

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

vs.

Case No. 8:07-CR-342-T-23MAP

AHMED ABDELLATIF SHERIF MOHAMED
_____ /

**AHMED MOHAMED’S MOTION and MEMORANDUM
TO DISMISS COUNT 1 OF THE INDICTMENT**

The Defendant, AHMED ABDELLATIF SHERIF MOHAMED, by and through his undersigned counsel, respectfully move the Court to dismiss Count 1 of the Indictment, (alleging a violation of 18 United States Code § 842 (p)(2)(A) and 2 and 18 United States Code § 2339(A)) on the grounds that this count violates the First and Fifth Amendments to the United States Constitution because (1) it violates the requirement set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) that restrictions on speech be limited to the prevention of “imminent lawless action.” (2) it is impermissibly overbroad; and (3) excessively vague; This statute implicates pure speech and contains no express requirement that the speech at issue be intended to incite imminent lawless action.

Additionally, the prohibition of 18 U.S.C. § 2339 A of “material support to terrorists” as used is unconstitutionally vague, and the charges pursuant to it cannot stand. Furthermore, the conduct of the defendant does not fit within the definition of a federal crime of violence

The grounds in support of this motion are set forth below.

INTRODUCTION

The central allegation in Count 1 of the Indictment is that the defendant's activity constituted a federal crime of violence in providing material support to terrorists in violation of 18 U.S. C. § 2339 A ("2339A") by teaching and demonstrating the making and use of an explosive and destructive device and distributing this information in violation of 18. U.S.C. § 842 (p)(2)(A) ("842"). Because the contours of the government's case are not yet clear, we have little besides the indictment to determine the conduct, which the government alleges, supports this allegation. Count 1 is premised on speech.

In a nutshell, it is the government's theory, as reflected in the indictment and in the discovery received thus far, that the defendant produced a 12-minute video in Arabic, wherein he demonstrated how to convert a remote control toy car into a detonator, which he then posted on the Internet. As of this writing, it is unclear exactly how long the video remained on the Internet, but it is understood that it was removed shortly after its posting. Also unclear are the alleged statements by Mr. Mohamed which the government claims constituted material support to terrorists, thereby defining the essential element of the federal crime of violence.

What is clear is that at no time did the speaker direct an attack against any particular target, that the tone of the speaker did not connote incitement and that there was no specific identifiable person(s) to whom the comments were directed. Indeed, the 'battle' of the "terrorists" is neither identified nor identifiable. There is no evidence that the speaker conspired with anyone to commit any illegal act. The indictment fails to state who the "terrorists" are who Mr. Mohamed is alleged to have supported with the instruction of this video. Are these Specially Designated Terrorists, as listed under the 1995 International Emergency Economic Powers (IEEP) Act and initiated under Presidential Executive Order 12947, which list is maintained by the U.S. Treasury Department? Or are these Specially Designated Global Terrorists, also implemented under the IEEP Act? Or are they fighters in some distant battle somewhere in the world? The indictment does not speak to the theater in which these so-called "terrorists" operate, nor

does it define their enemy. Because the indictment is ‘bare bones’, it provides no insight and no ability for Mr. Mohamed to address the core issue of intent.

What we do know about the government’s theory can be found in their filing with the Court. In their Response and Memorandum of Law in Opposition to Defendant Megahed’s Motion to Sever, Doc. #69, they pointed to the following statement from the video to support their claim of terrorist support:

In the video, the male narrator disassembled the toy car and talked about converting the circuit that connects the radio control device to the motor of the car and turning it into a circuit for a detonator. Among the comments on the tape are the following:

Instead of the brethren going to, to carry out martyrdom operations, no May G-D bless him, he can use the explosion tools from distance and preserve His life, G-D willing, the blessed and exalted, for real battles.¹
Page 3.

In fact, the concept of the statements as expressed on the video can be interpreted to inform someone, who wishes to carry out a “martyrdom operation” in the unknown future, to preserve their own life by use of this manner of detonation. While the statement may be condemnable, there is nothing imminent about it; nor is it “lawless”, without more articulation by the government². This does not fit within the definition of “imminent lawless action” as required by *Brandenburg* and its progeny. Speech advocating unlawful acts is thus unprotected only if it is “intended to produce, and likely to produce, imminent disorder”; “*advocacy of illegal action at some indefinite future time*” is not actionable. *Hess v. Indiana*, 414 U.S. 105, 108-109 (1973). (*Emphasis added*). One may even advocate for action that makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party, *Planned Parenthood of the Columbia/Willamette Inc. V. American Coalition of Life Activists*

¹ It should be noted that the government may reference other statements as evidence of Mr. Mohamed’s intent. However, as of this writing, this is the only filed statement, which has been expressly pointed to in support of their allegations.

² This issue will be the subject of a Motion for Bill of Particulars filed separately.

*(PPCWI), 244 F 3d 1007, 1015 (9th Cir 2001), vacated on other grounds, 290 F3d 1058 (9th Cir 2002) (en banc), cert denied, 123 S. Ct. 2637 (2003)(PPCWII).*³

If those statements are to be categorized at all, they may fall within the context of political speech, which must be given deference and not criminalized. The government utilizes these statements as an attempt to create a bridge between the Accused and the hypothetical violence somewhere in the world by unknown terrorists, with no evidence they learned from this video how to commit the violence; thus forms the basis of Count 1.

What is also clear is that the statements on the videotape regarding the detonator are widely available on the Internet. Even if this Court were to find the statute constitutional, nothing the defendant said or did, as alleged in this video, comes within the conduct proscribed in the indictment.

As set forth below, under the rule clearly expressed in *Brandenburg*, section 842(p)(2)(A) violates the First Amendment because it criminalizes speech without requiring that the speech be likely to produce imminent criminal conduct. The statute is overbroad and, therefore, violates the First and Fifth Amendments because it sweeps within its prohibition a substantial amount of protected speech. The statute also violates the Due Process Clause because it fails to put a reasonable person on notice of the conduct it criminalizes.

COUNT ONE

There is no introduction to Count 1 of the indictment. It merely tracks the statute with no reference to the conduct actually proscribed; in fact, no specific acts are discussed in the indictment. Therefore, a discussion of the statute and its legislative history is instructive to the challenge herein.

Congress enacted Title 18 U.S.C. § 842(p)(2)(A) in 1999. The pertinent portions state:

³ Mr. Mohamed denies that he has advocated a violation of the law. The comment merely is provided to describe the scope of the Constitutionally protected right.

It shall be unlawful for any person – to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an act that constitutes a Federal crime of violence.

In reviewing the legislative history of the statute, it is instructive to review the amendment to section 842 as proposed by Senator Feinstein in 1996 and the critical requirement of *scienter*. The “Feinstein Amendment” proposed to make it “unlawful for any person to teach or demonstrate the making of explosive materials, or to distribute by any means information pertaining to the manufacture of explosive materials.” Integral to the amendment was the requirement that “the person intends or knows, that such explosive materials or information will likely be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a criminal purpose affecting interstate commerce.”

While awaiting passage, the Judiciary Committee waited for the Department of Justice (“DOJ”) to finish a report on the subject of the availability of bomb-making material on the Internet and in print along with the First Amendment implications of federal laws designed to suppress this information which the DOJ was required to complete under section 709 of the Anti-Terrorism and Effective Death Penalty Act of 1996. In this report, the committee specifically addressed the proposed amendment, and in April of 1997, the DOJ released its report, which was entitled: *Report on the Availability of Bomb making Information, the Extent to which its Dissemination is Controlled by Federal Law, and the Extent to Which Such Dissemination may be subject to Regulation* (“Report”). (See <http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html>). In its analysis of the applicable case law and the restrictions imposed by the First Amendment, the Report addressed the “Feinstein Amendment” and demonstrated why section 842(p)(2)(A) is unconstitutional.

In the “Background” section of the Report, the DOJ assessed the availability of information regarding the manufacture of explosives or destructive devices available in our society. The Report noted that “. . . a cursory search of the holdings of the Library of Congress located at least 50 publications substantially devoted to such information all readily available to any member of the public interested in reading them and copying their contents.” Report, I.A. Moreover, the number of Internet sites containing such information was virtually unlimited.

home computer equipped with a mode. To demonstrate such availability, a member of the DOJ Committee accessed a single website on the World Wide Web and obtained the titles to over 110 different bomb making texts.....The user could access and print the text of each of the listed titles.

Report, I.B.

In its final section, the Report analyzed whether prospective legislation designed to proscribe the dissemination of such material, such as the Feinstein Amendment, violated the First Amendment. Mindful of the Constitutional implications, the Report concluded that a prohibition on the dissemination of bomb-making and other destructive materials should be drafted so that it criminalizes only the dissemination of information to a particular individual when the individual who teaches or disseminates the material knows that the recipient intends to use the material to commit a crime of violence. In this way, the disseminator is guilty of “aiding and abetting” the recipient in the crime. In addressing this issue, the DOJ stated, in part:

such a prohibition could be, in constitutionally significant respects, less problematic than a statute or tort that punishes speech having a propensity to be misused by some unknown recipient. In the latter type of tort and criminal cases, the practical effect of a penalty would be to deter altogether the dissemination of the information, since there is always a chance that some reader, listener or viewer will turn the information to bad use, and the only way to avoid this risk is to cease speaking altogether. **Indeed, even where there would in fact be only a slim likelihood that the information would be misused, a jury might be expected to find the requisite degree of “recklessness,” particularly if - as is likely in such cases - the jury is hostile to the message conveyed in the information and does not believe that it serves any social utility to distribute such information.** ...

In drafting a constitutional facilitation statute, we think the safest strategy would be to address Senator Biden's scenario directly -- for example, by barring dissemination of bomb-making information to a particular person, where the disseminator knows that such person intends to use the information for an **unlawful purpose**. Under such a statute, the requisite “knowledge” would not be of a **future** event, but instead, of someone else's **present** intent. Therefore, the government would not be required to prove that the disseminator was “practically certain” of the recipient's intent. See *supra* at 21 (discussing “practical certainty” standard for “knowledge” of future events). **Instead, it should suffice to prove that the person providing the information was aware of a “high probability” that the recipient had an intent to use the information to commit a crime.**

Report, VI. B (emphasis added)

In 1999, Congress prepared to pass a modified Feinstein amendment. The report suggested the distribution of information to a “particular person” and knowledge of that “particular person’s” “intent to use the information to commit a crime” would be imperative in drafting a constitutional statute; 842(p), as enacted, did not contain those words. As set forth below, the DOJ was correct in its assessment that the “particular person’s” “intent to use the information to commit a crime” language was required in order to make this statute pass Constitutional muster. Accordingly, if this Court does not strike down the statute in its entirety, it should construe it to require the type of person to particular person with a criminal intent component as set forth in the Report.

ARGUMENT

COUNT ONE VIOLATES THE FIRST AMENDMENT BECAUSE IT PUNISHES A SUBSTANTIAL AMOUNT OF CONSTITUTIONALLY PROTECTED SPEECH

A. The Government May Not Criminalize Speech Even if Such Speech Advocates Violence Unless It is Likely to Incite Others to Imminent Lawless Action.

While certain categories of speech may not be constitutionally protected, the Supreme Court traditionally has limited such speech to three categories of exceptions: obscenity, “fighting words”, and “clear and present danger”. For Section 842(p) to pass constitutional muster, it must fall under the “clear and present danger” exception.

and present danger” exception. Since it does not, the statute is unconstitutionally overbroad because it criminalizes speech and fits within no recognized exception.

The “clear and present danger” standard was first articulated by Justice Oliver Wendell Holmes, Jr., in the dicta of his opinion for a unanimous court in the landmark case of *Schenk v. United States*, 249 U.S. 47 (1919). The drama of the First Amendment’s expanding interpretation also can be seen in the rhetorical dissent of Justice Holmes in *Abrams vs. United States* 250 U.S. 616 (1919).

In that case, four radical refugees from the pogroms of czarist Russia protested President Wilson’s decision to send American troops into Russia after the Bolshevik Revolution. They distributed leaflets urging a general strike in protest against Wilson’s intervention. They were charged under amendments to the Espionage Act, which made it a crime to “utter, print, write or publish any disloyal, profane, scurrilous, or abusive language’ about the Constitution, the armed forces, military uniforms, or the flag. The charge was that their leaflets were an attempt to hurt the war against Germany. They were all convicted. The Supreme Court affirmed the convictions. But Justice Holmes dissented. He wrote that the United States had the power to “punish speech that produces and is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils.”... He went on:

That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.... While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”

Id at 630

Holmes, joined in dissent by Brandeis, argued that it is not the government’s place to suppress ideas because they are “wrong”; rather, there is to be a “free trade in ideas,” and truth will become accepted through “the competition of the market.” *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In his concurrence in *Whitney*, 274 U.S. at 373, Justice Brandeis (now joined by Holmes) argued that the supposed dicta in *Schenk* was binding, and that the government could not

restrict speech “. . . unless [the] speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent.” However, this question was not definitively settled until the seminal case of *Brandenburg v. Ohio*, 395 U.S. 444, when the Supreme Court expressly adopted the Holmes/Brandeis standard articulated in *Schenk, Abrams* and *Whitney*.

B. The Advocacy of Violence is Protected by the First Amendment

Brandenburg, the Supreme Court’s seminal advocacy case, established that mere advocacy for the use of force or violation of the law is constitutionally protected. *Id.* 395 U.S. at 449 (stating that a statute which “purports to punish for mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action... falls within the condemnation of the [First Amendment]”). In *Brandenburg*, a leader of an Ohio Ku Klux Klan (“KKK”) had been convicted under a state statute that prohibited advocating “the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform” after his speech at a KKK rally had been filmed by a news reporter. *Id.* At 444-445. One portion of the film showed Brandenburg and several individuals, some of whom were armed, wearing hoods and gathering around a large burning cross. *Id.* At 445-446. Other portions of the film showed Brandenburg making a speech warning of “revengeance”(sic) if the suppression of the white race continued, and making several derogatory comments regarding African-Americans and Jews, including the statements, “Bury the niggers. We intend to do our part, and “Send the Jews back to Israel.” *Id.* At 446-47; 446, n.1.

The United States Supreme Court struck down the statute in reliance on the First Amendment, and reversed Brandenburg’s conviction. *Id.* At 449. The Court reasoned that its prior decision in *Noto v. United States*, 367 US 290, 297-98 (1961), distinguished between the mere abstract teaching of the

moral propriety or moral necessity to resort to force and violence and actually preparing a group for violence and setting it into action. *Id.* At 447-48.

In doing so, the Court established the standard for the constitutional guarantee of free speech by holding that the First Amendment provides protection for the advocacy of force or the violation of the law “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such an action.” *Id.* At 448 (emphasis added). Applying this test to the Ohio statute, the Court found that it:

punishes persons who advocate or teach the duty, necessity, or propriety of violence as a means of accomplishing ... political reform; or who publish or circulate or display any book or paper containing such advocacy; or who justify the commission of violent acts with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or who voluntarily assemble with a group formed to teach or advocate the doctrines of criminal syndicalism. *Id.*

Accordingly, the Court found that the statute violated the First Amendment in that it failed to distinguish between mere advocacy and the incitement of imminent lawless action. *Id.* at 448-49.

In (PPCWI), the Ninth Circuit further clarified the limits as set forth in *Brandenburg*:

Political speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party. In *Brandbenberg* the Supreme Court held that the First Amendment protects speech that encourages others to commit violence, unless the speech is capable of ‘producing imminent lawless action.’ ***It doesn’t matter if the speech makes future violence more likely***; advocating ‘illegal action at some indefinite future time’ is protected.²⁴⁴ F.3d at 1015 (internal citations omitted) (emphasis added)

Again, another court stated that speech, which merely encourages unrelated terrorists to commit violent acts, is protected by the First Amendment.⁴ *Id.*

C. The Advocacy of Illegal Action at Some Indefinite Time in the Future is Protected

⁴ This statement was endorsed by the en banc panel in PPCW II: “had [the defendants] merely endorsed or encouraged the violent action of others, [their] speech would be protected. ...[A]dvocating violence is protected...” 290 F.3d at 1072.

By the First Amendment⁵

In *Hess v. Indiana*, 414 US 105 (1973), the United States Supreme Court held that advocating for illegal action at some indefinite time in the future was protected by the First Amendment. Hess had been a participant in an antiwar demonstration at Indiana University during which several individuals had entered a public street disrupting the flow of traffic. *Id.* at 106. When the demonstrators failed to obey verbal orders of the sheriff to clear the street, he and his deputies began walking up the street causing the demonstrators to retreat to the sidewalks. *Id.* As the sheriff walked up the street he heard Hess yell “fuck”, and arrested him for disorderly conduct. *Id.* at 107. It was later determined that Hess had actually stated “We’ll take the fucking street later,” or “We’ll take the fucking street again.”. *Id.*

Hess was convicted in City Court for disorderly conduct despite his argument that the imposition of criminal sanctions based upon protected speech violated the First Amendment. *Id.* at 106. On appeal, his conviction was affirmed by the Superior Court, as well as the Supreme Court of Indiana, which found that Hess’s statement “was intended to incite further lawless action on the part of the crowd in the vicinity of [Hess] and was likely to produce such action.” *Id.* at 106, 108. The United States Supreme Court rejected this finding, declaring:

At best, however, the statement could be taken as counsel for present moderation; at worst, *it amounted to nothing more than advocacy of illegal action at some indefinite future time.* This is not sufficient to permit the State to punish Hess’ speech. Under our decisions, *the constitutional guarantee of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.* Since the uncontroverted evidence showed that Hess’

⁵ Mr. Mohamed humbly reminds the Court that he does not concede he advocated illegal action at any time during this video. The statement about “brethren” carrying out “martyrdom operations” is ambiguous in terms of the identity, if there is a specific one, of the brethren and the specifics of the “operations”. International law may be implicated within this sentiment, which may render such a comment, in the proper context, ‘lawful’.

statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, *those words could not be punished by the State on the ground that they had a tendency to lead to violence.*

Id. at 108-09 (internal citations and quotations omitted) (emphasis added).

Accordingly, the Supreme Court reversed Hess's convictions. *Id.* at 109; *see also Ashcroft v. Free Speech Coalition*, 535 US 234, 253 (2002) (ban on virtual child pornography violates First Amendment notwithstanding government's argument that such pornography "whets the appetite of pedophiles and encourages them to engage in illegal conduct", there are "vital distinctions between words and deeds, between ideas and conduct," and the "government may not prohibit speech because it increases the chance of an unlawful act will be committed 'at some indefinite future time'" *Quoting Hess* (other citations omitted)).

D. Under *Brandenburg* Timing is Crucial, as The Illegal Act Must Be Likely to Occur Imminently

The Ninth Circuit next examined the applicability of *Brandenburg* in *McCoy v. Stewart*, 282 F.3d 626 (9th Cir. 2002), in which a former gang member had been convicted under an Arizona statute for participating in a criminal street gang. *Id.* at 628. The basis of the charge was that the defendant, McCoy, had provided advice to members of the "Bratz" street gang on how to operate their gang. *Id.* at 630. Specifically, he had recommended that they continue their initiation practices and increase their gang graffiti activities. *Id.* at 630. After exhausting his state appeals, McCoy sought and obtained habeas relief in US District Court that found his conviction to violate the First Amendment. *Id.* at 629. The state appealed.

At the Ninth Circuit, McCoy argued that his speech to members of the Bratz constituted nothing more than “abstract advocacy of lawlessness not directed to inciting imminent lawless action,” and was therefore protected under *Brandenburg*. *Id.* The Court emphasized:

Under *Brandenburg timing is crucial*, because speech must incite imminent lawless action to be constitutionally proscribable. Thus, several years later in *Hess v. Indiana*, the Court made explicit what was implicit in *Brandenburg*: a state cannot constitutionally sanction advocacy of illegal action at some indefinite future time.

Id. at 631.

Applying *Brandenburg* and *Hess*, the Ninth Circuit found that McCoy’s speech was merely the abstract advocacy of lawlessness. *Id.* The court analyzed the context of the conversations as well as the specificity of the instructions given. The court stated:

the circumstance of McCoy’s speech - interspersed at a barbeque and a social party, while Bratz members were drinking, chatting and listening to music - *made it unlikely anyone would act on it imminently*. Moreover, his advise was very general, McCoy’s ‘ideas’ about ‘how to court people out’ *were abstract in that they were not aimed at any particular person or any particular time*.⁶

Id. (emphasis added). Accordingly, even under the stringent standards for habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), the Ninth Circuit affirmed the district court’s findings:

To hold that McCoy’s speech could be punished merely *because he shared with them his prior experiences in a gang, or even advocated the propriety of gang activity generally*, would be unreasonable in light of clearly established Supreme Court precedent. *Indeed, McCoy’s conviction strays dangerously close to a finding of guilt by association*.

Id. At 623-33 (emphasis added).

It is beyond peradventure that the First Amendment protects advocacy of unlawful conduct unless

⁶ The term “court people out” refers to the process by which gang members are ejected from the gang. *Id.* at 630, n.4.

the advocacy calls for immediate unlawful action that it is genuinely likely to occur. In our case, there is no showing that the words on the video to some unidentifiable ‘brethren’ to “preserve his life” “for the real battles” sometime in the future, comes close to the advocacy of imminent unlawful action .

There was no incitement here. The audience exists only in theory.

The statute contains no express requirement that the speaker intends to incite imminent lawless action, or that the speech at issue is in fact likely to incite such action. It contains no temporal requirement at all. The speaker need only “intend” that some person listening to the speech use the information, at some indefinite time in the distant future, to commit an unspecified crime falling within a broad category of offenses. Such crime need not be imminent. Indeed, it need not ever be committed, or even likely to be committed.

Here it is alleged that Mr. Mohamed gave a video instruction about converting a toy truck into a detonator. The government has not charged Mr. Mohamed conspired with anyone and thus, there is no evidence to suggest that anyone who classifies as a “terrorist” even saw this video.

Mr. Mohamed is being prosecuted for giving a video instruction on detonators, and the government is attempting to prove the requisite intent by alleging he provided material support to terrorists. Accordingly, under the facts of the present case, and the government’s theory of prosecution, the one element of the statute which purports to provide some protection against criminalization of pure speech (the intent requirement) has been rendered moot. Further, in this case, there is no overt act that could form the basis of a conspiracy prosecution. The government cannot produce one person who heard the Mohamed video and used the information from the video to commit a federal crime of violence, and there is no evidence that Mr. Mohamed knew that any person had the intent to do so. In so doing, the government essentially has created a new offense which sweeps within its ambit vast amounts of protected speech.

The *Brandenburg* incitement test requires an audience capable of and likely to commit the unlawful act the speaker directs them to commit. However, section 842(p)(2)(A) does not even require that the speaker direct his message to any kind of audience, much less specify that the audience must be capable of and likely to commit the unlawful act directed. Rather, the statute focuses almost exclusively on the speaker.

Accordingly, this statute may not constitutionally be applied against Mr. Mohamed.

E. Overbreadth Standard

It is clearly established law that where a statute is overbroad and sweeps in a “substantial” amount of protected free speech, “judged in relation to the statute’s plainly legitimate sweep,” the statute may be declared facially unconstitutional. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The overbreadth doctrine permits a far broader analysis as to unconstitutionality: it has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. Statutes “that make[s] unlawful a substantial amount of constitutionally protected conduct may be held facially invalid”. *Houston v. Hill*, 482 U.S. 451, 459 (1987). *See also: Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972 (a statute may be overbroad “if in its reach it prohibits constitutionally protected conduct”). A statute whose terms are so broad as to chill a “substantial” amount of protected speech of parties not before the court may not be enforced against anyone, even one whose activity the statute legitimately governs. *New York Club Ass’n v. City of New York*, 487 U.S. 1, 14 (1988).

“[T]he overbreadth doctrine is a specialized exception to the general rule for facial challenges, justified in light of the risk that an overbroad statute will chill free expression.” *City of Chicago v. Morales*, 527 U.S. 41, 79-80, n. 2. A party may “challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decision-maker, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected” even if

“application in the case under consideration may be constitutionally unobjectionable. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

Examples of the vast number of written publications (and web sites) that contain the material sought to be proscribed by this statute are set forth in the “Background” section of the DOJ’s Report, cited above. These publications could be prosecuted under the government’s theory employed in this case because their content specifically indicates that their authors are advocating acts that constitute federal crimes of violence. Publishing houses would also not escape prosecution under this theory.

Thus, the statute that bans the widespread dissemination of technical information already in the public domain cannot pass constitutional muster without proof that the disseminator aid-and-abet, or conspire with, a particular individual(s) whose intent to use the information to commit a federal crime of violence is known to the disseminator. Because the instant statute contains no such requirement, it violates the First Amendment. It is to be remembered, that there is no evidence in this case of a co-conspirator, or that Mr. Mohamed aided and abetted a particular person who had formed the requisite criminal intent to commit a federal crime of violence, which intent was known to Mr. Mohamed. This would be required, since Mr. Mohamed is charged with supporting “terrorist(s)”.

F. Strict Scrutiny Applies

Regulation of speech in a traditional public forum “is subject to the highest scrutiny.” *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992). Accessible public places “historically associated with the free exercise of expressive activities . . . are considered, without more, to be ‘public forums’”. See *United States v. Grace*, 461 U.S. 171, 177 (1983). The Internet, without question, may be the greatest and freest global forum created, where the exchange of ideas and speech takes place millions of times each day throughout the world. The appropriate level of heightened scrutiny depends upon whether the statute regulates speech on the basis of content. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

A restriction on the content of speech in a public forum is subject to strict scrutiny and is presumptively unconstitutional. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); accord *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1009 (9th Cir. 2003). “[L]aws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.” *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994). “The ‘principal inquiry’ in determining whether a regulation is content-neutral or content-based ‘is whether the government has adopted the regulation because of agreement or disagreement with the message it conveys . . . [L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.’” *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996), (quoting *Turner Broadcasting Sys., Inc.*, 512 U.S. at 642).

When a person challenges a content-based speech restriction, the Government has the burden to prove that the proposed alternatives will not be as effective as the challenged statute. *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (invalidating certain provisions of Communications Decency Act as facially overbroad in violation of the First Amendment). A law survives strict scrutiny only if it is narrowly tailored to serve a

compelling governmental interest. *See, e.g., Boos v. Barry*, 485 U.S. 312, 321 (1988); *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 455 F.3d 910, 919 (9th Cir. 2006) (“Content-based restrictions in public fora are justified only if they serve a compelling state interest that is narrowly tailored to the desired end”). Here, the requirement proposed by the DOJ in its Report (*i.e.*, that the statute require that the disseminator of the information in question know that a particular person, or group of people, who receive it intend to use the information to commit a federal crime of violence) is not only equally effective, it complies with the First Amendment. Accordingly, the government cannot meet this burden

BECAUSE THE STATUTE FAILS TO PUT A REASONABLE PERSON ON NOTICE OF THE CONDUCT WHICH IT PROHIBITS, IT VIOLATES THE FIRST AND FIFTH AMENDMENTS AND IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO MR. MOHAMED

A. The Vagueness Standard

The Fifth Amendment states, “No person shall be . . . deprived of life, liberty or property without due process of law.” It is a fundamental tenet of “due process” that “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” *Lanzetta v. New Jersey*, 206 U.S. 451, 453 (1939). This “fair notice” requirement exists “to enable the ordinary citizen to conform his or her conduct to the law.” *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999). Thus, “a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . .” *Morales*, 527 U.S. at 56 (citing *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966)). A statute which fails to do so is unconstitutionally vague.

“Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage

461 U.S. 352, 357 (1983). In cases involving speech, a third reason is added: the concern that vague statutes will have a “chilling” effect on the exercise of First Amendment freedoms. *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). “[S]tandards of permissible statutory vagueness are strict in the area of free expression . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *NAACP v. Button*, 371 U.S. 415, 432-33 (1963); see *Hoffman Estates*, 455 U.S. at 498 (laws that threaten to inhibit exercise of right to free speech demand higher level of clarity).

“The degree of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and fair enforcement - depends in part on the nature of the enactment.” *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). A statute that imposes criminal penalties will be subject to more critical scrutiny than will other statutes challenged on vagueness grounds. *Flipside*, 455 U.S. at 498-499; *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2001) *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1198 (9th Cir. 1988). The general rule is that “[a] criminal statute is not vague if it provides adequate notice in terms that a reasonable person of ordinary intelligence would understand that [his] conduct is prohibited.” *United States v. Martinez*, 49 F.3d 1398, 1403 (9th Cir. 1995) (superseded by statute on other grounds). “The requirement involves an understanding by a putative actor about what conduct is prohibited . . . Notice that does not provide a meaningful understanding of what conduct is prohibited is vague and unenforceable.” *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1095 (9th Cir. 1999).

B. Section 842(p)(2)(A) does not place the reasonable person on notice of the precise conduct it prohibits.

Section 842(p)(2)(A) criminalizes speech²³ and provides for criminal penalties, and therefore is subject to the most exacting scrutiny under the vagueness doctrine. *Rv*

stating that “[i]t shall be unlawful . . . to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction”, that statute forbids such a broad range of behavior that it fails to inform the reasonable person exactly what is forbidden. What does “*information pertaining to, in whole or in part, the manufacture or use of an explosive device*” mean? Moreover, when we get into the “part” section of “in whole or in part” divining the meaning of the statute becomes virtually impossible. If a speaker on video shows how a toy can be turned into a detonator, does this, in and of itself, violate the statute? This conduct certainly provides information “in part” on how to make a destructive device.

Mr. Mohamed’s Speech Does Not Constitute a Federal Crime of Violence

In *United States vs Hull* 456 F. 3d133 (3rd Cir. 2006), the court considered the challenge to the element of the federal crime of violence in 18 U.S.C. § 842 (p)(2)(A). There, Hull argued that his mere possession of a pipe bomb, as charged in the indictment, did not qualify as a “Federal crime of violence”. At issue was the jury instruction which provided that:

“[P]ossession of an unregistered pipe bomb is a federal crime of violence...The government does not have to prove defendant intended the recipient of the information to blow up someplace or blow up somebody. They need only prove that the defendant intended the recipient of this information to make and thereafter possess the pipe bomb.” *Hull @ 137*.

The court agreed with Hull that simple possession of the pipe bomb, as opposed to the use of the pipe bomb could not qualify as a federal crime of violence and therefore his conviction had to be vacated. While the court focused its analysis on the definition of “crime of violence” and looked to 18 U.S.C. § 16, (see *Leocal v. Ashcroft*, 543 U.S. 1, 7 n.4 (2004)), the *Hull* court determined that the mere control the defendant had over the pipe bomb failed to establish a crime of violence. “*Use of a pipe bomb is the type of*

“violent, *active* crime []” the Supreme Court found constituted a crime of violence under §16. *Id.* @ 139. The court rejected the government’s arguments that a pipe bomb “might go off” at any moment and is therefore inherently dangerous. *Id.*

In the indictment herein, there is no allegation that Mr. Mohamed himself used a bomb, or any type of explosive or anything *inherently dangerous*. At best, the demonstration involves turning a toy into a detonator with the use of some wires; the government could argue that it may have the potential to carry some type of explosives but this argument should fail under the *Hull* analysis. In our case, it is not apparent that the demonstration on the video was even effective. Moreover, as discussed above, such content is all over the internet. Because the government has defined the “federal crime of violence” as a violation of 2339A, the questions abound over what violence was committed specifically as a result of someone utilizing the information they saw on the video, which is required.

Because the term “material support” as used in the AEDPA is unconstitutionally vague, the charges pursuant to it cannot stand

Executive Order 12947§(1)(ii)(B), 60 FR 5079 (Jan. 25, 1995), and AEDPA, 18 USCS 2339A (1996), define “material support” in “open-ended terms” and “inscrutable processes,” making it difficult for the potential speaker to know which activities are protected and which will subject him to criminal prosecution. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1,7 (2003). In other words, “censorship and guilt by association have an even wider chilling effect, making members of the public leery of engaging in any political activity that might potentially be condemned.” *Id.* The AEDPA defines “material support” as

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“currency or monetary instruments or financial securities, financial services, lodging,

training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” See AEDPA, § 2339B. However, the statute fails to define these elements in any meaningful way, leaving potential speakers guessing as to which types of otherwise protected conduct would run afoul of the statute. Consequently, the statute fails to meet the constitutional requirements for vagueness and overbreadth.

In order to satisfy constitutional requirements, a penal statute must 1) define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement;” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), and 2) the legislature must “establish minimum guidelines to govern law enforcement” to avoid the creation of “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.” *Id.* These principles date as far back as 1876 when the Court noted in *United States v. Reese*, 92 U.S. 214, 221 (1876):

“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.”

In the absence of court intervention, this indictment makes it clear that “[t]he material support prohibition could constitutionally apply to discussion, public or private, by members of a designated organization or those in their employ or under their control about operational issues, such as the status of ~~the~~ ‘cease fire.’ It would also cover public declarations . . .” Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the*

Roles of Lawyers for Clients Accused of Terrorist Activity, 62 Md. L. Rev. 173, 203

(2003). Such an over-reaching ban on political speech could criminalize the mere act of casually telling someone about the need for protection of Arab rights in the post-9/11 era.

CONCLUSION

American people are the most outspoken in the world. Hateful and shocking expression, religious, political or artistic, is almost all free to enter the marketplace of ideas in our country. The fundamental promise of the fourteen words in the First Amendment protects us even in times of war, where the contours of political speech are sharpest; it protects the words of the protestor, the radical, even the anarchist. The Internet has been the global marketplace of ideas, some enlightening, and many offensive, even morally reprehensible. But it is a marketplace nonetheless, where the currency of speech is valued, even if repugnant, in order to give the listener the opportunity to persuade or reject. The government overreaches in this case where it seeks to prosecute speech that is Constitutionally protected.

In passing Section 842(p), Congress acted to restrict the rights of free speech in violation of the First Amendment. However, offensive and unpalatable speech that is anathema to mainstream America is precisely what the First Amendment was designed to protect. The American tolerance of speech, even noxious speech, suggests an optimism that “discussion affords adequate protection against such noxious doctrine.” The question here is whether or not the government will be bound by its most basic law, the Bill of Rights of the United States Constitution.

Accordingly, for the reasons set forth²⁷ above, Mr. Mohamed respectfully requests that this Court grant his motion and dismiss the Indictment against him on the grounds

that the statute under which he is charged, Title 18 U.S.C. § 842(p)(2)(A), violates the Constitution of the United States of America.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 10, 2008, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to:

Jay L. Hoffer, Esq.
Office of the United States Attorney

Adam B. Allen, Esq.
Federal Public Defenders Office

/s/ Linda Moreno
Linda Moreno, Esquire

/s/ Lyann Goudie
Lyann Goudie, Esquire

