2019 H. Albert Young Distinguished Lecture in Constitutional Law

"Pot, the First Amendment, and Taxes: The IRS' Denial of 501(c)(6) Tax-Exempt Status to Marijuana Advocacy Groups"

Luke M. Scheuer, Associate Professor of Law
H. Albert Young Fellow in Constitutional Law, 2017-2019

Monday, November 4, 2019, 4:00 p.m.

Delaware Law School
Ruby R. Vale Moot Courtroom
Wilmington, Delaware

Lecture Description:
Federal law prohibits the sale, possession and use of marijuana under the Controlled Substances Act. Nevertheless, many states have legalized marijuana for medical or recreational uses and have licensed businesses for the purpose of selling marijuana to the public. As a result, a burgeoning marijuana industry has cropped up, and its participants seek further legalization at the state and federal level. Some of these efforts come from trade groups that are also seeking tax-exempt status under Internal Revenue Code Section 501(c)(6). The Internal Revenue Service ("IRS") has announced that it plans to delay or deny tax-exempt status to pro-legalization organizations while granting this status to groups who lobby against expanded marijuana legalization. As support, the IRS can point to the Supreme Court's decision in Bob Jones University, which held that the IRS can deny 501(c) status to an educational organization which had a racially discrimination admissions policy. The court held that there was a national policy against such practices. This article examines whether the same is true for denying tax-exempt status based on a speaker's desire to advocate for legalization of marijuana.

Biography:
Luke Scheuer is an Associate Professor of Law at Widener Delaware Law School, H. Albert Young Fellow in Constitutional Law and faculty member of the Institute of Delaware Corporate and Business Law. He has published articles in the areas of corporate law, cannabis business law, and professional responsibility. Prior to joining Delaware Law School, Luke was an associate at Goodwin Procter LLP where he practiced leveraged finance in their Boston office. In addition to his legal practice, Luke has been a professional ballet dancer and has performed internationally with companies such as Opera Atelier and the National Ballet of Canada. Most recently, he performed with the First State Ballet Theater in their production of *Don Quixote*. Luke Scheuer would like to thank the **Widener Law Review** which is publishing an article based on this presentation.

Widener University 1821
Delaware Law School

COURSE MATERIALS

Internal Revenue Bulletin: 2018-1.
January 2, 2018

[T]he Service will not issue a determination letter when the request concerns an organization whose purpose is directed to the improvement of business conditions of one or more lines of business relating to an activity involving controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law regardless of its legality under the law of the state in which such activity is conducted.

Available at
https://www.irs.gov/irb/2018-01_IRB#RP-2018-5

The Controlled Substances Act of 1970 (21 U.S.C. § 812.)

The Controlled Substances Act (CSA) places all substances which were in some manner regulated under existing federal law into one of five schedules. This placement is based upon the substance's medical use, potential for abuse, and safety or dependence liability.

Schedule I Controlled Substances

Substances in this schedule have no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse.

Some examples of substances listed in Schedule I are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), peyote, methaqualone, and 3,4-methylenedioxymethamphetamine ("Ecstasy").

Schedule II/IIN Controlled Substances (2/2N)

Substances in this schedule have a high potential for abuse which may lead to severe psychological or physical dependence.

Examples of Schedule II narcotics include: hydromorphone (Dilaudid®), methadone (Dolophine®), meperidine (Demerol®), oxycodone (OxyContin®, Percocet®), and fentanyl (Sublimaze®, Duragesic®). Other Schedule II narcotics include: morphine, opium, codeine, and hydrocodone.

Examples of Schedule IIN stimulants include: amphetamine (Dexedrine®, Adderall®), methamphetamine (Desoxyn®), and methylphenidate (Ritalin®).

Other Schedule II substances include: amobarbital, glutethimide, and pentobarbital.

Schedule III/IIIN Controlled Substances (3/3N)

Substances in this schedule have a potential for abuse less than substances in Schedules I or II and abuse may lead to moderate or low physical dependence or high psychological dependence.

Examples of Schedule III narcotics include: products containing not more than 90 milligrams of codeine per dosage unit (Tylenol with Codeine®), and buprenorphine (Suboxone®).

Examples of Schedule IIIN non-narcotics include: benzphetamine (Didrex®), phendimetrazine, ketamine, and anabolic steroids such as Depo®-Testosterone.

Schedule IV Controlled Substances

Substances in this schedule have a low potential for abuse relative to substances in Schedule III.

Examples of Schedule IV substances include: alprazolam (Xanax®), carisoprodol (Soma®), clonazepam (Klonopin®), clorazepate (Tranxene®), diazepam (Valium®), lorazepam (Ativan®), midazolam (Versed®), temazepam (Restoril®), and triazolam (Halcion®).

Schedule V Controlled Substances

Substances in this schedule have a low potential for abuse relative to substances listed in Schedule IV and consist primarily of preparations containing limited quantities of certain narcotics.

Examples of Schedule V substances include: cough preparations containing not more than 200 milligrams of codeine per 100 milliliters or per 100 grams (Robitussin AC®, Phenergan with Codeine®), and ezogabine

https://www.deadiversion.usdoj.gov/schedules/index.html

For a list of all controlled substances and their listing schedule see
https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf

Business Leagues

Section 501(c)(6) of the Internal Revenue Code provides for the exemption of business leagues, chambers of commerce, real estate boards, boards of trade and professional football leagues, which are not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual. An organization that otherwise qualifies for exemption under Internal Revenue Code section 501(c)(6) will not be disqualified merely because it engages in some political activity. In addition, the organization may engage in lobbying that is germane to accomplishing its exempt purpose without jeopardizing its exemption. However, if the organization engages in political and/or lobbying activities, it may need to give members notice of dues used for such activities, or be subject to a proxy tax on the amount of the expenditures.

A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. Trade associations and professional associations are business leagues. To be exempt, a business league's activities must be devoted to improving business conditions of one or more lines of business as distinguished from performing particular services for individual persons. No part of a business league's net earnings may inure to the benefit of any private shareholder or individual and it may not be organized for profit to engage in an activity ordinarily carried on for profit (even if the business is operated on a cooperative basis or produces only enough income to be self-sustaining). The term *line of business* generally refers either to an entire industry or to all components of an industry within a geographic area. It does not include a group composed of businesses that market a particular brand within an industry.

Chambers of commerce and boards of trade are organizations of the same general type as business leagues. They direct their efforts at promoting the common economic interests of all commercial enterprises in a trade or community, however.

https://www.irs.gov/charities-non-profits/other-non-profits/business-leagues

Examples of Marijuana Business Leagues

Marijuana Industry Group and National Cannabis Industry Association are both 501(c)(6) organizations "[d]efined as: Business leagues, chambers of commerce, real estate boards, etc, created for the improvement of business conditions."[1] As lobbying groups, donations to these organizations are already not tax deductible.[2] However as nonprofits they would gain other benefits such as not having to pay income taxes.[3] These organizations directly work to improve business conditions for the marijuana industry. As the Marijuana Industry Group states, "MIG represents the interests and advocates on behalf of the rapidly evolving needs of the regulated marijuana industry in Colorado. We have a reputation of working with state and local regulators and policymakers to solve issues facing the industry."[4] Similarly, the National Cannabis Industry Association's website states it "is leading the charge to protect legal cannabis businesses, defend our state laws, and advance federal policy reforms. Successful businesses are joining NCIA every day to become stronger, smarter, and more prosperous by working together to defend and expand the responsible cannabis industry."[5]

The IRS has not taken action to strip these organizations of non-profit status, despite the fact that their activity directly seeks to improve business conditions for the marijuana industry. It may be that the IRS is simply targeting new applications and not attempting to strip existing organizations of this status. If that is the case, it undermines the strength of the IRS's position. If there is a national policy justifying the denial of new applications, that policy should justifying revoking status for organizations already violating the policy. In any case, these two organizations represent the types of organizations that Revenue Procedure 2018-5 is targeted at.

[1] ProPublica: Nonprofit explorer, Medical Marijuana Industry Group, https://projects.propublica.org/nonprofits/organizations/272782877 (last visited Jun 29, 2019); ProPublica: Nonprofit Explorer, National Cannabis Industry Associations https://projects.propublica.org/nonprofits/organizations/273484449 (last visited Jun 29, 2019).

[2] Id.

[3] Fraser Sherman, *What is a 501(c)(6) Organizations?* https://smallbusiness.chron.com/501-c-6-organization-60734.html (Jan 25, 2019).

[4] http://marijuanaindustrygroup.org/.

[5] https://thecannabisindustry.org/.

POT, THE FIRST AMENDMENT, AND TAXES: THE IRS' DENIAL OF 501(c)(6) TAX-EXEMPT STATUS TO MARIJUANA ADVOCACY GROUPS

By Luke Scheuer

ABSTRACT

Federal law prohibits the sale, possession and use of marijuana under the Controlled Substances Act. Nevertheless, many states have legalized marijuana for medical or recreational uses and have licensed businesses for the purpose of selling marijuana to the public. As a result, a burgeoning marijuana industry has cropped up, and its participants seek further legalization at the state and federal level. Some of these efforts come from trade groups that are also seeking tax-exempt status under Internal Revenue Code Section 501(c)(6). The Internal Revenue Service ("IRS") has announced that it plans to delay or deny tax-exempt status to pro-legalization organizations while granting this status to groups who lobby against expanded marijuana legalization. As support, the IRS can point to the Supreme Court's decision in Bob Jones University, which held that the IRS can deny 501(c) status to an educational organization which had a racially discrimination admissions policy. The court held that there was a national policy against such practices. This article examines whether the same is true for denying tax-exempt status based on a speaker's desire to advocate for legalization of marijuana.

This article is forthcoming in the Widener Law Review.

KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Smith v. Fair Employment & Housing Com., Cal., April 9, 1996

103 S.Ct. 2017
Supreme Court of the United States

BOB JONES UNIVERSITY, Petitioner
v.
UNITED STATES.
GOLDSBORO CHRISTIAN SCHOOLS, INC., Petitioner
v.
UNITED STATES.

Nos. 81–3, 81–1.
|
Argued Oct. 12, 1982.
|
Decided May 24, 1983.

Synopsis
University, denied tax-exempt status because of its racially discriminatory admissions policy, sought refund of federal unemployment tax payments, and Government counterclaimed for unpaid taxes. The United States District Court for the District of South Carolina entered judgment in favor of university, and the IRS appealed. The Court of Appeals, 639 F.2d 147, reversed, and certiorari was granted. In a second case, another school sought refund of social security and unemployment taxes paid, and the IRS counterclaimed for unpaid taxes. The United States District Court for the Eastern District of North Carolina entered summary judgment for the Government, the Court of Appeals, 644 F.2d 879, affirmed, and certiorari was granted. The Supreme Court, Chief Justice Burger, held that nonprofit private schools that prescribe and enforce racially discriminatory admission standards on the basis of religious doctrine do not qualify as tax-exempt organizations under the Internal Revenue Code, nor are contributions to such schools deductible as charitable contributions.

Affirmed.

Justice Powell filed an opinion concurring in part and concurring in the judgment.

Justice Rehnquist filed a dissenting opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (25)

[1] Internal Revenue
Educational and scientific organizations

Nonprofit private schools that prescribe and enforce racially discriminatory admission standards on the basis of religious doctrine do not qualify as tax-exempt organizations under the Internal Revenue Code, nor are contributions to such schools deductible as charitable contributions. 26 U.S.C.A. §§ 170, 501(c)(3).

3 Cases that cite this headnote

[2] Statutes
Literal, precise, or strict meaning; letter of the law

A court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.

99 Cases that cite this headnote

[3] Internal Revenue
Purposes and activities of organization

An examination of the Internal Revenue Code's framework and the background of congressional purposes revealed unmistakable evidence that underlying all relevant parts of the Code is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity, namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy. 26 U.S.C.A. §§ 1 et seq., 170, 501(c)(3).

20 Cases that cite this headnote

[4] Internal Revenue

Constitutional and statutory provisions

Congress, in enacting those provisions of the Internal Revenue Code pertaining to the tax exempt status of religious, charitable or education corporations, and the deductibility of charitable contributions to such corporations, sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind. 26 U.S.C.A. §§ 170, 501(c)(3).

28 Cases that cite this headnote

[5] Charities

Purposes of Gift

Purpose of a charitable trust may not be illegal or violate established public policy.

2 Cases that cite this headnote

[6] Internal Revenue

Exempt Organizations

When the government grants exemptions or allows deductions, all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious "donors."

7 Cases that cite this headnote

[7] Internal Revenue

Exempt Organizations

Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. 26 U.S.C.A. § 501(c)(3).

18 Cases that cite this headnote

[8] Internal Revenue

Purposes and activities of organization

To warrant exemption under the Internal Revenue Code as a charitable corporation, an institution must fall within a category specified in the pertinent Code section and must demonstrably serve and be in harmony with the public interest, and the institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred. 26 U.S.C.A. § 501(c)(3).

16 Cases that cite this headnote

[9] Internal Revenue

Purposes and activities of organization

A declaration that a given institution is not "charitable," and thus not entitled to tax-exempt status under the Internal Revenue Code, should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. 26 U.S.C.A. § 501(c)(3).

11 Cases that cite this headnote

[10] Civil Rights

Education

Racial discrimination in education violates deeply and widely accepted views of elementary justice.

7 Cases that cite this headnote

[11] Civil Rights

Education

Racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.

7 Cases that cite this headnote

[12] Education

Private Primary and Secondary Schools

Educational institutions that, for whatever reasons, practice racial discrimination are not institutions exercising "beneficial and stabilizing influences in community life," nor should they be encouraged by having all taxpayers share in their support by way of special tax status. 26 U.S.C.A. § 501(c)(3).

2 Cases that cite this headnote

[13] Internal Revenue

Educational and scientific organizations

It would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities; whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy. 26 U.S.C.A. § 501(c)(3).

7 Cases that cite this headnote

[14] Internal Revenue

Educational and scientific organizations

Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the congressional intent underlying those provisions of the Internal Revenue Code relating to the tax-exempt status of religious, charitable or educational institutions, and the deductibility of charitable contributions thereto. 26 U.S.C.A. §§ 170, 501(c)(3).

8 Cases that cite this headnote

[15] Internal Revenue

Educational and scientific organizations

Internal Revenue Service did not exceed its authority when it announced its interpretation of the Internal Revenue Code's tax-exempt organizations provision as excluding racially discriminatory private schools; such interpretation was wholly consistent with what Congress, the Executive, and the courts had previously declared, and the actions of Congress since 1970 left no doubt that the IRS reached the correct conclusion in exercising its authority. 26 U.S.C.A. § 501(c)(3).

34 Cases that cite this headnote

[16] Internal Revenue

Making, Requisites and Validity

In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems.

30 Cases that cite this headnote

[17] Internal Revenue

Purposes and activities of organization

Internal Revenue Service has the responsibility, in the first instance, to determine whether a particular entity is "charitable" for purposes of the relevant Internal Revenue Code provisions, and this in turn may necessitate later determinations of whether given activities so violate public policy that the entities involved cannot be deemed to provide a public benefit worthy of "charitable" status. 26 U.S.C.A. §§ 170, 501(c)(3).

4 Cases that cite this headnote

[18] Internal Revenue

Educational and scientific organizations

Ordinarily, courts are slow to attribute significance to the failure of Congress to act on particular legislation, but in view of its prolonged

and acute awareness of so important an issue as the tax-exempt status of private schools that prescribe and enforce racially discriminatory admission standards, Congress' failure to act on the various bills proposed on that subject provided additional support for concluding that Congress acquiesced in the IRS rulings of 1970 and 1971 that such schools are not tax-exempt. 26 U.S.C.A. §§ 170, 501(c)(3).

72 Cases that cite this headnote

[19] Constitutional Law
Beliefs protected; inquiry into beliefs

Free exercise clause of the First Amendment constitutes an absolute prohibition against governmental regulation of religious beliefs. U.S.C.A. Const.Amend. 1.

16 Cases that cite this headnote

[20] Constitutional Law
Free Exercise of Religion

Free exercise clause of the First Amendment provides substantial protection for lawful conduct grounded in religious belief. U.S.C.A. Const.Amend. 1.

10 Cases that cite this headnote

[21] Constitutional Law
Freedom of Religion and Conscience

Not all burdens on religion are unconstitutional; the state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.

17 Cases that cite this headnote

[22] Constitutional Law
Post-Secondary Institutions
Constitutional Law
Religious Organizations or Educational Institutions

Government's fundamental, overriding interest in eradicating racial discrimination in education substantially outweighed whatever burden denial of tax benefits placed on the exercise of their religious beliefs by petitioners, nonprofit private schools that prescribe and enforce racially discriminatory admission standards on the basis of religious doctrine; petitioners' asserted interest could not be accommodated with that compelling governmental interest, and no less restrictive means were available to achieve the governmental interest. 26 U.S.C.A. §§ 170, 501(c)(3); U.S.C.A. Const.Amend. 1.

70 Cases that cite this headnote

[23] Constitutional Law
Post-Secondary Institutions
Constitutional Law
Exemptions

Denial of tax-exempt status to a nonprofit private school that prescribes and enforces racially discriminatory admission standards on the basis of religious doctrine did not violate the establishment clause by preferring religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden. 26 U.S.C.A. §§ 170, 501(c)(3); U.S.C.A. Const.Amend. 1.

35 Cases that cite this headnote

[24] Constitutional Law
Establishment of Religion

A regulation does not violate the establishment clause merely because it happens to coincide or harmonize with the tenets of some or all religions.

6 Cases that cite this headnote

[25] Internal Revenue
Educational and scientific organizations

Internal Revenue Service properly applied to both petitioners its policy of denying tax-exempt status to private schools that prescribe and enforce racially discriminatory admission standards; one petitioner admitted that it maintains racially discriminatory policies, and, contrary to the other petitioner's contention that it is not racially discriminatory, discrimination on the basis of racial affiliation and association was a form of racial discrimination. 26 U.S.C.A. §§ 170, 501(c)(3).

16 Cases that cite this headnote

***574** ****2019** *Syllabus* *

Section 501(c)(3) of the Internal Revenue Code of 1954 (IRC) provides that "[c]orporations ... organized and operated exclusively for religious, charitable ... or educational purposes" are entitled to tax exemption. Until 1970, the Internal Revenue Service (IRS) granted tax-exempt status under § 501(c)(3) to private schools, ****2020** independent of racial admissions policies, and granted charitable deductions for contributions to such schools under § 170 of the IRC. But in 1970, the IRS concluded that it could no longer justify allowing tax-exempt status under § 501(c)(3) to private schools that practiced racial discrimination, and in 1971 issued Revenue Ruling 71–447 providing that a private school not having a racially nondiscriminatory policy as to students is not "charitable" within the common-law concepts reflected in §§ 170 and 501(c)(3). In No. 81–3, petitioner Bob Jones University, while permitting unmarried Negroes to enroll as students, denies admission to applicants engaged in an interracial marriage or known to advocate interracial marriage or dating. Because of this admissions policy, the IRS revoked the University's tax-exempt status. After paying a portion of the federal unemployment taxes for a certain taxable year, the University filed a refund action in Federal District Court, and the Government counterclaimed for unpaid taxes for that and other taxable years. Holding that the IRS exceeded its powers in revoking the University's tax-exempt status and violated the University's rights under the Religion Clauses of the First Amendment, the District Court ordered the IRS to refund the taxes paid and rejected the counterclaim. The Court of Appeals reversed. In No. 81–1, petitioner Goldsboro Christian Schools maintains a racially discriminatory admissions policy based upon its interpretation of the Bible, accepting for the most part only Caucasian students. The IRS determined that Goldsboro was not an organization described in § 501(c)(3) and hence was required to pay federal social security and unemployment taxes. After paying a portion of such taxes for certain years, Goldsboro filed a refund suit in Federal District Court, and the IRS counterclaimed for unpaid taxes. The District Court entered summary judgment for ***575** the Government, rejecting Goldsboro's claim to tax-exempt status under § 501(c)(3) and also its claim that the denial of such status violated the Religion Clauses of the First Amendment. The Court of Appeals affirmed.

Held: Neither petitioner qualifies as a tax-exempt organization under § 501(c)(3). Pp. 2025–2035.

(a) An examination of the IRC's framework and the background of congressional purposes reveals unmistakable evidence that underlying all relevant parts of the IRC is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy. Thus, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest, and the institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred. Pp. 2025–2028.

(b) The IRS's 1970 interpretation of § 501(c)(3) was correct. It would be wholly incompatible with the concepts underlying tax exemption to grant tax-exempt status to racially discriminatory private educational entities. Whatever may be the rationale for such private schools' policies, racial discrimination in education is contrary to public policy.

Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the above "charitable" concept or within the congressional intent underlying § 501(c)(3). Pp. 2028–2030.

(c) The IRS did not exceed its authority when it announced its interpretation of § 501(c)(3) in 1970 and 1971. Such interpretation is wholly consistent with what Congress, the Executive, and the courts had previously declared. And the actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority. Pp. 2030–2033.

(d) The Government's fundamental, overriding interest in eradicating racial discrimination in education substantially outweighs whatever burden denial of tax benefits **2021 places on petitioners' exercise of their religious beliefs. Petitioners' asserted interests cannot be accommodated with that compelling governmental interest, and no less restrictive means are available to achieve the governmental interest. Pp. 2033–2034.

(e) The IRS properly applied its policy to both petitioners. Goldsboro admits that it maintains racially discriminatory policies, and, contrary to Bob Jones University's contention that it is not racially discriminatory, discrimination on the basis of racial affiliation and association is a form of racial discrimination. Pp. 2034–2035.

No. 81–1, 644 F.2d 879 (4th Cir., 1981), and No. 81–3, 639 F.2d 147 (4th Cir., 1980), affirmed.

Attorneys and Law Firms

*576 *William G. McNairy* argued the cause for petitioner in No. 81-1. With him on the briefs were *Claude C. Pierce, Edward C. Winslow,* and *John H. Small. William Bentley Ball* argued the cause for petitioner in No. 81-3. With him on the briefs were *Philip J. Murren* and *Richard E. Connell.*

Assistant Attorney General Reynolds argued the cause for the United States in both cases. With him on the briefs were *Acting Solicitor General Wallace* and *Deputy Assistant Attorney General Cooper.*

William T. Coleman, Jr., pro se, by invitation of the Court, 456 U.S. 922, argued the cause as *amicus curiae* urging affirmance. With him on the brief were *Richard C. Warmer, Donald T. Bliss, John W. Stamper, Ira M. Feinberg,* and *Eric Schnapper.*†

† Briefs of *amici curiae* urging reversal in No. 81-3 were filed by *Earl W. Trent, Jr.,* and *John W. Baker* for the American Baptist Churches in the U.S.A. et al.; by *William H. Ellis* for the Center for Law and Religious Freedom of the Christian Legal Society; by *Forest D. Montgomery* for the National Association of Evangelicals; and by *Congressman Trent Lott, pro se.*

Briefs of *amici curiae* urging affirmance in both cases were filed by *Nadine Strossen, E. Richard Larson,* and *Samuel Rabinove* for the American Civil Liberties Union et al.; by *Harold P. Weinberger, Lawrence S. Robbins, Justin J. Finger, Jeffrey P. Sinensky,* and *David M. Raim* for the Anti-Defamation League of B'nai B'rith; by *John H. Pickering, William T. Lake,* and *Adam Yarmolinsky* for Independent Sector; by *Amy Young-Anaway, David Carliner, Burt Neuborne,* and *Harry A. Inman* for the International Human Rights Law Group; by *Robert H. Kapp, Walter A. Smith, Jr., Joseph M. Hassett, David S. Tatel, Richard C. Dinkelspiel, William L. Robinson, Norman J. Chachkin,* and *Frank R. Parker* for the Lawyers' Committee for Civil Rights Under Law; by *Thomas I. Atkins, J. Harold Flannery,* and *Robert D. Goldstein* for the National Association for the Advancement of Colored People et al.; by *Leon Silverman, Linda R. Blumkin, Ann F. Thomas, Marla G. Simpson,* and *Jack Greenberg* for the NAACP Legal Defense and Educational Fund, Inc.; by *Harry K. Mansfield* for the National Association of Independent Schools; by *Charles E. Daye* for the North Carolina Association of Black Lawyers; by *Earle K. Moore* for the United Church of Christ; and by *Lawrence E. Lewy, pro se.*

Briefs of *amici curiae* in both cases were filed by *Martin B. Cowan* and *Dennis Rapps* for the National Jewish Commission on Law and Public Affairs; and by *Laurence H. Tribe, pro se,* and *Bernard Wolfman, pro se.*

Opinion

*577 Chief Justice BURGER delivered the opinion of the Court.

[1] We granted certiorari to decide whether petitioners, nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine, qualify as tax-exempt organizations under § 501(c)(3) of the Internal Revenue Code of 1954.

I

A

Until 1970, the Internal Revenue Service granted tax-exempt status to private schools, without regard to their racial admissions policies, under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), [1] and granted charitable ***578** deductions for contributions to such schools under § 170 of the Code, 26 U.S.C. § 170. [2]

On January 12, 1970, a three-judge District Court for the District of Columbia issued a preliminary injunction prohibiting the IRS from according tax-exempt status to private schools in Mississippi that discriminated as to admissions on the basis of race. *Green v. Kennedy,* 309 F.Supp. 1127 (D.D.C.), *app. dismissed sub nom. Cannon v. Green,* 398 U.S. 956, 90 S.Ct. 2169, 26 L.Ed.2d 539 (1970). Thereafter, in July 1970, the IRS concluded that it could "no longer legally justify allowing tax-exempt status [under § 501(c)(3)] to private schools which practice racial discrimination." IRS News Release (7/10/70), reprinted in App. in No. 81–3, p. A235. At the same time, the IRS announced that it could not "treat gifts to such schools as charitable deductions for income tax purposes [under § 170]." *Ibid.* By letter dated November 30, 1970, the IRS formally notified private schools, including those involved in this case, of this change in policy, "applicable to all private ****2022** schools in the United States at all levels of education." See *id.,* at A232.

On June 30, 1971, the three-judge District Court issued its opinion on the merits of the Mississippi challenge. *Green v. Connally,* 330 F.Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green,* 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971) (*per curiam*). That court approved the IRS' amended construction of the Tax Code. The court also held that racially discriminatory private schools were not entitled to exemption under § 501(c)(3) and that donors were not entitled to deductions for contributions to such schools under § 170. The court permanently enjoined the Commissioner of ***579** Internal Revenue from approving tax-exempt status for any school in Mississippi that did not publicly maintain a policy of nondiscrimination.

The revised policy on discrimination was formalized in Revenue Ruling 71–447, 1971–2 Cum.Bull. 230:

> "Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being 'organized and operated exclusively for religious, charitable, ... or educational purposes' was intended to express the basic common law concept [of 'charity']. ... All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy." *Id.,* at 230.

Based on the "national policy to discourage racial discrimination in education," the IRS ruled that "a private school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in sections 170 and 501(c)(3) of the Code." *Id.,* at 231. [3]

The application of the IRS construction of these provisions to petitioners, two private schools with racially discriminatory admissions policies, is now before us.

B

No. 81–3, Bob Jones University v. United States

Bob Jones University is a nonprofit corporation located in Greenville, South Carolina. [4] Its purpose is "to conduct an institution ***580** of learning ..., giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures." Certificate of Incorporation, Bob Jones University, Inc., of Greenville, S.C., *reprinted in* App. in No. 81–3, pp. A118–A119. The corporation operates a school

with an enrollment of approximately 5,000 students, from kindergarten through college and graduate school. Bob Jones University is not affiliated with any religious denomination, but is dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs. It is both a religious and educational institution. Its teachers are required to be devout Christians, and all courses at the University are taught according to the Bible. Entering students are screened as to their religious beliefs, and their public and private conduct is strictly regulated by standards promulgated by University authorities.

The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage. To effectuate these views, Negroes were completely excluded until 1971. From 1971 to May 1975, the University accepted no applications from unmarried Negroes,[5] but did accept applications **2023 from Negroes married within their race.

Following the decision of the United States Court of Appeals for the Fourth Circuit in *McCrary v. Runyon,* 515 F.2d 1082 (CA4 1975), *aff'd* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), prohibiting racial exclusion from private schools, the University revised its policy. Since May 29, 1975, the University has permitted unmarried Negroes to enroll; but a disciplinary rule prohibits interracial dating and marriage. That rule reads:

> *There is to be no interracial dating*
>
> 1. Students who are partners in an interracial marriage will be expelled.
>
> *581 2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
>
> 3. Students who date outside their own race will be expelled.
>
> 4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled. App. in No. 81–3, p. A197.

The University continues to deny admission to applicants engaged in an interracial marriage or known to advocate interracial marriage or dating. *Id.,* at A277.

Until 1970, the IRS extended tax-exempt status to Bob Jones University under § 501(c)(3). By the letter of November 30, 1970, that followed the injunction issued in *Green v. Kennedy, supra,* the IRS formally notified the University of the change in IRS policy, and announced its intention to challenge the tax-exempt status of private schools practicing racial discrimination in their admissions policies.

After failing to obtain an assurance of tax exemption through administrative means, the University instituted an action in 1971 seeking to enjoin the IRS from revoking the school's tax-exempt status. That suit culminated in *Bob Jones University v. Simon,* 416 U.S. 725, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974), in which this Court held that the Anti-Injunction Act of the Internal Revenue Code, 26 U.S.C. § 7421(a), prohibited the University from obtaining judicial review by way of injunctive action before the assessment or collection of any tax.

Thereafter, on April 16, 1975, the IRS notified the University of the proposed revocation of its tax-exempt status. On January 19, 1976, the IRS officially revoked the University's tax-exempt status, effective as of December 1, 1970, the day after the University was formally notified of the change in IRS policy. The University subsequently filed returns under the Federal Unemployment Tax Act for the period from December 1, 1970, to December 31, 1975, and paid a tax *582 totalling $21.00 on one employee for the calendar year of 1975. After its request for a refund was denied, the University instituted the present action, seeking to recover the $21.00 it had paid to the IRS. The Government counterclaimed for unpaid federal unemployment taxes for the taxable years 1971 through 1975, in the amount of $489,675.59, plus interest.

The United States District Court for the District of South Carolina held that revocation of the University's tax-exempt status exceeded the delegated powers of the IRS, was improper under the IRS rulings and procedures, and violated the University's rights under the Religion Clauses of the First Amendment. 468 F.Supp. 890, 907 (D.S.C.1978). The court accordingly ordered the IRS to pay the University the $21.00 refund it claimed and rejected the IRS counterclaim.

The Court of Appeals for the Fourth Circuit, in a divided opinion, reversed. 639 F.2d 147 (CA4 1980). Citing *Green v. Connally, supra,* with approval, the Court of Appeals concluded that § 501(c)(3) must be read against the background of charitable trust law. To be eligible for an exemption under that section, an institution must be "charitable" in the common law sense, and therefore must not be contrary to public policy. In the court's ****2024** view, Bob Jones University did not meet this requirement, since its "racial policies violated the clearly defined public policy, rooted in our Constitution, condemning racial discrimination and, more specifically, the government policy against subsidizing racial discrimination in education, public or private." *Id.,* at 151. The court held that the IRS acted within its statutory authority in revoking the University's tax-exempt status. Finally, the Court of Appeals rejected petitioner's arguments that the revocation of the tax exemption violated the Free Exercise and Establishment Clauses of the First Amendment. The case was remanded to the District Court with instructions to dismiss the University's claim for a refund and to reinstate the Government's counterclaim.

***583** C

No. 81–1, Goldsboro Christian Schools, Inc. v. United States

Goldsboro Christian Schools is a nonprofit corporation located in Goldsboro, North Carolina. Like Bob Jones University, it was established "to conduct an institution of learning ..., giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures." Articles of Incorporation, ¶ 3(a); see Complaint, ¶ 6, reprinted in App. in No. 81–1, pp. 5–6. The school offers classes from kindergarten through high school, and since at least 1969 has satisfied the State of North Carolina's requirements for secular education in private schools. The school requires its high school students to take Bible-related courses, and begins each class with prayer.

Since its incorporation in 1963, Goldsboro Christian Schools has maintained a racially discriminatory admissions policy based upon its interpretation of the Bible.[6] Goldsboro has for the most part accepted only Caucasians. On occasion, however, the school has accepted children from racially mixed marriages in which one of the parents is Caucasian.

Goldsboro never received a determination by the IRS that it was an organization entitled to tax exemption under § 501(c)(3). Upon audit of Goldsboro's records for the years 1969 through 1972, the IRS determined that Goldsboro was not an organization described in § 501(c)(3), and therefore was required to pay taxes under the Federal Insurance Contribution Act and the Federal Unemployment Tax Act.

***584** Goldsboro paid the IRS $3,459.93 in withholding, social security, and unemployment taxes with respect to one employee for the years 1969 through 1972. Thereafter, Goldsboro filed a suit seeking refund of that payment, claiming that the school had been improperly denied § 501(c)(3) exempt status.[7] The IRS counterclaimed for $160,073.96 in unpaid social security and unemployment taxes for the years 1969 through 1972, including interest and penalties.[8]

The District Court for the Eastern District of North Carolina decided the action on cross-motions for summary judgment. 436 F.Supp. 1314 (E.D.N.C.1977). In addressing the motions for summary judgment, the court assumed that Goldsboro's racially discriminatory admissions policy was based upon a sincerely held religious belief. The court nevertheless rejected Goldsboro's claim to tax-exempt status under § 501(c)(3), finding that "private schools maintaining racially ****2025** discriminatory admissions policies violate clearly declared federal policy and, therefore, must be denied the federal tax benefits flowing from qualification under Section 501(c)(3)." *Id.,* at 1318. The court also rejected Goldsboro's arguments that denial of tax-exempt status violated the Free Exercise and Establishment Clauses of the First Amendment. Accordingly, the court entered summary judgment for the Government on its counterclaim.

The Court of Appeals for the Fourth Circuit affirmed, 644 F.2d 879 (CA4 1981) (*per curiam*). That court found an "identity for present purposes" between the *Goldsboro* case and the *Bob Jones University* case, which had been decided

shortly ***585** before by another panel of that court, and affirmed for the reasons set forth in *Bob Jones University.*

We granted certiorari in both cases, 454 U.S. 892, 102 S.Ct. 386, 70 L.Ed.2d 205 (1981),[9] and we affirm in each.

II

A

In Revenue Ruling 71–447, the IRS formalized the policy first announced in 1970, that § 170 and § 501(c)(3) embrace the common law "charity" concept. Under that view, to qualify for a tax exemption pursuant to § 501(c)(3), an institution must show, first, that it falls within one of the eight categories expressly set forth in that section, and second, that its activity is not contrary to settled public policy.

Section 501(c)(3) provides that "[c]orporations ... organized and operated exclusively for religious, charitable ... or educational purposes" are entitled to tax exemption. Petitioners argue that the plain language of the statute guarantees them tax-exempt status. They emphasize the absence of any language in the statute expressly requiring all exempt organizations to be "charitable" in the common law sense, and they contend that the disjunctive "or" separating the categories in § 501(c)(3) precludes such a reading. Instead, they argue that if an institution falls within one or more of ***586** the specified categories it is automatically entitled to exemption, without regard to whether it also qualifies as "charitable." The Court of Appeals rejected that contention and concluded that petitioners' interpretation of the statute "tears section 501(c)(3) from its roots." *United States v. Bob Jones University, supra,* 639 F.2d, at 151.

[2] It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute:

> "The general words used in the clause ..., taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, *but will take in connection with it the whole statute ... and the objects and policy of the law....*"
>
> *Brown v. Duchesne,* 19 How. 183, 194, 15 L.Ed. 595 (1857) (emphasis added).

****2026** **[3]** Section 501(c)(3) therefore must be analyzed and construed within the framework of the Internal Revenue Code and against the background of the Congressional purposes. Such an examination reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.

[4] This "charitable" concept appears explicitly in § 170 of the Code. That section contains a list of organizations virtually identical to that contained in § 501(c)(3). It is apparent that Congress intended that list to have the same meaning in both ***587** sections.[10] In § 170, Congress used the list of organizations in defining the term "charitable contributions." On its face, therefore, § 170 reveals that Congress' intention was to provide tax benefits to organizations serving charitable purposes.[11] The form of § 170 simply makes plain what common sense and history tell us: in enacting both § 170 and ***588** § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.

Tax exemptions for certain institutions thought beneficial to the social order of the country as a whole, or to a particular community, are deeply rooted in our history, as in that of

England. The origins of such exemptions lie in the special privileges that have long been extended to charitable trusts. [12]

**2027 More than a century ago, this Court announced the caveat that is critical in this case:

> "[I]t has now become an established principle of American law, that courts of chancery will sustain and protect ... a gift ... to public charitable uses, *provided the same is consistent with local laws and public policy....*" *Perin v. Carey,* 24 How. 465, 501, 16 L.Ed. 701 (1861) (emphasis added).

Soon after that, in 1878, the Court commented:

> "A charitable use, *where neither law nor public policy forbids,* may be applied to almost any thing *that tends to promote the well-doing and well-being of social man.*" *Ould v. Washington Hospital for Foundlings,* 95 U.S. 303, 311, 24 L.Ed. 450 (1878) (emphasis added). *589 See also, *e.g., Jackson v. Phillips,* 96 Mass. 539, 556 (1867).

In 1891, in a restatement of the English law of charity [13] which has long been recognized as a leading authority in this country, Lord MacNaghten stated:

> " 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; *trusts for the advancement of education;* trusts for the advancement of religion; and trusts for *other purposes beneficial to the community,* not falling under any of the preceding heads." *Commissioners v. Pemsel,* [1891] A.C. 531, 583 (emphasis added). See, *e.g.,* 4 A. Scott, The Law of Trusts § 368, at 2853–2854 (3d ed. 1967) (hereinafter Scott).

These statements clearly reveal the legal background against which Congress enacted the first charitable exemption statute in 1894: [14] charities were to be given preferential treatment because they provide a benefit to society.

What little floor debate occurred on the charitable exemption provision of the 1894 Act and similar sections of later statutes leaves no doubt that Congress deemed the specified organizations entitled to tax benefits because they served desirable public purposes. See, *e.g.,* *590 26 Cong.Rec. 585–586 (1894); *id.,* at 1727. In floor debate on a similar provision in 1917, for example, Senator Hollis articulated the rationale:

> "For every dollar that a man contributes to these public charities, educational, scientific, or otherwise, the public gets 100 percent." 55 *id.,* at 6728 (1917). See also, *e.g.,* 44 *id.,* at 4150 (1909); 50 *id.,* at 1305–1306 (1913).

In 1924, this Court restated the common understanding of the charitable exemption provision:

> "Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain." *Trinidad v. Sagrada Orden,* 263 U.S. 578, 581, 44 S.Ct. 204, 205, 68 L.Ed. 458 (1924). [15]

**2028 In enacting the Revenue Act of 1938, ch. 289, 52 Stat. 447 (1938), Congress expressly reconfirmed this view with respect to the charitable deduction provision:

> "The exemption from taxation of money and property devoted to charitable and other purposes is based on the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare." H.R.Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938). [16]

[5] *591 A corollary to the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy. In 1861, this Court stated that a public charitable use must be "consistent with local laws and public policy," *Perin v. Carey, supra,* 24 How., at 501. Modern commentators and courts have echoed that view. See, *e.g.,* Restatement (Second) of Trusts, § 377, comment c (1959); 4 Scott § 377, and cases cited therein; Bogert § 378, at 191–192. [17]

[6] **[7]** **[8]** When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious "donors." Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues.[18] History buttresses ***592** logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public ****2029** interest.[19] The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.

B

[9] **[10]** We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. Prior to 1954, public education in many places still was conducted under the pall of ***593** *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896); racial segregation in primary and secondary education prevailed in many parts of the country. See, *e.g.,* Segregation and the Fourteenth Amendment in the States (B. Reams & P. Wilson, eds. 1975).[20] This Court's decision in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), signalled an end to that era. Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.

[11] An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.

> "The right of a student not to be segregated on racial grounds in schools ... is indeed so fundamental and pervasive that it is embraced in the concept of due process of law." *Cooper v. Aaron,* 358 U.S. 1, 19, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 19 (1958).

In *Norwood v. Harrison,* 413 U.S. 455, 468–469, 93 S.Ct. 2804, 2812, 37 L.Ed.2d 723 (1973), we dealt with a non-public institution:

> "[A] private school—even one that discriminates—fulfills an important educational function; *however, ... [that] legitimate educational function cannot be isolated from* ***594** *discriminatory practices ... [D]iscriminatory treatment exerts a pervasive influence on the entire educational process.*" (Emphasis added). See also *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976); *Griffin v. County School Board,* 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964).

Congress, in Titles IV and VI of the Civil Rights Act of 1964, Pub.L. 88–352, 78 Stat. 241, 42 U.S.C. §§ 2000c et seq., 2000c–6, 2000–d et seq., clearly expressed its agreement that racial discrimination in education violates a fundamental public policy. Other sections of that Act, and numerous enactments since then, testify to the public ****2030** policy against racial discrimination. See, *e.g.,* the Voting Rights Act of 1965, Pub.L. 89–110, 79 Stat. 437, 42 U.S.C. §§ 1971 *et seq.;* Title VIII of the Civil Rights Act of 1968, Pub.L. 90–284, 82 Stat. 81, 42 U.S.C. §§ 3601 *et seq.;* the Emergency School Aid Act of 1972, Pub.L. 92–318, 86 Stat.

354 (repealed effective Sept. 30, 1979; replaced by similar provisions in the Emergency School Aid Act of 1978, Pub.L. 95–561, 92 Stat. 2252, 20 U.S.C. §§ 3191–3207 (1980 Supp.)).

The Executive Branch has consistently placed its support behind eradication of racial discrimination. Several years before this Court's decision in *Brown v. Board of Education, supra,* President Truman issued Executive Orders prohibiting racial discrimination in federal employment decisions, Exec. Order No. 9980, 3federal employment decisions, Exec. Order No. 9980, 3 CFR 720 (1943–1948 Comp.), and in classifications for the Selective Service, Exec. Order No. 9988, *id.* 726, 729. In 1957, President Eisenhower employed military forces to ensure compliance with federal standards in school desegregation programs. Exec. Order No. 10730, 3Exec. Order No. 10730, 3 CFR 389 (1954–1958 Comp.). And in 1962, President Kennedy announced:

> "[T]he granting of federal assistance for ... housing and related facilities from which Americans are excluded because of their race, color, creed, or national origin is unfair, unjust, and inconsistent with the public policy of ***595** the United States as manifested in its Constitution and laws." Exec. Order No. 11063, 3Exec. Order No. 11063, 3 CFR 652 (1959–1963 Comp.).

These are but a few of numerous Executive Orders over the past three decades demonstrating the commitment of the Executive Branch to the fundamental policy of eliminating racial discrimination. See, *e.g.,* Exec. Order No. 11197, 3Exec. Order No. 11197, 3 CFR 278 (1964–1965 Comp.); Exec. Order No. 11478, 3Exec. Order No. 11478, 3 CFR 803 (1966–1970 Comp.); Exec. Order No. 11764, 3Exec. Order No. 11764, 3 CFR 849 (1971–1975 Comp.); Exec. Order No. 12250, 3Exec. Order No. 12250, 3 CFR 298 (1981).

[12] Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education. Given the stress and anguish of the history of efforts to escape from the shackles of the "separate but equal" doctrine of *Plessy v. Ferguson, supra,* it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life," *Walz v. Tax Comm'n,* 397 U.S. 664, 673, 90 S.Ct. 1409, 1413, 25 L.Ed.2d 697 (1970), or should be encouraged by having all taxpayers share in their support by way of special tax status.

[13] **[14]** There can thus be no question that the interpretation of § 170 and § 501(c)(3) announced by the IRS in 1970 was correct. That it may be seen as belated does not undermine its soundness. It would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities, which "exer [t] a pervasive influence on the entire educational process." *Norwood v. Harrison, supra,* 413 U.S., at 469, 93 S.Ct., at 2812. Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the "charitable" concept discussed earlier, ***596** or within the Congressional intent underlying § 170 and § 501(c)(3). [21]

C

[15] Petitioners contend that, regardless of whether the IRS properly concluded ****2031** that racially discriminatory private schools violate public policy, only Congress can alter the scope of § 170 and § 501(c)(3). Petitioners accordingly argue that the IRS overstepped its lawful bounds in issuing its 1970 and 1971 rulings.

[16] Yet ever since the inception of the tax code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws. In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems. Indeed as early as 1918, Congress expressly authorized the Commissioner "to make all needful rules and regulations for the enforcement" of the tax laws. Revenue Act of 1918, ch. 18, § 1309, 40 Stat. 1057, 1143 (1919). The same provision, so essential to efficient and fair administration of the tax laws, has appeared in tax codes ever since, see 26 U.S.C. § 7805(a) (1976); and this Court has

long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code, see, *e.g., Commissioner v. Portland Cement Co.,* 450 U.S. 156, 169, 101 S.Ct. 1037, 1045, 67 L.Ed.2d 140 (1981); *United States v. Correll,* 389 U.S. 299, 306–307, 88 S.Ct. 445, 449, 19 L.Ed.2d 537 (1967); *Boske v. Comingore,* 177 U.S. 459, 469–470, 20 S.Ct. 701, 705, 44 L.Ed. 846 (1900).

Congress, the source of IRS authority, can modify IRS rulings it considers improper; and courts exercise review over IRS actions. In the first instance, however, the responsibility ***597** for construing the Code falls to the IRS. Since Congress cannot be expected to anticipate every conceivable problem that can arise or to carry out day-to-day oversight, it relies on the administrators and on the courts to implement the legislative will. Administrators, like judges, are under oath to do so.

In § 170 and § 501(c)(3), Congress has identified categories of traditionally exempt institutions and has specified certain additional requirements for tax exemption. Yet the need for continuing interpretation of those statutes is unavoidable. For more than 60 years, the IRS and its predecessors have constantly been called upon to interpret these and comparable provisions, and in doing so have referred consistently to principles of charitable trust law. In Treas.Reg. 45, art. 517(1) (1921), for example, the IRS denied charitable exemptions on the basis of proscribed political activity before the Congress itself added such conduct as a disqualifying element. In other instances, the IRS has denied charitable exemptions to otherwise qualified entities because they served too limited a class of people and thus did not provide a truly "public" benefit under the common law test. See, *e.g., Crellin v. Commissioner,* 46 B.T.A. 1152, 1155–1156 (1942); *James Sprunt Benevolent Trust v. Commissioner,* 20 B.T.A. 19, 24–25 (1930). See also Treas.Reg. § 1.501(c)(3)–1(d)(1)(ii) (1959). Some years before the issuance of the rulings challenged in these cases, the IRS also ruled that contributions to community recreational facilities would not be deductible and that the facilities themselves would not be entitled to tax-exempt status, unless those facilities were open to all on a racially nondiscriminatory basis. See Rev.Rul. 67–325, 1967–2 Cum.Bull. 113. These rulings reflect the Commissioner's continuing duty to interpret and apply the Internal Revenue Code. See also *Textile Mills Securities Corp. v. Commissioner,* 314 U.S. 326, 337–338, 62 S.Ct. 272, 279, 86 L.Ed. 249 (1941).

[17] Guided, of course, by the Code, the IRS has the responsibility, in the first instance, to determine whether a particular ***598** entity is "charitable" for purposes of § 170 and § 501(c)(3).[22] This in turn may necessitate later determinations of whether given activities so violate public policy that the entities involved cannot be deemed to provide ****2032** a public benefit worthy of "charitable" status. We emphasize, however, that these sensitive determinations should be made only where there is no doubt that the organization's activities violate fundamental public policy.

On the record before us, there can be no doubt as to the national policy. In 1970, when the IRS first issued the ruling challenged here, the position of all three branches of the Federal Government was unmistakably clear. The correctness of the Commissioner's conclusion that a racially discriminatory private school "is not 'charitable' within the common law concepts reflected in ... the Code," Rev.Rul. 71–447, 1972–2 Cum.Bull., at 231, is wholly consistent with what Congress, the Executive and the courts had repeatedly declared before 1970. Indeed, it would be anomalous for the Executive, Legislative and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared.[23] Clearly an educational institution engaging in ***599** practices affirmatively at odds with this declared position of the whole government cannot be seen as exercising a "beneficial and stabilizing influenc[e] in community life," *Walz v. Tax Comm'n, supra,* 397 U.S., at 673, 90 S.Ct., at 1413, and is not "charitable," within the meaning of § 170 and § 501(c)(3). We therefore hold that the IRS did not exceed its authority when it announced its interpretation of § 170 and § 501(c)(3) in 1970 and 1971.[24]

D

The actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority. It is, of course, not unknown for independent agencies or the Executive Branch to misconstrue the intent of a statute; Congress can and often does correct such misconceptions, if the courts have not done so. Yet for a dozen years Congress has been made aware—acutely aware—of the IRS rulings of 1970 and 1971. As we noted earlier, few issues have been the subject of more vigorous and widespread debate and discussion in and out of Congress than those related to racial segregation in education. Sincere adherents advocating contrary views have ventilated the subject for well over three decades. Failure of Congress to modify the IRS rulings of 1970 and 1971, of which Congress was, by its own studies and by public discourse, constantly reminded; and Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings.

[18] ***600** Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation. See, *e.g.,* *Aaron v. SEC,* 446 U.S. 680, 694 n. 11, 100 S.Ct. 1945, 1954 n. 11, 64 L.Ed.2d 611 (1980). We have observed that "unsuccessful attempts at legislation are not the best of guides to legislative ****2033** intent," *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381–382 n. 11, 89 S.Ct. 1794, 1801–1802 n. 11, 23 L.Ed.2d 371 (1969). Here, however, we do not have an ordinary claim of legislative acquiescence. Only one month after the IRS announced its position in 1970, Congress held its first hearings on this precise issue. *Equal Educational Opportunity: Hearings Before the Senate Select Comm. on Equal Educational Opportunity,* 91st Cong., 2d Sess. 1991 (1970). Exhaustive hearings have been held on the issue at various times since then. These include hearings in February 1982, after we granted review in this case. *Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearing Before the House Comm. on Ways and Means,* 97th Cong., 2d Sess. (1982).

Non-action by Congress is not often a useful guide, but the non-action here is significant. During the past 12 years there have been no fewer than 13 bills introduced to overturn the IRS interpretation of § 501(c)(3).[25] Not one of these bills has emerged from any committee, although Congress has enacted numerous other amendments to § 501 during this same period, including an amendment to § 501(c)(3) itself. Tax Reform Act of 1976, Pub.L. 94–455, § 1313(a), 90 Stat. 1520, 1730 (1976). It is hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly ***601** aware of what was going on. In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in the IRS rulings of 1970 and 1971. See, *e.g.,* *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 379–382, 102 S.Ct. 1825, 1839–1841, 72 L.Ed.2d 182 (1982); *Haig v. Agee,* 453 U.S. 280, 300–301, 101 S.Ct. 2766, 2778–2779, 69 L.Ed.2d 640 (1981); *Herman & MacLean v. Huddleston,* —— U.S. ——, ——, 103 S.Ct. 683, 689, 74 L.Ed.2d 548 (1983); *United States v. Rutherford,* 442 U.S. 544, 554 n. 10, 99 S.Ct. 2470, 2476 n. 10, 61 L.Ed.2d 68 (1979).

The evidence of Congressional approval of the policy embodied in Revenue Ruling 71–447 goes well beyond the failure of Congress to act on legislative proposals. Congress affirmatively manifested its acquiescence in the IRS policy when it enacted the present § 501(i) of the Code, Act of October 20, 1976, Pub.L. 94–568, 90 Stat. 2697 (1976). That provision denies tax-exempt status to social clubs whose charters or policy statements provide for "discrimination against any person on the basis of race, color, or religion."[26] Both the House and Senate committee reports on that bill articulated the national policy against granting tax exemptions to racially discriminatory private clubs. S.Rep. No. 1318, 94th Cong., 2d Sess., 8 (1976); H.R.Rep. No. 1353, 94th Cong., 2d Sess., 8 (1976), U.S.Code Cong. & Admin.News 1976, p. 6051.

Even more significant is the fact that both reports focus on this Court's affirmance of *Green v. Connally, supra,* as having established that "discrimination on account of race is inconsistent with an *educational institution's* tax exempt status." S.Rep. No. 1318, *supra,* at 7–8 and n. 5;

H.R.Rep. No. 1353, *supra,* at 8 and n. 5 (emphasis added), U.S.Code Cong. & Admin.News, p. 6058. These references in Congressional committee reports on an enactment denying **2034 tax exemptions to racially discriminatory private social clubs cannot be read *602 other than as indicating approval of the standards applied to racially discriminatory private schools by the IRS subsequent to 1970, and specifically of Revenue Ruling 71–447.[27]

III

Petitioners contend that, even if the Commissioner's policy is valid as to nonreligious private schools, that policy cannot constitutionally be applied to schools that engage in racial discrimination on the basis of sincerely held religious beliefs.[28] *603 As to such schools, it is argued that the IRS construction of § 170 and § 501(c)(3) violates their free exercise rights under the Religion Clauses of the First Amendment. This contention presents claims not heretofore considered by this Court in precisely this context.

[19] [20] [21] This Court has long held the Free Exercise Clause of the First Amendment an absolute prohibition against governmental regulation of religious beliefs, *Wisconsin v. Yoder,* 406 U.S. 205, 219, 92 S.Ct. 1526, 1535, 32 L.Ed.2d 15 (1972); *Sherbert v. Verner,* 374 U.S. 398, 402, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963); *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). As interpreted by this Court, moreover, the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief, see *Wisconsin v. Yoder, supra,* 406 U.S., at 220, 92 S.Ct., at 1535; *Thomas v. Review Board of the Indiana Emp. Security Div.,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Sherbert v. Verner, supra,* 374 U.S., at 402–403, 83 S.Ct., at 1793. However, "[n]ot all burdens on religion are unconstitutional.... The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *United States v. Lee,* 455 U.S. 252, 257–258, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982) (citations omitted). See, *e.g., McDaniel v. Paty,* 435 U.S. 618, 628, 98 S.Ct. 1322, 1328, 55 L.Ed.2d 593 and n. 8 (1978); *Wisconsin v. Yoder, supra,* 406 U.S., at 215, 92 S.Ct., at 1533; *Gillette v. United States,* 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971).

On occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct. In *Prince v. Massachusetts,* **2035 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), for example, the Court held that neutrally cast child labor laws prohibiting sale of printed materials on public streets could be applied to prohibit children from dispensing religious literature. The Court found no constitutional infirmity in "excluding [Jehovah's Witness children] from doing there what no other children may do." *Id.,* at 170, 64 S.Ct., at 444. See also *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1878); *United States v. Lee, supra; Gillette v. United States, supra.* Denial of tax benefits will inevitably have a substantial *604 impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.

[22] [23] [24] The governmental interest at stake here is compelling. As discussed in Part II(B), *supra,* the Government has a fundamental, overriding interest in eradicating racial discrimination in education[29]—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, see *United States v. Lee, supra,* 455 U.S., at 259–260, 102 S.Ct., at 1056; and no "less restrictive means," see *Thomas v. Review Board, supra,* 450 U.S., at 718, 101 S.Ct., at 1432, are available to achieve the governmental interest.[30]

*605 IV

[25] The remaining issue is whether the IRS properly applied its policy to these petitioners. Petitioner Goldsboro

Christian Schools admits that it "maintain[s] racially discriminatory policies," Brief of Petitioner, Goldsboro Christian Schools, No. 81–1, at 10, but seeks to justify those policies on grounds we have fully discussed. The IRS properly denied tax-exempt status to Goldsboro Christian Schools.

Petitioner Bob Jones University, however, contends that it is not racially discriminatory. It emphasizes that it now allows all races to enroll, subject only to its restrictions on the conduct of all students, including its prohibitions of association between men and women of different races, and of interracial marriage.[31] Although a ****2036** ban on intermarriage or interracial dating applies to all races, decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination, see, *e.g.,* *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *McLaughlin v. Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964); *Tillman v. Wheaton-Haven Recreation Ass'n,* 410 U.S. 431, 93 S.Ct. 1090, 35 L.Ed.2d 403 (1973). We therefore find that the IRS properly applied Revenue Ruling 71–447 to Bob Jones University.[32]

The judgments of the Court of Appeals are, accordingly,

Affirmed.

***606** Justice POWELL, concurring in part and concurring in the judgment.

I join the Court's judgment, along with part III of its opinion holding that the denial of tax exemptions to petitioners does not violate the First Amendment. I write separately because I am troubled by the broader implications of the Court's opinion with respect to the authority of the Internal Revenue Service (IRS) and its construction of §§ 170(c) and 501(c)(3) of the Internal Revenue Code.

I

Federal taxes are not imposed on organizations "operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes ...." 26 U.S.C. § 501(c)(3). The Code also permits a tax deduction for contributions made to these organizations. § 170(c). It is clear that petitioners, organizations incorporated for educational purposes, fall within the language of the statute. It also is clear that the language itself does not mandate refusal of tax-exempt status to any private school that maintains a racially discriminatory admissions policy. Accordingly, there is force in Justice REHNQUIST's argument that §§ 170(c) and 501(c)(3) should be construed as setting forth the only criteria Congress has established for qualification as a tax-exempt organization. See *post,* at 2039–2041 (REHNQUIST, J., dissenting). Indeed, were we writing prior to the history detailed in the Court's opinion, this could well be the construction I would adopt. But there has been a decade of acceptance that is persuasive in the circumstances of this case, and I conclude that there are now sufficient reasons for accepting the IRS's construction of the Code as proscribing ***607** tax exemptions for schools that discriminate on the basis of race as a matter of policy.

I cannot say that this construction of the Code, adopted by the IRS in 1970 and upheld by the Court of Appeals below, is without logical support. The statutory terms are not self-defining, and it is plausible that in some instances an organization seeking a tax exemption might act in a manner so clearly contrary to the purposes of our laws that it could not be deemed to serve the enumerated statutory purposes.[1] And, as the Court notes, if any national policy is sufficiently fundamental to constitute such an overriding limitation on the availability of tax-exempt status under § 501(c)(3), it is the policy against racial discrimination in education. See *ante,* at 2030–2031. Finally, and of critical importance for me, the subsequent actions of Congress present "an unusually strong case of legislative acquiescence in and ratification ****2037** by implication of the [IRS'] 1970 and 1971 rulings" with respect to racially discriminatory schools. *Ante,* at 2033. In particular, Congress' enactment of § 501(i) in 1976 is strong evidence of agreement with these particular IRS rulings.[2]

***608** II

I therefore concur in the Court's judgment that tax-exempt status under §§ 170(c) and 501(c)(3) is not available to private schools that concededly are racially discriminatory. I do not agree, however, with the Court's more general explanation of the justifications for the tax exemptions provided to charitable organizations. The Court states:

> "Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. History buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." *Ante,* at 2028–2029 (footnote omitted).

Applying this test to petitioners, the Court concludes that "[c]learly an educational institution engaging in practices affirmatively at odds with [the] declared position of the whole government cannot be seen as exercising a 'beneficial and stabilizing influenc[e] in community life,' ... and is not 'charitable,' within the meaning of § 170 and § 501(c)(3)." *Ante,* at 2032 (quoting *Walz v. Tax Comm'n,* 397 U.S. 664, 673, 90 S.Ct. 1409, 1413, 25 L.Ed.2d 697 (1970)).

With all respect, I am unconvinced that the critical question in determining tax-exempt status is whether an individual organization provides a clear "public benefit" as defined by the Court. Over 106,000 organizations filed § 501(c)(3) returns in 1981. Internal Revenue Service, 1982 Exempt ***609** Organization/Business Master File. I find it impossible to believe that all or even most of those organizations could prove that they "demonstrably serve and [are] in harmony with the public interest" or that they are "beneficial and stabilizing influences in community life." Nor I am prepared to say that petitioners, because of their racially discriminatory policies, necessarily contribute nothing of benefit to the community. It is clear from the substantially secular character of the curricula and degrees offered that petitioners provide educational benefits.

Even more troubling to me is the element of conformity that appears to inform the Court's analysis. The Court asserts that an exempt organization must "demonstrably serve and be in harmony with the public interest," must have a purpose that comports with "the common community conscience," and must not act in a manner "affirmatively at odds with [the] declared position of the whole government." Taken together, these passages suggest that the primary function of a tax-exempt organization ****2038** is to act on behalf of the Government in carrying out governmentally approved policies. In my opinion, such a view of § 501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints. As Justice BRENNAN has observed, private, nonprofit groups receive tax exemptions because "each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." *Walz, supra,* at 689, 90 S.Ct., at 1421 (BRENNAN, J., concurring). Far from representing an effort to reinforce any perceived "common community conscience," the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.[3] ***610** Given the importance of our tradition of pluralism,[4] "[t]he interest in preserving an area of untrammeled choice for private philanthropy is very great." *Jackson v. Statler Foundation,* 496 F.2d 623, 639 (CA2 1974) (Friendly, J., dissenting from denial of reconsideration en banc).

I do not suggest that these considerations always are or should be dispositive. Congress, of course, may find that some organizations do not warrant tax-exempt status. In this case I agree with the Court that Congress has determined that the policy against racial discrimination in education should override the countervailing interest in permitting unorthodox private behavior.

***611** I would emphasize, however, that the balancing of these substantial interests is for *Congress* to perform. I am unwilling to join any suggestion that the Internal Revenue Service is invested with authority to decide which public

policies are sufficiently "fundamental" to require denial of tax exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote "public policy." As former IRS Commissioner Kurtz has noted, questions concerning religion and civil rights "are far afield from the more typical tasks of tax administrators—determining taxable income." Kurtz, Difficult Definitional Problems in Tax Administration: Religion and Race, 23 Catholic Lawyer 301, 301 (1978). This Court often has expressed concern that the scope of an agency's authorization be limited to those areas in which the agency fairly may be **2039 said to have expertise,[5] and this concern applies with special force when the asserted administrative power is one to determine the scope of public policy. As Justice BLACKMUN has noted,

> "where the philanthropic organization is concerned, there appears to be little to circumscribe the almost unfettered power of the Commissioner. This may be very well so long as one subscribes to the particular brand of social policy the Commissioner happens to be advocating ***612** at the time ..., but application of our tax laws should not operate in so fickle a fashion. Surely, social policy in the first instance is a matter for legislative concern." *Commissioner v. "Americans United" Inc.*, 416 U.S. 752, 774–775, 94 S.Ct. 2053, 2065, 40 L.Ed.2d 518 (1974) (BLACKMUN, J., dissenting).

III

The Court's decision upholds IRS Revenue Ruling 71–447, and thus resolves the question whether tax-exempt status is available to private schools that openly maintain racially discriminatory admissions policies. There no longer is any justification for *Congress* to hesitate—as it apparently has—in articulating and codifying its desired policy as to tax exemptions for discriminatory organizations. Many questions remain, such as whether organizations that violate other policies should receive tax-exempt status under § 501(c)(3). These should be legislative policy choices. It is not appropriate to leave the IRS "on the cutting edge of developing national policy." Kurtz, *supra,* at 308. The contours of public policy should be determined by Congress, not by judges or the IRS.

Justice REHNQUIST, dissenting.

The Court points out that there is a strong national policy in this country against racial discrimination. To the extent that the Court states that Congress in furtherance of this policy could deny tax-exempt status to educational institutions that promote racial discrimination, I readily agree. But, unlike the Court, I am convinced that Congress simply has failed to take this action and, as this Court has said over and over again, regardless of our view on the propriety of Congress' failure to legislate we are not constitutionally empowered to act for them.

In approaching this statutory construction question the Court quite adeptly avoids the statute it is construing. This I am sure is no accident, for there is nothing in the language ***613** of § 501(c)(3) that supports the result obtained by the Court. Section 501(c)(3) provides tax-exempt status for:

> "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise **2040 provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." 26 U.S.C. § 501(c)(3).

With undeniable clarity, Congress has explicitly defined the requirements for § 501(c)(3) status. An entity must be (1) a corporation, or community chest, fund, or foundation, (2) organized for one of the eight enumerated purposes, (3) operated on a nonprofit basis, and (4) free from involvement in lobbying activities and political campaigns. Nowhere is there to be found some additional, undefined public policy requirement.

The Court first seeks refuge from the obvious reading of § 501(c)(3) by turning to § 170 of the Internal Revenue Code which provides a tax deduction for contributions made to § 501(c)(3) organizations. In setting forth the general rule, § 170 states:

> "There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified ***614** under regulations prescribed by the Secretary." 26 U.S.C. § 170(a)(1).

The Court seizes the words "charitable contribution" and with little discussion concludes that "[o]n its face, therefore, § 170 reveals that Congress' intention was to provide tax benefits to organizations serving charitable purposes," intimating that this implies some unspecified common law charitable trust requirement. *Ante,* at 2026.

The Court would have been well advised to look to subsection (c) where, as § 170(a)(1) indicates, Congress has defined a "charitable contribution":

> "For purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of ... [a] corporation, trust, or community chest, fund, or foundation ... organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals; ... no part of the net earnings of which inures to the benefit of any private shareholder or individual; and ... which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." 26 U.S.C. § 170(c).

Plainly, § 170(c) simply tracks the requirements set forth in § 501(c)(3). Since § 170 is no more than a mirror of § 501(c)(3) and, as the Court points out, § 170 followed § 501(c)(3) by more than two decades, *ante,* at 2026, n. 10, it is at best of little usefulness in finding the meaning of § 501(c)(3).

Making a more fruitful inquiry, the Court next turns to the legislative history of § 501(c)(3) and finds that Congress intended ***615** in that statute to offer a tax benefit to organizations that Congress believed were providing a public benefit. I certainly agree. But then the Court leaps to the conclusion that this history is proof Congress intended that an organization seeking § 501(c)(3) status "must fall within a category specified in that section *and must demonstrably serve and be in harmony with the public interest.*" *Ante,* at 2029 (emphasis added). To the contrary, I think that the legislative history of § 501(c)(3) unmistakably makes clear that *Congress has decided* what organizations are serving a public purpose and providing a public benefit within the meaning of § 501(c)(3) and has clearly set forth in § 501(c)(3) the characteristics of such organizations. In fact, there are few examples which better illustrate Congress' effort to define and redefine the requirements of a legislative act.

The first general income tax law was passed by Congress in the form of the Tariff Act of 1894. A provision of that Act ****2041** provided an exemption for "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes." Ch. 349, § 32, 28 Stat. 509, 556 (1894). The income tax portion of the 1894 Act was held unconstitutional by this Court, see *Pollock v. Farmers' Loan & Trust Co.,* 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108 (1895), but a similar exemption appeared in the Tariff Act of 1909 which imposed a tax on corporate income. The 1909 Act provided an exemption for "any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual." Ch. 6, § 38, 36 Stat. 11, 113 (1909).

With the ratification of the Sixteenth Amendment, Congress again turned its attention to an individual income tax with the Tariff Act of 1913. And again, in the direct predecessor of § 501(c)(3), a tax exemption was provided for "any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, ***616** no part of the net income of which inures to the benefit of any private stockholder or individual." Ch. 16, § II(G)(a), 38 Stat. 114, 172 (1913). In subsequent acts Congress continued to broaden the list of exempt purposes. The Revenue Act of 1918 added an exemption for corporations or associations organized "for the prevention of cruelty to children or animals." Ch. 18, § 231(6), 40 Stat. 1057, 1076 (1918). The Revenue Act of 1921 expanded the groups to which the exemption applied to include "any community chest, fund, or foundation" and added "literary" endeavors to the list of exempt purposes. Ch. 136, § 231(6), 42 Stat. 227, 253 (1921). The exemption remained unchanged in the Revenue Acts of 1924, 1926, 1928, and 1932.[1] In the Revenue Act of 1934 Congress added the requirement that no substantial part of the activities of any exempt organization can involve the carrying on of "propaganda" or "attempting to influence legislation." Ch. 277, § 101(6), 48 Stat. 680, 700 (1934). Again, the exemption was left unchanged by the Revenue Acts of 1936 and 1938.[2]

The tax laws were overhauled by the Internal Revenue Code of 1939, but this exemption was left unchanged. Ch. 1, § 101(6), 53 Stat. 1, 33 (1939). When the 1939 Code was replaced with the Internal Revenue Code of 1954, the exemption was adopted in full in the present § 501(c)(3) with the addition of "testing for public safety" as an exempt purpose and an additional restriction that tax-exempt organizations could not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." Ch. 1, § 501(c)(3), 68A Stat. 1, 163 (1954). Then in 1976 the statute was again amended adding to the purposes for which an exemption would be authorized, "to foster national or international amateur ***617** sports competition," provided the activities did not involve the provision of athletic facilities or equipment. Tax Reform Act of 1976, Pub.L. No. 94–455, § 1313(a), 90 Stat. 1520, 1730 (1976).

One way to read the opinion handed down by the Court today leads to the conclusion that this long and arduous refining process of § 501(c)(3) was certainly a waste of time, for when enacting the original 1894 statute Congress intended to adopt a common law term of art, and intended that this term of art carry with it all of the common law baggage which defines it. Such a view, however, leads also to the unsupportable idea that Congress has spent almost a century adding illustrations simply to clarify an already defined common law term.

****2042** Another way to read the Court's opinion leads to the conclusion that even though Congress has set forth *some* of the requirements of a § 501(c)(3) organization, it intended that the IRS additionally require that organizations meet a higher standard of public interest, not stated by Congress, but to be determined and defined by the IRS and the courts. This view I find equally unsupportable. Almost a century of statutory history proves that Congress itself intended to decide what § 501(c)(3) requires. Congress has expressed its decision in the plainest of terms in § 501(c)(3) by providing that tax-exempt status is to be given to any corporation, or community chest, fund, or foundation that is organized for one of the eight enumerated purposes, operated on a nonprofit basis, and uninvolved in lobbying activities or political campaigns. The IRS certainly is empowered to adopt regulations for the enforcement of these specified requirements, and the courts have authority to resolve challenges to the IRS's exercise of this power, but Congress has left it to neither the IRS nor the courts to select or add to the requirements of § 501(c)(3).

The Court suggests that unless its new requirement be added to § 501(c)(3), nonprofit organizations formed to teach pickpockets and terrorists would necessarily acquire tax exempt ***618** status. *Ante,* at 2028 n. 18. Since the Court does not challenge the characterization of *petitioners* as "educational" institutions within the meaning of § 501(c)(3), and in fact states several times in the course of its opinion that petitioners *are* educational institutions, see, *e.g., ante,* at 2022, 2024, 2035 n. 29, 2036 n. 32, it is difficult to see how this argument advances the Court's reasoning for disposing of petitioners' cases.

But simply because I reject the Court's heavy-handed creation of the requirement that an organization seeking § 501(c)(3) status must "serve and be in harmony with the public interest," *ante,* at 2029, does not mean that I would deny to the IRS the usual authority to adopt regulations further explaining what Congress meant by the term "educational." The IRS has fully exercised that authority in 26 CFR § 1.501(c)(3)–1(d)(3), which provides:

"(3) *Educational defined* —(i) *In general.* The term "educational", as used in section 501(c)(3), relates to—

"(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or

"(b) The instruction of the public on subjects useful to the individual and beneficial to the community.

"An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

"(ii) *Examples of educational organizations.* The following are examples of organizations which, if they otherwise meet the requirements of this section, are educational:

***619** "*Example (1).* An organization, such as a primary or secondary school, a college, or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.

"*Example (2).* An organization whose activities consist of presenting public discussion groups, forums, panels, lectures, or other similar programs. Such programs may be on radio or television.

"*Example (3).* An organization which presents a course of instruction by means of correspondence or through the utilization of television or radio.

"*Example (4).* Museums, zoos, planetariums, symphony orchestras, and other similar organizations."

****2043** I have little doubt that neither the "Fagin School for Pickpockets" nor a school training students for guerrilla warfare and terrorism in other countries would meet the definitions contained in the regulations.

Prior to 1970, when the charted course was abruptly changed, the IRS had continuously interpreted § 501(c)(3) and its predecessors in accordance with the view I have expressed above. This, of course, is of considerable significance in determining the intended meaning of the statute. *NLRB v. Boeing Co.,* 412 U.S. 67, 75, 93 S.Ct. 1952, 1957, 36 L.Ed.2d 752 (1973); *Power Reactor Development Co. v. Electricians,* 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961).

In 1970 the IRS was sued by parents of black public school children seeking to enjoin the IRS from according tax-exempt status under § 501(c)(3) to private schools in Mississippi that discriminated against blacks. The IRS answered, consistent with its long standing position, by maintaining a lack of authority to deny the tax-exemption if the schools met the specified requirements of § 501(c)(3). Then "[i]n the midst of this litigation", *Green v. Connally,* 330 F.Supp. 1150, 1156 (D.D.C.), aff'd per curiam sub nom. *Coit v. Green,* 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971), and in the face of a preliminary injunction, ***620** the IRS changed its position and adopted the view of the plaintiffs.

Following the close of the litigation, the IRS published its new position in Revenue Ruling 71–447, stating that "a school asserting a right to the benefits provided for in section 501(c)(3) of the Code as being organized and operated exclusively for educational purposes must be a common law charity in order to be exempt under that section." Rev.Rul. 71–447, 1971–2 Cum.Bull. 230. The IRS then concluded that a school that promotes racial discrimination violates public policy and therefore cannot qualify as a common law charity. The circumstances under which this change in interpretation was made suggest that it is entitled to very little deference. But even if the circumstances were different, the latter-day wisdom of the IRS has no basis in § 501(c)(3).

Perhaps recognizing the lack of support in the statute itself, or in its history, for the 1970 IRS change in interpretation, the Court finds that "[t]he actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority," concluding that there is "an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings." *Ante,* at 2033. The Court relies first on several bills introduced to overturn the IRS interpretation of § 501(c)(3). *Ante,* at 2033 and n. 25. But we have said before, and it is equally applicable here, that this type of congressional inaction is of virtually no weight in determining legislative intent. See *United States v. Wise,* 370 U.S. 405, 411, 82 S.Ct. 1354, 1358, 8 L.Ed.2d 590 (1962); *Waterman Steamship Corp. v. United States,* 381 U.S. 252, 269, 85 S.Ct. 1389, 1398, 14 L.Ed.2d 370 (1965). These bills and related hearings indicate little more than that a vigorous debate has existed in Congress concerning the new IRS position.

The Court next asserts that "Congress affirmatively manifested its acquiescence in the IRS policy when it enacted the present § 501(i) of the Code," a provision that "denies tax exempt status to social clubs whose charters or policy statements ***621** provide for" racial discrimination. *Ante,* at 2033. Quite to the contrary, it seems to me that in § 501(i) Congress showed that when it wants to add a requirement prohibiting racial discrimination to one of the tax-benefit provisions, it is fully aware of how to do it. Cf. *Commissioner v. Tellier,* 383 U.S. 687, 693 n. 10, 86 S.Ct. 1118, 1121 n. 10, 16 L.Ed.2d 185 (1966).

The Court intimates that the Ashbrook and Dornan Amendments also reflect an intent by Congress to acquiesce in the new IRS position. *Ante,* at 2034 n. 27. The amendments were passed to limit certain enforcement procedures proposed by the IRS in 1978 and 1979 for determining whether a school operated in a racially ****2044** nondiscriminatory fashion. The Court points out that in proposing his amendment, Congressman Ashbrook stated: " 'My amendment very clearly indicates on its face that all the regulations in existence as of August 22, 1978, would not be touched.' " *Ante,* at 2034 n. 27. The Court fails to note that Congressman Ashbrook also said:

> "The IRS has no authority to create public policy.... So long as the Congress has not acted to set forth a national policy respecting denial of tax exemptions to private schools, it is improper for the IRS or any other branch of the Federal Government to seek denial of tax-exempt status.... There exists but a single responsibility which is proper for the Internal Revenue Service: To serve as tax collector." 125 Cong.Rec. H5879–80 (daily ed. July 13, 1979).

In the same debate, Congressman Grassley asserted: "Nobody argues that racial discrimination should receive preferred tax status in the United States. However, the IRS should not be making these decisions on the agency's own discretion. Congress should make these decisions." *Id.,* at 5884. The same debates are filled with other similar statements. While on the whole these debates do not show conclusively that Congress believed the IRS had exceeded its authority with the 1970 change in position, they likewise are ***622** far less than a showing of acquiescence in and ratification of the new position.

This Court continuously has been hesitant to find ratification through inaction. See *United States v. Wise, supra.* This is especially true where such a finding "would result in a construction of the statute which not only is at odds with the language of the section in question and the pattern of the statute taken as a whole, but also is extremely far reaching in terms of the virtually untrammeled and unreviewable power it would vest in a regulatory agency." *SEC v. Sloan,* 436 U.S. 103, 121, 98 S.Ct. 1702, 1713, 56 L.Ed.2d 148 (1978). Few cases would call for more caution in finding ratification by acquiescence than the present one. The new IRS interpretation is not only far less than a long standing administrative policy, it is at odds with a position maintained by the IRS, and unquestioned by Congress, for several decades prior to 1970. The interpretation is unsupported by the statutory language, it is unsupported by legislative history, the interpretation has lead to considerable controversy in and out of Congress, and the interpretation gives to the IRS a broad power which until now Congress had kept for itself. Where in addition to these circumstances Congress has shown time and time again that it is ready to enact positive legislation to change the tax code when it desires, this Court has no business finding that Congress has adopted the new IRS position by failing to enact legislation to reverse it.

I have no disagreement with the Court's finding that there is a strong national policy in this country opposed to racial discrimination. I agree with the Court that Congress has the power to further this policy by denying § 501(c)(3) status to organizations that practice racial discrimination. [3] But as of yet Congress has failed to do so. Whatever the reasons for the failure, this Court should not legislate for Congress. [4]

***623** Petitioners are each organized for the "instruction or training of the individual for the purpose of improving or developing his capabilities," 26 CFR § 1.501(c)(3)–1(d)(3), and thus are organized for "educational purposes" within the meaning of § 501(c)(3). Petitioners' nonprofit status ****2045** is uncontested. There is no indication that either petitioner has been involved in lobbying activities or political campaigns. Therefore, it is my view that unless and until Congress affirmatively amends § 501(c)(3) to require more, the IRS is without authority to deny petitioners § 501(c)(3) status. For this reason, I would reverse the Court of Appeals.

All Citations

461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157, 52 A.F.T.R.2d 83-5001, 83-1 USTC P 9366, 10 Ed. Law Rep. 918, 1983-2 C.B. 80

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 501(c)(3) lists the following organizations, which, pursuant to § 501(a), are exempt from taxation unless denied tax exemptions under other specified sections of the Code:
"Corporations, and any community chest, fund, or foundation, *organized and operated exclusively for religious, charitable,* scientific, testing for public safety, literary, *or educational purposes,* or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation ..., and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." (Emphasis added).

2 Section 170(a) allows deductions for certain "charitable contributions." Section 170(c)(2)(B) includes within the definition of "charitable contribution" a contribution or gift to or for the use of a corporation "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes...."

3 Revenue Ruling 71–447, 1971–2 Cum.Bull. 230, defined "racially nondiscriminatory policy as to students" as meaning that:

> "[T]he school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs."

4 Bob Jones University was founded in Florida in 1927. It moved to Greenville, South Carolina, in 1940, and has been incorporated as an eleemosynary institution in South Carolina since 1952.

5 Beginning in 1973, Bob Jones University instituted an exception to this rule, allowing applications from unmarried Negroes who had been members of the University staff for four years or more.

6 According to the interpretation espoused by Goldsboro, race is determined by descendance from one of Noah's three sons—Ham, Shem and Japheth. Based on this interpretation, Orientals and Negroes are Hamitic, Hebrews are Shemitic,

and Caucasians are Japhethitic. Cultural or biological mixing of the races is regarded as a violation of God's command. App. in No. 81–1, pp. 40–41.

7 Goldsboro also asserted that it was not obliged to pay taxes on lodging furnished to its teachers. Petitioner does not ask this Court to review the rejection of that claim.

8 By stipulation, the IRS agreed to abate its assessment for 1969 and most of 1970 to reflect the fact that the IRS did not begin enforcing its policy of denying tax-exempt status to racially discriminatory private schools until November 30, 1970. As a result, the amount of the counterclaim was reduced to $116,190.99. App. in No. 81–1, pp. 104, 110.

9 After the Court granted certiorari, the Government filed a motion to dismiss, informing the Court that the Department of Treasury intended to revoke Revenue Ruling 71–447 and other pertinent rulings and to recognize § 501(c)(3) exemptions for petitioners. The Government suggested that these actions were therefore moot. Before this Court ruled on that motion, however, the United States Court of Appeals for the District of Columbia Circuit enjoined the Government from granting § 501(c)(3) tax-exempt status to any school that discriminates on the basis of race. *Wright v. Regan,* No. 80–1124 (CADC Feb. 18, 1982) (*per curiam* order). Thereafter, the Government informed the Court that it would not revoke the revenue rulings and withdrew its request that the actions be dismissed as moot. The Government continues to assert that the IRS lacked authority to promulgate Revenue Ruling 71–447, and does not defend that aspect of the rulings below.

10 The predecessor of § 170 originally was enacted in 1917, as part of the War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917), whereas the predecessor of § 501(c)(3) dates back to the income tax law of 1894, Act of August 27, 1894, ch. 349, 28 Stat. 509, see n. 14, *infra.* There are minor differences between the lists of organizations in the two sections, see generally Liles & Blum, Development of the Federal Tax Treatment of Charities, 39 L. & Contemp. Prob. 6, 24–25 (No. 4, 1975) (hereinafter Liles & Blum). Nevertheless, the two sections are closely related; both seek to achieve the same basic goal of encouraging the development of certain organizations through the grant of tax benefits. The language of the two sections is in most respects identical, and the Commissioner and the courts consistently have applied many of the same standards in interpreting those sections. See 5 J. Mertens, The Law of Federal Income Taxation § 31.12 (1980); 6 *id.* §§ 34.01–34.13 (1975); B. Bittker & L. Stone, Federal Income Taxation 220–222 (5th ed. 1980). To the extent that § 170 "aids in ascertaining the meaning" of § 501(c)(3), therefore, it is "entitled to great weight," *United States v. Stewart,* 311 U.S. 60, 64–65, 61 S.Ct. 102, 105–106, 85 L.Ed. 40 (1940). See *Harris v. Commissioner,* 340 U.S. 106, 107, 71 S.Ct. 181, 182, 95 L.Ed. 111 (1950).

11 The dissent suggests that the Court "quite adeptly avoids the statute it is construing," *post,* at 2039, and "seeks refuge ... by turning to § 170," *post,* at 2040. This assertion dissolves when one sees that § 501(c)(3) and § 170 are construed together, as they must be. The dissent acknowledges that the two sections are "mirror" provisions; surely there can be no doubt that the Court properly looks to § 170 to determine the meaning of § 501(c)(3). It is also suggested that § 170 is "at best of little usefulness in finding the meaning of § 501(c)(3)," since "§ 170(c) simply tracks the requirements set forth in § 501(c)(3)," *post,* at 2040. That reading loses sight of the fact that § 170(c) defines the term "charitable contribution." The plain language of § 170 reveals that Congress' objective was to employ tax exemptions and deductions to promote certain *charitable* purposes. While the eight categories of institutions specified in the statute are indeed presumptively charitable in nature, the IRS properly considered principles of charitable trust law in determining whether the institutions in question may truly be considered "charitable," for purposes of entitlement to the tax benefits conferred by § 170 and § 501(c)(3).

12 The form and history of the charitable exemption and deduction sections of the various income tax acts reveal that Congress was guided by the common law of charitable trusts. See Simon, The Tax-Exempt Status of Racially Discriminatory Religious Schools, 36 Tax L.Rev. 477, 485–489 (1981) (hereinafter Simon). Congress acknowledged as much in 1969. The House Report on the Tax Reform Act of 1969, Pub.L. 91–172, 83 Stat. 487, stated that the §

501(c)(3) exemption was available only to institutions that served "the specified charitable purposes," H.R.Rep. No. 413 (Part 1), 91st Cong., 1st Sess. 35 (1969), U.S.Code Cong. & Admin.News 1969, p. 1645, and described "charitable" as "a term that has been used in the law of trusts for hundreds of years." *Id.,* at 43, U.S.Code Cong. & Admin.News 1969, p. 1688. We need not consider whether Congress intended to incorporate into the Internal Revenue Code any aspects of charitable trust law other than the requirements of public benefit and a valid public purpose.

13 The draftsmen of the 1894 income tax law, which included the first charitable exemption provision, relied heavily on English concepts of taxation; and the list of exempt organizations appears to have been patterned upon English income tax statutes. See 26 Cong.Rec. 584–588, 6612–6615 (1894).

14 Act of August 27, 1894, ch. 349, § 32, 28 Stat. 509, 556–557 (1894). The income tax system contained in the 1894 Act was declared unconstitutional, *Pollock v. Farmers' Loan and Trust Co.,* 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108 (1895), for reasons unrelated to the charitable exemption provision. The terms of that exemption were in substance included in the corporate income tax contained in the Payne Aldrich Tariff Act of 1909, ch. 6, § 38, 36 Stat. 11, 112 (1909). A similar exemption has been included in every income tax act since the adoption of the Sixteenth Amendment, beginning with the Revenue Act of 1913, ch. 16, § II(G), 38 Stat. 114, 172 (1913). See generally Reiling, Federal Taxation: What Is a Charitable Organization?, 44 ABA J. 525 (1958); Liles & Blum.

15 That same year, the Bureau of Internal Revenue expressed a similar view of the charitable deduction section of the estate tax contained in the Revenue Act of 1918, ch. 18, § 403(a)(3), 40 Stat. 1057, 1098 (1919). The Solicitor of Internal Revenue looked to the common law of charitable trusts in construing that provision, and noted that "generally bequests for the benefit and advantage of the general public are valid as charities." Sol.Op. 159, III–1 C.B. 480 (1924)III–1 C.B. 480 (1924).

16 The common law requirement of public benefit is universally recognized by commentators on the law of trusts. For example, Bogert states:

"In return for the favorable treatment accorded charitable gifts which imply some disadvantage to the community, the courts must find in the trust which is to be deemed 'charitable' some real advantages to the public which more than offset the disadvantages arising out of special privileges accorded charitable trusts." G. Bogert & G. Bogert, The Law of Trusts and Trustees § 361, at 3 (rev. 2d ed. 1977) (hereinafter Bogert).

For other statements of this principle, see, *e.g.,* 4 Scott § 348, at 2770; Restatement (Second) of Trusts § 368, comment b (1959); E. Fisch, D. Freed & E. Schachter, Charities and Charitable Foundations § 256 (1974).

17 Cf. *Tank Truck Rentals, Inc. v. Commissioner,* 356 U.S. 30, 35, 78 S.Ct. 507, 510, 2 L.Ed.2d 562 (1958), in which this Court referred to "the presumption against congressional intent to encourage violation of declared public policy" in upholding the Commissioner's disallowance of deductions claimed by a trucking company for fines it paid for violations of state maximum weight laws.

18 The dissent acknowledges that "Congress intended ... to offer a tax benefit to organizations ... providing a public benefit," *post,* at 2040, but suggests that Congress itself fully defined what organizations provide a public benefit, through the list of eight categories of exempt organizations contained in § 170 and § 501(c)(3). Under that view, any nonprofit organization that falls within one of the specified categories is automatically entitled to the tax benefits, provided it does not engage in expressly prohibited lobbying or political activities. *Post,* at 2042. The dissent thus would have us conclude, for example, that any nonprofit organization that does not engage in prohibited lobbying activities is entitled to tax exemption as an "educational" institution if it is organized for the "instruction or training of the individual for the purpose of improving or developing his capabilities," 26 CFR § 1.501(c)(3)–1(d)(3). See *post,* at 2045. As Judge Leventhal noted in *Green v. Connally,* 330 F.Supp. 1150, 1160 (D.D.C.), *aff'd sub nom. Coit v. Green,* 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971) (*per curiam*), Fagin's school for educating English boys in the art of picking pockets would be an "educational" institution under that definition. Similarly, a band of former military personnel might well set up a school for intensive training of subversives for guerrilla warfare and terrorism in other countries; in the abstract, that "school" would qualify as an "educational" institution. Surely Congress had no thought of affording such an unthinking, wooden meaning to § 170 and § 501(c)(3) as to provide tax benefits to "educational" organizations that do not serve a public, charitable purpose.

19 The Court's reading of § 501(c)(3) does not render meaningless Congress' action in specifying the eight categories of presumptively exempt organizations, as petitioners suggest. See Brief of Petitioner Goldsboro Christian Schools 18–24. To be entitled to tax-exempt status under § 501(c)(3), an organization must first fall within one of the categories specified by Congress, and in addition must serve a valid charitable purpose.

20 In 1894, when the first charitable exemption provision was enacted, racially segregated educational institutions would not have been regarded as against public policy. Yet contemporary standards must be considered in determining whether given activities provide a public benefit and are entitled to the charitable tax exemption. In *Walz v. Tax Comm'n,* 397 U.S. 664, 672–673, 90 S.Ct. 1409, 1413, 25 L.Ed.2d 697 (1970), we observed:

> "Qualification for tax exemption is not perpetual or immutable; some tax-exempt groups lose that status when their activities take them outside the classification and new entities can come into being and qualify for the exemption."

Charitable trust law also makes clear that the definition of "charity" depends upon contemporary standards. See, *e.g.,* Restatement (Second) of Trusts, § 374, comment a (1959); Bogert § 369, at 65–67; 4 Scott § 368, at 2855–2856.

21 In view of our conclusion that racially discriminatory private schools violate fundamental public policy and cannot be deemed to confer a benefit on the public, we need not decide whether an organization providing a public benefit and otherwise meeting the requirements of § 501(c)(3) could nevertheless be denied tax-exempt status if certain of its activities violated a law or public policy.

22 In the present case, the IRS issued its rulings denying exemptions to racially discriminatory schools only after a three-judge District Court had issued a preliminary injunction. See *supra,* at 2021–2022.

23 Justice POWELL misreads the Court's opinion when he suggests that the Court implies that "the Internal Revenue Service is invested with authority to decide which public policies are sufficiently 'fundamental' to require denial of tax exemptions," *post,* at 2039. The Court's opinion does not warrant that interpretation. Justice POWELL concedes that "if any national policy is sufficiently fundamental to constitute such an overriding limitation on the availability of tax-exempt status under § 501(c)(3), it is the policy against racial discrimination in education." *Post,* at 2037. Since that policy is sufficiently clear to warrant Justice POWELL's concession and for him to support our finding of longstanding Congressional acquiescence, it should be apparent that his concerns about the Court's opinion are unfounded.

24 Many of the *amici curiae,* including Amicus William T. Coleman, Jr. (appointed by the Court), argue that denial of tax-exempt status to racially discriminatory schools is independently required by the equal protection component of the Fifth Amendment. In light of our resolution of this case, we do not reach that issue. See, *e.g., United States v. Clark,* 445 U.S. 23, 27, 100 S.Ct. 895, 899, 63 L.Ed.2d 171 (1980); *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 504, 99 S.Ct. 1313, 1320, 59 L.Ed.2d 533 (1979).

25 H.R. 1096, 97th Cong., 1st Sess. (1981); H.R. 802, 97th Cong., 1st Sess. (1981); H.R. 498, 97th Cong., 1st Sess. (1981); H.R. 332, 97th Cong., 1st Sess. (1981); H.R. 95, 97th Cong., 1st Sess. (1981); S. 995, 96th Cong., 1st Sess. (1979); H.R. 1905, 96th Cong., 1st Sess. (1979); H.R. 96, 96th Cong., 1st Sess. (1979); H.R. 3225, 94th Cong., 1st Sess. (1975); H.R. 1394, 93d Cong., 1st Sess. (1973); H.R. 5350, 92d Cong., 1st Sess. (1971); H.R. 2352, 92d Cong., 1st Sess. (1971); H.R. 68, 92d Cong., 1st Sess. (1971).

26 Prior to the introduction of this legislation, a three-judge district court had held that segregated social clubs were entitled to tax exemptions. *McGlotten v. Connally,* 338 F.Supp. 448 (D.D.C.1972). Section 501(i) was enacted primarily in response to that decision. See S.Rep. No. 1318, 94th Cong., 2d Sess., 7–8 (1976); H.R.Rep. No. 1353, 94th Cong., 2d Sess., 8 (1976), U.S.Code Cong. & Admin.News 1976, p. 6051.

27 Reliance is placed on scattered statements in floor debate by Congressmen critical of the IRS' adoption of Revenue Ruling 71–447. See, *e.g.,* Brief of Petitioner Goldsboro Christian Schools 27–28. Those views did not prevail. That several Congressmen, expressing their individual views, argued that the IRS had no authority to take the action in question, is

hardly a balance for the overwhelming evidence of Congressional awareness of and acquiescence in the IRS rulings of 1970 and 1971. Petitioners also argue that the Ashbrook and Dornan Amendments to the Treasury, Postal Service, and General Government Appropriations Act of 1980; Pub.L. 96–74; §§ 103, 614, 615; 93 Stat. 559, 562, 576–577 (1979), reflect Congressional opposition to the IRS policy formalized in Revenue Ruling 71–447. Those amendments, however, are directly concerned only with limiting more aggressive enforcement procedures proposed by the IRS in 1978 and 1979 and preventing the adoption of more stringent substantive standards. The Ashbrook Amendment, § 103 of the Act, applies only to procedures, guidelines or measures adopted after August 22, 1978, and thus in no way affects the status of Revenue Ruling 71–447. In fact, both Congressman Dornan and Congressman Ashbrook explicitly stated that their amendments would have no effect on prior IRS policy, including Revenue Ruling 71–447, see 125 Cong.Rec. H5982 (daily ed. July 16, 1979) (Cong. Dornan: "[M]y amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71–447...."); 125 Cong.Rec. H5882 (daily ed. July 13, 1979) (Cong. Ashbrook: "My amendment very clearly indicates on its face that all the regulations in existence as of August 22, 1978, would not be touched."). These amendments therefore do not indicate Congressional rejection of Revenue Ruling 71–447 and the standards contained therein.

28 The District Court found, on the basis of a full evidentiary record, that the challenged practices of petitioner Bob Jones University were based on a genuine belief that the Bible forbids interracial dating and marriage. 468 F.Supp., at 894. We assume, as did the District Court, that the same is true with respect to petitioner Goldsboro Christian Schools. See 436 F.Supp., at 1317.

29 We deal here only with religious *schools* —not with churches or other purely religious institutions; here, the governmental interest is in denying public support to racial discrimination in education. As noted earlier, racially discriminatory schools "exer[t] a pervasive influence on the entire educational process," outweighing any public benefit that they might otherwise provide, *Norwood v. Harrison,* 413 U.S. 455, 469, 93 S.Ct. 2804, 2812, 37 L.Ed.2d 723 (1973). See generally Simon 495–496.

30 Bob Jones University also contends that denial of tax exemption violates the Establishment Clause by preferring religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden. It is well settled that neither a State nor the Federal Government may pass laws which "prefer one religion over another," *Everson v. Board of Education,* 330 U.S. 1, 15, 67 S.Ct. 504, 511, 91 L.Ed. 711 (1947), but "[i]t is equally true" that a regulation does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland,* 366 U.S. 420, 442, 81 S.Ct. 1101, 1113, 6 L.Ed.2d 393 (1961). See *Harris v. McRae,* 448 U.S. 297, 319–320, 100 S.Ct. 2671, 2689, 65 L.Ed.2d 784 (1980). The IRS policy at issue here is founded on a "neutral, secular basis," *Gillette v. United States,* 401 U.S. 437, 452, 91 S.Ct. 828, 837, 28 L.Ed.2d 168 (1971), and does not violate the Establishment Clause. See generally U.S. Comm'n on Civil Rights, Discriminatory Religious Schools and Tax Exempt Status 10–17 (1982). In addition, as the Court of Appeals noted, "the uniform application of the rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief." *United States v. Bob Jones Univ.,* 639 F.2d 147, 155 (CA4 1980) (emphasis in original). Cf. *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979). But see generally Note, 90 Yale L.J. 350 (1980).

31 This argument would in any event apply only to the final eight months of the five tax years at issue in this case. Prior to May 1975, Bob Jones University's admissions policy was racially discriminatory on its face, since the University excluded unmarried Negro students while admitting unmarried Caucasians.

32 Bob Jones University also argues that the IRS policy should not apply to it because it is entitled to exemption under § 501(c)(3) as a "religious" organization, rather than as an "educational" institution. The record in this case leaves no doubt, however, that Bob Jones University is both an educational institution and a religious institution. As discussed previously,

the IRS policy properly extends to all private schools, including religious schools. See n. 29, *supra.* The IRS policy thus was properly applied to Bob Jones University.

1 I note that the Court has construed other provisions of the Code as containing narrowly defined public-policy exceptions. See *Commissioner v. Tellier,* 383 U.S. 687, 693–694, 86 S.Ct. 1118, 1121–1122, 16 L.Ed.2d 185 (1966); *Tank Truck Rentals, Inc. v. Commissioner,* 356 U.S. 30, 35, 78 S.Ct. 507, 510, 2 L.Ed.2d 562 (1958).

2 The District Court for the District of Columbia in *Green v. Connally,* 330 F.Supp. 1150 (three-judge court), aff'd *sub nom. Coit v. Green,* 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971) (*per curiam*), held that racially discriminatory private schools were not entitled to tax-exempt status. The same District Court, however, later ruled that racially segregated social clubs could receive tax exemptions under § 501(c)(7) of the Code. See *McGlotten v. Connally,* 338 F.Supp. 448 (D.D.C.1972) (three-judge court). Faced with these two important three-judge court rulings, Congress expressly overturned the relevant portion of *McGlotten* by enacting § 501(i), thus conforming the policy with respect to social clubs to the prevailing policy with respect to private schools. This affirmative step is a persuasive indication that Congress has not just silently acquiesced in the result of *Green.* Cf. *Merrill Lynch, Pierce, Fenner & Smith v. Curran,* 456 U.S. 353, 402, 102 S.Ct. 1825, 1852, 72 L.Ed.2d 182 (1982) (POWELL, J., dissenting) (rejecting theory "that congressional intent can be inferred from silence, and that legislative inaction should achieve the force of law").

3 Certainly § 501(c)(3) has not been applied in the manner suggested by the Court's analysis. The 1,100-page list of exempt organizations includes—among countless examples—such organizations as American Friends Service Committee, Inc., Committee on the Present Danger, Jehovah's Witnesses in the United States, Moral Majority Foundation, Inc., Friends of the Earth Foundation, Inc., Mountain States Legal Foundation, National Right to Life Educational Foundation, Planned Parenthood Federation of America, Scientists and Engineers for Secure Energy, Inc., and Union of Concerned Scientists Fund, Inc. See Internal Revenue Service, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954, at 31, 221, 376, 518, 670, 677, 694, 795, 880, 1001, 1073 (Rev'd Oct. 1981). It would be difficult indeed to argue that each of these organizations reflects the views of the "common community conscience" or "demonstrably ... [is] in harmony with the public interest." In identifying these organizations, largely taken at random from the tens of thousands on the list, I of course do not imply disapproval of their being exempt from taxation. Rather, they illustrate the commendable tolerance by our Government of even the most strongly held divergent views, including views that at least from time to time *are* "at odds" with the position of our Government. We have consistently recognized that such disparate groups are entitled to share the privilege of tax exemption.

4 "A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system." *Mississippi University for Women v. Hogan,* 458 U.S. ——, ——, 102 S.Ct. 3331, 3347, 73 L.Ed.2d 1090 (1982) (POWELL, J., dissenting). Sectarian schools make an important contribution to this tradition, for they "have provided an educational alternative for millions of young Americans" and "often afford wholesome competition with our public schools." *Wolman v. Walter,* 433 U.S. 229, 262, 97 S.Ct. 2593, 2613, 53 L.Ed.2d 714 (1977) (POWELL, J., concurring in part, concurring in the judgment in part, and dissenting in part).

5 See, *e.g., Community Television of Southern California v. Gottfried,* 459 U.S. ——, ——, n. 17, 103 S.Ct. 885, 893, n. 17, 74 L.Ed.2d 705 (1983) ("[A]n agency's general duty to enforce the public interest does not require it to assume responsibility for enforcing legislation that is not directed at the agency"); *Hampton v. Mow Sun Wong,* 426 U.S. 88, 114, 96 S.Ct. 1895, 1910, 48 L.Ed.2d 495 (1976) ("It is the business of the Civil Service Commission to adopt and enforce regulations which will best promote the efficiency of the federal civil service. That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies"); *NAACP v. FPC,* 425 U.S. 662, 670, 96 S.Ct. 1806, 1811, 48 L.Ed.2d 284 (1976) ("The use of the words 'public interest' in the Gas and Power Acts is not a directive to the [Federal Power] Commission to seek to eradicate

discrimination, but, rather, is a charge to promote the orderly production of supplies of electric energy and natural gas at just and reasonable rates").

1 See Revenue Act of 1924, ch. 234, § 231(6), 43 Stat. 253, 282; Revenue Act of 1926, ch. 27, § 231(6), 44 Stat. 9, 40; Revenue Act of 1928, ch. 852, § 103(6), 45 Stat. 791, 813; Revenue Act of 1932, ch. 209, § 103(6), 47 Stat. 169, 193.

2 See Revenue Act of 1936, ch. 690, § 101(6), 49 Stat. 1648, 1674; Revenue Act of 1938, ch. 289, § 101(6), 52 Stat. 447, 481.

3 I agree with the Court that such a requirement would not infringe on petitioners' First Amendment rights.

4 Because of its holding, the Court does not have to decide whether it would violate the equal protection component of the Fifth Amendment for Congress to grant § 501(c)(3) status to organizations that practice racial discrimination. *Ante,* at 2032 n. 24. I would decide that it does not. The statute is facially neutral; absent a showing of a discriminatory purpose, no equal protection violation is established. *Washington v. Davis,* 426 U.S. 229, 241–244, 96 S.Ct. 2040, 2048–2049, 48 L.Ed.2d 597 (1976).

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Rothstein v. UBS AG, S.D.N.Y., January 3, 2011

130 S.Ct. 2705
Supreme Court of the United States

Eric H. HOLDER, Jr., Attorney General, et al., Petitioners,
v.
HUMANITARIAN LAW PROJECT et al.
Humanitarian Law Project, et al., Petitioners,
v.
Eric H. Holder, Jr., Attorney General, et al.

Nos. 08–1498, 09–89.
|
Argued Feb. 23, 2010.
|
Decided June 21, 2010.

Synopsis

Background: United States citizens and domestic organizations seeking to provide support for lawful activities of two organizations that had been designated as foreign terrorist organizations sought injunction to prohibit enforcement of criminal ban on providing material support to such organizations. The United States District Court for the Central District of California, Audrey B. Collins, J., 2001 WL 36105333, entered permanent injunction against applying to plaintiffs the bans on "personnel" and "training" support. On appeal, the United States Court of Appeals for the Ninth Circuit, 352 F.3d 382, affirmed, but, on rehearing en banc, vacated its decision and remanded to the District Court, which consolidated case with another case challenging "expert advise or assistance" provision of the ban. On remand, the District Court, 380 F.Supp.2d 1134, granted plaintiffs partial relief on vagueness grounds. On appeal, the Court of Appeals, Pregerson, Circuit Judge, 552 F.3d 916, affirmed. Petitions for certiorari were granted.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

[1] material-support statute was not vague as applied to activities plaintiffs wished to pursue;

[2] material-support statute did not, as applied to plaintiffs, violate freedom of speech; and

[3] material-support statute did not violate plaintiffs' freedom of association.

Affirmed in part, reversed in part, and remanded.

Justice Breyer filed dissenting opinion, in which Justices Ginsburg and Sotomayor joined.

West Headnotes (11)

[1] Constitutional Law
Case or controversy requirement

Preenforcement review of criminal ban on providing material support to organizations that have been designated as foreign terrorist organizations presented justiciable case or controversy under Article III; plaintiffs faced credible threat of prosecution and would not be required to await and undergo criminal prosecution as sole means of seeking relief. U.S.C.A. Const. Art. 3, § 1; 18 U.S.C.A. § 2339B.

40 Cases that cite this headnote

[2] Constitutional Law
Terrorist organizations

War and National Emergency
Constitutional and statutory provisions

Statute prohibiting "knowingly" providing material support to organization that has been designated as foreign terrorist organization does not require proof that defendant intended to further foreign terrorist organization's illegal activities, but only that defendant knew about organization's connection to terrorism,

regardless of whether proposed activity consists of speech. 18 U.S.C.A. § 2339B.

52 Cases that cite this headnote

[3] Constitutional Law
Limitations of Rules and Special Circumstances Affecting Them

Although Supreme Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute.

4 Cases that cite this headnote

[4] Constitutional Law
Certainty and definiteness in general

Conviction fails to comport with due process if statute under which it is obtained fails to provide person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. U.S.C.A. Const.Amend. 5.

103 Cases that cite this headnote

[5] Constitutional Law
Due Process
Constitutional Law
Certainty and definiteness; vagueness

Whether statute is vague, in violation of due process, is considered as applied to particular facts at issue, since plaintiff who engages in some conduct that is clearly proscribed cannot complain of vagueness of the law as applied to conduct of others. U.S.C.A. Const.Amend. 5.

208 Cases that cite this headnote

[6] Constitutional Law
Particular Offenses
War and National Emergency
Constitutional and statutory provisions

Statute prohibiting knowingly providing material support to foreign terrorist organizations was not vague, in violation of due process, in defining "material support" to include "training," "service," "personnel" and "expert advice or assistance"; statutory definitions increased clarity of these terms, and knowledge requirement further reduced potential for vagueness. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 2339B.

28 Cases that cite this headnote

[7] Constitutional Law
Particular Offenses
War and National Emergency
Constitutional and statutory provisions

Even if heightened vagueness standard applied to statute prohibiting knowingly providing material support to foreign terrorist organizations where speech was potentially implicated, statutory terms "training" and "expert advice or assistance" were not vague in violation of due process as applied to plaintiffs' proposed activities of training members of organizations designated as foreign terrorist organization on how to use humanitarian and international law to peacefully resolve disputes and on how to petition for humanitarian relief before United Nations. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. §§ 2339A(b)(2, 3), 2339B.

19 Cases that cite this headnote

[8] Constitutional Law
Terrorist organizations
War and National Emergency
Constitutional and statutory provisions

Statute prohibiting knowingly providing material support to foreign terrorist organizations does not ban pure political speech or prohibit independent advocacy or expression of any kind, rather, it prohibits "material support," which

most often does not take the form of speech at all, and when it does, statute is carefully drawn to cover only narrow category of speech to, under direction of, or in coordination with foreign groups that speaker knows to be terrorist organizations. 18 U.S.C.A. § 2339B.

17 Cases that cite this headnote

[9] **Constitutional Law**
Terrorist organizations
War and National Emergency
Constitutional and statutory provisions

"Intermediate scrutiny," under which content-neutral regulation will be sustained under First Amendment if it advances important governmental interests unrelated to suppression of free speech and does not burden substantially more speech than necessary to further those interests, did not apply to challenge to statute prohibiting knowingly providing material support to foreign terrorist organization, since statute regulated speech on basis of its content. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. § 2339B.

64 Cases that cite this headnote

[10] **Constitutional Law**
Terrorist organizations
War and National Emergency
Constitutional and statutory provisions

Statute prohibiting knowingly providing material support to foreign terrorist organizations did not violate freedom of speech as applied to organizations and individuals who allegedly sought to provide organizations that had been designated as foreign terrorist organizations with support for only lawful, nonviolent activities, such as training members on how to use humanitarian and international law to peacefully resolve disputes and on how to petition for humanitarian relief before United Nations and other representative bodies, and engaging in political advocacy on behalf of those organizations' ethnic groups; significant weight was due considered judgment of Congress and Executive that providing material support to designated foreign terrorist organization, even seemingly benign support, bolstered terrorist activities of that organization. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. §§ 2339A(b)(2, 3), 2339B.

80 Cases that cite this headnote

[11] **Constitutional Law**
Freedom of Association
War and National Emergency
Constitutional and statutory provisions

Statute prohibiting knowingly providing material support to foreign terrorist organizations did not violate rights of association of organizations and individuals who allegedly sought to provide organizations that had been designated as foreign terrorist organizations with support for only lawful, nonviolent activities; statute penalized material support of, not mere association with, foreign terrorist organization, and any burden on plaintiffs' freedom of association, in preventing them from providing support to designated terrorist organizations, but not to other groups, was justified. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. § 2339B.

83 Cases that cite this headnote

West Codenotes

Negative Treatment Reconsidered

18 U.S.C.A. §§ 2339A(b), 2339B(a)

****2707** *Syllabus* *

It is a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization." 18 U.S.C. § 2339B(a)(1). The authority to designate an entity a "foreign

terrorist organization" rests with the Secretary of State, and is subject to judicial review. ****2708** "[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials." § 2339A(b)(1). Over the years, § 2339B and the definition of "material support or resources" have been amended, *inter alia,* to clarify that a violation requires knowledge of the foreign group's designation as a terrorist organization or its commission of terrorist acts, § 2339B(a)(1); and to define the terms "training," § 2339A(b)(2), "expert advice or assistance," § 2339A(b)(3), and "personnel," § 2339B(h).

Among the entities the Secretary of State has designated "foreign terrorist organization[s]" are the Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), which aim to establish independent states for, respectively, Kurds in Turkey and Tamils in Sri Lanka. Although both groups engage in political and humanitarian activities, each has also committed numerous terrorist attacks, some of which have harmed American citizens. Claiming they wish to support those groups' lawful, nonviolent activities, two U.S. citizens and six domestic organizations (hereinafter plaintiffs) initiated this constitutional challenge to the material-support statute. The litigation has had a complicated 12–year history. Ultimately, the District Court partially enjoined the enforcement of the material-support statute against plaintiffs. After the Ninth Circuit affirmed, plaintiffs and the Government cross-petitioned for certiorari. The Court granted both petitions.

As the litigation now stands, plaintiffs challenge § 2339B's prohibition on providing four types of material support —"training," "expert advice or assistance," "service," and "personnel"—asserting violations of the Fifth Amendment's Due Process Clause on the ground that the statutory terms are impermissibly vague, and violations of their First Amendment rights to freedom of speech and association. They claim that § 2339B is invalid to the extent it prohibits them from engaging in certain specified activities, including training PKK members to use international law to resolve disputes peacefully; teaching PKK members to petition the United Nations and other representative bodies for relief; and engaging in political advocacy on behalf of Kurds living in Turkey and Tamils living in Sri Lanka.

Held: The material-support statute, § 2339B, is constitutional as applied to the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations. Pp. 2715 – 2731.

(a) This preenforcement challenge to § 2339B is a justiciable Article III case or controversy. Plaintiffs face "a credible threat of prosecution" and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. Farm Workers,* 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895. P. 2717.

(b) The Court cannot avoid the constitutional issues in this litigation by accepting plaintiffs' argument that the material-support statute, when applied to speech, should be interpreted to require proof that a defendant intended to further a foreign terrorist organization's illegal activities. That reading is inconsistent with ****2709** § 2339B's text, which prohibits "knowingly" providing material support and demonstrates that Congress chose knowledge about the organization's connection to terrorism, not specific intent to further its terrorist activities, as the necessary mental state for a violation. Plaintiffs' reading is also untenable in light of the sections immediately surrounding § 2339B, which —unlike § 2339B—do refer to intent to further terrorist activity. See §§ 2339A(a), 2339C(a)(1). Finally, there is no textual basis for plaintiffs' argument that the same language in § 2339B should be read to require specific intent with regard to speech, but not with regard to other forms of material support. Pp. 2717 – 2718.

(c) As applied to plaintiffs, the material-support statute is not unconstitutionally vague. The Ninth Circuit improperly merged plaintiffs' vagueness challenge with their First Amendment claims, holding that "training," "service," and a

portion of "expert advice or assistance" were impermissibly vague because they applied to protected speech—regardless of whether those applications were clear. The Court of Appeals also contravened the rule that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362.

The material-support statute, in its application to plaintiffs, "provide[s] a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams,* 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650. The statutory terms at issue here—"training," "expert advice or assistance," "service," and "personnel"—are quite different from the sorts of terms, like " 'annoying' " and " 'indecent,' " that the Court has struck down for requiring "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id.,* at 306, 128 S.Ct. 1830. Congress has increased the clarity of § 2339B's terms by adding narrowing definitions, and § 2339B's knowledge requirement further reduces any potential for vagueness, see *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597.

Although the statute may not be clear in every application, the dispositive point is that its terms are clear in their application to plaintiffs' proposed conduct. Most of the activities in which plaintiffs seek to engage readily fall within the scope of "training" and "expert advice or assistance." In fact, plaintiffs themselves have repeatedly used those terms to describe their own proposed activities. Plaintiffs' resort to hypothetical situations testing the limits of "training" and "expert advice or assistance" is beside the point because this litigation does not concern such situations. See *Scales v. United States,* 367 U.S. 203, 223, 81 S.Ct. 1469, 6 L.Ed.2d 782. *Gentile v. State Bar of Nev.,* 501 U.S. 1030, 1049–1051, 111 S.Ct. 2720, 115 L.Ed.2d 888, distinguished. Plaintiffs' further contention, that the statute is vague in its application to the political advocacy they wish to undertake, runs afoul of § 2339B(h), which makes clear that "personnel" does not cover advocacy by those acting entirely independently of a foreign terrorist organization, and the ordinary meaning of "service," which refers to concerted activity, not independent advocacy. Context confirms that meaning: Independently advocating for a cause is different from the prohibited act of providing a service "to a foreign terrorist organization." § 2339B(a)(1).

Thus, any independent advocacy in which plaintiffs wish to engage is not prohibited by § 2339B. On the other hand, a person of ordinary intelligence would understand ****2710** the term "service" to cover advocacy performed in coordination with, or at the direction of, a foreign terrorist organization. Plaintiffs argue that this construction of the statute poses difficult questions of exactly how much direction or coordination is necessary for an activity to constitute a "service." Because plaintiffs have not provided any specific articulation of the degree to which *they* seek to coordinate their advocacy with the PKK and LTTE, however, they cannot prevail in their preenforcement challenge. See *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 454, 128 S.Ct. 1184, 170 L.Ed.2d 151. Pp. 2718 – 2722.

(d) As applied to plaintiffs, the material-support statute does not violate the freedom of speech guaranteed by the First Amendment. Pp. 2722 – 2730.

(1) Both plaintiffs and the Government take extreme positions on this question. Plaintiffs claim that Congress has banned their pure political speech. That claim is unfounded because, under the material-support statute, they may say anything they wish on any topic. Section 2339B does not prohibit independent advocacy or membership in the PKK and LTTE. Rather, Congress has prohibited "material support," which most often does not take the form of speech. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations. On the other hand, the Government errs in arguing that the only thing actually at issue here is conduct, not speech, and that the correct standard of review is intermediate scrutiny, as set out in *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672. That standard is not used to review a content-based regulation of speech, and § 2339B regulates plaintiffs' speech to

the PKK and LTTE on the basis of its content. Even if the material-support statute generally functions as a regulation of conduct, as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. Thus, the Court "must [apply] a more demanding standard" than the one described in *O'Brien*. *Texas v. Johnson,* 491 U.S. 397, 403, 109 S.Ct. 2533, 105 L.Ed.2d 342. Pp. 2722 – 2724.

(2) The parties agree that the Government's interest in combating terrorism is an urgent objective of the highest order, but plaintiffs argue that this objective does not justify prohibiting their speech, which they say will advance only the legitimate activities of the PKK and LTTE. Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question. Congress rejected plaintiffs' position on that question when it enacted § 2339B, 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." § 301(a)(7), 110 Stat. 1247, note following § 2339B. The record confirms that Congress was justified in rejecting plaintiffs' view. The PKK and LTTE are deadly groups. It is not difficult to conclude, as Congress did, that the taint of their violent activities is so great that working in coordination with them or at their command legitimizes and furthers their terrorist means. Moreover, material support meant to promote peaceable, lawful conduct can be diverted to advance terrorism in multiple ways. The record shows that designated foreign terrorist organizations do not maintain organizational firewalls between social, political, and terrorist operations, or financial firewalls between funds raised for humanitarian ****2711** activities and those used to carry out terrorist attacks. Providing material support in any form would also undermine cooperative international efforts to prevent terrorism and strain the United States' relationships with its allies, including those that are defending themselves against violent insurgencies waged by foreign terrorist groups. Pp. 2724 – 2727.

(3) The Court does not rely exclusively on its own factual inferences drawn from the record evidence, but considers the Executive Branch's stated view that the experience and analysis of Government agencies charged with combating terrorism strongly support Congress's finding that all contributions to foreign terrorist organizations—even those for seemingly benign purposes—further those groups' terrorist activities. That evaluation of the facts, like Congress's assessment, is entitled to deference, given the sensitive national security and foreign relations interests at stake. The Court does not defer to the Government's reading of the First Amendment. But respect for the Government's factual conclusions is appropriate in light of the courts' lack of expertise with respect to national security and foreign affairs, and the reality that efforts to confront terrorist threats occur in an area where information can be difficult to obtain, the impact of certain conduct can be difficult to assess, and conclusions must often be based on informed judgment rather than concrete evidence. The Court also finds it significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns. Most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups. Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that prohibiting material support in the form of training, expert advice, personnel, and services to foreign terrorist groups serves the Government's interest in preventing terrorism, even if those providing the support mean to promote only the groups' nonviolent ends.

As to the particular speech plaintiffs propose to undertake, it is wholly foreseeable that directly training the PKK on how to use international law to resolve disputes would provide that group with information and techniques that it could use as part of a broader strategy to promote terrorism, and to threaten, manipulate, and disrupt. Teaching the PKK to petition international bodies for relief also could help the PKK obtain funding it would redirect to its violent activities. Plaintiffs' proposals to engage in political advocacy on behalf of Kurds and Tamils, in turn, are phrased so generally that they cannot prevail in this preenforcement challenge. The Court does not decide whether any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It simply holds that § 2339B does not violate the freedom of speech as applied to the particular types of support these plaintiffs seek to provide. Pp. 2727 – 2730.

(e) Nor does the material-support statute violate plaintiffs' First Amendment freedom of association. Plaintiffs argue that the statute criminalizes the mere fact of their associating with the PKK and LTTE, and thereby runs afoul of this Court's precedents. The Ninth Circuit correctly rejected this claim because § 2339B does not penalize mere association, but prohibits the act of giving foreign terrorist groups material support. Any burden on plaintiffs' freedom of association caused by preventing them from supporting designated foreign terrorist organizations, ****2712** but not other groups, is justified for the same reasons the Court rejects their free speech challenge. Pp. 2730 – 2731.

552 F.3d 916, affirmed in part, reversed in part, and remanded.

ROBERTS, C.J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, pp. 2731 – 2743.

Attorneys and Law Firms

David D. Cole, for petitioners in 09–89.

Solicitor General Elena Kagan, for petitioners in 08–1498.

Elena Kagan, Solicitor General, Counsel of Record, Department of Justice, Washington, D.C., for respondents.

David D. Cole, c/o Georgetown Univ. Law Center, Washington, DC, Counsel of Record for Respondents/Cross–Petitioners Humanitarian Law Project et al., Shayana Kadidal, Jules Lobel, Joshua M. Rosenthal, Center for Constitutional Rights, New York, NY, Richard G. Taranto, Farr & Taranto, Washington, DC, Clifford Y. Chen, Watkins, Bradley & Chen LLP, New York, NY, Carol Sobel, Santa Monica, CA, Paul Hoffman, Schonbrun, De Simone, Seplow, Harris and Hoffman LLP, Venice, CA, Visuvanathan Rudrakumaran, New York, NY, for Respondents in 08–1498 and Cross–Petitioners in 09–89, Humanitarian Law Project et al.

Elena Kagan, Solicitor General, Counsel of Record, Tony West, Assistant Attorney General, Neal Kumar Katyal, Deputy Solicitor General, Jeffrey B. Wall, Assistant to the Solicitor General, Douglas N. Letter, Joshua Waldman, Department of Justice, Washington, D.C., for respondents.

Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***7** Congress has prohibited the provision of "material support or resources" to certain foreign organizations that engage in terrorist activity. 18 U.S.C. § 2339B(a)(1). That prohibition is based on a finding that the specified organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose). The plaintiffs in this litigation seek to provide support to two such organizations. Plaintiffs claim that they ***8** seek to facilitate only the lawful, nonviolent purposes of those groups, and that applying the material-support law to prevent them from doing so violates the Constitution. In particular, they claim that the statute is too vague, in violation of the Fifth Amendment, and that it infringes their rights to freedom of speech and association, in violation of the First Amendment. We conclude that the material-support statute is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue. We do not, however, address the resolution of more difficult cases that may arise under the statute in the future.

I

This litigation concerns 18 U.S.C. § 2339B, which makes it a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization." [1] Congress has amended the definition ****2713** of "material support or resources" periodically, but at present it is defined as follows:

> "[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or

identification, communications equipment, facilities, ***9** weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials." § 2339A(b)(1); see also § 2339B(g)(4).

The authority to designate an entity a "foreign terrorist organization" rests with the Secretary of State. 8 U.S.C. §§ 1189(a)(1), (d)(4). She may, in consultation with the Secretary of the Treasury and the Attorney General, so designate an organization upon finding that it is foreign, engages in "terrorist activity" or "terrorism," and thereby "threatens the security of United States nationals or the national security of the United States." §§ 1189(a)(1), (d)(4). " '[N]ational security' means the national defense, foreign relations, or economic interests of the United States." § 1189(d)(2). An entity designated a foreign terrorist organization may seek review of that designation before the D.C. Circuit within 30 days of that designation. § 1189(c)(1).

In 1997, the Secretary of State designated 30 groups as foreign terrorist organizations. See 62 Fed.Reg. 52650. Two of those groups are the Kurdistan Workers' Party (also known as the Partiya Karkeran Kurdistan, or PKK) and the Liberation Tigers of Tamil Eelam (LTTE). The PKK is an organization founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey. *Humanitarian Law Project v. Reno,* 9 F.Supp.2d 1176, 1180–1181 (C.D.Cal.1998); Brief for Petitioners in No. 08–1498, p. 6 (hereinafter Brief for Government). The LTTE is an organization founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. 9 F.Supp.2d, at 1182; Brief for Government 6. The District Court in this action found that the PKK and LTTE engage in political and humanitarian activities. See 9 F.Supp.2d, at 1180–1182. The Government has presented evidence that both groups have also committed numerous terrorist attacks, some of which have harmed American citizens. See App. 128–133. The LTTE sought judicial review of its designation as a foreign ***10** terrorist organization; the D.C. Circuit upheld that designation. See *People's Mojahedin Organization of Iran v. Dept. of State,* 182 F.3d 17, 18–19, 25 (1999). The PKK did not challenge its designation. 9 F.Supp.2d, at 1180.

Plaintiffs in this litigation are two U.S. citizens and six domestic organizations: the Humanitarian Law Project (HLP) (a human rights organization with consultative status to the United Nations); Ralph Fertig (the HLP's president, and a retired Administrative Law Judge); Nagalingam Jeyalingam (a Tamil physician, born in Sri Lanka and a naturalized U.S. citizen); and ****2714** five nonprofit groups dedicated to the interests of persons of Tamil descent. Brief for Petitioners in No. 09–89, pp. ii, 10 (hereinafter Brief for Plaintiffs); App. 48. In 1998, plaintiffs filed suit in federal court challenging the constitutionality of the material-support statute, § 2339B. 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 under § 2339B. 9 F.Supp.2d, at 1180–1184. [2]

As relevant here, plaintiffs claimed that the material-support statute was unconstitutional on two grounds: First, it violated their freedom of speech and freedom of association under the First Amendment, because it criminalized their ***11** provision of material support to the PKK and LTTE, without requiring the Government to prove that plaintiffs had a specific intent to further the unlawful ends of those organizations. *Id.,* at 1184. Second, plaintiffs argued that the statute was unconstitutionally vague. *Id.,* at 1184–1185.

Plaintiffs moved for a preliminary injunction, which the District Court granted in part. The District Court held that plaintiffs had not established a probability of success on their First Amendment speech and association claims. See *id.,* at 1196–1197. But the court held that plaintiffs had established a probability of success on their claim that, as applied to them, the statutory terms "personnel" and "training" in the definition of "material support" were impermissibly vague. See *id.,* at 1204.

The Court of Appeals affirmed. 205 F.3d 1130, 1138 (C.A.9 2000). The court rejected plaintiffs' speech and

association claims, including their claim that § 2339B violated the First Amendment in barring them from contributing money to the PKK and LTTE. See *id.*, at 1133–1136. But the Court of Appeals agreed with the District Court that the terms "personnel" and "training" were vague because it was "easy to imagine protected expression that falls within the bounds" of those terms. *Id.*, at 1138; see *id.*, at 1137.

With the preliminary injunction issue decided, the action returned to the District Court, and the parties moved for summary judgment on the merits. The District Court entered a permanent injunction against applying to plaintiffs the bans on "personnel" and "training" support. See No. CV–98–1971 ABC (BQRx), 2001 WL 36105333 (CD Cal., Oct. 2, 2001). The Court of Appeals affirmed. 352 F.3d 382 (C.A.9 2003).

Meanwhile, in 2001, Congress amended the definition of "material support or resources" to add the term "expert advice or assistance." Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), ***12** § 805(a)(2)(B), 115 Stat. 377. In 2003, plaintiffs filed a second action challenging ****2715** the constitutionality of that term as applied to them. 309 F.Supp.2d 1185, 1192 (C.D.Cal.2004).

In that action, the Government argued that plaintiffs lacked standing and that their preenforcement claims were not ripe. *Id.*, at 1194. The District Court held that plaintiffs' claims were justiciable because plaintiffs had sufficiently demonstrated a "genuine threat of imminent prosecution," *id.*, at 1195 (internal quotation marks omitted), and because § 2339B had the potential to chill plaintiffs' protected expression, see *id.*, at 1197–1198. On the merits, the District Court held that the term "expert advice or assistance" was impermissibly vague. *Id.*, at 1201. The District Court rejected, however, plaintiffs' First Amendment claims that the new term was substantially overbroad and criminalized associational speech. See *id.*, at 1202, 1203.

The parties cross-appealed. While the cross-appeals were pending, the Ninth Circuit granted en banc rehearing of the panel's 2003 decision in plaintiffs' first action (involving the terms "personnel" and "training"). See 382 F.3d 1154, 1155 (2004). The en banc court heard reargument on December 14, 2004. See 380 F.Supp.2d 1134, 1138 (C.D.Cal.2005). Three days later, Congress again amended § 2339B and the definition of "material support or resources." Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), § 6603, 118 Stat. 3762–3764.

In IRTPA, Congress clarified the mental state necessary to violate § 2339B, requiring knowledge of the foreign group's designation as a terrorist organization or the group's commission of terrorist acts. § 2339B(a)(1). Congress also added the term "service" to the definition of "material support or resources," § 2339A(b)(1), and defined "training" to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," § 2339A(b)(2). It also defined "expert advice or assistance" to mean "advice or assistance derived from scientific, technical or other specialized ***13** knowledge." § 2339A(b)(3). Finally, IRTPA clarified the scope of the term "personnel" by providing:

> "No person may be prosecuted under [§ 2339B] in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." § 2339B(h).

Shortly after Congress enacted IRTPA, the en banc Court of Appeals issued an order in plaintiffs' first action. 393 F.3d 902, 903 (C.A.9 2004). The en banc court affirmed the rejection of plaintiffs' First Amendment claims for the reasons set out in the Ninth Circuit's panel decision in 2000.

See *ibid.* In light of IRTPA, however, the en banc court vacated the panel's 2003 judgment with respect to vagueness, and remanded to the District Court for further proceedings. *Ibid.* The Ninth Circuit panel assigned to the cross-appeals in plaintiffs' second action (relating to "expert advice or assistance") also remanded in light of IRTPA. See 380 F.Supp.2d, at 1139.

The District Court consolidated the two actions on remand. See *ibid.* The court also allowed plaintiffs to challenge the new term "service." See *id.*, at 1151, n. 24. ****2716** The parties moved for summary judgment, and the District Court granted partial relief to plaintiffs on vagueness grounds. See *id.*, at 1156.

The Court of Appeals affirmed once more. 552 F.3d 916, 933 (C.A.9 2009). The court first rejected plaintiffs' claim that the material-support statute would violate due process ***14** unless it were read to require a specific intent to further the illegal ends of a foreign terrorist organization. See *id.*, at 926–927. The Ninth Circuit also held that the statute was not overbroad in violation of the First Amendment. See *id.*, at 931–932. As for vagueness, the Court of Appeals noted that plaintiffs had not raised a "facial vagueness challenge." *Id.*, at 929, n. 6. The court held that, as applied to plaintiffs, the terms "training," "expert advice or assistance" (when derived from "other specialized knowledge"), and "service" were vague because they "continue[d] to cover constitutionally protected advocacy," but the term "personnel" was not vague because it "no longer criminalize[d] pure speech protected by the First Amendment." *Id.*, at 929–931.

The Government petitioned for certiorari, and plaintiffs filed a conditional cross-petition. We granted both petitions. 557 U.S. 966, 130 S.Ct. 48, 49, 174 L.Ed.2d 632 (2009).

II

Given the complicated 12–year history of this litigation, we pause to clarify the questions before us. Plaintiffs challenge § 2339B's prohibition on four types of material support —"training," "expert advice or assistance," "service," and "personnel." They raise three constitutional claims. First, plaintiffs claim that § 2339B violates the Due Process Clause of the Fifth Amendment because these four statutory terms are impermissibly vague. Second, plaintiffs claim that § 2339B violates their freedom of speech under the First Amendment. Third, plaintiffs claim that § 2339B violates their First Amendment freedom of association.

Plaintiffs do not challenge the above statutory terms in all their applications. Rather, plaintiffs claim that § 2339B is invalid to the extent it prohibits them from engaging in certain specified activities. See Brief for Plaintiffs 16–17, n. 10. With respect to the HLP and Judge Fertig, those activities are: (1) "train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes"; (2) "engag [ing] in political advocacy on behalf of ***15** Kurds who live in Turkey"; and (3) "teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief." 552 F.3d, at 921, n. 1; see 380 F.Supp.2d, at 1136. With respect to the other plaintiffs, those activities are: (1) "train[ing] members of [the] LTTE to present claims for tsunami-related aid to mediators and international bodies"; (2) "offer[ing] their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government"; and (3) "engag[ing] in political advocacy on behalf of Tamils who live in Sri Lanka." 552 F.3d, at 921, n. 1; see 380 F.Supp.2d, at 1137.

Plaintiffs also state that "the LTTE was recently defeated militarily in Sri Lanka," so "[m]uch of the support the Tamil organizations and Dr. Jeyalingam sought to provide is now moot." Brief for Plaintiffs 11, n. 5. Plaintiffs thus seek only to support the LTTE "as a political organization outside Sri Lanka advocating for the rights of Tamils." *Ibid.* Counsel for plaintiffs specifically stated at oral argument that plaintiffs no longer seek to teach the LTTE how to present claims for tsunami-related aid, because the LTTE now "has no role in ****2717** Sri Lanka." Tr. of Oral Arg. 63. For that reason, helping the LTTE negotiate a peace agreement with Sri Lanka appears to be moot as well. Thus, we do not consider the application of § 2339B to those activities here.

[1] One last point. Plaintiffs seek preenforcement review of a criminal statute. Before addressing the merits, we must be sure that this is a justiciable case or controversy under Article III. We conclude that it is: Plaintiffs face "a credible threat of prosecution" and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. Farm Workers,* 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (internal quotation marks omitted). See also *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 128–129, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007).

Plaintiffs claim that they provided support to the PKK and LTTE before the enactment of § 2339B and that they would provide similar support again if the statute's allegedly unconstitutional ***16** bar were lifted. See 309 F.Supp.2d, at 1197. The Government tells us that it has charged about 150 persons with violating § 2339B, and that several of those prosecutions involved the enforcement of the statutory terms at issue here. See Brief for Government 5. The Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do. Cf. Tr. of Oral Arg. 57–58. See *Babbitt, supra,* at 302, 99 S.Ct. 2301. See also *Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229, 234, 248 – 249, 130 S.Ct. 1324, 1330–1331, 1340, 176 L.Ed.2d 79 (2010) (considering an as-applied preenforcement challenge brought under the First Amendment). Based on these considerations, we conclude that plaintiffs' claims are suitable for judicial review (as one might hope after 12 years of litigation).

III

[2] Plaintiffs claim, as a threshold matter, that we should affirm the Court of Appeals without reaching any issues of constitutional law. They contend that we should interpret the material-support statute, when applied to speech, to require proof that a defendant intended to further a foreign terrorist organization's illegal activities. That interpretation, they say, would end the litigation because plaintiffs' proposed activities consist of speech, but plaintiffs do not intend to further unlawful conduct by the PKK or LTTE.

We reject plaintiffs' interpretation of § 2339B because it is inconsistent with the text of the statute. Section 2339B(a)(1) prohibits "knowingly" providing material support. It then specifically describes the type of knowledge that is required: "To violate this paragraph, a person 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 ...." *Ibid.* Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's ***17** connection to terrorism, not specific intent to further the organization's terrorist activities.

Plaintiffs' interpretation is also untenable in light of the sections immediately surrounding § 2339B, both of which do refer to intent to further terrorist activity. See § 2339A(a) (establishing criminal penalties for one who "provides material support or resources ... knowing or intending that they are to be used in preparation for, or in carrying out, a violation of" statutes prohibiting violent terrorist acts); § 2339C(a)(1) (setting criminal penalties ****2718** for one who "unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out" other unlawful acts). Congress enacted § 2339A in 1994 and § 2339C in 2002. See § 120005(a), 108 Stat.2022 (§ 2339A); § 202(a), 116 Stat. 724 (§ 2339C). Yet Congress did not import the intent language of those provisions into § 2339B, either when it enacted § 2339B in 1996, or when it clarified § 2339B's knowledge requirement in 2004.

[3] Finally, plaintiffs give the game away when they argue that a specific intent requirement should apply only when the material-support statute applies to speech. There is no basis whatever in the text of § 2339B to read the same provisions in that statute as requiring intent in some circumstances but not others. It is therefore clear that plaintiffs are asking us not to interpret § 2339B, but to revise it. "Although this Court will often strain to construe legislation so as to save it

against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute." *Scales v. United States,* 367 U.S. 203, 211, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961).

Scales is the case on which plaintiffs most heavily rely, but it is readily distinguishable. That case involved the Smith Act, which prohibited membership in a group advocating the violent overthrow of the government. The Court held that a person could not be convicted under the statute unless he had knowledge of the group's illegal advocacy and a specific ***18** intent to bring about violent overthrow. *Id.,* at 220–222, 229, 81 S.Ct. 1469. This action is different: Section 2339B does not criminalize mere membership in a designated foreign terrorist organization. It instead prohibits providing "material support" to such a group. See *infra,* at 2722 – 2723, 2725 – 2726, 2731. Nothing about *Scales* suggests the need for a specific intent requirement in such a case. The Court in *Scales,* moreover, relied on both statutory text and precedent that had interpreted closely related provisions of the Smith Act to require specific intent. 367 U.S., at 209, 221–222, 81 S.Ct. 1469. Plaintiffs point to nothing similar here.

We cannot avoid the constitutional issues in this litigation through plaintiffs' proposed interpretation of § 2339B. [3]

IV

[4] **[5]** We turn to the question whether the material-support statute, as applied to plaintiffs, is impermissibly vague under the Due Process Clause of the Fifth Amendment. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams,* 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). We consider ****2719** whether a statute is vague as applied to the particular facts at issue, for "[a] plaintiff who engages ***19** in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). We have said that when a statute "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.,* at 499, 102 S.Ct. 1186. "But 'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.' " *Williams, supra,* at 304, 128 S.Ct. 1830 (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

The Court of Appeals did not adhere to these principles. Instead, the lower court merged plaintiffs' vagueness challenge with their First Amendment claims, holding that portions of the material-support statute were unconstitutionally vague because they applied to protected speech—regardless of whether those applications were clear. The court stated that, even if persons of ordinary intelligence understood the scope of the term "training," that term would "remai[n] impermissibly vague" because it could "be read to encompass speech and advocacy protected by the First Amendment." 552 F.3d, at 929. It also found "service" and a portion of "expert advice or assistance" to be vague because those terms covered protected speech. *Id.,* at 929–930.

Further, in spite of its own statement that it was not addressing a "facial vagueness challenge," *id.,* at 929, n. 6, the Court of Appeals considered the statute's application to facts not before it. Specifically, the Ninth Circuit relied on the Government's statement that § 2339B would bar filing an *amicus* brief in support of a foreign terrorist organization —which plaintiffs have not told us they wish to do, and which the Ninth Circuit did not say plaintiffs wished to do —to conclude that the statute barred protected advocacy and was therefore vague. See *id.,* at 930. By deciding how the statute applied in hypothetical circumstances, the Court of Appeals' discussion of vagueness seemed to incorporate elements of First Amendment overbreadth doctrine. See ***20** *id.,* at 929–930 (finding it "easy to imagine" protected expression that would be barred by § 2339B (internal quotation marks omitted)); *id.,* at 930 (referring to both vagueness and overbreadth).

In both of these respects, the Court of Appeals contravened the rule that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates, supra,* at 495, 102 S.Ct. 1186. That rule makes no exception for conduct in the form of speech. See *Parker v. Levy,* 417 U.S. 733, 755–757, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). Thus, even to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others. Such a plaintiff may have a valid overbreadth claim under the First Amendment, but our precedents make clear that a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression. See *Williams, supra,* at 304, 128 S.Ct. 1830; *Hoffman Estates, supra,* at 494–495, 497, 102 S.Ct. 1186. Otherwise the doctrines would be substantially redundant.

[6] Under a proper analysis, plaintiffs' claims of vagueness lack merit. Plaintiffs ****2720** do not argue that the material-support statute grants too much enforcement discretion to the Government. We therefore address only whether the statute "provide[s] a person of ordinary intelligence fair notice of what is prohibited." *Williams,* 553 U.S., at 304, 128 S.Ct. 1830.

As a general matter, the statutory terms at issue here are quite different from the sorts of terms that we have previously declared to be vague. We have in the past "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id.,* at 306, 128 S.Ct. 1830; see also *Papachristou v. Jacksonville,* 405 U.S. 156, n. 1, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (holding ***21** vague an ordinance that punished "vagrants," defined to include "[r]ogues and vagabonds," "persons who use juggling," and "common night walkers" (internal quotation marks omitted)). Applying the statutory terms in this action—"training," "expert advice or assistance," "service," and "personnel"—does not require similarly untethered, subjective judgments.

Congress also took care to add narrowing definitions to the material-support statute over time. These definitions increased the clarity of the statute's terms. See § 2339A(b)(2) (" 'training' means instruction or teaching designed to impart a specific skill, as opposed to general knowledge"); § 2339A(b)(3) (" 'expert advice or assistance' means advice or assistance derived from scientific, technical or other specialized knowledge"); § 2339B(h) (clarifying the scope of "personnel"). And the knowledge requirement of the statute further reduces any potential for vagueness, as we have held with respect to other statutes containing a similar requirement. See *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); *Posters 'N' Things, Ltd. v. United States,* 511 U.S. 513, 523, 526, 114 S.Ct. 1747, 128 L.Ed.2d 539 (1994); see also *Hoffman Estates, supra,* at 499, 102 S.Ct. 1186.

[7] Of course, the scope of the material-support statute may not be clear in every application. But the dispositive point here is that the statutory terms are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail. Even assuming that a heightened standard applies because the material-support statute potentially implicates speech, the statutory terms are not vague as applied to plaintiffs. See *Grayned v. City of Rockford,* 408 U.S. 104, 114–115, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (rejecting a vagueness challenge to a criminal law that implicated First Amendment activities); *Scales,* 367 U.S., at 223, 81 S.Ct. 1469 (same).

Most of the activities in which plaintiffs seek to engage readily fall within the scope of the terms "training" and "expert advice or assistance." Plaintiffs want to "train members of [the] PKK on how to use humanitarian and international ***22** law to peacefully resolve disputes," and "teach PKK members how to petition various representative bodies such as the United Nations for relief." 552 F.3d, at 921, n. 1. A person of ordinary intelligence would understand that instruction on resolving disputes through international law falls within the statute's definition of "training" because it imparts a "specific skill," not "general knowledge." §

2339A(b)(2). Plaintiffs' activities also fall comfortably within the scope of "expert advice or assistance": A reasonable person would recognize that teaching the PKK how to petition for humanitarian relief before the United Nations involves advice derived from, as the statute puts it, "specialized knowledge." § 2339A(b)(3). In fact, plaintiffs themselves ****2721** have repeatedly used the terms "training" and "expert advice" throughout this litigation to describe their own proposed activities, demonstrating that these common terms readily and naturally cover plaintiffs' conduct. See, *e.g.,* Brief for Plaintiffs 10, 11; App. 56, 58, 59, 61, 62, 63, 80, 81, 98, 99, 106, 107, 117.

Plaintiffs respond by pointing to hypothetical situations designed to test the limits of "training" and "expert advice or assistance." They argue that the statutory definitions of these terms use words of degree—like "specific," "general," and "specialized"—and that it is difficult to apply those definitions in particular cases. See Brief for Plaintiffs 27 (debating whether teaching a course on geography would constitute training); *id.,* at 29. And they cite *Gentile v. State Bar of Nev.,* 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991), in which we found vague a state bar rule providing that a lawyer in a criminal case, when speaking to the press, "may state without elaboration ... the general nature of the ... defense." *Id.,* at 1048, 111 S.Ct. 2720 (internal quotation marks omitted).

Whatever force these arguments might have in the abstract, they are beside the point here. Plaintiffs do not propose to teach a course on geography, and cannot seek refuge in imaginary cases that straddle the boundary between "specific ***23** skills" and "general knowledge." See *Parker v. Levy,* 417 U.S., at 756, 94 S.Ct. 2547. We emphasized this point in *Scales,* holding that even if there might be theoretical doubts regarding the distinction between "active" and "nominal" membership in an organization—also terms of degree—the defendant's vagueness challenge failed because his "case present [ed] no such problem." 367 U.S., at 223, 81 S.Ct. 1469.

Gentile was different. There the asserted vagueness in a state bar rule was directly implicated by the facts before the Court: Counsel had reason to suppose that his particular statements to the press would not violate the rule, yet he was disciplined nonetheless. See 501 U.S., at 1049–1051, 111 S.Ct. 2720. We did not suggest that counsel could escape discipline on vagueness grounds if his own speech were plainly prohibited.

Plaintiffs also contend that they want to engage in "political advocacy" on behalf of Kurds living in Turkey and Tamils living in Sri Lanka. 552 F.3d, at 921, n. 1. They are concerned that such advocacy might be regarded as "material support" in the form of providing "personnel" or "service[s]," and assert that the statute is unconstitutionally vague because they cannot tell.

As for "personnel," Congress enacted a limiting definition in IRTPA that answers plaintiffs' vagueness concerns. Providing material support that constitutes "personnel" is defined as knowingly providing a person "to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization." § 2339B(h). The statute makes clear that "personnel" does not cover *independent* advocacy: "Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." *Ibid.*

"[S]ervice" similarly refers to concerted activity, not independent advocacy. See Webster's Third New International Dictionary 2075 (1993) (defining "service" to mean "the ***24** performance of work commanded or paid for by another: a servant's duty: attendance on a superior"; or "an act done for the benefit or at the command of another"). Context confirms that ordinary meaning here. The statute prohibits providing a service "*to* a foreign ****2722** terrorist organization." § 2339B(a)(1) (emphasis added). The use of the word "to" indicates a connection between the service and the foreign group. We think a person of ordinary intelligence would understand that independently advocating for a cause is different from providing a service to a group that is advocating for that cause.

Moreover, if independent activity in support of a terrorist group could be characterized as a "service," the statute's specific exclusion of independent activity in the definition of "personnel" would not make sense. Congress would not have prohibited under "service" what it specifically exempted from

prohibition under "personnel." The other types of material support listed in the statute, including "lodging," "weapons," "explosives," and "transportation," § 2339A(b)(1), are not forms of support that could be provided independently of a foreign terrorist organization. We interpret "service" along the same lines. Thus, any independent advocacy in which plaintiffs wish to engage is not prohibited by § 2339B. On the other hand, a person of ordinary intelligence would understand the term "service" to cover advocacy performed in coordination with, or at the direction of, a foreign terrorist organization.

Plaintiffs argue that this construction of the statute poses difficult questions of exactly how much direction or coordination is necessary for an activity to constitute a "service." See Reply Brief for Petitioners in No. 09–89, p. 14 (hereinafter Reply Brief for Plaintiffs) ("Would any communication with any member be sufficient? With a leader? Must the 'relationship' have any formal elements, such as an employment or contractual relationship? What about a relationship through an intermediary?"). The problem with these ***25** questions is that they are entirely hypothetical. Plaintiffs have not provided any specific articulation of the degree to which *they* seek to coordinate their advocacy with the PKK and LTTE. They have instead described the form of their intended advocacy only in the most general terms. See, *e.g.,* Brief for Plaintiffs 10–11 (plaintiffs "would like, among other things, to offer their services to advocate on behalf of the rights of the Kurdish people and the PKK before the United Nations and the United States Congress" (internal quotation marks and alteration omitted)); App. 59 (plaintiffs would like to "write and distribute publications supportive of the PKK and the cause of Kurdish liberation" and "advocate for the freedom of political prisoners in Turkey").

Deciding whether activities described at such a level of generality would constitute prohibited "service[s]" under the statute would require "sheer speculation"—which means that plaintiffs cannot prevail in their preenforcement challenge. See *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 454, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). It is apparent with respect to these claims that "gradations of fact or charge would make a difference as to criminal liability," and so "adjudication of the reach and constitutionality of [the statute] must await a concrete fact situation." *Zemel v. Rusk,* 381 U.S. 1, 20, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965).

V

A

[8] We next consider whether the material-support statute, as applied to plaintiffs, violates the freedom of speech guaranteed by the First Amendment. Both plaintiffs and the Government take extreme positions on this question. Plaintiffs claim that Congress has banned their "pure political speech." *E.g.,* Brief for Plaintiffs 2, 25, 43. It has not. Under the material-support statute, plaintiffs may say ****2723** anything they wish on any topic. They may speak and write ***26** freely about the PKK and LTTE, the Governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations. As the Government states: "The statute does not prohibit independent advocacy or expression of any kind." Brief for Government 13. Section 2339B also "does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so." *Id.,* at 60. Congress has not, therefore, sought to suppress ideas or opinions in the form of "pure political speech." Rather, Congress has prohibited "material support," which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations. [4]

[9] For its part, the Government takes the foregoing too far, claiming that the only thing truly at issue in this litigation is conduct, not speech. Section 2339B is directed at the fact of plaintiffs' interaction with the PKK and LTTE, the Government contends, and only incidentally burdens their expression. The Government argues that the proper standard of review is therefore the one set out in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). In that case, the Court rejected a First Amendment challenge to a conviction under a generally applicable prohibition on

destroying draft cards, even though O'Brien had burned his card in protest against the draft. See *id.,* at 370, 376, 382, 88 S.Ct. 1673. In so doing, we applied what we have since called "intermediate scrutiny," under which a "content-neutral regulation will be sustained under the First Amendment if it advances important governmental ***27** interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 189, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (citing *O'Brien, supra,* at 377, 88 S.Ct. 1673).

The Government is wrong that the only thing actually at issue in this litigation is conduct, and therefore wrong to argue that *O'Brien* provides the correct standard of review.[5] *O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech, see *R.A.V. v. St. Paul,* 505 U.S. 377, 385–386, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Texas v. Johnson,* 491 U.S. 397, 403, 406–407, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), and § 2339B regulates speech on the basis of its content. Plaintiffs want to speak to the PKK and LTTE, and whether they may do so under § 2339B depends on what they ****2724** say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. See Brief for Government 33–34. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge. See *id.,* at 32.

The Government argues that § 2339B should nonetheless receive intermediate scrutiny because it *generally* functions as a regulation of conduct. That argument runs headlong into a number of our precedents, most prominently *Cohen* ***28** *v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). *Cohen* also involved a generally applicable regulation of conduct, barring breaches of the peace. See *id.,* at 16, 91 S.Ct. 1780. But when Cohen was convicted for wearing a jacket bearing an epithet, we did not apply *O'Brien*. See 403 U.S., at 16, 18, 91 S.Ct. 1780. Instead, we recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message. We accordingly applied more rigorous scrutiny and reversed his conviction. See *id.,* at 18–19, 26, 91 S.Ct. 1780.

This suit falls into the same category. The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. As we explained in *Texas v. Johnson* : "If the [Government's] regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien* 's test, and we must [apply] a more demanding standard." 491 U.S., at 403, 109 S.Ct. 2533 (citation omitted).

B

[10] The First Amendment issue before us is more refined than either plaintiffs or the Government would have it. It is not whether the Government may prohibit pure political speech, or may prohibit material support in the form of conduct. It is instead whether the Government may prohibit what plaintiffs want to do—provide material support to the PKK and LTTE in the form of speech.

Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order. See Brief for Plaintiffs 51. Plaintiffs' complaint is that the ban on material support, applied to what they wish to do, is not "necessary to further that interest." *Ibid.* The objective ***29** of combating terrorism does not justify prohibiting their speech, plaintiffs argue, because their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism. *Id.,* at 51–52.

Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question. When it enacted § 2339B in 1996, Congress made specific findings regarding the serious threat posed by international terrorism. See AEDPA §§ 301(a)(1)-(7), 110 Stat. 1247, note following

18 U.S.C. § 2339B (Findings and Purpose). One of those findings explicitly rejects plaintiffs' contention that their support would not further the terrorist activities of the PKK and LTTE: "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct." § 301(a)(7) (emphasis added).

**2725 Plaintiffs argue that the reference to "any contribution" in this finding meant only monetary support. There is no reason to read the finding to be so limited, particularly because Congress expressly prohibited so much more than monetary support in § 2339B. Congress's use of the term "contribution" is best read to reflect a determination that any form of material support furnished "to" a foreign terrorist organization should be barred, which is precisely what the material-support statute does. Indeed, when Congress enacted § 2339B, Congress simultaneously removed an exception that had existed in § 2339A(a) (1994 ed.) for the provision of material support in the form of "humanitarian assistance to persons not directly involved in" terrorist activity. AEDPA § 323, 110 Stat. 1255; 205 F.3d, at 1136. That repeal demonstrates that Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.

We are convinced that Congress was justified in rejecting that view. The PKK and LTTE are deadly groups. "The *30 PKK's insurgency has claimed more than 22,000 lives." Declaration of Kenneth R. McKune, App. 128, ¶ 5 (hereinafter McKune Affidavit). The LTTE has engaged in extensive suicide bombings and political assassinations, including killings of the Sri Lankan President, Security Minister, and Deputy Defense Minister. *Id.,* at 130–132; Brief for Government 6–7. "On January 31, 1996, the LTTE exploded a truck bomb filled with an estimated 1,000 pounds of explosives at the Central Bank in Colombo, killing 100 people and injuring more than 1,400. This bombing was the most deadly terrorist incident in the world in 1996." McKune Affidavit, App. 131, ¶ 6.h. It is not difficult to conclude as Congress did that the "tain[t]" of such violent activities is so great that working in coordination with or at the command of the PKK and LTTE serves to legitimize and further their terrorist means. AEDPA § 301(a)(7), 110 Stat. 1247.

Material support meant to "promot[e] peaceable, lawful conduct," Brief for Plaintiffs 51, can further terrorism by foreign groups in multiple ways. "Material support" is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds —all of which facilitate more terrorist attacks. "Terrorist organizations do not maintain *organizational* 'firewalls' that would prevent or deter ... sharing and commingling of support and benefits." McKune Affidavit, App. 135, ¶ 11. "[I]nvestigators have revealed how terrorist groups systematically conceal their activities behind charitable, social, and political fronts." M. Levitt, Hamas: Politics, Charity, and Terrorism in the Service of Jihad 2–3 (2006). "Indeed, some designated foreign terrorist organizations use social and political components to recruit personnel to carry *31 out terrorist operations, and to provide support to criminal terrorists and their families in aid of such operations." McKune Affidavit, App. 135, ¶ 11; Levitt, *supra,* at 2 ("Muddying the waters between its political activism, good works, and terrorist attacks, Hamas is able to use its overt political and charitable organizations as a financial and logistical support network for its terrorist operations").

Money is fungible, and "[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put." McKune Affidavit, App. 134, ¶ 9. But "there is reason to believe that foreign terrorist organizations do not maintain legitimate *financial* **2726 firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations." *Id.,* at 135, ¶ 12. Thus, "[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives." *Id.,* at 134, ¶ 10. See also Brief for Anti–Defamation League as *Amicus Curiae* 19–29 (describing fundraising activities by the PKK, LTTE, and Hamas); *Regan v. Wald,* 468 U.S. 222, 243, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984) (upholding President's decision to impose travel ban to Cuba "to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism"). There is evidence that the PKK and LTTE, in particular, have not "respected the line between humanitarian and violent activities." McKune

Affidavit, App. 135, ¶ 13 (discussing PKK); see *id.,* at 134 (LTTE).

The dissent argues that there is "no natural stopping place" for the proposition that aiding a foreign terrorist organization's lawful activity promotes the terrorist organization as a whole. *Post,* at 2736. But Congress has settled on just such a natural stopping place: The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent ***32** advocacy that might be viewed as promoting the group's legitimacy is not covered. See *supra,* at 2721 – 2723. [6]

Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks. We see no reason to question Congress's finding that "international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over persons involved in a variety of terrorist acts, including hostage taking, murder of an internationally protected person, and aircraft piracy and sabotage." AEDPA § 301(a)(5), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose). The material-support statute furthers this international effort by prohibiting aid for foreign terrorist groups that harm the United States' partners abroad: "A number of designated foreign terrorist organizations have attacked moderate governments with which the United States has vigorously endeavored to maintain close and friendly relations," and those attacks "threaten [the] social, economic and political stability" of such governments. McKune Affidavit, App. 137, ¶ 16. "[O]ther foreign terrorist organizations attack our NATO allies, thereby implicating important and sensitive multilateral security arrangements." *Ibid.*

For example, the Republic of Turkey—a fellow member of NATO—is defending itself against a violent insurgency ***33** waged by the PKK. Brief for Government 6; App. 128. That nation and our other allies would react sharply to Americans furnishing material support to foreign groups like the PKK, and would hardly be mollified by the explanation that the support was meant only to further those groups' "legitimate" activities. From Turkey's perspective, ****2727** there likely are no such activities. See 352 F.3d, at 389 (observing that Turkey prohibits membership in the PKK and prosecutes those who provide support to that group, regardless of whether the support is directed to lawful activities).

C

In analyzing whether it is possible in practice to distinguish material support for a foreign terrorist group's violent activities and its nonviolent activities, we do not rely exclusively on our own inferences drawn from the record evidence. We have before us an affidavit stating the Executive Branch's conclusion on that question. The State Department informs us that "[t]he experience and analysis of the U.S. government agencies charged with combating terrorism strongly suppor[t]" Congress's finding that all contributions to foreign terrorist organizations further their terrorism. McKune Affidavit, App. 133, ¶ 8. See *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 24 – 25, 129 S.Ct. 365, 376–377, 172 L.Ed.2d 249 (2008) (looking to similar affidavits to support according weight to national security claims). In the Executive's view: "Given the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities." McKune Affidavit, App. 133, ¶ 8.

That evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security ***34** and foreign affairs. The PKK and LTTE have committed terrorist acts against American citizens abroad, and the material-support statute addresses acute foreign policy concerns involving relationships with our Nation's allies. See *id.,* at 128–133, 137. We have noted that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene v. Bush,* 553 U.S. 723, 797, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008). It is vital in this context "not to substitute ... our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker*

v. Goldberg, 453 U.S. 57, 68, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981). See *Wald,* 468 U.S., at 242, 104 S.Ct. 3026; *Haig v. Agee,* 453 U.S. 280, 292, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981).

Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake. We are one with the dissent that the Government's "authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals." *Post,* at 2743. But when it comes to collecting evidence and drawing factual inferences in this area, "the lack of competence on the part of the courts is marked," *Rostker, supra,* at 65, 101 S.Ct. 2646, and respect for the Government's conclusions is appropriate.

One reason for that respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess. The dissent slights these real constraints in demanding hard proof—with "detail," "specific facts," and "specific evidence"—that plaintiffs' proposed activities ****2728** will support terrorist attacks. See *post,* at 2735 – 2736, 2739, 2743. That would be a dangerous requirement. In this context, conclusions must often be based on informed judgment rather than ***35** concrete evidence, and that reality affects what we may reasonably insist on from the Government. The material-support statute is, on its face, a preventive measure —it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur. The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions. See *Zemel,* 381 U.S., at 17, 85 S.Ct. 1271 ("[B]ecause of the changeable and explosive nature of contemporary international relations, ... Congress ... must of necessity paint with a brush broader than that it customarily wields in domestic areas").

This context is different from that in decisions like *Cohen*. In that case, the application of the statute turned on the offensiveness of the speech at issue. Observing that "one man's vulgarity is another's lyric," we invalidated Cohen's conviction in part because we concluded that "governmental officials cannot make principled distinctions in this area." 403 U.S., at 25, 91 S.Ct. 1780. In this litigation, by contrast, Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not.

We also find it significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns. First, § 2339B only applies to designated foreign terrorist organizations. There is, and always has been, a limited number of those organizations designated by the Executive Branch, see, *e.g.,* 74 Fed.Reg. 29742 (2009); 62 Fed.Reg. 52650 (1997), and any groups so designated may seek judicial review of the designation. Second, in response to the lower courts' holdings in this litigation, Congress added clarity to the statute by providing narrowing definitions of the terms "training," "personnel," and "expert advice or assistance," as well as an explanation ***36** of the knowledge required to violate § 2339B. Third, in effectuating its stated intent not to abridge First Amendment rights, see § 2339B(i), Congress has also displayed a careful balancing of interests in creating limited exceptions to the ban on material support. The definition of material support, for example, excludes medicine and religious materials. See § 2339A(b)(1). In this area perhaps more than any other, the Legislature's superior capacity for weighing competing interests means that "we must be particularly careful not to substitute our judgment of what is desirable for that of Congress." *Rostker, supra,* at 68, 101 S.Ct. 2646. Finally, and most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.

At bottom, plaintiffs simply disagree with the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization —even seemingly benign support—bolsters the terrorist activities of that organization. That judgment, however, is entitled to significant weight, and we have persuasive

evidence before us to sustain it. Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government's interest in preventing terrorism, it was necessary to prohibit providing material support in the **2729 form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups' nonviolent ends.

We turn to the particular speech plaintiffs propose to undertake. First, plaintiffs propose to "train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes." 552 F.3d, at 921, n. 1. Congress can, consistent with the First Amendment, prohibit this direct training. It is wholly foreseeable that the PKK could use the "specific skill[s]" that plaintiffs propose to *37 impart, § 2339A(b)(2), as part of a broader strategy to promote terrorism. The PKK could, for example, pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks. See generally A. Marcus, Blood and Belief: The PKK and the Kurdish Fight for Independence 286–295 (2007) (describing the PKK's suspension of armed struggle and subsequent return to violence). A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote.

Second, plaintiffs propose to "teach PKK members how to petition various representative bodies such as the United Nations for relief." 552 F.3d, at 921, n. 1. The Government acts within First Amendment strictures in banning this proposed speech because it teaches the organization how to acquire "relief," which plaintiffs never define with any specificity, and which could readily include monetary aid. See Brief for Plaintiffs 10–11, 16–17, n. 10; App. 58–59, 80–81. Indeed, earlier in this litigation, plaintiffs sought to teach the LTTE "to present claims for tsunami-related aid to mediators and international bodies," 552 F.3d, at 921, n. 1, which naturally included monetary relief. Money is fungible, *supra,* at 2725 – 2726, and Congress logically concluded that money a terrorist group such as the PKK obtains using the techniques plaintiffs propose to teach could be redirected to funding the group's violent activities.

Finally, plaintiffs propose to "engage in political advocacy on behalf of Kurds who live in Turkey," and "engage in political advocacy on behalf of Tamils who live in Sri Lanka." 552 F.3d, at 921, n. 1. As explained above, *supra,* at 2722 – 2723, plaintiffs do not specify their expected level of coordination with the PKK or LTTE or suggest what exactly their "advocacy" would consist of. Plaintiffs' proposals are phrased at such a high level of generality that they cannot prevail in this *38 preenforcement challenge. See *supra,* at 2722; *Grange,* 552 U.S., at 454, 128 S.Ct. 1184; *Zemel, supra*, at 20, 85 S.Ct. 1271.

In responding to the foregoing, the dissent fails to address the real dangers at stake. It instead considers only the possible benefits of plaintiffs' proposed activities in the abstract. See *post,* at 2737 – 2739. The dissent seems unwilling to entertain the prospect that training and advising a designated foreign terrorist organization on how to take advantage of international entities might benefit that organization in a way that facilitates its terrorist activities. In the dissent's world, such training is all to the good. Congress and the Executive, however, have concluded that we live in a different world: one in which the designated foreign terrorist organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA § 301(a)(7). One in which, for example, "the United Nations High Commissioner for Refugees was forced to close a Kurdish refugee **2730 camp in northern Iraq because the camp had come under the control of the PKK, and the PKK had failed to respect its 'neutral and humanitarian nature.' " McKune Affidavit, App. 135–136, ¶ 13. Training and advice on how to work with the United Nations could readily have helped the PKK in its efforts to use the United Nations camp as a base for terrorist activities.

If only good can come from training our adversaries in international dispute resolution, presumably it would have been unconstitutional to prevent American citizens from training the Japanese Government on using international organizations and mechanisms to resolve disputes during World War II. It would, under the dissent's reasoning, have been contrary to our commitment to resolving disputes through " 'deliberative forces,' " *post,* at 2738 (quoting

Whitney v. California, 274 U.S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring)), for Congress to conclude that assisting Japan on that front might facilitate its war effort more generally. That view is not one the First Amendment requires us to embrace.

***39** All this is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It is also not to say that any other statute relating to speech and terrorism would satisfy the First Amendment. In particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations. We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.

VI

[11] Plaintiffs' final claim is that the material-support statute violates their freedom of association under the First Amendment. Plaintiffs argue that the statute criminalizes the mere fact of their associating with the PKK and LTTE, thereby running afoul of decisions like *De Jonge v. Oregon,* 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937), and cases in which we have overturned sanctions for joining the Communist Party, see, *e.g., Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *United States v. Robel,* 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967).

The Court of Appeals correctly rejected this claim because the statute does not penalize mere association with a foreign terrorist organization. As the Ninth Circuit put it: "The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group.... What [§ 2339B] prohibits is the act of giving material support...." 205 F.3d, at 1133. Plaintiffs want to do the latter. Our decisions scrutinizing penalties on simple association or assembly are therefore inapposite. See, *e.g., Robel, supra,* at 262, 88 S.Ct. 419 ("It is precisely because th[e] statute sweeps indiscriminately across all types of association with Communist-action groups, without regard ***40** to the quality and degree of membership, that it runs afoul of the First Amendment"); *De Jonge, supra,* at 362, 57 S.Ct. 255.

Plaintiffs also argue that the material-support statute burdens their freedom of association because it prevents them from providing support to designated foreign ****2731** terrorist organizations, but not to other groups. See Brief for Plaintiffs 56; Reply Brief for Plaintiffs 37–38. Any burden on plaintiffs' freedom of association in this regard is justified for the same reasons that we have denied plaintiffs' free speech challenge. It would be strange if the Constitution permitted Congress to prohibit certain forms of speech that constitute material support, but did not permit Congress to prohibit that support only to particularly dangerous and lawless foreign organizations. Congress is not required to ban material support to every group or none at all.

* * *

The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to "provide for the common defence." As Madison explained, "[s]ecurity against foreign danger is ... an avowed and essential object of the American Union." The Federalist No. 41, p. 269 (J. Cooke ed.1961). We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.

The judgment of the United States Court of Appeals for the Ninth Circuit is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BREYER, with whom Justice GINSBURG and Justice SOTOMAYOR join, dissenting.

Like the Court, and substantially for the reasons it gives, I do not think this statute is unconstitutionally vague. But ***41** I cannot agree with the Court's conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations' lawful political objectives. In my view, the Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government's compelling interest in combating terrorism. And I would interpret the statute as normally placing activity of this kind outside its scope. See *Crowell v. Benson,* 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932); *Ashwander v. TVA,* 297 U.S. 288, 346–347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

I

The statute before us forbids "knowingly provid[ing]" "a foreign terrorist organization" with "material support or resources," defined to include, among other things, "training," "expert advice or assistance," "personnel," and "service." 18 U.S.C. §§ 2339B(a)(1), (g)(4); § 2339A(b)(1). The Secretary of State has designated the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) as "foreign terrorist organizations"—a designation authorized where the organization is "foreign," threatens the security of the United States or its nationals, and engages in "terrorist activity," defined to include "any" of such activities as "highjacking" and "assassination," or the "use of any ... weapon or dangerous device ... with intent to endanger, directly or indirectly, the safety of one or more individuals." 62 Fed.Reg. 52650 (1997); 8 U.S.C. § 1182(a)(3)(B)(iii); 18 U.S.C. § 2339B(a)(1).

The plaintiffs, all United States citizens or associations, now seek an injunction and declaration providing that, without violating the statute, they can (1) "train members of [the] PKK on how to use humanitarian ****2732** and international law to peacefully resolve disputes"; (2) "engage in political advocacy ***42** on behalf of Kurds who live in Turkey"; (3) "teach PKK members how to petition various representative bodies such as the United Nations for relief"; and (4) "engage in political advocacy on behalf of Tamils who live in Sri Lanka." *Humanitarian Law Project v. Mukasey,* 552 F.3d 916, 921, n. 1 (C.A.9 2009); *ante,* at 2716. All these activities are of a kind that the First Amendment ordinarily protects.

In my view, the Government has not made the strong showing necessary to justify under the First Amendment the criminal prosecution of those who engage in these activities. All the activities involve the communication and advocacy of political ideas and lawful means of achieving political ends. Even the subjects the plaintiffs wish to teach—using international law to resolve disputes peacefully or petitioning the United Nations, for instance—concern political speech. We cannot avoid the constitutional significance of these facts on the basis that some of this speech takes place outside the United States and is directed at foreign governments, for the activities also involve advocacy in *this* country directed to *our* government and *its* policies. The plaintiffs, for example, wish to write and distribute publications and to speak before the United States Congress. App. 58–59.

That this speech and association for political purposes is the *kind* of activity to which the First Amendment ordinarily offers its strongest protection is elementary. See *New York Times Co. v. Sullivan,* 376 U.S. 254, 269, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (The First Amendment " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people' " (quoting *Roth v. United States,* 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)); *Lovell v. City of Griffin,* 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949 (1938) (rejecting licensing scheme for distribution of "pamphlets and leaflets," "historic weapons in the defense of liberty"); *R.A.V. v. St. Paul,* 505 U.S. 377, 422, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (STEVENS, J., concurring in judgment) ("Our First Amendment decisions have created a rough hierarchy in the ***43** constitutional protection of speech" in which "[c]ore political speech occupies the highest, most protected position"); *Hill v. Colorado,* 530 U.S. 703, 787, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (KENNEDY, J., dissenting) ("Laws punishing speech which protests the

lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against"); *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 349, 130 S.Ct. 876, 904, 175 L.Ed.2d 753 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech").

Although in the Court's view the statute applies only where the PKK helps to coordinate a defendant's activities, *ante,* at 2723, the simple fact of "coordination" alone cannot readily remove protection that the First Amendment would otherwise grant. That amendment, after all, also protects the freedom of association. See *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 911, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (The First Amendment's protections "of speech, assembly, association, and petition, 'though not identical, are inseparable' " (quoting *Thomas v. Collins,* 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945))); *De Jonge v. Oregon,* 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278 (1937) (describing the "right of peaceable assembly" as "a right cognate to those of free speech and free press and ... equally fundamental"); see also *Roberts v.* ****2733** *United States Jaycees,* 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). "Coordination" with a political group, like membership, involves association.

"Coordination" with a group that engages in unlawful activity also does not deprive the plaintiffs of the First Amendment's protection under any traditional "categorical" exception to its protection. The plaintiffs do not propose to solicit a crime. They will not engage in fraud or defamation or circulate obscenity. Cf. *United States v. Stevens,* 559 U.S. 460, 468 – 469, 130 S.Ct. 1577, 1585, 176 L.Ed.2d 435 (2010) (describing "categories" of unprotected speech). And the First Amendment protects advocacy even of *unlawful* action so long as that advocacy is not ***44** "directed to inciting or producing *imminent lawless action* and ... *likely to incite or produce* such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam)* (emphasis added). Here the plaintiffs seek to advocate peaceful, *lawful* action to secure *political* ends; and they seek to teach others how to do the same. No one contends that the plaintiffs' speech to these organizations can be prohibited as incitement under *Brandenburg*.

Moreover, the Court has previously held that a person who associates with a group that uses unlawful means to achieve its ends does not thereby necessarily forfeit the First Amendment's protection for freedom of association. See *Scales v. United States,* 367 U.S. 203, 229, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961) ("[Q]uasi-political parties or other groups that may embrace both legal and illegal aims differ from a technical conspiracy, which is defined by its criminal purpose"); see also *NAACP, supra,* at 908, 102 S.Ct. 3409 ("The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected"). Rather, the Court has pointed out in respect to associating with a group advocating overthrow of the Government through force and violence: "If the persons assembling have committed crimes elsewhere ..., they may be prosecuted for their ... violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." *De Jonge, supra,* at 365, 57 S.Ct. 255 (striking down conviction for attending and assisting at Communist Party meeting because "[n]otwithstanding [the party's] objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose").

Not even the "serious and deadly problem" of international terrorism can require *automatic* forfeiture of First Amendment rights. § 301(a)(1), 110 Stat. 1247, note following ***45** 18 U.S.C. § 2339B (Findings and Purpose). Cf. § 2339B(i) (instructing courts not to "constru[e] or appl[y the statute] so as to abridge the exercise of rights guaranteed under the First Amendment"). After all, this Court has recognized that not " '[e]ven the war power ... remove[s] constitutional limitations safeguarding essential liberties.' " *United States v. Robel,* 389 U.S. 258, 264, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967) (quoting *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398, 426, 54 S.Ct. 231, 78 L.Ed. 413 (1934)). See also *Abrams v. United States,* 250 U.S. 616, 628, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (Holmes, J.,

dissenting) ("[A]s against dangers peculiar to war, as against others, the principle of the right to free speech is always the same"). Thus, there is no general First Amendment exception that applies here. If the statute is **2734 constitutional in this context, it would have to come with a strong justification attached.

It is not surprising that the majority, in determining the constitutionality of criminally prohibiting the plaintiffs' proposed activities, would apply, not the kind of intermediate First Amendment standard that applies to conduct, but " 'a more demanding standard.' " *Ante,* at 2724 (quoting *Texas v. Johnson,* 491 U.S. 397, 403, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)). Indeed, where, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications "strictly"—to determine whether the prohibition is justified by a "compelling" need that cannot be "less restrictively" accommodated. See *Houston v. Hill,* 482 U.S. 451, 459, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (criminal penalties); *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (content-based); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (same); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 540, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (strict scrutiny); *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 786, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (same).

But, even if we assume for argument's sake that "strict scrutiny" does not apply, no one can deny that we must at *46 the very least "measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment." *Robel, supra,* at 268, n. 20 (describing constitutional task where the Court is faced "with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights"). And here I need go no further, for I doubt that the statute, as the Government would interpret it, can survive any reasonably applicable First Amendment standard. See, *e.g.,* *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 189, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (describing intermediate scrutiny). Cf. *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring) (examining whether a statute worked speech-related harm "out of proportion to the statute's salutary effects upon" other interests).

The Government does identify a compelling countervailing interest, namely, the interest in protecting the security of the United States and its nationals from the threats that foreign terrorist organizations pose by denying those organizations financial and other fungible resources. I do not dispute the importance of this interest. But I do dispute whether the interest can justify the statute's criminal prohibition. To put the matter more specifically, precisely how does application of the statute to the protected activities before us *help achieve* that important security-related end? See *Simon & Schuster, supra*, at 118, 112 S.Ct. 501 (requiring that "narrowly drawn" means further a "compelling state interest" by the least restrictive means (internal quotation marks omitted)); *Turner, supra,* at 189, 117 S.Ct. 1174 (requiring "advance[ment of] important governmental interests unrelated to the suppression of free speech" without "burden[ing] substantially more speech than necessary to further those interests"); *Robel, supra,* at 268, n. 20, 88 S.Ct. 419 (requiring measurement of the "means adopted by Congress against ... the [security] goal it has sought to achieve"). See also *47 *Nixon, supra*, at 402, 120 S.Ct. 897 (BREYER, J., concurring); *Federal Election Comm'n v. Wisconsin* **2735 *Right to Life, Inc.,* 551 U.S. 449, 478, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of ROBERTS, C.J.) ("A court ... must ensure that [the interest justifying a statutory restriction] supports *each application* of [the] statute").

The Government makes two efforts to answer this question. *First,* the Government says that the plaintiffs' support for these organizations is "fungible" in the same sense as other forms of banned support. Being fungible, the plaintiffs' support could, for example, free up other resources, which the organization might put to terrorist ends. Brief for Respondents in No. 09–89, pp. 54–56 (hereinafter Government Brief).

The proposition that the two very different kinds of "support" are "fungible," however, is not *obviously* true. There is no *obvious* way in which undertaking advocacy for political change through peaceful means or teaching the PKK and LTTE, say, how to petition the United Nations for political change is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible. It is far from obvious that these advocacy activities can themselves be redirected, or will free other resources that can be directed, toward terrorist ends. Thus, we must determine whether the Government has come forward with evidence to support its claim.

The Government has provided us with no empirical information that might convincingly support this claim. Instead, the Government cites only to evidence that Congress was concerned about the "fungible" nature in general of resources, predominately money and material goods. It points to 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." § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (emphasis added). It also points ***48** to a House Report's statement 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." H.R.Rep. No. 104–383, p. 81 (1995) (emphasis added). Finally, the Government refers to a State Department official's affidavit describing how ostensibly charitable contributions have either been "redirected" to 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." Declaration of Kenneth R. McKune, App. 134, 136 (emphasis added).

The most one can say in the Government's favor about these statements is that they *might* be read as offering highly general support for its argument. The statements do not, however, explain in any detail how the plaintiffs' political-advocacy-related activities might actually be "fungible" and therefore capable of being diverted to terrorist use. Nor do they indicate that Congress itself was concerned with "support" of this kind. The affidavit refers to "funds," "financing," and "goods"—none of which encompasses the plaintiffs' activities. *Ibid.* 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. See *infra,* at 15–16. Peaceful political advocacy ****2736** does not obviously fall into these categories. And the statute itself suggests that Congress did not intend to curtail freedom of speech or association. See § 2339B(i) ("Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment"); see also *infra,* at 18–19.

***49** *Second,* the Government says that the plaintiffs' proposed activities will "bolste[r] a terrorist organization's efficacy and strength in a community" and "undermin[e] this nation's efforts to *delegitimize and weaken* these groups." Government Brief 56 (emphasis added). In the Court's view, too, the Constitution permits application of the statute to activities of the kind at issue in part because those activities could provide a group that engages in terrorism with "legitimacy." *Ante,* at 2725. The Court suggests that, armed with this greater "legitimacy," these organizations will more readily be able to obtain material support of the kinds Congress plainly intended to ban—money, arms, lodging, and the like. See *ibid.*

Yet the Government does not claim that the statute forbids *any* speech "legitimating" a terrorist group. Rather, it reads the statute as permitting (1) membership in terrorist organizations, (2) "peaceably assembling with members of the PKK and LTTE for lawful discussion," or (3) "independent advocacy" on behalf of these organizations. Government Brief 66, 61, 13. The Court, too, emphasizes that activities not "*coordinated with* " the terrorist groups are not banned. See *ante,* at 2723, 2725 – 2726, 2728 – 2729 (emphasis added). And it argues that speaking, writing, and teaching aimed at furthering a terrorist organization's peaceful political ends could "mak[e] it easier for those groups to persist, to recruit members, and to raise funds." *Ante,* at 2725.

But this "legitimacy" justification cannot by itself warrant suppression of political speech, advocacy, and association. Speech, association, and related activities on behalf of a group

will often, perhaps always, help to legitimate that group. Thus, were the law to accept a "legitimating" effect, in and of itself and without qualification, as providing sufficient grounds for imposing such a ban, the First Amendment battle would be lost in untold instances where it should be won. Once one accepts this argument, there is no natural stopping place. The argument applies as strongly to "independent" ***50** as to "coordinated" advocacy. But see *ante,* at 2725 – 2726. That fact is reflected in part in the Government's claim that the ban here, so supported, prohibits a lawyer hired by a designated group from filing on behalf of that group an *amicus* brief before the United Nations or even before this Court. See Tr. of Oral Arg. 47–49, 53.

That fact is also reflected in the difficulty of drawing a line designed to accept the legitimacy argument in some instances but not in others. It is inordinately difficult to distinguish when speech activity will and when it will not initiate the chain of causation the Court suggests—a chain that leads from peaceful advocacy to "legitimacy" to increased support for the group to an increased supply of material goods that support its terrorist activities. Even were we to find some such line of distinction, its application would seem so inherently uncertain that it would often, perhaps always, "chill" protected speech beyond its boundary. In short, the justification, put forward simply in abstract terms and without limitation, must *always,* or it will *never,* be sufficient. Given the nature of the plaintiffs' activities, "always" cannot possibly be the First Amendment's answer.

Regardless, the "legitimacy" justification itself is inconsistent with critically important ****2737** First Amendment case law. Consider the cases involving the protection the First Amendment offered those who joined the Communist Party intending only to further its peaceful activities. In those cases, this Court took account of congressional findings that the Communist Party not only advocated theoretically but also sought to put into practice the overthrow of our Government through force and violence. The Court had previously accepted Congress' determinations that the American Communist Party was a "Communist action organizatio[n]" which (1) acted under the "control, direction, and discipline" of the world Communist movement, a movement that sought to employ "espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship," ***51** and (2) "endeavor[ed]" to bring about "the overthrow of existing governments by ... force if necessary." *Communist Party of United States v. Subversive Activities Control Bd.,* 367 U.S. 1, 5–6, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961) (internal quotation marks omitted).

Nonetheless, the Court held that the First Amendment protected an American's right to belong to that party—despite whatever "legitimating" effect membership might have had —as long as the person did not share the party's unlawful purposes. See, *e.g., De Jonge,* 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278; *Scales,* 367 U.S., at 228–230, 81 S.Ct. 1469; *Elfbrandt v. Russell,* 384 U.S. 11, 17, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966); *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 605–610, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Robel,* 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (holding that national security interests did not justify overbroad criminal prohibition on members of Communist-affiliated organizations working in any defense-related facility). As I have pointed out, those cases draw further support from other cases permitting pure advocacy of even the most unlawful activity—as long as that advocacy is not "directed to inciting or producing imminent lawless action and ... likely to incite or produce such action." *Brandenburg,* 395 U.S., at 447, 89 S.Ct. 1827. The Government's "legitimating" theory would seem to apply to these cases with equal justifying force; and, if recognized, it would have led this Court to conclusions other than those it reached.

Nor can the Government overcome these considerations simply by narrowing the covered activities to those that involve *coordinated,* rather than *independent,* advocacy. Conversations, discussions, or logistical arrangements might well prove necessary to carry out the speech-related activities here at issue (just as conversations and discussions are a necessary part of *membership* in any organization). The Government does not distinguish this kind of "coordination" from any other. I am not aware of any form of words that might be used to describe "coordination" that would not, at a minimum, seriously chill not only the kind of activities the ***52** plaintiffs raise before us, but also the "independent advocacy" the Government purports to permit. And, as for the Government's willingness to distinguish *independent* advocacy from *coordinated* advocacy, the former

is *more* likely, not *less* likely, to confer legitimacy than the latter. Thus, other things being equal, the distinction "coordination" makes is arbitrary in respect to furthering the statute's purposes. And a rule of law that finds the "legitimacy" argument adequate in respect to the latter would have a hard time distinguishing a statute that sought to attack the former.

Consider the majority's development of the Government's themes. First, the majority discusses the plaintiffs' proposal to " 'train members of [the] PKK on how to use humanitarian and international law to **2738 peacefully resolve disputes.' " *Ante,* at 2729 (quoting 552 F.3d, at 921, n. 1). The majority justifies the criminalization of this activity in significant part on the ground that "peaceful negotiation[s]" might just "bu[y] time ..., lulling opponents into complacency." *Ante,* at 2729. And the PKK might use its new information about "the structures of the international legal system ... to threaten, manipulate, and disrupt." *Ibid.*

What is one to say about these arguments—arguments that would deny First Amendment protection to the peaceful teaching of international human rights law on the ground that a little knowledge about "the international legal system" is too dangerous a thing; that an opponent's subsequent willingness to negotiate might be faked, so let's not teach him how to try? What might be said of these claims by those who live, as we do, in a nation committed to the resolution of disputes through "deliberative forces"? *Whitney v. California,* 274 U.S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

In my own view, the majority's arguments stretch the concept of "fungibility" beyond constitutional limits. Neither Congress nor the Government advanced these particular hypothetical *53 claims. I am not aware of any case in this Court—not *Gitlow v. New York,* 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925), not *Schenck v. United States,* 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919), not *Abrams,* 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173, not the later Communist Party cases decided during the heat of the Cold War—in which the Court accepted anything like a claim that speech or teaching might be criminalized lest it, *e.g.,* buy negotiating time for an opponent who would put that time to bad use.

Moreover, the risk that those who are taught will put otherwise innocent speech or knowledge to bad use is omnipresent, at least where that risk rests on little more than (even informed) speculation. Hence to accept this kind of argument without more and to apply it to the teaching of a subject such as international human rights law is to adopt a rule of law that, contrary to the Constitution's text and First Amendment precedent, would automatically forbid the teaching of any subject in a case where national security interests conflict with the First Amendment. The Constitution does not allow all such conflicts to be decided in the Government's favor.

The majority, as I have said, cannot limit the scope of its arguments through its claim that the plaintiffs remain free to engage in the protected activity *as long as it is not "coordinated."* That is because there is no practical way to organize classes for a group (say, wishing to learn about human rights law) without "*coordination*." Nor can the majority limit the scope of its argument by pointing to some special limiting circumstance present here. That is because the only evidence the majority offers to support its general claim consists of a single reference to a book about terrorism, which the Government did not mention, and which apparently says no more than that at one time the PKK suspended its armed struggle and then returned to it.

Second, the majority discusses the plaintiffs' proposal to " 'teach PKK members how to petition various representative bodies such as the United Nations *for relief*.' " *54 *Ante,* at 2729 (quoting 552 F.3d, at 921, n. 1; emphasis added). The majority's only argument with respect to this proposal is that the relief obtained "could readily include monetary aid," which the PKK might use to buy guns. *Ante,* at 2729. The majority misunderstands the word **2739 "relief." In *this* context, as the record makes clear, the word "relief" does not refer to "money." It refers to recognition under the Geneva Conventions. See App. 57–58 (2003 Complaint); *id.,* at 79–80 (1998 Complaint); *id.,* at 113 (Fertig Declaration); see also Tr. of Oral Arg. 63 (plaintiffs' counsel denying that plaintiffs seek to teach about obtaining relief in the form of money).

Throughout, the majority emphasizes that it would defer strongly to Congress' "informed judgment." See, *e.g., ante,* at 2728. But here, there is no evidence that Congress has made such a judgment regarding the specific activities at

issue in these cases. See *infra,* at 2741 – 2742. In any event, "[w]henever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open [for judicial determination] whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature." *Whitney, supra,* at 378–379, 47 S.Ct. 641 (Brandeis, J., concurring). In such circumstances, the "judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 844, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). Hence, a legislative declaration "does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution." Whitney, *supra,* at 378, 47 S.Ct. 641; see also *Landmark, supra,* at 843, 98 S.Ct. 1535 ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake").

***55** I concede that the Government's expertise in foreign affairs may warrant deference in respect to many matters, *e.g.,* our relations with Turkey. Cf. *ante,* at 2726 – 2727. But it remains for this Court to decide whether the Government has shown that such an interest justifies criminalizing speech activity otherwise protected by the First Amendment. And the fact that other nations may like us less for granting that protection cannot in and of itself carry the day.

Finally, I would reemphasize that neither the Government nor the majority points to any specific facts that show that the speech-related activities before us are fungible in some *special way* or confer some *special* legitimacy upon the PKK. Rather, their arguments in this respect are general and speculative. Those arguments would apply to virtually all speech-related support for a dual-purpose group's peaceful activities (irrespective of whether the speech-related activity is coordinated). Both First Amendment logic and First Amendment case law prevent us from "sacrific[ing] First Amendment protections for so speculative a gain." *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 127, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973); see also *Consolidated Edison Co.,* 447 U.S., at 543, 100 S.Ct. 2326 (rejecting proffered state interest not supported in record because "[m]ere speculation of harm does not constitute a compelling state interest").

II

For the reasons I have set forth, I believe application of the statute as the Government interprets it would gravely and without adequate justification injure interests of the kind the First Amendment protects. Thus, there is "a serious doubt" as to the statute's constitutionality. *Crowell,* 285 U.S., at 62, 52 S.Ct. 285. And ****2740** where that is so, we must "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ibid.;* see also *Ashwander,* 297 U.S., at 346–348, 56 S.Ct. 466 (Brandeis, J., concurring); *Zadvydas v. Davis,* 533 U.S. 678, 689, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001); *United States* ***56** *v. X–Citement Video, Inc.,* 513 U.S. 64, 78, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994); *United States v. Jin Fuey Moy,* 241 U.S. 394, 401, 36 S.Ct. 658, 60 L.Ed. 1061 (1916).

I believe that a construction that would avoid the constitutional problem is "fairly possible." In particular, I would read the statute as criminalizing First Amendment protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions. Under this reading, the Government would have to show, at a minimum, that such defendants provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims.

A person acts with the requisite knowledge if he is aware of (or willfully blinds himself to) a significant likelihood that his or her conduct will materially support the organization's terrorist ends. See *Allen v. United States,* 164 U.S. 492, 496, 17 S.Ct. 154, 41 L.Ed. 528 (1896); cf. ALI, Model Penal Code § 2.02(2)(b)(ii) (1962). See also *United States v. Santos,* 553 U.S. 507, 521, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008) (plurality opinion); cf. Model Penal Code § 2.02(7)

(willful blindness); S.Rep. No. 95–605S.Rep. No. 95–605, pt. 1, pp. 59–60 (1977). A person also acts with the requisite intent if it is his "conscious objective" (or purpose) to further those same terrorist ends. See *United States v. Bailey,* 444 U.S. 394, 408, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980); Model Penal Code §§ 2.02(2)(a) and 2.02(5) ("When acting knowingly suffices to establish an element, such element also is established if a person acts purposely"). On the other hand, for the reasons I have set out, see *supra,* at 2735 – 2737, knowledge or intent that this assistance (aimed at lawful activities) could or would help further terrorism simply by helping to legitimate the organization is not sufficient.

This reading of the statute protects those who engage in pure speech and association ordinarily protected by the First Amendment. But it does not protect that activity where a defendant purposefully intends it to help terrorism or where a defendant knows (or willfully blinds himself to the fact) that the activity is significantly likely to assist terrorism. ***57** Where the activity fits into these categories of purposefully or knowingly supporting terrorist ends, the act of providing material support to a known terrorist organization bears a close enough relation to terrorist acts that, in my view, it likely can be prohibited notwithstanding any First Amendment interest. Cf. *Brandenburg,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430. At the same time, this reading does not require the Government to undertake the difficult task of proving which, as between peaceful and nonpeaceful purposes, a defendant specifically preferred; knowledge is enough. See *Bailey, supra,* at 405, 100 S.Ct. 624 (defining specific intent).

This reading is consistent with the statute's text. The statute prohibits "*knowingly* provid[ing] *material* support or resources to a foreign terrorist organization." § 2339B(a)(1) (emphasis added). Normally we read a criminal statute as applying a *mens rea* requirement to all of the subsequently listed elements of the crime. See *Flores–Figueroa v. United States,* 556 U.S. 646, 652, 129 S.Ct. 1886, 1891–1892, 173 L.Ed.2d 853 (2009). So read, the defendant would have to know or intend (1) that he is *providing* support ****2741** or resources, (2) that he is providing that support *to a foreign terrorist organization,* and (3) that he is providing support that is *material,* meaning (4) that his support bears a significant likelihood of furthering the organization's terrorist ends.

This fourth requirement flows directly from the statute's use of the word "material." That word can mean being of a physical or worldly nature, but it also can mean "being of real importance or great consequence." Webster's Third New International Dictionary 1392 (1961). Here, it must mean the latter, for otherwise the statute, applying only to physical aid, would not apply to speech at all. See also § 2339A(b)(1) (defining " 'material support or resources' " as "any property, *tangible or intangible* " (emphasis added)). And if the statute applies only to support that would likely be of real importance or great consequence, it must have importance or consequence in respect to the organization's ***58** terrorist activities. That is because support that is not significantly likely to help terrorist activities, for purposes of this statute, neither has "importance" nor is of "great consequence."

The statutory definition of "material support" poses no problem. The statute defines "material support" through reference to a list of terms, including those at issue here —"training," "expert advice or assistance," "personnel," and "service." § 2339B(g)(4); § 2339A(b)(1). Since these latter terms all fall under the definition of the term "*material* support," these activities fall within the statute's scope only when they too are "material." Cf. *Stevens,* 559 U.S., at 474, 130 S.Ct., at 1591 (definitional phrase may take meaning from the term to be defined (citing *Leocal v. Ashcroft,* 543 U.S. 1, 11, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004))).

Thus, textually speaking, a statutory 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.

I need not decide whether this is the only possible reading of the statute in cases where "material support" takes the form of "currency," "property," "monetary instruments," "financial securities," "financial services," "lodging," "safehouses," "false documentation or identification," "weapons," "lethal substances," or "explosives," and the like. § 2339A(b)(1). Those kinds of aid are inherently more likely to help an organization's terrorist activities, either directly or because they are fungible in nature. Thus, to show that an individual has provided support of those kinds

will normally prove sufficient for conviction (assuming the statute's other requirements are met). But where support consists of pure speech or association, I would indulge in no such presumption. Rather, the Government would have to prove that the defendant knew he was providing support significantly likely to help the organization pursue its unlawful terrorist ***59** aims (or, alternatively, that the defendant intended the support to be so used).

The statute's history strongly supports this reading. That history makes clear that Congress primarily sought to end assistance that takes the form of fungible donations of money or goods. See, *e.g.,* H.R.Rep. No. 104–383, at 38, 43–45, 81; *supra,* at 2735 – 2736. It shows that Congress, when referring to "expert services and assistance," for example, had in mind training that was sufficiently fungible to further terrorism directly, such as an aviation expert's giving "advice" that "facilitate[s] ****2742** an aircraft hijacking" or an accountant's giving "advice" that will "facilitate the concealment of funds used to support terrorist activities." Hearing on Administration's Draft Anti–Terrorism Act of 2001 before the House Committee on the Judiciary, 107th Cong., 1st Sess., 61 (2001).

And the Chairman of the Senate Committee on the Judiciary, when reporting the relevant bill from Committee, told the Senate:

> "This bill also includes provisions making it a crime to knowingly provide material support *to the terrorist functions of*foreign groups designated by a Presidential finding to be engaged in terrorist activities." 142 Cong. Rec. S3354 (Apr. 16, 1996) (statement of Sen. Hatch) (emphasis added).

He then added:

> "I am convinced we have crafted a narrow but effective designation provision which meets these obligations *while safeguarding the freedom to associate,* which none of us would willingly give up." *Id.,* at S3360 (emphasis added).

Consistent with this view, the statute itself says:

> "Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under ***60** the First Amendment to the Constitution of the United States." § 2339B(i).

In any event, the principle of constitutional avoidance demands this interpretation. As Part II makes clear, there is a "serious" doubt—indeed, a "grave" doubt—about the constitutionality of the statute insofar as it is read to criminalize the activities before us. *Crowell,* 285 U.S., at 62, 52 S.Ct. 285; see also *Ashwander,* 297 U.S., at 346–348, 56 S.Ct. 466 (Brandeis, J., concurring); *Jin Fuey Moy,* 241 U.S., at 401, 36 S.Ct. 658. We therefore must "read the statute to eliminate" that constitutional "doub[t] so long as such a reading is not plainly contrary to the intent of Congress." *X–Citement Video, Inc.,* 513 U.S., at 78, 115 S.Ct. 464.

For this reason, the majority's statutory claim that Congress did not use the word "knowingly" as I would use it, *ante,* at 2718, and n. 3, is beside the point. Our consequent reading is consistent with the statute's text; it is consistent with Congress' basic intent; it interprets but does not significantly add to what the statute otherwise contains. Cf., *e.g., United States v. Thirty-Seven Photographs,* 402 U.S. 363, 373–374, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971) (constitutionally compelled to add requirement that "forfeiture proceedings be commenced within 14 days and completed within 60 days" despite absence of any statutory time limits); *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 507, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979) (constitutionally compelled to interpret "employer" as implicitly excluding "church-operated schools" despite silence and eight other different but explicit exceptions). We should adopt it.

III

Having interpreted the statute to impose the *mens rea* requirement just described, I would remand the cases so that the lower courts could consider more specifically the precise activities in which the plaintiffs still wish to engage and determine whether and to what extent a grant of declaratory and injunctive relief were warranted. I do not see why the majority does not also remand the cases for consideration ***61** of the plaintiffs' activities relating to "advocating" for the organizations' peaceful causes. See *ante,* at 2722 – 2723, 2729 – 2730.

The majority does not remand, apparently because it believes the plaintiffs lose automatically in that these "advocacy" **2743 claims are too general. It adds that the plaintiffs did not "suggest what exactly their 'advocacy' would consist of." *Ante,* at 2729. But the majority is wrong about the lack of specificity. The record contains complaints and affidavits, which describe in detail the forms of advocacy these groups have previously engaged in and in which they would like to continue to engage. See App. 56–63, 78–87, 95–99, 110–123.

Moreover, the majority properly rejects the Government's argument that the plaintiffs' speech-related activities amount to "conduct" and should be reviewed as such. Government Brief 44–57. Hence, I should think the majority would wish the lower courts to reconsider this aspect of the cases, applying a proper standard of review. See, *e.g.,* *Philip Morris USA v. Williams,* 549 U.S. 346, 357–358, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007); *Johnson v. California*, 543 U.S. 499, 515, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005); cf. *Ricci v. DeStefano,* 557 U.S. 557, 631, 129 S.Ct. 2658, 2702, 174 L.Ed.2d 490 (2009) (GINSBURG, J., dissenting) ("When this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance").

IV

In sum, these cases require us to consider how to apply the First Amendment where national security interests are at stake. When deciding such cases, courts are aware and must respect the fact that the Constitution entrusts to the Executive and Legislative Branches the power to provide for the national defense, and that it grants particular authority to the President in matters of foreign affairs. Nonetheless, this Court has also made clear that authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals. Cf. *62 *Hamdi v. Rumsfeld,* 542 U.S. 507, 536, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) ("We have long since made clear that a state of war is not a blank check ... when it comes to the rights of th[is] Nation's citizens"). In these cases, for the reasons I have stated, I believe the Court has failed to examine the Government's justifications with sufficient care. It has failed to insist upon specific evidence, rather than general assertion. It has failed to require tailoring of means to fit compelling ends. And ultimately it deprives the individuals before us of the protection that the First Amendment demands.

That is why, with respect, I dissent.

All Citations

561 U.S. 1, 130 S.Ct. 2705, 177 L.Ed.2d 355, 78 USLW 4625, 10 Cal. Daily Op. Serv. 7742, 2010 Daily Journal D.A.R. 9347, 22 Fla. L. Weekly Fed. S 535, 49 A.L.R. Fed. 2d 567

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 In full, 18 U.S.C. § 2339B(a)(1) provides: "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 15 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 ..., that the organization has engaged or engages in terrorist activity ..., or that the organization has engaged or engages in terrorism...." The terms "terrorist activity" and "terrorism" are defined in 8 U.S.C. § 1182(a)(3)(B)(iii) and 22 U.S.C. § 2656f(d)(2), respectively.

2 At the time plaintiffs first filed suit, 18 U.S.C. § 2339B(a) (2000 ed.) provided: "Whoever, within the United States or subject to the jurisdiction of the United States, 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 10 years, or both." See *Humanitarian Law Project v. Reno,* 9 F.Supp.2d 1205, 1207 (C.D.Cal.1998). And 18 U.S.C. § 2339A(b) (2000 ed.) defined "material support or resources" to mean "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials."

3 The dissent would interpret the statute along the same lines as the plaintiffs, to prohibit speech and association "only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions." *Post,* at 2740 (opinion of BREYER, J.). According to the dissent, this interpretation is "fairly possible" and adopting it would avoid constitutional concerns. *Ibid.* (internal quotation marks omitted). The dissent's interpretation of § 2339B fails for essentially the same reasons as plaintiffs'. Congress explained what "knowingly" means in § 2339B, and it did not choose the dissent's interpretation of that term. In fact, the dissent proposes a mental-state requirement indistinguishable from the one Congress adopted in §§ 2339A and 2339C, even though Congress used markedly different language in § 2339B.

4 The dissent also analyzes the statute as if it prohibited "[p]eaceful political advocacy" or "pure speech and association," without more. *Post,* at 2735, 2740. Section 2339B does not do that, and we do not address the constitutionality of any such prohibitions. The dissent's claim that our decision is inconsistent with this Court's cases analyzing those sorts of restrictions, *post,* at 2736 – 2737, is accordingly unfounded.

5 The Government suggests in passing that, to the extent plaintiffs' activities constitute speech, that speech is wholly unprotected by the First Amendment. The Government briefly analogizes speech coordinated with foreign terrorist organizations to speech effecting a crime, like the words that constitute a conspiracy. Brief for Government 46; Reply Brief for Government 31–32, and n. 8. See, *e.g., Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 498, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949). We do not consider any such argument because the Government does not develop it: The Government's submission is that applying § 2339B to plaintiffs triggers intermediate First Amendment scrutiny—not that it triggers no First Amendment scrutiny at all.

6 The dissent also contends that the particular sort of material support plaintiffs seek to provide cannot be diverted to terrorist activities, in the same direct way as funds or goods. *Post,* at 2735 – 2736. This contention misses the point. Both common sense and the evidence submitted by the Government make clear that material support of a terrorist group's lawful activities facilitates the group's ability to attract "funds," "financing," and "goods" that will further its terrorist acts. See McKune Affidavit, App. 134–136.