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# The First Amendment's Borders: The Place of *Holder v. Humanitarian Law Project* in First Amendment Doctrine

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David Cole\*

In the 1950s and 1960s, when Congress had found the Communist Party to be engaged in an international conspiracy to overthrow the United States by force and violence, and when the Ku Klux Klan was terrorizing black citizens through violent attacks, the Supreme Court repeatedly confronted the question whether the state could criminalize speech or association on the ground that it might further such organizations' illegal ends. The Court equivocated for some time, but ultimately reached a clear answer. With respect to speech, the Court ruled in *Brandenburg v. Ohio* that the First Amendment "do[es] 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."<sup>1</sup> With respect to association, the Court held in *Scales v. United States*<sup>2</sup> and its progeny that Congress could not punish membership in the Communist Party absent proof that an individual specifically intended to further the party's unlawful ends.<sup>3</sup>

These precedents and principles are the linchpin of the First Amendment's protection of political expression. The lesson of the Court's earliest First Amendment decisions is that limits on the government's ability to criminalize speech on the ground that it might lead to harmful conduct are essential to ensure breathing room for free public discussion on matters of

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\* Professor, Georgetown Law. I was counsel for Humanitarian Law Project in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), and am currently counsel for plaintiffs in *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 660 F.3d 1019 (9th Cir. 2011), both of which are discussed herein. I would like to thank Irv Gornstein, Carl Grossman, Jules Lobel, Allegra McLeod, Amanda Shanor, Larry Schwartzol, David Super, Richard Taranto, and Matt Waxman for their feedback on drafts of this article, and members of the Drake and Georgetown law faculties for their comments at workshop presentations of this paper.

<sup>1</sup> 395 U.S. 444, 447 (1968) (per curiam).

<sup>2</sup> 367 U.S. 203 (1961).

<sup>3</sup> In *Scales*, the Court interpreted a statute criminalizing membership in the Communist Party to require proof of "specific[ ] inten[t] to accomplish [the aims of the organization] by resort to violence." 367 U.S. at 229 (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)). This principle was subsequently applied to a variety of noncriminal sanctions, including the denial of a security clearance, *United States v. Robel*, 389 U.S. 259, 262 (1967) (holding that the government could not ban Communist Party members from working in defense facilities absent proof that they had specific intent to further the Party's unlawful ends); state employment, *Keyishian v. Bd. of Regents*, 385 U.S. 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring Communist Party members from employment in a state university system); denial of access to school meeting rooms, *Healy v. James*, 408 U.S. 169, 188–89 (1972); and civil damages, *NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886, 920 (1982).

public concern. Political association is equally critical, because free speech would do little to serve self-government if it did not entail the right to join forces with like-minded others to advocate for and work toward common ends. The rights of speech and association are the lifeblood of self-government in a liberal democracy.

In its first decision to address the tension between First Amendment rights and national security since the terrorist attacks of September 11, 2001, however, the Supreme Court appeared to retreat dramatically from these principles. In *Holder v. Humanitarian Law Project*,<sup>4</sup> decided in 2010, as in *Brandenburg* and *Scales*, the Court addressed the constitutionality of punishing speech and association on the ground that they might further violence. The law at issue punishes the provision of “material support” to designated “foreign terrorist organizations.”<sup>5</sup> It defines “material support” to include, among other things, speech, in the form of “expert advice,” “training,” “service,” and “personnel.”<sup>6</sup> The particular speech in question in *Humanitarian Law Project* advocated only nonviolent, lawful ends; the plaintiffs principally sought to advocate for human rights and peace to and with the Kurdistan Workers’ Party, a Kurdish organization in Turkey that the Secretary of State had designated as a “foreign terrorist organization.” They did not intend to further the organization’s illegal ends; indeed, they sought to dissuade it from violence, and to urge it to pursue lawful ends through peaceful means. Yet the Court held, by a vote of 6-3, that the First Amendment permitted criminal prosecution of such speech.

Perhaps most surprisingly, the Court did so only after unanimously siding with plaintiffs on the central dispute between the parties in the briefing: namely, the standard of review triggered by the statute’s application. The government had rested its defense of the statute on the contention that it regulated only conduct in a content-neutral manner, and therefore needed to satisfy only deferential “intermediate” scrutiny. The government did not even argue that the statute would satisfy any higher degree of scrutiny. The Court agreed with the Humanitarian Law Project (HLP) that because the law as applied to plaintiffs penalized speech based on its content, it had to satisfy the “demanding” scrutiny that content-based laws trigger. Gerald Gunther once famously described such “strict scrutiny” as “strict in theory, fatal in fact,”<sup>7</sup> because its application is nearly always the death knell for the law in question. In *Humanitarian Law Project*, however, the Court’s scrutiny was, in actuality, neither strict nor fatal, nor even “demanding.” Instead, the Court engaged in only the most deferential review, and upheld the law in the absence of any argument, much less evidentiary showing, that prohibiting plaintiffs’ speech was necessary or narrowly tailored to further a compelling interest.

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<sup>4</sup> 130 S. Ct. 2705 (2010).

<sup>5</sup> 18 U.S.C. § 2339B(a)(1) (2006).

<sup>6</sup> *Id.* § 2339B(g)(4).

<sup>7</sup> *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

The *Humanitarian Law Project* decision has potentially grave repercussions. Most immediately, nongovernmental organizations working to resolve conflict or to provide humanitarian assistance may well be unable to operate where designated “terrorist organizations” are involved, because any advice or assistance they provide could be criminally prohibited. Under this law, for example, when the Carter Center, run by former President Jimmy Carter, monitored elections in Lebanon in 2009, and met with Hezbollah, one of the parties to the contest, to explain what the monitors would look for in a free and fair election,<sup>8</sup> it committed a crime by providing “expert advice,” a form of “material support,” to a designated terrorist organization. And when former Attorney General Michael Mukasey, former Homeland Security advisor Fran Townsend, and former Secretary of Homeland Security Tom Ridge recently advocated for de-listing a designated terrorist group from Iran in coordination with a leader of the group,<sup>9</sup> they too committed the federal felony of providing “material support” in the form of “services” to the organization.

Still more troubling, however, are the decision’s potential consequences for First Amendment doctrine more generally. If this is the type of scrutiny that content-based laws enacted in the name of national security are to receive in the future, the scope of political freedom has been significantly narrowed. For the first time in its history, the Court upheld the criminalization of speech advocating only nonviolent, lawful ends on the ground that such speech might unintentionally assist a third party in criminal wrongdoing. That result calls into question the continuing validity of the *Brandenburg* incitement test. The Court treated a viewpoint-based motive for suppressing speech not as grounds for invalidation, but as a *justification* for the law. And the Court reduced the right of association to an empty formalism, allowing the government to prohibit, under the rubric of “material support,” virtually any concrete manifestation of association—such as paying dues, donating funds, volunteering one’s time or services, or working together toward common ends, no matter how lawful.<sup>10</sup>

If these doctrinal developments are generally applicable, *Humanitarian Law Project* has dramatically expanded government authority to suppress political expression and association in the name of national security. But the Court did not suggest that it was overruling any prior decisions. And it expressly pointed to three facts in stressing the narrowness of its result: (1) the law leaves unregulated independent advocacy; (2) the speech in question related to foreign affairs and national security; and (3) the law governed only speech in coordination with foreign organizations, not domestic groups. The Court did not attempt to explain why, as a doctrinal matter, these features

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<sup>8</sup> See Joshua Hersh, *Jimmy Carter Visits Lebanon*, NEW YORKER, June 10, 2009, <http://www.newyorker.com/online/blogs/newsdesk/2009/06/jimmy-carter-visits-lebanon.html>.

<sup>9</sup> See Edward Cody, *GOP Leaders Criticize Obama’s Iran Policy in Rally for Opposition Group*, WASH. POST, Dec. 23, 2010, at A6.

<sup>10</sup> For an incisive critique of *Humanitarian Law Project*’s implications, see Owen Fiss, *The World We Live In*, 83 TEMP. L. REV. 295 (2011).

might make a difference to its analysis. Do any of these facts provide a reasoned basis for limiting the reach of *Humanitarian Law Project*? Can *Humanitarian Law Project* be cabined?

This essay seeks to answer these questions. Part I summarizes the case and its treatment by the Supreme Court. Part II details the grave consequences for First Amendment doctrine that the Court's analysis portends if it applies generally. Part III asks whether *Humanitarian Law Project* can be limited in ways that would preserve First Amendment protection for other speech and association disputes involving national security in the future. I conclude that none of the Court's three "distinguishing" factors is sufficient to reconcile *Humanitarian Law Project* with the Court's First Amendment precedents. However, reading the decision to require the presence of all three factors would do the least damage to First Amendment freedoms going forward and mark the least disruption with established First Amendment precedents. On such a reading, the decision would not support the validity of a prohibition on independent advocacy, speech coordinated with a domestic group, or speech that did not threaten national security.

One case has already provided a testing ground for assessing the sweep of *Humanitarian Law Project*. In *Al Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury*,<sup>11</sup> the Ninth Circuit Court of Appeals recently held that the First Amendment bars the government from banning advocacy coordinated with a *domestic* organization that the government has labeled "terrorist." The court applied *Humanitarian Law Project*, but reasoned that the government had not shown that banning speech coordinated with a domestic entity whose assets the government had already frozen was necessary to further the compelling interest in preventing terrorism. That decision points the way toward an understanding of *Humanitarian Law Project* that takes the Supreme Court at its word, and limits its reasoning to the very particular facts presented.

If one is concerned about the potential implications of a decision that allows the government to make speech advocating human rights a crime, and that substitutes unquestioning deference for the demanding scrutiny speech prohibitions generally trigger, it is important to identify a principled path by which the Court might avoid further harm to First Amendment rights. This article seeks to lay that foundation. The future of free expression and association in a post-9/11 world may depend on it.

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<sup>11</sup> 660 F.3d 1019 (9th Cir. 2011).

## I. THE DECISION

A. *The Material Support Statute and Its Application to Humanitarian Law Project*

Almost a year to the day that Timothy McVeigh and Terry Nichols bombed the Alfred P. Murrah Federal Building in Oklahoma City, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>12</sup> Among other things, this law created a new crime, prohibiting the provision of “material support” to foreign groups designated as “terrorist” by the Secretary of State. The law expansively defined both “foreign terrorist organization” and “material support.” The Secretary of State may designate as “terrorist” any foreign group that engages in virtually any unlawful use of a weapon against person or property,<sup>13</sup> and whose activities she determines undermine the “national defense, foreign relations, or economic interests of the United States.”<sup>14</sup> Once a group has been designated, it is a crime to knowingly provide “material support” to it. “Material support” includes not only funds and tangible goods, but also any “service,” “expert advice or assistance,” “training,” and “personnel”—provisions that can be applied to speech.<sup>15</sup>

When the law was enacted, the Humanitarian Law Project, a human rights organization based in Los Angeles, had been working with the Kurdistan Workers’ Party (PKK) in Turkey, encouraging it to resolve its disputes with the Turkish government through peaceful, lawful means. It taught the PKK how to file human rights complaints before the United Nations and helped it file such complaints, assisted it in peace overtures to the Turkish government, and advocated in coordination with it for Kurdish human rights. In 1977, the Secretary of State designated the PKK a “foreign terrorist organization,” which appeared to make the HLP’s activities a crime. The HLP and several others filed suit, seeking a ruling that their intended activities could not be constitutionally prohibited.<sup>16</sup> In the district

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<sup>12</sup> Pub. L. No. 104-132, 110 Stat. 1214.

<sup>13</sup> 8 U.S.C. § 1189(a) (2004); *id.* § 1182(a)(3)(B)(iii)(V)–(VI) (defining “terrorist activity” to include, among other things, any unlawful use of, or threat to use, a weapon against person or property, unless for mere personal monetary gain).

<sup>14</sup> 8 U.S.C. § 1189(d)(2) (defining “national security”).

<sup>15</sup> 18 U.S.C. § 2339 (2002). “Training” is defined as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge.” *Id.* § 2339A(b)(2). “Expert advice or assistance” is defined as “advice or assistance derived from scientific, technical or other specialized knowledge.” *Id.* § 2339A(b)(3). “Personnel” is defined as acting under an organization’s “direction or control.” *Id.* § 2339B(h). The statute does not define “service,” but the government maintained in litigation that “service” included any “act done for the benefit of” a designated group. Petition for Writ of Certiorari at 17, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (No. 08-1498), 2009 WL 1567496, at \*9.

<sup>16</sup> As the district court found, the HLP sought to: provide training in the use of humanitarian and international law for the peaceful resolution of disputes, engage in political advocacy on behalf of the Kurds working in Turkey, and teach the PKK how to petition for relief before representative bodies like the United Nations. *Humanitarian Law Project v. Reno*, No. CV 98-1971 ABC (BQRx), 2001 WL 36105333, at \*5 (C.D. Cal. Oct. 2, 2001). In their original

court<sup>17</sup> and court of appeals,<sup>18</sup> plaintiffs were generally successful in invalidating the speech-related provisions on vagueness grounds.

### B. *The Majority Decision*

The Supreme Court upheld the material support law as applied to plaintiffs' proposed activities. Writing for the majority, Chief Justice Roberts concluded that, even though the statute punished speech on the basis of its content, thereby triggering "demanding" scrutiny, it satisfied that scrutiny.<sup>19</sup> With respect to the right of association, the Court reasoned that the statute did not ban membership in designated groups, but only material support, and that in any event, the same reasons that justified the restrictions on plaintiffs' speech also justified any infringements on association.<sup>20</sup>

As noted above, the Court sided with plaintiffs in concluding that, as applied, the statute penalized speech on the basis of its content, and therefore had to satisfy "demanding" scrutiny, not the lenient "intermediate" scrutiny upon which the Solicitor General had rested her defense of the statute. The Court reasoned that where laws regulating both conduct and speech are *applied* to speech, and particularly where they are applied to speech because of its *content*, heightened scrutiny is required. Plaintiffs' intended support came in the form of pure speech—the communication of ideas through words—and nothing more. Moreover, the statute targeted speech by reference to its content, in the form of "training" and "expert advice." As the Court held, "[Section] 2339B regulates speech on the basis of its content,"<sup>21</sup> and therefore "we are outside of [intermediate scrutiny], and we must [apply] a more demanding standard."<sup>22</sup>

Chief Justice Roberts never actually used the term "strict scrutiny," but the cases he relied upon all applied strict scrutiny. Thus, in *Cohen v. California*, the Court applied strict scrutiny to a "breach of the peace" ordinance that generally forbade conduct, where it was applied to Cohen because of what his jacket (bearing the logo "Fuck the Draft") communicated.<sup>23</sup> Similarly, in *Texas v. Johnson*, the Court applied strict scrutiny to a flag burning prohibition because the ban was motivated by the message that flag burning was thought to communicate.<sup>24</sup> The *Humanitarian Law Project* Court reasoned that as applied to plaintiffs' speech, the material support prohibitions

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complaint, plaintiffs also sought to make monetary donations to lawful activities of the PKK. However, the lower courts rejected their right to do so, and in the Supreme Court, plaintiffs did not press any claims regarding financial assistance, and instead limited their claims to the provision of pure speech.

<sup>17</sup> *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134 (C.D. Cal. 2005).

<sup>18</sup> *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2009).

<sup>19</sup> *Humanitarian Law Project*, 130 S. Ct. at 2724.

<sup>20</sup> *Id.* at 2730–31.

<sup>21</sup> *Id.* at 2723.

<sup>22</sup> *Id.* at 2724 (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989)) (second alteration in original).

<sup>23</sup> 403 U.S. 15 (1971).

<sup>24</sup> 491 U.S. 397 (1989).

were similarly content-based, and triggered what Chief Justice Roberts labeled “demanding” scrutiny.<sup>25</sup>

Under that test, content-based laws are invalid unless the government establishes that the particular content distinctions drawn are “the least restrictive means” to further a “compelling interest.”<sup>26</sup> “[T]he curtailment of free speech must be actually necessary to the solution.”<sup>27</sup> And “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.”<sup>28</sup> In as-applied challenges, moreover, the government must justify the necessity not just of the statute in general, but of the specific prohibitions of plaintiffs’ speech.<sup>29</sup>

The Court’s actual inquiry in *Humanitarian Law Project*, however, bears little resemblance to these standards. No one disputed that the government had a compelling interest in deterring and preventing terrorism; the critical issue was whether criminalizing plaintiffs’ advocacy of human rights and peace was “narrowly tailored,” the “least intrusive means,” or “necessary” to furthering that interest. Congress itself had made no findings regarding advocacy of human rights or peace, or indeed regarding any of the specific statutory provisions at issue in *Humanitarian Law Project* (training, personnel, expert advice or assistance, or service). The only evidence the government offered was a single affidavit from a State Department official, Kenneth R. McKune, which combined conclusory assertions about the structure of terrorist organizations with hearsay allegations about specific violent acts of the PKK.<sup>30</sup> It said nothing whatsoever about speech, much less whether prohibiting plaintiffs’ advocacy of human rights and peace was narrowly tailored to preventing terrorism.<sup>31</sup> Nor did the government make any argument in its briefs that prohibiting plaintiffs’ specific speech was necessary to prevent terrorism. Instead, the government sought only to justify prohibiting “material support” as a general matter. Thus, it argued that money is fungible, that aid furthering lawful activities might free up resources that the organization could then use for terrorism, and that such aid might “bolste[r] a terrorist organization’s efficacy and strength in a commu-

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<sup>25</sup> *Humanitarian Law Project*, 130 S. Ct. at 2724.

<sup>26</sup> *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>27</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011).

<sup>28</sup> *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000).

<sup>29</sup> Thus, in *FEC v. Wisconsin Right to Life*, the Court entertained an as-applied challenge to § 203 of the Bipartisan Campaign Reform Act (BCRA), even though the Court had previously upheld § 203 as facially valid. 551 U.S. 449 (2007). As the Court explained, “[t]hese cases, however, present the separate question whether § 203 may be constitutionally applied to these specific ads . . . . [T]he Government must prove that applying BCRA to WRTL’s ads furthers a compelling interest and is narrowly tailored to achieve that interest.” *Id.* at 464; see also *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173 (1999) (as-applied First Amendment analysis); *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454 (1995) (same).

<sup>30</sup> Joint Appendix at 127–38, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2009 WL 3877534, at \*127–38.

<sup>31</sup> *Id.*



nity” and thereby “undermin[e] this nation’s efforts to delegitimize and weaken those groups.”<sup>32</sup>

In the absence of any argument or evidence from the government to meet its burden, and particularly as the burden was first imposed by the Supreme Court itself, the usual course would be to remand for further factfinding, as Chief Justice Roberts suggested at oral argument.<sup>33</sup> The lower courts had not applied heightened scrutiny, and had not subjected the government’s evidentiary submission (a single affidavit) to any adversarial testing whatsoever, as they deemed it immaterial. Where stringent scrutiny applies, the courts insist that the government identify specific justifications and support them with evidence.<sup>34</sup> Yet instead of remanding to put the government to that test, the Court simply upheld the statute based on its own proffered justifications—justifications that the government never even advanced, much less supported with evidence.

Thus, the Court posited that teaching a group how to bring human rights claims before the United Nations human rights bodies might lead the group to use those tactics “to threaten, manipulate and disrupt,” and declared this threat to be “real, not remote,” even though the government had never articulated such a concern, much less substantiated it with any evidence.<sup>35</sup> It also asserted, again without government support, that assisting a group in peace negotiations might lead the group to “pursue peaceful negotiations as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks.”<sup>36</sup> It speculated that the “relief” the PKK might obtain from the UN “could readily include monetary aid,”<sup>37</sup> which could then be used for terrorism, even though the government did not suggest as much, and the UN human rights bodies are not authorized to order monetary damages as relief.<sup>38</sup> And the Court opined, again without any suggestion by the govern-

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<sup>32</sup> Brief for the Respondents at 14–15, *Humanitarian Law Project*, 130 S. Ct. 2705 (Nos. 08–1498, 09–89), 2009 WL 4951303, at \*56.

<sup>33</sup> Transcript of Oral Argument at 61, *Humanitarian Law Project*, 130 S. Ct. 2705 (Nos. 08–1498, 09–89); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 668 (1994) (remanding for development of evidence to sustain government’s burden).

<sup>34</sup> See, e.g., *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (applying strict scrutiny to invalidate racial preferences in contracting because state failed to offer evidence of the discrimination in the construction industry that the state claimed to be remedying through the preferences). Even under the less demanding intermediate scrutiny that the *Humanitarian Law Project* Court rejected, the government “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and meaningful way.” *Turner*, 512 U.S. at 664.

<sup>35</sup> *Humanitarian Law Project*, 130 S. Ct. at 2729.

<sup>36</sup> *Id.* at 2729. The majority cited a book on the PKK that reported that the PKK once suspended armed struggle, but later resumed it, as its only empirical support for this proposition—support that the government itself never offered. The book in fact offers no indication that the PKK used peacemaking negotiation skills in so doing, or that the suspension was not undertaken in good faith, but merely that there was a temporary ceasefire. See *id.* at 2738 (Breyer, J., dissenting).

<sup>37</sup> *Id.* at 2729.

<sup>38</sup> *Id.* at 2738–39 (Breyer, J., dissenting).

ment, that tolerating advocacy in support of foreign terrorist groups might “strain[ ] the United States’ relationships with its allies.”<sup>39</sup>

The Court did also recite the general concerns that the government had actually proffered: namely, that money is fungible; that material support might free up other resources; and that material support might “lend legitimacy to foreign terrorist groups . . . that makes it easier for these groups to persist, to recruit members, and to raise funds.”<sup>40</sup> But it cited no evidence that training in human rights advocacy or efforts to advance peace, the activities at issue, are fungible in the way money is, or that they would free up resources the PKK was actually directing toward such activities. Nor did the Court cite any evidence that plaintiffs’ speech would have the “legitimizing” effect it feared, or that advocacy for human rights had enabled any group to engage in terrorism.

The Court disposed of plaintiffs’ right of association claim in three paragraphs. It stated, without explanation, that its precedents addressing membership and assembly were not applicable because the statute does not ban membership per se, but only material support.<sup>41</sup> And it asserted that the reasons it had deemed sufficient to justify the criminalization of speech also justified the selective criminalization of speech when done in association with specifically designated “foreign terrorist organizations.”<sup>42</sup>

### C. *The Dissent*

Justice Breyer dissented, joined by Justices Ginsburg and Sotomayor. He stressed that plaintiffs sought to engage solely in political speech, to which the First Amendment ordinarily offers its highest protection. He found no evidence that advocating peace or human rights would free up resources that the PKK could use for terrorism.<sup>43</sup> He rejected the government’s “legitimacy” rationale as inconsistent with the Court’s precedents invalidating prohibitions on association with the Communist Party.<sup>44</sup> He deemed the statute arbitrary in its prohibition of “coordinated” but not “independent” advocacy, as both forms of speech posed the same “risks.”<sup>45</sup> He found that there was “serious doubt” as to the statute’s validity as the government interpreted it, and reasoned that those doubts could be allayed by interpreting the statute to criminalize “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.”<sup>46</sup> Under

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<sup>39</sup> *Id.* at 2726.

<sup>40</sup> *Id.* at 2725.

<sup>41</sup> *Id.* at 2730.

<sup>42</sup> *Id.* at 2731.

<sup>43</sup> *Id.* at 2735 (Breyer, J., dissenting).

<sup>44</sup> *Id.* at 2736 (Breyer, J., dissenting).

<sup>45</sup> *Id.* at 2736–38 (Breyer, J., dissenting).

<sup>46</sup> *Id.* at 2740 (Breyer, J., dissenting).

that interpretation, plaintiffs would have been free to engage in their intended speech.

Justice Breyer concluded his opinion by criticizing the majority for failing to apply the “demanding” scrutiny it claimed was appropriate:

[T]he Court has failed to examine the Government’s justifications with sufficient care. It has failed to insist upon specific evidence, rather than general assertion. It has failed to require tailoring of means to fit compelling ends. And ultimately it deprives the individuals before us of the protection that the First Amendment demands.<sup>47</sup>

## II. DEPARTURES FROM PRECEDENT AND FUTURE CONSEQUENCES

As Justice Breyer pointed out in dissent, the rationale and result in *Humanitarian Law Project* sharply depart from some of the Court’s most fundamental First Amendment precedents and principles. If these departures reflect a new direction for speech protections when they clash with national security interests in the post-9/11 world, the decision will have grave consequences. The principal question going forward, therefore, is what effect the decision will have on the trajectory of First Amendment doctrine and the scope of speech and associational rights. If the past is prologue, future threats to our security will prompt the political branches to impose additional restrictions on speech and association, and the government will surely cite *Humanitarian Law Project* in defending such measures. The majority’s approach departed radically from precedent, so if the Court’s reasoning is generally applicable to restrictions on speech imposed in the name of national security, the consequences for First Amendment doctrine are deeply troubling.

### A. *Whither Brandenburg?*

Before *Humanitarian Law Project*, the Supreme Court had ruled that even express advocacy of crime is protected unless it meets the *Brandenburg* “imminent incitement” test. The related principle that speech advocating *lawful* activity cannot be prohibited in the name of deterring someone else’s illegal conduct dates back to some of the Court’s earliest First Amendment decisions. In *De Jonge v. Oregon*,<sup>48</sup> the Court invalidated the conviction of an individual who spoke and recruited on behalf of the Communist Party at a meeting held under Party auspices.<sup>49</sup> The Court accepted that the Party engaged in illegal activities, but held that De Jonge could not be convicted for

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<sup>47</sup> *Id.* at 2743 (Breyer, J., dissenting).

<sup>48</sup> 299 U.S. 353 (1937).

<sup>49</sup> *Id.* at 365.

his work on its behalf because he advocated only “peaceable” activity.<sup>50</sup> The Court noted that if individuals are “engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy.”<sup>51</sup> But, the Court continued, “it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.”<sup>52</sup> In *Humanitarian Law Project*, however, the Court held that “a lawful public discussion” about human rights advocacy or peace could be “the basis for a criminal charge.”<sup>53</sup>

More recently, in *Ashcroft v. Free Speech Coalition*,<sup>54</sup> the Court struck down a federal statute banning “virtual child pornography,” and rejected arguments that the restriction was justified because such materials might be used by third parties to seduce children, or might increase demand for child pornography using actual children. As the Court explained, “the government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”<sup>55</sup> Yet in *Humanitarian Law Project*, the Court upheld the punishment of plaintiffs’ speech, advocating only lawful, nonviolent activities, on speculation that such speech might facilitate the PKK’s pursuit of terrorism at some indefinite future time.

Much lawful advocacy could be linked, at least in the indirect way deemed sufficient in *Humanitarian Law Project*, to wrongdoing by another. Could the state prohibit the provision of job training to gang members on the theory that the skills might make them more effective criminals? Could training in nonviolent mediation be prohibited on the ground that it might “legitimate” the gang, thereby making it more attractive to new members who might commit future crimes? Could peaceable environmental advocacy coordinated with Greenpeace be banned because the organization sometimes engages in illegal trespass or property damage as civil disobedience?

Before *Humanitarian Law Project*, the answers to these questions would have been simple. *Brandenburg* established that even speech directly

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court relied on *De Jonge* to hold that the leader of and participants in an economic boycott could not be held liable for illegal violence that attended the boycott absent proof that they engaged in or directly incited the violence. *Id.* at 908–09, 932–34; *id.* at 928 (“When [an advocate’s] appeals do not incite lawless action, they must be regarded as protected speech.”).

<sup>53</sup> *Humanitarian Law Project v. Holder*, 130 S. Ct. 2705, 2733 (2010) (quoting *De Jonge*, 299 U.S. at 365).

<sup>54</sup> 535 U.S. 234 (2002). See also *Bartnicki v. Vopper*, 532 U.S. 514, 529–30 (2001) (“[I]t would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.”).

<sup>55</sup> *Ashcroft*, 535 U.S. at 253 (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam)); *id.* at 250 (noting that the “harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts”). The Court has also previously rejected attempts to criminalize advocacy of lawful activities to secure peace and safety during war, *Taylor v. Mississippi*, 319 U.S. 583, 589 (1943), and to prevent a breach of the peace, *Cox v. Louisiana*, 379 U.S. 536, 545 (2005); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969).

advocating criminal conduct could not be penalized unless it was intended and likely to produce “imminent lawless action.”<sup>56</sup> Speech advocating lawful, peaceable activity was plainly protected, even when done in coordination with a group that engaged in illegal activities that threatened the United States, such as the Communist Party. After *Humanitarian Law Project*, the answers are less clear, because for the first time, the Court upheld the criminalization of speech advocating no crime whatsoever.

### B. *Deferential Strict Scrutiny*

The second dramatic departure from precedent with potentially grave consequences for the future of First Amendment law was the “deferential strict scrutiny” the Court applied. As illustrated above, the Court claimed to be applying the “demanding” scrutiny traditionally triggered by content-based speech regulation. But the Court actually applied an unrecognizably lenient form of that scrutiny. Outside the speech area, the Court has often deemed it appropriate to defer to the political branches on national security and foreign affairs.<sup>57</sup> But never before has the Court substituted deference for stringent scrutiny in reviewing a content-based regulation of speech. Yet rather than put the government to the test of demonstrating with actual evidence that its prohibitions of human rights and peace advocacy were necessary to combat terrorism, the Court engaged in little meaningful scrutiny at all.

Indeed, the Court went beyond deference, offering up its own arguments for how speech might implicate national security, arguments that the political branches never even *asserted*. Deference is usually predicated on the notion that the political branches are better situated to make the requisite judgment calls. But in this case, the Court engaged in more analysis of the potential relation of speech to national security than both of the other branches combined.

The Court’s deference is illustrated by its heavy reliance on a “finding” that Congress included in the material support statute.<sup>58</sup> The “finding” states in full 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.”<sup>59</sup> The Court never asked whether the legislative record contained any evidence to support this claim. It is not actually a factual finding in any real sense, but a conclusory assertion about a whole category of unidentified entities. Congress defined “terrorist activity” to

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<sup>56</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *see also Hess*, 414 U.S. at 108–09 (holding that the First Amendment prohibits application of a disorderly conduct statute to pure speech that, while advocating illegal activity, did not incite it).

<sup>57</sup> *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).

<sup>58</sup> *See Humanitarian Law Project*, 130 S. Ct. at 2712, 2724, 2726.

<sup>59</sup> AEDPA, Pub. L. No. 104-132, § 301(a)(1)–(7), 110 Stat. 1214, 1247 (1996), note following 18 U.S.C. § 2339B (Findings and Purpose).

include virtually any threat to use a weapon against person or property, so hundreds if not thousands of foreign organizations likely fall within the category of "foreign organizations that engage in terrorist activity." It also delegated the designation of specific organizations to the Secretary of State, so which groups would be designated could not be predicted. Yet Congress heard no evidence regarding the effect of contributions on *any* organization, much less on all "foreign organizations that engage in terrorist activity."

It is one thing, as Congress did with respect to the Communist Party in the 1950s, to hold hearings on and make specific findings about a particular organization based on extensive evidence presented about the group. It is another matter simply to insert a boilerplate conclusion about a virtually limitless category of groups, without entertaining evidence about any of them.<sup>60</sup> Again, deference may be warranted where there is evidence that the political branches applied their expertise to evidence; here, however, the legislative record is devoid of any evidence related to this "finding." Should the political branches be free, in the national security arena, to make conclusory assertions without any evidentiary support and then use them as trump cards to justify infringements on rights of speech or association? Or should the Court have remanded for factfinding, even if only for the purpose of determining whether there was any factual basis to support the finding? In *Bartnicki v. Vopper*,<sup>61</sup> the Court dismissed a congressional finding advanced to support a statute criminalizing speech because "the relevant factual foundation [wa]s not to be found in the legislative record."<sup>62</sup> In *Humanitarian Law Project*, the Court did not even ask if there was a foundation in the record for Congress's sweeping "finding."

Congress's "finding," moreover, is limited to "contributions," not speech. Congress made no finding that speech advocating human rights and peace has the same effect. The Court reasoned that because Congress prohibited "training" and "personnel" when it enacted this finding in 1996, it must have intended "contributions" to encompass speech. But the legislative history shows that Congress did *not* contemplate its prohibitions reaching coordinated advocacy with designated groups.<sup>63</sup> Ordinarily, Congress's

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<sup>60</sup> See 8 U.S.C. § 1189(a) (1996) (enumerating the expansive criteria Congress uses for the designation of "foreign terrorist organizations").

<sup>61</sup> 532 U.S. 514 (2001).

<sup>62</sup> *Id.* at 530–31, 531 n.17; *cf.* *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503–11 (1984) (finding appellate courts have independent obligation to assess facts where First Amendment freedoms are at stake).

<sup>63</sup> A key House Report states that the statute was not intended to reach protected speech and association. The Report recognizes that "[t]he First Amendment protects one's right to associate with groups that are involved in both legal and illegal activities," and insists that "[t]he basic protection of free association afforded individuals under the First Amendment remains in place" because the statute does not prohibit "one's right to think, speak, or opine in concert with, or on behalf of, such an organization." H.R. REP. NO. 104-383, at 43, 44 (1995). Quoting the Report, the government argued that after the 2001 and 2004 amendments the Report still reflected Congress's intent and even added: "Congress noted that the statutory ban 'only affects one's contribution of financial or material resources.'" First Cross-Appeal Brief for Appellants at 5–6, *Humanitarian Law Project v. Gonzales*, 552 F.3d 916 (9th Cir. 2007) (Nos. 05-56753, 05-56846), 2006 WL 2982037, at \*4 (quoting H.R. REP. NO. 104-383, at 44).

findings in the First Amendment area must be specific to speech and supported by evidence.<sup>64</sup> This finding was neither.

The Court maintained that deference was appropriate because the government's interest was "preventive,"<sup>65</sup> and because in the realm of foreign affairs and national security, the political branches have greater expertise.<sup>66</sup> But virtually all laws are "preventive," as they seek to prevent undesired conduct from occurring. And virtually any anti-terrorism law will touch on matters of national security and foreign relations. Moreover, neither Congress nor the Executive had actually spoken to the specific issue at hand; namely, whether it was necessary to prohibit advocacy of human rights and peace in order to halt terrorist activity. The Court did not so much defer to these branches' expertise, as make up arguments that neither Congress nor the Executive had advanced, and then approve those arguments without any evidentiary basis. If the "demanding" scrutiny applicable to laws penalizing speech on the basis of its content can be satisfied by such "evidence" whenever "national security" is said to be at stake, the First Amendment will offer scant protection against future government efforts to censor speech on such grounds.<sup>67</sup>

### C. "*Legitimizing*" Viewpoint Discrimination

The Court's acceptance of the government's interest in "delegitimizing" disfavored political organizations as a justification for suppressing speech is a third dramatic departure from precedent that, if generally applicable, directly jeopardizes much of what we have come to rely on as First Amendment freedoms. The Court reasoned that even if plaintiffs' advocacy of human rights and peacemaking was not itself capable of being turned to illegal ends, it could be prohibited on the ground that engaging in such communications with a designated group might send the message that the group has "legitimacy," and that message might then be used by the group to attract financial or other support that could be used for terrorist ends.<sup>68</sup> If the government's desire to suppress messages it disapproves of is sufficient to justify content-based prohibitions on speech generally, it is difficult to imagine any censorship law that would be invalid.

Such a justification, for example, would require reversal of the Court's long line of Communist Party cases. The government in those cases specifi-

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<sup>64</sup> See *Bartnicki*, 532 U.S. at 530–31, 531 n.17.

<sup>65</sup> *Humanitarian Law Project v. Holder*, 130 S. Ct. 2705, 2728 (2010).

<sup>66</sup> *Id.* at 2727.

<sup>67</sup> It is nonetheless important that no member of the Court accepted the government's argument that the statute as applied should be treated as a content-neutral regulation of conduct. Had the Court ruled for the government on that theory, the damage done to First Amendment jurisprudence would have been much greater, for that rationale for deference would not be limited to national security or foreign relations matters. Instead, deferential scrutiny would be appropriate wherever the government, in addition to criminalizing speech, also prohibited some related conduct.

<sup>68</sup> *Id.* at 2725.

cally argued that it should be able to ban “active support of any kind,” even support exclusively of the Party’s lawful ends, because such aid would inevitably help the organization achieve its illegal ends.<sup>69</sup> In the words of Chief Justice Roberts, associating with the Communist Party to further its lawful ends risks “lend[ing it] legitimacy . . . that makes it easier for [it] to persist, to recruit members, and to raise funds . . . .”<sup>70</sup>

Indeed, the government’s argument was, if anything, stronger with respect to the Communist Party than with respect to the PKK. Congress had made detailed findings, based on extensive factual hearings, that the Communist Party was part of an international conspiracy using terrorism and other illegal methods to overthrow the United States by force and violence.<sup>71</sup> Congress further found that the Communist Party was controlled by the world communist movement and supported by the world’s second greatest superpower, a nation with which we were in a potentially planet-ending nuclear arms race. The Court questioned none of that. Yet it repeatedly insisted that anti-Communist laws must carefully distinguish between those who associated with the Communist Party to further its legal ends and those who did so to further its illegal ends, and between those who incited illegal conduct and those who advocated abstract ideas.<sup>72</sup> Had the Court accepted the interest in “delegitimizing” the Party, no such distinctions would have been required, because all speech or association, regardless of its motivation or content, risked “legitimizing” the Party. Indeed, from a “legitimizing” vantage point, the government might well be *more* concerned by speech and association in furtherance of the Party’s legal activities than by speech furthering its illegal ends.

The “legitimacy” rationale seeks to suppress a particular disfavored message—namely, that groups the United States wants to treat as “illegitimate” are “legitimate.” At bottom, this is a viewpoint-discriminatory justification. Ordinarily, a viewpoint-based purpose is sufficient to invalidate a

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<sup>69</sup> Brief for the United States on Reargument, *Scales v. United States*, 367 U.S. 203 (1961) (No. 1), 1959 WL 101542, at \*22–23 (arguing that active membership in the Communist Party can be proscribed “even though the activity be expended along lines not otherwise illegal, since active support of any kind aids the organization in achieving its own illegal purposes”); *id.* at \*8 (“[K]nowingly joining an organization with illegal objectives contributes to the attainment of these objectives because of the support given by membership itself.”); *id.* at \*11 (“Membership in an organization renders aid and encouragement to the organization.”) (quoting *Frankfeld v. United States*, 198 F.2d 679, 684 (4th Cir. 1952)).

<sup>70</sup> *Humanitarian Law Project*, 130 S. Ct. at 2725.

<sup>71</sup> Congress found that there “exists a world Communist movement . . . whose purpose it is, by treachery, deceit, infiltration . . . espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.” 50 U.S.C. § 781 (West 1991) (repealed 1993), *quoted in* *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 n.8 (1964). The American Communist Party, Congress found, was directed and controlled by this “world Communist movement.” *See Humanitarian Law Project*, 130 S. Ct. at 2737 (Breyer, J., dissenting) (quoting *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 5–6 (1961)).

<sup>72</sup> *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967); *Noto v. United States*, 367 U.S. 290, 296–97 (1961); *Scales*, 367 U.S. 203 at 229–30; *Yates v. United States*, 354 U.S. 298, 316 (1957).



law. Thus, the Court has held that even where the government is merely regulating access to government benefits, viewpoint discrimination is presumptively impermissible.<sup>73</sup> It has struck down a law that discriminated on the basis of viewpoint even within the category of otherwise unprotected speech.<sup>74</sup> Here, by contrast, the Court accepted the government's desire to discriminate on the basis of viewpoint as a *justification* for suppressing speech.

Suppose a state or local government decides that it wants to deny legitimacy to a political organization that has engaged in illegal activities. Could it penalize any speech addressed to or coordinated with that group, on the ground that it may lend the group legitimacy? In *Healy v. James*,<sup>75</sup> the Court held unconstitutional a state university's refusal to recognize and provide meeting space to a student branch of the Students for a Democratic Society based on the larger group's violent activities.<sup>76</sup> After *Humanitarian Law Project*, could a university successfully defend such action on the ground that it seeks to deny "legitimacy" to a group that had used violence? Could a city bar speech in support of the "Occupy Wall Street" movement on the ground that it might legitimate the movement and further its violations of property laws and zoning regulations?

#### D. *An Empty Right of Association*

The Court's decision defined the right of association in ways that, if applied generally, would reduce that right to the most formalistic of meanings. The *Humanitarian Law Project* plaintiffs argued that the law violated their associational rights because the trigger for criminal prohibition was association with a particular political group. Advocating for peace and human rights is fully tolerated under the material support law as long as it is done independently or in coordination with a non-proscribed group. But the very same speech, communicated to or in coordination with the PKK, is a crime. One could file an amicus brief challenging the material support law on behalf of oneself, or any organization that was not designated, but not on behalf of the PKK. A law that banned campaign speech only when it was done in coordination with the Democratic Party, but not when done independently or with the Republican Party, would plainly be viewed as infringing the right to association. The material support law is of the same character.

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<sup>73</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995) (stating that in public forum, even where content lines may sometimes be legal, "viewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum's limitations"); see also *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1991) (striking down hate crimes law as applied to speech because it was viewpoint-based); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (excluding religious group from using school facilities after hours constituted impermissible viewpoint discrimination).

<sup>74</sup> *R.A.V.*, 505 U.S. at 391 (striking down law that prohibited fighting words that expressed certain messages but not others).

<sup>75</sup> 408 U.S. 169 (1972).

<sup>76</sup> *Id.* at 180.

The Court concluded first that the right of association was not infringed because the law bans only “material support,” not membership or association *simpliciter*. But as shown above, the only thing that makes the filing of an amicus brief a crime is the fact of its association with a proscribed group. The fact that the law selectively punishes speech when expressed in association with another would seem to render the law *more* unconstitutional (because it violates both the rights of speech and association), not save it from invalidation.

After *Humanitarian Law Project*, Congress presumably could reenact every one of the anti-Communist penalties and disabilities that the Supreme Court invalidated, simply by penalizing “speaking in coordination with,” instead of “membership in,” the Communist Party. The Court has never before suggested that the right of association is so devoid of substance. On the contrary, it has affirmed that the First Amendment protects the “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>77</sup> Through the right of association, the Court has protected the rights to “peaceable assembly for lawful discussion”;<sup>78</sup> to solicit members to the Communist Party and circulate literature;<sup>79</sup> to organize a boycott, even where it included substantial acts of violence;<sup>80</sup> and to litigate for social and political purposes.<sup>81</sup> All of these acts could be characterized as “material support”; does that mean that they are no longer protected by the right of association?

The Court also reasoned that any infringement of associational rights was justified for the same reasons that justified the restrictions on plaintiffs’ speech.<sup>82</sup> But that does not necessarily follow. A statute that restricted political campaign contributions on an across-the-board, non-partisan basis, for example, might satisfy First Amendment scrutiny, as the contribution limits in *Buckley v. Valeo* did.<sup>83</sup> But it does not follow that a statute that *selectively* restricted contributions to the Republican Party but not the Democratic Party, or vice versa, would be constitutional for *the same reasons*. Rather, the government would have to justify separately why it was treating some parties differently from others. In *Buckley* itself, for example, the government had to separately defend the statute’s differential treatment, for purposes of public financing, of candidates who had received over twenty-five percent and under twenty-five percent of the vote.<sup>84</sup>

After *Humanitarian Law Project*, it would appear that the right of association is limited to holding a membership card. If this distinction is valid, what is to stop Congress from barring members of disfavored political

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<sup>77</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

<sup>78</sup> *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

<sup>79</sup> *Herndon v. Lowery*, 301 U.S. 242, 259 (1937).

<sup>80</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–09 (1982).

<sup>81</sup> *NAACP v. Button*, 371 U.S. 415, 428–29 (1963).

<sup>82</sup> *Humanitarian Law Project v. Holder*, 130 S. Ct. 2705, 2731 (2010).

<sup>83</sup> *See Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>84</sup> *Id.* at 85–108 (holding that differential treatment of candidates does not violate equal protection or First Amendment).

groups from doing anything to support the group they join? As in *Humanitarian Law Project*, the government could claim that citizens remain free to join the proscribed groups—but they cannot pay dues, volunteer their time, speak in coordination with, or provide the group with anything of value. The right of association would be a nullity.

In sum, *Humanitarian Law Project* departed from precedent in significant and troubling ways. If these departures reflect a new course for First Amendment doctrine in the post-9/11 context, they portend radically diminished protection of political speech. Yet the Court did not suggest that it was overruling any of the precedents discussed herein. If *Humanitarian Law Project* is to be harmonized with these precedents, therefore, it must be read narrowly. The following section explores the grounds for narrow construction that the Court itself proposed.

### III. POSSIBLE DISTINCTIONS

The Court made little or no attempt to reconcile the reasoning in its decision with conflicting precedent. It did point to three possible distinguishing features of the case: (1) the law at issue proscribed only advocacy provided to or in coordination with a designated group, and did not reach independent advocacy;<sup>85</sup> (2) the government's interest was to further national security and foreign relations;<sup>86</sup> and (3) the law regulated only speech addressed to or expressed in coordination with *foreign* organizations, not *domestic* groups.<sup>87</sup> The Court did not, however, offer any explanation for why these factors might make a difference. Do any of these factors provide a satisfactory basis for reconciling the decision with First Amendment precedent or principle? In this section, I first show that no factor standing alone can rationalize the result. But I then conclude that the best way to read the case to harmonize it with precedent and to limit its deleterious effect on future speech and association disputes is to limit it to situations in which *all three* distinguishing features are present.

There is certainly reason to believe that the analysis in *Humanitarian Law Project* is not generally applicable. After all, the very next Term, in *Brown v. Entertainment Merchants Ass'n*,<sup>88</sup> the Court struck down a ban on violent video games, applying strict scrutiny as it has traditionally been understood, and finding the law insufficiently narrowly tailored to the compelling state interests identified. Among other problems, the Court found insufficient evidence that violent video games caused children to be violent.<sup>89</sup> And the same Term that it decided *Humanitarian Law Project*, the

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<sup>85</sup> *Humanitarian Law Project*, 130 S. Ct. at 2726.

<sup>86</sup> *Id.* at 2727.

<sup>87</sup> *Id.* at 2731.

<sup>88</sup> 131 S. Ct. 2729 (2011).

<sup>89</sup> *Id.* at 2739, 2741–42.

Court in *Citizens United v. FEC*<sup>90</sup> applied demanding scrutiny to invalidate a requirement that corporations use segregated funds for campaign spending. The Court rejected as insufficiently supported by evidence the government's argument that unrestricted corporate expenditures could lead to corruption of politicians, despite extensive congressional findings and evidence documenting precisely such corruption.<sup>91</sup>

In other words, *Humanitarian Law Project* notwithstanding, the strict scrutiny standard appears to be alive and well, and the Court has shown itself willing to apply it in its traditional stringent form to invalidate content-based speech restrictions that indisputably are designed to further compelling government ends. What, then, might explain the very different analysis employed in *Humanitarian Law Project*?

#### A. *The Court's Proffered Distinguishing Features Considered Independently*

##### 1. *Independent vs. Coordinated Speech*

The majority repeatedly emphasized that the material support law prohibited only speech coordinated with or directed to "foreign terrorist organizations," not independent advocacy, implying that a ban on independent advocacy might be viewed differently. The Court did not hold as much, as it merely interpreted the law not to prohibit independent advocacy.<sup>92</sup> But the Court found it "significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns," and that "most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups."<sup>93</sup> And in specifying what it had *not* decided, the Court stressed that "in particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations."<sup>94</sup>

The Court never specified, however, why the analysis would differ if the statute barred independent advocacy. On the government interest side of the analysis, coordinated advocacy is no more harmful than independent advocacy. As Justice Breyer pointed out, independent advocacy could just as

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<sup>90</sup> 130 S. Ct. 876 (2010).

<sup>91</sup> *Id.* at 910–11.

<sup>92</sup> Indeed, the Court also declined to address whether "coordinated advocacy" in the form of lobbying Congress or the UN could constitutionally be prohibited as a "service," because it concluded that plaintiffs' allegations regarding their proposed activities in that regard were insufficiently specific to present a concrete controversy. *Humanitarian Law Project*, 130 S. Ct. at 2729.

<sup>93</sup> *Id.* at 2728.

<sup>94</sup> *Id.* at 2730.

effectively lend a designated organization legitimacy.<sup>95</sup> Indeed, independent advocacy might well provide *more* legitimacy—precisely because of its independence. And if independent advocacy substitutes for work the group itself might have done, it would have the same potential to free up resources. (This is a common feature, for example, of “independent expenditures” in campaign finance, which often allow the candidate to spend more resources in other ways.) The fact that speech is coordinated with or directed to a designated group might make it easier as a factual matter to establish that it benefitted the group, but in theory there is no reason why independent speech could not also offer the group substantial benefits.

A ban on independent advocacy would be especially challenging to enforce, because in order to determine whether particular speech was providing impermissible aid to a designated group, the government would have to assess its content. But as the *Humanitarian Law Project* Court acknowledged, the material support statute’s ban on “training” and “expert advice” also requires the government to examine the content of speech, yet that posed no obstacle to its validation by the Court.

Nor does there appear to be any basis to conclude that independent advocacy deserves greater protection than advocacy directed to or coordinated with another, even a “foreign terrorist organization.” Speech is almost always a relational act; we almost always speak to, or in coordination with, someone else. But the identity of the person to or with whom we speak does not generally reduce the protection the speech deserves. An op-ed written by two authors is no less deserving of protection than one written by a single author.

Indeed, a law that targets coordinated speech for suppression may well be *more* suspect than one that targets independent advocacy. Speech to and with others more directly serves the First Amendment’s goals of promoting self-government and the search for truth than speech kept entirely to oneself. The First Amendment is ultimately designed to protect the *exchange* of ideas, which necessarily involves either directing one’s speech to another or some other form of coordination. And what is coordinated speech but speech plus association, both of which are constitutionally protected? As the Supreme Court has stated, “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”<sup>96</sup> The fact that speech is coordinated should make it doubly protected, not cause it to lose its protection.

In the campaign finance arena, the Court has upheld restrictions on coordinated expenditures for speech that would be invalid as applied to independent expenditures.<sup>97</sup> But the rationale for doing so stems from the

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<sup>95</sup> *Id.* at 2736 (Breyer, J., dissenting).

<sup>96</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982) (quoting *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

<sup>97</sup> *See, e.g., McConnell v. FEC*, 540 U.S. 93, 203 (2003).

Court's initial distinction between contributions and expenditures in *Buckley v. Valeo*.<sup>98</sup> There, the Court concluded that while restrictions on campaign contributions and expenditures both trigger heightened First Amendment scrutiny, a ceiling on contributions is less undermining of First Amendment values and more closely tailored to the state's compelling interest in avoiding the appearance and reality of quid pro quo corruption than a restriction on expenditures.<sup>99</sup> Coordinated expenditures may be treated as contributions to ensure that they do not become an end-run around the permissible restrictions on contributions.

This rationale does not extend to the material support statute. The campaign finance restrictions applied only to expenditures or contributions of money,<sup>100</sup> and expressly permitted individuals to volunteer as much of their own time and speech to a political campaign as they chose.<sup>101</sup> The law imposed no restrictions on pure speech, whether coordinated or independent. Moreover, the Court emphasized that even the limit on contributions was a ceiling, not an outright ban, and thereby enabled individuals to express their support for a candidate through donating, limiting only the size of such donations.<sup>102</sup> The object of regulation in *Humanitarian Law Project*, by contrast, was not an expenditure of money, but pure speech. And the law imposed an outright ban, not a ceiling. A law that prohibited pure speech when communicated to or in coordination with a candidate would not withstand First Amendment scrutiny under the *Buckley* analysis.

Thus, there appears to be no satisfactory rationale for the distinction between independent and coordinated speech. Certainly, the Court offered none.

## 2. *National Security and Foreign Relations*

The Court defended its deferential analysis by noting that the statute concerns "national security and foreign affairs," and "addresses acute foreign policy concerns involving relationships with our Nation's allies."<sup>103</sup> These facts did not warrant an "abdication of the judicial role," the Court explained, but "respect for the Government's conclusions is appropriate."<sup>104</sup> The Court added that because the law was "a preventive measure" and addressed "evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess," the government "is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions."<sup>105</sup>

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<sup>98</sup> 424 U.S. 1, 46–47 (1976).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 12–14.

<sup>101</sup> *Id.* at 35.

<sup>102</sup> *See id.* at 21–22.

<sup>103</sup> *Humanitarian Law Project v. Holder*, 130 S. Ct. 2705, 2727 (2010).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2727–28.

The national security and foreign relations features of the material support law do distinguish *Humanitarian Law Project* from certain other First Amendment cases. But the Court has never before suggested that national security and foreign relations interests are categorically distinct from other compelling state interests, or require a categorically distinct form of First Amendment scrutiny. Many of the most important cases protecting speech and association implicated these concerns, yet never before has the Court cited them as a basis for what I have called “deferential strict scrutiny.”

Congress’s prohibitions on advocating Communist doctrine and associating with the Communist Party just as squarely concerned foreign relations and national security. If ever there were a case for deference, the anti-Communist laws would present it. As noted above, Congress had actually heard substantial evidence on the Communist Party, and made specific findings based on that evidence. The anti-Communist laws were “preventive,” and addressed an “evolving threat[ ] in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.”<sup>106</sup> And the government argued, as it did in *Humanitarian Law Project*, that support of the organization’s legal ends would inevitably further its illegal ends. Yet the Court did not defer to the government’s assertions, and ruled that Congress could restrict advocacy only when it constituted incitement to criminal conduct, and association only when it was specifically intended to further the group’s illegal ends.<sup>107</sup>

Similarly, in *Boos v. Barry*,<sup>108</sup> the Court rejected the government’s argument that concerns about U.S. relations with foreign powers justified a regulation banning displays near foreign embassies that were “designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization.”<sup>109</sup> Because the statute was content-based, the Court subjected it to “exacting scrutiny.”<sup>110</sup> The government argued that the law served the compelling purposes of avoiding friction with foreign countries (a “preventive” measure), and furthering an international legal obligation under the Vienna Convention to respect diplomats. The Court refused to defer to Congress’s judgment that such a ban was necessary, noting, among other things, that Congress had enacted a less restrictive law for application outside the District of Columbia.<sup>111</sup> Thus, even though the case involved foreign relations, the Court applied traditional strict scrutiny, and declined to defer to Congress.<sup>112</sup>

There are powerful reasons to be skeptical about deference to government efforts to suppress speech in the name of national security or foreign relations. In the modern world, when speech can be immediately communi-

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<sup>106</sup> *Id.*

<sup>107</sup> *See, e.g.,* *Scales v. United States*, 367 U.S. 203 (1961); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

<sup>108</sup> 485 U.S. 312 (1988).

<sup>109</sup> *Id.* at 316 (quoting D.C. CODE § 22-1315 (1938)).

<sup>110</sup> *Id.* at 321.

<sup>111</sup> *Id.* at 329.

<sup>112</sup> *Id.* at 334.

cated around the world via the Internet, virtually all speech might implicate foreign affairs.<sup>113</sup> And national security is an equally capacious standard. The history of censorship in the United States has shown that security concerns are often cited to defend censorship and political repression. If such incantations were sufficient to trigger judicial deference to restrictions on speech and association, political freedoms would be gravely at risk. Thus, the fact that a law affects foreign relations and national security is not a sound basis for applying less than rigorous scrutiny where the law penalizes speech on the basis of content.

### 3. *Foreign vs. Domestic Organizations*

The third and final potential basis for limiting *Humanitarian Law Project* is that the material support law regulates speech and association with *foreign*, not *domestic*, organizations. The Court emphasized that it did “not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations.”<sup>114</sup> Should the fact that plaintiffs sought to communicate to and with a *foreign* organization affect the First Amendment inquiry? This distinction might help explain the majority’s failure even to address the Communist Party cases. Those cases involved restrictions on association with the U.S. Communist Party, a domestic organization. While Congress had found that the U.S. Communist Party was part of an international conspiracy headed and supported by the Soviet Union,<sup>115</sup> it was nonetheless also an indisputably domestic group, part of the American domestic polity. The PKK, by contrast, was an exclusively foreign organization.

If Congress were to ban speech in coordination with domestic organizations that had engaged in illegal conduct, even terrorism, it seems unlikely that the Court would uphold the ban, even if, as was the case with the Communist Party, Congress could cite foreign relations and national security justifications for doing so, and the group had international connections. Correlatively, it is not obvious that the Supreme Court in the 1960s would have invalidated a ban on membership in the *Soviet Communist Party*.

On the other hand, communication and association with foreign organizations is, and should be, protected by the First Amendment. Were it not protected, the Court in *Humanitarian Law Project* would not have had to apply any First Amendment scrutiny to the material support law’s application. The Court has long extended First Amendment protection to U.S. residents’ communications with persons outside our borders. In *Lamont v.*

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<sup>113</sup> See Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 945 (2011).

<sup>114</sup> *Humanitarian Law Project v. Holder*, 130 S. Ct. 2705, 2730 (2010).

<sup>115</sup> The government argued that the U.S. Communist Party “was under the firm and direct control of the Communist International and, through it, of the Soviet Union.” Brief for the United States at 185, *Dennis v. United States*, 341 U.S. 494 (1951) (No. 336), 1950 WL 78653, at \*185 (discussing Congressional findings).



*Postmaster General*,<sup>116</sup> the first Supreme Court decision to invalidate a federal law on First Amendment grounds, the Court protected the right of Americans to receive communications from the Communist Party abroad, without suggesting that any lower standard of First Amendment protection should apply merely because the communication came from a foreign source.<sup>117</sup> And in *Kleindienst v. Mandel*,<sup>118</sup> the Court held that U.S. citizens had an interest, protected by the First Amendment, in exchanging ideas face-to-face with a foreign national who had been denied a visa.<sup>119</sup>

Communication across borders furthers many of the values said to be served by the First Amendment. Exchange with foreign voices informs citizens about world affairs, and thereby furthers self-government. The search for truth, reflected in the metaphor of the “marketplace of ideas,” certainly knows no borders. And exposure to perspectives from around the world, and exchange with people and groups around the world, facilitates self-actualization. In the modern world, in which the Internet has made transnational communication routine and immediate, the importance of protecting such communication has never been greater.<sup>120</sup> As Professor Timothy Zick has argued:

Citizens and many resident aliens communicate with aliens abroad, obtain information from sources located overseas, collaborate across borders, associate with aliens residing in the United States and abroad, protest in foreign nations, and report from foreign lands. Digitization has increased reliance upon cross-border speech and given rise to new forms of cross-border association. The speech of U.S. citizens now routinely crosses borders, and the speech of foreigners easily reaches our shores.<sup>121</sup>

The First Amendment should protect our right to read *The Guardian* (UK), as it does our right to read the *New York Times*, and our right to post blogs on sites immediately accessible in a distant foreign land, as it does our right to hand out a leaflet on a neighborhood street corner. If the govern-

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<sup>116</sup> 381 U.S. 301 (1965).

<sup>117</sup> *Id.* at 306–07.

<sup>118</sup> 408 U.S. 753 (1972).

<sup>119</sup> *Id.* at 765. It might be objected that the Court in *Kleindienst* did not give much First Amendment protection to this interest, as it held that the government’s denial of a visa should prevail as long as it had a “facially legitimate and bona fide” reason for doing so, a very deferential standard. *Id.* at 769. But employing a deferential standard in this setting makes some sense, as Congress has broad discretion over immigration decisions, and every time a foreign national is denied a visa, someone in the United States could claim that he or she wanted to meet face-to-face with that person. Moreover, the basis for denying entry to Mandel was, at least ostensibly, that he had violated the terms of his visa in the past, so the rationale was itself content neutral. *Id.* A decision to deny entry on the basis of what he might say in the United States would present a different case.

<sup>120</sup> Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 438 (2009) (“[W]hat people do on the Internet transcends the nation state; they participate in discussions, debate, and collective activity that does not respect national borders.”).

<sup>121</sup> Zick, *supra* note 113, at 946.

ment could not constitutionally prohibit training a disfavored domestic organization how to advocate for its rights, it should not be permitted to prohibit the same training simply because it is directed to a disfavored foreign organization.

*B. The Distinguishing Features Taken Together: Is the Whole Greater Than the Sum of Its Parts?*

None of the three distinguishing features that the Court identified is sufficient, standing alone, to reconcile *Humanitarian Law Project* with existing First Amendment doctrine. But what about all three factors taken together? Perhaps a stronger case can be made that when the government seeks to regulate speech directed to foreign organizations for compelling national security reasons, it should have greater leeway than when it regulates independent speech, prohibits speech addressed to domestic groups, or acts for reasons other than national security. Given the tensions explored in Part II between *Humanitarian Law Project* and established First Amendment principles, the decision should be read as narrowly as possible in order to harmonize it with the precedent from which it seems to depart. Is there a principled basis for doing so?

Each feature does seem to play some role in limiting the decision's departure from precedent. Thus, while speech coordinated with others deserves as much protection as wholly independent advocacy, a ban on independent advocacy would cast an even more sweeping chilling effect on political expression. To assess whether independent advocacy furthers the interests of a foreign terrorist organization in such a way as to warrant its prohibition would require a close and nuanced reading of the content of the speech in question. As difficult as it may be to define "expert advice," "training," or "coordinated" advocacy, it is infinitely more challenging to define independent advocacy that somehow "legitimizes" a foreign terrorist organization, or in some other way might indirectly support the group or facilitate terrorist activity. Indeed, such an inquiry would seem to require the same sorts of causal inferences that the Court has long since rejected. The Court at various times held that speech could be prohibited if it had a tendency to lead to illegal activity,<sup>122</sup> or posed a "clear and imminent danger,"<sup>123</sup> or advocated action rather than abstract ideas.<sup>124</sup> Today, however, speech may be proscribed based on the relation of its content to criminal activity only where it is intended and likely to produce imminent lawless

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<sup>122</sup> *Patterson v. Colorado*, 205 U.S. 454, 463 (1907) (upholding contempt judgment for publication of cartoon critical of court, and holding that "if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it").

<sup>123</sup> *Abrams v. United States*, 250 U.S. 616, 627 (1919).

<sup>124</sup> *Yates v. United States*, 354 U.S. 298, 325 (1957).

conduct.<sup>125</sup> Thus, a ban on independent advocacy would raise distinct constitutional problems.

Similarly, while the fact that the government cites national security and foreign relations should not justify the substitution of deference for demanding review of content-based prohibitions of speech, one might nonetheless insist that at a minimum such deference is not appropriate for interests other than those asserted in *Humanitarian Law Project*. A similar ban on speech directed to domestic criminal gangs, while it might be said to serve the compelling interest of domestic security, should not trigger deferential review.

And while speech with foreign entities should be constitutionally protected, deference may be more appropriate when the government targets *foreign* entities for what are effectively diplomatic sanctions. The political branches have long imposed such restrictions on foreign governments and associated entities under the Trading With the Enemy Act of 1917<sup>126</sup> and the International Emergency Economic Powers Act (IEEPA).<sup>127</sup> Nations have long used economic sanctions as a tool of foreign diplomacy, and the Court has upheld restrictions on travel to foreign countries and transactions with foreign governments and related entities subject to embargoes, even when such embargoes restricted citizens' access to information or ability to engage in speech activities.<sup>128</sup> Here, the sanctions are imposed on foreign terrorist organizations, not nation-states, raising different concerns about rights of association.<sup>129</sup> But if the deference employed in *Humanitarian Law Project* were limited to the deployment of quasi-diplomatic sanctions against foreign entities for reasons of national security, the decision's effect would be less disruptive of First Amendment traditions and principles.<sup>130</sup>

The material support law's limitation to speech directed to or coordinated with *foreign* groups should be seen as essential to the result in *Humanitarian Law Project*. This would be in keeping with the intuition that the Communist Party cases might have been decided differently had Congress imposed restrictions on association with the *Soviet* rather than the *American* Communist Party. And if the rationales accepted in *Humanitarian Law Project* would not suffice to justify a similar ban with respect to *domestic* orga-

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<sup>125</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1968) (per curiam).

<sup>126</sup> 50 U.S.C. app. §§ 1–44 (Supp. II 2008).

<sup>127</sup> 50 U.S.C. §§ 1701–1707 (Supp. IV 2010).

<sup>128</sup> See *Regan v. Wald*, 468 U.S. 222 (1984); *Zemel v. Rusk*, 381 U.S. 1 (1965).

<sup>129</sup> Compare *Zemel*, 381 U.S. 1 (upholding restriction on travel to Cuba against First Amendment challenge), with *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964) (invalidating restrictions on travel on ground of association with the Communist Party).

<sup>130</sup> At times, the majority's discussion seems to imply that the possibility that speech or association might disturb a foreign ally is sufficient to warrant its prohibition. Thus, it surmised that permitting U.S. citizens to associate with the PKK might undermine our relations with Turkey. *Humanitarian Law Project v. Holder*, 130 S. Ct. 2705, 2726–27 (2010). But surely such a concern, standing alone, cannot be a sufficient basis for criminalizing speech or association. *Boos v. Barry* refutes such a broad reading. See 485 U.S. 312, 319 (1988). Thus, this aspect of the Court's discussion must be understood in light of the statute's principal concern with not merely upsetting foreign governments, but with preventing terrorist acts that threaten national security.

nizations, the decision could be harmonized with the Communist Party cases. Just as the First Amendment reserves its most jealous protection for political speech, so it might be argued that while the First Amendment protects speech and association with foreign as well as domestic groups, attempts to regulate speech and association in the domestic realm warrant especially skeptical review from the courts. There are at least three reasons for directing special skepticism at the regulation of domestic speech and association.

First, the interest in speaking and associating in coordination with domestic political organizations is arguably closer to the core of the First Amendment's protection than the interest in speaking and associating with a foreign group. One of the First Amendment's central purposes is to facilitate and protect political freedom, and in particular, the polity's interest in self-government.<sup>131</sup> A liberal democracy requires that its citizens be free to speak their minds, criticize the government, and join forces with like-minded others in those pursuits.<sup>132</sup> The ability to associate and speak with domestic organizations is therefore at the very core of the First Amendment's democratic purpose. The ability to associate and speak with foreign organizations is closer to the periphery—still protected, but less essential. It is virtually impossible to imagine meaningful self-government if the state can prohibit speech in coordination with domestic political groups it disfavors, but restrictions on speech with foreign organizations arguably pose a less direct challenge to the mechanisms of democracy. Thus, domestic political candidates can be barred altogether from receiving campaign donations from foreign organizations and individuals, but cannot be barred from receiving contributions from domestic individuals, organizations, and corporations.<sup>133</sup>

Second, the Court has applied its most stringent First Amendment scrutiny where the risk of improperly motivated government censorship is greatest, such as when the government targets political speech for its content or viewpoint.<sup>134</sup> The risk of improperly motivated censorship is arguably greater with respect to domestic than foreign political groups, precisely because domestic organizations are potentially in a position to challenge the incumbent administration's hold on political power, while foreign organizations generally are not.

Third, and most importantly, the government has much greater opportunity to control and monitor domestic organizations' conduct directly. It can reduce the likelihood that such groups use their resources for terrorist activity without restricting speech or association. Domestic organizations must obey all of our laws and regulations, are subject to service of process and asset freezes, can be required to report on their financial affairs, and can be

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<sup>131</sup> See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); see also *Boos*, 485 U.S. at 318; *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>132</sup> See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982).

<sup>133</sup> Federal Election Campaign Act, 2 U.S.C. § 441e (Supp. IV 2010).

<sup>134</sup> See *Texas v. Johnson*, 491 U.S. 397 (1989).

prosecuted if they engage in criminal conduct. Foreign organizations, by contrast, generally operate beyond our jurisdiction, and are therefore much more difficult, if not impossible, to regulate. We cannot require that a foreign organization follow any particular accounting practice, for example. And the government can directly freeze the assets of domestic entities whose activities allegedly support terrorism; it cannot do so with respect to foreign organizations whose assets are beyond our reach.

As a result, some of the central justifications cited in *Humanitarian Law Project* would be inapplicable to a prohibition on speech coordinated with a domestic terrorist organization. The Court's concern that speech might free up resources or legitimate a foreign group, allowing it to devote more funds to terrorism, does not arise where the government can freeze the entirety of a domestic organization's assets. Frozen assets cannot be "freed up" to be spent on anything, much less terrorism. And if a domestic terrorist organization's resources are frozen, it cannot use its burnished "legitimacy" to raise funds for terrorist ends.

In short, while none of the three features the Supreme Court emphasized in *Humanitarian Law Project* is independently sufficient to justify the departure from established First Amendment doctrine, the decision is best harmonized with precedent if read narrowly to rest on all three features—regulation of speech *coordinated with foreign* groups for *national security* purposes.

C. *A Test Case: Al Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury*

One court has already adopted such reasoning. In *Al Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury (AHIF)*,<sup>135</sup> the Ninth Circuit Court of Appeals recently held that *Humanitarian Law Project* does not permit the government to prohibit speech coordinated with a *domestic* organization designated as "terrorist."<sup>136</sup> Executive Order 13224, issued by President George W. Bush shortly after September 11, 2001, pursuant to the International Emergency Economic Powers Act, permits the Executive to designate domestic entities and individuals as "specially designated global terrorists."<sup>137</sup> Designation under E.O. 13224 has roughly the same consequences as designation under the material support statute: it becomes a crime to provide the designated person or entity with any service or anything of value, including speech, and the designation freezes all of the entity's assets. As with the material support statute, the government maintains that IEEPA prohibits coordinated but not independent advocacy. Thus, E.O. 13224 extends to speech and association with domestic entities the same prohibition

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<sup>135</sup> 660 F.3d 1019 (9th Cir. 2011).

<sup>136</sup> *Id.* at 1023.

<sup>137</sup> Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001).

on speech and association with foreign entities that the Supreme Court upheld in *Humanitarian Law Project*.

In *AHIF*, an Oregon-based Muslim charity designated as terrorist under E.O. 13224, and a local community organization, Multicultural Association of Southern Oregon (MCASO), sought a ruling that they may engage in coordinated advocacy with each other to protest the designation. MCASO specifically sought to coordinate with AHIF-Oregon in speaking to the press, holding demonstrations, contacting the government, holding a press conference, and issuing a press release.<sup>138</sup> The government argued that *Humanitarian Law Project* controlled, and required dismissal of plaintiffs' First Amendment claims. The court of appeals agreed that its analysis should be guided by *Humanitarian Law Project*, but noted that the Supreme Court had "expressly limited its holdings to the particular facts of the case."<sup>139</sup>

The court of appeals emphasized that "the entities in *HLP* were wholly foreign, whereas AHIF-Oregon is, at least in some respects, a domestic organization."<sup>140</sup> It acknowledged that AHIF-Oregon had alleged ties to a foreign organization, Al Haramain Islamic Foundation of Saudi Arabia, but also noted that it had a U.S. presence and legal existence as a nonprofit organization incorporated under Oregon law and headquartered in Oregon. It deemed this fact significant for two reasons. First, the fact that the United States had already frozen all of AHIF-Oregon's assets meant that there was little risk that MCASO's coordinated advocacy with AHIF-Oregon would free up resources that the latter could direct toward terrorism.<sup>141</sup> Second, it found that permitting U.S. citizens to engage in coordinated advocacy with a domestic organization was much less likely to engender foreign relations problems than "direct training of a wholly foreign organization actively at war with an ally, at issue in *HLP*."<sup>142</sup>

The court of appeals in *AHIF* interpreted *Humanitarian Law Project* narrowly, respecting the Supreme Court's admonitions that its decision was limited to the specific facts of that case. The fact that the prohibition applied to speech coordinated with a domestic entity rather than a foreign organization led the court to a different, speech-protective, result. Most importantly, the court rejected the government's invitation to read *Humanitarian Law Project* broadly. And by doing so, the court in *AHIF* helped ensure that *Humanitarian Law Project* would not *sub silentio* overrule a legion of critically important First Amendment precedents protecting domestic speech and association against government contentions that they undermine our national security. That reading honors the Supreme Court's efforts to "carefully circumscribe[ ] its analysis,"<sup>143</sup> renders the case less inconsistent with important First Amendment precedent that the Court made no sign of overturning,

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<sup>138</sup> See *Al Haramain*, 660 F.3d at 1228.

<sup>139</sup> *Id.* at 1050.

<sup>140</sup> *Id.* at 1051.

<sup>141</sup> *Id.* at 1052.

<sup>142</sup> *Id.* at 1054.

<sup>143</sup> *Id.*

and does the least amount of damage to First Amendment freedoms going forward.

#### IV. CONCLUSION

If any speech deserves presumptive protection under the First Amendment, it is speech advocating lawful, peaceful activity. Until 2010, that was indeed a core First Amendment principle. In *Humanitarian Law Project*, the Court properly ruled that the government may prohibit such speech only where it can satisfy the demanding standard that governs when laws prohibit speech on the basis of its content. But the Court's application of that scrutiny bore no resemblance to any other speech case in the modern era and, as I have suggested, employed reasoning and reached results that are sharply inconsistent with substantial precedent. Where it had previously protected even direct advocacy of crime, it now denied protection to advocacy of peace and human rights. Where it had previously held that strict scrutiny placed a heavy burden on the government to demonstrate with concrete evidence that its specific speech prohibitions were necessary to further a compelling end, here it *sua sponte* advanced arguments that the government never made; said no evidence was necessary to support its speculations; and deferred to a legislative finding and an executive affidavit that did not even address the necessity of prohibiting speech, and were not based on any actual evidence. Where it had previously ruled that a desire to suppress particular viewpoints was enough to render a law presumptively invalid, here it took the government's viewpoint-based motive in suppressing messages of legitimacy as a reason to uphold, not to strike down, the law. And where it had previously protected the right to associate with groups having both lawful and unlawful ends, and recognized that the right included the freedom to act in concert with one's associates, in *Humanitarian Law Project* it reduced the right to an empty formalism.

Such dramatic departures from precedent suggest that the decision was wrongly decided. That was the view of Justices Breyer, Ginsburg, and Sotomayor in dissent. That is also, needless to say, my view as counsel for the Humanitarian Law Project. But until it is overturned, we must live with it. And that puts a premium on considering whether its rationale can be limited. The Court itself offered three possible avenues of limitation, but offered no explanation for why those avenues were doctrinally significant. None of the three distinguishing features the Court identified is sufficient to reconcile the result with First Amendment precedent. But if the case is to be harmonized as much as possible with precedent, its application should be limited to situations in which *all three* of the factors identified by the Court are present—namely, when the government is prohibiting only speech coordinated with or directed to foreign organizations that have been subjected to diplomatic sanctions for compelling national security reasons. Short of an

outright reversal, such a reading provides the most persuasive ground for restricting the damage *Humanitarian Law Project* does to First Amendment doctrine.