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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HUMANITARIAN LAW PROJECT, ) CASE NO.: CV 03-6107 ABC (MCx)  
et al., )  
Plaintiffs, ) ORDER RE: PLAINTIFFS' MOTION FOR  
vs. ) SUMMARY JUDGMENT AND DEFENDANTS'  
JOHN ASHCROFT, et al., ) MOTION TO DISMISS  
Defendants. )

This action involves a challenge to the constitutionality of §805(a)(2)(B) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act") and §§302 and 303 of the Antiterrorism and Effective Death Penalty Act (the "AEDPA") which prohibit the provision of material support, including "expert advice or assistance," to designated foreign terrorist organizations. See §805(a)(2)(B), 18 U.S.C. §§2339A(a) and 2339B(a). Plaintiffs seek to provide support for the lawful activities of two organizations that have been designated as "foreign terrorist organizations." Plaintiffs seek summary judgment and an injunction to prohibit Defendants from enforcing the criminal prohibition on providing "expert advice or

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1 assistance" to such organizations on the ground that, like the  
2 prohibitions on providing "training" and "personnel," which the Court  
3 previously enjoined, the prohibition is unconstitutionally vague and  
4 overbroad. See Humanitarian Law Project v. Reno, 9 F.Supp. 2d 1176  
5 (C.D. Cal. 1998) (granting Plaintiffs' motion for preliminary  
6 injunction), aff'd, 205 F.3d 1130 (9<sup>th</sup> Cir. 2000) and Humanitarian Law  
7 Project v. Reno, No CV 98-1971 ABC (BQRx), 2001 U.S. Dist. LEXIS 16729  
8 (C.D. Cal. 2001) (granting in part and denying in part Plaintiffs'  
9 motion for summary judgment and denying Defendants' motion to  
10 dismiss), aff'd in part and rev'd in part, 352 F.3d 382 (9<sup>th</sup> Cir.  
11 2003) (hereinafter referred to as HLP I).

12 Plaintiffs HUMANITARIAN LAW PROJECT, RALPH FERTIG, ILANKAI THAMIL  
13 SANGAM, DR. NAGALINGAM JEYALINGAM, WORLD TAMIL COORDINATING COMMITTEE,  
14 FEDERATION OF TAMIL SANGAMS OF NORTH AMERICA and TAMIL WELFARE AND  
15 HUMAN RIGHTS COMMITTEE (collectively, "Plaintiffs") now bring a Motion  
16 for Summary Judgment, and Defendants JOHN ASCHROFT (in his official  
17 capacity as United States Attorney General), the UNITED STATES`  
18 DEPARTMENT OF JUSTICE, COLIN POWELL (in his official capacity as  
19 Secretary of the Department of State) and the UNITED STATES DEPARTMENT  
20 OF STATE ("collectively, "Defendants") bring a Motion to Dismiss. The  
21 Court found the motions appropriate for submission without oral  
22 argument. See Fed. R. Civ. P. 78; Local R. 7-15. Accordingly, the  
23 scheduled hearing date of January 12, 2004 was VACATED. After  
24 reviewing the materials submitted by the parties and the case file,  
25 the Court GRANTS IN PART and DENIES IN PART Defendants' motion to  
26 dismiss and GRANTS IN PART and DENIES IN PART Plaintiffs' motion for  
27 summary judgment.

28 //

1 I. FACTUAL BACKGROUND

2 A. The Regulatory Scheme

3 On October 26, 2001, Congress enacted the USA PATRIOT Act, which  
4 broadened the AEDPA's definition of "material support or resources" to  
5 add as a proscribed act the provision of "expert advice or  
6 assistance." As discussed in detail in HLP I, the AEDPA permits the  
7 Secretary of State, in consultation with the Secretary of the Treasury  
8 and the Attorney General, to designate an organization as a foreign  
9 terrorist organization after making certain findings as to the  
10 organization's involvement in terrorist activity. See 8 U.S.C. §  
11 1189(a)(1). "Terrorist activity" is defined as "an act which the  
12 actor knows, or reasonably should know, affords material support to  
13 any individual, organization, or government in conducting a terrorist  
14 activity at any time." 8 U.S.C. § 1182(a)(3)(B)(iii).

15 Section 303 of the AEDPA, as modified by Section 810 of the USA  
16 PATRIOT Act, provides: "Whoever, within the United States or subject  
17 to the jurisdiction of the United States, knowingly provides material  
18 support or resources to a foreign terrorist organization, or attempts  
19 or conspires to do so, shall be fined under this title or imprisoned  
20 not more than 15 years, or both, and, if the death of any person  
21 results, shall be imprisoned for any term of years or for life." 18  
22 U.S.C. § 2339B(a). "Material support or resources" is defined as  
23 "currency or monetary instruments or financial securities, financial  
24 services, lodging, training, expert advice or assistance, safehouses,  
25 false documentation or identification, communications equipment,  
26 facilities, weapons, lethal substances, explosives, personnel,  
27 transportation, and other physical assets, except medicine or  
28 religious materials." Id. §2339A(b) (emphasis added).

1           **B.     The Secretary's Designation**

2           On October 8, 1997, then Secretary of State Madeline Albright  
3 designated 30 organizations as "foreign terrorist organizations" under  
4 the AEDPA. See 62 Fed.Reg. 52,649-51. The designated organizations  
5 included the Kurdistan Workers' Party, a.k.a. Partiya Karkeran  
6 Kurdistan, a.k.a. PKK ("PKK") and the Liberation Tigers of Tamil  
7 Eelam, a.k.a. LTTE, a.k.a. Tamil Tigers, a.k.a. Ellalan Force  
8 ("LTTE").

9           **C.     The Plaintiffs**

10          Plaintiffs are five organizations and two United States citizens.  
11 Plaintiffs seek to provide support to the lawful, nonviolent  
12 activities of the PKK and the LTTE. Since October 8, 1997, the date  
13 on which the Secretary designated the PKK and the LTTE as foreign  
14 terrorist organizations, Plaintiffs, their members and individuals  
15 associated with the organizational Plaintiffs have not provided such  
16 support, fearing criminal investigation, prosecution and conviction.

17          1.     The PKK and the Plaintiffs that Support It

18          The PKK, the leading political organization representing the  
19 interests of the Kurds in Turkey, was formed approximately 25 years  
20 ago with the goal of achieving self-determination for the Kurds in  
21 Southeastern Turkey. It is comprised primarily of Turkish Kurds.  
22 Plaintiffs allege that for more than 75 years, the Turkish government  
23 has subjected the Kurds to human rights abuses and discrimination.  
24 The PKK's efforts on behalf of the Kurds include political organizing  
25 and advocacy both inside and outside Turkey, providing social services  
26 and humanitarian aid to Kurdish refugees and engaging in military  
27 combat with Turkish armed forces in accordance with the Geneva  
28 Convention and Protocols.

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1 Two Plaintiffs, Humanitarian Law Project ("HLP") and  
2 Administrative Judge Ralph Fertig,<sup>1</sup> HLP's President, seek to support  
3 the PKK's peaceful and non-violent activities. The HLP, a not-for-  
4 profit organization headquartered in Los Angeles, is dedicated to  
5 furthering international compliance with humanitarian law and human  
6 rights law and the peaceful resolution of armed conflicts.<sup>2</sup>

7 The HLP has consultative status to the United Nations ("UN") as a  
8 non-governmental organization and regularly participates in meetings  
9 of the UN Commission on Human Rights in Geneva, Switzerland. The HLP  
10 conducts fact-finding missions, writes and publishes reports, and  
11 works for the peaceful resolution of armed conflicts around the world.

12 Judge Fertig has a career of over 50 years in human rights work.  
13 He has been a member of the HLP's Board of Directors since 1989,  
14 serving as President from 1993 to 1995 and from 1997 to the present.  
15 He has participated in HLP delegations that have investigated alleged  
16 human rights violations in Turkey, Mexico, and El Salvador, has  
17 written reports for the HLP, and has trained others in the use of  
18 international human rights law and other lawful means for the peaceful  
19 resolution of disputes.

20 Since 1991, the HLP and Judge Fertig have devoted substantial  
21 time and resources advocating on behalf of the Kurds living in Turkey

22 \_\_\_\_\_  
23 <sup>1</sup>Although Judge Fertig was an administrative judge for the  
24 United States Equal Employment Opportunity Commission until his  
recent retirement, he sues solely in his personal capacity.

25 <sup>2</sup>The HLP was absorbed by the International Educational  
26 Development, Inc. ("IED") in 1989. The HLP is sometimes referred  
27 to as the International Educational Development,  
28 Inc.\*Humanitarian Law Project ("IED\*HLP"). The IED was formed in  
the 1950's by a group of Jesuit Fathers to conduct non-sectarian  
work to aid schools, hospitals, and impoverished third world  
communities.

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1 and working with and providing training, expert advice and other forms  
2 of support to the PKK. Judge Fertig and other individuals associated  
3 with the HLP have conducted fact-finding investigations on the Kurds  
4 in Turkey and have published reports and articles presenting their  
5 findings, which are supportive of the PKK and the struggle for Kurdish  
6 liberation. They assert that the Turkish government has committed  
7 extensive human rights violations against the Kurds, including the  
8 summary execution of more than 18,000 Kurds, the widespread use of  
9 arbitrary detentions and torture against persons who speak out for  
10 equal rights for Kurds or are suspected of sympathizing with those who  
11 do, and the wholesale destruction of some 2,400 Kurdish villages.  
12 Applying international law principles, they have concluded that the  
13 PKK is a party to an armed conflict governed by Geneva Conventions and  
14 Protocols and, therefore, is not a terrorist organization under  
15 international law.

16 To further peaceful resolutions of the armed conflict in Turkey  
17 and protect the human rights of the Kurds, the HLP, Judge Fertig, and  
18 other individuals associated with the HLP have worked with and  
19 supported the PKK in numerous ways. They have petitioned members of  
20 Congress to support Kurdish human rights and to encourage negotiations  
21 between the PKK and the Turkish government. They have argued for the  
22 release of Leyla Zana, Hatip Dicle, Orhan Dogan, and Selim Sadak, four  
23 Kurds who were elected to the Turkish Parliament in 1991, but  
24 sentenced to 15 years in prison by the Turkish courts for being  
25 members or supporters of the PKK. In addition, the HLP, Judge Fertig,  
26 and other individuals associated with the HLP have provided training  
27 to some PKK members and other Kurds in using humanitarian law and  
28 international human rights law and in seeking a peaceful resolution of

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1 the conflict in Turkey. Both the HLP and Judge Fertig only support  
2 the PKK in its non-violent and lawful activities.

3 Since the Secretary designated the PKK as a foreign terrorist  
4 organization, the HLP and Judge Fertig have been deterred from  
5 continuing to assist the PKK to improve conditions for the Kurds  
6 living in Turkey. But for the AEDPA and the USA PATRIOT Act, they  
7 would continue to provide the type of support which they provided in  
8 the past, as well as additional support. However, they fear that  
9 doing so would subject them to criminal prosecution.

10 The HLP, Judge Fertig, and individuals associated with the HLP  
11 would specifically like to, but are afraid to, provide support to the  
12 PKK in the following ways:

- 13 (1) engage in political advocacy on behalf of the PKK and  
14 the Kurds before the U.N. Commission on Human Rights and the  
United States Congress;
- 15 (2) provide the PKK and the Kurds with training and written  
16 publications on how to engage in political advocacy on their  
17 own behalf and on how to use international law to seek  
redress for human rights violations;
- 18 (3) write and distribute publications supportive of the PKK  
and the cause of Kurdish liberation;
- 19 (4) advocate for the freedom of Turkish political prisoners,  
20 including Leyla Zana, Hatip Dicle, Orhan Dogan, and Selim  
Sadak; and
- 21 (5) assist PKK members at peace conferences and other  
22 meetings designed to support a peaceful resolution of the  
Turkish conflict.

23 HLP and Judge Fertig are committed to providing the above-  
24 mentioned support. However, they are afraid that the conduct in which  
25 they have engaged and in which they wish to continue to engage may  
26 come within the scope of "expert advice or assistance." Since the  
27 enactment of the USA PATRIOT ACT and the amendment of the term  
28 "material support" to include "expert advice or assistance," the HLP

1 and Judge Fertig have refrained from providing this advice and  
2 assistance for fear that they may be subjected to criminal  
3 prosecution.

4 2. The LTTE and the Plaintiffs that Support It

5 The LTTE was formed in 1976 with the goal of achieving self-  
6 determination for the Tamil residents of Tamil Eelam, in the Northern  
7 and Eastern provinces of Sri Lanka. Plaintiffs allege that the Tamils  
8 constitute an ethnic group that has for decades been subjected to  
9 human rights abuses and discriminatory treatment by the Sinhalese, who  
10 have governed Sri Lanka since the nation gained its independence from  
11 Great Britain in 1948. The Sinhalese constitute a numerical majority  
12 of Sri Lanka's population.

13 Plaintiffs allege that the LTTE, to further its goal of self-  
14 determination for the Tamils, engages in: (1) political organizing and  
15 advocacy; (2) diplomatic activity; (3) the provision of social  
16 services and humanitarian aid; (4) the establishment of a quasi-  
17 governmental structure in Tamil Eelam; (5) economic development; (6)  
18 defense of the Tamil people from human rights abuses; and (7) military  
19 struggle against the government of Sri Lanka.

20 Five Plaintiffs--four membership organizations and an individual--  
21 seek to provide support to the LTTE. These Plaintiffs are committed  
22 to the human rights and well-being of the Tamils in Sri Lanka. Many  
23 members of these organizations and the individual Plaintiff, Dr.  
24 Nagalingam Jeyalingam, are Tamils born in Sri Lanka. Although they  
25 now reside in the United States and many are United States citizens,  
26 they still have close friends and family members living in Sri Lanka,  
27 many of whom have been the victims of alleged abuses by the Sri Lankan  
28 government.

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1           a.    Ilankai Tamil Sangam

2           Plaintiff Ilankai Tamil Sangam ("Sangam"), a New Jersey not-for  
3 profit corporation founded in 1977 has approximately 135 members, most  
4 of whom are Tamils born in Sri Lanka. The Sangam's objectives are to  
5 promote the association of Tamils in the New York City metropolitan  
6 area, to promote knowledge of the Tamil language, culture, and  
7 heritage, and to provide humanitarian assistance to the Tamils in Sri  
8 Lanka, especially those who are refugees and orphans as a result of  
9 the political strife in Sri Lanka.

10           The Sangam and its members, many of whom are physicians, wish to  
11 offer their expert medical advice and assistance to the LTTE by  
12 consulting with the LTTE on how the health care system in Tamil Eelam  
13 can be improved and by volunteering their advice and assistance to  
14 hospitals and medical centers in LTTE-controlled areas, some of which  
15 are run by the LTTE. Neither the Sangam nor its members seek to  
16 support any military or unlawful activities of the LTTE. The Sangam  
17 and its members have been deterred from providing the above-described  
18 advice and assistance because of fear of criminal investigation,  
19 prosecution and conviction.

20           b.    Dr. Nagalingam Jeyalingam

21           Plaintiff Dr. Nagalingam Jeyalingam is a naturalized United  
22 States citizen who is a Tamil from Sri Lanka. He is a surgeon with  
23 specialized training in otolaryngology, was President of Sangam from  
24 1995 to 1997 and is currently an active member. Members of Dr.  
25 Jeyalingam's family, including his mother, brothers, and sisters, were  
26 displaced from their homes and forced to flee from Sri Lanka to India  
27 as refugees in 1983.

28           Dr. Jeyalingam traveled to the Tamil Eelam region in April of

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1 2002, several months after the LTTE and the Sri Lankan government  
2 entered into a cease fire. During his travels, he visited a hospital  
3 run by the LTTE and observed first-hand the lack of trained  
4 physicians. Dr. Jeyalingam would like to return to the region in  
5 order to consult with and provide the LTTE his expert advice on how to  
6 improve the delivery of health care, with a special focus on  
7 otolaryngology, and to provide his services as an otolaryngology  
8 specialist for a period of six months or longer. Dr. Jeyalingam has  
9 been deterred from doing so because he fears he may be subjected to  
10 criminal prosecution for providing "expert advice or assistance."

11 c. World Tamil Coordinating Committee

12 Plaintiff World Tamil Coordinating Committee (the "WTCC"), an  
13 organization based in Jamaica, New York, and its members wish to  
14 provide expert advice and assistance to the LTTE toward the goals of  
15 achieving normalcy in war-torn Tamil Eelam and negotiating a permanent  
16 peace agreement between the LTTE and the Sri Lankan government. The  
17 WTCC and its members have expertise in the fields of politics, law and  
18 economic development and wish to provide expert advice and assistance  
19 in these fields. Since the enactment of the USA PATRIOT Act, the WTCC  
20 and its members have been afraid to provide this expert advice and  
21 assistance for fear of criminal prosecution.

22 d. Federation of Tamil Sangams of North America

23 Plaintiff Federation of Tamil Sangams of North America ("FETNA")  
24 is a non-profit corporation founded in 1986. FETNA's membership  
25 includes 30 Sangams in the United States, including Ilankai Tamil  
26 Sangam. The FETNA member Sangams are comprised mainly of United  
27 States citizens and legal permanent residents who are ethnic Tamils  
28 from all over the world, including India and Sri Lanka. FETNA's

1 purposes are to encourage appreciation of Tamil language, literature,  
2 arts, cultural heritage and history, and friendship among the Tamils  
3 and the Tamil Sangams around the world.

4 FETNA, its member Sangams, and its individuals members would like  
5 to provide their expert advice and assistance in the fields of Tamil  
6 language, literature, arts, cultural heritage, and history to the  
7 Tamils in the Tamil Eelam region, which is under the control of the  
8 LTTE, by developing school curricula, teaching these subjects and  
9 rebuilding Tamil Eelam's libraries and arts programs. In order for  
10 the FETNA and its members to do this, they would be required to work  
11 in coordination with the LTTE, which controls the infrastructure in  
12 Tamil Eelam. They are afraid, however, of being criminally prosecuted  
13 for doing so.

14 e. Tamil Welfare and Human Rights Committee

15 Finally, Plaintiff Tamil Welfare and Human Rights Committee  
16 ("TWHRC") is a Maryland association of approximately 100 Tamils, both  
17 United States citizens and non-citizens. Its primary objectives are  
18 to protect the human rights of the Tamils in Sri Lanka and to promote  
19 their health, social well-being, and welfare. The TWHRC and its  
20 members have expertise in the fields of economic development and  
21 information technology and wish to provide the LTTE with expert advice  
22 and assistance in these fields towards the goal of promoting civil  
23 peace and stability in the lives of the Tamils of Tamil Eelam.  
24 Because of the USA PATRIOT Act, however, the TWHRC and its members  
25 have been deterred from doing do for fear of criminal prosecution.  
26 The TWHRC seeks only to support the LTTE's humanitarian efforts and  
27 does not seek to support the LTTE's military activities.

28 //

1 **II. PROCEDURAL HISTORY**

2 In a related suit filed in March of 1998 by Plaintiffs  
3 challenging the AEDPA's material support provision, this Court granted  
4 an injunction prohibiting prosecution of Plaintiffs for providing  
5 "training" and "personnel" on the grounds that the terms were  
6 unconstitutionally vague. See HLP I, 9 F.Supp. 2d 1176 (C.D. Cal.  
7 1998) (granting Plaintiffs' motion for preliminary injunction), aff'd,  
8 205 F.3d 1130 (9<sup>th</sup> Cir. 2000); Humanitarian Law Project v. Reno, No.  
9 CV 98-1971 ABC (BQRx), 2001 U.S. Dist. LEXIS 16729 (C.D. Cal.  
10 2001) (granting in part and denying in part Plaintiffs' motion for  
11 summary judgment and denying Defendants' motion to dismiss), aff'd in  
12 part and rev'd in part, 352 F.3d 382 (9th Cir. 2003).

13 On August 27, 2003, Plaintiffs filed their Complaint against  
14 Defendants alleging the following three causes of action:

- 15 (1) Section 805(a)(2)(B) of the USA PATRIOT ACT  
16 violates the First Amendment's guarantees to  
17 freedom of speech and association and to petition  
18 the government for a redress of grievances insofar  
19 as it criminalizes the provision of "expert advice  
20 and assistance" to designated foreign terrorist  
21 organizations without a specific intent to further  
22 the organization's unlawful ends;
- 23 (2) Sections 302 and 303 of the AEDPA and Section  
24 805(a)(2)(B) of the USA PATRIOT Act violate the  
25 First and Fifth Amendments by granting the  
26 Secretary of State unreviewable authority to  
27 designate foreign organizations as terrorist  
28 organizations and prohibit the provision of  
"expert advice and assistance," which invite  
impermissible viewpoint discrimination targeting  
particular groups and their supporters based on  
their political views; and
- (3) Section 805(a)(2)(B) of the USA PATRIOT Act  
violates the First and Fifth Amendment because its  
prohibition of "expert advice and assistance" is  
impermissibly vague and substantially overbroad,  
fails to provide adequate notice of prohibited  
activity, gives government officials unfettered  
discretion in enforcement, and causes individuals

1 to avoid protected First Amendment activity in  
2 order to steer clear of the prohibited conduct.

3 Plaintiffs seek a preliminary and permanent injunction barring  
4 enforcement against Plaintiffs of the USA PATRIOT Act's prohibition of  
5 the provision of "expert advice or assistance" to a designated foreign  
6 terrorist organization absent a specific intent to further the  
7 organization's unlawful terrorist activities. Plaintiffs also seek an  
8 order declaring the prohibition of the provision of "expert advice or  
9 assistance" unconstitutional as applied to Plaintiffs' conduct because  
10 it violates the First and Fifth Amendments by criminalizing the act of  
11 providing expert advice or assistance to designated foreign terrorist  
12 organizations without requiring a showing of specific intent to  
13 further the organization's unlawful terrorist activities, and by doing  
14 so in an impermissibly vague and overbroad manner.

15 On October 16, 2003, Plaintiffs filed the instant motion for  
16 summary judgment, in which they seek summary judgment and a permanent  
17 injunction against enforcement of the "expert advice or assistance"  
18 provision of the USA PATRIOT Act, as well as summary judgment on their  
19 other claims. Defendants filed their memorandum in opposition to  
20 Plaintiffs' motion and in support of their motion to dismiss on  
21 November 24, 2003. On December 8, 2003, Plaintiffs filed their reply  
22 in support of their motion and in opposition to Defendants' motion to  
23 dismiss. Defendants filed their reply on December 15, 2003.

### 24 **III. LEGAL STANDARDS**

#### 25 **A. Motion to Dismiss for Lack of Justiciability**

26 Defendants move to dismiss Plaintiffs' challenge to the "expert  
27 advice or assistance" provision for lack of justiciability. They  
28 maintain that the case raises issues of both standing and ripeness.

1 A motion to dismiss will be denied unless it appears that the  
2 plaintiff can prove no set of facts which would entitle him or her to  
3 relief. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246 (9th Cir.  
4 1997). All material allegations in the complaint will be taken as  
5 true and construed in the light most favorable to the plaintiff. See  
6 NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

7 1. Standing

8 Standing is a threshold requirement in every federal case. Warth  
9 v. Seldin, 422 U.S. 490, 498 (1975). "As an aspect of justiciability,  
10 the standing question is whether the plaintiff has alleged such a  
11 personal stake in the controversy as to warrant [plaintiffs']  
12 invocation of federal court jurisdiction." MAI Sys. Corp. v. UIPS,  
13 856 F.Supp. 538, 540 (N.D. Cal. 1994) (citation omitted). The "three  
14 separate but interrelated components" of Article III standing are: (1)  
15 a distinct and palpable injury to the plaintiff; (2) a fairly  
16 traceable causal connection between the injury and challenged conduct;  
17 and (3) a substantial likelihood that the relief requested will  
18 prevent or redress the injury. Id. (citing McMichael v. County of  
19 Napa, 709 F.2d 1268, 1269 (9th Cir. 1983)).

20 2. Ripeness

21 Ripeness is "peculiarly a question of timing," Regional Rail  
22 Reorg. Act Cases, 419 U.S. 102, 140 (1974), designed to "prevent the  
23 courts, through avoidance of premature adjudication, from entangling  
24 themselves in abstract disagreements." Abbott Labs. v. Gardner, 387  
25 U.S. 136, 148 (1967). In the context of a claimed threat of  
26 prosecution, courts are to consider whether the plaintiffs face "a  
27 realistic danger of sustaining a direct injury as a result of the  
28 statute's operation or enforcement," Babbitt v. United Farm Workers

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1 Natal Union, 442 U.S. 289, 298 (1979), "look[ing] to whether the  
2 plaintiffs have articulated a 'concrete plan' to violate the law in  
3 question, whether the prosecuting authorities have communicated a  
4 specific warning or threat to initiate proceedings, and the history of  
5 past persecution or enforcement under the challenged statute."  
6 Thomas, 220 F.3d at 1139 (quoting San Diego County Gun Rights Comm. v.  
7 Reno, 98 F.3d 1121, 1126-27 (9<sup>th</sup> Cir. 1996)). If these requirements  
8 are met, the Court is also to consider "the fitness of the issues for  
9 judicial decision and the hardship to the parties of withholding court  
10 consideration." Abbott Labs., 387 U.S. at 149.

11 **B. Motion for Summary Judgment**

12 Summary judgment shall be granted when there is no genuine issue  
13 of material fact and the movant is entitled to judgment as a matter of  
14 law. See Fed. R. Civ. 56(c). The moving party bears the initial  
15 burden of identifying those portions of the record that demonstrate  
16 the absence of a genuine issue of material fact. The burden then  
17 shifts to the nonmoving party to "go beyond the pleadings, and by  
18 [its] own affidavits, or by the 'depositions, answers to  
19 interrogatories, or admissions on file,' designate 'specific facts  
20 showing that there is a genuine issue for trial.'" Celotex Corp. v.  
21 Catrett, 477 U.S. 317, 324 (1986) (citations omitted). A dispute  
22 about a material fact is genuine "if the evidence is such that a  
23 reasonable jury could return a verdict for the nonmoving party."  
24 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

25 The moving party discharges its burden by showing that the  
26 nonmoving party has not disclosed the existence of any "significant  
27 probative evidence tending to support the complaint." First Natal  
28 Bank v. Cities Serv. Co., 391 U.S. 253, 290 (1968). The Court views

1 the inferences drawn from the facts in the light most favorable to the  
2 party opposing the motion. See T.W. Elec. Serv., Inc. v. Pacific  
3 Elec. Contractor's Ass'n, 809 F.2d 626, 631 (9th Cir. 1987).

4 IV. DISCUSSION

5 A. Defendants' Motion to Dismiss.

6 Defendants move to dismiss Plaintiffs' challenge to the  
7 provisions regarding "expert advice or assistance," arguing that  
8 Plaintiffs' pre-enforcement challenge is not justiciable on the basis  
9 of both standing and ripeness.<sup>3</sup> Plaintiffs oppose the Government's  
10 motion, arguing that their claims are justiciable because they face a  
11 credible threat of prosecution.

12 "To satisfy the Article III case or controversy requirement, [a  
13 plaintiff] must establish, among other things, that it has suffered a  
14 constitutionally cognizable injury-in-fact." California Pro-Life  
15 Council, Inc. v. Getman, 328 F.3d 1088, 1093 (9<sup>th</sup> Cir. 2003).

16 "[N]either the mere existence of a proscriptive statute nor a  
17 generalized threat of prosecution satisfies the 'case or controversy'  
18 requirement." Thomas v. Anchorage Equal Rights Commission, 220 F.3d  
19 1134, 1139 (9<sup>th</sup> Cir. 2000) (*en banc*). Instead, there must be a  
20 "genuine threat of imminent prosecution." Id. "In evaluating the  
21 genuineness of a claimed threat of prosecution, [the Ninth Circuit  
22 considers] whether the plaintiffs have articulated a 'concrete plan to  
23

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24 <sup>3</sup>"Sorting out where standing ends and ripeness begins is not  
25 an easy task . . . . [I]n 'measuring whether the litigant has  
26 asserted an injury that is real and concrete rather than  
27 speculative and hypothetical, the ripeness inquiry merges almost  
28 completely with standing.'" Thomas v. Anchorage Equal Rights  
Commission, 220 F.3d 1134, 1138-39 (9<sup>th</sup> Cir. 2000) (*en*  
*banc*) (quoting Gene R. Nichol, Jr., Ripeness and the Constitution,  
54 U. Chi. L. Rev. 153, 172 (1987)).



1 violate the law in question, whether the prosecuting authorities have  
2 communicated a specific warning or threat to initiate proceedings, and  
3 the history of past prosecution or enforcement under the challenged  
4 statute." Id.

5 Defendants contend that the above-referenced factors support  
6 dismissal of Plaintiffs' claims on the basis of standing and ripeness,  
7 because Plaintiffs have failed to demonstrate (1) a history of  
8 prosecution under the relevant provision of the USA PATRIOT Act, or  
9 any threat of prosecution directed toward Plaintiffs or (2) that they  
10 have a "concrete plan" to violate the law in question, or that their  
11 intended conduct might arguably come within the statute's reach.  
12 Defendants also argue that Plaintiffs' 18-month delay in seeking  
13 relief also weighs against a finding of justiciability. Finally,  
14 Defendants attempt to divide Plaintiffs into two categories.  
15 Defendants argue that the Plaintiffs in the first category, which  
16 comprises the majority of Plaintiffs, do not fall within the scope of  
17 the statute because the advice and assistance they seek to provide is  
18 not "expert." Defendants concede that the Plaintiffs in the second  
19 category, comprised of Dr. Nagalingam Jeyalingam, and "to a lesser  
20 extent," Ilankai Tamil Sangam, seek to provide services that at least  
21 arguably fall within the statute's reach. However, Defendants claim  
22 that like the other Plaintiffs, the failure of Dr. Jeyalingam and of  
23 Sangam to identify a "concrete plan" to violate the law at issue is  
24 fatal to their claims. Based on the foregoing, Defendants conclude  
25 that Plaintiffs have failed to meet their burden in demonstrating an  
26 injury-in-fact in support of Article III ripeness or standing, and  
27 their claims should therefore be dismissed for lack of justiciability.  
28 In their opposition, Plaintiffs contend that the threat of

1 prosecution they face is credible because (1) the government has  
2 rigorously enforced the material support provision in the wake of  
3 September 11, 2001, (2) the government has specifically identified the  
4 LTTE and PKK as terrorist organizations, (3) prior to their  
5 designation as terrorist organizations, Plaintiffs provided support to  
6 the LTTE and PKK and (4) Defendants have never suggested that  
7 Plaintiffs' intended support was lawful and thus not subject to  
8 prosecution. In Plaintiffs' view, these facts are sufficient to  
9 establish a credible threat of prosecution and their standing to bring  
10 suit based upon that threat.

11 With respect to Defendants' contention that the advice and  
12 assistance Plaintiffs seek to offer (with the exception of medical  
13 advice and assistance) is not even arguably expert, Plaintiffs refer  
14 to their supplemental affidavits, which identify their expertise in  
15 the fields of (1) international human rights, peacemaking and advocacy  
16 (HLP and Judge Ralph Fertig) and (2) information technology and  
17 economic development (TWHRC).<sup>4</sup> In Plaintiffs' view, it is  
18 undisputable that Plaintiffs' activities are at least "arguably  
19 covered" by the prohibitions on the provision of "expert advice or  
20 assistance."

21 Plaintiffs also assert that they have sufficiently identified  
22 "concrete plans" which are specific as to the groups they seek to  
23 support and the type of expert advice and assistance they seek to  
24 provide, and that their past activities underscore that these plans  
25 are not merely abstract desires. Specifically, Plaintiffs HLP and  
26 Judge Fertig would encourage the PKK and its affiliate and successor

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27  
28 <sup>4</sup>Plaintiffs FETNA and WTCC did not submit supplement  
affidavits.

1 students in LTTE-controlled Tamil Eelam how to utilize computer  
2 equipment and desktop publishing software and (2) in the field of  
3 economic development, to assist in the development of sound economic  
4 plans that will encourage an infusion of capital in the region.  
5 (12/7/03 Declaration of Muthuthamby Sreetharan ¶¶ 3-4.) In  
6 Plaintiffs' estimate, the foregoing is sufficient to satisfy the  
7 "concrete plan" requirement of California Pro-Life Council and Thomas.

8 Plaintiffs also seek to discount Defendants' emphasis on the 18-  
9 month delay in filing a challenge to the "expert advice or assistance"  
10 provision, arguing that there is no requirement that a party challenge  
11 a statute as soon as it is enacted, and citing a number of Ninth  
12 Circuit cases in which pre-enforcement challenges were entertained  
13 long after the enactment of the statutes.<sup>5</sup>

14 Having carefully considered the parties' arguments and the  
15 applicable law, the Court finds that, with a few exceptions,  
16 Defendants' motion to dismiss for lack of justiciability must be  
17 denied. As set forth above, the relevant factors to consider in  
18 determining whether Article III requirements have been satisfied are  
19 (1) whether the plaintiffs have articulated a "concrete plan" to  
20 violate the law in question, (2) whether the prosecuting authorities  
21 have communicated a specific warning or threat to initiate  
22 proceedings, and (3) the history of past prosecution or enforcement  
23 under the challenged statute.

24 \_\_\_\_\_  
25 <sup>5</sup>See, e.g., Bland v. Fessler, 88 F.3d 729 (9<sup>th</sup> Cir.) (pre-  
26 enforcement challenge filed four years after statute's  
27 enactment), cert. denied, 519 U.S. 1009 (1996); Adult Video Ass'n  
28 v. Barr, 960 F.2d 781 (9<sup>th</sup> Cir. 1992) vacated sub nom., 509 U.S.  
918, reinstated in relevant part, 41 F.3d 503 (9<sup>th</sup> Cir.  
1994) (pre-enforcement challenge filed five years after statute's  
enactment).

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1 With respect to the articulation of a concrete plan, the Court  
2 finds that Plaintiffs have satisfied their burden. While "[a] general  
3 intent to violate a statute at some unknown date in the future does  
4 not rise to the level of an articulated, concrete plan[,]" Thomas, 220  
5 F.3d at 1139, Plaintiffs here have identified more than a  
6 "hypothetical intent to violate the law." Id. Unlike the plaintiffs  
7 in Thomas, who claimed that they had violated the law in the past and  
8 intended to do so in the future, but were unable to specify "when, to  
9 whom, where, or under what circumstances," ibid., the Plaintiffs in  
10 the instant case have articulated that they (1) have provided services  
11 in the past and would do so again if the fear of criminal prosecution  
12 were removed, and have in some cases identified the duration of time  
13 for which their services would be provided, (2) seek to assist the PKK  
14 and the LTTE (as well as Tamils in LTTE-controlled Tamil Eelam), (3)  
15 wish to provide this assistance in this country, through advocacy, as  
16 well as in Sri Lanka and Turkish-controlled Kurdistan and (4) would  
17 provide these services as needed, in many cases immediately. These  
18 plans are markedly different from the intent of the Thomas landlords  
19 to violate the law "on some uncertain day in the future." Id. at  
20 1140. The Court therefore finds that the first prong has been met.

21 Second, the Court finds that Plaintiffs have sufficiently  
22 demonstrated a threat of prosecution. As the Ninth Circuit indicated  
23 in California Pro-Life Council, "[p]articularly in the First  
24 Amendment-protected speech context, the Supreme Court has dispensed  
25 with rigid standing requirements." 328 F.3d at 1094. "In an effort  
26 to avoid the chilling effect of sweeping restrictions, the Supreme  
27 Court has endorsed what might be called a 'hold your tongue and  
28 challenge now' approach rather than requiring litigants to speak first

1 and take their chances with the consequences." Id., citing Ariz.  
2 Right to Life Political Action Comm. v. Bayless, 320 F.3d 1002, 1006  
3 (9<sup>th</sup> Cir. 2003). While recognizing that the "self-censorship door to  
4 standing" is not available for every plaintiff, fear of prosecution in  
5 the free speech context inures "if the plaintiff's intended speech  
6 arguably falls within the statute's reach." Id. at 1095.

7 While Defendants are correct that the record does not demonstrate  
8 that Plaintiffs have yet been subjected to prosecution for their  
9 activities, it is clear under California Pro-Life Council that this is  
10 not required in the free speech context. The PKK and the LTTE have  
11 been designated as foreign terrorist organizations, thus putting  
12 Plaintiffs on notice that provision of expert advice and assistance  
13 may subject them to criminal prosecution. The question is thus  
14 whether Plaintiffs' intended speech-related activities arguably fall  
15 within the statute's reach. Defendants concede that the medical  
16 expertise at least arguably falls within the reach of the statute, but  
17 contend that none of the other areas of expertise identified by  
18 Plaintiffs are actually "expert." The Court disagrees. Judge Fertig  
19 and HLP have set forth ample support of their asserted expertise in  
20 international human rights, peacemaking and advocacy, and TWHRC has  
21 identified at least two of its members with significant expertise and  
22 training in information technology and software development. For  
23 purposes of satisfying the standing requirements of Article III, the  
24 Court finds that these Plaintiffs have demonstrated that their speech  
25 at least arguably falls within the scope of the statute.

26 However, the Court finds that the failure of Plaintiffs W TTC and  
27 FETNA to provide supplemental declarations setting forth their  
28 expertise is fatal to finding that they face a threat of prosecution.

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1 The declarations submitted by these plaintiffs in September of 2003 do  
2 not adequately set forth facts sufficient for this Court to rule that  
3 they arguably fall within the statute.<sup>6</sup>

4 Third, Plaintiffs have sufficiently demonstrated a history of  
5 enforcement under the challenged statute, something which Defendants  
6 do not contest in their motion or reply. Unlike the statute in  
7 Thomas, for which there was not a single instance of criminal  
8 prosecution in the 25 years it had been in effect, the government has  
9 been active in its enforcement of the USA PATRIOT Act. The Court  
10 therefore finds that this prong weighs in favor of a finding of  
11 Article III standing.

12 Finally, the Court agrees with Plaintiffs that the delay in  
13 initiating the instant action is not fatal to a finding of standing or  
14 ripeness. Defendants have identified no legal requirement that a pre-  
15 enforcement challenge be filed within a set amount of time after a  
16 statute's enactment, and the Court finds, in light of Bland v. Fessler  
17 and Adult Video Ass'n v. Barr that this delay is not determinative.

18 Based on the foregoing, Defendants' Motion to Dismiss for lack of  
19 justiciability is hereby GRANTED IN PART and DENIED IN PART.

20 Defendants' motion is GRANTED as it relates to Plaintiffs WTTC and  
21 FETNA based on their failure to demonstrate the requisite threat of  
22 prosecution; and DENIED as it relates to Plaintiffs HLP, Judge Fertig,  
23 Dr. Jeyalingam, Sangam and TWHRC.

24 //

25 \_\_\_\_\_  
26 <sup>6</sup>The Court does not imply that an individual or group could  
27 not acquire expertise in the areas of law, politics and economic  
28 development (WTTC) or Tamil language, literature, arts, cultural  
heritage and history (FETNA). However, Plaintiffs have failed to  
set forth any evidence of such expertise in these fields.

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1           **B. Plaintiffs' Motion for Summary Judgment.**

2           Plaintiffs bring their motion for summary judgment on several  
3 grounds. First, they argue that the prohibition on providing expert  
4 advice and assistance is both impermissibly vague and substantially  
5 overbroad. Second, they contend that prohibition violates the First  
6 and Fifth Amendments by criminalizing associational speech without  
7 proof of intent to incite imminent violence or to support a group's  
8 illegal ends. Finally, they assert that the prohibition on providing  
9 expert advice and assistance violates the First and Fifth Amendments  
10 because it grants the Secretary of State unreviewable authority to  
11 designate groups as foreign terrorist organizations.

12           Defendants oppose Plaintiffs' motion, asserting that Plaintiffs'  
13 First and Fifth Amendment claims are meritless because (1) the statute  
14 is not vague under the Fifth Amendment or in relation to Plaintiffs'  
15 own conduct, (2) under Virginia v. Hicks, Plaintiffs' facial First  
16 Amendment overbreadth challenge must fail, and (3) the USA PATRIOT Act  
17 does not regulate advocacy or association with terrorist groups.  
18 Defendants also assert that the Court previously rejected Plaintiffs'  
19 arguments with respect to regulation of association and the  
20 unreviewable authority given to the Secretary of State in HLP I, and  
21 that these arguments need not be revisited here.

22           1. Plaintiffs Have Demonstrated that the Prohibition is  
23 Impermissibly Vague but Have Failed to Demonstrate that the  
24 Prohibition is Substantially Overbroad.

25           Plaintiffs first argue that the term "expert advice or  
26 assistance" is at least as vague as "training" and "personnel," the  
27 enforcement of which has been enjoined on constitutional grounds. See  
28 HLP I. Plaintiffs also contend that the prohibition is overbroad,

1 because it prohibits a substantial amount of speech activity that is  
2 clearly protected by the First Amendment.

3 a. Plaintiffs Have Demonstrated that the Prohibition is  
4 Impermissibly Vague.

5 A challenge to a statute based on vagueness grounds requires the  
6 Court to consider whether the statute is sufficiently clear so as not  
7 to cause persons "'of common intelligence . . . necessarily [to] guess  
8 at its meaning and [to] differ as to its application.'" United States  
9 v. Wunsch, 84 F.3d 1110, 1119 (9th Cir. 1996) (quoting Connally v.  
10 General Constr. Co., 269 U.S. 385, 391 (1926)). Vague statutes are  
11 void for three reasons: "(1) to avoid punishing people for behavior  
12 that they could not have known was illegal; (2) to avoid subjective  
13 enforcement of the laws based on 'arbitrary and discriminatory  
14 enforcement' by government officers; and (3) to avoid any chilling  
15 effect on the exercise of First Amendment freedoms." Foti v. City of  
16 Menlo Park, 146 F.3d 629, 638 (9th Cir. 1998) (citing Grayned v. City  
17 of Rockford, 408 U.S. 104, 108-09 (1972)).

18 "[P]erhaps the most important factor affecting the clarity that  
19 the Constitution demands of a law is whether it threatens to inhibit  
20 the exercise of constitutionally protected rights. If, for example,  
21 the law interferes with the right of free speech or of association, a  
22 more stringent vagueness test should apply." Village of Hoffman  
23 Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).  
24 "The requirement of clarity is enhanced when criminal sanctions are at  
25 issue or when the statute abuts upon sensitive areas of basic First  
26 Amendment freedoms." Information Providers' Coalition for the Defense  
27 of the First Amendment v. FCC, 928 F.2d 866, 874 (9th Cir. 1991)  
28 (quotation omitted). Thus, under the Due Process Clause, a criminal



1 statute is void for vagueness if it "fails to give a person of  
2 ordinary intelligence fair notice that his contemplated conduct is  
3 forbidden by the statute." United States v Harriss, 347 U.S. 612, 618  
4 (1954).

5 The determinative issue is thus whether the USA PATRIOT Act  
6 sufficiently identifies the prohibited conduct. Plaintiffs contend  
7 that the term "expert advice or assistance" is at least as vague as  
8 the terms "training" and "personnel," which the Court previously held  
9 to be vague as applied to Plaintiffs. To support this contention,  
10 Plaintiffs cite the definitions of "expert," "advice" and "assistance"  
11 to show that (1) "expert" fails to identify the types of activities  
12 which may or may not be undertaken, (2) "advice" is virtually  
13 synonymous with "training," (3) "assistance," which is potentially  
14 broader than "advice," could encompass nearly any human resources  
15 support, and (4) although the modifier "expert" makes the ban on  
16 advice and assistance less broad than the ban on the provision of  
17 "personnel," it is still similar to, and potentially broader than, the  
18 ban on "training."

19 In addition to the foregoing, Plaintiffs argue that the  
20 prohibition conceivably encompasses any activity that may provide  
21 counsel or aid, regardless of intent, including many activities  
22 protected by the First Amendment, e.g., instructing designated groups  
23 how to petition the United Nations and advocating for a designated  
24 group. Plaintiffs assert that certain expert advice and assistance,  
25 which they believe to be protected by the First Amendment, could  
26 potentially be barred by the USA PATRIOT Act. Specifically, (1) HLP  
27 seeks to assist the PKK by advocating on its behalf and advising it on  
28 international law and the art of peacemaking and negotiation; (2)

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1 physician members of Sangam and Dr. Jeyalangim wish to provide expert  
2 medical advice and assistance to improve the delivery of health care  
3 in LTTE-controlled regions of Sri Lanka; and (3) TWHRC members seek  
4 provide expertise to the LTTE in the fields of economic development  
5 and information technology.<sup>7</sup> Plaintiffs claim that they are fearful  
6 that participating in these activities would constitute providing  
7 expert advice or assistance to foreign terrorist organizations, for  
8 which they would be subject to criminal prosecution.

9 In their opposition, Defendants argue that the definitions of  
10 "expert," "advice" and "assistance" are clear, as is Congress's intent  
11 to deny foreign terrorist groups expert skills, whether in the flying  
12 of jet aircraft, the raising of funds or the manufacture of weapons.  
13 Defendants also claim that the statute does not prohibit either (1)  
14 advocacy on behalf of terrorist organizations or their causes or (2)  
15 association with those organizations in furtherance of their advocacy  
16 goals. With the exception of these activities, in Defendants' view,  
17 the statute gives "fair warning" that it prohibits the provision of  
18 any expert advice or assistance to terrorist organizations.

19 Defendants next argue that the law is not vague in relation to  
20 Plaintiffs' own conduct, because it puts them on notice that the  
21 provision of medical services is barred, as is the provision of expert  
22 advice or assistance on economic development or human rights  
23 advocacy.<sup>8</sup> Thus, in Defendants' view, Plaintiffs' argument that the

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25 <sup>7</sup>Because WTTC and TWHRC have been dismissed, it is  
26 unnecessary to address the expert advice and assistance they  
sought to offer to the LTTE.

27 <sup>8</sup>Defendants do not address whether this prohibition extends  
28 to the provision of advice and assistance in the field of  
information technology, although presumably such activity is also

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1 prohibition is impermissibly vague must fail.

2 In their reply, Plaintiffs first point out that Defendants'  
3 opposition entirely fails to articulate how the term "expert advice  
4 assistance" is less vague than "training" and "personnel." They also  
5 note that Defendants appear to contradict themselves, by asserting  
6 that the ban does not prohibit advocacy of foreign terrorist  
7 organizations but does preclude the provision of any expert advice or  
8 assistance, including associational activity which might be construed  
9 as expert advice or assistance, which Plaintiffs contend could  
10 potentially include HLP's intended assistance to the PKK in the fields  
11 of training in human rights advocacy and peacemaking. Plaintiffs  
12 conclude based on this that the term "expert advice or assistance" is  
13 void for vagueness for the same reasons the Court previously found the  
14 terms "training" and "personnel" to be impermissibly vague.<sup>9</sup>

15 Having considered the parties' arguments and the relevant law,  
16 including the rulings in HLP I, the Court concludes that the term  
17 "expert advice or assistance," like the terms "training" and  
18 "personnel," is not "sufficiently clear so as to allow persons of  
19 'ordinary intelligence a reasonable opportunity to know what is  
20 prohibited.'" Foti, 146 F.3d at [638] (quoting Grayned, 408 U.S. at  
21 108). Defendants have failed to adequately distinguish the provision  
22 of "expert advice or assistance" from the provision of "training" or

23 \_\_\_\_\_  
24 barred by the statute.

25 <sup>9</sup>Defendants raise additional arguments in opposition to  
26 Plaintiffs' motion for summary judgment in their reply in support  
27 of their own motion to dismiss. To the extent that these  
28 arguments constitute an improper sur-reply, the Court has  
disregarded them. The Court also notes that Defendants'  
arguments on this issue conflict with the Ninth Circuit's recent  
decision.

1 "personnel" in a way that allows the Court to reconcile its prior  
2 finding that the terms "training" and "personnel" are impermissibly  
3 vague, with a finding that the term "expert advice or assistance" is  
4 not.

5 Furthermore, Defendants' contradictory arguments on the scope of  
6 the prohibition underscore the vagueness of the prohibition. The  
7 "expert advice or assistance" Plaintiffs seek to offer includes  
8 advocacy and associational activities protected by the First  
9 Amendment, which Defendants concede are not prohibited under the USA  
10 PATRIOT Act. Despite this, the USA PATRIOT Act places no limitation  
11 on the type of expert advice and assistance which is prohibited, and  
12 instead bans the provision of all expert advice and assistance  
13 regardless of its nature. Thus, like the terms "personnel" and  
14 "training," "expert advice or assistance" "could be construed to  
15 include unequivocally pure speech and advocacy protected by the First  
16 Amendment" or to "encompass First Amendment protected activities."  
17 2003 U.S. App. LEXIS 24305 at \*60-61 (9<sup>th</sup> Cir. Dec. 3, 2003).

18 Based on the foregoing, the Court finds that Plaintiffs have  
19 satisfied their burden on their claim that the term "expert advice or  
20 assistance" is impermissibly vague, and concludes that Plaintiffs are  
21 entitled to injunctive relief.<sup>10</sup>

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22  
23 <sup>10</sup>The Ninth Circuit recently construed 18 U.S.C. §2339B "to  
24 require the government to prove that a person acted with  
25 knowledge of an organization's designation as a 'foreign  
26 terrorist organization' or knowledge of the unlawful activities  
27 that caused the organization to be so designated." 2003 U.S.  
28 App. LEXIS 24305 at \*29-30 (9<sup>th</sup> Cir. Dec. 3, 2003). Although the  
Ninth Circuit's ruling in HLP I clarifies the statute's scienter  
requirement with respect to non-First Amendment protected  
activities, it does not mitigate a finding of vagueness with  
respect to those activities that fall within the scope of the  
First Amendment. See id. at \*57-59 (affirming this Court's ruling

1        b.    Plaintiffs Have Failed to Demonstrate that the Prohibition  
2            is Substantially Overbroad.

3            "The First Amendment doctrine of overbreadth is an exception to  
4 [the] normal rule regarding the standards for facial challenges."  
5 Virginia v. Hicks, 123 S. Ct. 2191, 2196 (2003). Under the  
6 overbreadth doctrine, a "showing that a law punishes a 'substantial'  
7 amount of protected free speech judged in relation to the statute's  
8 plainly legitimate sweep . . . suffices to invalidate *all* enforcement  
9 of that law, until and unless a limiting construction or partial  
10 invalidation so narrows it as to remove the seeming threat or  
11 deterrence to constitutionally protected expression." Id. (internal  
12 citations and quotations omitted.)

13            Despite the foregoing, the Supreme Court has recognized that  
14 "there comes a point at which the chilling effect of an overbroad law,  
15 significant though it may be, cannot justify prohibiting all  
16 enforcement of that law-particularly a law that reflects legitimate  
17 state interests in maintaining comprehensive controls over harmful,  
18 constitutionally unprotected conduct." Id. at 2197. "To ensure that  
19 [the substantial social costs created by the overbreadth doctrine] do  
20 not swallow the social benefits of declaring a law 'overbroad,'" the  
21 Supreme Court requires that the "law's application to protected speech  
22 be 'substantial,' not only in an absolute sense, but also relative to  
23 the scope of the law's plainly legitimate applications before applying  
24 the 'strong medicine' of the overbreadth invalidation." Id.

25            In their motion, Plaintiffs contend that the term "expert advice  
26

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27            that the terms "personnel" and "training" are impermissibly vague  
28 "because they bring within their ambit constitutionally protected  
speech and advocacy.")

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1 or assistance" is substantially overbroad because it prohibits a  
2 substantial amount of speech activity which is clearly protected by  
3 the First Amendment, such as training in human rights advocacy, giving  
4 advice on how to improve medical care and education, and distributing  
5 human rights literature. Defendants oppose, arguing that Plaintiffs  
6 have failed to meet their burden in showing that substantial  
7 overbreadth exists, as required by Virginia v. Hicks. In Defendants'  
8 view, Plaintiffs have offered no examples of core political activities  
9 barred by the statute, and the examples they have provided fall short  
10 of demonstrating that the statute prohibits a substantial amount of  
11 speech in either an absolute sense or in relation to the law's  
12 legitimate applications.

13 With respect to the physician members of Sangam and Dr.  
14 Jeyalangim, Defendants contend that the prohibition on providing  
15 medical aid and advice survives First Amendment scrutiny because (1)  
16 the practice of medicine is subject to reasonable licensing and  
17 regulation, (2) the government has the authority to restrict the  
18 dealings of United States citizens with foreign entities and (3) the  
19 prohibition is not aimed at interfering with the expressive component  
20 of Plaintiffs' intended conduct.<sup>11</sup>

21 In addition, Defendants argue that Plaintiffs cannot demonstrate  
22 overbreadth from the statutory text itself. In Defendants' view,

23 \_\_\_\_\_  
24 <sup>11</sup>Defendants also argue that the record is devoid of any  
25 facts showing that Plaintiffs' alleged intended conduct comes  
26 within the statute's reach, asserting that with the exception of  
27 the doctors' medical expertise, Plaintiffs have presented  
28 insufficient evidence that the advice and assistance they seek to  
offer is "expert" for purposes of the USA PATRIOT Act. The Court  
already rejected this argument in its ruling on Defendants'  
motion to dismiss.

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1 while the statute might at the fringes apply to protected speech, this  
2 is insufficient to block its legitimate applications. To succeed,  
3 Plaintiffs must demonstrate that the law's application is substantial  
4 both in an absolute sense and relative to the scope of the law's  
5 legitimate applications. While Defendants concede that the statute  
6 could apply to international human rights advocacy and peacekeeping,  
7 thus implicating First Amendment values, they argue that because the  
8 statute is not aimed at interfering with expressive conduct,  
9 Plaintiffs' overbreadth claim must be dismissed. Defendants argue  
10 that any potential First Amendment violation can be remedied by "as  
11 applied" litigation.

12 In their reply, Plaintiffs reiterate that the ban is directed at  
13 pure speech, not just at the margins, and at all expert advice and  
14 assistance, regardless of whether it is intended to or could ever  
15 further terrorist activity. They also argue that the examples  
16 identified by Defendants as activities which may be legitimately  
17 barred are the same as those used in defense of the ban on "training,"  
18 despite the fact that the ban is not limited to those forms of advice  
19 and assistance. Finally, Plaintiffs contend that Virginia v. Hicks  
20 does not contradict their position, as the law in Virginia v. Hicks  
21 had nothing to do with the plaintiffs' speech and the Court indicated  
22 that the plaintiff had failed to show that the bar would be applied to  
23 anyone engaging in constitutionally protected speech.

24 The Court agrees with Defendants that Plaintiffs have failed to  
25 meet their burden in establishing that the prohibition on the  
26 provision of "expert advice or assistance" is substantially overbroad,  
27 thereby warranting an injunction of its enforcement. Although  
28 Plaintiffs have provided examples of some protected speech which may

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1 be prohibited by the application of the ban, this is not sufficient to  
2 meet the burden imposed by Virginia v. Hicks. The USA PATRIOT Act's  
3 prohibition of the provision of "expert advice or assistance" is aimed  
4 at furthering a legitimate state interest: curbing support for  
5 designated foreign terrorist organizations' activities, which  
6 unquestionably constitute "harmful, constitutionally unprotected  
7 conduct." Virginia v. Hicks, 123 S. Ct. at 2197. Plaintiffs have  
8 failed to demonstrate that the USA PATRIOT Act's application to  
9 protected speech is "substantial" both in an absolute sense and  
10 relative to the scope of the law's plainly legitimate applications.  
11 The Court therefore declines to apply the "strong medicine" of the  
12 overbreadth doctrine, finding instead that as-applied litigation will  
13 provide a sufficient safeguard for any potential First Amendment  
14 violation.

15 2. Plaintiffs Have Failed to Demonstrate that the Prohibition  
16 on the Provision of "Expert Advice or Assistance"  
17 Criminalizes Associational Speech.

18 Plaintiffs argue that the prohibition on providing "expert advice  
19 or assistance" punishes pure speech by penalizing moral innocents for  
20 the culpable acts of the groups that they have supported through their  
21 speech, without requiring a showing of intent to incite or further  
22 terrorist or other illegal activity. For support, they cite  
23 Brandenburg v. Ohio, 395 U.S. 444 (1969) and McCoy v. Stewart, 282  
24 F.3d 626 (9<sup>th</sup> Cir.), cert. denied, 537 U.S. 993 (2002). Plaintiffs  
25 attempt to distinguish this argument from that made in HLP I on the  
26 ground that they do not seek to provide material support in the form  
27 of money or any other tangible asset, but only through associational  
28 speech and assistance.



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1 In their opposition, Defendants contend that this argument was  
2 previously raised and rejected by the Court in HLP I, where the Court  
3 found that the material support restriction (1) was content-neutral  
4 and not aimed at the suppression of free speech and (2) does not  
5 criminalize mere association with designated foreign terrorist  
6 organizations. These rulings were affirmed by the Ninth Circuit. See  
7 205 F.3d at 1135. According to Defendants, the addition of "expert  
8 advice or assistance" should not alter the analysis of the issue by  
9 this Court or the Ninth Circuit, and Plaintiffs' efforts to relitigate  
10 HLP I should be rejected.

11 The Court agrees with Defendants that Plaintiffs' attempt to  
12 relitigate this issue is improper. In addition, as discussed in Note  
13 10, the Ninth Circuit recently clarified that the knowledge required  
14 by the statute is of a group's designation as a terrorist  
15 organization, or its participation in unlawful activities that caused  
16 it to be so designated. There is thus no risk of the prosecution of  
17 "moral innocents" under the law, contrary to Plaintiffs' assertion.  
18 The Court therefore DENIES Plaintiffs' motion for summary judgment on  
19 this basis.

20 3. Plaintiffs Have Failed to Demonstrate that the Prohibition  
21 Gives the Secretary of State Unreviewable Authority to  
22 Designate Groups as Terrorist Organizations.

23 Plaintiffs' final argument in support of their motion for summary  
24 judgment is that the prohibition on providing "expert advice or  
25 assistance" found in the USA PATRIOT Act violates the First and Fifth  
26 Amendments by granting the Secretary of State unreviewable authority  
27 to designate groups as terrorist organizations. Plaintiffs recognize  
28 that the Court previously rejected the same argument made with respect

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1 to the material support provision as a whole in HLP I. 9 F. Supp. 2d  
2 at 1198-1201 (finding that Plaintiffs had failed to establish a  
3 probability of success on the merits of their claim that the Secretary  
4 of State had unfettered discretion to target disfavored political  
5 groups), aff'd, 205 F.3d at 1136-1137 (finding that the AEDPA's  
6 standard is not so vague or indeterminate as to give the Secretary of  
7 State unfettered discretion). Plaintiffs have not presented any  
8 arguments in their motion that would require the Court to reconsider  
9 its previous determination. The Court therefore DENIES Plaintiffs'  
10 motion for summary judgment on this basis, concluding that Plaintiffs  
11 have failed to establish that the prohibition on providing "expert  
12 advice and assistance" violates the First and Fifth Amendments by  
13 giving the Secretary of State virtually unreviewable authority to  
14 designate groups as terrorist organizations.

15 **V. CONCLUSION**

16 For the reasons set forth above, Defendants' Motion to Dismiss is  
17 GRANTED IN PART and DENIED IN PART as follows:

- 18 1. The Court GRANTS Defendants' motion to dismiss as it relates  
19 to Plaintiffs WTTC and FETNA; and
- 20 2. The Court DENIES Defendants' motion to dismiss as it relates  
21 to Plaintiffs HLP, Judge Fertig, Dr. Jeyalingam, Sangam and  
22 TWHRC.

23 Plaintiffs' Motion for Summary Judgment is GRANTED IN PART and  
24 DENIED IN PART as follows:

- 25 1. Plaintiffs' motion is GRANTED to the extent the Court finds  
26 that the term "expert advice or assistance" is impermissibly vague;  
27 and
- 28 2. Plaintiffs' motion is DENIED with respect to the remaining

1 arguments raised.

2 Accordingly, Defendants, their officers, agents, employees, and  
3 successors are ENJOINED from enforcing the USA PATRIOT Act's  
4 prohibition on providing "expert advice or assistance" to foreign  
5 terrorist organizations against any of the remaining named Plaintiffs  
6 or their members. The Court declines to grant a nationwide  
7 injunction.

8  
9 SO ORDERED.

10  
11 DATED:

January 22, 2004

Audrey B. Collins  
AUDREY B. COLLINS  
UNITED STATES DISTRICT JUDGE

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