Holder v. Humanitarian Law Project's Shadow: When Fear Suppresses Disfavored Voices

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In 2010, the Supreme Court held in Holder v. Humanitarian Law Project (HLP) *that "material support," as defined in § 2339B of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), includes a humanitarian organization's efforts to teach a U.S.-designated foreign terrorist organization how to engage in international affairs peaceably. In deferring to Congress' proclamation that such support is "fungible" and "legitimizes" foreign terrorist organizations, the Court departed sharply from First Amendment precedents.*

This Note examines scholarship that has proliferated since HLP. *The Introduction describes Zoom Video Communication's cancellation of a university event at which Leila Khaled, a member of a U.S.-designated foreign terrorist organization, was scheduled to speak. The cancellation of this event alarmed many First Amendment advocates because it suggested that* HLP *was chilling otherwise constitutional speech. Part I analyzes* HLP *and subsequent cases applying its holding. Part II shows how expansive interpretations of 18 U.S.C. § 2339B, the material support statute at issue in* HLP*, conflict with First Amendment jurisprudence. Part III calls on Congress to rectify the First Amendment problems that* HLP *and its applications have created and urges courts to interpret § 2339B narrowly in order to protect Americans' free speech rights.*

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INTRODUCTION

In early September 2020, San Francisco State University Professor Rabab Abdulhadi invited Leila Khaled, a member of the U.S.-designated foreign terrorist organization Popular Front for the Liberation of Palestine (PFLP),[1] to speak at an event hosted on the video-conferencing software Zoom.[2] Khaled is a highly controversial figure. She hijacked an airplane in 1969 and attempted to hijack another plane a year later.[3] Nevertheless, Professor Abdulhadi saw Khaled as a "feminist icon" and "radical nationalist" worth inviting to speak.[4] Khaled's planned appearance at the university had received significant attention—with more than 1,500 people registering for the event.[5]

On September 14, the Lawfare Project, a legal advocacy group and think tank, sent Zoom a letter warning that if it allowed the webinar to occur, Zoom could be subject to criminal liability for violating the material support to terrorism statute, 18 U.S.C. § 2339B.[6] The Lawfare Project then reached out to lawyers from

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1. *See Designated Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, https://www.state.gov/foreign-terrorist-organizations/ [https://perma.cc/3QJZ-L88Q].

2. *See* Adam Steinbaugh, *As Critics Call for Deplatforming, Defunding, and Prosecution Over Leila Khaled Discussion, San Francisco State University President Gets It Right*, FOUND. FOR INDIVIDUAL RTS. AND EXPRESSION (Sept. 23, 2020), https://www.thefire.org/news/critics-call-deplatforming-defunding-and-prosecution-over-leila-khaled-discussion-san [https://perma.cc/D9L9-KXGH].

3. *See* Bobby Allyn, *'Welcome to the Party, Zoom': Video App's Rules Lead to Accusations of Censorship*, N.P.R. (Nov. 23, 2020), https://www.npr.org/2020/11/23/937336309/welcome-to-the-party-zoom-video-apps-rules-lead-to-accusations-of-censorship [https://perma.cc/3KY7-STLG].

4. *Id.*

5. *See id.*

6. (a) Prohibited Activities.—

(1) Unlawful conduct.—

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

(2) Financial institutions.—Except as authorized by the Secretary, any financial institution that becomes aware that it has possession of, or control over, any funds in which a foreign terrorist organization, or its agent, has an interest, shall—

(A) retain possession of, or maintain control over, such funds; and

Facebook, Google, Amazon, and other conferencing services providers to pressure them to refuse to stream the webinar.[7] In addition to contacting these private actors, the Lawfare Project wrote to the Department of Justice, formally requesting that it investigate both Zoom and San Francisco State University for possibly violating § 2339B.[8] All of this pressure led Zoom to disable its registration link—and thereby cancel the event—the night before Khaled was scheduled to appear.[9]

A Zoom spokesperson later clarified that, at the time of the San Francisco State event cancellation, there were ten other events related to Khaled that were scheduled to take place on the platform.[10] Of those ten events, Zoom canceled three events at which Khaled was scheduled to speak. Zoom allowed the other seven to go on as planned, because those events "did not publicize any appearance from Ms. Khaled."[11] Thus, it appears that Zoom did not fear that any discussion of Khaled's past terrorist activities at an event could subject Zoom to criminal liability; rather, Zoom

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(B) report to the Secretary the existence of such funds in accordance with regulations issued by the Secretary.

(b) Civil Penalty.—Any financial institution that knowingly fails to comply with subsection (a)(2) shall be subject to a civil penalty in an amount that is the greater of—

(A) $50,000 per violation; or

(B) twice the amount of which the financial institution was required under subsection (a)(2) to retain possession or control.

See also Deplatforming Terrorist Leila Khaled from Zoom, Facebook, and YouTube, LAWFARE PROJECT (Sept. 25, 2020), https://www.thelawfareproject.org/combatingextremism/2020/9/25/deplatforming-terrorist-leila-khaled-from-zoom-facebook-and-youtube [https://perma.cc/PLR7-Y58B].

7. *See id.* After Zoom canceled the event, the webinar organizers tried to livestream the event on Facebook, which complied with The Lawfare Project's request to block the event. The organizers then moved to YouTube. *See id.* The Lawfare Project worked with Google's general counsel as the broadcast began, "to interrupt and terminate it, and did so a second (and final) time when the webinar's organizers attempted to resume using a another [sic] YouTube account." *See id.*

8. *See* Adam Kredo, *Legal Group: Zoom and California University in Violation of U.S. Law for Hosting Forum with Terrorist*, WASH. FREE BEACON (Sept. 18, 2020), https://freebeacon.com/campus/legal-group-zoom-and-california-university-in-violation-of-u-s-law-for-hosting-forum-with-terrorist/ [https://perma.cc/ME8A-E3NJ].

9. *See id.*; *see also* Gabriel Greschler, *S.F. State Event with Leila Khaled, Briefly Hosted on YouTube, is Taken Down*, JEWISH NEWS OF N. CAL. (Sept. 23, 2020), https://jweekly.com/2020/09/23/zoom-and-facebook-take-down-khaled-event-organizers-scramble-for-new-platform/ [https://perma.cc/8V8R-N3SX].

10. *See* Allyn, *supra* note 3.

11. *Id.*

feared that giving a platform to Khaled herself could violate federal criminal law.[12]

Zoom spokesperson Andy Duberstein told *The Intercept* that any person may use Zoom so long as they do not, among other things, violate anti-terrorism laws.[13] Although he did not point to a specific statute, Duberstein said that "the meeting [was] in violation of Zoom's Terms of Service" and that Zoom "reserves the right to bar anyone from using its services, for any reason or none at all."[14] Faiza Patel, co-director of the Brennan Center's Liberty and National Security Program, explained that this was an example of "private companies who are not bound by free speech rules . . . us[ing] their discretion to selectively block voices."[15] NYU Professor Andrew Ross added that "[i]t's very dangerous for a third-party vendor to be in the position of deciding what is legitimate academic speech and what is not—it violates all of the customs and norms of the academic culture."[16] Daphne Keller, a former Google lawyer who currently works at Stanford University's Cyber Policy Center, wondered whether "we want Zoom to be the content police or the speech police," given how dependent American society became on the platform during the COVID-19 pandemic.[17] Even though Zoom "function[s] in a way that for previous generations the postal service or the phone company functioned," Zoom is not a utility and is thus subject to criminal prosecution if it hosts content violative of criminal law.[18]

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12. *See generally* U.C. Berkeley Ctr. for Stud. in Higher Educ. (@BerkeleyCSHE), *Is There Academic Freedom in an Online World?*, YOUTUBE (June 22, 2021), https://www.youtube.com/watch?v=fivEBHro07g [https://perma.cc/C8LK-QBST] (panel discussing Zoom's decision to cancel the Khaled event and Zoom's role in academic freedom more generally).

13. *See* Alice Speri & Sam Biddle, *Zoom Censorship of Palestine Seminars Sparks Fight Over Academic Freedom*, INTERCEPT (Nov. 14, 2020), https://theintercept.com/2020/11/14/zoom-censorship-leila-khaled-palestine/ [https://perma.cc/4CG2-MHUA].

14. *Id.*

15. *Id.*

16. *Id.*

17. Allyn, *supra* note 3.

18. *Id.* Note that this is distinct from the civil arena, where § 230 of the Communications Decency Act of 1996 protects online platforms from *civil* lawsuits over what users say or do on their platforms. *See* Univ. Commc'n. Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007) (interpreting § 230 broadly "so as to effectuate Congress's 'policy choice . . . not to deter harmful online speech through the . . . route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages'") (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997)); *see also* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123–24 (9th Cir. 2003); Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 985 n.3 (10th Cir. 2000); *see also infra* Part III.B.

The Khaled incident occurred in September 2020, at a time when most American college students were receiving their education primarily or fully online.[19] At that time, Zoom exerted considerable control over the content those students could consume. Zoom's outsized influence on education during the COVID-19 pandemic highlights the extent to which overbroad interpretations of federal criminal law can chill speech. The result was that American students were robbed of the opportunity to hear Khaled speak.[20]

This Note argues that lower courts' interpretations of *HLP* have created a chilling effect on speech for online service providers like Zoom, who are likely to err on the side of over-censoring speech that is protected by the First Amendment. Part I lays out the legal landscape of this issue by analyzing *HLP* and its progeny. This series of cases demonstrates the difficulties of applying unclear precedent to novel situations or new technologies. Part I also shows that although many courts have read § 2339B and *HLP* expansively, there is precedent for reading both more narrowly. Part II discusses how expansive interpretations of the material support statute conflict with case law that shaped First Amendment jurisprudence throughout the twentieth century. Part III calls on Congress to amend the material support statute and provide immunity from criminal liability to Zoom-like platforms for third-party content on their platforms that might violate § 2339B. Part III also asks the courts to interpret § 2339B narrowly in order to protect the First Amendment rights of all Americans.

I. LEGAL BACKGROUND: JUDICIAL INTERPRETATIONS OF 18 U.S.C. § 2339B

Section A of Part I discusses the history and nature of the material support statute. Section B outlines the holding in *HLP*, the first case in which the Supreme Court considered the material

19. *See* Alicia Frazier, *Zoom University: The Complexities of Student Life in a Pandemic*, MIDSTORY (Apr. 8, 2021), https://www.midstory.org/zoom-university-the-complexities-of-student-life-in-a-pandemic/ [https://perma.cc/GM5P-KRJS] ("According to the Chronicle of Higher Education, out of about 3000 colleges/universities, 34% were primarily online while another 21% were fully online in fall of 2020.").

20. *See* Steinbaugh, *supra* note 2.

support statute.[21] Section C explores various interpretations of § 2339B in light of *HLP*. This section shows how expansively many courts have interpreted § 2339B—a troubling development from the perspective of free speech advocates.[22] The aim here is to highlight the questionable legal foundation upon which *HLP* rests by showing how courts have struggled to apply the decision's amorphous language to novel situations.[23]

A. MATERIAL SUPPORT TO TERRORISM LAWS

Unlike most criminal laws, anti-terrorism statutes often criminalize conduct in more actively preventative ways.[24] Criminal laws usually aim either to deter people from committing crimes, punish people for committing crimes, or both.[25] Deterrence and the threat of punishment are often not enough, however, when people are willing to sacrifice their own lives for a cause.[26] Consequently, anti-terrorism laws inevitably sweep more broadly than ordinary criminal laws. A terrorist's ability to blend in with the rest of the population further stifles law enforcement's ability to prevent terrorists from committing violent acts.[27]

In September 1994, in response to the difficulties that are inherent to fighting terrorism, Congress passed 18 U.S.C. § 2339A, "a statute aimed at reaching those persons who provide material support to terrorists knowing that such support will be used to commit one of the offenses specified in the statute."[28] The law

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21. *See* Frances Howell Rudko, *Searching for Remedial Paradigms: Human Rights in the Age of Terrorism*, U. MASS. ROUNDTABLE SYMP. L.J. 116, 117–118 (2010) ("In the 2009–2010 term, for the first time, the Supreme Court heard one of these cases. . . .").

22. *See infra* Part I.C.

23. *See id.*

24. *See generally* Arturo J. Carrillo, *The Price of Prevention: Anti-Terrorism Pre-Crime Measures and International Human Rights Law*, 60 VA. J. INT'L L. 571 (2020).

25. *See* Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (considering penalties in light of the different objectives of criminal punishment, including deterrence, rehabilitation, and retribution).

26. *See* Aaron Tuley, Holder v. Humanitarian Law Project*: Redefining Free Speech Protection in the War on Terror*, 49 IND. L. REV. 579, 581 (2016) (citing Nikolas Abel, United States v. Mehanna, *The First Amendment, and Material Support in the War on Terror*, 54 B.C. L. REV. 711, 722 (2013) (explaining that, because so many terrorists are willing to be martyrs for their cause, any threat of punishment after a terrorist commits a terrorist act is unlikely to be effective)).

27. *See id.* at 581–82 (citing Abel, *supra* note 26, at 725).

28. Dep't of Just., Crim. Res. Manual § 1-499.15 (2020), https://www.justice.gov/archives/jm/criminal-resource-manual-15-providing-material-support-terrorists-18-usc-2339a [https://perma.cc/KP3D-JTT6].

defines "material support or resources" as "any property, tangible or intangible, or service, including currency or monetary instruments . . . financial services, lodging, training, expert advice or assistance . . . personnel (1 or more individuals who may be or include oneself) . . . except medicine or religious materials."[29] The statute defines "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge."[30] "Expert advice or assistance" is defined as "advice or assistance derived from scientific, technical, or other specialized knowledge."[31]

Congress strengthened its efforts to combat terrorism after the 1995 Oklahoma City bombing[32] by passing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[33] A major part of AEDPA was § 2339B, which proscribes "knowingly provid[ing] material support or resources to a foreign terrorist organization, or attempt[ing] or conspir[ing] to do so."[34] The definition of "material support or resources" in § 2339B is the same as that used in § 2339A.[35] The mens rea component of § 2339B is that the individual "must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism."[36] The Secretary of State must designate a group as a terrorist organization in order for a group to be classified as such under § 2339B.[37]

There are noteworthy differences between § 2339A and § 2339B. First, while a violation of § 2339A requires one to attempt, to conspire, or to actually provide support to a specific terrorist *act*, a violation of § 2339B only requires one to attempt, to conspire, or to actually provide support to a foreign terrorist *organization*.[38] The mens rea elements are also different. A conviction under § 2339A requires one to "have an intent to support a terrorist act or more discrete knowledge of the terrorist

29. 18 U.S.C. § 2339A(b)(1).
30. 18 U.S.C. § 2339A(b)(2).
31. 18 U.S.C. § 2339A(b)(3).
32. *See Oklahoma City Bombing,* FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing [https://perma.cc/6YG6-W7ZQ].
33. *See* Tuley, *supra* note 26, at 582.
34. 18 U.S.C. § 2339B.
35. *See* Tuley, *supra* note 26, at 583.
36. 18 U.S.C. § 2339B(a)(1); *see also* Tuley, *supra* note 26, at 583.
37. *See* Tuley, *supra* note 26, at 583.
38. *See id.* at 584.

act [they are] supporting."[39] A conviction under § 2339B, on the other hand, requires one to "have knowledge (or constructive knowledge) that [their] support is being provided to a designated terrorist organization or an organization that engages in some type of terrorism."[40]

Taking action to combat terrorism was a politically popular move in the early 2000s, after 9/11 rattled the country.[41] Because many Americans were justifiably worried about potential future terrorist attacks, government officials knew that cracking down on terrorism would be politically beneficial.[42] As such, the pride that some legislators took in strengthening anti-terrorism laws was palpable.[43]

B. *HOLDER V. HUMANITARIAN LAW PROJECT*

In the landmark case *Holder v. Humanitarian Law Project*, the Supreme Court upheld the application of 18 U.S.C. § 2339B to the plaintiffs' (two U.S. citizens and six domestic organizations)

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39. *Id.*

40. *Id.*

41. *See* David W. Moore, *Public Little Concerned About Patriot Act*, GALLUP (Sept. 9, 2003), https://news.gallup.com/poll/9205/public-little-concerned-about-patriot-act.aspx [https://perma.cc/7P25-VCWD] ("Just 21% of Americans believe the [Bush] administration has gone 'too far' in restricting people's liberties, but about an equal number, 19%, say 'not far enough.' A majority, 55%, says the administration has done 'about right.'); *see also* JOHN MUELLER & MARK G. STEWART, PUBLIC OPINION AND COUNTERTERRORISM POLICY (2018), https://www.cato.org/white-paper/public-opinion-counterterrorism-policy [https://perma.cc/KR35-7FT2].

42. *See generally* Benjamin H. Friedman, *Managing Fear: The Politics of Homeland Security*, 126 POL. SCI. Q. 1 (2011) (explaining that American citizens receive information about terrorism largely from politicians and government organizations, who have an interest in reinforcing excessive fears of terrorism).

43. For instance, then-Senator Orrin G. Hatch (R-UT) once heralded Congress for expanding the material support statute through § 805 at a Senate Judiciary Committee Hearing. Prior to 2001, he explained, it was uncertain whether § 2339B prohibited "expert advice and assistance" to acts that occurred in a jurisdiction outside of the United States. *See Aiding Terrorists: An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 95–100 (2004) (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary), https://www.govinfo.gov/content/pkg/CHRG-108shrg95100/html/CHRG-108shrg95100.htm [https://perma.cc/CN5Z-SP7H]. Hatch said that Congress rectified this problem by adding § 805, which clarified that "expert advice and assistance" applied to acts that take place outside of the United States and is in fact included in the definition of "material support." *Id.* He then proclaimed that § 805 expanded the reach of the statute in a host of ways: adding more underlying terrorist crimes, clarifying that material support includes all monetary activity, and making the penalties for violating the statutes more severe. *See id.*

activities.[44] Section 2339B prohibits individuals or organizations from providing material support to entities that the United States has designated as foreign terrorist organizations (FTOs).[45] The criminal prohibition applies to the provision of "personnel," "training," "service," and "expert advice and support" to such entities.[46] In *HLP*, the plaintiffs sought to advise members of the Partiya Karkeran Kurdistan (PKK)[47] and the Liberation Tigers of Tamil Eelam (LTTE)[48]—two U.S.-designated FTOs—on how to petition the United Nations and similar bodies for funding.[49] The plaintiffs also wanted to train members of these groups to carry out activities unrelated to terrorism.[50] The plaintiffs sought pre-enforcement review to ensure that they could teach the PKK and the LTTE how to apply for humanitarian aid, engage in political advocacy on behalf of the minority groups these organizations represented, and provide legal advice on peace talks.[51]

Chief Justice Roberts delivered the 6–3 opinion for the Court.[52] He acknowledged that § 2339B contains a content-based speech restriction[53] and therefore applied "a more demanding standard"

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44. *See* Holder v. Hum. L. Project, 561 U.S. 1, 39 (2010) (holding that § 2339B prohibits a humanitarian organization from teaching a United States-designated foreign terrorist organization how to engage in international affairs peaceably).

45. *See id.*

46. 18 U.S.C. § 2339B.

47. The PKK is a "militant separatist group" that was formed to fight for the establishment of a Marxist-Leninist state to protect "cultural and political rights and self-determination for the Kurds in Turkey." *See PKK: The Kurdistan Workers' Party*, KURDISH PROJECT, https://thekurdishproject.org/history-and-culture/kurdish-nationalism/pkk-kurdistan-workers-party/ [https://perma.cc/3C7M-A28D].

48. The LTTE was an organization that aimed to establish an independent Tamil state in Sri Lanka. *See Tamil Tigers*, BRITANNICA, https://www.britannica.com/topic/Tamil-Tigers [https://perma.cc/BB82-7CGR]. The group was militarily defeated by the Sri Lankan government in May 2009. *See Liberation Tigers of Tamil Elam*, STAN. UNIV. CTR. FOR INT'L SEC. AND COOP. (last updated July 8, 2015), https://cisac.fsi.stanford.edu/mappingmilitants/profiles/liberation-tigers-tamil-elam [https://perma.cc/XVT3-WQGX].

49. *See Hum. L. Project*, 561 U.S. at 10 (2010) (discussing the activities that the plaintiffs attempted to engage in); *see also Designated Foreign Terrorist Organizations*, *supra* note 1 (displaying list of current U.S.-designated foreign terrorist organizations).

50. *See Hum L. Project*, 561 U.S. at 10 ("Plaintiffs claimed that they wished to provide support for the humanitarian and political activities of the PKK and LTTE in the form of monetary contributions, other tangible aid, legal training, and political advocacy, but that they could not do so for fear of prosecution. . . .").

51. *See id.*

52. *See id.* at 1.

53. When a speech regulation "draws distinctions based on the message a speaker conveys" (i.e., is content-based), the regulation "is subject to strict scrutiny." Reed v. Town of Gilbert, 576 U.S. 155, 163–164 (2015). Under a strict scrutiny analysis, the government must show that the speech restriction is "narrowly tailored to further a compelling government interest." *Id.* at 172. This is distinct from "content-neutral" speech restrictions,

of scrutiny than he would have had the statute merely prohibited conduct.[54] Despite its purported application of strict scrutiny, the Court upheld the statute on the grounds that it covered speech "coordinated with" FTOs and not "independent advocacy" supporting such groups.[55] Thus, the government had a relatively easy time showing that the prohibition was narrowly tailored to advance a compelling state interest in protecting national security.[56]

The Court used two main rationales to justify its conclusion that § 2339B advances the government's compelling interest in protecting national security by combating terrorism. First, Congress had "logically concluded that money a terrorist group such as the PKK obtains using the techniques plaintiffs proposed to teach could be redirected to funding the group's violent activities" (i.e., the "fungibility" rationale).[57] Second, the Court reasoned that official cooperation and interaction with non-governmental entities could lend legitimacy to FTOs, which "makes it easier for those groups to persist, to recruit members, and to raise funds," all of which hurt the government's interest in preventing terrorist acts (i.e., the "legitimacy" rationale).[58] Prohibiting the provision of material support to FTOs therefore advances the government's compelling interest in fighting terrorism.[59] And since the prohibition only applies to material support "coordinated with" (as opposed to "independent advocacy for") FTOs, § 2339B is narrowly tailored to the government's

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which receive a more lenient form of scrutiny than strict scrutiny. *See* NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, FIRST AMENDMENT LAW 231 (Saul Levmore et al. eds., 8th ed. 2023). In order to survive this less exacting standard of scrutiny, the government must show that the speech regulation "'further[s] an important or substantial government interest' and involve[s] an 'incidental restriction on alleged First Amendment freedoms [that] is no greater than is essential to the furtherance of that interest.'" *See id*. at 256–57 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

54. *See Hum. L. Project*, 561 U.S. at 28. *But see* David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 158 (2012) (arguing that notwithstanding the Court's proclamation that it was applying strict scrutiny, the Court in fact applied a highly deferential standard of review).

55. *Hum. L. Project*, 561 U.S. at 31–32.

56. *See* Cole, *supra* note 54, at 153–54 (explaining that the government argued that "prohibiting 'material support' [to terrorism] as a general matter" was justified). Further, the government argued that money is fungible, that aid to lawful activities could be used for terrorism, and that aid might strengthen a terrorist group and hamper the United States' goals of delegitimizing such groups. *Id.*

57. *Id.* at 37.

58. *Id.* at 30.

59. *See id*. at 30–31.

compelling interest.[60] The majority noted that its holding was limited to the facts of the case, acknowledging that more difficult cases could arise later.[61] Importantly, the Court "in no way suggest[ed] . . . that a regulation of *independent* speech" (i.e., speech that is not coordinated with a FTO) "would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations" or that a similar statute banning the provision of material support to a *domestic* organization would survive review.[62]

In dissent, Justice Breyer, joined by Justices Ginsburg and Sotomayor, contested both of the majority's rationales.[63] He saw no evidence for the fungibility rationale and challenged the notion that any funds obtained from advocating for human rights or international peace would free up resources that FTOs could use for terrorist purposes.[64] Justice Breyer also argued that the "legitimacy" rationale contradicted Court precedents holding that prohibitions on merely associating with the Communist Party violated the First Amendment.[65] He noted that interpreting the statute to require a mens rea of knowledge or intent that an individual's protected speech and association would help an organization carry out its illegal terrorist actions could alleviate his concerns.[66]

C. INTERPRETING § 2339B POST-*HUMANITARIAN LAW PROJECT*

Although the Supreme Court in *HLP* asserted that it did not set out to solve any potential future cases,[67] similar cases soon arose. Many courts have since interpreted § 2339B incredibly expansively. It would seem, then, that Chief Justice Roberts' efforts to cabin *HLP* to its facts were unsuccessful.[68] By refusing

60. *See id.* at 26, 36.
61. *See id.* at 8.
62. *Id.* at 39 (emphasis added).
63. *See id.* at 39–41 (Breyer, J., dissenting).
64. *See id.* at 47.
65. *See id.* at 50–51; *see also* Scales v. United States, 367 U.S. 203, 228 (1961) (upholding conviction but explicitly noting that said conviction was based on the defendant's "active" participation in the group rather than mere membership); United States v. Robel, 389 U.S. 258, 261 (1967) (holding that a statute prohibiting Communists from working in defense industries violated the First Amendment right of association).
66. *See* Cole, *supra* note 54, at 155; *see also infra*, Part III.A.
67. *See Hum. L. Project*, 561 U.S. at 8.
68. *See id.* (explaining that "[w]e do not . . . address the resolution of more difficult cases that may arise under the statute in the future").

to draw a clear line between "independent advocacy" and "coordinated activity," the Court failed to instruct lower courts on how to interpret § 2339B, leaving room for appellate courts to broaden the scope of the statute dramatically.[69] Such expansive interpretations have likely had a chilling effect on otherwise constitutional speech—e.g., causing Zoom to fear criminal liability for providing a platform to Leila Khaled. Interpreting § 2339B more narrowly might lead to outcomes more consistent with the First Amendment.

This Section discusses three cases in which federal courts interpreted § 2339B even more expansively than the Supreme Court did in *HLP*. In *United States v. Mehanna*, the First Circuit concluded that a defendant's online Arabic-to-English translations, some of which were used to support al-Qaeda, were not protected speech.[70] The expansion of "material support" to include translations restricted pure speech in a way that *HLP*'s prohibition on providing expert advice or assistance to FTOs did not. In *United States v. Pugh*, the Second Circuit upheld a material support conviction based largely on an unsent letter in which the defendant expressed pro-terrorist sentiments.[71] Expanding the definition of "material support" to include private correspondence makes it hard to imagine *any* pro-FTO expression that would not be prohibited under § 2339B. Finally, in *Weiss v. National Westminster Bank, PLC*, the Second Circuit concluded that the mens rea requirement of § 2339B was satisfied by "deliberate indifference."[72] This means that a defendant need not even have positive knowledge that they provided material support to an FTO to face prosecution under § 2339B. This Section concludes by examining a singular case in which a federal court interpreted § 2339B narrowly: *Al-Haramain Islamic Foundation, Inc. v. United States Department of Treasury*. There, the Ninth Circuit resolved an as-applied challenge to an Executive Order that was similar to § 2339B in favor of the plaintiffs.[73]

To be clear, the cases discussed in this Section are not directly analogous to the Leila Khaled-Zoom case study. Rather, this

69. *See* Cole, *supra* note 54, at 155–56 (summarizing Justice Breyer's dissent).
70. *See* United States v. Mehanna, 735 F.3d 32, 48–49 (1st Cir. 2013).
71. *See* United States v. Pugh, 945 F.3d 9, 21–23 (2d Cir. 2019).
72. Weiss v. Nat'l Westminster Bank PLC, 768 F.3d 202, 206 (2d Cir. 2014).
73. *See* Al-Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 1001 (9th Cir. 2012) (demonstrating "hesitan[ce] to apply [*HLP*] to facts far beyond those at issue in that case").

Section provides a brief overview of how lower courts have applied § 2339B since the Supreme Court decided *HLP*. Each of the three cases described below expanded § 2339B and illustrates how *HLP* has led to a slow but steady creep in the direction of restricting various speech types of speech. The result is an environment in which entities like Zoom must worry about facing criminal prosecution for providing platforms to speakers like Khaled.

One of the most notable cases interpreting § 2339B in the post-*HLP* era is *United States v. Mehanna*.[74] Defendant Tarek Mehanna, an American citizen, was convicted of multiple material-support-to-terrorism charges.[75] These charges were based on two separate activities: first, Mehanna's travel to Yemen in search of a terrorist training camp, and second, his Arabic-to-English translations,[76] which he posted to the website at-Tibyan.[77] Some of Mehanna's translations "constituted al-Qa'ida-generated media and materials supportive of al-Qa'ida and/or jihad."[78]

Mehanna argued that his trip to Yemen constituted First Amendment-protected activity—namely, discussing and reading about politics and religion, and associating with particular individuals and groups.[79] The First Circuit disagreed. In light of comments that Mehanna had made to his co-conspirators, the court held that a reasonable jury could infer that Mehanna had a plan to travel abroad to join al-Qaeda and support its terrorist activities.[80]

Mehanna also argued that even if his trip to Yemen provided sufficient evidence to convict him of the material-support-to-terrorism charges, the convictions could not stand because they would have been predicated on his First Amendment-protected

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74. *See Mehanna*, 735 F.3d at 32.

75. *See id.* at 40.

76. *See* Dorlin A. Armijo, *Online Free Speech or Materially Supporting Terrorism?*, 18 SMU SCI. & TECH. L. REV. 37, 39 (2017).

77. *See Mehanna*, 735 F.3d at 41 (noting that at-Tibyan hosted "an online community for those sympathetic to al-Qaeda and Salafi-Jihadi perspectives"). For more information about at-Tibyan, see STAFF OF SENATE COMM. ON HOMELAND SEC. AND GOV'T AFFS., 110TH CONG., VIOLENT ISLAMIST EXTREMISM, THE INTERNET, AND THE HOMEGROWN TERRORIST THREAT 8 (Comm. Print 2008) (primarily the work of Senators Joseph Lieberman and Susan Collins).

78. *Mehanna*, 735 F.3d at 41.

79. *See id.* at 43.

80. *See id.* at 44. Mehanna's statements included his belief that jihad was "a duty upon a Muslim if he's capable of performing it," that such a duty includes committing violence, and that "America was at war with Islam." *Id.*

online translations.[81] In addressing this argument, the First Circuit emphasized that the role of the appellate court is to determine whether any errors occurred at trial.[82] The court relied on *HLP* to conclude that there was sufficient evidence for the jury to find that Mehanna's online translations were "in coordination with" al-Qaeda, despite the absence of evidence that Mehanna had ever communicated with anyone from al-Qaeda.[83] The court accepted the government's theory that the translations constituted a "service"—i.e., a type of material support that § 2339B covers.[84] And since the *HLP* Court noted "that 'service,' as material support, 'refers to concerted activity, not independent advocacy,'" such a "service" is not speech protected by the First Amendment.[85] The First Circuit agreed with the district court that the "coordination" question was one of fact for the jury to decide.[86] The court's choice to leave the question of "coordination" to a jury means that as long as a court views speech as a "service" and a jury can reasonably find coordination, the First Amendment does not protect that speech.

Another post-*HLP* case involving § 2339B is *United States v. Pugh*, "the first material support trial in the United States involving support for ISIS, or the Islamic State [of Iraq and Syria]."[87] Air Force veteran Tairod Pugh was arrested and charged with attempting to provide material support to ISIS.[88] Pugh had moved to the Middle East to work as a civilian contractor for various aerospace companies after completing his military service.[89] "While abroad, Pugh also met and married an Egyptian

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81. *See id.* at 47.

82. *See id.* The court explained that an appellate court "is not a sorting hat, divining which criminal defendants' stories fall into constitutionally protected and unprotected stacks. *Cf.* J.K. Rowling, Harry Potter and the Sorcerer's Stone 113–22 (1997)." *Id.*

83. *See id.* at 50; *see also* Armijo, *supra* note 76, at 45.

84. *See Mehanna,* 735 F.3d at 49; *see also* 18 U.S.C. § 2339A(b)(1); 18 U.S.C. § 2339B(g)(4) (defining "material support" to include "services").

85. *Mehanna*, 735 F.3d at 49 (quoting Holder v. Hum. L. Project, 561 U.S. 1, 23 (2010)).

86. *See id.* Mehanna's trip to Yemen was extremely damaging to his case, so this case does not provide much guidance to lower courts as to whether mere online translations, where the translator has not been found to have been in communication with a foreign terrorist organization, could be enough to convict an individual under § 2339B. *See also* Abigail M. Pierce, *#TweetingForTerrorism: First Amendment Implications in Using Proterrorist Tweets to Convict Under the Material Support Statute*, 24 WM. & MARY BILL RTS. J. 251, 265 (2015).

87. Benjamin Bricker, *Material Support for Terror and* Holder v. Humanitarian Law Project*: An Empirical Examination*, 42 S. ILL. U. L.J. 1, 13 (2017).

88. *See id.*

89. *See Pugh*, 945 F.3d at 15.

woman."[90] In 2015, Pugh flew from Cairo, Egypt, to Istanbul, Turkey, where he was denied entry and was subsequently returned to Cairo.[91] There, Egyptian and U.S. law enforcement officers discovered electronic media devices in his possession, many of which Pugh tried to destroy or succeeded in destroying.[92] Pugh was then returned to the United States and arrested.[93]

Pugh argued at trial that he had traveled to Turkey to seek employment; however, the jury found "that he was traveling to Turkey to cross the Syrian border in an effort to join ISIS."[94] This matters because Pugh's travel plans were relevant to the question of whether he had taken a substantial step toward violating § 2339B.[95] Prosecutors introduced many pieces of evidence, including Pugh's web browsing history, which contained "research into ISIS' control of border crossings between Turkey and Syria and its presence in both countries," as well as files indicating that he had viewed ISIS propaganda videos.[96] The most crucial piece of evidence (as far as the First Amendment was concerned), however, was a letter that Pugh had written to his wife, found on his laptop hard drive.[97] This letter stated in part, "I am a Mujahid . . . .[98] I will use the talents and skills given to me by Allah to establish and defend the Islamic State."[99] He continued, "I will escort you into Paradise and when you see the home paid for by my blood and your tears you will know it was all worth it . . . . I defied my friends and family to become a Muslim, now I will defy Muslims to be a Mujahid . . . . I am a sword against the oppressor and a shield for the oppressed."[100]

Pugh objected to the admission of the letter into evidence because he did not actually send it, suggesting that there was insufficient proof that he had intended to act on his statements.[101] He further argued that because his wife did not understand

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90. *Id.*
91. *See id.*
92. *See id.*
93. *See id.*
94. *See id.* at 20–21.
95. *See id.*
96. *See id.* at 20.
97. *See id.* at 16.
98. *Id.* The word "Mujahid" means "one who struggles" and, in the context of a jihad, "holy warrior." *See id.*
99. *See* Bricker, *supra* note 87, at 13.
100. *Pugh*, 945 F.3d at 16.
101. *See* Bricker, *supra* note 87, at 13.

English and the letter had been written in English, the letter constituted a mere thought.[102] Pugh's objections were to no avail, however, as the letter was introduced into evidence and Pugh was ultimately convicted.[103] The Second Circuit affirmed Pugh's conviction, reasoning that the evidence presented to the jury supported its conclusion that Pugh had taken a substantial step toward providing material support to ISIS.[104] Crucially, the jury heard testimony that an individual need not have secured assistance in Turkey prior to reaching Syria in order to have taken a substantial step toward providing material support to an FTO.[105]

The admission of the letter into evidence may suggest—depending on how one interprets the letter itself—that the line between material support to terrorism and mere private, potentially pro-terrorist ideation is thin.[106] Pugh's letter could serve as evidence of his state of mind to join ISIS, but the use of the letter at his trial is concerning because he never actually sent the letter.[107] Thus, it is possible that Pugh's conviction was based in part on private, unperformed support for ISIS.[108] The difference between unperformed thoughts and performed actions is significant for two reasons. First, *HLP* is clear that § 2339B criminalizes material support to terrorism, not mere membership in a terrorist organization.[109] Second, § 2339B criminalizes *material* support, not implicit or inchoate support.[110] Although there was no discussion of the First Amendment in *Pugh*, the prospect of a criminal defendant's conviction being predicated in part on his private thoughts is problematic in light of Chief Justice Roberts' explicit distinction between activity coordinated with a foreign terrorist organization and independent advocacy.[111]

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102. *See Pugh*, 945 F.3d at 16.
103. *See* Bricker, *supra* note 87, at 13.
104. *See Pugh*, 945 F.3d at 21.
105. *See id.*
106. *See* Bricker, *supra* note 87, at 13.
107. *See id.*
108. *See id.* at 13–14 ("Without the act of sending or transmitting the letter, there is a real risk that the evidence used in Pugh's terror conviction was based on his private—but unperformed—beliefs of support for the Islamic State.").
109. *See id.* at 14 ("[I]t is not simple membership in a terrorist group that is criminalized but rather the provision of material support for a terrorist group that is made illegal—a point made clear in *Holder*.").
110. *See id.* ("[I]t is not inchoate or unformed support, but rather material support that is criminalized.").
111. *See Hum. L. Project*, 561 U.S. at 31–32.

Some courts have concluded that individuals can be punished under § 2339B for supporting organizations that do not themselves engage in terrorist activities, thereby creating a chain of liability and imposing additional speech restrictions. In *Weiss v. National Westminster Bank, PLC*, "approximately 200 United States nationals (or their estates, survivors, or heirs) who were victims of terrorist attacks launched in Israel by Hamas,"[112] filed a civil suit against National Westminster Bank PLC (NatWest), alleging that NatWest had violated § 2339B, among other statutes.[113] The plaintiffs alleged that, by keeping bank accounts and executing funds transfers for the Palestine Relief and Development Fund (Interpal), NatWest was providing material support to terrorism in contravention of § 2339B.[114] Interpal itself was not a designated FTO; rather, the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) had declared it a "Specially Designated Global Terrorist group" because there were reports that it was a financial conduit for Hamas.[115] Thus, the plaintiffs were arguing that NatWest had violated § 2339B by providing material support to Hamas, a designated FTO, by allowing Interpal to be a banking customer.[116] The District Court for the Eastern District of New York granted NatWest's motion for summary judgment on the basis that NatWest did not have the scienter required to violate § 2339B.[117]

The Second Circuit reversed, noting that the District Court had incorrectly applied the mens rea requirement of § 2339A rather than that of § 2339B.[118] The appellate court, however, did not stop

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112. Hamas, which stands for Harakat al-Muqawama al-Islamiya ("Islamic Resistance Movement"), is a U.S.-designated foreign terrorist organization that carried out violent acts during the second intifada in the early 2000s. *See* Kali Robinson, *What is Hamas?*, COUNCIL ON FOREIGN RELS. (Oct. 31, 2023), https://www.cfr.org/backgrounder/what-hamas#:~:text=Hamas%2C%20an%20acronym%20for%20Harakat,to%20Islamic%20scholarship%20in%20Cairo [https://perma.cc/MWX8-BDKQ]. More recently, Hamas "launched a massive surprise attack on southern Israel" in October 2023. *See id.*

113. *See* Weiss v. Nat'l Westminster Bank, PLC, 768 F.3d 202, 204 (2d Cir. 2014); *see also* Tuley, *supra* note 26, at 598.

114. *See* Tuley, *supra* note 26, at 598.

115. *See id.* at 598–99.

116. *See id.* at 599.

117. *See* Weiss v. Nat'l Westminster Bank, PLC, 936 F. Supp. 2d 100, 114 (E.D.N.Y. 2013), *vacated and remanded*, 768 F.3d 202 (2d Cir. 2014).

118. *See* Tuley, *supra* note 26, at 599; *see also* 18 U.S.C. § 2339A (where one providing material support must "know[ ] or intend[ ] that [material support or resources] are to be used in preparation for, or in carrying out, a violation of section . . . 2332"); § 2339B (where one must "knowingly provide[ ] material support or resources to a foreign terrorist

there. The Second Circuit described the § 2339B mens rea requirement as "knowledge [on the part of the defendant] that an organization engages in terrorist activity if the defendant has actual knowledge of such activity or if the defendant exhibited deliberate indifference to whether the organization engages in such activity."[119] The court defined "deliberate indifference" as "know[ing] there is a *substantial probability* that the organization engages in terrorism but . . . does not care."[120] The court's adoption of this definition of "deliberate indifference"[121] means that an individual or entity in the Second Circuit might be subject to criminal liability for violating § 2339B even if it is unclear whether the organization receiving support is actually involved in terrorism.[122] This departs sharply from the scienter requirement of § 2339B; that law plainly says that "[w]hoever knowingly provides material support or resources to a foreign terrorist organization" shall face criminal punishment.[123]

Although many courts—as in *Mehanna*, *Pugh*, and *Weiss*—have taken an expansive view of § 2339B since *HLP*, not every court has done so. In *Al-Haramain Islamic Foundation, Inc. v. United States Department of Treasury*, the Ninth Circuit concluded that the rationales the *HLP* Court relied on were weak, as applied to facts of *Al-Haramain*. There, the Al-Haramain Islamic Foundation (AHIF) of Oregon challenged its status as a Specially Designated

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organization," but there is no requirement that one knows their support will be used in committing unlawful activity).

119. *Weiss*, 768 F.3d at 208 (citing Strauss v. Credit Lyonnais, S.A., 925 F. Supp. 2d 414, 428–29 (E.D.N.Y. 2013) and *In re* Terrorist Attacks on September 11, 2001, 740 F. Supp. 2d 494, 517 (S.D.N.Y. 2010)); *see also* Tuley, *supra* note 26, at 599.

120. *Weiss*, 768 F.3d at 208 (emphasis added) (quoting Boim v. Holy Land Found. for Relief and Dev., 549 F.3d 685, 693 (7th Cir. 2008)).

121. The court reasoned that the district "court gave inappropriate weight to the British authorities' [the Charity Commission, the Special Branch, and the Bank of England] decisions" "to condone NatWest's relationship with Interpal . . . . The Charity Commission had investigated whether Interpal had financed Hamas' political and violent militant activities, not whether Interpal provided any material support to Hamas, regardless of purpose . . . . The report made no findings regarding whether Interpal provided material support to Hamas for non-political and non-violent activities." *Id.* at 209–10. The court explained that the same observations applied to the Special Branch's conclusions. *See id.* at 210. The court explained that even had British authorities looked into whether Interpal had provided material support to Hamas and concluded that there were no connections between the two entities, such a conclusion "would not be inconsistent with liability under the United States statutes and could not justify summary judgment in the face of contrary evidence." *Id.*

122. *See* Tuley, *supra* note 26, at 599.

123. 18 U.S.C. § 2339B.

Global Terrorist group[124] by the U.S. Treasury Department.[125] Plaintiff Multicultural Association of Southern Oregon (MCASO), an organization seeking to provide services to AHIF-Oregon, joined the suit, arguing that Executive Order 13224,[126] which the Treasury Department had relied on to freeze AHIF's assets, violated the First Amendment.[127] The Ninth Circuit viewed this Executive Order as functionally equivalent to § 2339B, and therefore applied the *HLP* framework.[128]

The court pointed out a major difference between AHIF-Oregon and the organizations at issue in *HLP*: the distinction between domestic and foreign terrorist organizations.[129] In *HLP*, the organizations at issue were fully foreign.[130] In *Al-Haramain*, however, the court concluded that AHIF was primarily a domestic organization and that there was insufficient evidence to support an inference that MCASO's speech would provide aid to the international part of the AHIF organization.[131] The court went further. Judge Graber explained that the "fungibility of money" rationale that the Supreme Court had relied upon in *HLP* did not apply with the same force to this case because AHIF-Oregon's assets had been frozen by the Office of Foreign Assets Control (OFAC).[132] In *HLP*, by contrast, the organizations could easily access funds through foreign coffers, and "the record showed that the entities had used funds that had been raised for humanitarian purposes to pursue violent activities."[133] The court rejected OFAC's fungibility argument despite acknowledging that AHIF-

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124. *See* Exec. Order No. 13,224, 3 C.F.R. § 2 (2001) (prohibiting any person from making "any contribution of . . . services to or for the benefit of" designated entities).

125. *See Al-Haramain Islamic Found., Inc.* at 970.

126. *See* Exec. Order No. 13,224, *supra* note 124.

127. *See* Tuley, *supra* note 26, at 600. MCASO sought, *inter alia*, to "speak[ ] to the press, hold[ ] demonstrations, and contact[ ] the government" "in coordination with AHIF-Oregon." *Al-Haramain Islamic Found., Inc.*, 686 F.3d at 998.

128. *See Al-Haramain Islamic Found., Inc.*, 686 F.3d at 995 (stating the court was "guided" by the Supreme Court's decision in *HLP*).

129. *See id.* at 998 (discussing parties' respective arguments about whether AHIF-Oregon was a domestic or foreign organization).

130. *See id.* The court noted that AHIF-Oregon was domestic because it was "incorporated under Oregon law, [was] physically located in Oregon, [had] funds in domestic bank accounts, and . . . conducted most of its activities in the United States. But it also [had] ties to the larger AHIF organization because of the overlap between its founding members and those of foreign entities and because of its interactions and communications with AHIF-Saudi Arabia and other AHIF branches." *Id.*

131. *See id.* at 1001.

132. *See id.* at 999.

133. *Id.*

Oregon is a branch of the worldwide AHIF organization, which possesses unfrozen assets in foreign nations.[134] Although supporting a domestic branch could help the international organization at large, the court saw the possibility of freeing up assets as far more speculative and less direct than in *HLP*.[135]

Furthermore, the court "assume[d] that there is some small additional legitimization by being able, for instance, to state that a legitimate organization's public relations campaign is 'on behalf of' a designated entity or to coordinate efforts with the designated entity."[136] But the court reasoned that independent advocacy—which *HLP* had declared protected speech—could have the same legitimizing effect as coordinated advocacy.[137] The court conceded that the "legitimacy" rationale applied in this case, but described the grounds for *HLP*'s legitimacy rationale in general as "not particularly strong."[138] The court further noted that it was unclear whether the "rationale would apply to pure-speech activities like a coordinated press conference."[139] The court held that the pertinent part of Executive Order 13224 violated the First Amendment.[140]

The court then addressed the foreign policy concerns underlying the *HLP* decision.[141] The Ninth Circuit distinguished *Al-Haramain* by noting that in *HLP*, the government had a sworn affidavit describing how the foreign activities of the relevant entities affected the foreign relations of the United States.[142] Here, however, the government did not present any specific evidence as to what effect, if any, support to AHIF-Oregon would have on foreign relations. Additionally, AHIF-Oregon's status as an (at least partly) domestic organization ameliorated Chief Justice Roberts' "concern about foreign nations' perception of 'Americans furnishing material support to *foreign* groups.'"[143]

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134. *See id.*
135. *See id.*
136. *Id.* at 1000.
137. *See id.*
138. *Id.*
139. *Id.*
140. *See id.* at 1001.
141. *See id.* at 1000. Specifically, Chief Justice Roberts had stated that providing material support to foreign terrorist organizations perpetuates terrorism by harming "the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks." Holder v. Hum. L. Project, 561 U.S. 1, 32 (2010).
142. *See Al-Haramain Islamic Found., Inc.*, 686 F.3d at 1000.
143. *Id.* (quoting *Hum. L. Project*, 561 U.S. at 33 (emphasis in original)).

Al-Haramain is notable because it expressed reservations about applying *HLP* in a broad manner. Judge Graber described the Supreme Court's decision to refrain from closely grappling with the activities the plaintiffs proposed to engage in—providing education and training aimed at encouraging terrorist groups to engage in international affairs in a peaceful manner—as "punt[ing]."[144] The *Al-Haramain* court also went out of its way to note that Chief Justice Roberts had limited *HLP* to the facts of that case.[145]

This Part has aimed to provide an overview of § 2339B, the Supreme Court's interpretation of that statute in *HLP*, and key cases that arguably interpreted § 2339B more expansively than the Supreme Court did in *HLP*. This discussion sought to highlight the vast amount of speech that lacks First Amendment protection by virtue of its ostensible violation of § 2339B. Part II examines First Amendment jurisprudence more generally and describes how courts have applied § 2339B to social media.

II. INCREASINGLY EXPANSIVE INTERPRETATIONS OF § 2339B CONFLICT WITH FIRST AMENDMENT JURISPRUDENCE

Courts have construed *HLP* in ways that arguably broaden the conduct covered by § 2339B.[146] In doing so, they have narrowed the scope of First Amendment protection, notwithstanding Chief Justice Roberts' assurances to the contrary.[147] Section A of this Part discusses the relevant First Amendment jurisprudence generally, showing how far courts have strayed from the *Brandenburg* incitement standard.[148] Section B discusses how courts have undermined free speech in wartime throughout American history.[149] Section C applies the *HLP* framework to

144. *Id.* at 997.

145. *See id.* (citing *Hum. L. Project*, 561 U.S. at 8–9).

146. *See supra* Part I.C.

147. *See Hum. L. Project*, 561 U.S. at 39 (emphasizing that the Court's holding does not "say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny" and that "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").

148. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (holding that the government may not prohibit speech advocating for illegal conduct unless the speech is meant to incite imminent lawless action and is actually likely to induce such action).

149. *See generally* Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919) (arguing that it is perverse that the Espionage Act was passed at a time during which soldiers were sacrificing their lives for American freedoms); *see also* David

social media, distinguishing potential § 2339B prosecutions for social media posts from the nature of the Zoom incident involving Leila Khaled.

A. LOCATING *HUMANITARIAN LAW PROJECT* IN FIRST AMENDMENT JURISPRUDENCE

In the United States, the First Amendment, as interpreted by the Supreme Court, provides strong protections for incendiary speech that could lead to violence.[150] This section discusses some of the case law that has created these robust protections. As described in the previous Part, courts have interpreted the material support statute to restrict speech in various ways. It is worth bearing in mind the tension between the United States' generally highly speech-protective First Amendment doctrine and judicial interpretations of § 2339B.

One of the most important First Amendment cases is *Brandenburg v. Ohio*. This case involved Ku Klux Klan members who had been convicted of violating Ohio's criminal syndicalism statute, which prohibited "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism.'"[151] The Klansmen defendants had made inflammatory statements at a televised rally,[152] with one member proclaiming: "We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[153] He then said, "We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St.

Skover & Ronald Collins, *What is War? Reflections on Free Speech in 'Wartime'*, 36 RUTGERS L.J. 833 (2005) (pointing out that the Executive Branch has claimed authority to suppress speech under wartime powers even absent a formal declaration of war); Mark C. Rahdert, *The First Amendment and Media Rights During Wartime: Some Thoughts After Operation Desert Storm*, 36 VILL. L. REV. 1513 (1991) (focusing on the relationship between the military and the press during times of war).

150. *See* Emerson J. Sykes, *In Defense of* Brandenburg*: The ACLU and Incitement Doctrine in 1919, 1969, and 2019*, 85 BROOK. L. REV. 15, 17, 31 (2019).

151. KATHLEEN ANN RUANE, CONG. RSCH. SERV., R44626, THE ADVOCACY OF TERRORISM ON THE INTERNET: FREEDOM OF SPEECH ISSUES AND THE MATERIAL SUPPORT STATUTES 4 (2016) (quoting *Brandenburg*, 395 U.S. at 445), https://sgp.fas.org/crs/terror/R44626.pdf [https://perma.cc/N4ZT-3A92FN 16].

152. *See Brandenburg*, 395 U.S. at 445–46.

153. *Id.* at 445.

Augustine, Florida, the other group to march into Mississippi."[154] During the rally, Klan members carried weapons, burned a large wooden cross, and made derogatory statements about Black people and Jews.[155]

The Supreme Court ultimately overturned the Klan members' convictions,[156] reasoning that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action."[157] As such, the defendants' incendiary speech could not be punished under the First Amendment.[158] The Court held that when it comes to speech inciting violence or lawlessness, the government can prohibit such expression only when it "is directed to inciting or producing imminent lawless action and is likely to produce such action."[159] The Court struck down Ohio's criminal syndicalism statute because the statute did not distinguish between "mere abstract teaching" and "preparing a group for violent action," and was thus overly broad.[160]

Although *Brandenburg*'s incitement standard was understood as reflecting an expansive view of free speech, ambiguity remained with respect to what kind of incendiary speech the government could actually proscribe. For instance, the Supreme Court did not elaborate on what speech that is "likely to imminently produce" unlawful action might look like.[161] Moreover, the Court's opinion did not clarify how imminent the encouraged violence must be in order for its prohibition to be constitutional.[162]

The Court later provided some guidance in *Hess v. Indiana*.[163] There, the defendant was convicted of disorderly conduct after he yelled, "[we'll] take the [expletive] street later" at an anti-Vietnam war rally.[164] Noting that the defendant's statement advocated for illegal behavior at an undefined, uncertain future time and was not specifically directed toward a particular individual or group,

154. *Id.* at 446.
155. *See id.* at 445–46.
156. *See id.* at 449–50.
157. *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).
158. *See id.*
159. *Id.* at 447.
160. *Id.* at 448.
161. *See* RUANE, *supra* note 151, at 5 (citing Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 681 (2009)).
162. *See id.*
163. *See* Hess v. Indiana, 414 U.S. 105 (1973) (per curiam).
164. *Id.* at 107.

the Court overturned his conviction.[165] Some observers have since interpreted *Hess* to mean that to rise to the level of "imminent" under *Brandenburg*, violence must be likely to happen almost immediately.[166]

Only one other Supreme Court case has applied the *Brandenburg* incitement standard: *N.A.A.C.P. v. Claiborne Hardware Company*.[167] There, the Court "overturned civil judgments against black defendants who had organized a boycott of white-owned businesses in a Mississippi town in order to protest discrimination and advocate for racial equality."[168] One of the defendants had allegedly advocated the use of violence against people who did not wish to participate in the boycott.[169] The Supreme Court rejected the argument that the defendant's advocacy for violence rendered him liable for the economic losses caused by the boycott. Instead, the Court held that "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment."[170] The Court noted that the case would have been more challenging if immediate violence had followed the defendant's speech.[171] But since violence did not occur until weeks later, the speech was protected.[172] Taken together, *Brandenburg* and *Claiborne* therefore provide strong First Amendment protections to incendiary speech that could lead to violence.[173]

As is true of most rights, the right to free speech is not absolute.[174] The Supreme Court has placed limits on speech related to illegal acts, for instance. In *United States v. Williams*, the Supreme Court upheld a statute that prohibited "knowing

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165. *See id.* at 108–09.
166. *See* RUANE, *supra* note 151, at 5–6.
167. N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982).
168. RUANE, *supra* note 151, at 6.
169. *See Claiborne*, 458 U.S. at 926.
170. *Id.* at 927–28.
171. *See id.* at 928 ("If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however . . . the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech; the chancellor made no finding of any violence after the challenged 1969 speech.").
172. *See id.*
173. *See* Sykes, *supra* note 150, at 31.
174. *See* Ken White, *"The First Amendment Isn't Absolute." Sure, But So What?*, POPEHAT REP. (Dec. 24, 2022), https://popehat.substack.com/p/the-first-amendment-isnt-absolute [https://perma.cc/J73Z-TD54].

offers to provide or requests to receive child pornography."[175] The Court explained that there is a difference between actually trying to engage in illegal activity and the mere abstract advocacy of illegal conduct.[176] In *New York v. Ferber*, the Supreme Court had held that child pornography itself was not protected speech.[177] The Court in *Williams* simply extended that precedent.[178] The Court did not believe the statute raised any problems "regarding permissible restrictions on the pure advocacy of violence or lawlessness"; thus, *Brandenburg*'s scope remains uncertain.[179]

The Supreme Court's decision in *HLP* and lower courts' applications of that decision in the cases discussed in Part I diverge from the *Brandenburg* incitement standard insofar as speech that would ordinarily be protected under *Brandenburg* (i.e., attempting to educate FTOs on how to engage in international affairs peaceably) is in fact not protected due to the Court's interpretation of the material support statute. One might counter that *Brandenburg* and *HLP* are consistent because *HLP* interpreted § 2339B to restrict fungible speech that legitimizes terrorist organizations—a reasonable objective for Congress to pursue. But even if the two cases are logically consistent, *HLP* undermines *Brandenburg*'s spirit by allowing for a significant amount of political speech to lack First Amendment protection based on the idea that restricting such speech will keep Americans safe. One should be highly skeptical when the government advances speech restrictions using such reasoning.

HLP also arguably departs from the Supreme Court's typical reluctance to expand unprotected speech categories. In *United States v. Stevens*, the Court struck down 18 U.S.C. § 48, which "establishe[d] a criminal penalty of up to five years in prison for anyone who knowingly 'creates, sells, or possesses a depiction of animal cruelty,' if done 'for commercial gain' in interstate or foreign commerce."[180] In that case, the government argued that "depictions of animal cruelty" should be deemed to be a category of

175. RUANE, *supra* note 151, at 7 (citing United States v. Williams, 553 U.S. 285 (2008)).
176. *See Williams*, 553 U.S. at 299.
177. *See* RUANE, *supra* note 151, at 7 (citing New York v. Ferber, 458 U.S. 747, 764 (1982)).
178. *See id.*
179. *Id.*
180. United States v. Stevens, 559 U.S. 460, 464–65 (2010) (quoting 18 U.S.C. § 48(a)).

speech that does not receive First Amendment protection.[181] The government also maintained that "whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."[182] The Court rejected this "startling and dangerous" proposed test, saying that the First Amendment protects more than just "categories of speech that survive an ad hoc balancing of relative social costs and benefits."[183] Rather, the Court explained, "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."[184]

Stevens and *HLP* were decided in the same term, and Chief Justice Roberts wrote both opinions. Yet the Court in *HLP* seemed to allow for what the Court in *Stevens* rejected: using an ad hoc social cost-benefit test to justify speech restrictions. Again, one might say that there is no tension between these two cases because *HLP* does not explicitly state that § 2339B constitutes a new category of speech undeserving of First Amendment protection. But § 2339B and *HLP* arguably do, in fact, create a new unprotected category of speech. *HLP* held that § 2339B prohibits anyone from teaching FTOs how to engage in international affairs peaceably. This could mean that First Amendment protection does not extend to a new category of speech: speech that might strengthen, aid, or legitimize FTOs.

B. FREE SPEECH DURING WARTIME

Brandenburg and its progeny suggest that speech advocating for illegal action will generally be protected unless it is intended to produce violent action and violent action is imminently likely to

181. *Id.* at 469. Such categories of speech include "obscenity, Roth v. United States, 354 U.S. 476, 483 (1957), defamation, Beauharnais v. Illinois, 343 U.S. 250, 254–255 (1952), fraud, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976), incitement, Brandenburg v. Ohio, 395 U.S. 444, 447–449 (1969) (per curiam), and speech integral to criminal conduct, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)[. These] are 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.' Chaplinsky v. New Hampshire, 315 U.S. 568, 571–572 (1942)." *Id.* at 468–69.

182. *See id*. at 470.

183. *Id.* The Court also explained that there is no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Id*. at 472.

184. *Id.* at 470.

result, or the speech itself constitutes illegal activity.[185] Free speech during wartime, however, is often a different story. The government has a heightened interest in prohibiting speech when it would derail its efforts to win a war.[186] As the following section examines the history of the First Amendment during wartime, consider the War on Terror: a war that began shortly after September 11, 2001, and continues to this day.[187]

In 1798, Congress passed the Sedition Act, "which prohibited 'the publication of false, scandalous, and malicious writing against the [g]overnment . . . with intent to defame [it] . . . or to excite against [it] the hatred of the good people of the United States. . . .'"[188] A major purpose of the Act was to suppress support for Thomas Jefferson during the 1800 presidential race.[189] The Act was presented to the public, however, as a way to protect American citizens "in preparation for an anticipated war with France."[190] Several lower courts upheld the Sedition Act, but the Supreme Court never reviewed the Act.[191] President Jefferson allowed the Act to expire in 1800.[192] Nevertheless, the Sedition Act was only the beginning of thinly-veiled government efforts to curtail speech.

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185. *See generally* Sykes, *supra* note 150 (explaining the importance of *Brandenburg* and *Claiborne* for the success of social movements that challenge state and corporate power).

186. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (explaining that a government may "prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops"); *see also* Byron Price, *Governmental Censorship in War-Time*, 36 AM. POL. SCI. REV. 837, 838 (1942) (arguing that censorship is essential in wartime because "it goes a long way toward keeping the enemy from knowing what we are doing on the home front" and ensures that the enemy does not learn about the movements of troops or the production of weapons).

187. *See* Mark Landler, *20 Years on, the War on Terror Grinds Along, with No End in Sight*, N.Y. TIMES (Sept. 10, 2021), https://www.nytimes.com/2021/09/10/world/europe/war-on-terror-bush-biden-qaeda.html [https://perma.cc/C9K7-F4N5].

188. Pierce, *supra* note 86, at 256.

189. *See The Alien and Sedition Laws*, THOMAS JEFFERSON HERITAGE SOC'Y, https://www.tjheritage.org/alien-sedition-laws#:~:text=Jefferson%20saw%20the%20sedition%20bill,nullify%20an%20act%20of%20Congress [https://perma.cc/98X9-KWYB].

190. *See* Pierce, *supra* note 86, at 256; *see also Alien and Sedition Acts (1798)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/alien-and-sedition-acts [https://perma.cc/CSZ3-44J4].

191. *See* Pierce, *supra* note 86, at 256.

192. *See The Alien and Sedition Acts (1798)*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/the-alien-and-sedition-acts-1798 [https://perma.cc/35B4-ACDX].

In 1917 Congress passed the Espionage Act,[193] which prohibited "caus[ing] or attempt[ing] to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces."[194] Unlike prosecutions under the Sedition Act, prosecutions under the Espionage Act occasionally reached the Supreme Court. In *Schenck v. United States*, Charles Schenck and Elizabeth Baer, leaders of the Socialist Party, had been indicted for violating the Espionage Act by "sending literature to recently conscripted soldiers suggesting that the draft was a form of involuntary servitude that violated the Thirteenth Amendment."[195] Writing for the Court, Justice Holmes acknowledged that Schenck and Baer's activities would have received First Amendment protection "in many places and in ordinary times," but that whether speech is protected depends on the circumstances under which it is made.[196] Justice Holmes famously wrote that even the most expansive view "of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[197] The Court stated that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[198]

Just a week after the Court decided *Schenck*, it considered *Debs v. United States*.[199] There, the Court upheld the conviction of famed socialist leader Eugene V. Debs under the Sedition Act of 1918[200] for giving a speech outside of a prison in which three fellow

193. *See Espionage Act of 1917 and Sedition Act of 1918 (1917–1918)*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/espionage-act-of-1917-and-sedition-act-of-1918-1917-1918 [https://perma.cc/4S6T-R56H].

194. *Id.*

195. David Asp, Schenck v. United States (1919), FREE SPEECH CTR., https://www.mtsu.edu/first-amendment/article/193/schenck-v-united-states [https://perma.cc/Y4YX-BVHL]; *see also* Schenck v. United States, 249 U.S. 47, 50 (1919).

196. *See Schenck*, 249 U.S. at 52. Justice Holmes further noted, "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Id.*

197. *Id.*; *see also* Jeff Kosseff, *America's Favorite Flimsy Pretext for Limiting Free Speech*, ATLANTIC (Jan. 4, 2022), https://www.theatlantic.com/ideas/archive/2022/01/shouting-fire-crowded-theater-speech-regulation/621151/ [https://perma.cc/VHJ6-FTW6] (noting that many who aim to restrict speech to this day accuse opponents of metaphorically "shouting 'fire' in a crowded theater").

198. *Schenck*, 249 U.S. at 52.

199. Debs v. United States, 249 U.S. 211 (1919).

200. *See* Christina L. Boyd, *Sedition Act of 1918*, FREE SPEECH CTR., https://firstamendment.mtsu.edu/article/sedition-act-of-1918 [https://perma.cc/H4BA-PZ2M].

Socialists were being held following their convictions under the Act.[201] He stated that the prisoners "were paying the price for 'seeking to pave the way to better conditions for all mankind.'"[202] Despite taking pains to ensure that he did not advocate any illegal activity, Debs was arrested and convicted of obstructing military recruitment and enlistment.[203] In light of *Schneck*, Justice Holmes rejected Debs' First Amendment challenge.[204]

On the same day it decided *Debs*, the Court upheld the conviction of Jacob Frohwerk for conspiring to violate the Espionage Act by penning articles published in a Missouri newspaper opposing the United States' involvement in World War I.[205] The Court also upheld his convictions for using the articles' contents in "attempts to cause disloyalty, mutiny, and refusal of duty" in the United States military."[206] Justice Holmes noted that the case was similar to *Schenck*,[207] but acknowledged that "[w]e do not lose our right to condemn either measures or men because the country is at war."[208] Although this case does not offer robust First Amendment protection, it is worth noting that Holmes did not allow the presence of wartime to confer unfettered power on the government to restrict speech.

The Supreme Court largely upheld efforts to suppress speech during World War I. In subsequent years, however, the Court began to show skepticism toward regulations of speech that purported to ensure the nation's survival. A major voice that led to a change in the Supreme Court's treatment of the First Amendment during wartime was that of Justice Brandeis.[209] In

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201. *See* Douglas C. Dow, Debs v. United States (1919), FREE SPEECH CTR., https://mtsu.edu/first-amendment/article/289/debs-v-united-states [https://perma.cc/F5RU-3FXY].

202. *Id.*

203. *See id.*

204. *See Debs*, 249 U.S. at 215 ("The chief defences upon which the defendant seemed willing to rely were the denial that we have dealt with and that based upon the First Amendment to the Constitution, disposed of in *Schenck*.").

205. *See* Richard Parker, Frohwerk v. United States (1919), FREE SPEECH CTR., https://mtsu.edu/first-amendment/article/460/frohwerk-v-united-states [https://perma.cc/XWR6-ERKY] (citing Frohwerk v. United States, 249 U.S. 204 (1919)).

206. *Id.* (quoting *Frohwerk*, 249 U.S. at 205).

207. *See id.*

208. *Id.* (quoting *Frohwerk*, 249 U.S. at 208).

209. *See generally* Frederick M. Lawrence, *The Continuing Vitality of Louis D. Brandeis's Free Expression Jurisprudence*, 33 TOURO L. REV. 131 (2017) (asserting that Brandeis' writing is uniquely fresh to the modern reader because he understood that theory and practice are mutually reinforcing, demonstrated care for third parties to litigation, and displayed moral courage from the bench).

Whitney v. California,[210] Charlotte Anita Whitney, an officer of the Communist Labor Party (CLP) in California, was convicted of criminal syndicalism because she had helped form the CLP.[211] California argued that the CLP had advocated overthrowing the U.S. government.[212] Writing for the Court, Justice Sanford held that the CLP's speech was not protected by the First Amendment because the organization's speech was "inimical to the public welfare, tending to incite crime, disturb the peace or endanger the foundations of organized government and threaten its overthrow."[213] In concurrence, Justice Brandeis noted that the law essentially created a scheme of guilt-by-association that the Founders would have opposed.[214] Brandeis argued that "free speech . . . . is essential to democracy because citizens are obliged to participate in government and they can do so without fear only if their right to criticize government is protected."[215] This argument eventually gained traction, as evidenced by a shift in the Court's approach to criminal syndicalism statutes and other laws adverse to free speech.

Approximately twenty years after the conclusion of World War I, the Supreme Court reconsidered the constitutionality of criminal syndicalism laws in *Herndon v. Lowry*.[216] Angelo Herndon was a member of the Communist Party who was convicted under Georgia's criminal syndicalism statute for possessing communist publications.[217] Writing for a 5–4 majority, Justice Owen Roberts noted that Georgia seemed to be penalizing Herndon in part because he was sharing materials about unemployment and emergency relief.[218] The Court held that "mak[ing] membership in the [Communist] party and solicit[ing] . . . members for that party

210. Whitney v. California, 274 U.S. 357 (1927).

211. *See id.* at 365–66; *see also* James R. Belpedio, Whitney v. California (1927), FREE SPEECH CTR., https://www.mtsu.edu/first-amendment/article/263/whitney-v-california [https://perma.cc/NJ3D-KR9N].

212. *See id.*

213. *Whitney*, 274 U.S. at 371.

214. *See* Belpedio, *supra* note 211.

215. *Id.*

216. Herndon v. Lowry, 301 U.S. 242 (1937).

217. *See* John R. Vile, Herndon v. Lowry (1937), FREE SPEECH CTR., https://www.mtsu.edu/first-amendment/article/268/herndon-v-lowry [https://perma.cc/8638-Q5K5].

218. *See id.* ("The state appeared to be penalizing Herndon in part because he was spreading literature having to do with unemployment and emergency relief.").

a criminal offense, punishable by death, in the discretion of a jury, is an unwarranted invasion of the right of freedom of speech."[219]

A similar pattern—retraction of First Amendment protection, followed by reconsideration and restoration of such protection—emerged during the Cold War. In *Dennis v. United States*,[220] the Supreme Court upheld the Roosevelt administration's prosecutions under the Smith Act of 1940, which outlawed "knowingly or willfully advocat[ing] . . . or teach[ing] the . . . propriety of overthrowing or destroying any government in the United States by force or violence" and being or becoming a member of a group that sought to do so.[221] But as the Red Scare began to subside in the late 1950s,[222] the Court began to better protect First Amendment rights.[223]

Historically, federal courts have been more likely to uphold government action if war is the purported justification.[224]

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219. *Herndon*, 301 U.S. at 261.

220. Dennis v. United States, 341 U.S. 494 (1951).

221. *See id.* at 496; *see also* Marcie K. Cowley, *Red Scare*, FREE SPEECH CTR., https://firstamendment.mtsu.edu/article/red-scare/ [https://perma.cc/XTL3-F7TQ].

222. *See Timeline of the Cold War and Red Scare*, CTR. FOR THE STUDY OF THE PAC. NORTHWEST, UNIV. OF WASH., https://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20Materials/Curriculum%20Packets/Cold%20War%20&%20Red%20Scare/III.html [https://perma.cc/4BMW-CUBC].

223. *See* Yates v. United States, 354 U.S. 298, 318 (1957) (holding that advocating mere abstract doctrine is protected by the First Amendment, thereby requiring prosecutors in Smith Act cases to demonstrate that defendants advocated illegal conduct); Scales v. United States, 367 U.S. 203, 209–10 (1961) (upholding convictions under the clause of the Smith Act prohibiting membership in the Communist party but only if the defendant played an "active and purposive" role in the Communist Party and was aware that the organization advocated illegal acts); United States v. Robel, 389 U.S. 258, 261 (1967) (upholding dismissal of indictment of a member of the Communist Party under the Subversive Activities Control Act based on a violation of the First Amendment right of association); *see also* Cowley, *supra* note 221.

224. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 53 (1919) (upholding conviction under the Espionage Act of 1917); Debs v. United States, 249 U.S. 211, 216–17 (1919) (upholding conviction under the Espionage Act despite Debs avoiding advocating illegal activity); Sugarman v. United States, 249 U.S. 182, 185 (1919) (upholding a conviction under the Espionage Act, noting that free speech "does not mean that a man may say whatever he pleases without the possibility of being called to account for it"); Gilbert v. Minnesota, 254 U.S. 325, 333 (1920) (upholding conviction under Minnesota sedition statute); Hirabayashi v. United States, 320 U.S. 81, 105 (1943) (upholding conviction of Japanese American for violating President Roosevelt's Executive Orders sanctioning the exclusion of Japanese Americans from certain areas and imposing curfews and potential relocations on Japanese Americans); Korematsu v. United States, 323 U.S 214, 223–24 (1944) (upholding conviction of violating evacuation order); Block v. Hirsh, 256 U.S. 135, 156 (1921) (upholding District of Columbia rent control law that limited rent increases and allowed tenants to continue to inhabit their occupancies as long as they paid rent and abided by certain other conditions); Bowles v. Willingham, 321 U.S 503, 519 (1944) (sustaining

Herndon, by contrast—which was protective of the defendants' free speech rights—was decided during peacetime.[225] Consider then the Global War on Terror, which began shortly after the terrorist attacks on September 11, 2001.[226] On September 20, 2001, President George W. Bush declared that "[o]ur war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."[227] Since 9/11, terrorist groups have proliferated around the globe.[228] The War on Terror is ongoing[229] and is unlike any war that the United States has ever fought.[230] Just as free speech suffered during the various wars that occurred throughout the twentieth century, it likewise suffers today as a result of the War on Terror.

The Supreme Court's decision in *HLP* demonstrates that war continues to pose a threat to free speech. The material support statutes were passed during the 1990s, when concern over terrorism in the United States was rapidly increasing. The War on Terror enabled the government to amend and expand these laws. Moreover, the Court's decision in *HLP* gave speech restrictions justified by the War on Terror a stamp of judicial approval. Furthermore, subsequent cases applying *HLP* have arguably read the material support statutes even more broadly than the Court did in *HLP*.

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rental ceiling that had been established absent a prior hearing because national security precluded delay).

225. *See World War I*, HISTORY (Aug. 11, 2023), https://www.history.com/topics/world-war-i/world-war-i-history [https://perma.cc/3GYB-J74G].

226. *See 9/11 Frequently Asked Questions*, 9/11 MEM'L & MUSEUM, https://www.911memorial.org/911-faqs [https://perma.cc/F27F-E7NC]; *see also* Ivo H. Daalder & James M. Lindsay, *Nasty, Brutish and Long: America's War on Terrorism*, BROOKINGS INST. (Dec. 1, 2001), https://www.brookings.edu/articles/nasty-brutish-and-long-americas-war-on-terrorism/ [https://perma.cc/33L3-WM28].

227. *Global War on Terror*, GEORGE W. BUSH PRESIDENTIAL LIBR. AND MUSEUM, https://www.georgewbushlibrary.gov/research/topic-guides/global-war-terror [https://perma.cc/F5FA-GDT4].

228. *See Threats to the Homeland: Evaluating the Landscape 20 Years after 9/11: Hearing Before the S. Homeland Security and Gov't Affairs Comm.*, 117th Cong. (2021) (statement of Christopher Wray, Director, Federal Bureau of Investigation), https://www.hsgac.senate.gov/hearings/threats-to-the-homeland-evaluating-the-landscape-20-years-after-9-11/ [https://perma.cc/Z8YJ-BQST].

229. *See, e.g.*, Landler, *supra* note 187.

230. *See generally* David H. Dunn, *Bush, 11 September and the Conflicting Strategies of the 'War on Terrorism*,' 16 IRISH STUD. INT'L AFFS. 11, 11–12 (2005) (arguing that there are multiple strategies the United States government has employed that have characterized the "remarkably dynamic nature" of the War on Terror).

It has now been over two decades since the United States launched the War on Terror. Case law during this time has shown how far restrictions on liberty can reach when the government uses wartime to justify them. The uniqueness of both terrorism itself and the antiterrorist strategies that governments use to respond to terrorism call for a rule that recognizes the threats posed by such strategies to free speech. The next time a material support statute reaches the Supreme Court, the Court should limit *HLP*—as *Brandenburg* limited *Schenck*—by requiring the government to show evidence of how the restriction on liberty at issue has actually furthered the war effort. Or, alternatively, in an as-applied challenge to § 2339B, the Court should require the government to show that the activity in which a particular plaintiff seeks to engage has undermined prior war efforts.

The Supreme Court should also reexamine the "legitimacy" rationale it used in *HLP*. As Justice Breyer noted in dissent, the majority's legitimacy rationale arguably contradicted the Court's Red Scare precedents.[231] Any form of speech related to or associated with a particular group could "legitimate" that group.[232] It is therefore hard to draw a line between speech that legitimates an organization and speech that does not.[233] Consider this difficulty in the context of Zoom and Khaled. Would Zoom "legitimate" Khaled merely by allowing her to appear on its platform? Or would a court require that Zoom praise Khaled or make some other positive statement about her or the FTOs to which she belongs? And if Zoom allowed Khaled to speak on its platform but included a statement condemning her views and associations with FTOs, would that undermine the legitimacy argument? These uncertainties counsel in favor of correcting judicial interpretations of the material support statute by repudiating the legitimacy rationale.

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231. *See* Holder v. Hum. L. Project, 561 U.S. at 50–51 (2010); *see also* Scales v. United States, 367 U.S. 203, 223 (1961) (upholding conviction but explicitly noting that said conviction was based on the defendant's "active" participation in the group rather than mere membership), and United States v. Robel, 389 U.S. 258, 261 (1967) (holding that a statute prohibiting Communists from working in defense industries violated the First Amendment right of association).

232. *See Hum. L. Project*, 561 U.S. at 49.

233. *See id.*

C. MATERIAL SUPPORT AND ZOOM

Returning to the Khaled-Zoom controversy, it is useful to look first at § 2339B as it relates to an entity similar to Zoom: social media. The contents of certain social media posts may well be sufficient to convict under § 2339B.[234] For the government to prosecute an individual for their posts under § 2339B, the government would have to prove: "(1) the [post](s) evidenced support for a foreign terrorist organization; (2) the person who [post]ed the support knew that the organization was a foreign terrorist organization; and (3) the [post](s) were formed in coordination with that foreign terrorist organization."[235] The hardest element to prove in many cases would be that relevant social media posts were made "in coordination" with an FTO.[236] The cases that have followed *HLP* have typically included powerful evidence incriminating defendants, such as the defendant traveling to a foreign country to visit a terrorist training camp.[237] Thus, it is hard to say whether a jury would convict an individual for violating § 2339B if that person's social media posts were the sole evidence against them.[238] One could argue that a standalone post, for example, would constitute mere "independent advocacy"; however, the coordinated activity versus independent advocacy distinction remains largely undefined.[239]

The Khaled incident and the material support prosecution of an individual for their social media posts differ in that Zoom itself did not create content that could be seen as providing material support.[240] It is a stretch to say that by merely allowing an individual affiliated with an FTO to speak on its platform, Zoom

234. *See* Pierce, *supra* note 86, at 264–66 (explaining that, because the jury's verdict rested on evidence related to Mehanna's trip to Yemen and his mere online translations, one does not know whether the online translations alone would suffice to convict a defendant under the material support to terrorism statute).

235. *See id.* at 266.

236. *See id.* at 267.

237. *See* United States v. Mehanna, 735 F.3d 32, 41 (1st Cir. 2013) ("[T]he defendant . . . continued on to Yemen in search of a terrorist training camp.").

238. *See* Pierce, *supra* note 86, at 267.

239. *See id.* (explaining that one could argue that a post might be "in coordination with" a terrorist group if the person posting had some other tangential association to the group (e.g., the person posting knew someone who belonged to the terrorist group)).

240. *See* Steinbaugh, *supra* note 2 (noting that there was no indication Khaled was receiving payment for her appearance, suggesting the only "support" that could be serving the terrorist group was speech); *see also* Pierce, *supra* note 86 (discussing the required elements of a material support prosecution for social media posts).

met the first element of § 2339B (allowing Khaled to speak evidenced support to an FTO) or the third element (allowing Khaled to appear on Zoom amounted to coordinating advocacy with an FTO).[241]

Another distinction between the Khaled incident and other material support prosecutions is that the planned Khaled appearance apparently had nothing to do with the FTO to which she belongs. Rather, the event was called, "Whose Narratives? Gender, Justice, & Resistance: A Conversation with Leila Khaled."[242] Zoom would have faced starker legal considerations had the event been aimed at encouraging people to join the PFLP. But it nevertheless appears as though Zoom feared criminal liability due to Khaled's mere membership in the PFLP.[243]

III. POTENTIAL SOLUTIONS

Congress and the courts must protect Americans' First Amendment rights. It is easy to critique *HLP* and its progeny; it is more difficult to identify solutions that would alleviate the First Amendment concerns these cases have created.[244] In Part III of this Note, Section A suggests that Congress change §'the mens rea requirement in § 2339B. Specifically, the government should clarify that speech that constitutes material support, but is otherwise constitutionally protected, would not subject the speaker to criminal liability. Alternatively, the government should at least

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241. *See* Holder v. Hum. L. Project, 561 U.S. 1, 37 (2010) (holding that the First Amendment does not protect plaintiffs' aim to "train" members of FTOs because they could use training to, among other things, prepare for new attacks). This was not at issue, however, in the Khaled case. The First Amendment also did not protect plaintiffs' attempt to teach FTOs how to acquire "relief," which might include monetary aid. Khaled's speech, however, in no way would have provided monetary aid. *See also id.* at 39 ("[W]e in no way suggest a regulation of *independent* speech would pass constitutional muster. . . ." (emphasis added)).

242. *Online Event: Whose Narratives? Gender, Justice, & Resistance: A Conversation with Leila Khaled*, SAMIDOUN PALESTINIAN PRISONER SOLIDARITY NETWORK (Sept. 23, 2020), https://samidoun.net/event/online-event-whose-narratives-gender-justice-resistance-a-conversation-with-leila-khaled/ [https://perma.cc/27E5-NL9F].

243. Zoom head of trust and safety Josh Parecki asserts that Zoom had reason to believe that allowing Khaled to speak on its platform might violate material support laws because in a previous event she had strayed from the topic of the webinar and made comments that one could interpret as calling for violence. *See* The Lawfare Podcast, *How Zoom Thinks About Content Moderation*, LAWFARE, at 54:05 (Dec. 2, 2021), https://www.lawfareblog.com/lawfare-podcast-how-zoom-thinks-about-content-moderation [https://perma.cc/4VFP-LCEV].

244. *See supra* Parts I and II.

be required to prove that a defendant knew that any alleged support they provided to an FTO would benefit that FTO's unlawful aims. Section B recommends that Congress grant immunity from criminal prosecution under § 2339B to technology platforms like Zoom. Section C urges the Supreme Court to grant certiorari in a § 2339B case involving the First Amendment. Section D asks whether it is desirable that *HLP* has created an environment where Zoom can control academic discourse.[245] Section D also responds to potential skepticism of the solutions that this Note proposes, as well as objections to the notion that a problem even exists.

A. AMENDING § 2339B

One way to fix the First Amendment problem raised by *HLP*—the chilling of constitutionally-protected speech that does not constitute "material support to terrorism"—would be for Congress to clarify that speech that constitutes material support but is otherwise constitutionally protected would not subject the speaker to criminal liability. In other words, the term "material support" should exclude pure speech unless it rises to the level of incitement that the Court laid out in *Brandenburg*. A hypothetical might be illustrative. Imagine a speaker who says to a member of one gang (Gang A) that the gang should execute an attack on a rival gang (Gang B) at some point in the future. The speaker likewise expresses support for Gang A at a city council meeting. The speaker also trains members of Gang A in community service so that they can bolster the gang's public image. All of these speech actions are protected under *Brandenburg*. However, if the speaker contributed funds to Gang A so that its members could obtain guns to carry out their violent activities, solicited individuals to join the group, or made a statement that was reasonably likely to incite imminent violence, that speaker would be subject to criminal liability under this modified version of § 2339B.

Of course, one might contend that limiting § 2339B to *Brandenburg* incitement would harm U.S. national security interests. If the First Amendment protects the right to train an FTO to engage in activities that will improve its public image, one might argue that "legitimates" the FTO and thereby undermines

245. *See* U.C. Berkeley, *supra* note 12.

the government's' efforts to combat terrorism. It is hard to dispute this claim, given how easy it is to say that any speech intended to benefit an organization "legitimates" that organization. The fact that negative consequences might result from certain speech, however, does not justify suppressing that speech. True, people might feel safer if all incendiary speech were proscribed. Perhaps people would even *be* safer if the *Brandenburg* incitement standard did not exist. But in the balance between protecting the right to free speech and preventing the negative consequences that might flow from said speech, the Supreme Court has interpreted the First Amendment to tilt heavily in favor of protecting speech. Although foreign policy concerns might weigh in favor of restricting certain speech, limiting § 2339B to *Brandenburg* incitement and non-speech activities sufficiently accounts for those concerns by maintaining a prohibition of genuinely *material* support to terrorism. The foreign policy benefits that *might* result from criminalizing speech that could potentially legitimate an FTO are too attenuated to justify the existing speech-restrictive legal framework.

Congress could also amend § 2339B by altering the mens rea to require knowledge that an individual's material support furthered the FTO's engagement in violent activity.[246] Justice Breyer argued in his *HLP* dissent that the statute's "requirement that the defendant *knew* the support was material can be read to require the Government to show that the defendant knew that the consequences of his acts had a significant likelihood of furthering the organization's terrorist, not just its lawful, aims."[247] Although this argument has merit, the majority did not read the statute this way.[248] Congress should amend § 2339B such that a defendant must know not only that they are supporting an FTO, but also that such aid will assist the FTO's violent activity. Congress should amend the statutory text to require that, in addition to "knowledge that the organization is a designated terrorist organization . . .

246. *See* CHARLES DOYLE, CONG. RSCH. SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. § 2339A AND § 2339B 17 (2023) (noting that in *HLP* the Court held that "the government does not have to demonstrate that the defendant 'intended to further a foreign terrorist organization's illegal activities'").

247. Holder v. Hum. L. Project, 561 U.S. 1, 58 (2010) (Breyer, J., dissenting) (emphasis in original).

248. *See id.* at 16–17 (stating that Congress had chosen to require a mental state of "knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities," in writing § 2339B).

that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism,"[249] the defendant also had knowledge that the support it provided would likely further the terrorist organization's unlawful aims. The phrase "unlawful aims" is intended to exclude a terrorist organization's lawful activities (e.g., engaging in international affairs peacefully).

Amending § 2339B in this way would generate more pro-speech outcomes in material support prosecutions. Requiring a mens rea for the particular use to which the support is put would protect humanitarian groups from liability for providing education and training aimed at encouraging terrorist groups to engage in international affairs in a peaceful manner.[250] If Congress were to revise § 2339B in this way, it also would be hard to argue that Zoom would have violated the statute had Khaled appeared on its platform for the SFSU event. This is because implementing this change would limit the conduct that § 2339B covers to much more specific acts than the broad range of behavior it has been applied to since *HLP*.[251]

One might also argue that amending § 2339B could put the United States at increased risk of terrorist attacks by making the transmission of terrorist propaganda easier. Many commentators have noted that terrorist groups have used social media to recruit young Americans to their causes.[252] This was not an issue,

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249. 18 U.S.C. § 2339B.

250. *See Supreme Court Rules "Material Support" Law Can Stand*, AM. C.L. UNION (June 21, 2010), https://www.aclu.org/press-releases/supreme-court-rules-material-support-law-can-stand [https://perma.cc/Y9DN-F8SP] (stating that the decision in *HLP* "thwarts the efforts of human rights organizations to persuade violent actors to renounce violence or cease their human rights abuses and jeopardizes the provision of aid and disaster relief in conflict zones controlled by designated groups").

251. *See* United States v. Mehanna, 735 F.3d 32 (1st Cir. 2013) (applying § 2339B to arguably protected online speech); *see also* United States v. Pugh, 162 F. Supp. 3d 97 (E.D.N.Y. 2016) (applying § 2339B to arguably mere private thoughts); Weiss v. Nat'l Westminster Bank, PLC., 768 F.3d 202 (2d Cir. 2014) (applying § 2339B to a bank serving a customer that had terrorist ties, broadly defining "deliberate indifference" so as to say actual knowledge of any terrorist activity was not required).

252. *See generally* MICHAEL JENSEN ET AL., NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM, THE USE OF SOCIAL MEDIA BY UNITED STATES EXTREMISTS (2017), https://www.start.umd.edu/pubs/START_PIRUS_UseOfSocialMediaByUSExtremists_ResearchBrief_July2018.pdf [https://perma.cc/WN32-MAZW]; *see also* Gabriel Weimann, *Terrorist Migration to Social Media*, 16 GEO. J. INT'L AFFS. 180 (2015) (discussing the appeal of social media to terrorists and how terrorists have used social media to recruit new members and spread their messages); Kajal Saxena, *Social Media – A Tool for Terrorism?*, SEC. DISTILLERY (Sept. 9, 2020), https://thesecuritydistillery.org/all-articles/social-media-a-tool-for-terrorism

however, with respect to the Khaled incident. There is no evidence that Khaled was planning on attempting to recruit students attending the Zoom event to the PFLP.[253] There is a difference between transmitting terrorist propaganda and providing a platform to an individual with ties to a terrorist group to speak at a university event. Barring an individual's voice based on their affiliation with a given organization—regardless of its nature—undermines the essence of First Amendment protection.[254]

Assuming, however, that Khaled did spread terrorist propaganda at the event, this activity would still be protected speech under *Brandenburg*. Of course, such propaganda could have the consequence of convincing students that the terrorists' cause is just. But that is a price we must pay if we are to inhabit a country that genuinely commits itself to freedom of thought. We must be confident that no matter how much we disagree with the views we allow to flow freely in the marketplace of ideas, better views will prevail in the end. It is perverse to think that in order to protect the nation, we must undermine the liberties that define it.

One could also argue that Congress would never amend § 2339B because there is no political will to do anything that could in any way be perceived as hostile to the national security interests of the United States or its allies in the current political climate.[255] First Amendment issues are always tricky in this way; it is rarely the most popular speech that is at the center of a free speech controversy.[256] Over time, however, Americans have become more

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[https://perma.cc/U6E5-4SW2] (urging governments and social media networks to adapt their counter-terrorism measures because terrorists are quick to adapt to new methods of spreading their propaganda).

253. *See* Allyn, *supra* note 3.

254. *See* Holder v. Hum. L. Project, 561 U.S. 1, 42 (2010) (Breyer, J., dissenting).

255. *See* Lydia Saad, *Americans Still Pro-Israel, Though Palestinians Gain Support*, GALLUP (Mar. 17, 2022), https://news.gallup.com/poll/390737/americans-pro-israel-though-palestinians-gain-support.aspx [https://perma.cc/WZ7Y-5XFP] (showing that only 26% of Americans' sympathies are with Palestinians regarding the Israel-Palestine conflict); *see also* Jeffrey M. Jones, *Americans' Views of Both Israel, Palestinian Authority Down*, GALLUP (Mar. 4, 2024), https://news.gallup.com/poll/611375/americans-views-israel-palestinian-authority-down.aspx [https://perma.cc/3TZG-PCVK] (showing that 51% of Americans' sympathies are more with the Israelis in the conflict, while 27% are more sympathetic to the Palestinians, nearly five months since Hamas' October 7, 2023 attack on Israel and the ongoing war between Israel and Hamas began).

256. *See* Suzanne Ito, *Protecting Outrageous, Offensive Speech*, AM. C.L. UNION (Oct. 6, 2020), https://www.aclu.org/news/free-speech/protecting-outrageous-offensive-speech [https://perma.cc/G26D-KGC3] ("[T]ruly offensive speech is protected by the First Amendment.").

skeptical of the War on Terror and the methods that the government has used to effectuate it.[257] This suggests that Americans might be more amenable to limiting some of the powers that the government has claimed in the name of fighting that War. Moreover, even if protecting Zoom's ability to host someone like Leila Khaled is not one of legislators' constituents' top priorities, legislators should nevertheless ensure that the First Amendment actually functions to protect speech.

B. GRANTING IMMUNITY FROM CRIMINAL LIABILITY

An alternative or supplement to amending § 2339B would be for Congress to grant immunity from criminal prosecution under § 2339B to technology platforms for any third-party speech posted or broadcast on their sites. The goal would be to eliminate any prior restraint on speech[258] made at these events.[259] Ensuring that the federal government cannot prosecute Zoom and companies like it would provide for a more robust free speech environment.[260]

Section 230 of the 1996 Communications Decency Act immunizes interactive computer services from civil liability for third-party content posted to their platforms.[261] Section 230 does not, however, apply to criminal laws.[262] The Supreme Court ruled

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257. *See* PEW RSCH. CTR., UNITED IN REMEMBRANCE, DIVIDED OVER POLICIES 1 (Sept. 1, 2011), https://www.pewresearch.org/politics/2011/09/01/united-in-remembrance-divided-over-policies/ [https://perma.cc/9JJA-PE8H] ("[T]he public continues to be divided over many of the anti-terrorism policies that arose in the wake of Sept. 11. . . .").

258. A "prior restraint" in the First Amendment context is any government action that prohibits speech before it occurs. *See* Howard O. Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283, 284–285 (1982) (noting that the classic example of a prior restraint is the English system of licensing, which was a driving force for the creation of the American free speech doctrine).

259. Prior restraints are particularly inimical to the First Amendment. *See* Near v. Minnesota, 283 U.S. 697, 733 (1931) ("It is plain, then, that the language of [the First] amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint. . . ."); *see also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (noting that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity").

260. *See* Derek E. Bambauer, *How Section 230 Reform Endangers Internet Free Speech*, BROOKINGS INST. (July 1, 2020), https://www.brookings.edu/techstream/how-section-230-reform-endangers-internet-free-speech/ [https://perma.cc/ZCR5-3AQJ].

261. *See id*.

262. *See* VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 4 https://crsreports.congress.gov/product/pdf/R/R46751 [https://perma.cc/79CH-QVW5] (quoting § 230(e)(1), which explains that § 230 does not apply to federal criminal laws).

on two cases involving this piece of legislation in 2023.[263] In *Twitter, Inc. v. Taamneh*, the father of a U.S. citizen, Nohemi Gonzalez, who had been killed in a terrorist attack in France in 2015,[264] sued Google, Facebook, and Twitter, arguing that the platforms had aided and abetted terrorism in violation of 18 U.S.C. § 2333 because they could have taken more "meaningful" or "aggressive" action to prevent the use of their platforms for such purposes.[265] Justice Thomas, writing for a unanimous Court, held that because Twitter did not "knowingly" give substantial assistance under § 2333, it could not have aided and abetted ISIS in its terrorist attack.[266]

Although the Court noted that the plaintiffs had satisfied the first two elements of aiding and abetting,[267] they failed to establish the third element.[268] The plaintiffs showed that ISIS had committed a wrong and that the platforms knew they had some role in ISIS' efforts; however, the plaintiffs failed to show that the platforms gave knowing and substantial assistance to ISIS that would amount to participation in the attack. The Court held that the plaintiffs had not alleged that Twitter did more than transmit information among billions of individuals who used the platform to communicate in ways that in the pre-Internet era took place over the phone, by mail, or in public.[269] This was insufficient to establish liability under § 2333.

This case is interesting because, although it concerns civil rather than criminal liability, it shows how the Court might view the Khaled incident under *HLP*. Assume, for a moment, that Zoom had not canceled the event and that the Department of Justice subsequently prosecuted Zoom's corporate officers. In light of

263. *See* Sabine Neschke et al., Gonzalez v. Google*: Implications for the Internet's Future*, BIPARTISAN POL'Y CTR. (Nov. 29, 2022), https://bipartisanpolicy.org/blog/gonzalez-v-google/ [https://perma.cc/8K54-WDLZ]; *see also* Anna Diakun, Twitter v. Taamneh *in the Supreme Court: What's at Stake*, KNIGHT FIRST AMEND. INST. (Dec. 12, 2022), https://knightcolumbia.org/blog/twitter-v-taamneh-in-the-supreme-court-whats-at-stake [https://perma.cc/CW8N-QCS3].

264. *See* Gonzalez v. Google LLC, 598 U.S. 617, 619–621 (2023).

265. *See* Gonzalez v. Google LLC, 2 F.4th 871, 908–09 (9th Cir. 2021).

266. *See* Twitter, Inc. v. Taamneh, 598 U.S. 471, 506–07 (2023).

267. The two elements are: (1) the party whom the defendant aids must perform a wrongful act that causes an injury and (2) the defendant must be generally aware of his role as part of an illegal activity at the time he provides assistance. *See Twitter, Inc.*, 598 U.S. at 486 (citing Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983)).

268. The third element is that the defendant must knowingly and substantially assist the principal violation. *See id.*

269. *See id.* at 499.

Taamneh, the Court might have held that Zoom did not "knowingly" provide material support to the PFLP.

On the other hand, the Court in *Taamneh* "treat[ed] algorithmic ranking as a basic part of platforms' function, and not something that—for tort law purposes—gives them a closer relationship with particular posts or more legal responsibility for what others say online."[270] The controversy surrounding the Khaled event, on the other hand, was of course widely known prior to the time at which the event was set to take place. So perhaps Zoom was on notice such that the Court would conclude that Zoom would have, in fact, "knowingly" provided material support had it allowed the event to proceed.

Another key distinction is the difference between the functions of Zoom and sites like Twitter and Facebook. Josh Kallmer, Zoom's head of global public policy and government relations, and Josh Parecki, Zoom's associate general counsel and head of trust and safety, have discussed how Zoom differs from Facebook and Twitter in that Zoom's content moderation is more hands-off than that of these social media companies.[271] Parecki explained that consumer expectations play a major role in determining Zoom's "Acceptable Use Guidelines."[272] This might seem reasonable on its face, but when applied to a university setting during a time when students relied almost exclusively on Zoom to receive an education and use school resources, the prospect of using majority preferences as a guidepost for acceptable speech is unsettling.[273] Regardless of whether a court would side with Zoom or with the government in this hypothetical, the uncertainty of the outcome

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270. Daphne Keller, *Stanford's Daphne Keller on SCOTUS Decision that Google, Twitter, and Facebook not Responsible for Islamic State Deadly Posts*, STAN. L. SCH. (May 19, 2023), https://law.stanford.edu/2023/05/19/stanfords-daphne-keller-on-scotus-decision-that-google-twitter-and-facebook-not-responsible-for-islamic-state-deadly-posts/ [https://perma.cc/3XX7-TAR6].

271. *See How Zoom Thinks About Content Moderation*, *supra* note 243, at 15:24.

272. *See id.* at 17:56–18:45 (explaining that the core of Zoom's business is based on business-to-business communications, meaning that consumers see Zoom as "a channel for communicating in a closed setting, with end-to-end encryption if people want it . . . with an identifiable group of people in . . . a controllable way. As opposed to being a place where content . . . is intended to be available to the planet in perpetuity").

273. *See* Ronald J. Krotoszynski Jr., *Dissent, Free Speech, and the Continuing Search for the "Central Meaning" of the First Amendment*, 98 MICH. L. REV. 1613, 1648 (2000); *see also generally* Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587 (2007) (arguing that First Amendment theory should do more to protect views that dissent from current customs or orthodoxy).

suggests that granting immunity from § 2339B liability to online video conferencing platforms like Zoom is a worthwhile way to protect speech made on those platforms.

The granting of immunity from criminal liability as it relates to § 2339B would generate criticisms similar to those of amending § 2339B. And this proposal might even be less likely to pass, seeing as Americans' perceptions of big tech companies are quite negative.[274] But Congress has a duty to pass laws that comport with the First Amendment.

C. INTERPRETING § 2339B NARROWLY

Another potential solution would be for the Supreme Court to grant certiorari in a § 2339B case involving the First Amendment. The Supreme Court has denied cert in every § 2339B case since *HLP*.[275] If the Court were to grant cert in such a case, the Court should read *HLP* narrowly, as scholar David Cole suggests.[276] Cole notes that Chief Justice Roberts emphasized that the decision should not be read as restricting speech that the First Amendment protects.[277] Recall *Al-Haramain*, in which the Ninth Circuit focused on Roberts' statement that *HLP* was limited to the facts of that case.[278]

Confining *HLP* to its facts would provide a more faithful reading of that case and a better interpretation of § 2339B than the extremely expansive view that some courts have taken. In its *HLP* brief, the government pointed to legislative history to argue for a reading of § 2339B expansive enough to bar plaintiff's

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274. *See* Sean Kates, Jonathan Ladd, & Joshua A. Tucker, *How Americans' Confidence in Technology Firms Has Dropped*, BROOKINGS INST. (June 14, 2023), https://www.brookings.edu/articles/how-americans-confidence-in-technology-firms-has-dropped-evidence-from-the-second-wave-of-the-american-institutional-confidence-poll/#:~:text=A%20representative%20poll%20from%20The,particular%20should%20already%20be%20separated [https://perma.cc/5GQ2-6E4D] (containing surveys showing that "technology companies have experienced the steepest drops" in approval of any American institutions between 2018 and 2021).

275. *See, e.g.*, United States v. Mehanna, 735 F.3d 32 (1st Cir. 2013), *cert denied*, 574 U.S. 814 (2014); Hassan v. United States, 742 F.3d 104 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 157 (2014); *see also* Amy Howells, *Bibles, Bandages, and Patriotism:* Holder v. Humanitarian Law Project *and Unresolved Exceptions to Providing Material Support to Foreign Terrorist Organizations*, 67 DRAKE L. REV. 767, 780 (2019) (explaining that the Supreme Court has denied certiorari in every case concerning the material support statute since *HLP*).

276. *See* Cole, *supra* note 54, at 164.

277. *See id.* at 175.

278. *See id*.

proposed activities. First, the government noted "a congressional finding that 'foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any *contribution* to such an organization facilitates that conduct.'"[279] A House Report statement said "that 'supply[ing] *funds*, *goods*, or *services*' would 'hel[p] defray the cost to the terrorist organization of running the ostensibly legitimate activities,' and 'in turn fre[e] an equal sum that can then be spent on terrorist activities.'"[280] The last piece of evidence that the government cited in support of its "fungibility" argument was an affidavit from a State Department official that detailed how seemingly charitable contributions had either been used for terrorist ends "or, even if spent charitably, have 'unencumber[ed] *funds* raised from other sources for use in facilitating violent, terrorist activities and gaining political support for these activities.'"[281] As Justice Breyer explained, these pieces of evidence could offer general support for the fungibility argument. But they do not show how engaging in political advocacy can be redirected to use for terrorism.[282]

It is difficult to imagine how Zoom's provision of an online platform that enabled Leila Khaled to speak at a university event could possibly "be 'fungible' and therefore capable of being diverted to terrorist use."[283] The aforementioned pieces of legislative history were arguably the strongest support for an expansive reading of the statute. But the three dissenting Justices in *HLP* still did not find them convincing, even in that case.[284] It would be a remarkable stretch to claim that this legislative history supported a reading so broad as to encompass the Zoom-Khaled incident.

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279. Holder v. Hum. L. Project, 561 U.S. 1, 47 (2010) (Breyer, J. dissenting) (citing § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (emphasis added)).

280. *Id.* at 47–48 (quoting H.R. REP. NO. 104-383, at 81 (1995) (emphasis added)).

281. *Id.* at 48 (quoting Decl. of Kenneth R. McKune Aff., App. 134, 136 (emphasis added)).

282. *See id.*

283. *Id.*

284. *See id.* at 48 ("The affidavit refers to 'funds,' 'financing,' and 'goods'—none of which encompasses the plaintiffs' activities. . . . The statutory statement and the House Report use broad terms like 'contributions' and 'services' that *might* be construed as encompassing the plaintiffs' activities. But in context, those terms are more naturally understood as referring to contributions of goods, money, or training and other services (say, computer programming) that could be diverted to, or free funding for, terrorist ends. . . . And the statute itself suggests that Congress did not intend to curtail freedom of speech or association. *See* § 2339B(i).").

One could argue, however, that Zoom's provision of a platform to Khaled would have been fungible and thus "capable of being diverted to terrorist use"[285] insofar as Khaled acts on behalf of the PFLP to instigate anti-Israel sentiment on American college campuses and thereby decreases the need for the PFLP to spend money on recruitment efforts. Khaled could have even tried to recruit students directly, which would decrease the amount of funds that the PFLP would need to spend on online recruitment. These arguments are problematic. First, requiring Zoom to predict the content of Khaled's speech or to ask Khaled ahead of time for planned remarks is not a workable First Amendment standard. Second, these fungibility rationales could be used to justify suppressing speech that clearly does not violate § 2339B, such as expressing general support for the Palestinian cause. Thus, even if there is some validity to the claim that providing a platform to Khaled 'is fungible, it would not make sense to hold Zoom criminally liable for Khaled's speech.

Although the argument that Zoom's provision of a platform to Khaled's speech would have been "fungible" is a stretch, there is a stronger argument that her speech at the event would have "legitimated" the PFLP and thereby subjected Zoom to liability for violating § 2339B under *HLP*. Proponents of this argument might say that Zoom's decision to platform Khaled at a university event legitimates the views of the PFLP because Khaled is a member of that group and one could perceive a university event held by academics and sanctioned by university administrators as tacitly condoning the aims or tactics of the PFLP. And it is plausible that broadcasting Khaled's speech on a platform as popular as Zoom[286] with the blessing of an accredited university could "make[ ] it easier for [the FTOs to which she belongs] to persist, to recruit members, and to raise funds."[287] Khaled's speech might persuade an observer of the event who harbors pro-terrorist sympathies to join the PFLP.

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285. *Id.*

286. More than 3.3 trillion annual meeting minutes occur on Zoom. *See* Matthew Woodward, *Zoom User Statistics: How Many People Use Zoom in 2024?*, SEARCHLOGISTICS, https://www.searchlogistics.com/learn/statistics/zoom-user-statistics/#:~:text=Annual%20Meeting%20Minutes,hosted%20in%20the%20previous%20year.&text=Not%20all%20of%20these%20users,Zoom%20offers%20a%20free%20version [https://perma.cc/X658-JUM4] (last updated Feb. 21, 2024).

287. *See* Holder v. Hum. L. Project, 561 U.S. 1, 30 (2010).

This argument highlights the weakness of *HLP*'s legitimacy rationale—"there is no natural stopping place."[288] Any speech that expresses approval of an FTO's goals might "legitimate" that FTO. Some foreign policy experts claim that rogue states and terrorist organizations gain legitimacy when "legitimate" actors interact with them.[289] But that does not justify applying such an "inherently uncertain" line to demarcate when speech crosses over from protected political advocacy to unprotected material support to terrorism.[290] One may express oral support for the overthrow of the United States government and even teach others about the supposed virtues of doing so.[291] The fact that such speech might increase the likelihood that listeners will try to overthrow the United States government does not justify proscribing the speech. It would be incongruous to permit that type of speech while simultaneously prohibiting speech that could be interpreted as expressing support for an FTO.

The legitimacy rationale is especially problematic as applied to the Khaled incident because universities should be places where young adults can exchange ideas freely and gain exposure to a variety of perspectives.[292] A university's invitation to an individual

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288. *Id.* at 49.

289. *See* Jonathan Pollack, *Around the Halls: Brookings Experts React to the Trump-Kim Jong-un Summit in Singapore*, BROOKINGS INST. (June 12, 2018), https://www.brookings.edu/articles/around-the-halls-brookings-experts-react-to-the-trump-kim-jong-un-summit-in-singapore/ [https://perma.cc/ARA3-96BA] ("By agreeing to meet with Kim Jong-un, President Trump legitimated Kim as a leader."); *see also* Ryan Hass (same source) ("Kim Jong-un . . . bolstered his legitimacy at home and abroad [by meeting with President Trump]"); Jeffrey Bader (same source) ("Kim Jong-un achieved . . . legitimization of his regime internationally by meeting with and being the object of lavish praise by the president of the United States."); Josh Lederman & Hans Nichols, *Trump Meets Kim Jong Un, Becoming First Sitting U.S. President to Step Into North Korea*, NBC NEWS (June 30, 2019), https://www.nbcnews.com/politics/donald-trump/trump-kim-jong-un-meet-dmz-n1025041 [https://perma.cc/F67M-A362] ("[V]eteran nuclear negotiators and North Korea experts immediately questioned whether Trump, by staging a high-profile photo-op absent nuclear concessions, was bestowing legitimacy on Kim and undermining global pressure to force the North to accept a denuclearization deal.").

290. *See Hum. L. Project*, 561 U.S. at 50.

291. *See* Dennis v. United States, 341 U.S. 494, 502 (1951) ("[T]he trial judge properly charged the jury that they could not convict if they found that petitioners did 'no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas' [related to the violent overthrow of the U.S. government].").

292. *See Speech on Campus*, AM. C.L. UNION (Dec. 18, 2023), https://www.aclu.org/documents/speech-campus [https://perma.cc/JXM4-ERNJ] ("The First Amendment protects speech no matter how offensive its content. Restrictions on speech by public colleges and universities amount to government censorship. . . . Such restrictions deprive students of their right to invite speech they wish to hear, debate speech with which they disagree, and

to speak on its campus—and Zoom's decision to allow this event to take place on its platform—is not an endorsement of that individual's views,[293] nor is it even a tacit acknowledgement that the views that the individual holds are "legitimate." There is a difference between providing a platform to an individual and supplying legitimacy to every view of an organization to which that individual belongs.

D. POLICY CONSIDERATIONS

In addition to the shaky legal foundation upon which *HLP* sits, the Khaled incident illustrates significant policy concerns arising from *HLP*. Zoom served as the primary—possibly *only*—education venue for students of all ages at public schools across the country during the COVID-19 pandemic.[294] For this reason, it is disconcerting to see Zoom cancel university events due to fear of prosecution under § 2339B.[295] Zoom's cancellation of the SFSU event deprived more than 1,500 people who had registered and 4,000 people who had expressed interest on Facebook of the opportunity to hear a conversation about global current affairs.[296] In an interview with *The Intercept*, David Greene, Senior Staff Attorney and Civil Liberties Director at the Electronic Frontier Foundation, stated, "I think Zoom has taken a very far-reaching and broad interpretation of the material support provisions—

protest speech they find bigoted or offensive. An open society depends on liberal education, and the whole enterprise of liberal education is founded on the principle of free speech.").

293. *See* Elliot Hirshman, *Freedom of Speech on Campus is an Essential Part of College*, HUFFINGTON POST (Oct. 29, 2014), https://www.huffpost.com/entry/freedom-of-speech-on-camp_b_6069908 [https://perma.cc/7CK7-KTQP] (indicating that "university policies throughout the country" maintain a framework in which the university "endorse[s] the speaker's right to express his or her views and the audience's right to hear these views," but does not endorse—expressly or impliedly—the speaker's views).

294. *See* Bianca Vázquez Toness et al., *Zoom School Set Kids Back During COVID-19 and Now Many Parents Are Questioning Why They Weren't Sent Back Sooner*, FORTUNE (Oct. 21, 2022), https://fortune.com/2022/10/21/zoom-school-set-kids-back-during-covid-19-parents-questioning-why-not-sooner/ [https://perma.cc/WSS9-6W32] ("When COVID-19 first reached the U.S., scientists didn't fully understand how it spread or whether it was harmful to children. American schools, like most around the world, understandably shuttered in March 2020.").

295. *See* Bill V. Mullen, *The Palestinian Exception in the Age of Zoom: A Bellwether for Academic Freedom*, 12 AM. ASS'N OF U. PROFESSORS J. OF ACAD. FREEDOM, 2021, at 10.

296. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out"); *see also* Speri & Biddle, *supra* note 13.

broader than, as far as I am aware, any court has interpreted it."[297] American Civil Liberties Union attorney Brian Hauss noted that "[a]ny attempt by the government to restrict academic freedom in this manner would undoubtedly violate the First Amendment."[298] This highlights the considerable significance of the Khaled incident. The broad interpretations of § 2339B and *HLP* might have functionally proscribed certain types of protected speech. Even if this speech would not actually violate § 2339B, a corporation's belief that it *might* could motivate decisions to censor.[299] Worse yet, the Khaled incident occurred at a university—an arena where free speech is supposed to thrive.[300] If a powerful technology company's fear of prosecution can interfere with educational opportunities for college students, § 2339B is chilling protected speech on campus.

One might object to this Note's characterization of the Khaled incident by claiming that there is no evidence that Zoom actually feared prosecution under § 2339B and that perhaps Zoom merely wanted to avoid negative publicity. Although it is impossible to prove that Zoom canceled the event because it genuinely felt threatened by criminal liability, Josh Parecki—Zoom's Head of Trust and Safety—has made statements indicating this possibility.[301] Parecki explained that Zoom was concerned because Khaled had previously "made some comments that could be interpreted as calling for violence," which could be considered material support if understood to call for violence in the PFLP's name.[302] According to Palecki, Zoom exercised caution because "the material support law is not horribly clear" and the risk of criminal prosecution was too great for Zoom to justify proceeding

297. Speri & Biddle, *supra* note 13.

298. *Id.*

299. *See* Mullen, *supra* note 295, at 10 (noting that giving some control over academic freedom to Zoom is concerning because "embedded within the fine print of new remote technology providers is the shadow of US foreign and domestic policy").

300. *See* Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"); *see also Free Speech Movement*, U.C. BERKELEY LIB., https://www.lib.berkeley.edu/visit/bancroft/oral-history-center/projects/free-speech-movement [https://perma.cc/5HRM-8SMC].

301. *See How Zoom Thinks About Content Moderation, supra* note 243, at 54:32.

302. *See id.*

with the event.[303] Regardless of why Zoom actually canceled the event, it is troubling that Zoom gave the excuse that it feared violating § 2339B.[304] Zoom's use of this excuse demonstrates how expansively § 2339B has been read over time, given that it is at least possible that Zoom genuinely feared prosecution for allowing Khaled to speak on its platform.

CONCLUSION

The Supreme Court's decision in *HLP* is an example of the broader erosion of freedom of speech during wartime. Zoom's cancellation of the SFSU event at which Leila Khaled was scheduled to speak highlights the long shadow that § 2339B casts under the Court's interpretation in *HLP*. No matter how much one might despise Khaled or her past actions, her views on the Israel-Palestine conflict, or her worldview, one cannot reasonably argue that allowing her to speak at a university event could constitute material support to terrorism under § 2339B. Although anti-terrorism laws are designed to prevent, rather than merely punish, terrorist activity, such laws cannot give the federal government carte blanche to criminalize speech which it would prefer that American citizens not hear.

The Khaled incident notwithstanding, there is still hope for stronger speech protections in wartime America. Although some will be skeptical of the solutions that this Note proposes, the government must act to preserve Americans' First Amendment rights amidst the War on Terror. The chilling effect on speech that *HLP* and its progeny have had calls for a reexamination of § 2339B. Congress should amend § 2339B to limit "material support" to speech that constitutes incitement under *Brandenburg* or is part of some other category of unprotected speech. Congress should also grant Zoom-like internet platforms immunity from § 2339B posted on their platforms. Courts, meanwhile, should interpret § 2339B narrowly, as the Ninth Circuit did in *Al-Haramain*. If Congress and the courts adopt these solutions, the United States will better live up to its promise of protecting the freedom to express unpopular views.

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303. *See id.* at 53:35.
304. *See* Speri & Biddle, *supra* note 13.