

No. 09-10560

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee*

v.

MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; SHUKRI ABU BAKER; MUFID  
ABDULQADER; ABDULRAHMAN ODEH; HOLY LAND FOUNDATION FOR RELIEF  
AND DEVELOPMENT, also known as HLF,

*Defendants-Appellants*

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On Appeal From the United States District Court  
For the Northern District of Texas  
Case No. 3:04-CR-240-4 (Jorge Solis, J.)

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AMICUS BRIEF OF CHARITIES, FOUNDATIONS, CONFLICT-  
RESOLUTION GROUPS, AND CONSTITUTIONAL RIGHTS  
ORGANIZATIONS IN SUPPORT OF DEFENDANTS AND URGING  
REVERSAL OF CONVICTIONS OF COUNTS 2-10

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**UNITED STATES OF AMERICA,**

*Plaintiff-Appellee,*

**v.**

**MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; SHUKRI ABU BAKER;  
MUFID ABDULQADER; ABDULRAHMAN ODEH,**

*Defendants-Appellants*

**CONSOLIDATED WITH No. 08-10774**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**UNITED STATES OF AMERICA,**

*Plaintiff-Appellee,*

**v.**

**MOHAMMAD EL-MEZAIN**

*Defendant-Appellant.*

**CONSOLIDATED WITH No. 10-10590**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**UNITED STATES OF AMERICA,**

*Plaintiff-Appellee-Cross-Appellant,*

**v.**

**MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; SHUKRI ABU BAKER;  
MUFID ABDULQADER; ABDULRAHMAN ODEH,**

*Defendants-Appellant- Cross-Appellee.*

**CONSOLIDATED WITH No. 10-10586**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**UNITED STATES OF AMERICA,**

*Plaintiff-Appellee,*

**v.**

**SHUKRI ABU BAKER, Defendant, NANCY HOLLANDER,**

*Appellant.*

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Amici certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

**The Amici**, who do not have a financial interest in the outcome of this case, but are nonetheless interested in the outcome of the legal issue they address, are:

American Friends Service Committee

Atlantic Philanthropies

The Carter Center

Christian Peacemaker Teams

The Constitution Project

The Nathan Cummings Foundation

The Fund For Constitutional Government

Global Greengrants Fund

Grantmakers Without Borders

Grassroots International

The Humanitarian Law Project

Islamic Relief USA

Milt Laumentin

Operation USA

The Peace Appeal Foundation

The Rockefeller Brother Fund

The Samuel Rubin Foundation

Rutherford Institute

Tikva Grassroots Empowerment Fund

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**TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS ..... i

TABLE OF CONTENTS ..... iv

TABLE OF AUTHORITIES ..... vi

INTRODUCTION ..... 1

INTEREST OF AMICI ..... 3

STATEMENT OF FACTS ..... 6

SUMMARY OF ARGUMENT ..... 12

ARGUMENT ..... 15

I. THE DISTRICT COURT’S JURY CHARGE VIOLATES THE FIFTH  
AMENDMENT’S DUE PROCESS CLAUSE ..... 15

A. The District Court’s Construction Denies Individuals Fair Notice Of  
What Is Prohibited ..... 15

B. The District Court’s Construction Fails To Require Proof Of  
Individual Culpability ..... 19

II. THE DISTRICT COURT’S CHARGE IS CONTRARY TO THE  
TERMS OF THE MATERIAL-SUPPORT STATUTE ..... 21

A. The Statute’s Plain Meaning Requires That A Donor Know That His  
Support Was Provided To A Designated “Foreign Terrorist  
Organization.” ..... 21

B. The Canon of “Constitutional Avoidance” Supports Interpreting the Material-Support Statute to Require Proof that Defendants Knew Their Support Was Provided To A Designated Terrorist Organization .....	22
C. The Rule Of Lenity Supports Interpreting the Statute To Require Proof Of Knowledge that Aid is Being Provided To A Designated Terrorist Organization .....	23
III. INTERPRETING THAT STATUTE TO REQUIRE PROOF OF KNOWLEDGE THAT THE RECIPIENT IS A DESIGNATED TERRORIST ORGANIZATION WILL NOT UNDERMINE NATIONAL SECURITY .....	25
CONCLUSION .....	26
CERTIFICATE OF SERVICE .....	27
CERTIFICATE OF COMPLIANCE .....	28
ADDENDUM - DETAILED DESCRIPTION OF AMICI .....	29



## INDEX OF AUTHORITIES

### CASES

<i>32 County Sovereignty Comm. v. Dep't of State</i> , 292 F.3d 797 (D.C. Cir. 2002) . . .	8
<i>Buckley v. Valeo</i> , 424 U.S. 1, 77 (1976) . . . . .	16, 18
<i>Edward J. DeBartolo Corp v. Florida Gulf Coast Bldg. &amp; Constr. Trades Council</i> , 485 U.S. 565, 575 (1988) . . . . .	23
<i>Ferguson v. Estelle</i> , 718 F.2d 730, 735-36 (5 <sup>th</sup> Cir. 1983) . . . . .	19
<i>Grayned v. City of Rockford</i> , 408 U.S. 104, 109 (1972) . . . . .	18
<i>Holder v. Humanitarian Law Project</i> , 130 S.Ct. 2705 (2010) . . . . .	6, 18
<i>Humanitarian Law Project v. United States Dep't of Justice</i> , 352 F.3d 382, 396-97 (9 <sup>th</sup> Cir. 2003), vacated 393 F. 3d 902(9th Cir. 2004) . . . . .	21
<i>International Union v. Bagwell</i> , 512 U.S. 821, 836 (1994) . . . . .	16
<i>Kunz v. New York</i> , 340 U.S. 290 (1951) . . . . .	18
<i>McNally v. United States</i> , 483 U.S. 350 (1987) . . . . .	24
<i>Papachristou v. City of Jacksonville</i> , 405 U.S. 156 (1972) . . . . .	16
<i>People's Mojahedin Org. of Iran v. United States Dep't of State</i> , 182 F.3d 17, 23-24 (D.C. Cir. 1999) . . . . .	25
<i>Public Citizen v. United States Dep't of Justice</i> , 491 U.S. 440, 446 (1989) . . . .	23
<i>Scales v. United States</i> , 367 U.S. 203, 224-25 (1961) . . . . .	19, 23
<i>Smith v. Goguen</i> , 415 U.S. 566, 573 (1973) . . . . .	18

*United States v. Harriss*, 347 U.S. 612, 617 (1954) ..... 16

**CONSTITUTIONAL PROVISIONS**

First Amendment ..... 18

Fifth Amendment ..... 15, 19, 20

**STATUTES**

8 U.S.C. §§ 1182(a)(3)(B)(iii)(V)(b), (VI) ..... 25

8 U.S.C. §1189(a), (d)(2) ..... 7

18 U.S.C. §2339A(b)(1) ..... 6

18 U.S.C. §2339B ..... 1, 2, 6, 9

18 U.S.C. § 2339B(a)(1) ..... 6, 7, 13, 21, 22

**OTHER AUTHORITIES**

U.S. Dep’t of Treasury, Alphabetical Listing of Specially Designated  
Nationals and Blocked Persons, [http://www.ustreas.gov/  
offices/enforcement/ofac/sdn/sdnlist.txt](http://www.ustreas.gov/offices/enforcement/ofac/sdn/sdnlist.txt) ..... 8

E.O. 13,224, §1(c) ..... 14, 25

## INTRODUCTION

This appeal stems from a criminal trial against the Holy Land Foundation (HLF)—the largest Muslim charity in the United States until the Treasury Department shut it down in 2001—and several members of its board. This amicus brief, filed on behalf of a diverse group of U.S. charities, foundations, peace groups, and civil liberties organizations, addresses only one issue: whether, under 18 U.S.C. § 2339B, a person can be convicted for violating a prohibition on “knowingly” providing “material support” to designated “foreign terrorist organizations” without proof that he or she knowingly provided aid to any designated group.

Amici take no position on other issues in the case, but support the defendants’ appeals from their convictions on Counts 2 through 10 on the ground that the district judge’s jury instructions on those counts relied upon an erroneous and dangerously expansive interpretation of the material-support statute. That interpretation, if upheld on appeal, would jeopardize the legitimate charitable work of countless foundations and charities throughout the United States. It would mean that a charity or foundation could be prosecuted under the material-support statute even if it exercised rigorous due diligence that ensured that it did not support any entity on the government’s list of designated organizations. Under the district court’s jury charge, a United States based foundation can be convicted for providing support to a group that has never

been designated even if the foundation did not know and had no reason to know that the non-designated group was in any way related to a designated terrorist organization. That instruction was contrary to the instructions proposed by both the prosecution and the defense, and is directly contrary to the terms of the statute.

The purpose of the material-support statute is to prohibit aid to groups that the government has officially designated as “foreign terrorist organizations,” and the law expressly requires both that the recipient in fact be designated, *and* that defendants know that the recipient has been designated or has engaged in terrorist acts that would render it subject to designation. 18 U.S.C. § 2339B. Here, the recipients of defendants’ aid—five local charities in the West Bank—were *not* designated, yet the district court instructed the jury that it could render a verdict of guilty without any proof that defendants knew that those recipients were in any way connected to a designated foreign terrorist organization. That interpretation, which the government itself did not even advance, would expand the material-support statute’s reach exponentially, and leave all organizations engaged in humanitarian assistance in danger of prosecution. The chilling effect on wholly legitimate charitable work would be substantial, because no charity or foundation could be certain that it would not face criminal investigation or prosecution.

Amici maintain that the judge's jury charge violates fundamental due process principles requiring fair notice of what conduct is prohibited, as well as proof of individual culpability. Moreover, the jury charge conflicts with the plain meaning of the statute, whose terms require proof that defendants knew that they were supporting a designated organization.

### **INTEREST OF AMICI**

Amici are charities and foundations that provide charitable aid around the world, peace groups that work in many conflict-ridden regions, and constitutional rights organizations committed to safeguarding the rights of individuals and entities to engage in this work.<sup>1</sup> The charities and foundations include the Council on Foundations, a membership association of more than 1750 foundations; Grantmakers Without Borders, whose members include some 160 international grantmakers; and several individual foundations and charities, including Rockefeller Brothers Fund, Operation USA, Global Greengrants Fund, the Nathan Cummings Foundation, Atlantic Philanthropies, and the Samuel Rubin Foundation. Among other forms of charitable support, they provide humanitarian aid in response to natural disasters, such as earthquakes and floods; man-made crises, such as war; and long-term

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<sup>1</sup> Detailed descriptions of the amici are included in an Addendum to this brief. The United States and all six defendants/appellants have consented to the filing of this amicus brief.

problems of poverty, hunger, and disease. In addition, they support projects to further environmental sustainability, economic development, and human rights.

The peace groups include the Carter Center, founded by former President Jimmy Carter; Christian Peacemaker Teams, formed to answer a Christian call to further peace; the American Friends Service Committee, a Quaker organization active in peacemaking and humanitarian assistance; the Humanitarian Law Project; and Peace Appeal Foundation. They work to foster peace and reduce conflict around the world, often in areas in which designated organizations exist, such as the Middle East and Asia. The constitutional rights groups, which include the Constitution Project and the Rutherford Institute, promote policy reforms and conduct advocacy to protect constitutional rights and ensure that foundations and conflict-resolution groups are able to provide such humanitarian assistance.

Amici are committed to providing support only to lawful, peaceful, nonviolent activities. They are concerned that if the convictions on Counts 2 through 10 are upheld, charities and foundations engaged in wholly legitimate and socially valuable work will be in danger of prosecution even if, before providing aid to a recipient, they ensure that the group is reputable and responsible, engages exclusively in lawful, nonviolent activity, and is not designated. As a result, a broad range of vital and essential humanitarian and charitable work will be chilled.

The district courts' expansive theory of liability renders precarious virtually any provision of charitable assistance to any region where "foreign terrorist organizations" operate. The State Department has designated terrorist organizations in many of the neediest parts of the world, including Africa, the Middle East, and Asia. Under the theory advanced in the jury instructions, a charity that provides food to flood-ravaged Pakistan today, where tens of millions of people have been left injured or homeless, could be held criminally liable even if it diligently avoids providing support to any designated organizations—if the government asserts, after the fact, that a non-designated recipient organization was, unbeknownst to the donor, controlled by a designated organization. Similarly, even if conflict-resolutions groups resolutely avoid working with designated organizations, they may nonetheless find themselves exposed to criminal prosecution if a prosecutor concludes, after the fact, that a non-designated entity was controlled by a designated organization, even if there is no evidence that the peace group was aware of that fact. Amici submit this brief because this theory would chill a vast amount of lawful and much needed humanitarian aid, thereby increasing human suffering around the world without furthering any legitimate security interest of the United States.

## STATEMENT OF FACTS

Amici address only one issue: whether the district court erred in instructing the jury that it could convict defendants for providing “material support” to non-designated groups, without any showing that they knew that doing so would support a designated group. Accordingly, this statement of facts focuses only on the facts relevant to that issue.

The statute at issue, 18 U.S.C. § 2339B, makes it a crime to “knowingly” provide “material support” to a designated “foreign terrorist organization.” The material-support statute criminalizes a wide range of “support,” including pure speech such as “expert advice” or “training.” 18 U.S.C. § 2339B(g)(4); 18 U.S.C. § 2339A(b)(1). The Supreme Court recently held that the statute criminalizes even those who seek only to advise a foreign designated group on how to pursue lawful, peaceable activities, such as nonviolent conflict resolution and human rights. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

The law makes such support a crime, however, only when “knowingly” provided to a designated “foreign terrorist organization.” 18 U.S.C. § 2339B(a)(1). In 2003, the U.S. Court of Appeals for the Ninth Circuit held that in order to avoid “serious due process concerns,” the provision must be interpreted to require proof that the donor knew that his recipient was a designated group or had engaged in terrorist



activity that would subject it to designation. *Humanitarian Law Project v. United States Dep't of Justice*, 352 F.3d 382, 396-97 (9th Cir. 2003).

In 2004, Congress ratified that interpretation, and amended the material-support statute to adopt such a requirement expressly. Thus, the statute now provides:

To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

18 U.S.C. § 2339B(a)(1). In light of that amendment, an en banc panel subsequently vacated the prior panel decision. *Humanitarian Law Project v. United States Dep't of Justice*, 393 F.3d 902 (9th Cir. 2004).

Thus, the statute bars material support only if it is (1) provided to an organization that has been designated as a “foreign terrorist organization”; and (2) the donor knows that the recipient is a designated organization or engages in terrorist activity. The Secretary of State may designate any foreign organization that engages in terrorist activity whose activities she deems contrary to our “national defense, foreign relations, or economic interests.” 8 U.S.C. § 1189(a), (d)(2). The Secretary may and often does designate multiple organizations that she perceives are affiliates,

subsidiaries, branches, or a.k.a.'s of a terrorist organization. Thus, when the Secretary designated the Real IRA, she also designated the 32 County Sovereignty Movement and the Irish Republican Prisoner Welfare Association, political organizations that were alleged to be controlled by the Real IRA. *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797 (D.C. Cir. 2002). Similarly, Hamas' designation lists 12 "a.k.a.'s," including Students of Ayyash, Students of the Engineer, and Yahya Ayyash Units. See U.S. Dep't of Treasury, *Alphabetical Listing of Specially Designated Nationals and Blocked Persons*.<sup>2</sup>

Counts 2 through 10 in this case charged that HLF and its board members provided material support to Hamas by wiring funds, not to Hamas itself, but to several local "zakat committees" in the West Bank and Gaza. None of these local zakat committees was (or is today) designated as a "foreign terrorist organization," either as an affiliate of Hamas or otherwise. "Zakat committees" are locally-based charities that provide aid to the needy. "Zakat" is an Arabic term describing the religious obligation to provide charity to the poor. Zakat committees exist in most towns in the West Bank and Gaza. HLF provided aid to the needy in the West Bank and Gaza through many different zakat committees, and the prosecution did not question HLF's provision of aid to most of these committees. It focused on HLF's

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<sup>2</sup> <http://www.ustreas.gov/offices/enforcement/ofac/sdn/sdnlist.txt>

aid to five such committees—in Ramallah, Jenin, Nablus, Hebron, and Qalqilia. There was no dispute that all the zakat committees that HLF supported, including these five, engaged in lawful charitable work for those in need, and there was no allegation that any of the five committees had ever engaged in any terrorist activity.

Each of counts 2 through 10 referred to a wire transfer (ranging from approximately \$7,000 to \$25,000) to one of the five local zakat committees between 1998 and 2001. Count 2, for example, was based on a transfer of \$11,962 in 1998 to the Ramallah Zakat Committee. Count 10 was predicated on a transfer of \$16,674 to the Nablus Zakat Committee in early 2001. There was no dispute that the wire transfers had been made. The question was whether they violated 18 U.S.C. § 2339B as “material support” to a designated terrorist organization, namely, Hamas.

The district court’s charge to the jury with respect to these counts was as follows:

To find a defendant guilty of the crimes charged in Counts 2 through 10, you must find that the government has proven each of the following elements beyond a reasonable doubt:

First: that the defendant under consideration knowingly provided, or attempted to provide, the material support alleged in the count under consideration to the entity listed in that count;

Second: that the entity listed in the count under consideration was controlled by Hamas or that the defendant under consideration was attempting to provide support to Hamas by providing or attempting to

provide the support to the entity listed in the count under consideration;

Third: that the defendant under consideration either knew that Hamas was designated as a foreign terrorist organization, or he knew that Hamas has engaged in, or engages in, terrorist activity; and

Fourth: that the court has jurisdiction over the crime charged in the count under consideration.

Jury Charge, at 27-31.

Under these instructions, the jury could reach a verdict of guilty by finding that a defendant knowingly provided support to a local zakat committee, even though the zakat committee was not itself a designated “foreign terrorist organization.” The jury would have to find that the zakat committee was “controlled by Hamas,” but *not* that the defendant knew that fact, or even should have known that fact. Nor would the jury have to find that the defendants intended to provide support to Hamas.

Significantly, the trial court’s theory of liability was more expansive than that advanced by either the prosecution or the defense. The prosecution’s proposed jury instructions for Counts 2 through 10 were as follows:

To find the HLF, Shukri Abu Baker and Ghassan Elashi guilty of the crimes charged in Counts 2 through 10, you must find that the government has proven each of the following elements beyond a reasonable doubt:

First: that the defendant under consideration *knowingly provided, or attempted to provide, the material support alleged in the count under consideration to Hamas through the entity listed in that count*;

Second: that the defendant under consideration either knew that Hamas was designated as a foreign terrorist organization, or he knew that Hamas has engaged in, or engages in, terrorist activity; and

Third: that the court has jurisdiction over the crime charged in the count under consideration.

You must decide whether the government has proven all of these elements for each of the nine counts listed in this section.....

Government's Proposed Instructions To the Jury, Doc. 1158, p.26 (emphasis added).

As the italicized language demonstrates, the government's proposed instructions expressly required the jury to find that defendants "knowingly provided, or attempted to provide [material support] *to Hamas through the entity listed in that count.*" The district court omitted that requirement.

Defendants similarly would have required a showing of intentional and knowing support of Hamas. Defense's Proposed Jury Instructions, at 49-50 (proposing that the judge require the jury to find that defendants specifically intended to fund Hamas or an organization under its control in order to further Hamas's illegal activities); *see also* Charge Conference, at 76 (objecting to jury instructions for Counts 2-10 on ground that they do not require the jury to find that defendants specifically intended to support Hamas in its illegal activities).

The district court’s jury charge thus inexplicably parted company with both the prosecution and the defense by failing to include *any* requirement that the jury find that defendants “knowingly” sought to support Hamas through the listed charity committees. The jury found defendants Baker, Elashi, and HLF guilty on Counts 2 through 10.

### SUMMARY OF ARGUMENT

Providing humanitarian aid and supporting human rights, environmental sustainability, and peace around the world often involves working in regions riddled by conflict. In many such areas, the United States has designated certain groups as “foreign terrorist organizations,” thereby making it a crime to provide “material support” to those groups. Amici seek to abide by the laws prohibiting such material support, but also seek to work with and provide assistance to non-designated groups that promote human rights and development, fight poverty, support the environment, and reduce conflict and violence.

The district court’s jury charge, by omitting what both parties agreed was essential—a showing that defendants supported the local zakat committees *knowing* that they would thereby provide support to Hamas, a designated terrorist organization—turned an already expansive statute into a trap that can catch donors unawares, exposing them to criminal prosecution even where they have been effective

in ensuring that none of their aid went to a designated organization. If upheld, it would interfere with and deter fully legitimate, nonviolent, humanitarian assistance in many parts of the world.

The district court's approach violates fundamental principles of due process. Criminal statutes must provide fair notice of what they prohibit, yet under the district court's charge, support to any organization in the world can render the donor guilty, even if the recipient has never been designated, if a jury later finds that, unbeknownst to the donor, the recipient was "controlled by" a designated group. Imposing liability on assistance to a group that has never been designated, without any proof that the individual provided the aid in order to support a designated terrorist organization, also contravenes the due process principle of individual culpability recognized by the Supreme Court and this Court.

In addition, the district court's approach is contrary to the terms of the material-support statute itself. The law expressly provides that to violate its prohibition, an individual must (1) support a designated "foreign terrorist organization," and (2) do so knowing that the group was designated or engaged in "terrorist activity." 18 U.S.C. § 2339B(a)(1). Congress's knowledge requirement is supported by the canon of constitutional avoidance, because construing the statute as the district court did raises serious due process concerns, as well as by the rule of lenity, which requires

any ambiguity to be interpreted in favor of the defendant. Yet the district court permitted conviction for support of *non-designated* groups, without any proof that the donor knew that by supporting those groups it was supporting a designated terrorist organization.

The approach to the statute advocated by amici would not hamper the government's efforts to staunch support to designated terrorist organizations. The government has the authority to, and frequently does, designate multiple organizations as a.k.a.'s for a designated group, and to designate organizations that are "controlled by" other designated groups. E.O. 13,224, §1(c) (2001) (permitting designation of any entity "controlled by" a designated group or individual). Thus, the government could have, but chose not to, designate the local charity committees at issue here if it deemed them to be parts of or controlled by Hamas. Had it done so, defendants would have been on notice that aid to these groups was forbidden. As it was, defendants had no reason to know that these groups were off-limits. The government can also prosecute individuals who use non-designated groups as intermediaries in order to knowingly support designated groups. It is no defense to a prohibition on providing material support to Hamas to say, "I only supported group A," *if* the government shows that the defendant supported group A knowing that his support would be passed on to Hamas. But the district court required no such



showing here, and that failure contravenes both the Constitution and the material-support statute itself.

## ARGUMENT

### I. THE DISTRICT COURT'S JURY CHARGE VIOLATES THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE

The district court's jury charge violates due process for two reasons: (1) it fails to provide fair notice of prohibited conduct; and (2) it imposes guilt without proof of individual culpability. If this charge is upheld, it would unconstitutionally chill the wholly lawful activities of charities, foundations, and peace, human rights, and development groups across the nation. Exercising due diligence and avoiding knowing support of designated "foreign terrorist organizations" would provide no assurance against prosecution. Donors would remain vulnerable to criminal investigation and prosecution if the government asserted, after the fact, that unbeknownst to them, one of the recipients of their aid was controlled by a designated terrorist organization.

#### A. The District Court's Construction Denies Individuals Fair Notice of What Is Prohibited.

Under the district court's theory, one can be convicted for providing humanitarian aid to a charity *without any evidence that one knew the charity was linked to a designated organization*. This makes the potential ambit of the statute

virtually limitless, and would make any donation to an overseas entity a potential crime, even where the donor engages in due diligence, ensures that its recipient is not a designated organization, provides aid only for lawful, nonviolent purposes, and has no knowledge that the recipient is linked to a designated group.

Perhaps the most fundamental principle governing criminal statutes is that they must provide fair notice of the conduct they prohibit. The Supreme Court has explained that:

Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for ‘no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.’

*Buckley v. Valeo*, 424 U.S. 1, 77 (1976) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)); *see also Int'l Union v. Bagwell*, 512 U.S. 821, 836 (1994) (“Due process traditionally requires that criminal laws provide prior notice . . . of the conduct to be prohibited . . .”); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (same).

Here, the district court’s charge means that individuals can be convicted for aiding a literally limitless number of organizations that are *not* designated and that do *not* engage in terrorism. As applied to groups that have been included on an official public list of “foreign terrorist organizations,” the statute adequately informs citizens

who they must not support. But as applied to the limitless and unspecified number of non-designated groups, without any proof of knowledge that the aid would ultimately support a designated group, the statute fails to provide fair notice of which groups to avoid.

Moreover, it is fully within the government's power to designate as "foreign terrorist organizations" any entity that is a subsidiary of or controlled by a designated group. In fact, the government often does just that. It could have designated the zakat committees as a.k.a.'s for Hamas, or as "controlled by" Hamas. Had it done so, defendants would have been put on notice that support to such groups was prohibited. Because the government did not do so, however, it must prove that defendants aided the *non-designated* zakat committees *knowing* that they were supporting Hamas, a designated group, by doing so.

The due process problems of notice are exacerbated by the fact that it is often extraordinarily difficult to know the relations between various foreign organizations in an overseas setting. Most terrorist organizations do not publish their affiliations, and many operate secretively. Thus, it can be very difficult to ascertain whether a non-designated entity is related to a designated group. To hold donors responsible after the fact without any showing that they were aware that a non-designated group was linked to a designated organization is to render anyone who provides aid abroad

at risk.

The requirement of fair notice applies with particular force where, as here, a statute touches on First Amendment freedoms. “Where First Amendment rights are involved, an even ‘greater degree of specificity’ is required.” *Buckley*, 424 U.S. at 77 (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1973)); see also *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *Kunz v. New York*, 340 U.S. 290 (1951). As the Supreme Court’s recent decision in *Holder v. Humanitarian Law Project* makes clear, the statute criminalizes certain forms of speech, but does not prohibit “independent advocacy.” 130 S. Ct. at 2723, 2726, 2728. That safeguard was critical to the Court’s upholding of the statute. *Id.* Yet if individuals can be prosecuted for providing material support to non-designated groups, then they will have no way of knowing whether they are indeed engaged in independent advocacy, as coordination even with a group that is not designated could lead to prosecution.

Thus, as interpreted by the district court, the material-support statute fails to provide even the most basic requisites of fair notice, and leaves ordinary citizens to guess at whether any charitable assistance might lead to a criminal prosecution.

B. The District Court's Construction Fails to Require Proof of Individual Culpability.

Due process also requires proof of individual culpability. Where, as here, culpability is predicated on one's relationship to another's illegal conduct, due process requires a substantial nexus between the defendant's actions and the ultimate criminal activity. As the Supreme Court has explained:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

*Scales v. United States*, 367 U.S. 203, 224-25 (1961).

This Court, expressly following and applying *Scales*, has held that criminal liability under conspiracy, complicity, and aiding and abetting statutes requires proof of a "shared purpose to achieve jointly held illegal aims" to avoid infringing the due process principle of individual culpability. *Ferguson v. Estelle*, 718 F.2d 730, 735-36 (5th Cir. 1983). Upholding a Texas anti-riot statute against a due process challenge, the Court noted that liability required a showing that the:

defendant acted with an assemblage of seven or more persons, *knowing that the conduct of the assembly was creating an immediate danger of damage to property or injury to persons*. That determination meets the constitutional requisites spelled out in *Scales*, 81 S. Ct. at 1845-46, of

active participation with others toward the achievement of the ends recognized to be illegal.

*Id.* at 736 (emphasis added). This “community of illicit intent,” the Court explained, established the requisite personal guilt for Fifth Amendment purposes. *Id.* at 735-36.

A charity that provides aid for otherwise lawful activity to an organization that is *not* designated, without knowledge that doing so will aid a designated group, has engaged in no culpable conduct. That a non-designated organization is, unbeknownst to the donor, “controlled by” a designated group, is plainly insufficient to establish a “community of illicit intent,” particularly in the absence of knowledge of that relationship.

Due process bars the criminalization of aid to a *designated* group without proof that the donor knew the group was designated or engaged in terrorism. *HLP v. United States Dep’t of Justice*, 352 F.3d at 396-97. Surely, then, it violates due process to impose guilt for providing aid to a *non-designated* organization, without proof that the donor aided that group knowing that doing so would aid a designated group. Otherwise, defendants are being penalized for their associations with groups that in turn have disapproved associations.

Those who knowingly provide material support to a designated foreign terrorist organization through an intermediary should not be shielded from liability. But

where, as here, the jury was told that it need find no such knowledge, a criminal conviction violates due process.

## II. THE DISTRICT COURT'S CHARGE IS CONTRARY TO THE TERMS OF THE MATERIAL-SUPPORT STATUTE

The district court's jury charge is also incorrect as a matter of statutory construction. The plain meaning of the material-support statute precludes imposition of liability on unknowing aid to designated organizations, yet the court's jury charge permits precisely that. If there were any doubt about this, the canons of constitutional avoidance and lenity would require the Court to interpret the material-support statute to require proof of knowing support of a designated organization.

### A. The Statute's Plain Meaning Requires That a Donor Know That His Support Was Provided to a Designated "Foreign Terrorist Organization."

The material-support statute criminalizes only those who "knowingly" provide material support to a designated "foreign terrorist organization." 18 U.S.C. § 2339B(a)(1). As noted above, the U.S. Court of Appeals for the Ninth Circuit interpreted this language in the original statute to require proof that a defendant knew that a recipient organization had been designated or had engaged in terrorist activity. *Humanitarian Law Project v. United States Dep't of Justice*, 352 U.S. at 396-97.

Congress ratified that interpretation the following year, and the statute now provides that:

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. . . .

18 U.S.C. § 2339B(a)(1).

The district court’s charge to the jury permitted it to render a verdict of guilty without proof that defendants had such knowledge. Counts 2 through 10 alleged that defendants supported five local zakat committees, and the jury charge required no finding that defendants knew that supporting these charities would thereby support Hamas, the only designated “terrorist organization” at issue in the case.

To be consistent with the statute’s plain language, the district court should have instructed the jury that conviction required a finding that defendants knew that the local zakat committees were designated or engaged in terrorist activities, or that they supported those committees knowing that doing so supported Hamas. It did not.

**B. The Canon of “Constitutional Avoidance” Supports Interpreting the Material-Support Statute to Require Proof that Defendants Knew Their Support Was Provided to a Designated Terrorist Organization.**

The canon of constitutional avoidance further supports reading the statute to require proof that defendants knew that their recipients were designated terrorist



organizations or engaged in terrorist activity. It is well-established that statutes should be construed, wherever possible, to avoid constitutional problems. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

As established above, *see* Point I, *supra*, absent proof that a defendant knew his recipient was designated, the statute would violate the due process requirements of fair notice and individual culpability. The material-support statute avoids both constitutional problems if it is construed to criminalize only those who provide aid knowing that it will support a “designated terrorist organization.” Thus, just as in *Scales*, 367 U.S. 203, in which the Supreme Court interpreted an anti-Communism statute to avoid due process problems by requiring proof of specific intent, so, too, here, this Court should avoid the serious due process problems presented by the district court’s jury charge by reading the material-support statute, as it was written, to require proof that a donor knew that his recipient was designated.

C. The Rule of Lenity Supports Interpreting the Statute to Require Proof of Knowledge that Aid is Being Provided to a Designated Terrorist Organization.

The interpretation advanced above is also supported by the rule of lenity, which requires that ambiguities in criminal statutes be interpreted in favor of the defendant

and against the government. *See McNally v. United States*, 483 U.S. 350 (1987). On its face, the statute criminalizes only knowing support of designated terrorist organizations. There is no dispute that the five recipient charities were not designated. The government maintained that by aiding the local charity committees, defendants supported Hamas, because those charities were controlled by Hamas. But the statute on its face does not criminalize support to entities “controlled by” designated terrorist organizations, but only support to designated terrorist organizations themselves.

Even if the statute could be read to criminalize support to entities “controlled by” designated terrorist organizations, the rule of lenity would require the government to make at least as strong a showing of knowledge in such instances as in the case of direct provision of support to Hamas. If Counts 2 through 10 alleged wire transfers to Hamas, proof that defendants knew Hamas was a designated terrorist organization would suffice. But because Counts 2 through 10 alleged wire transfers to five non-designated local charities, the court should have required proof that defendants knew that aiding those charities was in fact aiding Hamas.

### III. INTERPRETING THE STATUTE TO REQUIRE PROOF OF KNOWLEDGE THAT THE RECIPIENT IS A DESIGNATED TERRORIST ORGANIZATION WILL NOT UNDERMINE NATIONAL SECURITY

Congress's decision to require proof that an individual know that the organization to which he provides material support is designated reflects its judgment that such a knowledge requirement will not interfere unduly with national security objectives. Given the expansive criteria for designation, the Secretary of State has a relatively free hand in designating foreign organizations as terrorist. She need only find that the group engaged in a single act or threat of violence to person or property with a weapon,<sup>3</sup> and that the group's activities undermine our foreign relations or economic interests. The U.S. Court of Appeals for the D.C. Circuit has ruled that the Secretary's judgment that a group's activities undermine our foreign relations or economic interests is not judicially reviewable. *People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17, 23-24 (D.C. Cir. 1999). In addition, the government may designate groups as "specially designated global terrorists" if they are, *inter alia*, "controlled by" another designated entity. E.O. 13,224, §1(c) (authorizing designation of individuals or entities deemed "to be owned or controlled

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<sup>3</sup> The definition of "engage in terrorist activity" is very expansive, and includes any use, or threat to use, any "explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain) with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." 8 U.S.C. §§ 1182(a)(3)(B)(iii)(V)(b), (VI).

by, or to act for or on behalf of” a designated entity). Accordingly, had the government chosen to do so, it could have designated the local zakat committees that the prosecution belatedly argued were “controlled by” Hamas. That approach would have protected the government’s interests, and put defendants and others on notice that such groups may not be supported.

Alternatively, if the government can show that an individual provided material support to a non-designated entity as a middleman with knowledge that the aid would be provided to a designated organization, the fact that the donor used an intermediary would be no defense. The government’s proposed charge to the jury would have required the jury to make just such a finding. The district court, however, inexplicably omitted that requirement. In doing so, its charge contravened the statute’s plain terms and rendered the convictions on Counts 2 through 10 invalid.

### **CONCLUSION**

For all the above reasons, defendants’ convictions on Counts 2 through 10 must be vacated.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

The foregoing Amicus Brief of Charities, Foundations, Conflict-Resolution Groups, And Constitutional Rights Organizations In Support Of Defendants And Urging Reversal Of Convictions Of Countys2-10 was served upon all counsel of record by means of the Court of Appeals ECF system on October 26, 2010.

/s/ J. Craig Jett

J. Craig Jett

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this contains [state the number of] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using WordPerfect in 14 font size in New Times Roman style.

(s)J. Craig Jett

Attorney for Amici

Dated: October 26, 2010

## ADDENDUM

### Detailed Description of Amici

Since 1917, the **American Friends Service Committee (AFSC)**, an international Quaker-based organization, has lived out the Quaker testimonies of equality, non-violence and peace in some of the most war-torn and conflict-ridden locations on the globe. For its provision of humanitarian assistance and reaching out to all sides of those affected by World War II, it was awarded the Nobel Peace Prize in 1947. AFSC reaches out to engage all parties in conflict in dialogue, mediation and healing. As a trusted partner, AFSC has provided channels for communication between entities that formally do not recognize each other in order to bring about peace and the resolution of conflict. AFSC has worked with communities to heal from violent conflict which by its nature involves parties from diverse political, cultural or social affiliations. AFSC is concerned that the ruling in this case, if upheld, will deter it from engaging in peace building activities and humanitarian support without fear of criminal investigation and prosecution.

**ATLANTIC Philanthropies** is dedicated to bringing about lasting changes in the lives of people who are disadvantaged by their economic situation, race, nationality, gender, age, disabilities, immigration status, sexual orientation, political affiliation or religion. It makes grants through its Ageing, Children & Youth, Population Health and Reconciliation & Human Rights Programmes. Atlantic also makes Founding Chairman grants. The foundation is active in Australia, Bermuda, Northern Ireland, the Republic of Ireland, South Africa, the United States and Viet Nam.

**The Carter Center**, in partnership with Emory University, is guided by a fundamental commitment to human rights and the alleviation of human suffering. It seeks to prevent and resolve conflicts, enhance freedom and democracy, and improve health. Founded in 1982 by former U.S. President Jimmy Carter and former First Lady Rosalynn Carter, the Center has helped to improve the quality of life for people in more than 70 countries.

**Christian Peacemaker Teams (CPT)** arose from a call in 1984 for Christians to devote the same discipline and self-sacrifice to nonviolent peacemaking that armies devote to war. Committed to nonviolent alternatives to war, CPT places violence-

reduction teams in crisis situations and militarized areas around the world at the invitation of local peace and human rights workers. With a diverse membership of Catholics, Baptists, Presbyterians, Mennonites, Brethren and Quakers, CPT's peacemaking emphasizes creative public witness, nonviolent direct action and protection of human rights.

**The Constitution Project** is an independent, nonprofit organization that brings together legal and policy experts from across the political spectrum to promote and defend constitutional safeguards. The Project's bipartisan Liberty and Security Committee works to ensure that we protect both our nation's security and our civil liberties. In November 2009, the Committee issued a statement on *Constitutional Concerns Presented by Prohibitions on Material Support to "Terrorist Organizations,"* in which the bipartisan group of signers recognized that "cutting off support of terrorist activity is an important and legitimate part of the United States' counter-terrorism strategy," but urged that "in providing the legal authority to prohibit and punish such conduct, it is essential that the law respect constitutional freedoms."

Formed in 1949, the **Council on Foundations** is a nonprofit membership association of grantmaking foundations and corporations. The Council's mission is to provide the opportunity, leadership, and tools needed by philanthropic organizations to expand, enhance, and sustain their ability to advance the common good. Members of the Council include more than 1,750 independent, operating, community, public and company-sponsored foundations and corporate giving programs in the United States and abroad. U.S. foundations gave an estimated \$5.4 billion in support of international causes in 2007, including about \$2 billion given directly to organizations outside the United States.

The **Nathan Cummings Foundation** is rooted in the Jewish tradition and committed to democratic values and social justice, including fairness, diversity, and community. It seeks to build a socially and economically just society that values nature and protects the ecological balance for future generations; promotes humane health care; and fosters arts and culture that enriches communities. It makes grants for ecological, health, and arts and cultural projects to organizations in the United States and funds environmental initiatives and work to advance women in Israel.



The **Fund for Constitutional Government (FCG)** is a publicly funded foundation dedicated to the exposure and correction of corruption in the United States federal government. FCG accomplishes this work by funding organizations and journalists working to advance and sustain an open and accountable government.

**Global Greengrants Fund** is a public charity that gives small grants to organization and communities working on behalf of the environment and human rights. It bridges the gap between those who can offer financial support and grassroots groups in developing countries that can make effective use of that support. Its mission is to mobilize resources for global environmental sustainability and social justice. It is based in Boulder, Colorado, with staff and volunteers around the world. Since 1993, it has made 6,000 grants totaling \$20 million in over 120 countries.

**Grantmakers Without Borders** is a philanthropic network dedicated to increasing funding for international social justice and environmental sustainability and to improving the practice of international grantmaking. Its membership, currently numbering some 160 grantmaking entities, includes private foundations, grantmaking public charities, individual donors with a significant commitment to philanthropy, and philanthropic support organizations. Grantmakers Without Borders provides capacity-building support to international grantmakers both novice and experienced. It offers opportunities for education, community and collaboration among international social change grantmakers. It advocates before policymakers on behalf of social change grantmakers, and works to leverage the philanthropic sector to increase funding to the global South, and to amplify the voice of the global South in international philanthropy. It is committed to the ideals of justice, equity, peace, democracy, and respect for the environment, and values and respects the wisdom and experience of local communities.

**Grassroots International (GRI)** is a human rights and international development organization that promotes global justice through partnerships with social change organizations. GRI works around the world to advance political, economic, and social rights and supports development alternatives through grantmaking, education, and advocacy.

The **Humanitarian Law Project** is a longstanding human rights organization located in Los Angeles, California, with consultative status to the United Nations. It is dedicated to furthering knowledge of and compliance with humanitarian law, to

training individuals and groups in peaceful means to resolve their disputes, and to encouraging and facilitating dialogue toward peace in areas of conflict around the world.

**Islamic Relief USA (IRUSA)** was founded in 1993 as a legally separate and independent member of the Islamic Relief family of charities worldwide, which collectively operates in 39 countries. IRUSA strives to alleviate poverty and suffering among the world's poorest people. Paying no heed to gender, race, or creed, IRUSA supports a wide variety of international relief and development projects in over 35 countries, including emergency relief, health and nutrition, education, income generation, water and sanitation, and orphan support.

**Milt Lauenstein** Is an individual philanthropist. His charitable giving is aimed at reducing war. It is now focused on supporting the work of The BEFORE Project, which helps leaders in fragile states to consolidate peace, and develops and disseminates knowledge about how best to prevent political violence in the third world. It has been active in West Africa since 2004.

**Operation USA** is a 31 year-old international relief and development organization that has worked in 99 countries with exclusively private funds. It was the first US nongovernmental organization licensed by the US Departments of Commerce and Treasury to work in Vietnam and Cambodia, and is also licensed to provide humanitarian aid to Cuba. It has worked in conflict zones in Sri Lanka, Pakistan, Sudan, Lebanon, the West Bank/Gaza, Nicaragua (during and after the Contra war), and El Salvador (during and after the war with the FMLN). It provides material and financial assistance to grassroots organizations that promote sustainable development, leadership and capacity building, and income generating activities; provides education and health services; and advocates on behalf of vulnerable people.

The **Peace Appeal Foundation** was founded in 2001 as The Appeal of the Nobel Peace Laureates Foundation with the mandate of five Nobel Peace Laureates to promote peace and non-violence internationally. Since 2003 the foundation has focused its efforts on providing intensive support to peace initiatives in countries and regions in conflict, including the Balkans, Sri Lanka, Nepal and the Middle East. The Peace Appeal offers local stakeholders in conflict innovative tools, approaches and people to launch and sustain peace initiatives created and managed at the local level.

The **Rockefeller Brothers Fund** advances social change that contributes to a more just, sustainable, and peaceful world. The RBF's grantmaking is organized around three themes: Democratic Practice, Sustainable Development, and Peace and Security. Though the Fund pursues its three program interests in a variety of geographic contexts, it has identified several specific locations on which to concentrate cross-programmatic attention. The Fund refers to these as "RBF pivotal places": subnational areas, nation-states, or cross-border regions that have special importance with regard to the Fund's substantive concerns and whose future will have disproportionate significance for the future of a surrounding region, an ecosystem, or the world. The Fund currently works in three pivotal places: New York City, Western Balkans, and Southern China.

The **Samuel Rubin Foundation** is a family foundation located in New York supporting human rights, constitutional rights, women's rights and peace, both at home and abroad.

The **Rutherford Institute** is an international civil liberties and human rights organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal representation without charge to individuals whose civil liberties are threatened or violated and educates the public about constitutional and human rights issues. During its 28-year history, the Institute has filed numerous briefs as an amicus at all levels of the federal judiciary and before the Supreme Court in cases dealing with critical constitutional issues. It believes that an unwavering commitment to our basic and fundamental constitutional framework is the best guarantor of our nation's liberty and security, and is concerned that the expansive interpretation of the law by the court below would have a chilling and stifling effect on a wide range of entirely legitimate grant-making and peace work.

The **Tikva Grassroots Empowerment Fund** supports poor and disempowered communities worldwide seeking to provide sustainability for basic needs and to protect basic human rights. Tikva Grassroots provides small to medium-sized grants to locally conceived and led efforts to advance self-determination, protect traditional ways of life, gain access to resources, develop economic self-sufficiency, foster environmental justice, and reduce violence throughout the world, particularly in Africa and the Middle East.

The **Urgent Action Fund for Women's Human Rights** supports women's human rights defenders striving to create cultures of justice, equality and peace. Organizations can apply to UAF's Rapid Response Grantmaking Program in any language on any day of the year, and count on a response within 72 hours, enabling women to respond to opportunities or threats too urgent for traditional funding cycles. UAF also engages in collaborative advocacy and research, to draw attention to key new issues and trends affecting women's human rights.