BIBLES, BANDAGES, AND PATRIOTISM: *HOLDER V. HUMANITARIAN LAW PROJECT* AND UNRESOLVED EXCEPTIONS TO PROVIDING MATERIAL SUPPORT TO FOREIGN TERRORIST ORGANIZATIONS

ABSTRACT

The Supreme Court decision in Holder v. Humanitarian Law Project *has been widely criticized for its interpretation of the federal statute that prohibits providing material support to foreign terrorist organizations. The Court determined that even support meant to further only the lawful aims of a foreign terrorist organization was punishable under the law, thereby curtailing First Amendment rights of free speech and association in deference to the government's interest in national security. Although the case was an "as applied" challenge and the ruling technically only applies to the activities of the plaintiffs, a noticeable chilling effect has been observed among international humanitarian groups, despite exceptions for the provision of medicine and religious materials.*

This Note considers the analysis of both the majority and the dissent in the Humanitarian Law Project *case and considers how a challenge to the two exceptions for medicine and religious materials may fare under each form of scrutiny should the Court decide to tiptoe the lines between free exercise of religion and national security, and between provision of international humanitarian aid and national security. This Note then considers potential solutions to the issues raised by these exceptions.*

TABLE OF CONTENTS

I. INTRODUCTION

Following the terrorist attacks on September 11, 2001, President George W. Bush declared an untraditional war that continues to this day.[1] Unlike wars fought in the past, the "War on Terrorism" is geographically undefined, has no concrete timeframe, and involves vaguely identified enemies including both legitimate and illegitimate foreign governments and potentially their citizens.[2] Effectuating new military strategies to fight a war

1. George W. Bush, President of the United States of America, Address to the Joint Session of the 107th Congress (Sept. 20, 2001), *in Selected Speeches of President George W. Bush: 2001–2008*, THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH 65, georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf [https://perma.cc/B6PE-CCUE].

2. *See id.* at 68–69 ("Our enemy is a radical network of terrorists, and every government that supports them. Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. . . . Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen.").

on a concept, rather than against a nation-state, has led to arguable breaches of U.S. freedoms through the enactment and enforcement of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act).[3] One such infringement on the rights of citizens came from the beefing up of a previously enacted statute, 18 U.S.C. § 2339B(a) (material-support statute), which prohibits the provision of material support or resources to foreign terrorist organizations.[4]

The material-support statute, prior to and as amended by both the PATRIOT Act and later by the Intelligence Reform and Terrorism Prevention Act of 2004, was the subject of lengthy litigation initiated by the Humanitarian Law Project and other domestic organizations and citizens (Plaintiffs).[5] The Plaintiffs were interested in providing support for the nonviolent humanitarian and political activities of the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both of which had been designated as Foreign Terrorist Organizations (FTOs) by the United States Secretary of State in 1997.[6] The 12-year-long litigation culminated in a 2010 United States Supreme Court decision finding the statute to be constitutional in its prohibition of the Plaintiffs' proposed activities.[7] In its holding, the Court stated, "We conclude that the material-support statute is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue. We do not, however, address the resolution of more difficult cases that may arise under the statute in the future."[8]

3. *See generally* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S. Code).

4. *Id.* § 805(a)(2)(B) (codified as amended at 18 U.S.C. § 2339(A)(b) (2018)); 18 U.S.C. § 2339A(b); *see also* 18 U.S.C. § 2339B(a); USA PATRIOT ACT § 810(d) (codified as amended at 18 U.S.C. §2339(B)(a)).

5. USA PATRIOT ACT § 805(a)(2)(B); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603, 118 Stat. 3638, 3762–64; 18 U.S.C. § 2339B(a); Holder v. Humanitarian Law Project, 561 U.S. 1, 10 (2010).

6. *Humanitarian Law Project*, 561 U.S. at 9–10.

7. *See id.* at 8–10.

8. *Id.* at 8.

The definition of *material support* under 18 U.S.C. § 2339A(b) includes a lengthy list of prohibited activities, broadly covering both conduct and communication.[9] There are, however, two explicit exceptions: medicine and religious materials.[10] Neither of these exceptions applied to the Plaintiffs in the case.[11] It is unclear exactly how these exceptions came to be and what interest they serve.[12] What is even less clear is the constitutionality of these exceptions.[13]

This Note addresses constitutional questions left unanswered in the Court's holding in *Humanitarian Law Project*.[14] Specifically, this Note considers the constitutionality of the exceptions for medicine and religious materials found in 18 U.S.C. § 2339A(b)(1).[15] Part II outlines the language of the material-support statute and the Court's application of the statute to the Plaintiffs in *Humanitarian Law Project.* Part III reviews each exception and applies the rationale of both the majority and the dissent from *Humanitarian Law Project* in an attempt to determine the exceptions' constitutionality under the same scrutiny applied to the prohibited activities for material support. Finally, Part IV considers resolutions to the constitutional questions raised by each exception.

II. *HOLDER V. HUMANITARIAN LAW PROJECT*

The Plaintiffs in *Humanitarian Law Project* challenged four specific activities prohibited by § 2339B: training, expert advice or assistance, service, and personnel.[16] The Plaintiffs claimed their purpose in pursuing these prohibited activities was to support the nonviolent actions of the PKK and LTTE, not to further any unlawful or violent conduct of the groups.[17] The Plaintiffs' proposed activities included training the groups how to resolve disputes peacefully, teaching the groups how to appeal to the United Nations for humanitarian relief, and offering the groups expertise on negotiating peace agreements with governments.[18] The Plaintiffs also sought to

9. *See* 18 U.S.C. § 2339A(b).
10. *Id.*
11. *Id.*; *see Humanitarian Law Project*, 561 U.S. at 9.
12. *See infra* Part III.
13. *See infra* Part III.
14. *Humanitarian Law Project*, 561 U.S. at 8.
15. 18 U.S.C. § 2339A(b)(1) (2018).
16. *Id.*; *Humanitarian Law Project*, 561 U.S. at 14.
17. *See Humanitarian Law Project*, 561 U.S. at 16.
18. *Id.* at 14–15.

independently advocate on behalf of both groups.[19] As a threshold matter, the Plaintiffs contended the Court should interpret the statute to require proof of an intention to support illegal activities in order to be found guilty.[20] They argued that, under such an interpretation, the statute would not apply to the activities they sought to engage in because they only intended to further the lawful, nonviolent actions of PKK and LTTE.[21] The majority dismissed this interpretation of the statute[22] and instead turned to the three constitutional claims brought by the Plaintiffs.[23]

The Plaintiffs challenged the constitutionality of § 2339B(a)(1) by asserting the following claims: (1) the four terms at issue (training, expert advice or assistance, service, and personnel) are impermissibly vague and therefore violate the Due Process Clause of the Fifth Amendment; (2) the statute violates their First Amendment right of free speech; and (3) their First Amendment right of freedom of association is also violated under the statute.[24]

A. *The Majority's Rationale*

1. *Issue: Vagueness Under the Due Process Clause of the Fifth Amendment*

In addressing the vagueness issue, the majority relied on several cases outlining the standard of review for vagueness generally, as well as those that specifically applied to regulations of free speech.[25] The dissent ultimately agreed with the majority that, as applied to the Plaintiffs' activities, § 2339B(a)(1) was not unconstitutionally vague and therefore did not infringe on the Plaintiffs' due process rights under the Fifth Amendment.[26] First, the majority found the terms at issue were unlike those the Court

19. *Id.* at 25.

20. *Id.* at 16.

21. *See id.*

22. *Id.* at 16–17 ("We reject plaintiffs' interpretation of § 2339B[(a)(1)] because it is inconsistent with the text of the statute. . . . Plaintiffs' interpretation is also untenable in light of the sections immediately surrounding § 2339B, both of which do refer to the intent to further terrorist activity.").

23. *Id.* at 18, 25; U.S. CONST. amends. I, V.

24. U.S. CONST. amends. I, V; *Humanitarian Law Project*, 561 U.S. at 20, 25, 39.

25. *See Humanitarian Law Project*, 561 U.S. at 20 (citing United States v. Williams, 553 U.S. 285, 304 (2008); Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982)).

26. *Id.* at 40 (Breyer, J., dissenting).

declared vague previously.[27] Further, Congress took care to add clarifying definitions to the statute, increasing understanding of the application of the terms under the statute.[28] The majority acknowledged certain applications of the statute could result in a vagueness challenge in the future; however, the activities proposed by the Plaintiffs were not of that kind.[29] "[T]he statutory terms are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail."[30] Under the majority's view, proffered hypotheticals of activities that would not be clearly prohibited or allowed under the statute were insufficient to support a vagueness challenge where those activities in no way related to the Plaintiffs' own aspirations.[31] As for the activities Plaintiffs sought to engage in, the statute's application was clear.[32]

Although the vagueness issue was less contentious than the two First Amendment issues, the Court's consideration of the issue may prove informative should the exceptions for medicine and religious materials under § 2339A(b) be challenged for vagueness in the future.[33]

2. *Issue: Violation of First Amendment Free Speech*

In drafting the material-support statute, Congress was acutely aware of the First Amendment implications and addressed those implications in § 2339B(i), titled "Rule of construction," stating: "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*."[34] The majority, however, finds plenty of justification in this case for banning speech that would otherwise be protected by the First Amendment.[35] The majority ultimately stated, "[I]n prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech."[36]

27. *Id.* at 20 (majority opinion).
28. *Id.* at 21.
29. *Id.*
30. *Id.*
31. *Id.* at 22–23.
32. *Id.* at 21.
33. *See id.* at 40 (Breyer, J., dissenting).
34. 18 U.S.C. § 2339B(i) (2018) (emphasis added).
35. *See Humanitarian Law Project*, 561 U.S. at 39 (majority opinion).
36. *Id.*

The Plaintiffs claimed if their vagueness challenge failed and the statute did apply to their proposed activities, it would result in a purely political ban on speech in clear violation of their First Amendment rights.[37] Conversely, the Government contended the Plaintiffs' proposed activities consisted solely of conduct, resulting in only an incidental burdening of expression, and therefore warranted judicial review under intermediate scrutiny, as applied in *United States v. O'Brien*.[38]

The majority rejected both assertions and stated, "The First Amendment issue before us is more refined than either plaintiffs or the Government would have it. . . . It is . . . whether the Government may prohibit what plaintiffs want to do—provide material support to the PKK and LTTE in the form of speech."[39] The majority subsequently applied a form of strict scrutiny analysis instead of the tests suggested by the parties but not without criticism by the dissent.[40] While the Court found § 2339B does regulate conduct based on speech,[41] it nevertheless held the statute survived strict scrutiny because it was narrowly tailored to serve the compelling government interest in combating terrorism.[42] The majority rejected the Plaintiffs' assertion that the means were overbroad and unnecessary to further the government's interest in combating terrorism as applied to the Plaintiffs' proposed activities—even though those activities were only intended to further legitimate, nonviolent activities of the terrorist groups and not to further terrorism.[43] In denying this claim and finding the means of § 2339B narrowly tailored, the Court gave a great deal of deference to Congress's findings in its drafting of the legislation despite

37. *Id.* at 25; U.S. CONST. amend. I.

38. *Humanitarian Law Project*, 561 U.S. at 26; *see* United States v. O'Brien, 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

39. *Humanitarian Law Project*, 561 U.S. at 28.

40. *Id.* at 61 (Breyer, J., dissenting).

41. *Id.* at 27 (majority opinion).

42. *Id.* at 36 ("[T]o serve the Government's interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups' nonviolent ends.").

43. *See id.* at 28–29.

acknowledging, "Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role."[44]

The majority made clear it did not intend to automatically defer to the legislature's wisdom in how the statute was crafted and whether it was narrowly tailored to serve a compelling government interest.[45] But, the majority affirmatively stated that the legislature's fact finding in support of their drafting was appropriate to defer to given the judicial branch's ignorance in confronting "evolving threats . . . where information can be difficult to obtain and the impact of certain conduct difficult to assess."[46] In addition, the exceptions to the definition of *material support* created by Congress supported the Court's finding of narrow tailoring.[47]

Whereas the exclusion of religious materials and medicine from the definition of *material support* is considered a "careful balancing of interests" to avoid overreach,[48] the Court appeared to apply the same rationale and support to Congress's removal of an earlier exception for "'humanitarian assistance to persons not directly involved in' terrorist activity."[49] It is unclear how the majority reconciled its support for the removal of humanitarian assistance as an exception (because it "demonstrates that Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects")[50] yet simultaneously supported the current exceptions for religious materials and medicine as a means to create a "balancing of interests," even though no clear definition of *religious materials* or *medicine* has been provided.[51] This incongruence muddles the majority's application of strict scrutiny under the statute to the Plaintiffs' First Amendment claims and may provide ammunition for a later due process claim for vagueness under those exceptions.[52] Such hypotheticals will be discussed further in Part III.[53]

44. *Id.* at 34.
45. *Id.*
46. *Id.*
47. *Id.* at 36.
48. *Id.*
49. *Id.* at 29; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1255 (codified as amended at 18 U.S.C. § 2339A (2018)).
50. *See Humanitarian Law Project*, 561 U.S. at 29.
51. *See id.* at 36.
52. *See infra* Part III.
53. *See infra* Part III.

In its review of the Plaintiffs' First Amendment claims, the majority relied heavily on Congress's finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[54] The majority found even the kind of support advocated for by the Plaintiffs would in effect be fungible because "[s]uch support frees up other resources within the organization that might be put to violent ends."[55] Additionally, the majority reasoned this kind of support—even for the promotion of nonviolent activities and diplomacy—provides legitimacy to these groups, which "makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks."[56] The dissent strongly opposed the legitimacy rationale on several grounds.[57] In addressing the concerns of the dissent that such a rationalization would result in prohibiting constitutionally protected speech and conduct, the majority responded by noting the narrow tailoring of the statute "reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group's legitimacy is not covered."[58] Similar to the finding of narrow tailoring relating to exceptions withdrawn (humanitarian support to individuals not directly involved in terrorist activity)[59] and exceptions retained (religious materials and medicine),[60] the majority used the concept of legitimacy to justify the prohibition and the exceptions on exactly the same grounds.[61]

The majority supported its holding that the Plaintiffs' First Amendment claim fails by stating the activities the Plaintiffs purport to engage in are too vaguely stated and not specifically defined in a way that would relieve the Court of its concerns and justify the statute's broad reach.[62] However, the majority claimed the ruling is narrow because it only applies to the case at hand: "All this is not to say that any future applications of the

54. *Humanitarian Law Project*, 561 U.S. at 29 (quoting Antiterrorism and Effective Death Penalty Act § 301(a)(7) (codified at 18 U.S.C. § 2339B note)).

55. *Id.* at 30.

56. *Id.*

57. *Id.* at 49–52 (Breyer, J., dissenting).

58. *Id.* at 31–32 (majority opinion).

59. *Id.* at 29.

60. *Id.* at 36.

61. *See id.* at 32.

62. *Id.* at 37 ("[P]laintiffs do not specify their expected level of coordination with the PKK or LTTE or suggest what exactly their 'advocacy' would consist of.").

material-support statute to speech or advocacy will survive First Amendment scrutiny. It is also not to say that any other statute relating to speech and terrorism would satisfy the First Amendment."[63] In essence, this narrow holding applied only to vaguely stated activities, foreshadowing the inevitable chilling effect to follow.[64]

3. *Issue: Violation of First Amendment Freedom of Association*

The last claim the Plaintiffs made was based on freedom of association under the First Amendment.[65] The Plaintiffs argued the statute prohibits mere association with the PKK and LTTE.[66] The majority made quick work of this claim, affirmatively stating the statute does not criminalize association with an FTO, only the provision of material support to such an organization.[67] The majority also disregarded the Plaintiffs' assertion that the provision of material support is impermissibly discriminatory, stating, "Congress is not required to ban material support to every group or none at all."[68]

B. *The Dissent's Rationale*

Virtually the only points agreed on by the majority and dissent were that the material-support statute is not unconstitutionally vague and that the government has a compelling interest in combating terrorism.[69] Beyond those points, the dissent vigorously disagreed with the majority's rationale in upholding the statute as applied to the Plaintiffs' proposed activities.[70] The dissent agreed with the Plaintiffs that their proposed activities were the kind that the First Amendment ordinarily vehemently protects because the activities involved political speech and association for political purposes.[71] Further, the dissent did not believe the Government met its burden in justifying criminalization of those activities through the means of § 2339B.[72]

63. *Id.* at 39.
64. *See id.*
65. *Id.*; U.S. CONST. amend. I.
66. *Humanitarian Law Project*, 561 U.S. at 39.
67. *Id.*
68. *See id.* at 40.
69. *Id.* at 40–41 (Breyer, J., dissenting).
70. *Id.* at 41.
71. *Id.* at 42.
72. *Id.* ("In my view, the Government has not made the strong showing necessary

Where the majority made a narrow ruling of strict scrutiny application to the Plaintiffs' proposed activities,[73] the dissent insisted on applying traditional First Amendment tests that were essentially ignored by the majority.[74] This was either in avoidance of the broader constitutional issues presented by the Plaintiffs' claims or in light of deference to the wisdom of Congress under the enormously compelling interest of national security and foreign relations.[75]

Namely, the dissent considered the *Brandenburg* test for incitement and concluded the Plaintiffs' proposed activities could not be considered incitement since they lacked both the requisite intent and likelihood of imminent lawless action.[76] Similarly, the dissent considered the statute to apply criminal penalties based on content, requiring a strict scrutiny analysis to determine whether the prohibition on ordinarily protected speech could be justified by a compelling government interest and by using the least restrictive means possible.[77]

The dissent also contended that even if the appropriate test was intermediate scrutiny as articulated in *Turner Broadcasting System, Inc. v. FCC*, the Government would still fail to meet its burden of proof to justify a prohibition on the Plaintiffs' activities in order to serve the interest of combating terrorism.[78]

---

to justify under the *First Amendment* the criminal prosecution of those who engage in these activities." (emphasis added)).

73. *See id.* at 40 (majority opinion).

74. *See id.* at 43–46 (Breyer, J., dissenting) (considering categorical prohibitions to free speech, such as incitement, as well as the validity of content-based distinctions and application of intermediate scrutiny).

75. *See id.* at 25, 28 (majority opinion).

76. *Id.* at 43–44 (Breyer, J., dissenting); *see* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

77. *Humanitarian Law Project*, 561 U.S. at 45; *see* Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983)) ("[A]s a general matter, 'the *First Amendment* means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" (alteration in original) (emphasis added)).

78. *See Humanitarian Law Project*, 561 U.S. at 46; *see* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997) ("[C]ontent-neutral regulation will be sustained under the *First Amendment* if it advances important governmental interests unrelated

The dissent was particularly concerned with exactly how the prohibition on activities proposed by the Plaintiffs would combat terrorism and what proof the Government could submit to make such a causal connection.[79] To this end, the dissent considered the Government's two main arguments in turn: (1) the kind of support to FTOs proposed by the Plaintiffs would be fungible[80] and (2) support would legitimize and thereby strengthen those groups, enabling them to further their terrorist aims.[81]

1. *Fungibility of Support*

The dissent disputed the Government's argument that the Plaintiffs' proposed activities would be as obviously fungible in the same way as money or food.[82] Though advocating political change through peaceful means could actually be fungible in a way that an FTO could divert the benefits or resources from that support for violent purposes, that conclusion was not obviously true and required substantial evidentiary proof, which the Government failed to supply.[83] The only meaningful support the Government provided for its claim came from a congressional finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[84] Additionally, the Government cited a House Report[85] and a State Department official's affidavit;[86] however, the dissent did not find any of those sources adequate in explaining how the Plaintiffs' proposed activities would be fungible and capable of diversion for terrorist purposes.[87] The dissent was also not convinced Congress was even genuinely concerned

to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." (emphasis added) (citation omitted)).

79. *See Humanitarian Law Project*, 561 U.S. at 46.

80. *Id.* at 47.

81. *Id.* at 49.

82. *Id.* at 47.

83. *Id.*

84. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (codified at 18 U.S.C § 2339B note (2018)).

85. H.R. REP. No. 104-383, at 81 (1995) ("Supply[ing] funds, goods, or services . . . helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities.").

86. Joint Appendix at 134, 136, Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (No. 05-56846), 2009 WL 3877534.

87. *Humanitarian Law Project*, 561 U.S. at 48.

with the kind of support proposed by the Plaintiffs in its drafting of the statute,[88] and the dissent instead believed the terms used in the House Report, including *contributions* and *services*, should be more naturally understood to refer to physical goods, money, or training (such as computer programming).[89]

2. *Legitimizing Terrorist Groups*

The dissent also poked significant holes in the Government's argument that allowing the Plaintiffs' proposed activities would result in "'bolste[ring] a terrorist organization's efficacy and strength in a community' and 'undermin[ing] this nation's efforts to delegitimize and weaken these groups.'"[90] The majority seemed to agree with the Government's assessment that the alleged legitimacy provided to FTOs through the Plaintiffs' proposed activities would result in increased access and acquisition of other—potentially even more threatening—kinds of material support.[91] The majority used this assessment to support the constitutionality of the statute and further justify its application to the Plaintiffs.[92] But the dissent pointed out just how dangerous this rationale could be because it could easily be applied to all manners of speech and conduct, even those the majority claimed are not prohibited by the statute, such as independent advocacy and association.[93] Indeed, the dissent found this rationale inadequate to justify the prohibition of activities the Plaintiffs have identified: "But this 'legitimacy' justification cannot by itself warrant suppression of political speech, advocacy, and association."[94] The dissent found the legitimacy justification not only messy and unclear, inevitably leading to a chilling of speech that should be protected, but also inconsistent with First Amendment precedent, as demonstrated by cases protecting Communist Party membership and advocacy of unlawful activity.[95]

88. *See* 18 U.S.C. § 2339B(i) ("Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the *First Amendment* . . . ." (emphasis added)).

89. *Humanitarian Law Project*, 561 U.S. at 48.

90. *See id.* at 49; Brief for the Respondents at 56, Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (Nos. 08-1498, 09-89), 2009 WL 4951303.

91. *Humanitarian Law Project*, 561 U.S. at 30 (majority opinion).

92. *See id.*

93. *Id.* at 49–50 (Breyer, J., dissenting).

94. *Id.*

95. *Id.* at 50–51.

C. *Remaining Questions*

The effect of the *Humanitarian Law Project* ruling is still not entirely clear. Lower courts have struggled to consistently apply the majority's rationale, and the Supreme Court has since denied certiorari in every case concerning the material-support statute.[96] Although the majority claimed to be making a narrow ruling,[97] the rationale it used seems broad enough to apply to a variety of situations, including both conduct and speech that might otherwise be protected in different contexts.[98] While the dissent argued the majority provided no clarity as to the scope of activities covered under the statute,[99] neither the majority nor the dissent paid much attention to the exceptions under the statute and whether or not those carve outs might invalidate the statute as a whole—or at least themselves be unconstitutional.[100] The dissent did allude to such a challenge by highlighting the deficiency in both the Government's and the majority's rationale, saying, "[N]either . . . points to any specific facts that show that the speech-related activities before us are fungible in some *special way* or confer some *special* legitimacy . . . Those arguments would apply to virtually all speech-related support for a dual-purpose group's peaceful activities (irrespective of . . . coordinat[ion])."[101] Part III considers how the fungibility and legitimacy arguments potentially apply to the exceptions provided for by the statute: medicine and religious materials.[102]

III. EXCEPTIONS FOR MEDICINE AND RELIGIOUS MATERIALS

A. *Definition*

The word *medicine* is not defined in the text of the statute; however, legislative history reveals the term is intended to "be understood to be limited to the medicine itself, and does not include the vast array of medical

96. Kasey A. Feltner, *Swipe Right for ISIS: Social Media and Material Support to Foreign Terrorist Organizations*, 26 B.U. PUB. INT. L.J. 95, 98 (2017).

97. *Humanitarian Law Project*, 561 U.S. at 39 (majority opinion) ("All this is not to say that any future applications of the material-support statute to speech or advocacy will survive *First Amendment* scrutiny." (emphasis added)).

98. *See* CHARLES W. RHODES, CHARLES W. "ROCKY" RHODES ON *HOLDER V. HUMANITARIAN LAW PROJECT*, 2010 EMERGING ISSUES 5393 (Lexis 2010).

99. *Humanitarian Law Project*, 561 U.S. at 55 (Breyer, J., dissenting).

100. *See generally Humanitarian Law Project*, 561 U.S. 1.

101. *Id.* at 55 (Breyer, J., dissenting).

102. *See infra* Part III.

supplies."[103] Although it is clear *medicine* does not include other medical supplies, it is not clear whether administration of the medicine, providing information about the medicine, or performing a medical procedure such as surgery would fall under the exception or instead be considered a "service" or "expert advice or assistance" under the statute and therefore be prohibited and punishable.[104] The drafters may have intended to simplify the exception by stating only *medicine*; however, the lack of detail complicates the provision of medical aid—chilling humanitarian workers and organizations from fulfilling their missions and forcing courts to construe the exception broadly or narrowly, leading to inconsistent rulings.[105] Beyond just the provision of medicine, the holding in *Humanitarian Law Project*, along with the legislative history of the statute itself, seemed to indicate a majority of humanitarian activities could be considered material support.[106] Consideration of the analyses of both the majority and the dissent regarding both the statute and the activities proposed by the Plaintiffs in *Humanitarian Law Project* may provide insight as to how the Supreme Court might consider a challenge to the exception for medicine and whether the law imposes a chilling effect on activities that are not actually meant to be prohibited.

B. *Analysis*

1. *Under the Majority's Rationale*

If the majority's fungibility and legitimacy arguments are applied to the provision of humanitarian aid in areas of the world occupied by FTOs, humanitarian organizations would almost certainly violate the statute, despite the exception for medicine, which is presumably in place to allow humanitarian relief. If nothing else, knowing the analysis has been applied to activities intended only to support nonviolent aims of an FTO may chill humanitarian organizations from performing their work due to confusion and fear of prosecution.[107] Legislators considered these concerns in a 2005

103. 18 U.S.C. § 2339A(b) (2018); H.R. REP. NO. 104-518, at 114 (1996) (Conf. Rep.).

104. 18 U.S.C. § 2339A(b).

105. *See* Justin A. Fraterman, *Criminalizing Humanitarian Relief: Are U.S. Material Support for Terrorism Laws Compatible with International Humanitarian Law?*, 46 N.Y.U. J. INT'L L. & POL. 399, 408 (2014) (citing United States v. Farhane, 634 F.3d 127, 143 (2d Cir. 2011); Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 699 (7th Cir. 2008) (en banc)).

106. *Id*. at 412 (*Farhane*, 634 F.3d at 143; citing *Boim*, 549 F.3d at 699).

107. *Implementation of the USA Patriot Act: Prohibition of Material Support Under*

hearing regarding the constitutionality and effects of the statute; however, this was prior to the Supreme Court's decision in *Humanitarian Law Project*, so fungibility was not expressly articulated as a concern.[108]

First, like other forms of material support defined by the statute,[109] medicine may be fungible.[110] Even if organizations were careful to only provide medicine itself without actually administering it, providing information about it, or performing any other ancillary medical procedures, the provision of the medicine alone may still be considered fungible. Like other forms of support, medicine costs money, and any money saved by an FTO on medication could be directed to terrorist activities. Additionally, medicine may help sustain the physical health of the FTO by restoring or ensuring the health of its members and the very personnel that carry out the terrorist activities. In these ways, medicine may be even more fungible than other forms of support that are either explicitly banned in the statute or that were determined to be prohibited in *Humanitarian Law Project*. Therefore, allowing an exception for medicine would run counter to the majority's and Congress's determination that *any* support to an FTO would be impermissible because it could potentially facilitate or support terrorist activities.[111] Indeed, medicine would fall under that category.[112]

Second, the provision of medicine to designated FTOs may have a legitimizing effect, thereby undermining U.S. efforts to dismantle and defeat them. The majority pointed out that, in addition to being fungible, material support may help legitimize an FTO by "mak[ing] it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks."[113] In this sense, it is hard to see how medicine could be distinguished from other kinds of prohibited support, such as food or water, which are often also supplied by humanitarian groups. Indeed, it

Sections 805 of the USA Patriot Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. 2–3 (2005) [hereinafter *Hearing*] (statement of Rep. Robert C. Scott, Member, Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary).

108. *See generally id.*

109. 18 U.S.C. § 2339A(b).

110. *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 30 (2010).

111. *Id.* at 29; Antiterrorism and Effective Death Penalty Act of 1996 Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1255 (codified as amended at 18 U.S.C. § 2339A).

112. *See Humanitarian Law Project*, 561 U.S. at 29.

113. *Id.* at 30.

would be virtually impossible to provide medicine as permitted in the statute without conferring some benefit to the FTO "whether by offering perceived legitimacy to a non-state actor, improving the image of a negligent state or relieving the party of its own obligations to care for the population in the area under its control."[114] The majority clarified that, in an effort to preserve First Amendment rights, any independent advocacy that might be perceived as legitimizing an FTO would not be prohibited; only coordinated activity would be prohibited.[115] It would be difficult for a humanitarian organization to provide medicine without coordination, as that is often exactly how access to victims and civilians is granted.[116] Under the majority's analysis, even if the provision of medicine would not be punished, a humanitarian organization may still be chilled from providing relief due to fear of crossing the line into coordinated activity that has a legitimizing effect.[117]

2. *Under the Dissent's Rationale*

The dissent strongly opposed the majority's analysis of fungibility and legitimacy.[118] The exception for medicine provides a specific example of its concerns with the applicability of the majority's rationale. As far as fungibility, the dissent was not convinced that political advocacy through peaceful means would be fungible in the same way provision of food, money, or certain kinds of computer training would be.[119] At the very least, the dissent wanted the Government to provide more evidence to support that conclusion.[120] In this sense, medicine is more similar to tangible goods and resources, such as money and food, and would be much more fungible than

114. Sara Pantuliano et al., *Counter-Terrorism and Humanitarian Action: Tensions, Impact and Ways Forward*, HPG POLICY BRIEF 43, Oct. 2011, at 6 https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7347.pdf [https://perma.cc/Q9SC-HB3V].

115. *Humanitarian Law Project*, 561 U.S. at 31–32.

116. Pantuliano et al., *supra* note 114, at 6 ("Failure to engage with armed opposition groups significantly limits the ability of aid actors to reach the population under their control, and can effectively exclude victims on one side of the conflict from humanitarian assistance.").

117. *Hearing*, *supra* note 107, at 2–3 (statement of Rep. Robert C. Scott, Member, Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary). While this hearing was held prior to the *Humanitarian Law Project* decision, the hearing indicates the concern was present even prior to the decision, and the concern continues to this day.

118. *Humanitarian Law Project*, 561 U.S. at 47–50 (Breyer, J., dissenting).

119. *Id.* at 47.

120. *Id.* at 48.

the activities the Plaintiffs intended to pursue and those the Court deemed prohibited. It is difficult to see how the majority could support prohibition of coordinated, peaceful political advocacy because of the danger of fungibility but would allow the provision of medicine, which would be obviously fungible.[121] Although a fungibility argument may be made in terms of coordinated, peaceful political advocacy training, it appears insufficient by itself to support such a holding.[122] The very nature of fungibility contradicts the idea that some exceptions could be permissible without undermining the purpose of the law.[123]

Similarly, the dissent was dissatisfied with the majority's legitimacy justification as a means to prohibit activities similar to those proposed by the Plaintiffs.[124] Here again the argument is about speech and the distinction (or lack of distinction) provided by the majority between coordinated and independent activity.[125] Still, the arguments can be applied to the provision of medicine. The dissent stated:

> It is inordinately difficult to distinguish when speech activity will and when it will not initiate the chain of causation the Court suggests—a chain that leads from peaceful advocacy to "legitimacy" to increased support for the group to an increased supply of material goods that support its terrorist activities.[126]

As with any activity, coordinated or not, an FTO may benefit from some legitimizing effect that could potentially be directed to terrorist activity.[127] Therefore, a legitimizing effect alone is insufficient as a basis to determine which activities, or types of material support, should be prohibited or accepted.[128]

121. *See id.* at 28–29, 36 (majority opinion).

122. *See id.* at 47 (Breyer, J. dissenting).

123. *Fungibility*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The quality of being interchangeable with another thing or quantity of a thing.").

124. *Humanitarian Law Project*, 561 U.S. at 49.

125. *Id.* at 49–50.

126. *Id.* at 50.

127. *See* Pantulaino et al., *supra* note 114, at 6.

128. *See Humanitarian Law Project*, 561 U.S. at 59.

IV. RELIGIOUS MATERIALS

A. *Definition*

Like the term *medicine*, the term *religious materials* is not defined in the text of the statute.[129] However, according to the legislative history, "'Religious materials' should not be read to include anything that could be used to cause physical injury to any person. It is meant to be limited to those religious articles typically used during customary and time-honored rituals or teachings of a particular faith, denomination, or sect."[130] Although the exception for religious materials is more straightforward than the medicine exception and has yet to be challenged in the courts,[131] its purpose is less clear, and the implications are likewise problematic.[132] First, the exception is content-based, inviting First Amendment[133] scrutiny for both freedom of speech and religious expression.[134] Also, the complicated nature of the religious affiliations of many terrorist groups further muddies the analysis of not only whether the exception is lawful but if it is wise.[135]

B. *Analysis*

1. *Under the Majority's Rationale*

Applying the majority's arguments regarding fungibility and legitimacy provides an interesting analysis for the exception for religious materials and why it may or may not be constitutional, reasonable, and practical. As with

129. 18 U.S.C. § 2339(B)(g) (2018).

130. H.R. REP. NO. 104-518, at 123 (1996) (Conf. Rep.).

131. Brandon James Smith, *Protecting Citizens and Their Speech: Balancing National Security and Free Speech When Prosecuting the Material Support of Terrorism*, 59 LOY. L. REV. 89, 114 (2013).

132. *See* Reply Brief for Humanitarian Law Project, et al. at 28–29, Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (Nos. 08-1498, 09-89), 2010 WL 302209 (citing Boos v. Barry, 485 U.S. 312 (1988)); *see* H.R. REP. NO. 104-383, at 43 (1995); Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455, 487 (2012).

133. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

134. Reply Brief for Humanitarian Law Project, et al., *supra* note 132, at 28–29 (citing *Boos*, 485 U.S. 312).

135. H.R. REP. NO. 104-383, at 43; *see* Margulies, *supra* note 132, at 487.

the application of the majority's analysis to the exception for medicine, religious materials could also be effectively prohibited, or at least chilled, by the arguments of fungibility and legitimacy as applied to the Plaintiffs' proposed activities. The majority gave deference to the wisdom of Congress and the Executive in its determinations "between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not."[136] However, the reasons the majority supports this decision-making for the prohibited activities could be applied as strongly to the stated exceptions, including religious materials.

First, religious materials may be fungible. Given the definition provided in the legislative history, religious materials are not limited to just religious texts, such as the Bible, Quran, Sutras, Talmud, etc.[137] Religious materials may also include other items used for traditional religious customs and ceremonies, such as clothing, food, statues, jewelry, prayer mats, musical instruments, and more.[138] Many of these materials, absent any religious connotation, would be explicitly prohibited in the language of the material-support statute,[139] particularly because of their fungible nature.[140]

Similarly, the provision of religious materials to FTOs may confer legitimacy to those groups, which was another justification the majority used to support the prohibition of seemingly peaceful aid.[141] The majority cited several sources provided by the Government that discussed ways in which FTOs acquire funds and resources under the guise of charitable causes and redirect them to terrorist activities.[142] Certainly religious materials, given the broad range of items purportedly included under that exception and how many of those charitable causes have a religious affiliation, could be redirected in the same way, making the broad exception for religious

136. *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 35 (2010).

137. *See* H.R. REP. NO. 104-518, at 114 (1996) (Conf. Rep.).

138. *See* Michael De Groote, *Religious Objects Connect to God in a Material World*, DESERET NEWS (Aug. 2, 2011), http://www.deseretnews.com/article/700168005/Religious-objects-connect-to-God-in-a-material-world.html [https://perma.cc/YVA5-2UBV].

139. *See* 18 U.S.C. § 2339A(b)(1) (2018).

140. *Humanitarian Law Project*, 561 U.S. at 30 ("'Material support' is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends.").

141. *Id.* ("[Material support] also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.").

142. *Id.* at 30–31.

materials counterintuitive to the purpose of the statute as a whole.[143] The majority, however, seemed fine with this juxtaposition, stating, "The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions."[144] In providing the exception for religious materials, the Court concluded Congress has "displayed a careful balancing of interests,"[145] rather than a loophole for otherwise prohibited material support.[146]

2. *Under the Dissent's Rationale*

Considering the dissent's assessment of the majority's application of fungibility and legitimacy rationales, their application to religious materials may prove less straightforward than for medicine.[147] Because of its broad definition,[148] religious materials may be more analogous to both explicitly prohibited kinds of materials support (such as food, clothing, items of high monetary value, jewelry, etc.) [149] and the kind of support that is prohibited but less prone to a fungibility and legitimacy justification (such as the activities proposed by the Plaintiffs).[150]

Unlike the provision of medicine, the provision of religious materials is explicitly subject to First Amendment analysis as it concerns both speech and free exercise of religion.[151] Therefore, the distinction between coordinated and independent activity, as well as concerns about freedom of association, are implicated at a higher level for religious materials than with medicine.[152] As the dissent states, "Not even the 'serious and deadly problem' of international terrorism can require *automatic* forfeiture of First Amendment rights."[153] As the dissent called for in response to the Plaintiffs'

143. *Id.* at 30. "The material-support statute is, on its face, a preventive measure—it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur." *Id.* at 35.

144. *Id.*

145. *Id.* at 36.

146. *See id*.

147. *See id.* at 47–48 (Breyer, J., dissenting).

148. H.R. REP. NO. 104-518, at 114 (1996) (Conf. Rep.).

149. *See* 18 U.S.C. § 2339A(b)(1) (2018).

150. *See Humanitarian Law Project*, 561 U.S. at 10 (majority opinion).

151. U.S. CONST. amend. I.

152. *See Humanitarian Law Project*, 561 U.S. at 36.

153. *Id.* at 44 (Breyer, J., dissenting).

proposed activities, the Government would have to provide strong evidence for not only a compelling government interest (which the dissent conceded it has) but also show the means provided for in the statute are narrowly tailored to serve that interest in order to justify the content-based exception for religious materials.[154]

While the majority agreed with the Plaintiffs that intermediate scrutiny is not appropriate, the standard of review applied is not exactly that of strict scrutiny either but rather a "more demanding standard."[155] The arguments of fungibility and legitimacy attempt to support the Government's assertion not that the statute is narrowly tailored per se but rather that the prohibitions do in fact further the Government's interests.[156]

In terms of fungibility, the argument the dissent made about peaceful political advocacy may apply to religious materials because neither are obviously fungible or capable of being diverted for terrorist activities.[157] However, because religious materials are broadly defined and include communications that may be both peace-promoting and violence-inducing and materials that are obviously fungible, such as food and clothing, the argument cuts in favor of both prohibition and exception.[158]

The majority's legitimacy argument poses similar quandaries, as stated by the dissent,[159] in that providing religious materials to an FTO may have a legitimizing effect, which may be even more powerful than that provided by

154. *See id.* at 45–46 ("The Government does identify a compelling countervailing interest. . . . I do dispute whether the interest can justify the statute's criminal prohibition.").

155. *Id.* at 44 (quoting Texas v. Johnson, 491 U.S. 397, 403 (1989) ("If the [Government's] regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must [apply] a more demanding standard.")).

156. *See id.* at 46–47.

157. *Id.* at 48.

158. *Id.* at 47 ("There is no obvious way in which undertaking advocacy for political change through peaceful means . . . is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible.").

159. *Id.* at 49–50 ("It is inordinately difficult to distinguish when speech activity will and when it will not initiate the chain of causation the Court suggests—a chain that leads from peaceful advocacy to 'legitimacy' to increased support for the group to an increased supply of material goods that support its terrorist activities.").

other material support that is explicitly banned.[160] Providing religious materials may bolster an FTO's charitable front, which is often religious in nature, thereby providing them with legitimacy to attract more resources and funding, which can be diverted to terrorist ends.[161]

V. POTENTIAL RESOLUTIONS

The constitutionality of the exceptions for medicine and religious materials is dubious at best. However, proposed solutions to resolve potential First Amendment issues in the context of *Humanitarian Law Project* may also provide answers to ensure humanitarian organizations are protected and religious freedom is safeguarded in light of the compelling government interest in protecting the nation from FTOs.

A. *Applying Breyer's Construction*

In his dissent, Justice Stephen Breyer maintains where the constitutionality of a statute is in doubt, the Court must consider alternative constructions that would avoid the constitutional question.[162] In doing so, he proposed a construction of the statute that contained a more specific intent requirement: that guilt would be established only if support was provided to an FTO (1) with the intent to further the unlawful activities of the group and (2) with the knowledge it would be likely to do so.[163] Justice Breyer points out that under this construction, any knowledge of a potential legitimizing effect from assistance aimed only at lawful activities would be insufficient grounds for prosecution.[164] Not only does Justice Breyer find his proposed *mens rea* construction consistent with the text of the statute,[165] his reading of

160. *See id.*

161. H.R. REP. NO. 104-383, at 43 (1995) ("Many of these [terrorist] organizations operate under the cloak of a humanitarian or charitable exercise, or are wrapped in the blanket of religion. They use the mantle of religion to protect themselves from scrutiny, and thus operate largely without fear of recrimination.").

162. *Humanitarian Law Project*, 561 U.S. at 55 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).

163. *Id.* at 56 ("I would read the statute as criminalizing First Amendment protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions. . . [T]he Government would have to show . . . that . . . such defendants provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims.").

164. *Id.*

165. *Id.* ("Normally we read a criminal statute as applying a *mens rea* requirement to all of the subsequently listed elements of the crime.").

the term *material support* is consistent with the definition and purpose of that term.[166] In defining *material* as "being of real importance or great consequence," Justice Breyer would only prohibit conduct or speech that is of importance or consequence as it relates to actual terrorist activity.[167] "That is because support that is not significantly likely to help terrorist activities, for purposes of this statute, neither has 'importance' nor is of 'great consequence.'"[168]

Altogether, Justice Breyer's construction would require the application of a more purposeful *mens rea* to each element of the claim and would ensure the only punishable support is that which is truly capable of the harm the statute is meant to prevent:[169]

> "So read, the defendant would have to know or intend (1) that he is *providing* support or resources, (2) that he is providing that support to a *foreign terrorist organization*, and (3) that he is providing support that is *material*, meaning (4) that his support bears a significant likelihood of furthering the organization's terrorist ends."[170]

1. *Benefits*

Applying Justice Breyer's construction to the exceptions for medicine and religious materials has several benefits and resolves many of the issues identified in Part III.[171]

First, humanitarian aid organizations would be able to operate more effectively and confidently.[172] There are many barriers for humanitarian aid organizations without having to vet all possible beneficiaries of their aid before providing assistance in an effort to avoid prosecution.[173] Under

166. *Id.* at 57 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1392 (1961)) ("[Material] can mean 'being of real importance or great consequence'").

167. *Id.* at 57–58.

168. *Id.* at 58.

169. *Id.* at 56.

170. *Id.*

171. *See supra* Part III.

172. *See* Fraterman, *supra* note 105, at 417–18 (describing how a system of vetting and then denying treatment to known or suspected terrorists may violate the fundamental humanitarian principle of impartiality and be difficult to implement, given how often care is rendered under emergency circumstances and how language barriers may also make such a practice impractical).

173. *Id.*

Justice Breyer's construction, those aid organizations would be guilty under the statute only if the aid they provided was material, was intended to further illegal terrorist activities, and the organization had knowledge such a result was likely.[174] Incidental aid to a terrorist or an FTO, regardless of coordination, would not automatically create liability for the humanitarian group under the statute.[175] However, humanitarian aid that was coordinated and served an FTO at a heightened level may still be punishable if the requisite knowledge and intent to further terrorist activities was proven and the aid provided was of such a nature and to such a degree to actually achieve that objective.[176] This construction would still preserve the government's interest in hindering the resources FTOs are able to attract and benefit from as a means to carry out violent attacks.[177]

Justice Breyer's construction would similarly benefit the provision of religious materials. As long as religious materials were provided without the intent or knowledge of the likelihood of furthering any terrorist acts, individuals and organizations would be free to provide those materials.[178] This would also likely result in a liberalization of free exercise of religion under the statute. Many religions require or encourage proselytization[179] or evangelism, which would be hampered if this teaching[180] or, as stated in the statute, sharing of "expert advice" or "specialized knowledge"[181] continued to be banned without regard to intent and only the provision of religious materials allowed.[182]

174. *See Humanitarian Law Project*, 561 U.S. at 56.

175. *See id.*

176. *See id*.

177. *See id.* at 41, 56.

178. *See id.* at 56.

179. *Proselytize,* DICTIONARY.COM, http://dictionary.com/browse/proselytize [https://perma.cc/AMB6-29L3] ("[T]o convert (someone) from one religious faith to another").

180. *See Matthew* 28:18–20 (*The Great Commission*) ("Then Jesus came to them and said, 'All authority in heaven and on earth has been given to me. Therefore go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and *teaching* them to obey everything I have commanded you.'" (emphasis added)).

181. 18 U.S.C. § 2339A(b)(2)–(3) (2018).

182. *See* Emp't Div. v. Smith, 494 U.S. 872, 877 (1990) ("But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation."), *superseded by statute*, Religious Freedom Restoration Act of 1993,

2. *Consequences*

The main criticism for requiring the *mens rea* proposed by Justice Breyer is that it would pose a problem for criminal prosecutions by the government under the statute.[183] The requirement of intent to further terrorist activities would inhibit the government's ability to prosecute nearly any form of support, including support in the form of speech as proposed by the Plaintiffs in *Humanitarian Law Project*, that the government deems may be fungible or lend legitimacy to an FTO.[184] If those claims of fungibility and legitimacy are true or more likely than not, rather than hypothetical as the dissent suggested,[185] the purpose of the statute may be undermined.[186]

B. *Removal of the Exceptions*

1. *Benefits*

In 2006, an amendment was proposed that would have removed the exception for medicine and religious materials.[187] The proposed bill also included an intent requirement, punishing only material support done "to facilitate, reward, or encourage that act or other acts of international terrorism."[188] With the addition of such an intent requirement modifying the existing *mens rea* in the statute, removal of the exceptions may be plausible. Under this construction, the same kind of support could be provided without risk of prosecution, so long as it was not provided with the intent to further

Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

183. *Hearing, supra* note 107, at 29 (statement of Mr. Barry Sabin, Chief, Counterterrorism Section, Criminal Division, United States Department of Justice) ("To impose a specific intent requirement would be contrary to what was the standard passed in the Intelligence Reform Act . . . and would be a significant problem for criminal prosecutions.").

184. *See id.*; Holder v. Humanitarian Law Project, 561 U.S. 1, 47 (2010).

185. *Humanitarian Law Project*, 561 U.S. at 52–53 ("In my own view, the majority's arguments stretch the concept of 'fungibility' beyond constitutional limits. Neither Congress nor the Government advanced these particular hypothetical claims.").

186. *Hearing*, *supra* note 107, at 29 (statement of Mr. Barry Sabin, Chief, Counterterrorism Section, Criminal Division, United States Department of Justice) ("Specific legislative intent, I would refer you to Senator Feinstein's comments, 'I simply do not accept that so-called humanitarian works by terrorist groups can be kept separate from their other operations. I think the money will ultimately go to bombs and bullets, rather than babies . . . .'").

187. S. 3882, 109th Cong. § 2 (2006).

188. *Id.*

terrorism. Removing the exceptions under the statute without the addition of a *mens rea* intent to further terrorism may further bolster the government's ability to combat FTOs by eliminating forms of material support that could be fungible and legitimizing, such as medicine itself and religious materials that are otherwise prohibited absent any religious connotation.

2. *Consequences*

Removing the exceptions under the statute as it currently exists would likely further curtail the provision of humanitarian support and potentially invite challenges for violations of the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act.[189]

C. *Other Proposals*

Particularly relevant to the exception for medicine and its impact on humanitarian aid organizations, some groups have proposed a broader exception for humanitarian aid that would allow humanitarian support when that aid fits all of the following:

> • is conducted in accordance with long-accepted standards of charitable practice, such as the Code of Conduct for the International Red Cross Red Crescent Movement and NGOs in Disaster Relief and the *Principles of International Charity*,
>
> • is provided only to noncombatants in need, with priority to the most vulnerable, and
>
> • when contact, communications and logistical arrangements with a listed organization cannot reasonably be avoided.[190]

This approach provides a reasonable balance between interests in national security and commitment to international humanitarian law.[191] It allows humanitarian aid organizations to operate within the guidelines of neutrality and impartiality as they have always done and focus on providing

189. U.S. CONST. amend. I; Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

190. Fraterman, *supra* note 105, at 466.

191. *See id.*

care and services for those who need it most.[192] Under this proposal, victims and citizens under the control of a terrorist regime would not have their health and humanity sacrificed in an effort to prevent a hypothetical and loosely defined benefit to the FTO itself that may or may not result in further terrorist activity.[193] However, unlike Justice Breyer's construction requiring a more specific *mens rea* of intent and likelihood to further terrorist activity, this humanitarian proposal may make it more difficult for the government to prosecute material activities and support that are inherently fungible to terrorist ends.[194] Simply incorporating Justice Breyer's proposed *mens rea* into the humanitarian proposal may resolve this inconsistency by permitting humanitarian aid that stops short of substantially threatening national and international security.[195]

Similar to Justice Breyer's *mens rea* requirement, the Court could apply a more stringent incitement standard to fit the context of the fight against terrorism.[196] As noted earlier, the majority in *Humanitarian Law Project* did not use the *Brandenburg* test for incitement.[197] However, the *Brandenburg* test, or a modified version, may prove useful and more protective of First Amendment rights and in turn address some of the issues created by the exceptions for medicine and religious materials.[198] One example of such a proposal would protect any advocacy of terrorism unless:

> [T]he speaker has made proven contact with a member of terrorist organization as defined by § 2339B, (2) the speaker spoke in support of terror after this contact was made, and (3) the advocacy was made to incite others to provide material support or resources . . . for the commission of a crime as set out in § 2339A.[199]

This proposal would effectively remove the *Brandenburg* requirement for imminence to allow the government to fulfill the statute's objective of

192. *See id.*

193. *See id.* at 465.

194. *See id.*; Holder v. Humanitarian Law Project, 561 U.S. 1, 57 (2010) (Breyer, J., dissenting).

195. *See Humanitarian Law Project*, 561 U.S. at 57; Fraterman, *supra* note 105, at 465.

196. Nikolas Abel, Note, United States v. Mehanna*, The First Amendment, and Material Support in the War on Terror*, 54 B.C. L. REV. 711, 713 (2013).

197. *Humanitarian Law Project*, 561 U.S. at 43–44; *see* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

198. Abel, *supra* note 196, at 747.

199. *See id.*

proactively preventing terrorism, rather than focusing on punishment after the fact.[200]

This proposal focuses on resolving the majority's lack of distinction between coordinated and uncoordinated activity and the problem of justifying prohibition of speech due to a legitimizing effect.[201] Applied to medicine and religious materials, the benefits would be similar to those provided by the humanitarian exception proposal.[202] It would broaden the scope of what kind of support could be provided without risk of prosecution while maintaining a strong prohibition (and opportunity for preemptive action) against even humanitarian support or provision of religious materials, services, information, or training that is intended and likely to further terrorist action.

VI. CONCLUSION

The complete fallout of *Humanitarian Law Project* and the many possible applications of the material-support statute to international speech and conduct has yet to be seen.[203] Time will tell if the exceptions for medicine and religious materials hold up as constitutional through the lens of *Humanitarian Law Project*. If the exceptions themselves become problematic, it will be necessary for Congress or the Supreme Court to clarify the extent and limitations of the exceptions in a practical sense, ensuring First Amendment protections and international humanitarian law are not unnecessarily infringed.[204]

*Amy Howells**

200. *See id.* at 749.

201. *See* Margulies, *supra* note 132, at 495.

202. *See* Fraterman, *supra* note 105, at 466.

203. RHODES, *supra* note 98 ("It will be interesting to see if this deference [to Congress and the Executive] is extended to other situations involving the balance between national security and free speech, or if this was a truly unique case based on the Court's view that Congress had been conscious of its own responsibility to abide by First Amendment limitations in narrowly crafting the material-support statute.").

204. Fraterman, *supra* note 105, at 404 ("[T]he United States has a clear obligation under international humanitarian law, more specifically the Geneva Conventions, to refrain from interfering with the provision of humanitarian assistance in certain circumstances.").

* B.A., University of Iowa; M.P.H. candidate, Des Moines University, 2019; J.D., Drake University Law School, 2019. At Drake, the Author served as a Junior Staff member of the Drake Law Review and member of the National Appellate Advocacy Team.