

No. 06 – 241

IN THE

Morris Tyler Moot Court of Appeals at Yale

Roya Rahmani, et al.,
Petitioners

v.

United States of America,
Respondent

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED¹

1. Whether it violates the Fifth and Sixth Amendments to prosecute an individual for donating to or soliciting funds for an organization the government has administratively designated a “foreign terrorist organization,” while prohibiting the defendant from contesting that designation as improper, where the procedure under which the designation was obtained violated the Due Process Clause?
2. Whether criminally prosecuting an individual for financial contributions to a foreign political organization whose views she shares violates that individual’s free speech rights under the First Amendment, where the alleged crime is premised upon a disputed “terrorist” designation that was rendered by an executive agency without traditional procedural safeguards?

¹ The petitioners in this case are Roya Rahmani, Hossein Afshari, Mohammad Omidvar, Hassan Rezaie, Navid Taj, Mustafa Ahmady, and Alireza Mohamad Moradi. The respondent is the United States of America.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii
TABLE OF AUTHORITIES iv

OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS 1
STATEMENT OF THE CASE..... 2
SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. PETITIONER IS CONSTITUTIONALLY ENTITLED TO RAISE A CHALLENGE TO THE VALIDITY OF MEK’S ADMINISTRATIVE DESIGNATION AS A DEFENSE IN THIS CRIMINAL PROCEEDING. 8

 A. The Section 1189 rule against petitioner challenging the validity of the designation in her defense offends the Due Process Clause..... 8

 1. The Section 1189 bar shirks the government’s constitutional burden of proving beyond a reasonable doubt all elements of the alleged offense. 11

 2. The Section 1189 bar denies petitioner’s right to a jury trial on an element of the alleged offense..... 13

 3. The Section 1189 bar uses a judgment from a civil action to which petitioner was not a party to bind her in this criminal proceeding, violating *McKinney v. Alabama*..... 14

 4. In this case, the Section 1189 bar violates due process because it prevents Rahmani from challenging a constitutionally infirm predicate. 17

 B. The government’s use of the 1999 designation to seek criminal penalties violates the Ex Post Facto Clause. 20

 C. The violation of these guarantees requires dismissal of petitioner’s indictment. 22

 D. Petitioner’s constitutional guarantees trump the government’s interest in deference to the executive. 23

II. CRIMINALIZING FINANCIAL CONTRIBUTIONS TO FOREIGN POLITICAL ORGANIZATIONS DESIGNATED AS “TERRORISTS” UNDER CONSTITUTIONALLY DEFECTIVE PROCEDURES VIOLATES THE FIRST AMENDMENT..... 24

 A. Section 1189 imposes a prior restraint on political speech that lacks the minimum safeguards required by *Freedman v. Maryland* and the First Amendment..... 26

 1. Financial contributions to foreign political organizations constitute protected speech under the First Amendment. 26

 2. The prior restraint on protected speech created by Section 1189 fails to satisfy the requirements of *Freedman* 29

 B. The constitutionally defective prior restraint created by § 1189 is especially offensive to the First Amendment in the context now before the Court..... 34

CONCLUSION 40
STATUTORY APPENDIX..... 41

TABLE OF AUTHORITIES

Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	11
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	22
<i>Armstrong v. Manzo</i> , 380 U.S. 545 (1965).....	21
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963).....	31, 34, 36
<i>Bates v. State Bar of Ariz.</i> , 433 U.S. 350 (1977)	26
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	15, 26, 27, 33
<i>Burgess v. Salmon</i> , 97 U.S. 381 (1878).....	21
<i>Carroll v. Princess Anne</i> , 393 U.S. 175 (1968).....	31
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1952).....	24
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	22
<i>Coffin v. United States</i> , 156 U.S. 432 (1895).....	9
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968)	11, 13, 14
<i>Ex parte Milligan</i> , 71 U.S. (4 Wall) 2 (1866).....	7, 23
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965).....	passim
<i>FW/PBS, Inc. v. City of Dallas</i> , 493 U.S. 215 (1990).....	29, 31
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	21
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004)	24
<i>Hamilton v. Kentucky Distilleries & Warehouse Co.</i> , 251 U.S. 146 (1919)	23
<i>Harisiades v. Shaughnessy</i> , 342 U.S. 580 (1952).....	21
<i>Harris v. United States</i> , 404 U.S. 1232 (1971).....	13
<i>Hill v. Colorado</i> , 530 U.S. 703 (2000)	28
<i>Hynes v. Borough of Oradell</i> , 425 U.S. 610 (1976)	26
<i>In re Winship</i> , 397 U.S. 358 (1970).....	8, 10, 11, 12
<i>International Society for Krishna Consciousness v. Lee</i> , 505 U.S. 672 (1992)	26
<i>Joint Anti-Fascist Refugee Committee v. McGrath</i> , 341 U.S. 123 (1951).....	21, 24, 37, 38
<i>Jones v. United States</i> , 526 U.S. 227 (1999)	11
<i>Kasky v. Nike, Inc.</i> , 93 Cal. Rptr. 2d 854, 860-61, writ of certiorari ultimately dismissed as improvidently granted (Cal. App. 1 Dist. 2000).....	28
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144 (1963).....	24
<i>Leland v. Oregon</i> , 343 U.S. 790 (1952).....	9, 13
<i>Lewis v. United States</i> , 445 U.S. 55 (1980)	18
<i>Malloy v. South Carolina</i> , 237 U.S. 180 (1915).....	22
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803).....	21
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	21
<i>McConnell v. Federal Election Com'n</i> , 540 U.S. 93 (2003)	27, 36
<i>McKinney v. Alabama</i> , 424 U.S. 669 (1976).....	passim
<i>McKinney v. State</i> , 296 So. 2d 228 (1974)	15
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986).....	9
<i>Meese v. Keene</i> , 481 U.S. 465 (1987).....	29
<i>Miller v. California</i> , 413 U.S. 15 (1973)	24
<i>Mullane v. Central Hanover Bank</i> , 339 U.S. 306 (1950)	19
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975).....	10
<i>National Council of Resistance of Iran v. Dep't of State (NCRI)</i> , 251 F.3d 192 (D.C. Cir. 2001)	14, 17, 19

<i>Near v. Minnesota</i> , 283 U.S. 697 (1931)	31
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	39
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971).....	31, 38
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971).....	31
<i>Patterson v. New York</i> , 432 U.S. 197 (1977).....	9, 13
<i>People’s Mojahedin Organization of Iran v. Dep’t of State (PMOI I)</i> , 182 F.3d 17 (D.C. Cir. 1999)	3, 16, 34
<i>People’s Mojahedin Organization of Iran v. Dep’t of State (PMOI II)</i> , 327 F. 3d 1238 (D.C. Cir. 2003)	3, 20
<i>Quantity of Copies of Books v. Kansas</i> , 378 U.S. 205 (1964)	34
<i>Rahmani v. United States</i> , 127 S.Ct. 930 (2007) (mem).....	5
<i>Randall v. Sorrell</i> , 126 S. Ct. 2479 (2006)	27
<i>Regan v. Wald</i> , 468 U.S. 222 (1984)	23
<i>Roth v. United States</i> , 354 U.S. 476 (1957).....	15
<i>Rust v. Sullivan</i> , 500 U.S. 173 (1991).....	35
<i>Schaumburg v. Citizens for a Better Environment</i> , 444 U.S. 620 (1980).....	26
<i>Shuttlesworth v. City of Birmingham</i> , 394 U.S. 147 (1969)	29
<i>Simpson v. Florida</i> , 403 U.S. 384 (1971)	12
<i>Snyder v. Massachusetts</i> , 291 U.S. 97 (1934).....	9
<i>Southeastern Promotions v. Conrad</i> , 420 U.S. 546 (1975)	29
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958).....	6, 9, 36
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....	6, 13, 22
<i>United States v. Afshari</i> , 426 F.3d 1150 (9th Cir. 2005)	passim
<i>United States v. Afshari</i> , 446 F.3d 915 (2006).....	31, 35
<i>United States v. Cohen Grocery Co.</i> , 255 U.S. 81 (1921)	23
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995).....	6, 8, 13
<i>United States v. Mendoza-Lopez</i> , 481 U.S. 828 (1987).....	6, 17, 18
<i>United States v. Rahmani</i> , 209 F. Supp. 2d 1045 (2002).....	3, 4, 35
<i>United States v. Spector</i> , 343 U.S. 169 (1952)	17
<i>Watts v. United States</i> , 394 U.S. 705 (1969)	24
<i>Weaver v. Graham</i> , 450 U.S. 24 (1981)	20
<i>Wong Wing v. United States</i> , 163 U.S. 228 (1896).....	17

Statutes

18 U.S.C. § 2339A	30
18 U.S.C. § 2339B (2000)	3, 16
18 U.S.C. § 2339B(a)(1) (2000)	9, 36
18 U.S.C. § 2339B(i)	28
8 U.S.C. § 1189 (2000)	16
8 U.S.C. § 1189(a)(2)(A)(i) (2000).....	4
8 U.S.C. § 1189(a)(4)(b) (2000)	12
8 U.S.C. § 1189(c) (2000).....	12, 32
8 U.S.C. § 1189(c)(1) (2000).....	32
8 U.S.C. § 1189(c)(3) (2000).....	12, 15, 32
8 U.S.C. § 1189(c)(4) (2000).....	20

Other Authorities

Jeremy Maltby, Note, *Juggling Comity and Self-Government*, 94 Colum. L. Rev. 1978, 2020
(1994)..... 28

Jessica Garrison & David Rosenzweig, *Terror Funding Charges Rejected*, L.A. Times, June 22,
2002, at A1..... 4

Joseph Story, *Commentaries on the Constitution of the United States* (4th ed. 1873)..... 11

Will Herberg, *Still King*, National Review, Sept. 7, 1965, at 769-70..... 35

William Blackstone, *Commentaries* 10

No. 06-241
IN THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

ROYA RAHMANI, ET AL.
Petitioners,
v.
UNITED STATES OF AMERICA
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER ROYA RAHMANI

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 426 F.3d 1150 (9th Cir. 2005). The opinion of the District Court for the Central District of California is reported at 209 F. Supp. 2d 1045 (C.D. Cal. 2002).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Congress shall make no law . . . abridging the freedom of speech

U.S. Const. amend. I.

[N]or shall any person be . . . deprived of life, liberty, or property, without due process of law

U.S. Const. amend. V.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

U.S. Const. amend. VI.

No Bill of Attainder or ex post facto Law shall be passed.

U.S. Const. Art. I, § 9, cl. 3.

8 U.S.C. § 1189 and 18 U.S.C § 2339B are appended to this brief. Key parts provide:

(8) Use of designation in trial or hearing. If a designation under this subsection has become effective . . . a defendant in a criminal action . . . shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection

8 U.S.C. § 1189(a)(8) (2000).

(1) Unlawful conduct. Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity

18 U.S.C. § 2339B(a)(1) (2000).

STATEMENT OF THE CASE

Petitioner Roya Rahmani, an Iranian refugee, obtained political asylum in the United States in 1999. She has long objected to the human rights violations perpetrated by the government of Iran, specifically the suppression of women by the mullahs. Now a resident of Los Angeles, Rahmani has coordinated peaceful protests on college campuses (*e.g.*, UCLA), organized fundraising activities for political groups opposed to the present regime, raised awareness of Iran’s oppressive government (which the President recently described as part of the “axis of evil”), and donated and solicited financial contributions for foreign groups that criticize the authorities now ruling Iran, the country from which the United States granted her asylum.²

² Rahmani has explained that she fled Iran after her husband and brother were executed by the Islamic regime, and after she spent four years in jail because of her opposition to the regime’s oppression of women. *See generally* Matt Krasnowski, *Terrorist Designation Will Go on Trial*, Daily Breeze, Nov. 26, 2001, at A1; Editorial, *Arrests Send Frightening Messages to Iranian Americans*, San Jose Mercury News, Mar. 24, 2001, at 9B; Jessica Garrison & David Rosenzweig, *Terror Funding Charges Rejected*, L.A. Times, June 22, 2002, at A1. Under the rules of this Court, counsel may not read or cite the trial record, but may cite news sources to supplement the factual record. *See* Morris Tyler Moot Court of Appeals at Yale, *Manual for Competitors*, Rule V.D.8 (2006).

In 2001, Rahmani and other defendants were indicted under 18 U.S.C. § 2339B for providing material support to Mujahedin-e Khalq (“MEK”), one of the groups that opposes the present regime in Iran. MEK had been designated by the State Department as a “foreign terrorist organization” under 8 U.S.C. § 1189.³ Rahmani’s indictment, premised upon terrorist designations made in 1997 and 1999, referred to financial contributions made between October 8, 1997 and February 27, 2001. *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1047 (2002).

In June 2001, the Court of Appeals for the D.C. Circuit concluded that the procedures that led to the 1997 and 1999 designations were constitutionally defective, and it remanded the designation to the agency for reconsideration. *Nat’l Council of Resistance of Iran v. Dep’t of State* (NCRI), 251 F.3d 192 (D.C. Cir. 2001). In September 2001—seven months after Rahmani’s last alleged contribution—the agency re-entered its 1999 designation, this time purporting to comply with the D.C. Circuit’s instructions to give MEK notice and an opportunity to present evidence. *PMOI v. Dep’t of State* (PMOI II), 327 F.3d 1238 (D.C. Cir. 2003). Rahmani has *not* been charged with making or soliciting donations to MEK after this redesignation in 2001 (nor have there been any allegations to this effect).

MEK, for its part, sought to challenge the agency’s designations in federal court. In respect to the 1997 designation, the D.C. Circuit concluded that MEK had insufficient ties to the United States to raise constitutional due process objections. *PMOI v. Dep’t of State* (PMOI I), 182 F.3d 17 (D.C. Cir. 1999). The court noted, however, that the “unique” procedures in place at the time were unlike traditional administrative proceedings because there was “no adversary hearing, no presentation of what courts and agencies think of as evidence, no advance notice to

³ See generally 62 Fed. Reg. 52,650 (Oct. 8, 1997); see also *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1047 (C. D. Cal. 2002). MEK is also known also as the People’s Mojahedin Organization of Iran (“PMOI”). See 62 Fed. Reg. at 52,650. Provisions of the Antiterrorism and Effective Death Penalty Act, passed by Congress in 1996, allow the Secretary to designate groups as “foreign terrorist organizations,” 8 U.S.C. § 1189 (2000), and prohibits individuals from providing material support to organizations so designated, 18 U.S.C. § 2339B(a)(1) (2000).

the entity affected by the [State Department's] internal deliberations.” *Id.* at 19. The court also confessed that the factual information before it was “certainly not evidence of the sort that would normally be received in court.” *Id.* It was instead “material [the agency] compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.” *Id.*

In 2001, after Rahmani’s indictment, the D.C. Circuit considered a second challenge by MEK, this time to the 1999 designation. Because MEK now had sufficient ties entitling it to dispute the constitutionality of the designation procedures, the court considered the merits of MEK’s challenge. The court held that the designation process violated federal due process because Section 1189 provided neither notice nor a meaningful opportunity to be heard. *NCRI*, 251 F.3d at 209. Under the procedures in place at the time of these designations, the Secretary of State was required only to notify several high ranking members of Congress, supplying them with the sometimes-classified information on the basis of which the designation was made. 8 U.S.C. § 1189(a)(2)(A)(i) (2000). Seven days later, the designation could be published in the Federal Register, and the federal legislature could have blocked or revoked the designations only by an Act of Congress. 8 U.S.C. § 1189(a)(2) (2000). Despite the D.C. Circuit’s ruling, on remand, the agency both reissued the 1999 designation—following the minimum procedures set forth by the D.C. Circuit—and made the designation *retroactive*. See *PMOI II*, 327 F.3d at 1241.

Rahmani has never had an opportunity to challenge the designation, though she continues to dispute it. She is not alone. In fact, more than 220 members of Congress have signed a petition asking the State Department to remove MEK from the list of designated groups. Jessica Garrison & David Rosenzweig, *Terror Funding Charges Rejected*, L.A. Times, June 22, 2002, at A1; see also *Rahmani*, 209 F. Supp. 2d at 1051. According to these federal legislators, MEK is

not a terrorist group, but rather is part of a “legitimate struggle for an Iran of democracy, religious tolerance, human rights and non-violence.” *Id.*

Rahmani moved to dismiss her indictment, and the District Court for the Central District of California granted her motion, holding that the designation, “having been obtained in violation of the Constitution, is a nullity and cannot serve as a predicate in a prosecution.” *Rahmani*, 209 F. Supp. 2d at 1059. The government appealed, and the Court of Appeals for the Ninth Circuit reversed. *United States v. Afshari*, 426 F.3d 1150 (9th Cir. 2005). Following the denial of her petition for rehearing en banc, *United States v. Afshari*, 446 F.3d 915 (9th Cir. 2006), Rahmani petitioned this Court for certiorari on August 15, 2006, and it was granted on January 8, 2007. *Rahmani v. United States*, 127 S.Ct. 930 (2007) (mem).

SUMMARY OF ARGUMENT

By neither legislation nor designation may Congress or the State Department deprive individuals of their Due Process or First Amendment rights under the Constitution. Yet, under the guise of broad foreign affairs powers, Section 1189 accomplishes just this. Criminal defendants accused of supporting a “foreign terrorist organization” must be allowed to challenge the validity of the State Department’s factual assertion that the group they support has, in reality, engaged in terrorism. Moreover, because the *ex ante* designation operates as a prior restraint on the free speech of individuals who seek to endorse and amplify the views expressed by foreign political organizations, criminal prosecutions may not proceed when the disputed designation was made without procedural safeguards or a meaningful opportunity to be heard.

Section 1189’s prohibition of defendant challenges to “terrorist” designations is unconstitutional both on its face and as applied. On its face, the statute commits two errors. *First*, it violates petitioner’s due process entitlement to be convicted only “upon a jury

determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Although the government argues that the statutory language excludes the validity of an organizational designation from the elements of the offense, this is untenable: criminalizing political donations when they are made to terrorist organizations while removing the crucial distinction from the rigors of criminal procedure is an affront to the Fifth and Sixth Amendments and thus transgresses constitutional limitations on statutory definitions of offense elements. *Speiser v. Randall*, 357 U.S. 513 (1958). Therefore, the indictment triggers the full complement of constitutional guarantees. *Second*, the predicate of these criminal prosecutions is a civil proceeding to which no defendant was a party, thereby denying notice and opportunity to be heard. *McKinney v. Alabama*, 424 U.S. 669 (1976).

Further errors arise from the government’s application of Section 1189 in this case. *First*, because the 1999 designation was obtained in violation of due process, the government’s accusation violates this Court’s rule against the use of constitutionally infirm predicates as a basis for prosecution. *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). *Second*, because the Secretary re-entered the infirm 1999 designation and made it retroactive after the 2001 remand, the government’s reliance upon the re-entered designation to prosecute Rahmani violates the Ex Post Facto Clause. Because these errors and those commanded by the statute are structural in nature, they trigger the rule of automatic reversal for any conviction obtained from the indictment. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Therefore, these criminal indictments should be dismissed as unconstitutional.

Although the government invokes national security concerns to justify its denial of this array of fundamental guarantees, this Court has resisted such efforts during many trying times. It

should continue to provide the “watchful care of those intrusted with the guardianship of the Constitution and laws,” *Ex Parte Milligan*, 71 U.S. (4 Wall) 2, 124 (1866), not only because the rights at issue are among the most basic of constitutional promises, but also because allowing petitioner to object to non-classified information, to submit in her own proceeding her own evidence of the organization’s status, and most importantly, to enter evidence that is entirely a matter of public record regarding the infirm designation proceeding, in no way impedes the federal government’s ability to manage foreign affairs.

Moreover, the criminal indictment in this case should be dismissed on the independent (but related) ground that it violates the First Amendment’s requirement, set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965), and *McKinney v. Alabama*, 424 U.S. 669 (1976), that an *ex ante* designation scheme that imposes restrictions upon protected speech must provide the minimum constitutional safeguard of, *inter alia*, a meaningful opportunity to be heard. Designations under Section 1189 determine in advance whether individuals may exercise their free speech rights to make contributions to foreign political groups whose views they share and wish to broadcast. Accordingly, these designations must be made with great care and with adequate procedural safeguards to ensure that legitimate political speech is not improperly suppressed in the name of national security. To be clear, Rahmani is not entitled to make political contributions to foreign organizations that engage in, or promote, terrorism, no matter how strongly she agrees with their politics. She is entitled, however, to a valid *ex ante* determination of whether a group she wishes to support is a “foreign terrorist organization.” Criminally prosecuting Rahmani when the prior restraint lacked the required constitutional safeguards plainly violates the First Amendment.

Indeed, several specific features of this case underscore the need for the procedural protections guaranteed by *Freedman* and *McKinney*. For one thing, the improper designation

scheme leads to *criminal* penalties, which run the greatest risk of chilling protected speech. For another thing, because political organizations depend upon financial contributions, a prior restraint threatens to silence not only the principal speaker (e.g., Rahmani), but also a secondary speaker (e.g., MEK) whose views the principal seeks to endorse. Furthermore, there is no indication that the agency directed to administer the designation scheme is concerned at all with promoting or protecting free speech. Procedural protections at the agency level are crucial, then, because judicial review of the agency's determination may be sharply circumscribed by those matters that prove to be non-justiciable. These considerations reinforce, in the specific context of this case, the prudence of *Freedman's* constitutional guarantee that prior restraints on speech be allowed only where certain procedural protections are present.

Because the government's prosecution of Rahmani violates the Due Process Clause and the First Amendment of the Constitution, the motion to dismiss the indictment should be granted.

ARGUMENT

I. PETITIONER IS CONSTITUTIONALLY ENTITLED TO RAISE A CHALLENGE TO THE VALIDITY OF MEK'S ADMINISTRATIVE DESIGNATION AS A DEFENSE IN THIS CRIMINAL PROCEEDING.

A. The Section 1189 rule against petitioner challenging the validity of the designation in her defense offends the Due Process Clause.

Because the validity of the Section 1189 designation is an element of the Section 2239B offense, this prosecution triggers Fifth and Sixth Amendment protections. This Court has *unanimously* held that the due process requirement of proof beyond a reasonable doubt, *see In re Winship*, 397 U.S. 358 (1970), and the Sixth Amendment jury trial guarantee together mandate that "criminal convictions . . . rest upon a jury determination that the defendant is guilty of *every element* of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (emphasis added). In ascertaining the elements of an offense,

the legislative definition typically controls, although there are constitutional limits which legislatures may not contravene. *See, e.g., McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986).

Speiser v. Randall, 357 U.S. 513 (1958), summed the boundaries:

[I]t is normally within the power of the [legislature] to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause “*unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.*”

Id. at 523 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (emphasis added).

Section 2339B transgresses precisely the line that *Speiser* drew. Because the statute defines a violation as supporting an organization that a person knows has been designated as terrorist, 18 U.S.C. § 2339B(a)(1) (2000), the government contends that the fact of the designation, but not its validity, is an element. *United States v. Afshari*, 426 F.3d 1150, 1158 (9th Cir. 2005). This offends fundamental principles. Specifically, it is an affront to the Fifth and Sixth Amendments because it imposes criminal penalties for the otherwise legal activity of making political donations without *ever* even *submitting* to a jury, much less *proving* beyond a reasonable doubt, the *core* of the prohibition – that the organization is a terrorist one. Indeed, it is this fact alone which makes otherwise legal political contributions criminal acts.

This Court has long treated the Fifth and Sixth Amendments as fundamental protections in criminal proceedings. It has said of the reasonable doubt standard: “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Coffin v. United States*, 156 U.S. 432, 453 (1895). The *Coffin* Court traced the requirement to Deuteronomy and invoked descriptions of its role in Spartan, Athenian, Roman and English legal systems. *Id.* Justice Frankfurter wrote in *Leland v. Oregon*, 343 U.S. 790 (1952):

[F]rom the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors This . . . is a requirement and a safeguard of due process of law. . . .

343 U.S. at 802-03. Finally, the *Winship* Court explained the “indispensable” requirement’s practical importance. 397 U.S. at 364 (declaring that defendants have “at stake interests of immense importance” and that “the moral force of the criminal law [should] not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”). This Court following *Winship* has established the reasonable doubt standard as a *specific* constitutional limitation on legislative definitions of offense elements. *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975). *Mullaney* held that a statute distinguishing between murder and manslaughter on the element of malice aforethought could not require the defendant to prove that he had acted in the heat of passion because doing so would relieve the government of its responsibility to prove the charges beyond a reasonable doubt. *Id.* Under *Mullaney*, drawing a distinction, “while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns . . . denigrates the interests found critical in *Winship*.” *Id.* at 698.

The Sixth Amendment right to jury trial is equally fundamental. English common law provided that “the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors” William Blackstone, 4 *Commentaries* 343 (emphasis added). As this Court has appreciated, the Framers expected the jury trial guarantee to “guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY.” *Jones v. United States*, 526 U.S. 227, 248

(1999) (internal citations omitted). It continues to form a cornerstone of the criminal justice system, “guard[ing] against a spirit of oppression and tyranny.” 2 Joseph Story, *Commentaries on the Constitution of the United States* 541 n.2 (4th ed. 1873). The entitlement’s “profound judgment about the way in which law should be enforced” checks not only the overzealous prosecutor, but also the excessively deferent judge:

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to . . . higher authority Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968). The right is so robust that it applies to factors that, while not elements, may enhance punishment. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). It can “be lost not only by gross denial, but by erosion.” *Jones*, 526 U.S. at 248.

In sum, the statute may not exclude the designation’s validity from the offense elements; therefore, the indictment triggers Rahmani’s due process protections related to offense elements.

1. The Section 1189 bar shirks the government’s constitutional burden of proving beyond a reasonable doubt all elements of the alleged offense.

Section 1189’s use of an administrative designation and civil judgment as predicates in criminal proceedings is fatally defective because it relieves the government of the constitutional burden of proving beyond a reasonable doubt a material element of the alleged offense—that the organization which Rahmani has supported is a properly designated terrorist organization.

It has been settled that accused individuals enjoy a due process entitlement to the protection of the reasonable doubt standard since *Winship*, 397 U.S. 358. *Winship* held that the standard was “among the ‘essentials of due process and fair treatment’ required during the adjudicatory stage” in juvenile proceedings. *Id.* It applies to every assertion of fact necessary for the government to convict the accused: “[W]e explicitly hold that the Due Process Clause

protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary* to constitute the crime with which he is charged.” *Id.* at 364 (emphasis added).

The use of administrative designations and civil judgments as predicates for Rahmani’s prosecution necessarily evades this burden. The requirement is so stringent that it bars the government from using a guilty verdict in a *criminal* proceeding to relieve itself of the burden of proving the same fact in a prosecution for a different offense, even though it met the burden in the first proceeding. *Simpson v. Florida*, 403 U.S. 384 (1971). The standard cannot possibly relax, then, to allow the government to use a designation from an administrative or civil proceeding (where the burden has not even been attempted) to relieve itself of the responsibility of proving beyond a reasonable doubt the same fact in a criminal prosecution. Indeed, this Court appreciated as much, barring such a twist in a misdemeanor obscenity prosecution. *McKinney v. Alabama*, 424 U.S. 669, 687 (1976) (Brennan, J., concurring) (“The requirement that obscenity be proved beyond a reasonable doubt may not be diluted by transporting the determination to a prior civil proceeding.”). The same principle applies to these graver allegations.

Crucially however, the predication of the indictment on the Secretary’s designation fails the *Winship* requirement even more starkly. Section 1189 provides for two reviews of the administrative designation: one whereby the organization may petition the Secretary for its revocation, 8 U.S.C. § 1189(a)(4)(b) (2000), and one whereby the organization may seek judicial review in the D.C. Circuit, 8 U.S.C. § 1189(c) (2000). Neither process requires – or even allows – a designation to be set aside because the government has not proven beyond a reasonable doubt that the organization is a foreign terrorist one threatening the United States. The statute mandates no standards for the Secretary in the first process, and it specifies five for the D.C. Circuit in the second. 8 U.S.C. § 1189(c)(3) (2000). None of these standards mimic the

preponderance of the evidence standard for civil proceedings, and they do not even approach the reasonable doubt burden. The opinion below essentially acknowledges this infirmity: “Maybe the MEK’s position . . . has changed, so that its interest in overturning the current regime in Iran coincides with the interests of the United States. *Defendants could be right about MEK.*” *Afshari*, 426 F.3d at 1162 (emphasis added). The government thus may not substitute a designation proven against lenient specifications for a fact required to be proved beyond a reasonable doubt, and it may not employ that designation as an uncontestable fact, immune from challenge in a criminal prosecution.

2. The Section 1189 bar denies petitioner’s right to a jury trial on an element of the alleged offense.

The statute’s use of an administrative designation as a predicate in criminal proceedings is also gravely flawed because it denies Rahmani’s Sixth Amendment entitlement to a jury trial on every offense element, which is well settled. *See, e.g., Gaudin*, 515 U.S. at 510, *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993), *Duncan*, 391 U.S. at 151-55, *Leland*, 343 U.S. at 795.

Section 1189(a)(8), by barring defendants even from raising “*any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing,*” attempts to set aside this right entirely. 8 U.S.C. § 1189(a)(8) (2000) (emphasis added). It prevents Rahmani from objecting to the designation in a pre-trial hearing before a judge, and she is plainly barred from raising any questions regarding the issue before a jury. One of the offense elements is thus assumed on the basis of the administrative and civil proceedings, and Rahmani may be convicted without a jury determination of guilt. Indeed, she may be convicted on a record containing no evidence at all that MEK is validly designated as “terrorist”, a result that does not comport with due process. *See, e.g., Harris v. United States*, 404 U.S. 1232, 1233 (1971) (“[I]t

is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process.”).

The reality that classified information forms part of the record does not render jury consideration of this element impossible. In its remand of the faulty 1999 designation, the D.C. Circuit instructed the Secretary to provide MEK with an opportunity to respond to the non-classified evidence in the administrative record and an opportunity to file evidence supporting “their allegations that they are not terrorist organizations.” *NCRI*, 251 F.3d at 209.

Similar instructions in these proceedings would allow Rahmani to object to the organizational designation and to submit her own evidence of its invalidity as a defense, without requiring the disclosure of any classified information or allowing “a jury in a criminal case to make foreign policy decisions” *Afshari*, 426 F.3d at 1162. Indeed, two of her primary challenges – the objection to the use of an infirm civil predicate in criminal proceedings, *see infra* Part I.A.4., and the *Freedman* challenge to pre-deprivation procedures implicating First Amendment entitlements, *see supra* Part II.A, would rely *entirely* on public records. As a result, it makes little sense to bar this evidence merely because other evidence may not be disclosed, and such pretense cannot justify the denial of the right to a jury trial on all elements.

3. The Section 1189 bar uses a judgment from a civil action to which petitioner was not a party to bind her in this criminal proceeding, violating *McKinney v. Alabama*.

The result of the designation action in the D.C. Circuit cannot bind petitioner because this Court has held that civil actions to which accused individuals were not a party cannot bind them as criminal defendants. *McKinney v. Alabama*, 424 U.S. 669 (1976). In *McKinney*, Alabama convicted a retailer of selling magazines previously declared obscene in an action in equity and refused to allow him to challenge the obscenity issue in his defense. *Id.* at 670. This Court

reversed on due process grounds in an 8-0 decision: “Petitioner’s conviction must be vacated so that *he* may be afforded the opportunity to litigate in some forum the issue of the obscenity of [the magazine] before *he* may be convicted.” *Id.* at 677 (emphasis added).

In *McKinney*, it was not enough that the magazine had an opportunity to participate in the state’s designation proceeding; the Constitution promised the defendant an opportunity to raise his own challenge because the interests of the magazine were not “sufficiently identical to [his] that they will adequately protect his . . . rights.” *Id.* at 675. The Court thus rejected the notion that “a decision reached in [civil] proceedings should conclusively determine the . . . rights of others.” *Id.* at 676. *McKinney* thus requires that criminal proceedings predicated on civil designations afford defendants an opportunity to litigate the validity of the designation.

This case is a straightforward application of *McKinney* because its facts are nearly perfectly analogous. First, donating money to political organizations is covered by the First Amendment, *Buckley v. Valeo*, 424 U.S. 1 (1976), while donating money to terrorist organizations is not, much like selling magazines is protected, while selling obscenity is not, *Roth v. United States*, 354 U.S. 476, 485 (1957). Second, this designation has been proven only to the standards required by the statutory scheme, 8 U.S.C. § 1189(c)(3) (2000), as in *McKinney*, *see* 424 U.S. at 670, and not to the reasonable doubt standard. Third, while MEK had an opportunity to challenge the designation, as did the magazine, the statute denies petitioner any such right, 8 U.S.C. § 1189(a)(8) (2000), as Alabama did Mr. McKinney, 424 U.S. at 675.

Fourth, Rahmani’s due process rights are not sufficiently protected by MEK’s ability to challenge its designation, much like Mr. McKinney’s rights were not adequately protected by the magazine’s ability to challenge its designation. Indeed, MEK may be much more easily deterred from challenging the designation than petitioner would be from objecting to it: an organization

could decide to acquiesce rather than go to the expense of challenging a designation, or an organization could collapse as a result of the adverse effects of a designation before it could mount a challenge. Or the organization, animated by different goals than a criminal defendant, might present a different (and perhaps less rigorous) defense. Therefore, the government may not rely on the organization's institutional interests to approximate petitioner's interest in acquittal, and it may not substitute the organization's ability to challenge the designation in the D.C. Circuit for Rahmani's ability to do the same wherever she is accused.

Furthermore, where this case differs from *McKinney*, the facts encourage *greater* reluctance to use the results of non-criminal proceedings to bind nonparties as criminal defendants. First, the *McKinney* designation proceeding began as a civil action in state court, with the attendant procedural protections for the magazine, *see* 424 U.S. at 670 n.1, whereas this designation arose from an administrative decision, with comparatively fewer procedural protections for the organization, and a following civil proceeding, with statutorily circumscribed bases for judicial review, *see* 8 U.S.C. § 1189(c)(2000). The D.C. Circuit described the process as follows: “[T]he record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected.” *PMOI I*, 182 F.3d at 25. The ability for petitioner to litigate the designation to a more exacting standard is thus in sharper relief. Additionally, Mr. McKinney faced up to six months in prison, *see* 424 U.S. at 672 n.2, whereas petitioner faces fifteen years, *see* 18 U.S.C. § 2339B(a) (2000). While procedural protections apply regardless of the punishment, rules that applied to avoid an error of that magnitude must apply to avoid the greater risk here. *McKinney* therefore necessitates that Rahmani be allowed to contest the validity of the MEK designation in this criminal proceeding.

4. In this case, the Section 1189 bar violates due process because it prevents Rahmani from challenging a constitutionally infirm predicate.

In petitioner's case, Section 1189 is further defective because it has allowed the government to predicate a criminal accusation on proceedings which have been held to violate due process guarantees. *NCRI*, 251 F.3d at 209. It is therefore especially egregious for the government now to prevent petitioner from challenging the validity of the designation.

This Court has been reluctant to allow constitutionally infirm administrative proceedings to establish an element of a criminal offense. *See, e.g., United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), *Wong Wing v. United States*, 163 U.S. 228 (1896).⁴ *Wong Wing* invalidated a federal statute providing that any person of Chinese descent adjudged by any federal justice, judge or commissioner not lawfully entitled to be in the country should be imprisoned at hard labor and then removed. 163 U.S. at 229. This Court held that "summary" methods could not constitutionally determine a defendant's guilt, and that the facts which made a defendant's presence illegal had to be tried before a jury. *Id.* at 237. Finally, *Mendoza-Lopez* refused to allow the government to use a prior deportation order against a defendant because it was obtained in violation of due process: "[T]he result of an administrative proceeding may not be used as a conclusive element of a criminal offense where the judicial review that legitimated such a practice in the first instance has effectively been denied." 481 U.S. at 838 n.15. In establishing a rule against the use of constitutionally defective administrative predicates in criminal cases, this case law requires at the least that petitioner be allowed to object to the invalidity of the designation. Crucially though, petitioner's case differs from *Mendoza-Lopez*

⁴ In *United States v. Spector*, 343 U.S. 169, 179 (1952) (Jackson, Frankfurter, J.J., dissenting), Justices Jackson and Frankfurter found a statute constitutionally defective for failing to allow a court trying an alien accused of a criminal charge to consider the validity of the predicate deportation order:

Having thus dispensed with important constitutional safeguards in obtaining an administrative adjudication that the alien is guilty of conduct making him deportable on the ground it is only a civil proceeding, the Government seeks to turn around and use the result as a conclusive determination of that fact in a criminal proceeding. We think it cannot make that use of such an order.

and *Wong Wing* in that those predicates involved the defendant. Here, Rahmani was not a party to the predicate. The distinction advantages her for two reasons. *First*, as a logical matter, the hesitation that applies to infirm predicates binding parties in later proceedings militates against infirm predicates binding *nonparties*. Indeed, this magnifies the importance of allowing Rahmani to challenge the predicate: she has no other opportunity to do so, and MEK's strategy in an administrative proceeding cannot substitute for her rights in a criminal one, *see supra* Part I.A.3.

Second, as a jurisprudential matter, this Court has been clear that a defendant's involvement in the infirm predicate determines the question of whether she is bound by it. *Lewis v. United States*, 445 U.S. 55 (1980), held that a prior conviction could be used as a predicate for a later conviction for a felon in possession of a firearm, even though the predicate had been obtained in violation of the right to counsel. *Id.* at 67. This Court weighed heavily the facts that the defendant was involved in the predicate, *and* that *he* had an opportunity to seek direct judicial review of it. *Id.* at 64-65. *Mendoza-Lopez* affirmed the importance of this detail:

What was assumed in *Lewis*, namely the opportunity to challenge the predicate conviction in a judicial forum, was precisely that which was denied *to respondents* here. *Persons charged* with crime are entitled to have the factual and legal determinations upon which convictions are based subjected to the scrutiny of an impartial judicial officer.

481 U.S. at 841 (emphasis added).

Therefore, *Lewis* does not grant general permission that a “a criminal proceeding may go forward, even if the predicate was in some way unconstitutional, so long as a sufficient opportunity for judicial review of the predicate exists.” *Afshari*, 426 F.3d at 1157. Rather, taken with *Mendoza-Lopez*, it only creates an *exception* to the rule that infirm predicates cannot be used against defendants where the *defendant* had a previous opportunity to seek judicial review of the infirm predicate. Because Rahmani had no such opportunity, no such exception is

warranted and *Mendoza-Lopez* prevents the government from prosecuting her on the basis of the infirm designation. Furthermore, *Lewis* does not indicate that its permission for criminal trials to proceed on the basis of unconstitutional predicates goes beyond infirm *criminal* predicates. *Lewis*' original conviction involved all the usual procedural protections (excepting the infirmity), whereas the procedural features of the predicate in this case did not mimic those of a criminal trial. *See NCRI*, 251 F.3d at 209. Again, a *Lewis* exception is unjustified and *Mendoza-Lopez*'s prohibition against the use of infirm predicates protects Rahmani.

In sum, the key factor that prohibited the use of the infirm predicate in *Mendoza-Lopez* prohibits it here, and none of the factors that mitigated the predicate's defects in *Lewis* reduce its deficiency here. The rule that infirm predicates may not be used to bind defendants thus applies, and the government may not prosecute Rahmani on the basis of the designation. Indeed, considered with the *McKinney* problem, the problem of this predicate's infirmity is grave: Rahmani is bound to the results of a civil proceeding a) to which she was not a party, and b) which has been declared constitutionally unsound. It cannot be the law that the government can prosecute her while forbidding her from raising either of these deficiencies in her defense.

For the foregoing reasons, Section 1189's rule that Rahmani may not challenge the validity of the MEK designation violates the fundamentals of her due process guarantees as a criminal defendant. Indeed, by binding her to the result of the administrative and civil proceedings in which she had no opportunity to participate, Section 1189 violates even basic due process requirements in *civil* actions, let alone in respect to the higher threshold in criminal proceedings. *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950). Crucially, the statutory bar is unconstitutional not only because it offends the Due Process Clause, but also because it allows this prosecution to rest on an administrative designation obtained in violation of the Clause.

B. The government’s use of the 1999 designation to seek criminal penalties violates the Ex Post Facto Clause.

Two elements are required to make a criminal law *ex post facto*: “it must be retrospective . . . and it must disadvantage the offender affected by it.” *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The government’s use of the 1999 designation entered in 2001 satisfies both criteria. *First*, it is straightforwardly retrospective. In 1999, the Secretary re-designated MEK, “extend[ing] the October 8, 1997 designation.” *NCRI*, 251 F.3d at 197. In June 2001, the D.C. Circuit held that the 1999 designation “violate[d] the due process rights of the [organization]”, because it denied it any notice or opportunity to be heard. *Id.* at 195, 208-9. By extension, the 1997 designation which it had merely continued was infirm as well. On September 24, 2001, one year and fifty weeks after entering the first 1999 designation, the Secretary “re-entered” it effective retroactively. *PMOI II*, 327 F. 3d at 1241. Indeed, no judicial review of the merits of the designation upheld it until 2003, two years *after* the alleged crime. *See id.* at 1238.

Second, the use of the retroactive designation adversely affects petitioner. Without it, the alleged donations would have been legal. The government contends that this is not so because the indictment was based on the original 1999 designation, which was always effective under the statutory provisions that designations “take effect upon publication,” 8 U.S.C. § 1189(a)(2)(B) (2000), and that “the pendency of an action for judicial review of a designation . . . shall not affect the application of this section,” 8 U.S.C. § 1189(c)(4) (2000). But because these provisions allow the government an end-run around the principle of prospectivity and due process guarantees, they may not give the infirm designation effect for the two years before its re-entry.

The requirements of prospectivity and due process prohibit the government from curing due process defects in laws after they become effective, and then applying the corrected law retrospectively for the *precise* period in which courts declared it constitutionally infirm. Were it

otherwise, the government would be free—routinely—to deny notice and opportunity to be heard before depriving life, liberty or property, provide notice and hearing later, add new evidence of its own, arrive at the same result nonetheless, and continue the deprivation. This Court has long objected to such a sequence of events. *See, e.g., Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (“A fundamental requirement of due process is ‘the opportunity to be heard’ . . . at a meaningful time and in a meaningful manner.”), *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (“The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.”). Because this designation here precipitates the stigma and hardship of criminal proceedings, and because the deprivation—imprisonment for many years—is great, its use should be particularly objectionable. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 341 (1976) (“[T]he degree of potential deprivation . . . is a factor to be considered in assessing the validity of any administrative decisionmaking process.”), *Goldberg v. Kelly*, 397 U.S. 254, 264-265 (1970). In sum, because the government has accused petitioner on the basis of a retroactive predicate that disadvantages her, it has done precisely what the Ex Post Facto Clause proscribes.

Crucially, the administrative nature of the designation amplifies this problem. This Court has long held that “the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.” *Burgess v. Salmon*, 97 U.S. 381, 385 (1878). *See also Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952). The proposition that the government may not prosecute individuals for crimes after a federal court has declared the criminal statute constitutionally defective is so fundamental as not to need extensive citation. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (“[A] law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument.”). It is startlingly

anomalous, then, for the government to prosecute individuals for typically legal acts rendered criminal as the result of an *administrative* process after a federal court has declared that process constitutionally defective. Because it does exactly that, the indictment should be dismissed. The Ex Post Facto Clause simply does not allow the government to accuse petitioner of a crime on the basis of an administrative criminalization of her behavior after it was complete.

C. The violation of these guarantees requires dismissal of petitioner’s indictment.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court distinguished constitutional violations requiring automatic reversal of a judgment from those that might be deemed harmless. Because the due process violations under this scheme fall into the former category, they require reversal. Post-*Chapman* jurisprudence has articulated a set of constitutional errors that trigger automatic reversal. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), this Court characterized these as involving “structural defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Id.* at 310. It applied *Chapman* and *Fulminante* in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), to hold *unanimously* that violations of the due process requirement that guilt be proven beyond a reasonable doubt and violations of the guarantee of a jury trial on every offense element require reversal because they qualify as structural defects. *Id.* at 280-282. In *Sullivan*, the error was an erroneous reasonable doubt charge to the jury. *Id.* Here, the statute orders a much plainer mistake: because it bars petitioner from discussing the validity of the organizational designation at all, the jury will never even consider that offense element, much less receive instructions on how properly to do so. *See supra* Part I.A.2. Because any conviction obtained as a result of such constitutional error would require reversal under *Sullivan*, the indictment should be dismissed as unconstitutional.

D. Petitioner’s constitutional guarantees trump the government’s interest in deference to the executive.

The court below erred in allowing the government’s foreign affairs power to trump Rahmani’s due process guarantees. Although “matters relating ‘to the conduct of foreign relations . . . are . . . largely immune from judicial inquiry or interference,’” *Regan v. Wald*, 468 U.S. 222, 242 (1984) (internal citations omitted), they are not *entirely* immune from judicial review.

Indeed, this Court has required the government to stay within constitutional boundaries during many crises. In *Ex Parte Milligan*, 71 U.S. (4 Wall) 2, 120-21 (1866), it said of the Constitution: “It is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances,” and:

[I]f the passions of men are aroused and the restraints of law weakened, if not disregarded -- these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

Id. at 124. In *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919), it reiterated the point: “The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations.” *United States v. Cohen Grocery Co.*, 255 U.S. 81, 88 (1921) spoke even more firmly: “[T]he decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments” Put simply, due process guarantees remain essential during trying times:

It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). This has limited the government’s power recently: “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (requiring due process for a citizen detained as an enemy combatant).

These cases make clear that Congress cannot legislate away and the Secretary cannot designate away the Constitution’s promises to Rahmani. The government does not have the power to prosecute her while denying the protection of the reasonable doubt standard and a jury trial. Neither may it prosecute her on the basis of an administrative proceeding to which she was not a party and which has been declared constitutionally infirm, nor on the basis of an ex post facto law. Because its indictment does these things, it should be dismissed as unconstitutional.

II. CRIMINALIZING FINANCIAL CONTRIBUTIONS TO FOREIGN POLITICAL ORGANIZATIONS DESIGNATED AS “TERRORISTS” UNDER CONSTITUTIONALLY DEFECTIVE PROCEDURES VIOLATES THE FIRST AMENDMENT.

Our history teaches us that the power to brand groups or individuals as traitors or communists or terrorists is a potent instrument by which political dissent may be suppressed. *See, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 138 (1951). At the same time, the First Amendment in no way provides harbor to treason or terrorism—or the *promotion* of treason or terrorism—any more than it protects those who peddle obscene pornography or those who threaten violence or seek to incite an imminent breach of the peace. *See Miller v. California*, 413 U.S. 15 (1973); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1952). Because of the significant stakes on both sides of these kinds of cases, the process of distinguishing between what is and what is not protected must be performed with great vigilance. *See McKinney v. Alabama*, 424 U.S. 669, 674

(1976) (“[T]he procedures by which a State ascertains whether certain materials are obscene must be ones which ensure the necessary sensitivity to freedom of expression.”).

The procedures set forth in Section 1189 fail to do so. Instead, they operated in this case as an unconstitutional prior restraint on the protected political speech of Rahmani and others like her. After all, the 1997 and 1999 designations of MEK as a “foreign terrorist organization” were accomplished without the minimum safeguards required by this Court in *McKinney* and *Freedman v. Maryland*, 380 U.S. 51 (1965). These patent constitutional defects were eventually diagnosed by the D.C. Circuit in June 2001, and the State Department subsequently sought to redesignate the group with these procedural safeguards in place. These later developments do not alter, however, the *unconstitutional* status of the procedures that were in place in 1997 and 1999 when MEK was originally designated a “foreign terrorist organization.” Nor can they justify criminal prosecutions premised upon those improper designations. Put another way, if otherwise-protected political speech is to be made unlawful on the basis of an executive agency’s discretionary determination, that determination must comport with the First Amendment *in advance*, not four years after the muzzle was first imposed.

The prior restraint scheme authorized by Section 1189 is particularly offensive to the First Amendment in the circumstances now before the Court. Indeed, adequate procedures are crucial here (1) because the *criminal* sanctions imposed by Section 1189 will have a significant chilling effect on speech; (2) because political organizations, foreign and domestic, depend upon financial contributions to broadcast and amplify the message of their like-minded supporters; and (3) because the agency administering the statute is principally concerned with objectives unrelated to (and often in conflict with) free speech, and judicial review is severely limited.

To be sure, terrorism is a real threat in today’s world. But, the careless use and abuse of the “terrorist” label in order to silence speech also poses a grave danger to the country. Minimum procedural safeguards have been the Constitution and this Court’s answer to the longstanding question of how to balance these sorts of competing considerations. Section 1189 fails to provide those safeguards. Hence, Rahmani’s prosecution, predicated upon defective designations made in 1997 and 1999, violates the requirements of the First Amendment.

A. Section 1189 imposes a prior restraint on political speech that lacks the minimum safeguards required by *Freedman v. Maryland* and the First Amendment.

1. Financial contributions to foreign political organizations constitute protected speech under the First Amendment.

Political statements in support of an organization, even when they take the form of financial contributions to a political group, have consistently been treated by this Court as valid political speech protected by the First Amendment. In this respect, the fact that the speech involves money does not diminish its status as protected speech: “[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 16 (1976). *See also Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 675, 677 (1992) (“It is uncontested that the solicitation at issue in this case [“raising funds for the movement”] is a form of speech protected under the First Amendment.”); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977) (“Our analysis began with the observation that our cases long have protected speech even though it is in the form of a paid advertisement, in a form that is sold for profit, *or in the form of a solicitation to pay or contribute money.*” (emphasis added)); *Hynes v. Borough of Oradell*, 425 U.S. 610, 616-20 (1976).

The expressive act of making and soliciting financial contributions has been thought to have three free speech dimensions, alliteratively thought of as advocacy, affiliation, and association. Thus, in *Buckley*, this Court stated that “the First Amendment right to speak one’s mind . . . includes the right to engage in *vigorous advocacy* no less than abstract discussion.” 424 U.S. at 48 (internal citations omitted) (emphasis added). The Court added: “Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals.” *Buckley*, 424 U.S. at 22. Subsequent cases have consistently reaffirmed that contributions to political organizations “implicate fundamental First Amendment interests, namely, the freedoms of ‘political expression’ and ‘political association.’” *Randall v. Sorrell*, 126 S. Ct. 2479, 2491 (2006). See *McConnell v. Fed. Election Com’n*, 540 U.S. 93, 135 (2003) (“[T]he expression rests solely on the undifferentiated, symbolic act of contributing.”).

The traditional reasons for according First Amendment protections to political contributions plainly apply to the facts of this case. After all, Rahmani and the other petitioners sought to express their opposition to the government of Iran by raising funds, pooling their resources, and making financial contributions to a foreign political organization, MEK, which shares their views and, on their behalf, voices opposition to a government whose practices and politics petitioners find deeply offensive and undemocratic. Neither the fact that the subject matter petitioners are concerned with is, in some respects, “foreign,” nor the fact that the organization that represents their views is located abroad diminishes the First Amendment interests of the principal speakers themselves, *i.e.*, petitioners such as Rahmani. In *Boos v. Barry*, for instance, this Court ruled in favor of an individual who sought to display outside the Nicaraguan embassy a sign reading “Stop the Killing,” that was meant to criticize the practices

and policies of a foreign government. *Boos v. Barry*, 485 U.S. 312 (1988). Moreover, in *Int’l Soc’y for Krishna Consciousness*, this Court did not so much as question whether contributions and solicited donations for an *international* organization were covered by the First Amendment—that went “uncontested.” 452 U.S. at 677. In fact, the statute itself recognizes that it governs activity with clear First Amendment implications. *See* 18 U.S.C. § 2339B(i) (“Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.”).⁵

Indeed, no less than debate about abortion or contraception in Sub-Saharan Africa, *cf. Hill v. Colorado*, 530 U.S. 703, 714 (2000) (acknowledging free speech interests of protesters outside an abortion clinic), or the use of sweatshops by international companies, *cf. Kasky v. Nike, Inc.*, 93 Cal. Rptr. 2d 854, 860-61 (Cal. Ct. App. 2000) (finding that Nike’s use of “low-cost foreign labor” was a “matter of public concern”), *writ of certiorari ultimately dismissed as improvidently granted*, 539 U.S. 654 (2003), public discourse about the present leadership in Iran (or the now-deposed regime in Iraq) undoubtedly entails matters of public concern. *Cf. Jeremy Maltby*, Note, *Juggling Comity and Self-Government*, 94 COLUM. L. REV. 1978, 2020 (1994) (“[D]iscussion of foreign governments and their conduct will be relevant to the process of self-government. Americans need information about the conduct of foreign governments and their officials to determine the direction of U.S. foreign policy with regard to those countries. For example, Americans must be fully informed about the behavior of the various governments in

⁵ The Ninth Circuit’s contrary analysis is deeply flawed. The court of appeals suggested that “what the defendants propose to do is not to engage in speech, but rather to provide material assistance.” 426 F.3d at 1159-60. For, the court continues, “the statute says ‘knowingly provides material support or resources to a foreign terrorist organization’ [and] [t]he indictment charges them with sending money to the MEK.” *Id.* at 1160. The principal problem with the court’s reasoning is that it is circular. It infers from the fact that Rahmani sent MEK money that she was providing material assistance to a terrorist group, rather than engaging in political speech supporting a political organization in which she believed. The Ninth Circuit’s inference is permissible only on the basis of the designation of the group. But, of course, it is that designation and the procedures by which it was reached that Rahmani challenges on appeal. Put simply, whether it is protected speech or impermissible conduct depends upon the designation—and the veracity of that designation, and how it was made, is what Rahmani continues to dispute.

the former Yugoslavia, so that they will be able to decide whether or not to commit troops there.”). Today, as ever, foreign affairs and the activities of foreign governments are crucial matters of public concern. And the First Amendment does not confer lesser protection upon citizens who decide to broadcast their views through foreign organizations rather than through domestic ones. *See Meese v. Keene*, 481 U.S. 465, 478 (1987) (“The statute itself neither prohibits nor censors the dissemination of advocacy materials by agents of foreign principals.”).

2. The prior restraint on protected speech created by Section 1189 fails to satisfy the requirements of *Freedman*

Section 1189 puts in place a classic system of prior restraint by enabling the State Department to criminalize speech activity in advance of the actual expressive conduct and before judicial review can be pursued. *See Southeastern Promotions v. Conrad*, 420 U.S. 546, 553 (1975) (noting that all of the Court’s prior restraint decisions “had this in common: they gave public officials the power to deny use of a forum in advance of actual expression”). Thus, three features—(a) *ex ante* determination of whether the speech may proceed; (b) discretionary decisionmaking that decides whether the speech is allowed; and (c) no judicial review of the determination in advance—characterize those regulations that this Court has consistently treated as prior restraint schemes. *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). Thus, in *Freedman*, the Court invalidated a movie censorship board to which movies had to be submitted before they could be shown in Maryland theaters. The Court characterized prior restraints as the criminalization of particular expression in advance of its actual occurrence:

Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor’s business is to censor, there inheres the danger that he may well be less responsive than a court—part of an

independent branch of government—to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor’s determination may in practice be final.

Freedman, 380 U.S. at 57-58.

All of these features are present under the designation scheme set forth in Section 1189. First, like the censorship board in *Freedman*, which decided whether a *particular* movie could be shown in advance of a screening, in this case, whether a citizen is allowed to express her support for a *particular* organization is similarly determined before she makes the donation, before funds are collectively pooled by the group to which she and like-minded contributors donated, and before that political organization uses those funds to voice a viewpoint on behalf of its constituents. In *Freedman*, the *ex ante* censorship board replaced the traditional route of *ex post* prosecutions for obscenity. Here too, prosecutions under § 2339B based upon the State Department’s *ex ante* designations replaced the traditional route of *ex post* prosecutions under § 2339A for giving “material aid to terrorists.” *See generally* 18 U.S.C. § 2339A.

Second, like the censorship board in *Freedman*, the State Department officials who make the discretionary “terrorist” designation are not part of the judiciary, and their business, in many respects, is to designate groups as terrorists without regard to free speech concerns. Third, the agency’s designation “may in practice be final,” since the prohibition on donations cannot be reversed before it becomes operative unless the federal legislature is able to pass an Act of Congress during the seven-day period the statute provides between the agency’s decision and the time when the designation is published in the Federal Register. Moreover, judicial review, if available at all, is possible only *after* the designation is made.⁶ Indeed, compliance with the designation scheme is immediately required and “pendency of an action for judicial review of a

⁶ Likewise, an organization may petition the Secretary for revocation of the designation after it has gone into effect. The Secretary then has 180 days—essentially six months—to make a determination as to such revocation. 8 U.S.C. §§ 1189(a)(4)(B)(ii),(iv) (2000).

designation” does not suspend the application of the designation. As Judge Kozinski described the statutory scheme: “A terrorist designation is thus a type of prior restraint on speech, because it criminalizes monetary contributions that would otherwise be protected by the First Amendment.” *United States v. Afshari*, 446 F.3d 915 (2006) (Kozinski, J., dissenting).

Because Section 1189 imposes an *ex ante* constraint that seeks to silence speech before it is made, it is subject to the presumption of invalidity that this Court has long applied to prior restraints. *See, e.g., Near v. Minnesota*, 283 U.S. 697, 713-15 (1931) (“In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.”); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968).

The weight of this presumption led the Court in *Freedman* to explain that, “[a]pplying the settled rule of our cases, we hold that noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.” *Freedman*, 380 U.S. at 58. As this Court later reported, *Freedman* gave clear instructions on what, at a minimum, was needed in order to permit a prior restraint to pass constitutional muster:

In *Freedman*, we determined that the following three procedural safeguards were necessary to ensure expeditious decisionmaking by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990).

None of these safeguards are provided for in § 1189. First, *Freedman* mandated that “the burden of proving that the film is unprotected expression must rest on the censor.” 380 U.S. 51, 58 (1965). Here, the burden falls on the organization to initiate an action for judicial review. See 8 U.S.C. § 1189(c)(1) (2000). Further, during judicial review, it is the organization rather than the Secretary who bears the burden of showing that the organization is not correctly designated a terrorist one. In fact, the designation may be overturned only if the federal court finds that that State Department’s determination was “arbitrary, capricious, [or] an abuse of discretion.” 8 U.S.C. § 1189(c)(3)(A) (2000). Moreover, the administrative record upon which the State Department makes its designation, and upon which the federal court bases its review, was to be developed solely by the agency and could be based upon classified information that “shall not be subject to disclosure . . . except that such information may be disclosed to a court *ex parte* and *in camera* for purposes of judicial review.” 8 U.S.C. §§ 1189(a)(3)(B),(c)(2) (2000).

The statute’s election not to place the burden on the State Department is particularly problematic in this case because the designation is not objective. Unlike some licensing schemes which may be content-neutral insofar as they only require a bureaucrat to check off a few nondiscretionary criteria, the Secretary’s decision to designate an organization as a terrorist one is much more subjective. See *United States v. Afshari*, 426 F.3d 1150, 1155 (9th Cir. 2006) (“One man’s terrorist is another man’s freedom fighter.”). Just as the censor’s chief task is to censor rather than to preserve the First Amendment’s guarantees, the Secretary of State who ultimately makes the designation, see § 1189(a)(1), may be more willing to impinge on free speech rights in order to pursue the State Department’s primary goals.

Second, *Freedman* establishes that “while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement

cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression." 380 U.S. at 58. Section 1189 clearly fails this test as it criminalizes expressive conduct effective immediately upon publication in the Federal Register of the "terrorist" designation. See 8 U.S.C. § 1189(a)(2)(B) (2000). Moreover, "monetary contributions to a designated organization are prohibited even while judicial review is pending." Indeed, from Rahmani's standpoint, the determination is ironically final insofar as she is unable to challenge or defend against it during a criminal proceeding in which she is the defendant. *Id.* at § 1189(a)(8); *see also supra* Part I.A. The statute therefore implicates the *Freedman* concern that individuals could be convicted on the basis of the Secretary's designation system "even though no court had ever ruled on" whether the contribution was a protected expression. *See Freedman*, 380 U.S. at 60.

Finally, *Freedman* requires that individuals affected by the challenged determination "must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film." 380 U.S. at 58-59. The *Buckley* Court emphasized the need for strict review because of the fundamental character of the rights enshrined in the First Amendment: "In view of the fundamental nature of right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (internal citations omitted). Because judicial review is far from assured here, the statutory scheme cannot satisfy this final prong of the *Freedman* test. The statutory scheme only provides limited judicial review of the designation to some organizations. Since a "foreign entity without property or presence in this country has no constitutional rights," a designation in those cases would have only statutory and no constitutional review. *See People's Mojahedin Org. of Iran v. Dep't of*

State (PMOI I), 182 F.3d 17, 22 (D.C. Cir. 1999) (“Whatever rights the . . . MEK enjoy[s] in regard to these cases are therefore statutory rights only.”).

Yet judicial review of “foreign terrorist” designations under Section 1189 is especially important here. For one thing, judicial review ensures that a more neutral arbiter approve the designation than an in-house agency determination. As the *Freedman* Court noted, an agency “may well be less responsive than a court.” 380 U.S. at 57-58. Similarly, this Court held in *Bantam Books*: “We have tolerated such a system [of prior restraint] only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint.” 372 U.S. at 70. For another thing, this Court’s jurisprudence has consistently held that an adversarial proceeding is the only constitutionally valid process by which to determine whether certain speech is protected by the First Amendment. *See Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 213 (1964) (“For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books.”). Because the procedures for the designation clearly fall short of the minimum procedural standards set out in *Freedman* and its progeny, the prior restraint is invalid.

B. The constitutionally defective prior restraint created by § 1189 is especially offensive to the First Amendment in the context now before the Court.

Three dimensions of the present context compound the constitutional flaws of the prior restraint scheme now before the Court. They too should convince this Court, on free speech grounds, to grant Rahmani’s motion to dismiss the criminal indictment against her.

First, *ex ante* designations under Section 1189 impose criminal, as opposed to civil, sanctions upon otherwise-protected speech, and the allegation that an individual lent “material support” to terrorists carries with it an indelible public stigma. The mere threat of these

combined consequences will deter much legitimate speech, even in cases where it might be possible to segregate donations to separate arms of a foreign political organization, *i.e.*, insuring that donations are directed only to a group's humanitarian arm, and not a militant one. *Cf. Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem another way."). And the label of "terrorist" has been applied to groups such as the International Monetary Fund and individuals including Mahatma Gandhi and Martin Luther King, Jr.⁷ It is a label that can and has been debated in this very case.⁸

Despite the complex issues surrounding the "terrorist" label, such a designation under Section 1189 nevertheless converts speech activity that is constitutionally-protected into speech activity for which the speaker is publicly accountable and criminally liable. Neither the intention of the speaker, nor the actual use of the money makes any difference. Only the State Department's designation matters. As Judge Kozinski said: "The determination of whether or not an organization is engaged in terrorism is therefore crucial, because it distinguishes activities that can be criminalized from those that are protected by the First Amendment." *United States v. Afshari*, 446 F.3d 915, 916 (2006). Knowingly providing material support can lead to prison

⁷ *See, e.g.*, Will Herberg, *Still King*, National Review, Sept. 7, 1965, at 769-70. ("For years now, the Rev. Dr. Martin Luther King and his associates have been deliberately undermining the foundations of internal order in this country. With their rabble-rousing demagoguery, they have been cracking the 'cake of custom' that holds us together. With their doctrine of 'civil disobedience' they have been teaching hundreds of thousands of Negroes . . . that it is perfectly all right to break the law and defy constituted authority if you are a Negro-with-a-grievance. . . . And they have done more than talk. They have on occasion after occasion, in almost every part of the country, called out their mobs on the streets, promoted 'school strikes' sit-ins, lie-ins, in explicit violation of the law and in explicit violation of the public authority. They have taught anarchy and chaos by word and deed . . .").

⁸ *See, e.g., United States v. Rahmani*, 209 F.Supp.2d at 1051 ("Members of Congress have opined that the MEK is a legitimate resistance movement fighting the tyrannical regime presently in power in Iran. According to these members of Congress, the MEK prevented the Iranian regime from obtaining nuclear weapons; provided information to the U.S. regarding Iran-sponsored bombing attacks on Israeli interests; and supports the Middle East peace process. Finally, members of Congress have stated that the MEK is not engaged in terrorist activities but, rather, in a legitimate struggle for an Iran of democracy, religious tolerance, human rights and non-violence.")

terms as long as a life sentence. *See* 18 U.S.C. § 2339B(a)(1) (2000). *See also* *Speiser v.*, 357 U.S. at 525 (“Because the line between unconditionally guaranteed speech and speech that may legitimately regulated is a close one, the ‘separation of legitimate from illegitimate speech calls for . . . sensitive tools.”); *Bantam Books*, 372 U.S. 58 (requiring the government “conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line”). Because of the seriousness of the consequences that follow from a Section 1189 designation, this Court should not allow a designation to be operative without rigorous procedural safeguards at least as substantial as those that are required to justify an ordinary prior restraint on speech.

Second, those like Rahmani who wish to speak out against the government of Iran through the collective mouthpiece of a foreign political association such as MEK are, in a sense, *twice* silenced by the prior restraint scheme here at issue. For, by prohibiting donations and solicitations that would have funded associations through which multiple speakers have sought to pool their resources, this prior restraint scheme threatens to stifle the speech of the organizations themselves. In this respect, the prior restraint “may bear ‘more heavily on the associational right than on freedom to speak,’ since contributions serve ‘to affiliate a person with a candidate’ and ‘enabl[e] like-minded persons to pool their resources.’” *McConnell*, 540 U.S. at 135-136 (citations omitted). But it is important to emphasize that the limits imposed by Section 1189 do not operate, in practice, like a traditional “contribution limit.” They do not, after all, “merely require candidates and political committees to raise funds from a *greater* number of persons.” *Id.* More accurately, they set limits “so low”—that is, at zero—“as to prevent candidates and political committees from amassing the resources necessary for effective advocacy.” *Id.* (quoting *Buckley*). In an analogous setting, Justice Black once observed that the burden of being

blacklisted as a communist organization involved *both* “the practical equivalents of confiscation and death sentences for any blacklisted organization not possessing extraordinary financial, political or religious prestige and influence.” *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 132. Injuring the ability of foreign political organizations to communicate the message of their adherents is an injury not merely to the foreign organization, but more importantly to the principal speaker who wishes to have her voice heard as loud as possible.

Imagine if the same sort of prior restraint present in this case arose not in the context of financial contributions to domestic political parties, but rather in the more tangible context of movie production. Suppose, under a new federal law, an executive agency was directed to review movie scripts to decide whether the script, if developed into a full-blown movie, would incite terrorism. If a script was designated by the agency as a “terrorist risk,” it would then be unlawful for individuals to contribute money to support movie production houses that were considering developing the designated script into a movie. If such a scheme contained adequate procedural safeguards in respect to the designation process, the program might just be lawful. But, assume *arguendo* that it lacked these safeguards, one should recall that the burden imposed upon production studios trying to develop a script would fall disproportionately upon smaller studios. For larger movie companies that could raise funds from other sources, this defective prior restraint might not matter. For fledgling studios that depend upon private contributions to develop and broadcast movies, however, this sort of *ex ante* restriction could prove devastating. Consequently, it is important to recognize that, in the present context, it is not just large well-organized foreign associations, *e.g.*, Doctors Without Borders, Greenpeace, the Palestinian Liberation Organization, that could be deemed “foreign terrorist organizations,” but also smaller political resistance movements such as the Movement for Democratic Change (“MDC”), a

struggling opposition group critical of the president of Zimbabwe, Robert Mugabe, or Nelson Mandela's African National Congress *before* it came to prominence. Some of these may, in fact, be engaged in activities that allow the federal legislature to prohibit Americans from sending them financial donations. But because of the difficulty in drawing such lines, and because of the corrosive effects an adverse designation can have on some foreign political groups, the procedural safeguards required by the Constitution are not just prudent, they are indispensable.

Finally, the need for sound procedural protections at the agency stage is especially acute because the State Department, as the agency chiefly responsible for managing relations with foreign countries, may have little concern for the free speech rights of individuals. Especially "at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe," the State Department's principal responsibility may not be to the First Amendment's assurances of free speech. See *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 171. Nor should security concerns reflexively trump the country's interests in safeguarding free speech, for as Justice Black noted, "[t]he word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." *New York Times v. United States*, 403 U.S. 713, 719 (1971) (Black, J. concurring). He then said: "The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged." *Id.*

Moreover, the divergence of goals between the State Department and the judiciary is not fully addressed in this case by the limited presence of judicial review. It has been said that, even in times of war when faced with threats to national security, federal courts must serve their traditional function to, "make an independent examination of the whole record in order to make

sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-85 (1964). In the present context, it has been already been observed that judicial review of an inadequate record produced exclusively by the State Department without any opportunity for rebuttal or supplemental evidence is plainly deficient. It is worth emphasizing, moreover, that procedural safeguards *at the administrative level* are particularly vital here because some of what must be examined, e.g., whether the organization poses a terrorist threat to national security, may prove to be non-justiciable in federal court. *See, e.g., Rahmani*, 209 F.Supp.2d at 1052 (finding a non-justiciable political question because “[h]ere, the executive branch, through the Secretary of State, and some members of the legislative branch differ on whether the MEK is a foreign terrorist organization.”). In those circumstances, though the federal court may be unable to appraise the substantive merits of the principal issue, *i.e.*, whether a designated group is a “foreign terrorist organization,” it is nonetheless allowed to evaluate the procedural adequacy of the safeguards in place at the agency level. Because adequate procedural safeguards are essential in contexts where many of the disputed issues germane to these designations may be non-justiciable in federal court, thus leaving much of the decisionmaking exclusively with the agency, it is only proper that federal courts—whose role is narrowed by statute and prudence—insist upon robust procedural protections during agency proceedings. *See id.* (“That being said, once the decision to designate is made, this court has the duty to scrutinize the designation procedure for conformance with the Constitution.” (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803))). *See also Marcus v. Search Warrant*, 367 U.S. 717, 730-31 (1961) (“In *Roth* itself we expressly recognized the complexity of the test of obscenity fashioned in that case, and the vital necessity in its application of safeguards to prevent denial of ‘the protection of freedom of speech and

press.”); *Carroll v. Princess Anne*, 393 US 175, 181 (1968) (“Even where this presumption might otherwise be overcome, the Court has insisted upon careful *procedural provisions*, designed to assure the fullest presentation and consideration of the matter which the circumstances permit.”).

These added considerations only reinforce what this Court’s prior restraint jurisprudence already demands. The withering effect that criminal and public penalties have on free speech, the secondary effects on foreign political groups to broadcast the message of their principals, and the narrow role that federal courts may play underscore the reasons provided above for why it violate the First Amendment to allow a criminal prosecution of Rahmani to proceed.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the decision of the Court of Appeals for the Ninth Circuit and dismiss the indictment.

Respectfully submitted,

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April 30, 2007

STATUTORY APPENDIX

8 U.S.C. § 1189 (2000) provides:

(a) Designation

(1) In general

The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that--

- (A) the organization is a foreign organization;
- (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title or terrorism (as defined in section 2656f(d)(2) of Title 22), or retains the capability and intent to engage in terrorist activity or terrorism) [FN1]; and
- (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

(2) Procedure

(A) Notice

(i) To Congressional leaders

Seven days before making a designation under this subsection, the Secretary shall, by classified communication, notify the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees of the House of Representatives and the Senate, in writing, of the intent to designate an organization under this subsection, together with the findings made under paragraph (1) with respect to that organization, and the factual basis therefor.

(ii) Publication in Federal Register

The Secretary shall publish the designation in the Federal Register seven days after providing the notification under clause (i).

(B) Effect of designation

(i) For purposes of section 2339B of Title 18, a designation under this subsection shall take effect upon publication under subparagraph (A)(ii).

(ii) Any designation under this subsection shall cease to have effect upon an Act of Congress disapproving such designation.

(C) Freezing of assets

Upon notification under paragraph (2)(A)(i), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court.

(3) Record

(A) In general

In making a designation under this subsection, the Secretary shall create an administrative record.

(B) Classified information

The Secretary may consider classified information in making a designation under this subsection. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (c) of this section.

(4) Period of designation

(A) In general

A designation under this subsection shall be effective for all purposes until revoked under paragraph (5) or (6) or set aside pursuant to subsection (c).

(B) Review of designation upon petition

(i) In general

The Secretary shall review the designation of a foreign terrorist organization under the procedures set forth in clauses (iii) and (iv) if the designated organization files a petition for revocation within the petition period described in clause (ii).

(ii) Petition period

For purposes of clause (i)--

(I) if the designated organization has not previously filed a petition for revocation under this subparagraph, the petition period begins 2 years after the date on which the designation was made; or

(II) if the designated organization has previously filed a petition for revocation under this subparagraph, the petition period begins 2 years after the date of the determination made under clause (iv) on that petition.

(iii) Procedures

Any foreign terrorist organization that submits a petition for revocation under this subparagraph must provide evidence in that petition that the relevant circumstances described in paragraph (1) are sufficiently different from the circumstances that were the basis for the designation such that a revocation with respect to the organization is warranted.

(iv) Determination

(I) In general

Not later than 180 days after receiving a petition for revocation submitted under this subparagraph, the Secretary shall make a determination as to such revocation.

(II) Classified information

The Secretary may consider classified information in making a determination in response to a petition for revocation. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (c) of this section.

(III) Publication of determination

A determination made by the Secretary under this clause shall be published in the Federal Register.

(IV) Procedures

Any revocation by the Secretary shall be made in accordance with paragraph (6).

(C) Other review of designation

(i) In general

If in a 5-year period no review has taken place under subparagraph (B), the Secretary shall review the designation of the foreign terrorist organization in order to determine whether such designation should be revoked pursuant to paragraph (6).

(ii) Procedures

If a review does not take place pursuant to subparagraph (B) in response to a petition for revocation that is filed in accordance with that subparagraph, then the review shall be conducted pursuant to procedures established by the Secretary. The results of such review and the applicable procedures shall not be reviewable in any court.

(iii) Publication of results of review

The Secretary shall publish any determination made pursuant to this subparagraph in the Federal Register.

(5) Revocation by Act of Congress

The Congress, by an Act of Congress, may block or revoke a designation made under paragraph (1).

(7) Effect of revocation

The revocation of a designation under paragraph (5) or (6) shall not affect any action or proceeding based on conduct committed prior to the effective date of such revocation.

(8) Use of designation in trial or hearing

If a designation under this subsection has become effective under paragraph (2)(B) a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing.

(b) Amendments to a designation

(1) In general

The Secretary may amend a designation under this subsection if the Secretary finds that the organization has changed its name, adopted a new alias, dissolved and then reconstituted itself under a different name or names, or merged with another organization.

(2) Procedure

Amendments made to a designation in accordance with paragraph (1) shall be effective upon publication in the Federal Register. Subparagraphs (B) and (C) of subsection (a)(2) of this section shall apply to an amended designation upon such publication. Paragraphs (2)(A)(i), (4), (5), (6), (7), and (8) of subsection (a) of this section shall also apply to an amended designation.

(3) Administrative record

The administrative record shall be corrected to include the amendments as well as any additional relevant information that supports those amendments.

(4) Classified information

The Secretary may consider classified information in amending a designation in accordance with this subsection. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (c).

(c) Judicial review of designation

(1) In general

Not later than 30 days after publication in the Federal Register of a designation, an amended designation, or a determination in response to a petition for revocation, the designated organization may seek judicial review in the United States Court of Appeals for the District of Columbia Circuit.

(2) Basis of review

Review under this subsection shall be based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation, amended designation, or determination in response to a petition for revocation.

(3) Scope of review

The Court shall hold unlawful and set aside a designation, amended designation, or determination in response to a petition for revocation the court finds to be--

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;
- (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), [FN2] or
- (E) not in accord with the procedures required by law.

(4) Judicial review invoked

The pendency of an action for judicial review of a designation, amended designation, or determination in response to a petition for revocation shall not affect the application of this section, unless the court issues a final order setting aside the designation, amended designation, or determination in response to a petition for revocation.

(d) Definitions

As used in this section--

- (1) the term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);
- (2) the term "national security" means the national defense, foreign relations, or economic interests of the United States;
- (3) the term "relevant committees" means the Committees on the Judiciary, Intelligence, and Foreign Relations of the Senate and the Committees on the Judiciary, Intelligence, and International Relations of the House of Representatives; and
- (4) the term "Secretary" means the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General.

18 U.S.C. § 2339B (2000) provides:

a) Prohibited activities.--

(1) Unlawful conduct.--Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d) (2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

(c) Injunction.--Whenever it appears to the Secretary or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of this section, the Attorney General may initiate civil action in a district court of the United States to enjoin such violation.

(f) Classified information in civil proceedings brought by the United States.--

(1) Discovery of classified information by defendants.--

(A) Request by United States.--In any civil proceeding under this section, upon request made ex parte and in writing by the United States, a court, upon a sufficient showing, may authorize the United States to--

(i) redact specified items of classified information from documents to be introduced into evidence or made available to the defendant through discovery under the Federal Rules of Civil Procedure;

(ii) substitute a summary of the information for such classified documents; or

(iii) substitute a statement admitting relevant facts that the classified information would tend to prove.

(B) Order granting request.--If the court enters an order granting a request under this paragraph, the entire text of the documents to which the request relates shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(C) Denial of request.--If the court enters an order denying a request of the United States under this paragraph, the United States may take an immediate, interlocutory appeal in accordance with paragraph (5). For purposes of such an appeal, the entire text of the documents to which the request relates, together with any transcripts of arguments made ex parte to the court in connection therewith, shall be maintained under seal and delivered to the appellate court.

(2) Introduction of classified information; precautions by court.--

(A) Exhibits.--To prevent unnecessary or inadvertent disclosure of classified information in a civil proceeding brought by the United States under this section, the United States may petition the court ex parte to admit, in lieu of classified writings, recordings, or photographs, one or more of the following:

(i) Copies of items from which classified information has been redacted.

(ii) Stipulations admitting relevant facts that specific classified information would tend to prove.

(iii) A declassified summary of the specific classified information.

(B) Determination by court.--The court shall grant a request under this paragraph if the court finds that the redacted item, stipulation, or summary is sufficient to allow the defendant to prepare a defense.

(3) Taking of trial testimony.--

(A) Objection.--During the examination of a witness in any civil proceeding brought by the United States under this subsection, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible.

(B) Action by court.--In determining whether a response is admissible, the court shall take precautions to guard against the compromise of any classified information, including--

(i) permitting the United States to provide the court, ex parte, with a proffer of the witness's response to the question or line of inquiry; and

(ii) requiring the defendant to provide the court with a proffer of the nature of the information that the defendant seeks to elicit.

(C) Obligation of defendant.--In any civil proceeding under this section, it shall be the defendant's obligation to establish the relevance and materiality of any classified information sought to be introduced.

(6) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States to protect against the disclosure of classified information, including the invocation of the military and State secrets privilege.

(g) Definitions.--As used in this section--

(1) the term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

(2) the term "financial institution" has the same meaning as in section 5312(a)(2) of title 31, United States Code;

(3) the term "funds" includes coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, stocks, bonds, debentures, drafts, letters of credit, any other negotiable instrument, and any electronic representation of any of the foregoing;

(4) the term "material support or resources" has the same meaning given that term in section 2339A (including the definitions of "training" and "expert advice or assistance" in that section);

(5) the term "Secretary" means the Secretary of the Treasury; and

(6) the term "terrorist organization" means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.

(i) Rule of construction.--Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.