

# Campus Protests: Student Advocacy in Support of a “Foreign Terrorist Organization”

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## I. INTRODUCTION

College campuses are places where free speech should flourish and where intolerance of viewpoint should not operate as a censor. Historically, the First Amendment has been the North Star that has guided institutions of higher education in the United States in addressing often difficult free speech issues.

Student protests roiled campuses throughout the United States in 2023–2025 and continue even today. While these are reminiscent of earlier campus demonstrations like those against the Vietnam War in the late 1960s and against South Africa’s then-system of apartheid in the 1980s, there are many differences among them. One such difference stands out: In the recent protests, a number of student demonstrators have advocated for Hamas and praised the organization and its violent acts against civilians and military personnel alike in its cross-border attack against Israel on October 7, 2023 (followed by the Israeli war against Hamas in Gaza).

Student celebration of Hamas is unfathomable. Since 1997, Hamas has been officially designated as a foreign terrorist organization (“FTO”) by the United States.<sup>1</sup> Attaching that label to Hamas is not simply the expression of a political view; it is based on a determination that Hamas is an organization that engages in terrorist violence.<sup>2</sup> The designation is made under a statute that is one of a package of provisions that make it a serious federal crime to knowingly provide “material support” to a foreign terrorist organization, 18 U.S.C. § 2339B.<sup>3</sup> None of

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1. For the current list of designated foreign terrorist organizations plus official materials describing the implications of being so listed, see *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <https://perma.cc/9VCQ-YN77>.

2. There are a number of other terrorist designation lists and resulting sanctions applicable to those on one or more of these lists. Additionally, certain countries have been designated as state sponsors of terrorism, which comes with its own set of sanctions applicable to those countries. For a general overview of these various terrorism-related listings and links to more specific information relating to this subject and individuals, organizations, and countries currently on the various lists, see *Terrorist Designations and State Sponsors of Terrorism*, U.S. DEP’T OF STATE, <https://perma.cc/TT4N-635T>.

3. I have previously written about special aspects of the material support crimes, 18 U.S.C. §§ 2339A and 2339B. See generally Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT’L SEC. L. & POL’Y 5 (2005); Norman Abrams, *A Constitutional Minimum Threshold for the Actus Reus of Crime? MPC Attempts and Material Support Offenses*, 37 QUINNIAC L. REV. 199 (2019); *The Material Support Offenses*, in NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 63 (6th ed. 2024).

the campus upheavals from the 60s and 80s contained such an unusual central element in the demonstrations that were mounted.<sup>4</sup>

The fact that Hamas is a designated FTO presents a unique set of legal questions arising out of the campus protests across the country. First, generally, is there a possibility that on-campus and/or off-campus participants in, and facilitators of, advocacy in support of Hamas might be subject to criminal liability under the “material support” crime? Would they be protected from such liability under the First Amendment? Second, specifically, could simply extolling Hamas, an FTO, by students or non-students possibly be a federal crime? The short answer to this last question is clear: By itself and without more, advocacy in support of Hamas is protected speech under the First Amendment. Even praise of evil is protected speech under the First Amendment. But may such speech lose its protected status under certain conditions, that is, if certain additional facts are present? Specifically, under what circumstances, if any, might congressional legislation that has the effect of criminalizing this particular form of speech be upheld against constitutional challenges?

Of course, defining the circumstances that would, as a constitutional matter, permit criminal enforcement of § 2339B against certain forms of speech may not mean that any campus protestors could be held criminally liable. It would depend on the actual facts on the ground that can be proved. Those facts would include those that are already known, such as the public statements made by the protestors, as well as any additional facts that might be uncovered through further investigation. Given the location of where some of the relevant facts have taken place, namely, U.S. campuses, a criminal investigation would be especially sensitive. If investigation into whether any federal crimes may have been committed is to be undertaken, it would be appropriate for the matter to be handled by a federal investigatory agency, most likely the Federal Bureau of Investigation (“FBI”). But bringing in a federal investigatory agency triggers additional concerns that need to be taken into account.<sup>5</sup>

## II. THE MATERIAL SUPPORT STATUTES AND THE SUPREME COURT’S DECISION IN *HOLDER V. HUMANITARIAN LAW PROJECT*

To date, the statute that criminalizes the providing of material support to a foreign terrorist organization has been considered by the U.S. Supreme Court only once, in *Holder v. Humanitarian Law Project* (“HLP”).<sup>6</sup> HLP is therefore the primary source of guidance regarding the interpretation of the statute and the constitutional issues that would be raised by efforts to enforce the statute against certain forms of speech. Additionally, there are many lower court cases involving enforcement of the material support offenses. A couple of these which are especially relevant will also be reviewed here.<sup>7</sup> Before examining these judicial

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4. § 2339B was not enacted until 1996, but the point still holds.

5. See *infra* Sections V A and C.

6. 561 U.S. 1 (2010).

7. *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011); *U.S. v. Holy Land Foundation for Relief and Development*, 2007 WL 1498813 (N.D. Tex. May 23, 2007).

opinions, however, it will be helpful to examine closely the specific language of the pertinent statute(s).

### *A. The Applicable Statutes*

There are two federal statutes that together criminalize providing material support in aid of terrorism, § 2339B and § 2339A. The provision at issue here, § 2339B, states in excerpted form:

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 20 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 . . . , or that the organization has engaged or engages in terrorism . . . .

The terms “terrorist activity” and “terrorism” are defined in 8 U.S.C. § 1182(a)(3)(B)(iii)<sup>8</sup> and 22 U.S.C. § 2656f(d)(2),<sup>9</sup> respectively. 8 U.S.C. § 1189 provides both the definition of foreign terrorist organization and places in the Secretary of State the authority to designate an organization as a foreign terrorist organization.<sup>10</sup> Material support is defined in the sister criminal material support statute, 18 U.S.C. § 2339A, both for purposes of that statute and for purposes of § 2339B.

8. This provision of Title 8, U.S.C. § 1182 states:

(iii) **“Terrorist activity” defined**

As used in this chapter, the term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

- (I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person . . . or upon the liberty of such a person.
- (IV) An assassination.
- (V) The use of any—
  - (a) biological agent, chemical agent, or nuclear weapon or device, or
  - (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
- (VI) A threat, attempt, or conspiracy to do any of the foregoing.

9. This provision of Title 22, U.S.C. 2656f is the State Department’s definition of terrorism and reads as follows:

- (2) the term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents;

10. 8 U.S.C. § 1189(a) reads as follows:

- (1) **In general**

Rather than using a general formula, material support is defined by a listing of nineteen<sup>11</sup> categories, any one of which can constitute material support:

**18 U.S.C. 2339A**

...

**(b) Definitions.**—As used in this section—

**(1)** the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

**(2)** the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

**(3)** the term “expert advice or assistance” means advice or assistance derived from scientific, technical or other specialized knowledge.

Looking to the different statutory categories that can amount to material support as defined in § 2339A(b)(1), *supra*, none of them refer expressly to statements, advocacy, political advocacy, or any similar category that might refer to the kinds of statements made by the protestors in support of Hamas. Only two of the statutory categories appear possibly to lend themselves to an interpretation that would include statements or advocacy, and each of these at the outset presents issues of how it is to be interpreted. The first to be considered here is the category, “personnel,” listed in the definition of material support. Another provision in § 2339B explains how the term personnel is to be construed:

**(h) Provision of personnel.**—No person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or

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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); 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.

11. This number can vary slightly depending on how one counts the different components of the listed categories.

objectives shall not be considered to be working under the foreign terrorist organization's direction and control.<sup>12</sup>

There are two features of what it means to provide personnel that are expressly addressed in the statute. The first is that not only can a person provide personnel to the foreign terrorist organization by providing other individuals, but a person can provide personnel by providing himself, making himself available to act on behalf of the foreign terrorist organization. One might think that making statements or advocating in a way that furthers the interests and goals of the organization might be seen as a way of providing oneself to act on behalf of the organization.

Further, a person who in some sense provides himself to the organization, for example, by speaking in support of it, cannot be held criminally liable unless he is providing himself to work *under the direction or control* of the organization. This interpretation flows from the use of the word "personnel," which implies such a relationship to the organization, and the requirement is made explicit by the statutory language. This provision makes clear that individuals who advocate in support of a foreign terrorist organization but speak *entirely independently* of the organization are not personnel of the organization and therefore are not providing "personnel" within the meaning of the statute.

The second listed category in the statutory definition of material support that may be looked to as another possible basis for bringing some of the statements of the protestors under § 2339B is the statutory category of providing "service." May statements of the protestors in support of Hamas be viewed as the performance of, or providing service to, that organization? There is nothing in § 2339B further explicating the meaning of the statutory category of "service" as a type of material support, but there is relevant discussion in the Supreme Court decision in *HLP* interpreting that statutory term and opining on the constitutionality of § 2339B.

### *B. The Humanitarian Law Project Decision*

Unlike the typical Supreme Court constitutional decision in a criminal case, the opinion in *Holder v. Humanitarian Law Project*<sup>13</sup> does not involve review of a criminal conviction or even review of issues raised during the course of a criminal prosecution. Rather, it arises out of plaintiffs having brought a suit seeking pre-enforcement judicial review of the issues raised by their plans to engage in conduct that might violate the § 2339B prohibitions. In effect, they ask the Court to tell them whether what they propose to do would be criminal in order to avoid the risk that they may incur if they engaged in the planned conduct. That fact is significant because it means that the case does not arise out of specific facts and circumstances that have already occurred and that could inform the Court's decision. Instead, the Court's ruling is based on the plaintiffs' general descriptions of what they propose to do.

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12. 18 U.S.C. § 2339B(h).

13. 561 U.S. 1 (2010).

The plaintiffs were individuals who proposed to engage in political advocacy in support of two different organizations that had been designated as foreign terrorist organizations.<sup>14</sup> The Court's opinion, *inter alia*, addressed the question of whether the plaintiffs' plan to engage in political advocacy supporting a foreign terrorist organization violates the providing "personnel" or "service" forms of material support and, if so, whether constitutional restrictions would bar enforcement against them. The Court here considered two constitutional challenges, the first under the void for vagueness doctrine of the due process clause of the Fifth Amendment, and the second under the free speech clause in the First Amendment. Regarding the vagueness contention, the plaintiffs argued that they wanted to engage in political advocacy on behalf of Kurds in Turkey and Tamils in Sri Lanka and were concerned that such advocacy might be regarded as "material support" by providing "personnel" or "service[s]." Because they could not tell whether their advocacy may violate the statute, they asserted that the statute was unconstitutionally vague. Regarding "personnel," the Court in response stated,

Congress enacted a limiting definition . . . that answers plaintiffs' vagueness concerns. Providing material support that constitutes "personnel" is defined as knowingly providing a person "to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization." § 2339B(h). The statute makes clear that "personnel" does not cover *independent* advocacy . . .<sup>15</sup>

The Court noted that "service" similarly refers to "concerted activity, not independent advocacy," citing a dictionary definition of "service" as "the performance of work commanded or paid for by another: a servant's duty: attendance on a superior."<sup>16</sup>

The Court addressed the First Amendment challenge as follows:

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

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14. The Court in *HLP* also considered the statutory interpretation issue of whether other activities that the plaintiffs wished to engage in fell within the categories of "training" and providing "expert advice" and, if so, whether the Constitution would bar enforcement of the criminal prohibition against engaging in these forms of material support.

15. *Holder v. Humanitarian Law Project*, 561 U.S. at 23.

16. *Id.* at 23–24. The Court proceeded to add:

The other types of material support listed in the statute, including "lodging," "weapons," "explosives," and "transportation," § 2339A(b)(1), are not forms of support that could be provided independently of a foreign terrorist organization. We interpret "service" along the same lines. Thus, any independent advocacy in which plaintiffs wish to engage is not prohibited by § 2339B. On the other hand, a person of ordinary intelligence would understand the term "service" to cover advocacy performed in coordination with, or at the direction of, a foreign terrorist organization. *Id.* at 24.

form of speech. Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order.<sup>17</sup>

Plaintiffs in effect conceded that fighting terrorism is an important government interest "of the highest order,"<sup>18</sup> with the possible implication that advocacy in support of the terrorist activities of a foreign terrorist organization could be prohibited consistently with the First Amendment. Plaintiffs, however, argued that they only wished to support the non-criminal, non-terrorist activities of these two organizations.<sup>19</sup> As part of its reply to this contention, the Court quoted from an affidavit submitted by a government expert:

Given the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities.<sup>20</sup>

The Court went on to state, "That evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference."<sup>21</sup>

In buttressing its conclusion that the enforcement of the statute in this context does not violate the First Amendment, the Court listed the different ways in which Congress imposed limits on the application of the statute.<sup>22</sup> The last item on this list echoes the main contention that the Court had earlier articulated for rejecting the vagueness challenge, which is that, "most importantly, Congress has

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17. *Id.* at 28.

18. *Id.*

19. *Id.*

20. *Id.* at 33.

21. *Id.*

22. The full list set forth by the Court:

We also find it significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns. First, § 2339B only applies to designated foreign terrorist organizations. There is, and always has been, a limited number of those organizations designated by the Executive Branch, see, *e.g.*, 74 Fed.Reg. 29742 (2009); 62 Fed.Reg. 52650 (1997), and any groups so designated may seek judicial review of the designation. Second, in response to the lower courts' holdings in this litigation, Congress added clarity to the statute by providing narrowing definitions of the terms "training," "personnel," and "expert advice or assistance," as well as an explanation of the knowledge required to violate § 2339B. Third, in effectuating its stated intent not to abridge First Amendment rights, see § 2339B(i), Congress has also displayed a careful balancing of interests in creating limited exceptions to the ban on material support. The definition of material support, for example, excludes medicine and religious materials. See § 2339A(b)(1). In this area perhaps more than any other, the Legislature's superior capacity for weighing competing interests means that "we must be particularly careful not to substitute our judgment of what is desirable for that of Congress." [citing *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)] Finally, and most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups. *Id.* at 35–36.

avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.”<sup>23</sup>

Justice Breyer, dissenting alongside Justices Ginsburg and Sotomayor, generally took issue with the constitutional analysis engaged in by the majority.<sup>24</sup> The Court responded to the dissent’s argument, stating that it is as if the statute,

prohibited “[p]eaceful political advocacy” or “pure speech and association,” without more . . . Section 2339B does not do that, and we do not address the constitutionality of any such prohibitions. The dissent’s claim that our decision is inconsistent with this Court’s cases analyzing those sorts of restrictions . . . is accordingly unfounded.<sup>25</sup>

More specifically, the Court stated that “the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.”<sup>26</sup>

In the end, however, Justice Breyer, too, found a way to distinguish in this context speech protected by the First Amendment and that speech which is not protected: “But [the First Amendment] does not protect that activity where a defendant purposefully intends it to help terrorism or where a defendant knows (or willfully blinds himself to the fact) that the activity is significantly likely to assist terrorism.”<sup>27</sup> In effect, the dissent reached a conclusion not dissimilar to the majority except in that it substituted a strong specific intent requirement for the majority’s limiting criterion, speech that is under the direction or control of, or in coordination with, the FTO.

The majority opinion did leave the door ajar somewhat to the possibility that the material support statute could be applied in ways involving political advocacy that would violate the First Amendment. It made the point several times that the case before the Court did not present specific statements of political advocacy or facts that could test the degree of coordination, direction, or control and were “phrased at such a high level of generality that they [could] not prevail in this preenforcement challenge.”<sup>28</sup> The actual words of advocacy used or facts relating to the coordination, direction, or control aspect might make a difference in deciding whether the speech involved was protected by the First Amendment. Accordingly, the Court concludes, “All this is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny.”<sup>29</sup> Rather, “[w]e simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech.”<sup>30</sup>

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23. *Id.* at 36.

24. *Id.* at 41.

25. *Id.* at 26 n.4.

26. *Id.* at 26.

27. *Id.* at 56.

28. *Id.* at 37–38.

29. *Id.* at 39.

30. *Id.*

The bottom-line conclusion to be drawn from *HLP* is that advocacy, even political advocacy, can be subject to criminal sanctions under § 2339B as a form of providing material support to an FTO. This can occur through the statutory material support terms, “service” or “personnel,” but only if the advocacy is done at the direction of, under the control of, or in coordination with said foreign terrorist organization. If the advocacy is engaged in entirely independently of the FTO, it is protected speech under the First Amendment. Without providing any examples, the Court leaves open the possibility that the specific content or nature of the advocacy involved or the degree of coordination, direction, or control, or other features of these elements, could make a difference with respect to the constitutional result.

### III. IMPLICATIONS OF THE COURT MAKING CRIMINAL LIABILITY AND CONSTITUTIONALITY TURN ON DIRECTING, CONTROLLING, OR COORDINATING BY THE FTO

#### *A. In General*

The import of the Court’s decision in *HLP* is to shift the constitutional focus from the speech itself and the harms that it, by itself, might directly cause, to the direction, control, or coordination of the speaker (and, consequently, the speech) by the foreign terrorist organization and the harms that may come from that direction, control, or coordination.

An FTO, of course, has no First Amendment rights and, by definition, its agenda contains elements of violence. The concerns that are raised if an FTO is directing, controlling, or coordinating the advocacy on its behalf would seem to be obvious and, generally, different from the concerns arising out of the speech alone that often is tested under the First Amendment. For example, First Amendment case law is often concerned with evaluating whether particular speech is likely to provoke imminent lawless action, with a focus on the imminence feature.<sup>31</sup> The *HLP* approach does not incorporate an imminence requirement. The harms that are matters of concern are those which result from promoting through advocacy the fulfillment of an FTO’s terrorist agenda, namely destructive and deadly violence, perpetrated in furtherance of political, social, or similar goals.

In drawing a line between independent advocacy, on the one hand, and advocacy “directed, coordinated with, or controlled by foreign terrorist groups,” on the other, and sustaining the latter category of advocacy against constitutional challenges, the Court has put a spotlight on a dimension of the material support statute which, prior to the *HLP* decision, was largely ignored. Legal attention now needs to be paid to the possibility that a foreign terrorist organization is operating in an active mode, directing, controlling, or coordinating the providers of the material support.

Consider the application of this focus in the context of the student protests that have been occurring on numerous university campuses throughout the country.

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31. See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

On the face of it, students speaking in favor of Hamas, a designated FTO, may be speaking independently, and, consequently, their speech would be protected by the First Amendment. But if Hamas is indeed directing, controlling or coordinating the advocacy on its behalf (for example, through individuals or organizations, functioning as agents, intermediaries, or surrogates), and *if this can be proved*, the implications would be far-reaching.<sup>32</sup> Under such a scenario, Hamas would have the potential to manipulate and influence the speech and debate taking place not just on one campus, but, potentially, on numerous campuses, wherever it has adherents subject to its direction or control. Add to that the possibility of a copycat effect that would seem likely to occur, and the spread of Hamas's influence and its ability to manipulate campus debates in its favor could be occurring nationwide.

Several caveats should be noted. The first is that the legal terms "direction," "control," and "coordination," are not fleshed out by the Court in *HLP*, and questions remain as to the exact content of these terms, as well as the nature and quality of the proof required to apply them in particular contexts. Answering such questions will need to await any prosecutions that may arise in the future.

Second, note should be taken of the fact that the only statements made by student protestors deemed relevant here are those which directly praise Hamas and/or directly express support for its violent actions against Israel. More general statements regarding the Israeli-Palestinian conflict, statements hostile to Israel, statements that only very indirectly support Hamas or its activities, and all similar statements are not considered in this paper. Determining whether such statements might fall within the category of advocacy in support of Hamas that would with other evidence support charges under § 2339B would add another layer of interpretation to the analysis. Among the many campus protests nationwide, there are enough reports of statements which expressly and specifically support Hamas and/or its violent actions to provide a solid factual foundation for treating them as advocacy in support of Hamas.<sup>33</sup>

Third, note should also be taken here of the difference between the type of advocacy statements examined in the *HLP* decision and those actually made in the course of student protests over the past two years. Those considered in *HLP* were not supportive, expressly or directly, of violence or the violent actions of the FTOs involved. In contrast, many of the student protestors in the recent demonstrations directly expressed praise for Hamas's violent and murderous attacks on October 7. This provides specific language contexts, missing in *HLP*, that, if anything, strengthen the case for withholding First Amendment protection.

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32. For discussion of issues relating to how Hamas's involvement might be proved, see *infra* Section V.

33. See, e.g., Brie Stimson, *Anti-Israel Protesters Heard Shouting 'We Are Hamas,' 'Long Live Hamas' Amid Columbia U Demonstrations*, FOX NEWS (Apr. 19, 2024), <https://perma.cc/6FUP-SBMR>; Sharon Otterman, *Pro-Palestinian Group at Columbia Now Backs 'Armed Resistance' by Hamas*, N.Y. TIMES (Oct. 9, 2024), <https://perma.cc/GX5V-73YX> (reporting instances of express support for Hamas by students at Columbia University and other campuses); Laura Meckler & Susan Svrluga, *Pro-Hamas Messages Intensify on College Campuses*, WASH. POST (Nov. 10, 2024) <https://perma.cc/CCQ3-MNF9> (describing similar messages on U.S. campuses); OCTOBER 8, Amazon Prime (Inbal B. Lessner, Nimrod Erez & Kelley Hartmann 2025).

Fourth, in the matter of the campuses, there have been many statements by protestors that facially would seem to be advocacy in support of Hamas.<sup>34</sup> While there is circumstantial evidence of the provision of funding and other assistance from sources external to individual campuses, evidence of Hamas's direction or control has not surfaced. The only way to determine whether in fact there has been such legally significant linkage between Hamas and the protestors' statements would be through appropriate investigations.<sup>35</sup>

### *B. The Campuses as Targets*

U.S. campuses present a very attractive target for those who might wish to influence and change political discourse in the United States. Typically, U.S. campuses have a strong commitment to a tradition of open and free discussion of important, and sometimes controversial, societal issues.

The physical and demographic attributes of these campus locales of free speech are striking in their numbers and size of populations. Nationwide, currently, there are almost 6,000 campuses of higher education, comprising a total of roughly nineteen million students; each campus, an island unto itself, an encapsulated, usually geographically small area containing within it a large cohort of intellectually active, engaged individuals, the majority of whom are under the age of twenty-five; add to those numbers an estimated 1.5 million faculty and a huge number of staff and administrators.<sup>36</sup> Approximately one quarter of the student population, of course, rolls over each year and becomes part of the adult inhabitants of the nation. A non-trivial number become graduate students and continue their education, some years later entering the adult work force. The student bodies alone at any given time represent more than five percent of the U.S. population, and, over time, become a significant proportion of that populace, constantly growing and spreading. Out of this group will emerge many societal leaders, political, social, religious, and the like.

Given these attributes and the free speech tradition of our campuses, it is no wonder that many people outside these campuses who desire to influence the national discourse, values, and change in the American society might perceive them as an avenue through which to exert influence. So, while the issues discussed and debated on the campuses and the attitudes engendered may often be arrived at spontaneously by the student population, sometimes they may also

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34. See *supra* note 33; see also *Students for Justice in Palestine (SJP)*, ADL (Aug. 9, 2024), <https://perma.cc/FT53-J7FB>. The plaintiffs in *HLP* planned to engage in political advocacy on behalf of an FTO. The Court in *HLP* did not attempt to define "political advocacy." The students' various statements supporting, praising, and otherwise endorsing Hamas and its actions would seem readily to amount to advocacy in support of Hamas. While it is not clear that it must amount to *political* advocacy in order to qualify within the ruling of *HLP*, it would seem easily also to have that characteristic. The students, after all, in their protests and demonstrations, were engaged in an activity that was intended to influence political actions and consequences.

35. See discussion *infra* Section V (exploring whether there are grounds to initiate such investigations and other related matters).

36. Lyss Welding, *College Enrollment Trends and Statistics: 2024-2025*, BEST COLLEGES (Mar. 5, 2025), <https://perma.cc/L6RS-HD8J>.

result from efforts to influence and direct the student discourse from within the campuses by faculty and, potentially, from without by any of a varied assortment of outside influencers. Of course, it is taken as a given today that our young people use electronic social media extensively and that those media are a highly effective way to communicate messages and readily influence large numbers of people.

### *C. Potential Outside Influencers*

Who might be the potential outside influencers? They, of course, could be U.S. individuals or groups of individuals, each with their own free speech protections under the First Amendment, who either might come onto campus and initiate or participate in demonstrations, speak themselves, or encourage the speech of others. Or they might consist of organizations who directly participate in free speech activities on campus, fund the establishment of specific student organizations on campus, or otherwise initiate and support specific student campus organizational activities. Focusing only on outside organizations, one can contemplate U.S. organizations engaging in this kind of activity, or foreign organizations who assumedly would not have First Amendment protections.<sup>37</sup>

Suppose, however, the foreign outside organization is a designated FTO. The possibility that an FTO, like Hamas, might engage in a planned, organized effort to influence discussion and debate on U.S. campuses in order to further, ultimately, its terrorist agenda is especially disturbing. It could be seen as a new form of terrorist-related activity, not directly involving violent acts, but in some sense equally dangerous to the fabric of our society.

## IV. WHAT CAN BE LEARNED FROM *UNITED STATES V. EL-MEZAIN*?

A major material support prosecution under § 2339B occurred in the early 2000s, culminating in the Fifth Circuit's 2011 decision in *United States v. El-Mezain*.<sup>38</sup> Significantly, the FTO in that case was Hamas. The case is notable for what it decided, but it is even more important because of what can be learned from it about Hamas, its history, and its extensive reach. It reveals much about how Hamas operates worldwide, its relationships, and the way it works. Hamas uses surrogates and intermediaries, both organizations and individuals, and has demonstrated its willingness and ability to deceive and employ various methods of deception.

In *El-Mezain*, several individuals and the Holy Land Foundation ("HLF") were charged under the material support statute for fundraising and sending money to

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37. Actions by foreign governments to influence the political discourse on U.S. campuses, for example, by employing students to take particular political positions may not be *per se* unlawful under U.S. law, though activities of individuals acting on behalf of such governments may require those individuals to register as foreign agents, and a failure to register may subject them to criminal liability. See 18 U.S.C. § 951; *U.S. Citizens Convicted of Conspiring to Act as Illegal Agents of the Russian Government*, U.S. DEP'T OF JUSTICE (Sep. 12, 2024), <https://perma.cc/VJ4Y-58N7> (reporting on the criminal conviction of agents of the Russian government for activities that included their efforts to influence a U.S. election). See also 18 U.S.C. § 219.

38. 664 F.3d 467 (5th Cir. 2011).

Hamas by way of zakat committees<sup>39</sup> allegedly controlled by Hamas. After the first trial ended in a mistrial, the government filed a superseding indictment, and the defendants were convicted by a jury of violating § 2339B. At trial, the government's theory of the case was that the money sent was for the benefit of Hamas, an FTO, and that Hamas controlled the zakat committees.<sup>40</sup> The defendants argued that sending the funds to entities that were not designated FTOs did not violate § 2339B. In its opinion, the trial court stated:

The indictment charges the defendants with knowingly giving money to Hamas by giving it to organizations operated by and for Hamas. The defendants essentially ask this court to hold that it is lawful to support a terrorist organization as long as the money is funneled through a subsidiary or affiliate that has not been independently designated as a terrorist organization. Such a ruling would completely eviscerate the statute by allowing anyone intelligent enough to launder donations to clandestinely give financial support to terrorist organizations without legal consequences . . . .

It requires no extraordinary acumen to realize that funneling money to an organization operated by or on behalf of a specially designated terrorist organization with the intent that the money be passed on to the designated terrorist group would, at the very least, constitute an attempt to provide support or resources to the terrorist organization in contravention of § 2339B. The statute would be unconstitutional in its application to the defendants only if it sought to punish them for innocently giving money to organizations which they later learned were affiliated with Hamas. However, if the government is unable to prove that the defendants knew the groups to whom they gave money were affiliated with Hamas when they provided support, then the defendants cannot be found guilty under the terms of the statute.<sup>41</sup>

On appeal, the Fifth Circuit affirmed the convictions and upheld the substantial sentences that had been imposed.<sup>42</sup> *Inter alia*, the appeals court affirmed the trial court's rulings related to the zakat committees. The court spent a great deal of time examining the government's investigation, including evidence obtained from covert surveillance, searches, and testimony showing a web of complex relationships connecting the defendants to Hamas and its various sub-groups. That investigation revealed much about how Hamas was linked to an organization of committees that

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39. *See id.* at 485 ("Zakat committees are charitable organizations to which practicing Muslims may donate a portion of their income pursuant to their religious beliefs . . . .").

40. Israeli sources provided important information relating to Hamas, including testimony regarding the control of the zakat committees by Hamas. *United States v. El-Mezain*, 664 F.3d 467, 489 (5th Cir. 2011).

41. *U.S. v. Holy Land Foundation for Relief and Development*, 2007 WL 1498813, at \*2 (N.D. Tex. May 23, 2007).

42. The *El-Mezain* opinion reported, "The district court imposed sentences ranging from 65 years in prison for Baker and Elashi, to 20 years for Abdulqader, and 15 years for Odeh and El-Mezain. HLF was sentenced to one year of probation." *El-Mezain*, 664 F.3d at 490.

operated worldwide; how, after Hamas had been designated as an FTO, the organization's branches and individuals took steps to conceal their connections to Hamas; and that Hamas received millions of dollars from abroad.

For example, Hamas "considered itself to be the Palestinian branch of the Muslim Brotherhood," which, after Hamas was formed, "directed its world-wide chapters to establish so-called 'Palestine Committees' to support Hamas from abroad."<sup>43</sup> The government's investigation uncovered that several of the defendants were members of such a committee, led by the former "leader of Hamas's political wing."<sup>44</sup> The prosecution asserted that this Palestine Committee had created numerous other organizations, including the Holy Land Foundation, the Islamic Association for Palestine (a "media entity"), and the United Association for Studies and Research, which "published papers and books about Hamas."<sup>45</sup> The references to Hamas became less explicit after the organization was designated an FTO, but "HLF continued to support the same zakat committees that Hamas controlled."<sup>46</sup> These allegations were supported by documents acquired through government searches, "includ[ing] organizational flow charts, bylaws, and meeting minutes," confirming the connection to Hamas.<sup>47</sup> One such document even identified HLF as the "official organization which represents the financial and charitable aspect to support the homeland people in the occupied territories."<sup>48</sup>

Interestingly, while the case did not involve the question of speech or advocacy as a form of material support and the court did not substantively address the direction, control, or coordination concepts,<sup>49</sup> there is material in the case that is useful in exploring some questions related to these issues. The case highlighted the complex relationships between Hamas and various sub-groups at the time. As an organization, outside of Israel, it may continue today to be large and complex with various subgroups, making it difficult to identify when Hamas acts through its agents or surrogates. Hamas may continue to exercise direction, control, or coordination authority, even today, through a far-flung network. One may speculate,

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43. *Id.* at 486. See generally INST. FOR THE STUDY OF GLOB. ANTISEMITISM AND POL'Y, THE MUSLIM BROTHERHOOD'S STRATEGIC ENTRYISM INTO THE UNITED STATES: A SYSTEMIC ANALYSIS (2025); see also Chris Cameron & Edward Wong, *U.S. Moves Toward Labeling Muslim Brotherhood as Terrorists*, N.Y. TIMES, Nov. 26, 2025, at A9.

44. *El-Mezain*, 664 F.3d at 486.

45. *Id.* The scheme defendants were charged with used the HLF to raise money "by conducting nationwide fundraising events, conferences, and seminars where HLF sponsored speakers and solicited donations," as well as "teleconferences where participants could listen to featured speakers and donate money."

46. *Id.* In just nine years, "HLF raised approximately \$56 million in donations," roughly \$12.4 million of which the organization funneled outside the United States to "willfully contribute funds, goods, and services to Hamas," according to the government.

47. *Id.* at 487.

48. *Id.*

49. *Id.* at 536. Decided a year and a half after *HLP*, the *El-Mezain* case incidentally cited *HLP* twice, noting the holding of the case by way of contrast with the issue in the instant prosecution. In other words, it did not import the "direction, control, coordination" features into the matter of fundraising for an FTO.

more broadly, about the possible uses of surrogates or agents as intermediaries in a relationship between Hamas and campus protestors: It could involve the use of individuals or organizations as surrogates under the direct control of the FTO or extend to one or more intermediaries, with a lesser relationship to Hamas, but which act on behalf of Hamas as agents following directions.

There are several other ways in which the *El-Mezain* court's rulings and its description of the history of Hamas and the way it operates may be helpful in applying *HLP* and addressing questions relating to the issues raised by the Supreme Court's decision in that case. First, the trial court's ruling in the case emphasized that, for criminal liability to be imposed, the defendants had to be aware that the entities to which they were providing funds were affiliated with Hamas. Similarly, under *HLP*, it is assumed that for any persons to be held criminally liable, the evidence must show knowledge (or willful blindness regarding the fact) that Hamas was involved in directing, controlling, or coordinating their advocacy in its support.

Second, in *El-Mezain*, the control of the zakat committees by Hamas was an important issue. That control was the legal determinant of whether money given to those committees was the legal equivalent of giving money to Hamas. Elucidating the issue of control in that legal context can be helpful in defining the issue of control under the *HLP* test (whether or not the definition of control is the same in both contexts).

Third, the *El-Mezain* court described the relationships between Hamas and the Palestine Committee,<sup>50</sup> on the one hand, and the Palestine Committee and the Holy Land Foundation on the other, only with respect to the raising of money for Hamas.<sup>51</sup> But it is fair to look at the descriptions of those relationships and ask how they might fit where the question is whether the kind of direction, control, or coordination articulated in *HLP* is present. Factually, they are treated in *El-Mezain* under a different rubric, but they provide the kind of facts that might be developed in an investigation utilizing the *HLP* test.

While not arising directly out of *El-Mezain*, that case also suggests a series of questions which the courts may need to answer in applying the *HLP* test: (1) Is there a difference between directing, controlling, or coordinating? Why did the Court use three different terms? (2) Might the specific term to be applied and the content of the term vary with the category of material support involved? Note that the *HLP* court also identified at least four of the categories of material support in addition to "personnel" and "service" in which one or more of these terms, in an appropriate case, could be relevant for purposes of determining criminal liability.<sup>52</sup> (3) Might the degree of direction, control, or coordination required differ depending on whether the issue was criminal liability or constitutionality? (4) How specific, direct, and explicit must the evidence of direction, control, or coordination be? To what extent can the existence of direction, control, or coordination be proved inferentially and circumstantially? These are just a few of the type

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50. *Id.* at 486.

51. *Id.*

52. *See supra* note 16.

of questions to be addressed in fleshing out the content of the direction, control, and coordination terms of the *HLP* doctrine.

## V. IMPLICATIONS OF THE FOREGOING STATUTORY, CONSTITUTIONAL, AND RELATED DISCUSSION

### A. *Grounds for a Governmental Investigation of the Matter*

How does all of the above relate factually to the student protests on the nation's campuses where many protestors have expressed strong support for, and endorsed violent actions by, Hamas, a designated foreign terrorist organization? To begin with, it should be repeated that no evidence has been reported in the media of any direct involvement of Hamas or its known surrogates on the campuses, or that Hamas, its surrogates, or its agents are fomenting student protests.

Almost immediately after October 7, 2023, protests that were pro-Palestinian and anti-Israel (despite the fact that Israel had been the victim of a surprise attack) seemingly spontaneously sprang up on a number of campuses across the United States.<sup>53</sup> Many statements and actions, at a minimum, impliedly supported Hamas. Certain student organizations also made very explicit statements in support of Hamas and some even expressed support of its terrorist attack(s) on Israel.<sup>54</sup> Given, however, the absence of evidence that has surfaced of direction, control, or coordination by Hamas of this protest activity, one might conclude that ends the inquiry. Not quite: there are reasons to be concerned about the possibility that Hamas or its surrogates may be involved. First, the very substance of the protests and the strong specific support by some student organizations and individual students for Hamas and even its violent terrorist actions do not alone prove Hamas's involvement, but they are consistent with it and arguably provide some circumstantial support for such involvement.

Second, there is evidence of a central operation behind these campus protests throughout the United States. A "Day of Resistance Toolkit" for organizing protests on campuses was issued by National Students for Justice in Palestine on October 8, 2023.<sup>55</sup> Among other things, it celebrated the Hamas attacks on Israel

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53. See Rachel Treisman & Elissa Nadworny, *U.S. Students Are Clashing Over the Israel-Hamas War. What Can Colleges Do?*, NPR (Oct. 14, 2023), <https://perma.cc/WZ3G-DK3M> (reporting on remarkably similar statements made on October 8<sup>th</sup>, 2023, by student organizations at Harvard and a student leader at NYU, holding Israel responsible for the great loss of life, as well as clashes of protestors at a half dozen schools within a week of the October 7 attacks); see also Nadine El-Bawab, *How Pro-Palestinian Protests Unfolded on College Campuses Across the US: A Timeline*, ABC NEWS (May 4, 2024), <https://perma.cc/S7PF-TLVW>; Howard Cooper & Rachel Hutchinson, *Free Speech on College Campuses—Legal Analysis Post 2023/24 Pro-Palestine Protests*, BOS. BAR J. (Oct. 31, 2024), <https://perma.cc/R7ZN-QYZN> (reporting that since October 7, 2023, "pro-Palestine protests have erupted at over five-hundred campuses across the United States . . .").

54. See *supra* note 33. See also *Students for Justice in Palestine (SJP)*, *supra* note 34 ("In the aftermath of October 7, NSJP posted a 'Day of Resistance' toolkit with language celebrating the attack . . .").

55. NAT'L STUDENTS FOR JUST. IN PAL., *DAY OF RESISTANCE TOOLKIT 2* (2023), <https://perma.cc/8JDJ-CDA6>. The toolkit indicated that there would be a "National Call-in" on "'how to organize a protest,' including roles, security, media training, and more" on October 9<sup>th</sup>, 2023. If help was needed, readers were encouraged to contact the National Students for Justice in Palestine organization.

and encouraged students to mount protests, stating that one of its goals was to unify and coordinate a national student movement.<sup>56</sup> It also included instructions for messaging and the framing of pro-Palestinian arguments, as well providing template graphics for preparing flyers, signs, and posters.<sup>57</sup> At least two other even more detailed toolkits aimed at encouraging and assisting in the staging of protests on behalf of the Palestinian cause, but not specifically directed at the campuses, were also issued in this same general time frame.<sup>58</sup>

A great many of the campus protests involved setting up encampments, and the participating students appear to have had funds for buying tents for encampments, plywood for building fences around the encampments, first aid kits, and other materiel for use in their protests.<sup>59</sup> While the similarity in the setting up of encampments on campuses throughout the country could have been the result of copycat actions, and there is no indication where the money for purchasing these items came from, these, too, are circumstances to be noted.<sup>60</sup>

Third, the approximate simultaneity and almost immediacy<sup>61</sup> of the outbreak of the protests at campuses throughout the country in the wake of October 7, 2023, are key facts. Finally, there is the detailed evidence recounted in the *El-Mezain* case, *supra*, that shows many of the methods by which Hamas has operated in the recent past. Earlier, it engaged in worldwide activities setting up

56. *Id.*

57. *Id.* at 3–5.

58. See generally PALESTINIAN FEMINIST COLLECTIVE, ALL OUT FOR PALESTINE: PALESTINIAN DIGITAL ACTION TOOLKIT (2023), <https://perma.cc/824T-LVUR>; *Within Our Lifetime Rally Toolkit*, WITHIN OUR LIFETIME, <https://perma.cc/DZY7-JEBF>.

59. See Adam Young, *A Look Inside Gaza Solidarity Encampments Across SoCal*, SUBSTANCE (May 19, 2024), <https://perma.cc/PG3N-2M7U> (describing visits to three University of California campus pro-Palestinian encampments and comparing the similarities and differences in their features (all included physical barricades, tents, and other equipment) and noting that there were encampments at hundreds of other campuses around the United States); Philip Marcelo & Denise Lavoie, *Pro-Palestinian Encampment at USC Dismantled After Protestors Comply with Order to Leave*, PBS NEWS (May 5, 2025), <https://perma.cc/KD4B-5DB2> (reporting on the dismantling of encampments around the country and police arrests of demonstrators, and quoting the Virginia State Attorney General that at the University of Virginia, “outsiders’ who were not students provided protestors with supplies like wooden barriers.”).

60. There have been efforts by non-governmental organizations to discover where the funding for organizations such as the Students for Justice in Palestine and Jewish Voice for Peace comes from. In some instances, the trail ends with an obscure charitable organization or foundation, but there is no indication where that body obtains its funds. For available online reports on the funding of those two organizations, see *Jewish Voice for Peace’s Funding Network*, NGO MONITOR (Nov. 13, 2023), <https://perma.cc/33BY-V5LQ>; *Students for Justice in Palestine (SJP): Available Funding and Other Information*, NGO MONITOR (Nov. 5, 2023), <https://perma.cc/66G7-DYLA>. See also *Students for Justice in Palestine (SJP)*, NGO MONITOR (Feb. 27, 2025), <https://perma.cc/A4R4-AQMT>. Presumably, if an investigation of funding sources for these organizations is undertaken by a government law enforcement agency, either the FBI or in the Treasury, there would be a likelihood of greater success because of the tools these agencies have available and the extensive experience they have in conducting such investigations.

61. See *supra* notes 58 and 59.

multiple organizations and using surrogates, agents, individuals, and groups.<sup>62</sup> These are, at a minimum, some indication of how it may be operating today.

Of course, all of these circumstances, taken together, do not prove Hamas's involvement. They are, however, very suggestive. There is evidence of a central encouraging of student protests and strong statements of support for Hamas and its violent actions by many of the protesting students, including a key student organization.<sup>63</sup> In light of the substantial history of Hamas's organizing activities in the United States and its pattern of regenerating and creating new organizations, there are adequate reasons for concern. What needs to be shown is evidence of links (for example, through communications, transfer of money, and the like) between Hamas or its surrogates or agents and the national student organizations or individuals in key roles, and that those links can amount to direction, control, or coordination by Hamas within the meaning of the Supreme Court's opinion in *HLP*. It seems reasonable to conclude that all of these circumstances together provide enough grounds to warrant a detailed, careful investigation by a qualified government law enforcement agency.

The appropriate and best-qualified agency<sup>64</sup> for conducting such an investigation is the FBI. While university officials do conduct investigations in university faculty and student disciplinary matters, these bodies do not have professional investigative capabilities and do not have the necessary legal authority and legal tools to conduct investigations relating to the possibility of criminal liability. But if the FBI is the appropriate agency, then a further question must be asked: What would be the effect of having FBI agents rooting around on campuses conducting a criminal investigation? Would not such government activity have a chilling effect on free speech on the campuses which, as noted above, are valued as bastions of debate and places where there should be an absence of censorship and the freedom to speak one's mind consistent with First Amendment values?

### *B. The Post-October 7 Announced Investigations*

Within five weeks after October 7, 2023, the Director of the FBI indicated that the Bureau was focusing investigations on Hamas, possible fundraising activities carried out in the United States by its supporters, and the possibility that it might stage violent terrorist attacks in the United States.<sup>65</sup> So far as is known, however,

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62. See LORENZO VIDINO, *THE HAMAS NETWORK IN AMERICA: A SHORT HISTORY* 11 (2023), <https://perma.cc/VX6F-M4A8> ("The ... incident [involving the launching of still another charitable organization] is telling of a larger dynamic, which is the ability of the US-based Hamas network to regenerate itself and continue its activities under new guises. Similarly, in fact, many of the members of the Palestine Committee and participants of the 1993 Philadelphia meeting have over the years created new structures to provide support to Hamas. While some of them focus on fundraising, others have concentrated on more political and educational efforts ...").

63. See *supra* notes 54 and 55.

64. At the time of this writing in 2025, the FBI has undergone a major change in leadership and some changes in personnel, as well as some still-evolving changes in mission. Currently, the overall impact of these changes and the form they will ultimately take are not clear. It is to be hoped that these changes will not exclude the type of investigation into the operations of an FTO that is being suggested here.

65. See Christopher A. Wray, FBI Director, Opening Statement to the Committee on Homeland Security (Nov. 15, 2023) ("We've kept our sights on Hamas and have multiple investigations into

there have been no indications that the FBI would also be investigating any possible connections between Hamas and the campus protest movement.<sup>66</sup> The two types of investigation would involve different emphases. The fundraising investigation would likely target the activities and intentions of the fundraisers and would also investigate how money would be transferred *to* Hamas or its surrogates and agents. An investigation of links between Hamas and individual students and/or student organizations<sup>67</sup> participating in the campus protest movement would look for communications between them and the transfer of money and materiel *from* Hamas, its surrogates and agents, or other possible intermediaries, to the campus-related organizations and people. There would be some overlap between two such investigations, and both might be carried out at the same time. But the difference in focus is significant, and investigators might engage in the one while not paying much attention to the relevant facts of the other.

In the absence of any new public indications, one cannot know whether the FBI has been investigating links between the protestors and Hamas. Perhaps, indeed, the FBI has been engaging in such investigations, and such investigations are currently ongoing, but the Bureau has kept quiet about them because of the sensitivity of any investigation that touches on campuses and First Amendment concerns. On the other hand, perhaps due to the risk that it might be trenching on First Amendment values by investigating the possible sources of planning and funding for campus protests, the Bureau could be shying away from such investigations.

Respectfully, the FBI should, in the course of its other investigations of Hamas, also investigate possible links between Hamas and the campus protest movement. While there are important constitutional speech protections that must be respected, the need to prevent a foreign terrorist organization from manipulating discussions on college campuses, to the detriment of the national interest of the United States, should outweigh concerns about the possible chilling effects of such an investigation. Arguably, Congress, by enacting § 2339B, and the Supreme Court in its interpretation of the language of the statute, have concluded that the importance of preventing an FTO from influencing campus debates outweighs the concerns about protecting free speech.

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individuals affiliated with that foreign terrorist organization. And while, historically, our Hamas cases have identified individuals located here who are facilitating and financing terrorism overseas, we continue to scrutinize our intelligence to assess how the threat may be evolving.”)

66. But see an indication that a terrorism investigation may be undertaken in connection with the protests, though, as of this writing, it remains unclear exactly what this news item portends. *Compare* Maria Tsvetkova & Andrew Goudsward, *US to Probe Columbia Protests for Terrorism Violations, Official Says*, REUTERS (last updated Mar. 15, 2025), <https://perma.cc/37X3-KFCQ>, with Devlin Barrett, *Orders to Investigate Protesters at Columbia Raised Alarm at Justice Dept.*, N.Y. TIMES, May 2, 2025, at A17.

67. There have been a number of lawsuits targeting student organizations that have been at the forefront of organizing and promoting the protests. *See, e.g., Columbia University Janitors, UCLA Jewish Community Members Sue Orgs Behind Encampments*, BRANDEIS CTR. (Apr. 28, 2025), <https://perma.cc/F3CB-MU8U>; *Complaint for Damages and Jury Trial Demand, Weinberg et al. v. National Students for Justice in Palestine et al.*, No. 25-cv-03714 (C.D. Cal. Apr. 25, 2025).

### C. Chilling Effect Concerns and Needed Investigation

While chilling effect concerns are arguably outweighed by the need for such an investigation, this is not to say that these concerns should not play a role in shaping the course of the investigation. The same concerns about interfering with First Amendment values that could make federal law enforcement reluctant to focus investigation on possible links between Hamas and campus protests can be taken into account in other ways, if such an investigation is undertaken. The FBI is, of course, experienced and expert in how it conducts investigations. Accordingly, what is advanced here is only by way of making some limited suggestions.

The main issue in the type of investigation under discussion here is whether there are links between Hamas and the campuses. Most of the links in that chain, if they exist, are likely to be outside of the campuses. Accordingly, it is suggested that at the outset, the investigation should focus outside of the campuses: on Hamas itself; on people, organizations, and groups known to be affiliated with it; and on its known surrogates and agents.<sup>68</sup> The notion of following the money and looking for communications between these Hamas-related people and entities, with a view to finding if they ultimately exist, means that the potential links between Hamas and the campuses should be the target of the investigation.

It is suggested that at the early stages of such an investigation the posture of the Bureau be to try to minimize its presence on, and intrusion into, the campuses and keep to a minimum any investigations regarding the organizing of the protests on the campuses or the related on-campus activities of individual students, except to the extent necessary. It is recognized that it will probably not be possible to avoid entirely some investigation of activities on the campuses. Aligned with this approach, it is suggested that the use of undercover agents or informants on the campus should be similarly minimized.<sup>69</sup>

## VI. CONCLUSION

Maintaining the nation's higher education campuses as places where free debate is encouraged, the expression of even abhorrent views is tolerated, freedom of speech is protected, and First Amendment values reign should be a high priority. But there are limits to freedom of speech protections even under the First Amendment. Among

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68. Note that Israeli sources provided testimony and other evidence in the *El-Mezain* prosecution. *United States v. El-Mezain*, 664 F.3d 467, 489 (5th Cir. 2011). It is assumed that a similar productive cooperation might occur in a current investigation of Hamas's influence on U.S. campus discourse.

69. As of this writing, the Trump administration is addressing U.S. campus discourse which it believes is harmful to the national security mainly through the use of immigration laws—e.g., by revoking visas of foreign students and, in at least one instance, attempting to deport a student holder of a permanent resident alien card, apparently based on the student's politically related statements and activities. In at least some of these instances, the government has been relying on a statutory provision that places a wide range of discretion in the Secretary of State. The administration's approach is (a) controversial; (b) being legally challenged, with the legal outcome uncertain as of this writing; and (c) applicable only to foreign students. U.S. citizens who engage in similar activities are immune from oversight based on this approach. See Eugene Volokh, *May Aliens Be Deported Based on Their Speech?*, VOLOKH CONSPIRACY (Feb. 3, 2025), <https://perma.cc/PW7Q-HC3W>.

those limits, a majority of the Supreme Court in *Holder v. Humanitarian Law Project* ruled that while entirely independent political advocacy in support of a designated foreign terrorist organization is protected speech and not subject to prosecution under 18 U.S.C. § 2339B, such advocacy under the direction or control of or in coordination with an FTO may violate § 2339B.

Of course, much of the above discussion relating to our campuses during the 2023–2025 period could turn out to be academic discourse and nothing more, unless the FTO in this matter, Hamas, has in fact been exercising sufficient direction, control, or coordination and this can be proved. Further, until cases are investigated and prosecuted, the meaning and substance of the “direction, control, or coordination” standards will remain somewhat elusive. While, thus far, no information or evidence regarding links of Hamas to the campus protests has been produced, there is enough general circumstantial evidence available to warrant careful investigation into the matter.

Campus environments are fragile locations for maintenance of free and open debate. If a large-scale investigation were to be mounted on the campuses, it would undoubtedly have a chilling effect on speech and might trigger its own set of protests. Initially, the main focus for investigation should rather be off-campus, on the possible links between Hamas and intermediaries, individuals, or organizations, who may be, in turn, in touch with campus-linked organizations which themselves may be off-campus.

It may be that the campus protests that began in fall of 2023 and continue to this day have no actual link to Hamas.<sup>70</sup> Unless adequate investigation is undertaken, however, the matter will remain in a state of doubt and uncertainty, and the possibility will continue to exist that debate and discourse on U.S. campuses has been (and, possibly, is still being) unlawfully manipulated by a foreign terrorist organization.<sup>71</sup>

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70. See Simone Weichselbaum & Chloe Atkins, *When Does Free Speech Cross the Line into Breaking U.S. Anti-Terrorism Laws?*, NBC NEWS (Nov. 1, 2024) (describing the controversy surrounding the leader of a pro-Hamas organization in the United States, not based on a campus, stemming from her advocacy in support of Hamas, and discussing whether she crosses the line between entirely independent advocacy and advocacy coordinated with or under the direction or control of Hamas; various individuals have called for her prosecution under § 2339B). According to this article, the FBI declined to confirm or deny whether there was an ongoing investigation into the matter.

71. In March 2025, U.S. Senator Bill Cassidy, Chairman of the Health, Education, Labor and Pensions Committee (“HELP”) launched an investigation into the American Muslims for Palestine (“AMP”), an organization alleged to have some ties to Hamas, regarding the AMP’s activities relating to college campuses, including its connections to the Students for Justice in Palestine. Cassidy sent a letter to the AMP requesting answers to specific questions and also requested information on these topics from the DOJ and the FBI. *Chair Cassidy Launches HELP Investigation into Organization with Alleged Ties to Hamas, Antisemitic Violence on College Campuses*, U.S. S. COMM. ON HEALTH, EDUC., LAB. & PENSIONS (Mar. 28, 2025), <https://perma.cc/GX7S-JBXB>.

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