No. 17-35634

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOHAMED SHEIKH KARIYE; FAISAL NABIN KASHEM; RAYMOND EARL KNAEBLE IV; AMIR MESHAL; STEPHEN DURGA PERSAUD,

Plaintiffs – Appellants,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States; CHRISTOPHER A. WRAY, Director of the Federal Bureau of Investigation; CHARLES H. KABLE IV, Director of the Terrorist Screening Center,

Defendants – Appellees.

On Appeal from the United States District Court
for the District of Oregon
(3:10-cv-00750-BR)

SUPPLEMENTAL BRIEF FOR APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases:

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases:

STATEMENT OF THE ISSUES

1. Whether, in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Supreme Court overruled the principle that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). *See Henry v. Spearman*, 899 F.3d 703 (9th Cir. 2018), and *Copeland v. Vance*, 893 F.3d 101 (2d Cir. 2018).

2. Whether the plaintiffs may challenge an unpublished government policy as void for vagueness under the Due Process Clause of the Fifth Amendment. *See, e.g., Gilmore v. Gonzales*, 435 F.3d 1125, 1135-36 (9th Cir. 2006).

ARGUMENT

I. A PLAINTIFF'S AS-APPLIED VAGUENESS CHALLENGE FAILS IF HIS OWN CONDUCT IS CLEARLY PROSCRIBED BY THE CHALLENGED PROVISION

In an as-applied vagueness challenge, a court "consider[s] whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,'" and "[t]hat rule makes no exception for conduct in the form of speech." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) ("*HLP*") (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455

U.S. 489, 495 (1982)) (alterations in original). As described in the Government's Answering Brief at pp. 10-13, plaintiffs' conduct falls squarely and clearly within the No Fly List criteria.

For example, plaintiff Kariye's inclusion on the No Fly List was based on his "prior history as a mujahedeen fighter in Afghanistan against the Russians and interactions with and financial support of others who have engaged in supporting or committing acts of terror." 2 ER 419. Recorded conversations between a cooperating witness and two members of the "Portland Seven" – a group of individuals prosecuted for terrorism-related activities in 2003 – revealed that Kariye "expressed support for violent jihad," "provided financial support" to the criminal defendants who traveled to Afghanistan "to fight against American troops," and "told his followers" that they should "fight * * * against Americans." 2 ER 420. Kariye was also identified as a member of the Board of Directors of the Global Relief Foundation, which has been designated as a Specially Designated Global Terrorist by the Department of Treasury. 2 ER 420; *see Global Relief Foundation v. O'Neill*, 315 F.3d 748 (7th Cir. 2002). The record in this case, including materials that the Government has moved to file *ex parte* and *in camera*, leave no doubt that, for all plaintiffs, their own conduct is clearly proscribed by the No Fly List criteria.

The Supreme Court did not overrule *HLP* in either *Johnson v. United States*, 135 S. Ct. 2551 (2015), or *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). *HLP* holds

that a plaintiff's as-applied vagueness challenge fails if the law is clear as to the *plaintiff's own conduct*, regardless of whether the law is unclear as to third parties (*i.e.*, "whether a statute is vague as applied" depends on "*the particular facts at issue*," and the plaintiff "cannot complain of the vagueness of the law as applied to *the conduct of others*," *HLP*, 561 U.S. at 18 (emphasis added). *Johnson* and *Dimaya* clarify that the Government cannot defeat a vagueness challenge merely by showing the law is clear as to *some hypothetical third party's conduct* (*i.e.*, "because there is *some conduct* that clearly falls within the provision's grasp," *Johnson*, 135 S. Ct. at 2561 (emphasis added), or the law "is clear in *any* of its applications," *Dimaya*, 138 S. Ct. at 1214 n.3 (emphasis added)). But even if the law's clarity as to *third parties* does not save the statute (as *Johnson* and *Dimaya* hold), the plaintiff must still show that the law is unclear as to *his own* conduct (as *HLP* holds). *HLP*, *Johnson*, and *Dimaya* are entirely consistent with the same underlying principle: that a plaintiff's vagueness challenge stands or falls based on whether the law is clear with respect to the plaintiff's own conduct, and not whether it is clear with respect to someone else's conduct.

In addition, *HLP* addressed the standard for an as-applied vagueness challenge. *HLP*, 516 U.S. at 18 ("We consider whether a statute is vague *as applied* to the particular facts at issue") (emphasis added); *id.* at 14 ("plaintiffs had not raised a 'facial vagueness challenge'"). While *Johnson* and *Dimaya* did not expressly

discuss whether the vagueness challenges in those cases were as-applied or facial, this Court has understood those cases to have addressed only facial vagueness challenges. As this Court noted in *Henry v. Spearman*, 899 F.3d 703, 709 (9th Cir. 2018), *Johnson* "looked past this as-applied challenge directly to the petitioner's facial challenge," and "struck down [the provision] in its entirety."[1] *See also Guerrero v. Whitaker*, 908 F.3d 541, 544 (9th Cir. 2018) ("*Johnson* and *Dimaya* expressly rejected the notion that a statutory provision survives a *facial* vagueness challenge merely because some conduct clearly falls within the statute's scope.") (emphasis added); *City of El Cenizo v. Texas*, 890 F.3d 164, 190 (5th Cir. 2016) (characterizing *Johnson* as a facial challenge). Accordingly, even if *Johnson* and *Dimaya* had altered the vagueness analysis, they would at most have altered the facial vagueness standard, not the standard for an as-applied vagueness challenge addressed in *HLP*.[2]

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[1] In addition, *Henry* addressed only whether the litigants could file a second or successive habeas corpus petition, and thus the merits of their vagueness claim were not addressed; the Court held only that the vagueness claim was not "facially implausible." *Id.* at 705, 708.

[2] In addition, *Dimaya* suggested that the challenged provisions in both *Dimaya* and *Johnson* may have been vague as applied to the litigants' own conduct, *Dimaya*, 138 S. Ct. at 1214 n.3, meaning that the Court would have had no occasion to consider whether a plaintiff can raise a vagueness challenge even if the challenged provision is clear as to his own conduct. To the extent the *dissent* in *Dimaya* thought otherwise, *see Henry*, 899 F.3d at 709, that is not a sound basis for determining what

Other courts of appeals have concluded that *Johnson* and *Dimaya* did not alter the vagueness standard even as to facial challenges. *See United States v. Cook*, --- F.3d ----, 2019 WL 333538 at *3-6 (7th Cir. 2019); *United States v. Bramer*, 832 F.3d 908, 909 (8th Cir. 2016) (per curiam) (holding that, post-*Johnson*, "our case law still requires him to show that the statute is vague as applied to his particular conduct") (citing *HLP*).

As the Seventh Circuit recently explained in *Cook*, "so much of the Court's analysis in *Johnson* deals with a statute that is in key respects *sui generis*." 2019 WL 333538 at *5. Typically, a statute's application depends on an individual's own conduct. To determine whether that statute is vague, therefore, a court asks whether or not the law is clear as to the individual's own conduct – the conduct that causes him to be subject to the challenged provision. But the statutes at issue in *Johnson* and *Dimaya* operate quite differently. Under the "categorical approach," those statutes do not apply based on the "conduct in which an individual defendant engages *on a particular occasion*," but on "an idealized ordinary case of the crime" of which the defendant was convicted. *Johnson*, 135 S. Ct. at 2561; *see Dimaya*, 138 S. Ct. at 1211 (statute applies based on "the ordinary case of an offense," not "the particular

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the *majority* held, especially since the majority responded to the dissent by noting that the provisions in *Dimaya* and *Johnson* were likely vague both as applied and facially.

facts" of the defendant's conduct). Because those statutes' application does not depend on the individual's own conduct, it would make no sense to judge the statutes' vagueness based on whether they are clear with respect to the individual's conduct. *See Cook,* 2019 WL 333538 at *5-6 ("[T]he categorical approach [is] significantly different * * * from looking at * * * actual, concrete facts" and distinguishes *Johnson* from a "more routine vagueness challenge" that "calls on the court to apply the statutory prohibition to a defendant's real-world conduct"). Accordingly, *Cook* held that "[i]t is not clear how much *Johnson* – and the Court's follow-on decision * * * in * * * *Dimaya* – actually expanded the universe of litigants who may mount a facial challenge to a statute they believe is vague," *id.*at *5, and concluded that "*Johnson* did not alter the general rule that a defendant whose conduct is clearly prohibited by a statute cannot be the one to make a facial vagueness challenge." *Id*. at *5-6. *Johnson* and *Dimaya* applied the vagueness doctrine to highly specific and unusual statutes – the application of which does not depend on the individual's own conduct – and because of those unique circumstances *Cook* correctly concluded that those cases either did not alter the

facial vagueness standard at all or, at most, altered the facial vagueness standard only in the narrow settings presented by those unusual statutes.[3]

Similarly, in *Copeland v. Vance*, 893 F.3d 101 (2d Cir. 2018), the court suggested in dicta that *Johnson* and *Dimaya* may have altered the facial vagueness analysis in "exceptional circumstances." *Id.* at 111 n.2. But that court still reaffirmed that in an "as-applied challenge" the plaintiff must "prove that a statute cannot constitutionally be applied to a specific course of conduct that the challenger intends to follow," *id.* at 112, and affirmatively quoted *HLP* for the principle that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," *id*. at 111 (quoting *HLP*, 561 U.S. at 18-19). In addition, the plaintiffs in *Copeland* had not asserted an as-applied vagueness challenge, *id.* at 112, so the court had no occasion to decide whether the as-applied vagueness standard had been altered by the Supreme Court.

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[3] In addition, *Cook* reaffirmed the rule that an as-applied vagueness challenge still requires a litigant to "show that [the challenged provision] is vague as applied to him; and if the statute undoubtedly applies to his conduct, he will not be heard to argue that the statute is vague as to one or more hypothetical scenarios." 2019 WL 333538 at *3 (citing *HLP*, 561 U.S. at 18-19). And because the plaintiff in *Cook* had brought only a facial vagueness challenge, *id.* at *1-2, the court had no occasion to address whether *Johnson* or *Dimaya* altered the as-applied vagueness standard.

Consistent with this understanding, even after *Johnson*, the Supreme Court reiterated *HLP*'s holding in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151-52 (2017) ("'[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim.'") (quoting *HLP*, 561 U.S. at 20). The plaintiff in that case raised only an as-applied vagueness challenge, not a facial vagueness challenge. *Id.* at 1149. That as-applied challenge gave the Supreme Court "little pause," because "it is at least clear" that the challenged provision proscribed the plaintiff's own conduct. *Id.* at 1151-52. The Supreme Court's post-*Johnson* adherence to *HLP* is particularly notable because the court of appeals in that case had questioned whether "[t]he Supreme Court recently signaled another arguable departure" from its vagueness principles in *Johnson*. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 143 n.17 (2d Cir. 2015).

Even if this Court were to think that *Johnson* or *Dimaya* cast some doubt on *HLP*'s reasoning – which they do not – *HLP* would still be binding on this Court. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *see also Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) ("It is this Court's prerogative alone

to overrule one of its precedents."); *In re Twelve Grand Jury Subpoenas*, 908 F.3d 525, 529 (9th Cir. 2018) (where Supreme Court case "has direct application in [a] case * * * it is not for us to question its continuing validity or persuasiveness"). Accordingly, the plaintiffs cannot prevail on their as-applied vagueness challenge, because the No Fly List criteria clearly apply to their own conduct.

Nor can plaintiffs prevail on a facial vagueness challenge. In "a facial challenge to the * * * vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates*, 455 U.S. at 494. But a facial vagueness challenge fails where the statute is "surely valid in the vast majority of its intended applications." *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1275 (9th Cir. 2017) (citation omitted). The No Fly List criteria – referring to the threat of various criminal terrorist acts – do not target constitutionally protected conduct and are clearly valid in the majority of intended applications. Plaintiffs' central contention is that the No Fly List criteria's reference to a "threat" renders the statute vague, but *Johnson* and *Dimaya* squarely rejected that argument where the "threat" is measured against a litigant's real-world conduct. *Johnson*, 135 S. Ct. at 2561; *Dimaya*, 138 S. Ct. at 1213-14. A No Fly List designation is based on an individual's real-world conduct – as is plainly the case for plaintiffs here. Even if the Court were to conclude that *Johnson* and *Dimaya* eliminate the requirement that a challenged provision be vague as to a plaintiff's

own conduct, the plaintiffs in a facial vagueness challenge would still be required to show that the challenged provision reaches a substantial amount of constitutionally protected conduct, and the plaintiffs in this case come nowhere close to meeting that burden.

II. WHETHER A GOVERNMENT POLICY IS UNPUBLISHED IS IRRELEVANT TO PLAINTIFF'S VAGUENESS CHALLENGE

The No Fly List criteria at issue in this case were not published when plaintiffs were put on the List or at the outset of the litigation. Those criteria, however, were provided to plaintiffs in the course of this litigation and prior to the time when plaintiffs responded to their designation under the revised DHS TRIP procedures. That timing has no relevance for plaintiff's vagueness challenge.

A law is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). The challenged provision need only provide "relatively clear guidelines." *Posters N' Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994). The vagueness standard, in other words, asks whether the terms of the provision are clear, which turns on the words used, not the publication of the text. Published criteria can be confusing, and unpublished criteria can be crystal clear, but the fact of publication *vel non* does not affect the clarity of the text. While vagueness objections "rest on the lack of notice," *Henry*, 899 F.3d at 709, the notice problem

of a vague statute stems from an "indeterminacy" of the words, *Williams*, 553 U.S. at 306; *see Copeland*, 893 F.3d at 114, not the lack of publication.

Although lack of publication is not relevant to vagueness *per se*, it is relevant to the Due Process requirements of "notice reasonably calculated, under all the circumstances, to apprise interested parties," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and "an opportunity to be heard * * * at a meaningful time and in a meaningful manner," *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). But any such notice argument – based on the fact that the No Fly List criteria were not published until after this litigation commenced – fails on the merits.

First, it is undisputed that after the Government revised its DHS TRIP redress procedures, plaintiffs in this case *did* receive notice of the No Fly List criteria, and received it *before* their opportunity to respond and object to their designations. *See* Gov't Br. at 9. Because notice must be reasonably calculated to give a plaintiff a meaningful opportunity to respond, Due Process requires no more than notice of the No Fly List criteria *in advance of plaintiffs' redress response*. That indisputably occurred in this case. And plaintiffs have waived any argument that Due Process entitles them to advance notice of the No Fly List criteria before they were designated on the No Fly List in the first place. Plaintiffs have brought *only* a post-deprivation Due Process challenge, and have not raised any pre-deprivation claim. *See* Gov't Br. 68; 1 ER 11 ("Plaintiffs allege [that] Defendants have not given

Plaintiffs any post-deprivation notice"); 3 ER 671 (seeking only "post-deprivation" process for "their continued inclusion on the No Fly List").

Plaintiffs cannot credibly argue that because the No Fly List criteria were not published at the time of the conduct in which they engaged, they were not "free to steer between lawful and unlawful conduct," and thus the criteria became a "trap for the innocent." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Given the conduct on which the plaintiffs' designations were based, *see supra at* 2-3; Gov't Br. at 10-13, plaintiffs have no persuasive argument that they were acting under the good faith belief that their conduct was "innocent" and could not have reasonably expected negative consequences to flow from their actions. Moreover, the Constitution does not forbid the Government from designating a person on the No Fly List based on conduct – no matter how threatening or extreme – simply because that conduct occurred before the individual was given the No Fly List criteria. At least in the civil context, rules or prohibitions with exclusively future effect that are based on old conduct are common and permissible. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219-20 (1988) (Scalia, J., concurring); *National Medical Enterprises v. Sullivan*, 957 F.2d 664, 671 (9th Cir. 1992).

CONCLUSION

For these reasons and those in the Government's Answering Brief, this Court should affirm the judgment below.

Respectfully submitted,

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FEBRUARY 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this Supplemental Brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5). Consistent with the Court's January 15, 2019 order, this Supplemental Brief contains no more than 12 pages. This Supplemental Brief also complies with Ninth Circuit Rule 32-3(2) because it contains no more than 3050 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

/s/ Joshua Waldman
Joshua Waldman

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, I electronically filed the foregoing Supplemental Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I also hereby certify that counsel for plaintiffs are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Joshua Waldman
Joshua Waldman

STATEMENT OF RELATED CASES

Appellees are not aware of any related cases pending in this Court.

/s/ Joshua Waldman
Joshua Waldman