 18 U.S.C. § 2339B. Despite the importance of the designation to Ms. Taleb-Jedi's criminal case, a provision in the material

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F.3d 681, 692 (6th Cir. 2002) (recognizing that the Supreme Court "applied no deferential review to the Government's actions when faced with a national security threat" in the Pentagon Papers litigation). To the contrary, the courts must be especially vigilant where the executive justifies its actions in the name of national security. The Supreme Court has recognized that "the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable" and particularly susceptible to abuse. *Hamdi*, 542 U.S. at 520. As the Court stated in *Hamdi*,

> Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear …It is during our most challenging and uncertain moments that our [foundational constitutional principles are] most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

Id. at 532; *see also Robel*, 389 U.S. at 264 ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties … which makes the defense of the Nation worthwhile").

support statutory scheme explicitly deprives her of the right to challenge the FTO designation. 8 U.S.C. § 1189(a)(8).

Under long-standing Supreme Court precedent, both the First and Fifth Amendments mandate that a defendant in Ms. Taleb-Jedi's position be able to challenge in a meaningful judicial proceeding the predicate designation that strips her of her rights. *McKinney v. Alabama*, 424 U.S. 669 (1976); *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). If Section 1189(a)(8) is allowed to stand, Ms. Taleb-Jedi will have no vehicle through which to raise her own First Amendment interests or to protest in any way the designation that made her support for MEK unlawful. This our Constitution does not permit.

Amici respectfully urge this Court to strike 8 U.S.C. § 1189(a)(8) as unconstitutional and to permit Ms. Taleb-Jedi to challenge MEK's designation at her own criminal trial.

A. Title 8 U.S.C. § 1189(a)(8) Explicitly Prohibits a Defendant from Challenging the Foreign Terrorist Organization Designation that Renders Her Activity Criminal.

Title 8 U.S.C. § 1189 authorizes the Secretary of State to designate an organization as a "foreign terrorist organization," and specifies both the administrative procedures to be used and the judicial review process.[8] The Secretary designated MEK an FTO in 1997, 1999, 2001 and

[8] 8 U.S.C. § 1189(a)(1) provides:

> The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that
>
> > (A) the organization is a foreign organization;
> > (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title or terrorism (as defined in section 2656f(d)(2) of Title 22), or retains the capability and intent to engage in terrorist activity or terrorism); and
> > (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

2003.[9] The statute gives the Secretary complete discretion over the sources of information used for the designation and explicitly grants the Secretary authority to use classified information. 8 U.S.C. § 1189(a)(3)(B). Although the statute permits an organization to challenge its designation in the D.C. Circuit, 8 U.S.C. § 1189(c)(1), it limits judicial review to the administrative record the Secretary of State creates, and permits the government to submit classified information to the court for *ex parte, in camera* review. 8 U.S.C. § 1189(c)(3). The FTO may not, therefore, have the right to see or rebut all the evidence against it.

Most relevant here, the statute also specifically prohibits defendants in a criminal action from challenging the designation: the defendant "shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing." 8 U.S.C. § 1189(a)(8). Yet, under 18 U.S.C. § 2339B, the material support statute under which Ms. Taleb-Jedi is charged, providing support to a designated FTO is an element of the offence. The intersection of Section 2339B and Section 1189 therefore creates the constitutionally untenable situation whereby an individual can be tried for, and found guilty of, exercising her otherwise protected First Amendment rights without the opportunity to challenge the predicate designation that gives rise to the criminal liability. Section 1189(a)(8) is unconstitutional and should not be permitted to stand.

B. The First Amendment Requires that a Criminal Defendant Be Permitted to Challenge a Prior Determination that Strips Her of Her First Amendment Rights.

Ms. Taleb-Jedi is entitled to show to this Court that her associational support to MEK is constitutionally protected under the First Amendment and that MEK, a political organization she

[9] Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650 (Oct. 8, 1997); Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55, 112, 55, 112 (Oct. 8, 1999); Redesignation of Foreign Terrorist Organizations, 66 Fed. Reg. 51,088, 51,089 (Oct. 5, 2001); and, Redesignation of Foreign Terrorist Organizations, 68 Fed. Reg. 56,860, 56,861 (Oct. 2, 2003).

could lawfully support but for the administrative FTO designation, was wrongfully or invalidly designated as a terrorist group. This result is required by the Supreme Court's decision in *McKinney*, which controls in this case.

McKinney concerned the constitutionality of a statutory scheme similar to the one created by Section 1189 and Section 2239B. The statute in *McKinney* criminalized the sale of publications that had been adjudicated as obscene in a separate *in rem* civil action. 424 U.S. at 671-72. The obscenity designation meant that the publications were no longer protected by the First Amendment. *Id.* at 673-74. Although the defendant in *McKinney* was not a party to the *in rem* proceeding, he was prosecuted for selling obscene publications and, at his trial, was not permitted to challenge either the obscenity of the publication the validity of the prior designation itself. *Id.* at 673-74.

In a unanimous decision, the Supreme Court struck down the statutory scheme and held that "the procedures by which a State ascertains whether certain materials are obscene must be ones which ensure 'the necessary sensitivity to freedom of expression.'" *McKinney*, 424 U.S. at 674 (quoting *Freedman v. Maryland*, 380 U.S. 51, 58 (1973)). It went on to hold that because the defendant was not party to the proceeding in which the obscenity determination was made, the determination could not bind the defendant. Although the *publishers* of the materials were given notice and an opportunity to be heard in the prior proceeding, the Court said:

> [I]t does not follow that a decision reached in such proceedings should conclusively determine the First Amendment rights of others. Nonparties like petitioner may assess quite differently the strength of their constitutional claims and may, of course, have very different views regarding the desirability of disseminating particular materials. We think they must be given the opportunity to make these assessments themselves, as well as the chance to litigate the issues if they so choose.

Id. at 676. The Supreme Court's decision in *Freedman* is also instructive here. In *Freedman*, the Court struck down a statute that subjected film theatres to criminal prosecution if they

showed movies determined to be obscene by a censorship board. 380 U.S. at 52. The Court held that where a criminal defendant's First Amendment rights were at issue, "only a judicial determination in an adversary proceeding" would be "adequate safeguards against undue inhibition of protected expression." *Id.* at 58-60.

At an absolute minimum, then, *McKinney* and *Freedman* together require that: (1) in a case in which a defendant's otherwise protected First Amendment rights are stripped or infringed as a result of a prior proceeding and (2) the defendant does not receive notice of the prior proceeding or is not party to it, then (3) the defendant must be able to challenge the prior determination in an adversarial proceeding and receive a judicial determination. *McKinney*, 424 U.S. 669; *see also Afshari*, 446 F.3d 915 (9th Cir. 2006), *dissent from denial of rehearing en banc* ("*McKinney* stands for the proposition that a criminal defendant has an individual right to challenge the exclusion of what would otherwise be protected speech from the protection of the First Amendment.") *Id*. at 920 (Kozinski, J., dissenting).

The material support statutory scheme has all the infirmities of the statutes the Supreme Court struck down in *McKinney* and *Freedman*. Like the statutory scheme in *McKinney*, the basis for the prior designation of MEK as an FTO is not subject to challenge by Ms. Taleb-Jedi. 8 U.S.C. § 1189(a)(8). But for the designation of MEK by the government, Ms. Taleb-Jedi would be free to support, advocate for, associate with, volunteer under, organize and be a leader of MEK, even if it had unlawful as well as lawful aims. *See supra* Section I.A. (each of these types of activities would be protected by the First Amendment). Her associational support for MEK, which engages in a wide range of advocacy in support of its goal of overthrowing the current government of Iran, would be wholly protected. *See* Def.'s Mot. to Dismiss at 14-17. Yet, Ms. Taleb-Jedi had no notice of the administrative process resulting in MEK's designation

and was not a party either to that process or to the judicial proceedings in which MEK's designation was reviewed. *See id*. at 10-13, 25-29.

Ms. Taleb-Jedi's ability to challenge the designation is all the more critical for two reasons. First, as the D.C. Circuit itself recognized when it reviewed MEK's designation, the FTO designation process is constitutional flawed and is simply not a meaningful adversarial proceeding; for example, there is no opportunity for an alleged terrorist organization to have notice of the materials used against it or to comment on them; the administrative record can be based on secret evidence to which the organization has no access at any point; and, judicial review is limited to the administrative record. *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d. 196, 197 (D.C. Cir. 2001) ("NCRI"). Second, and as Judge Kozinksi eloquently described, the judicial review of the MEK designation was entirely inadequate. *Afshari*, 446 F.3d at 921 (Kozinski, J. dissenting) ("What good is the organization's right to challenge its designation if the outcome – in this case, that the designation was unconstitutional – is entirely ignored? Moreover, how can a procedure that was judicially determined to violate due process be an adequate substitute for the type of direct challenge that *McKinney* requires?").

It is an obvious point, but bears repeating: no other party or person has as much at stake in her criminal trial as Ms. Taleb-Jedi does. The First Amendment demands that she be able to challenge, at her trial, the government designation that is the direct cause of her prosecution.

C. The Fifth Amendment Requires Meaningful Judicial Review of an Administrative Determination that is Subsequently Used to Support a Criminal Prosecution.

The Fifth Amendment separately requires that Ms. Taleb-Jedi be able to challenge the FTO designation and the process under which it occurred. In *Mendoza-Lopez*, the Supreme Court held that a defendant has a due process right to "effective judicial review" of a prior decision that gives rise to subsequent criminal charges. *Mendoza-Lopez*, 481 U.S. at 841.

Mendoza-Lopez concerned the conviction of two Mexican nationals for illegally re-entering the United States after they were deported. *Id.* at 830. The defendants asked the Court to affirm the dismissal of their convictions on the ground that their predicate deportation proceedings were fundamentally unfair and, as a result, could not be used to support their criminal conviction. *Id*. at 830-31. Even though the Court found that Congress did not intend to allow defendants to challenge administrative deportation orders, it held that "where a determination made in an administrative procedure is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding." 481 U.S. at 837-38 (emphasis added).

In reasoning that is particularly instructive in Ms. Taleb-Jedi's case, the Court in *Mendoza-Lopez* rejected the government's argument that no collateral attack could be permitted even if the predicate proceeding was fundamentally unfair. 481 U.S. at 837. That argument was based on *Lewis v. United States*, 445 U.S. 55 (1980) in which the Supreme Court held that a state court conviction obtained in violation of the Sixth and Fourteenth Amendments could be used as a predicate for a subsequent conviction, under a statute that prohibited anyone convicted convicted felons from possessing a firearm. In *Mendoza-Lopez*, the Court distinguished *Lewis*, noting that the convicted felon was able to challenge the validity of the prior conviction in an "effective judicial proceeding." 445 U.S. at 64. In *Mendoza-Lopez*, however, the Court held that, "[i]t is precisely the unavailability of effective judicial review of the administrative determination at issue here that sets this case apart from *Lewis* . . . . Persons charged with crime are entitled to have the factual and legal determinations upon which convictions are based subjected to the scrutiny of an impartial judicial officer." *Id*.

Here, as in *Mendoza-Lopez*, and unlike in cases like *Lewis*, criminal defendants charged under the material support statutory scheme are not party either to the FTO designation, or to proceedings in which the FTO may challenge its own designation.[10] That the FTO can challenge its own designation does not address the constitutional requirements of the First and Fifth Amendments as they apply to individual criminal defendants prosecuted for material support to the FTO. *See McKinney*, 424 U.S. at 675.[11] In any event, the limited process provided in Section 1189 falls miserably short of meaningful review. *See NCRI*, 251 F.3d at 196 ("[t]he unique feature of this statutory procedure is the dearth of procedural participation and protection afforded the designated entity."); *Freedman*, 380 U.S. at 57-60; *Afshari*, 446 F.3d at 919 (Kozinski, J., dissenting); *supra* at 23. Individual defendants like Ms. Taleb-Jedi have no opportunity to challenge the FTO designation *as it applies to them* and criminalizes their otherwise protected First Amendment rights.[12] The only way to ensure Ms. Taleb-Jedi's First

[10] For the same reason, cases concerning export restriction and commodity control, *See, e.g., United States v. Bozarov*, 974 F.2d 1037 (9th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *United States v. Mandel*, 914 F.2d 1215 (9th Cir. 1990), *United States v. Spawr Optical Research, Inc.*, 864 F.2d 1467, 1472-73) (9th Cir. 1988), do not apply in the material support context.

[11] Many FTOs may not, in fact, be able to challenge their own designation. *See People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (foreign entities without presence in the United States have no due process rights under the Constitution). This scenario presents the same troubling possibility a defendant like Ms. Taleb-Jedi faces: that an FTO designation could conclusively determine the First Amendment rights of U.S. citizens, without providing those citizens any due process.

[12] Some courts have held that under Section 2339B, it is the mere "fact" of the FTO designation that is the critical element resulting in criminal liability, not the substantive content of the designation itself. *See, e.g.*, *Hammoud*, 381 F.3d at 331. Therefore, the argument goes, it does not violate a criminal defendant's due process rights if she is not able to challenge the procedural or substantive validity of the designation. *Sattar*, 272 F. Supp. 2d at 367. This argument is spurious on its face. It entirely ignores the *effect* of the designation on an individual criminal defendant, which is to turn what would otherwise be lawful conduct into unlawful conduct without procedural and substantive safeguards. *See Afshari*, 446 F.3d at 916 ("The determination of whether or not an organization is engaged in terrorism is therefore crucial, because it distinguishes activities that can be criminalized from those that are protected by the First Amendment.") *See also Mathews v. Eldridge*, 424 U.S. 319 (1976) (deprivation of liberty and property requires adequate safeguards).

and Fifth Amendment rights are protected is to permit her to challenge the predicate FTO designation in her own criminal trial.

CONCLUSION

For the foregoing reasons *amici* respectfully urge this court to (i) require the government to read 18 U.S.C. § 2339B to require proof of a specific intent or, in the alternative to declare the statute unconstitutional and dismiss the indictment, and (ii) to find 8 U.S.C § 1189(a)(8) unconstitutional and to allow Ms. Taleb-Jedi to challenge MEK's FTO designation in her own criminal case.

Respectfully submitted,

/s/

HINA SHAMSI[13]
MELISSA GOODMAN
JAMEEL JAFFER
American Civil Liberties Union Foundation
National Legal Department
125 Broad St.
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2629

ARTHUR N. EISENBERG
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
Phone: (212) 607-3324
Fax: (212) 549-2629

Attorneys for *Amici Curiae*

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[13] Danielle Tully, a fellow with the ACLU's National Security Project contributed to the preparation of this brief.