No. 23-208

In The
Supreme Court of the United States

KEREN KAYEMETH LEISRAEL, ET AL.,
Petitioners,

v.

EDUCATION FOR A JUST PEACE IN THE MIDDLE EAST,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AND *AMICUS* BRIEF OF THE NATIONAL JEWISH ADVOCACY CENTER, STANDWITHUS, AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS, COALITION FOR JEWISH VALUES, AND ORTHODOX JEWISH CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* OF THE NATIONAL JEWISH ADVOCACY CENTER ET AL. IN SUPPORT OF PETITIONERS

Amici Curiae the National Jewish Advocacy Center, StandWithUs, the American Association of Jewish Lawyers and Jurists, the Coalition for Jewish Values, and the Orthodox Jewish Chamber of Commerce respectfully move this Court for leave to file its Brief of Amicus Curiae in support of the Petition for Writ of Certiorari filed by Petitioners, Keren Kayemeth LeIsrael – Jewish National Fund et al.

The Court had asked Respondents to file a brief in opposition by November 20, 2023, but Respondents sought an extension to file until Dec. 20, 2023. In return for their consent to this extension, Respondents agreed in writing that they "have no objection to cert-stage amici attempting to file later than permitted by rule 37." As the leading treatise on Supreme Court practice explains, the current rules "are designed to enable a respondent to seek an extension of time in order to respond to the amicus filing in its brief in opposition," and in this instance Respondent has agreed that the rule would not apply.

Because the brief provides information and arguments that bring to the attention of the Court relevant matter not already brought to its attention by the parties and may be of considerable help to the Court, and because both parties have agreed to this arrangement and have agreed that no party will be prejudiced by permitting amici to file this brief, and because the acceptance of this brief should not delay

this Court in reaching its decision on the Petition, *amici* file this motion under Rule 37 seeking permission to file the attached brief in support of Petitioners.

Respectfully submitted,

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December 20, 2023

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INTEREST OF AMICUS*

The National Jewish Advocacy Center, Inc. (NJAC) is a nonprofit organization committed to advocating for the Jewish nation and the Jewish state as prisms through which people from all walks of life can learn about the dignity of difference, the power of coexistence, and the strength that comes from tolerance. The proper resolution of this case is a matter of utmost concern to NJAC because it involves holding those who target both the Jewish people and the Jewish State for genocidal attacks accountable, even when they try and funnel their money through facially legitimate charities and other sources.

David Schoen has 30+ years of extensive experience throughout the nation as lead counsel in trial and appellate level complex litigation cases including litigation under the Anti-Terrorism Act. StandWithUs is an international, non-partisan education organization that supports Israel and fights antisemitism. The American Association of Jewish Lawyers and Jurists' mission includes representing the human rights interests of the

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* Counsel of record for Petitioners consented to the filing of this amicus brief. Counsel of record for Respondents did as well, noting that they "have no objection to cert-stage amici attempting to file later than permitted by rule 37." (See accompanying motion for leave to file). No person or entity aside from Amicus, its members, or its respective counsel made a monetary contribution to the preparation or submission of this brief.

American Jewish community, and the AAJLJ seeks legal remedies to achieve justice for victims of terrorism through its participation in legal cases in the United States and abroad. Coalition for Jewish Values is the largest Rabbinic public policy organization in America, and promotes religious liberty, human rights, and classical Jewish ideas in public policy, including by filing amicus curiae briefs in defense of equality and freedom for religious institutions and individuals. The Orthodox Jewish Chamber of Commerce is a global umbrella of businesses, professionals, elected officials and communal activists, with a mission to, among other things, positively affect the public policy of governments around the world.

SUMMARY OF THE ARGUMENT

Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA) "to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against [any person or entity that] provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA § 2(b), 130 Stat. at 853. The enactment of JASTA was necessitated by recurrent lower court rulings which failed to recognize Anti-Terrorism Act (ATA) claims based upon theories of "secondary" liability—against anyone who conspired to violate the ATA or aided and

abetted persons who violated the ATA or otherwise engaged in terrorist activities. JASTA § 4(a), 130 Stat. at 854 (codified at 18 U.S.C. § 2333(d)(2)). Accordingly, JASTA clarified the broad scope and reach of the ATA as a vehicle for civil restitution against those who facilitate acts of terror against United States citizens abroad.

In the earliest JASTA aiding-and-abetting cases, the bar established by the courts for demonstrating a defendant's knowledge of its aiding in terrorist activity was so high as to render all but the most explicit support for terror non-actionable activity. The Second Circuit in *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329-30 (2d Cir. 2018) required that a defendant be "'generally aware' that it was … playing a 'role' in [the terrorist party's] violent or life-endangering activities." *Id.* This high threshold—which in essence required a defendant to be not only aiding and abetting but playing a direct role in terror—was inconsonant with other statutes requiring only "knowledge of the organization's connection to terrorism." *Linde v. Arab Bank, PLC,* 882 F.3d 314, 329-30 (2d Cir. 2018) (affirming jury verdict) This initial understanding of JASTA enabled terror-supporting entities to evade accountability as they cynically and disingenuously supported Foreign Terrorist Organizations (FTO's) while feigning ignorance as to how their assistance aided the operations of highly secretive international terror organizations. JASTA was thereby undermined, and civilians were left without redress despite the enactment of a statute intended to provide them with

the broadest possible avenues for seeking justice. See also, *Freeman v. HSBC Holdings PLC*, 413 F. Supp. 3d 67, 73 n.2 (E.D.N.Y. 2019) (recognizing the then-"decided trend toward disallowing ATA claims against defendants who did not deal directly with a terrorist organization or its proxy.").

Since JASTA's early days, however, such decisions have been subsequently revisited and in many cases reversed as representing judicial impediments to Congress' purpose in enacting both the ATA and JASTA, whose purpose was explicitly to close "gap[s] in our efforts to develop a comprehensive legal response to international terrorism," H.R. REP. No. 102-1040, supra, at 5, and to thereby impose liability "at any point along the causal chain of terrorism," S. REP. No. 102-342, supra, at 22. Given the clear intent cited above, the Second and D.C. Circuits recently revisited the standard for pleading a JASTA aiding-and-abetting claim and reversed the decisions of their lower district courts and ordered further discovery in lieu of the dismissal of complaints.

In the case before the Court, the United States Court of Appeals for the District of Columbia adopted an approach to the enforcement of JASTA which is incompatible with the JASTA statute itself, undermines the very purpose for which JASTA was enacted, and is contrary to recent case law rejecting dismissals of complaints in favor of discovery and further factfinding. The USCPR, a U.S.-based non-profit with a clear and undisputed chain of affiliation with an FTO—Hamas—whose leaders have

repeatedly explained that their actual goal is the destruction of the State of Israel,[1] and who publicly support the armed wing of Hamas responsible for the October 7 attacks—the Al Qassam Brigades—on social media,[2] serves as a clearinghouse for the raising of funds for a broad array of causes *including* but not limited to support for the FTO Hamas. This nonprofit does indeed also engage in lawful advocacy; however, such lawful activity in no way mitigates its liability under JASTA. The Court of Appeals' treatment of the USCPR's legitimate activities as probative with respect to its aiding and abetting of terrorist activity takes account of extraneous information to complicate an otherwise straightforward assessment of what is already known about the Defendant.

That the Respondent, Education for Just Peace in the Middle East d/b/a US Campaign for Palestinian Rights (USCPR), does not make its financial support of Hamas apparent pursuant to a cursory examination is only to be expected given that Hamas is an FTO, and such interaction is illegal. Uncovering what is understandably hidden from plain sight is the very purpose of discovery. Even pending discovery, there is already ample evidence of a robust relationship between Respondent, the BDS National Committee (BNC), and Hamas.

The approach of the Court of Appeals—ignoring the allegations in the Complaint as well as publicly

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[1] (https://www.stopbds.com/?page_id=48)

[2] https://www.standwithus.com/factsheets-uscpr

available and undisputed facts about the relationships between these entities, and essentially refusing to see beyond what terrorist organizations and their confederates choose to advertise—effectively neuters the efficacy of JASTA while practically serving as a guidebook for FTOs who need to raise funds in the United States while avoiding accountability and evading government enforcement of the claims of private victims. The Court conflated Petitioners' present inability to pinpoint the precise flow of funds between and among Respondent and Hamas, with what is in fact a legitimate, necessary and proper subject for discovery: an accounting of the funds that have entered Respondent's coffers—coffers it shares with Hamas operatives—that includes where and how those funds were subsequently forwarded and used.

ARGUMENT

I. The D.C. Circuit erred in dismissing relevant information that adequately pled all three *Halberstam* elements

As the D.C. Circuit noted, in amending the ATA to permit suit against anyone "who aids and abets, by knowingly providing substantial assistance, or who conspires with" the terrorist organization, JASTA codified the aiding-and-abetting standard from *Halberstam v. Welch,* 705 F.2d 472 (D.C. Cir. 1983), which includes three elements: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally

aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation." Opinion at 13, quoting Atchley, 22 F.4th at 220.

The D.C. Circuit claimed that Petitioners failed to meet these elements because a) they did not adequately allege that Hamas "perform[ed] a wrongful act that cause[d] an injury"; b) there were no facts from which the Court could infer that USCPR was "generally aware" that its role of providing funds to the Boycott National Committee was "part of an overall illegal or tortious activity; and c) the Court could discern no non-conclusory factual allegations that USCPR "knowingly and substantially assist[ed]" any incendiary launches, because Petitioners "fail to allege that the funds that USCPR provided to the Boycott National Committee were used to finance any terrorist attacks, much less that USCPR was aware that it was happening. And as we have discussed, the Complaint does not even allege that the Boycott National Committee provided funds to Hamas." The Court was simply wrong on all counts.

A. The D.C. Circuit erred in failing to recognize the nature and extent of USCPR's donations to the BNC, and the knowledge both implied and imputed by their official relationship.

The Court of Appeals asserted that Petitioners failed to put forth sufficient allegations concerning "the

nature and extent of USCPR's donations to the Boycott National Committee," despite the repeated and undisputed factual assertion made and accompanying detailed evidence provided in the Complaint (See Compl. ¶¶ 24, 123-126), that the Education for Just Peace in the Middle East d/b/a US Campaign for Palestinian Rights (hereinafter "USCPR") is *the sponsor* of the BNC. Even the BNC itself does not hide the fact that it is fiscally sponsored by the USCPR:

Thank you for donating to the Palestinian BDS National Committee
1 message

Palestinian BDS National Committee <receipts@donorbox.org>
Reply-To: Palestinian BDS National Committee <michael.deas@bdsmovement.net>
To:

Dear

This is a receipt for your kind donation to the Palestinian BDS National Committee, the broadest coalition in Palestinian civil society that leads the global BDS movement for Palestinian rights.

Your donation will help us to continue building our movement and to keep our hope for freedom, justice and equality alive.

The impact of BDS has grown substantially this year. You might be interested to read our round-up of the year: bdsmovement.net/news/2016-bds-impact-round-up

Also please consider sharing the link to our Donate page with friends, family and colleagues. The link to share is www.bdsmovement.net/donate/.

BDS is an inclusive human rights movement for Palestinian rights that is anchored in the Universal Declaration of Human Rights and that rejects all forms of racism and discrimination on any of the prohibited grounds set by the UN.

For your records, the Palestinian BDS National Committee (BNC) is fiscally sponsor ed by Education for Just Peace in the Middle East, which is registered as a 501(c)3 charitable organization. We can accept contributions under either name and all contributions are tax-deductible to the fullest extent allowed by the law. This letter also confirms that no goods or services were provided in return for your donation. Our fiscal sponsor's EIN is 42-1636592.

Donation details:
Organization: Palestinian BDS National Committee
Campaign: Support the BDS movement
Amount:
Donation interval:
Receipt #:
Donated at:
Payment method:
Donor Address:

Thank you,
Palestinian BDS National Committee

As made clear in the above auto-reply email that donors to the BNC receive, BNC "can accept contributions under either name"—BNC, or USCPR.

In truth, there would be no way for the USCPR to not be "generally aware" that its role of providing funds to the BNC was "part of an overall illegal or tortious activity" because, as dictated by non-profit law, that is *precisely* the role of a fiscal sponsor.

A fiscal sponsorship is a relationship between a tax-exempt organization like the USCPR that serves as the official recipient of charitable donations for a new or smaller organization that is not yet recognized as tax-exempt. In this relationship, the organization that has tax-exempt status is the "fiscal sponsor" and the organization that does not have tax-exempt status is the "sponsored organization." This mechanism allows an "organization to temporarily extend their nonprofit privileges to another organization in the process of acquiring tax-exempt status." See Armin Rosen and Liel Leibovitz, *BDS Umbrella Group Linked to Palestinian Terrorist Organizations*, Tablet Magazine, June 1, 2018 https://www.tabletmag.com/sections/news/articles/bds-umbrella-group-linked-to-palestinian-terrorist-organizations (June 1, 2018); see also *MobilizeGreen, Inc. v. Cmty. Found. for Nat'l Cap. Region*, 101 F. Supp. 3d 36 (D.D.C. 2015) (outlining the definition of a fiscal sponsorship); see also Business Transactions Solutions § 72:244.

Here, USCPR is using fiscal sponsorship, its own nonprofit status, and its EIN number to accept tax-exempt donations for the BNC—a foreign political entity with known FTO members. See also Letter re Call for Investigation of Domestic Activities of Affiliates of Certain Designated Foreign Terror Organizations, Zachor Legal Inst. at 27, https://zachorlegal.org/wp-content/uploads/2018/11/Final-DOJ-Letter.pdf?189db0&189db0 (July 12, 2018) ("USCPR, the umbrella organization under which the Domestic Terror Affiliates operate, is listed as the fiscal sponsor of the BNC on receipts for donations made to the BNC . . . BNC, an organization littered with designated foreign terror organizations, proudly states that it coordinates BDS activity worldwide").

By law, a fiscal sponsorship is not a simple pass-through mechanism through which an entity that is not a 501(c)(3) non-profit can collect tax deductible donations. The money belongs to and is under the control of the fiscal sponsor who must maintain control over the donated funds and retain sole discretion as to how those funds are spent. Accordingly, money collected by the USCPR and remitted to the BNC which is then used to perpetrate a terrorist act *must be accounted for, itemized and recorded by the fiscal sponsor*, the USCPR.

According to IRS Revenue Ruling 68-489, the definitive statement of IRS policy on fiscal sponsorship arrangements, a 501(c)(3) organization is allowed to accept tax-deductible funds on behalf of a

non-501(c)(3) entity if the following three conditions are satisfied:

A. The project being carried out by the non-501(c)(3) organization is "in furtherance of [the 501(c)(3)'s] own exempt purposes."

B. The 501(c)(3) organization "retains control and discretion as to the use of the funds."

C. The 501(c)(3) organization "maintains records establishing that the funds were used for section 501(c)(3) purposes." Contributions to a 501(c)(3) which are solicited for a specific project are only deductible under 26 U.S.C § 170 of the IRC in cases where the 501(c)(3) has reviewed and approved the project as being in furtherance of its own tax-exempt purposes. (Rev. Rul. 66-79, 1966-1 C.B. 48.)

Any money accruing to the BNC via the USCPR: (a) is the legal property of the USCPR; (b) must be utilized by the BNC pursuant to the USCPR's guidance and mission; (c) must be accounted for by the BNC to the USCPR to comply with the USCPR's compliance requirements as a 501(c)(3) fiscal sponsor; and (d) is subject to audit by relevant authorities including the Internal Revenue Service and relevant states Attorneys General.

Since 2018, the BNC has been integrally involved in arranging, organizing, advertising, and sponsoring the "Great Return Marches" (GRM). Compl. at ¶ 112-

119. The GRM are a series of "organized efforts to terrorize Israel and those that reside in Israel, to sabotage Israel's border fence, plant explosive charges, and launch incendiary terror balloons and kites toward Israeli communities to burn the forests, parks, and farmlands on the Israeli side of the border and to terrorize the people and citizens of Israel," including the Petitioners. Compl. at ¶ 87. The GRM Supreme National Committee includes senior members of Hamas and other terrorist organizations, and coordinates closely with them. Compl. at ¶ 87-107.

If the USCPR does not have "general awareness" that the money it transfers to the BNC is used to aid and abet the acts of terrorism at the Great Return Marches, then it cannot be a tax-exempt entity and its 501(c)(3) status should be revoked for failure to comply with the basic requirements of acting as a financial sponsor.

It is undisputed that the USCPR was acting as fiscal sponsor for the BNC at all relevant times, and it is axiomatic that fiscal sponsors have a fiduciary duty to the non-profits they sponsor. E.g., Trust for Conservation Innovation, "Fiscal Sponsorship: A 360 Degree Perspective at Executive Summary ("A fiscal sponsor is a nonprofit organization that provides fiduciary oversight, financial management, and other administrative services to help build the capacity of charitable projects.") (emphasis added) (available at http://www.trustforconservationinnovation.org/about/pdf/TCI-FS-whitepaper-201403.pdf); see Compl. at ¶

20 (citing National Network of Fiscal Sponsors, Guidelines for Comprehensive Fiscal Sponsorship, Tides (Oct. 14, 2010) (www.tidescenter.org/nnfs). Courts have also recognized the existence of a fiduciary relationship in cases where an agent is entrusted with money to be used for a specific purpose. See, e.g., *Wagman v. Lee*, 457 A.2d 401, 404 (D.C. 1983).

Where, as here, the BNC's use of funds received via the USCPR is circumscribed by the USCPR's mission and oversight, and the USCPR is legally required to provide oversight and accounting of all flows of funds between and among it, the BNC, and third-party recipients. A fiduciary relationship existed between the USCPR and the BNC by virtue of the facts and circumstances of their relationship. See *Millennium Square Residential Ass'n v. 2200 M St. LLC*, 952 F. Supp. 2d 234, 248-49 (D.D.C. 2013) ("Whether a fiduciary relationship exists is a fact-intensive question, and the fact-finder must consider the nature of the relationship, the promises made, the type of services or advice given and the legitimate expectations of the parties.") (internal quotation marks omitted).

As such, the knowledge imputable to the USCPR is even more damning than the threshold required in previous caselaw. In *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842 (2d Cir. 2021) plaintiffs alleged that the Defendant bank aided and abetted Hezbollah—an FTO—by processing wire transfers for Hezbollah affiliates. The Second Circuit reversed the

findings of the district court and found that that the defendant did not need to intend to further terrorist activities to have "general awareness," but rather needed only to have been aware that it was playing a role in unlawful activities from which terrorist attacks were foreseeable. *Id.* at 859. The Second Circuit also rejected the bank's argument that substantial assistance must be rendered directly to the principal for liability to attach. Id. at 855-56. The court explained that JASTA permits "an aiding-and-abetting claim where the defendant's acts aided and abetted the principal even where his relevant substantial assistance was given to an intermediary." Id. at 856, 863-864.

In both *Honickman v. BLOM Bank SAL*, 6 F.4th 487 (2d Cir. 2021), the Second Circuit reaffirmed the Kaplan approach. The Honickman plaintiffs alleged that the bank aided and abetted Hamas, a designated FTO, by providing financial services to Hamas-affiliated customers. Although the Honickman Court upheld the lower court's dismissal, it found that Plaintiffs did not need to allege the funds "actually went to Hamas." "Factual allegations that permit a reasonable inference that the defendant recognized the money it transferred to its customers would be received by the FTO would suffice." Id. at 500. both of those cases, the Court found that banks could be held liable under JASTA for processing money transfers where publicly available information *could* have put them on notice that they were facilitating terror. Here, all information necessary for the USCPR to know that the money it collects for the BNC is used

for terror operations is, *by law*, already in the USCPR's possession. If such information is not in fact in the USCPR's possession, then the USCPR is a pass-through conduit for terrorist activity and the case for further discovery is therefore bolstered. Thus, the Court erred in asserting that Petitioners had not met the second and third elements of aiding and abetting under Atchley.

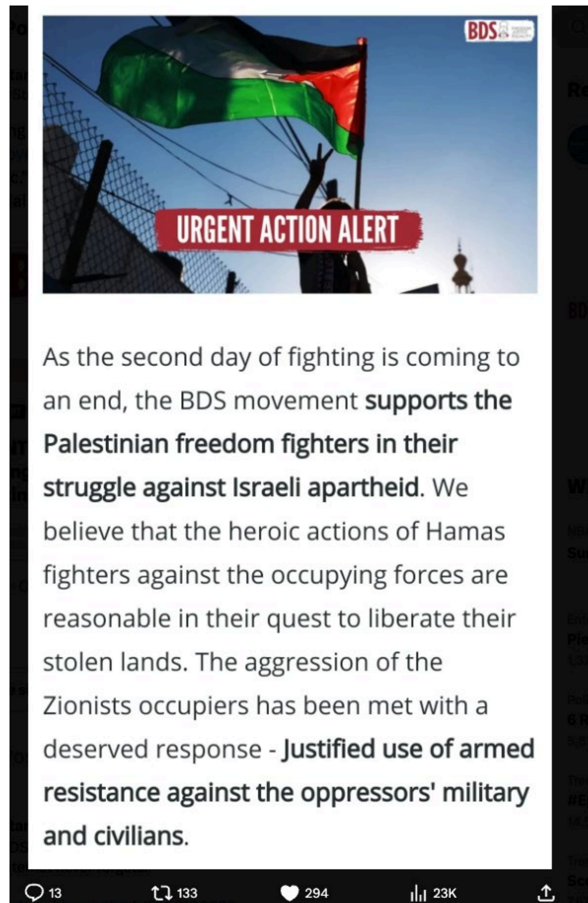
B) The D.C. Circuit erred in ignoring the existing overlap between the BNC and FTO's

In its decision, the Court of Appeals also ignored the puzzle pieces connecting Respondent to Petitioners' injuries, including the specific and probative descriptions of the relationships between and among the BNC, USCPR, Palestinian National and Islamic Forces (the "PNIF") and various FTO's; the USCPR's repeated support and sponsorship (as demonstrated above) of the 'protest' events from which the incendiary balloon terror attacks against Petitioners were launched; and finally, Petitioners' unambiguous demonstration, via *Hamas' own social media*, that such attacks were carried out by Hamas and its affiliates. (See Compl. at ¶52)

The PNIF is a coordinating framework for a number of Palestinian national and religious factions, including five designated terrorist organizations; HAMAS, PFLP, PLF, PIJ and PFLP. Compl. at ¶ 66. Founded in 2000, its purpose was to lead and coordinate terrorist activities between its various member organizations at the onset of the "Second

Intifada" terror campaign, resulting in more than a thousand Israelis and Americans killed and many thousands more wounded over the course of this devastating period. The coalition was and remains an actual body of representatives from these member organizations. Id at 67. The PNIF is also *the lead coalition member of the BNC*. Id. at 77-80. Hamas *is* part and parcel of the PNIF, and, as such, the BNC. When, as demonstrated clearly above, the USCPR provides funding for the BNC, they are providing funding to Hamas and its affiliates. They are also *well aware* of what Hamas is doing with the money; here, for example, is Mahmoud Nawajaa, the General Coordinator of the BNC, publicly supp orting the Al Qassam Brigades (Hamas' military wing) and writing "the Qassam style! Glory to resistance and eternity to martyrs":

On October 8, 2023, one day after Hamas brutally slaughtered 1200+ men, women, and children; raped, tortured, and mutilated innocent human beings; and took elderly and infant captives, the BNC posted a statement urging additional "meaningful support to the Palestinian Armed Resistance," and referring to the Hamas terrorists responsible as "heroic" and their actions as "reasonable."



The Court's assertion that the BNC "also engages in lawful civil resistance" is no more relevant than the fact that the Hells Angels Motorcycle Club, an organization designated by the U.S. Justice Department as a criminal syndicate, also organizes highly successful toy drives for needy children. That McDonalds offers salads on the menu does not make it a health food restaurant chain. Legitimate undertakings do not inoculate an enterprise against

liability for illegitimate ones carried out contemporaneously.

The very fact that money is fungible and that donations can be used to cover legitimate as well as illegitimate operations is the reason that JASTA's broad emphasis is intended to encompass the direct and indirect aiding and abetting of an FTO by a funding organization, irrespective of whether such aid is the ultimate purpose of such funding organization or is peripheral to other initiatives of such funding organization. Liability under JASTA is not mitigated by engagement in lawful activities nor is it diluted by the numerosity of activities an organization engages in which are additional to the funding of an FTO. If it were, confederates of FTO's would be empowered to raise money to underwrite terror activities as long as a certain percentage of the funds they raise was remitted to unrelated deserving charities. This would not only be an anomalous result to JASTA's imposition of broad liability, but would defy the basic elements of law enforcement, terror prevention, and human behavior by trying to adjudge the sum total of an organization's redeeming qualities against the lives it helps destroy.

The Court's approach would establish the untenable result that an FTO can hide in plain sight by joining a coalition of the innocuous and cynically prospering in the non-profit space in ways explicitly prohibited in the regulated financial services space thereby establishing a paradigm whereby every drug cartel, human trafficking operation, organized crime

syndicate and terror group can operate by simply donning an NGO hat and mingling with the denizens of the charity circuit. Supporters of terror, increasingly marginalized by U.S. and international banking and money-laundering laws, need no longer try to hide their activities or circumvent enforcement efforts as membership in groups with intentionally non-existent vetting standards can accomplish what the most intricate money laundering operations could not—a U.S.-authorized means of direct person-to-person support for an FTO.

For purposes of JASTA and accountability for aiding and abetting acts of international terror, the Court's approach is also entirely impractical. Terrorist organizations operate in the shadows. Successful ones shield their movements by assimilating and ensconcing themselves within otherwise legitimate organizations. Organized crime syndicates and drug cartels operate and control vast portfolios of legitimate businesses and real estate holdings to launder their ill-gotten gains. This reality is the *raison d'etre* of a burgeoning multi-national, multi-jurisdictional anti-money laundering apparatus designed to prevent the co-mingling of illicit money with lawful payments, transfers and remittances.

Pursuant to the lower Court's decision, FTOs would be well-advised to simply hide in plain sight within lawful organizations whose operations are not easily ascertainable by third-party victims lacking the institutional investigative tools of international law enforcement agencies. The legislative intent behind

JASTA and the justice that Congress attempted to make available would give way to a newly created precedential certainty that JASTA claims are futile against FTOs that prudently mask their flows of funds within legitimate non-profit organizations.

Recent court decisions have rejected just such a fate for JASTA by rejecting the litmus test for aiding and abetting as one requiring a Defendant to know where exactly it fits into an FTO's overall infrastructural scheme before it is liable, in lieu of an approach consistent with Congress' intent in enacting JASTA: "knowledge of the organization's connection to terrorism." *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329-30 (2d Cir. 2018) The relationship between Respondent and Hamas, wherein Hamas plans and coordinates events sponsored by Respondent during which it routinely engages in and promotes terror attacks, is open and notorious. The specifics of that relationship, the flow of funds, and the possibility of intermediary parties, is where factfinding can shed light on entities that prefer to operate under cover of darkness.

As it relates to Hamas' involvement in the terrorist activity, in dismissing the Complaint, the Court of Appeals found that "appellants do not adequately allege that Hamas "perform[ed] a wrongful act that cause[d] an injury." In fact, paragraphs 52-56 of the Complaint allege Hamas' wrongful acts with great specificity including the means of attack, targets, a chronology of events, and a summary of the damages. These allegations are accompanied by

contemporaneous photo evidence from *Hamas' own social media*. Compl. at ¶ 103-16. Plaintiffs have therefore not only alleged but already conclusively demonstrated that Hamas is the entity behind the incendiary balloon attacks; described the over 4800 acres of forest damaged heretofore by such attacks; and provided Hamas' own contemporaneous documentation of such attacks. That Hamas is the entity behind the incendiary balloon attacks is a singular fact that both the Petitioners and Hamas could agree upon.

The Court claimed that "[a]ppellants assign responsibility for the incendiary attacks to the Sons of al-Zawari, "Palestinian youths," or "H[amas] and/or others." Compl. ¶¶ 9–21, 52, 100. Appellants' uncertainty about who perpetrated the incendiary attacks is fatal to their ability to plead that USCPR aided and abetted those attacks." This assertion, however, is a complete *misreading* of the Complaint, which brooks no doubt as to Hamas' responsibility for the incendiary balloon attacks. Petitioners are clear that the "Sons of al-Zawari" are a *branch* of Hamas, and paragraphs 103 and 104 provide a litany of proofs to validate Petitioners' assertion that the "Sons of al-Zawari," named after Hamas's Al Qassam Brigade's Tunisian aeronautical engineer, Mohammad Al Zawari, is in fact a Hamas affiliate. Accordingly, the Court's indulgence of the possibility of alternative perpetrators for the incendiary balloon attacks, despite Hamas' proud assumption of ownership of such attacks, bespeaks a failure to stipulate to relevant facts as they unquestionably are and

provides a highly defective basis for dismissing Petitioners' claims.

Aside from Hamas' own celebration of its incendiary balloon attacks on Israel, independent verification is also easily ascertainable. The arson attacks via incendiary balloons during Great March of Return events under the aegis of Hamas is not an allegation but a fact documented as early as March 30, 2018 by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), a United Nations agency that supports the relief and human development of Palestinian refugees[3], and has been extensively reported upon in mainstream new outlets[4] academi[5], and defense industry publications. See March 2019 analysis in Security & Defense Quarterly by Joanna Zych, Faculty of National Security War Studies University, Warsaw, Poland, examining "the Palestinian 'Great March of Return' as a background for the development of a new Hamas' tactic."[6] In the event there is any doubt as to Hamas's involvement in such attacks, the June 2019 UN and

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[3] https://www.unrwa.org/campaign/gaza-great-march-return

[4] https://www.theguardian.com/world/2020/aug/16/israel-continues-airstrikes-on-gaza-in-retaliation-for-hamas-balloon-bombs; https://honestreporting.com/exploding-balloons-hamas-explosive-terror-tactic-against-israel/; Schleifer, Ron. "The 2018-19 Gaza Fence clashes: a case study in psychological warfare." *Israel Affairs* 28.3 (2022): 357-372.

[5] Mendelboim, Aviad, and Liran Antebi. "Hamas and Technology: One Step Forward, Two Steps Back." *StA* 22.2 (2019): 43-55.;

[6] https://securityanddefence.pl/The-use-of-weaponized-kites-and-balloons-in-the-Israeli-Palestinian-conflict,108677,0,2.html

Egyptian-mediated agreement between Israel and Hamas whereby Israel granted significant economic concessions in exchange for Hamas ceasing its incendiary balloon-borne arson attacks, as well as the January 2020 Egyptian led negotiations, in which Hamas again claimed responsibility for the incendiary balloons, in international negotiations, serves to make Hamas's self-acknowledged involvement beyond the reasonable inquiries of the Court. See Compl. at ¶ 52)

In short, Petitioners have adequately pled all three aiding and abetting factors, which renders the D.C. Circuit's assertion that this Court's unanimous opinion in *Twitter, Inc. v. Taamneh*, No. 21-1496, 143 S. Ct. 1206 (2023) is not relevant incorrect. In fact, this is the perfect case to distinguish that case, which alleged a "failure to act" or "mere passive nonfeasance" (143 S. Ct. at 1227), from this one, which alleges active participation and malfeasance.

c) The Court erred in its narrow understanding of the allegation made that the USCPR provided material support for Terror

Finally, the Court of Appeals contended that Petitioners failed to adequately demonstrate that the BNC provides material support to terrorism. The Court of Appeals' opinion arrives at this conclusion by misreading a key element of JASTA aiding-and-abetting liability. Proof of JASTA liability requires a defendant be "generally aware of his role as part of an overall illegal or tortious activity at the time that he

provides the assistance." *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 220 (D.C. Cir. 2022). The Court of Appeals erroneously reads into this requirement the notion that that this "role" in illegal or tortious activity must involve demonstrable monetary support at all links across the chain. See *Keren Kayemeth LeIsrael - Jewish Nat'l Fund v. Educ. for a Just Peace in the Middle E.*, 66 F.4th 1007, 1017 (D.C. Cir. 2023).

In fact, the Complaint states that the USCPR provides material support to, and sponsors the BNC "by, inter alia collecting money in the United States for and on behalf of the BNC," and "raises money in the United States for, and transmits monies from the United States to the BNC, which directly and indirectly benefits Hamas and other designated terror organizations, in violation of applicable US law." (See Compl. at ¶ 24). The Complaint goes on to the allege that USCPR conspired to underwrite support and promote the GRM, which on a yearly basis, is the event and venue from which launchings of incendiary terror balloons, kites and other terror devices have been and are being used to attack the lands of the State of Israel and its citizens, including the Petitioners named herein. Compl. ¶¶24, 25. This event is promoted on Respondent's Facebook page, on Twitter, and via its emails. Compl. ¶¶24, 25.

The Complaint further specifically alleges that the USCPR's support to Hamas through the BNC, and the USCPR's concomitant funding and support for the GRM, enabled and supported the event and venue necessary for an FTO to commit acts of international

terrorism and trespass and illegally enter and destroy the property of KKL-JNF. Compl. at ¶243.

To the extent the allegations regarding the USCPR's funding of the BNC needs to be clarified further, the USCPR's own receipts (*supra* section I.A. at 6) acknowledging USCPR's receipt of tax-deductible donations on behalf of the BNC makes the point unmissable.

Moreover, Petitioner's Complaint alleges that direct monetary support was just one facet of the USCPR's support for the BNC. Such support extended to the USCPR's sponsoring the BNC representative in North America, being the "BNC's most important strategic ally and partner in the U.S.," promoting and sponsoring the GRM, and leading in the United States the "Stop the Jewish National Fund" campaign, all to the damage and detriment of KKL-JNF and the Rosenfeld and Vaknin Plaintiffs. Compl. ¶ 244.

In fact, material support for terrorist activities can comprise numerous efforts other than simply providing funding. In enacting JASTA, Congress made clear that the legislation's purpose was to "provide civil litigants with the broadest possible basis . . . to seek relief against persons, entities and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." *Bartlett v. Societe Generale De*

Banque Au Liban Sal, 2023 U.S. Dist. LEXIS 56982 (E.D.N.Y. 2023); see also *Honickman v. BLOM Bank SAL*, 6 F.4th 487 (2d Cir. 2021) (Quoting JASTA, Pub. L. No. 114-222, 130 Stat. 852, 853 (2016)). Pertinent for our purposes, even absent conclusive proof of monetary support (which discovery may yet find) the promotion and advertisement of terror activities can also comprise material support for these activities. See *Linde v. Arab Bank*, PLC, 882 F.3d 314 (2d Cir. 2018) (Court considered evidence that revealed that defendant processed transfers to charities that used funds to disseminate Hamas propaganda; support Hamas-affiliated terrorists; and make payments to the families of Hamas suicide bombers, prisoners, and operatives). The Court of Appeals' insistence that Petitioners trace funding across the chain of entities tying USCPR to Hamas and other FTOs prior to discovery, and refusal to consider evidence of non-monetary support for terrorism, not only renders JASTA limp, but broadcasts a simple roadmap for terror funding to FTOs across the globe.

It is well established that "[t]he language and purpose of JASTA are meant to allow an aiding-and-abetting claim where the defendant's acts aided and abetted the principal even where his relevant substantial assistance was given to an intermediary." *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 856 (2d Cir. 2021); see also *Honickman v. BLOM Bank SAL*, 6 F.4th 487 (2d Cir. 2021) (Second Circuit rejected defendant's contention that JASTA limits liability for aiding-and-abetting to circumstances in which a defendant actually aided and abetted the person who

committed the relevant act of international terrorism). Here, the USCPR aids and abets the principal through the intermediaries of the BNC and PNIF, which it fiscally sponsors. The governing body of the Great Return March—the "GRM Supreme National Committee"—was directly created by the PNIF in conjunction with other smaller Palestinian organizations. See Compl. at ¶ 88. Since its creation, the GRM Supreme National Committee and promotion of the March has been riddled with overlap between known FTO members and PNIF. Senior leaders of Hamas, PIJ, and PFLP are also members of the GRM Supreme National Committee. See. Compl. at ¶¶ 89–92. Ismail Haniyeh, a senior Hamas official, stated in 2018 that Hamas and the rest of the Palestinian factions are part of the Great Return March. See Compl. at ¶ 92. In 2019, Hamas even released a press statement on its own that called "on the Palestinian people to follow the decisions of and participate in the activities organized by the Supreme National Committee of the Great March of Return." See Compl. at ¶ 98.

To say PNIF was unaware of FTO involvement in the Great Return March and the GRM Supreme National Committee would be to say PNIF walked into Committee meetings deaf and blind to the FTO members sitting on the Committee themselves. That PNIF, a member of the BNC (which is fiscally sponsored by Respondent) was responsible for the creation the GRM Supreme National Committee is alone enough to demonstrate the general awareness requirement under JASTA, where substantial

assistance has been provided by an intermediary. Even absent knowledge that an organization to whom it is providing financial support to is engaged in terrorism, courts have reasoned that a defendant may be found liable when it "knows there is a substantial probability that the organization engages in terrorism but ... does not care" See *Miller v. Arab Bank, PLC*, at *19, No. 118CV2192HGPK (E.D.N.Y. 2023), quoting *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 693 (7th Cir. 2008). Additionally, BNC itself has promoted the Great Return March. On March 29, 2019, BNC published its support of the GRM on its official Facebook page. See Compl. at ¶ 116:

Several individual BNC members have participated in promotion of the Great Return March as well. See Compl at ¶ 116.

CONCLUSION

For the above reasons, the petition for certiorari should be granted.

Respectfully submitted,

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December 20, 2023