

No. 23-208

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**In The  
Supreme Court of the United States**

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KEREN KAYEMETH LEISRAEL, et al.,

*Petitioners,*

v.

EDUCATION FOR A JUST  
PEACE IN THE MIDDLE EAST,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The District Of Columbia Circuit**

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**BRIEF ON BEHALF OF ZACHOR LEGAL  
INSTITUTE AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

Zachor Legal Institute (“Zachor”) is a 501(c)(3) non-profit civil rights advocacy organization and legal think tank focusing on eliminating discrimination. Among Zachor’s areas of focus is confronting discrimination and violence promoted by the Boycott, Divest and Sanction movement (“BDS”). BDS, which Respondent is part of, has deep and extensive ties to designated foreign terrorist organizations, including Hamas and the Popular Front for the Liberation of Palestine and has infiltrated a number of organizations to spread a discriminatory agenda aimed at Jews and companies that do business with and in Israel. Zachor’s interest is in ending all forms of support to foreign terrorist organizations, and in holding their supporters accountable under law.

With regard to the instant case, Zachor has engaged in extensive research on the subject of the secondary liability provisions of the Anti-Terrorism Act, codified at 18 U.S.C. § 2333(d)(2) (“JASTA”). Based on this research, counsel for Zachor is the co-author, along with Nadav Machol, one of Zachor’s legal interns, of a law review article, “Judicial Aiding and Abetting of Terror” (hereinafter, “Judicial Aiding and Abetting of

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<sup>1</sup> No counsel for any party either (a) authored this brief in whole or in part or (b) made a monetary contribution intended to fund the preparation or submission of the brief. *See* SUP. CT. R. 37.6. All parties have been timely notified of the filing of this brief pursuant to SUP. CT. R. 37.2.

Terror”).<sup>2</sup> This article is directly relevant to the instant case in that it examines the phenomenon of facially charitable or humanitarian organizations that provide financial and other support for United States designated foreign terror organizations and how the aiding and abetting provisions of anti-terror financing laws, including the provisions of JASTA, should be interpreted to ensure that such laws are enforced consistent with the intent of Congress in enacting these laws.

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## SUMMARY

This brief focuses solely on the aiding and abetting liability provisions of the JASTA amendment to the Anti-Terrorism Act, 18 U.S.C. § 2333 et seq. (the “ATA”). Certiorari review is warranted because the District of Columbia Circuit’s opinion below, *Keren Kayemeth Leisrael-Jewish Nat’l Fund v. Educ. for a Just Peace in the Middle East*, 66 F.4th 1007 (D.C. Cir. 2023), ignored well-documented facts concerning the connections between various groups, including Respondent, and the designated foreign terror organization known as Hamas and those facts demonstrate an important element of aiding and abetting liability under JASTA. Further, the District of Columbia Circuit’s opinion below conflicts with the clear intent of Congress in enacting JASTA and “decided an important question of

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<sup>2</sup> Marc A. Greendorfer and Nadav Machol, *Judicial Aiding and Abetting of Terror*, 43 B. U. REV. OF BANKING AND FINANCIAL L. (forthcoming Spring 2024), currently available in draft form at <https://papers.ssrn.com/abstract=4377025>.

federal law that has not been, but should be, settled by this Court.” SUP. CT. R. 10(a), (c). The resulting conflict creates confusion regarding the scope of aiding and abetting liability under JASTA. This Court’s clarification is essential for both victims’ rights as well as the security of the United States.

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## ARGUMENT

### **I. The District of Columbia Circuit’s Conclutory Characterization of the BDS Movement is Contrary to Numerous Studies and Constitutes Prejudice Against Petitioners.**

For the past eight years *amicus* has engaged in extensive research on the origins and affiliations of the BDS movement as well as the role it occupies in the ecosystem of Palestinian Arab terrorism. *Amicus* has published numerous law review articles explaining how federal and state laws apply to BDS’s discriminatory conduct and how BDS was borne of, and exists to further the aims of, designated foreign terror organizations. In short, BDS does not accept the existence of Israel and actively works to eliminate Israel. The BDS rallying cry of “from the [Jordan] River to the [Mediterranean] Sea, Palestine will be free”, a slogan championed by Hamas and repeated by Respondent on its website,<sup>3</sup> is, at its core, a clear acknowledgement that

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<sup>3</sup> U.S. Campaign for Palestinian Rights Website, available at <https://uscpr.org/uscpr-national-conference-highlight-not-on-our-dime-session/#:~:text=From%20the%20river%20to%20the,National%20Conference%20in%20Houston%2C%20Oct.>



BDS's goal is to ethnically cleanse Jews from their historic homeland (whose borders stretch from the Mediterranean Sea to the Jordan River) and deprive Jews of their inherent right of self-determination,<sup>4</sup> the same *raison d'être* and primary goal of Hamas.

In light of this, and the well-documented fact that Palestinian Arab terror is made up of an ecosystem where facially non-violent groups like Respondent are created to sanitize and fundraise for the terrorist organizations that function as their eminence grise,<sup>5</sup> there can be no logical explanation for the District of Columbia District Court to have concluded that Petitioners allegations “ . . . do not even suggest defendants were ‘one in spirit’ with Hamas or that defendants intended to help Hamas or other groups succeed in perpetuating violent attacks”<sup>6</sup> or for the District of Columbia Circuit to have ratified this gross and prejudicial conclusion that is at odds with numerous reports and analyses when it opined “[t]he web of

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<sup>4</sup> For a detailed discussion of the establishment of Israel as the Jewish homeland in biblical times and the status of Jews as indigenous people today, see Marc A. Greendorfer, *The True History and Legal Meaning of Colonialism in the Holy Land: The 2042 B.C.E. Project*, Summer & Fall 2022 INT'L J. L. ETHICS TECH. 2 (2022), available at <https://doi.org/10.55574/NVOA3005>.

<sup>5</sup> See *Judicial Aiding and Abetting of Terror* at 45 (testimony of members of a Palestinian Arab “humanitarian” group documenting how a designated foreign terror organization that is a Palestinian National and Islamic Forces member, actually controls the “humanitarian” group).

<sup>6</sup> *Keren Kayemeth Leisrael-Jewish Nat'l Fund v. Education for a Just Peace in the Middle East*, 530 F. Supp. 3d 8, 15 (D.D.C. 2021).

connections alleged in the Complaint falls far short of establishing that the Boycott National Committee is an extension of Hamas or has been taken over by Hamas.”<sup>7</sup>

Notwithstanding Petitioners’ extensive and thorough documentation of the facts that (1) Respondent is an integral element of the BDS movement, and (2) the governing body of the BDS movement, the BDS National Committee (“BNC”), includes the Palestinian National and Islamic Forces, which comprises five designated foreign terror organizations, the District of Columbia Circuit’s opinion below arrived the unfathomable conclusion that these facts, which tie primary and secondary actors, are “nothing more than guilt by association.”<sup>8</sup>

This willful refusal to properly weigh the documented allegations of Petitioners is akin to the court below saying, “who are you going to trust, me or your lying eyes?”, is well beyond routine “error-correction” and has resulted in such prejudice that it requires this Court’s intervention.

The District of Columbia Circuit did, in fact, recite the proper standard for when a complaint alleges sufficient facts to warrant discovery in this case and also cogently set out the standard for surviving a motion to dismiss, but this only makes that court’s refusal to adhere to the standards it set forth and thoroughly

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<sup>7</sup> 66 F.4th 1007 at 1015.

<sup>8</sup> *Id.*

examine the facts alleged by Petitioners all the more incomprehensible.

In *amicus*' first law review article on the history of BDS, *The BDS Movement: That Which We Call a Foreign Boycott, By Any Other Name, Is Still Illegal* (hereinafter the "*RWU Article*"),<sup>9</sup> the origins of BDS as a less violent companion to the likes of Hamas, Hezbollah, Palestinian Islamic Jihad and the Popular Front for the Liberation of Palestine are documented. To wit,

Each of the anti-Israel actors today has a different structure and public persona. Hamas is a formal political and military entity with a centralized governing body and a territory under its control; al-Qaeda and the Islamic State are primarily militant terror organizations with very little centralization or formal political apparatus; the BDS Movement is primarily a propaganda organization with a decentralized governing structure. All of these organizations, however, strictly hew to the original Arab League "Three No's" position that Zionism is incompatible with the Palestinian Arab identity and all strive to replace the Jewish state with a Palestinian Arab state.<sup>10</sup>

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<sup>9</sup> Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. Iss. 1, Article 2 (2017), available at [http://docs.rwu.edu/rwu\\_LR/vol22/iss1/2](http://docs.rwu.edu/rwu_LR/vol22/iss1/2).

<sup>10</sup> *RWU Article* at 31.

The fact that BDS organizations were created to support designated terror organizations is, at this point, well known. In 2019, the government of Israel released a report *Terrorists in Suits: The Ties Between NGOs Promoting BDS and Terror Organizations* (“Terrorists in Suits”)<sup>11</sup> documenting “[h]ow terrorists came to hold key positions in NGOs promoting the Boycott Divestment and Sanctions (BDS) campaign against the State of Israel; and how, through these NGOs, they exploit Western governmental funding, philanthropic foundations, financial platforms and civil society to advance their goal of dismantling the State of Israel.”<sup>12</sup> Central to the findings of this report is the role BDS groups, including Respondent, play in assisting Hamas in its terror activities and their shared ultimate goal of destroying the State of Israel.

For the District of Columbia Circuit to dismiss the massive body of evidence that Respondents are an integral part of Hamas’ operations with a glib claim that the evidence is “nothing more than guilt by association” demonstrates that the court below did not adequately review the Petitioners’ evidence and allegations. BDS is many things, but for the District of Columbia Circuit to whitewash it as a “form of civil

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<sup>11</sup> *Terrorists in Suits: The Ties Between NGOs Promoting BDS and Terror Organizations*, Report by Ministry of Strategic Affairs and Public Diplomacy, State of Israel, available at [https://www.gov.il/BlobFolder/generalpage/terrorists\\_in\\_suits/en/De-Legitimization%20Brochure.pdf](https://www.gov.il/BlobFolder/generalpage/terrorists_in_suits/en/De-Legitimization%20Brochure.pdf).

<sup>12</sup> *Id.* at 2.

resistance”<sup>13</sup> and “lawful advocacy”<sup>14</sup> is further evidence of that court’s prejudicial failure to consider Petitioners’ evidence and allegations. There is nothing resembling “civil resistance” or “lawful advocacy” in an ecosystem that promotes ethnic cleansing.

Adding insult to injury, the District of Columbia Circuit’s opinion below contained an absolutely false statement of law, once again demonstrating its prejudicial handling of facts and law: “[a]dvocating and coordinating a boycott of Israel—‘economically, academically[,] and diplomatically,’ Compl. ¶ 70—is not unlawful.”<sup>15</sup>

In fact, BDS activities violate the provisions of federal anti-boycott laws including 50 U.S.C. § 4842, as well as the provisions of 42 U.S.C. § 2000d et seq. (Title VI of the Civil Rights Act), 42 U.S.C. §§ 2000e to 2000e-17 (Title VII of the Civil Rights Act), in that they promote discrimination against Israelis and Jews generally in education and employment, and also violate a host of state antidiscrimination laws, including those adopted by a supermajority of U.S. states to combat the discriminatory BDS movement.<sup>16</sup> Further, as Hamas and other entities that constitute the BNC are designated foreign terror organizations, providing support

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<sup>13</sup> 66 F.4th 1007 at 1011.

<sup>14</sup> *Id.* at 1018.

<sup>15</sup> *Id.* at 1017.

<sup>16</sup> *See, e.g., Ark. Times LP v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022), cert. denied, No. 22-379, 143 S. Ct. 774 (Feb. 21, 2023).

to them violates the provisions of 18 U.S.C. §§ 2339(A) and (B).<sup>17</sup>

In sum, the District of Columbia Circuit’s opinion below was riddled with prejudicial conclusions, blatant misstatements of law and significant refusals to fairly consider the Petitioners’ allegations, all of which are essential to properly assessing whether secondary liability applies to Respondent.

## **II. The District of Columbia Circuit’s Opinion Below Undermines the Purpose of JASTA.**

When Congress enacted JASTA, it specifically explained why there was a need to explicitly recognize aiding and abetting liability under the ATA.

JASTA was enacted to “. . . recognize the substantive causes of action for aiding and abetting and conspiracy liability under chapter 113B of title 18, United States Code”<sup>18</sup> in order to “**. . . provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, 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

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<sup>17</sup> For a full analysis of how BDS activity violates U.S. laws, see the *RWU Article* at 97-133.

<sup>18</sup> Pub. L. No. 114–222, §2(a)(3), Sept. 28, 2016, 130 Stat. 852.

the United States.”<sup>19</sup> The Congressional hearings prior to the enactment of JASTA confirm this: “. . . JASTA seeks to ensure that those, including foreign governments, who sponsor terrorist attacks on U.S. soil are held fully accountable for their actions. In addition, JASTA attempts to enhance the effectiveness of U.S. efforts at combatting terrorism and combatting terrorist financing by making those who provide financial support to foreign terrorist organizations liable for their conduct.”<sup>20</sup>

The District of Columbia Circuit in its opinion below effectively neutered JASTA, and defied the clear intent of Congress, when it interpreted JASTA in such a restrictive manner as to make it virtually impossible to successfully claim aiding and abetting liability against an organization that clearly aids and abets foreign terror organizations.

Terror financing is designed to require the peeling back of many layers, often with no overt connections among the participants, to uncover where the money starts and where it ultimately is received. This fact was made clear in testimony before Congress several months before JASTA was enacted. Dr. Jonathan Schanzer of the Foundation for Defense of Democracies presented testimony to Congress on the complex web

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<sup>19</sup> Pub. L. No. 114–222, §2(b)(4), Sept. 28, 2016, 130 Stat. 852. (emphasis added)

<sup>20</sup> *Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before the Subcomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 13 (2016) (statement of Richard D. Klinger, Sidley Austin LLP).

of financing, involving non-profit organizations and terror front groups, in the context of Islamic terror directed at Israel and the nature of the BDS movement. In his testimony, Dr. Schanzer explained that terror financing is quite sophisticated and often uses nominally lawful front groups, especially charities and humanitarian groups, to obfuscate the purposes for which the funding is ultimately used.<sup>21</sup>

This is not news. In fact, in 2001, the District Court for the Northern District of Illinois described Hamas and its fundraising activity in the United States succinctly:

Hamas' presence in the United States is significant but covert. It conducts its affairs through a network of front organizations that ostensibly have religious and charitable purposes. Upon information and belief, the organizational defendants in this case are Hamas' main fronts in the United States. These organizations' purportedly humanitarian functions mask their mission of raising and funneling money and other resources to

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<sup>21</sup> *Israel Imperiled: Threats to the Jewish State, Joint Hearing before H. Foreign Affairs Comm. Subcomm. on Terrorism, Nonproliferation, and Trade and the Subcomm. on the Middle East and North Africa* (April 19, 2016) (testimony of Dr. Jonathan Schanzer, Foundation for Defense of Democracies), available at <https://docs.house.gov/meetings/FA/FA18/20160419/104817/HHRG-114-FA18-Wstate-SchanzerJ-20160419.pdf>.



Hamas operatives to support their terrorist campaigns.<sup>22</sup>

Since 2001, Hamas' fundraising in the United States has become even more complex and lucrative. In addition to the fact that foreign terror organizations often mix charitable and political aims in their terror activities, they also avail themselves of complex funding strategies that include the use of money laundering, third party charitable organizations, criminal activities and fraudulent use of corporate structures. Further, while terrorism was generally financed by state actors in the past, as states have moved away from overt sponsorship of groups like Hamas, Hezbollah or the Popular Front for the Liberation of Palestine, the vacuum has been filled by a variety of non-state actors, from non-profit activist groups to non-governmental organizations, using criminal activity such as drug dealing to fill their coffers.<sup>23</sup>

Respondent's activities in the United States are one significant part of the "front organizations that ostensibly have religious and charitable purposes." JASTA was enacted to apply to such front organizations, yet the District of Columbia Circuit's opinion below, if allowed to stand, will render JASTA meaningless in the fight against terrorism.

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<sup>22</sup> *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1005 (N.D. Ill. 2001).

<sup>23</sup> See generally Shima Baradaran, Michael Findley, Daniel Nielson and Jason Sharman, *Terror Funding*, 162 U. PENN. L. REV. 477 (2014).

In part, the District of Columbia Circuit's decision can be attributed to the fact that when Congress enacted JASTA, it incorporated a standard for aiding and abetting liability from a case that had nothing to do with terrorism, *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

The *Halberstam* court was right to have imposed a fairly stringent knowledge requirement before it imposed liability on the secondary defendant since the primary and secondary defendants lived together and the secondary defendant had intimate and day-to-day knowledge of the primary defendant's actions. Imposing a lesser knowledge standard could have easily created liability for a large universe of individuals and entities who likely have no understanding of the actual criminal enterprise they are supporting.

This standard could never be used for terror financing prosecutions, because, as Congress acknowledged, terror financing is usually structured to ensure that only the primary actor (the terror organization) is aware of exactly what the funds will be used for. However, to ensure that innocent parties are not swept up in criminal investigations, Congress also imposed a requirement that the secondary defendants have some level of explicit knowledge of who they are supporting. This is why JASTA requires some level of knowledge on the part of the secondary actor but does not require specific knowledge of the terror group's plans and logistics. All that should matter, and all that does matter legally, is that the aider and abettor is aware that it is providing funding for a terror group's activities,

something that is amply documented with regard to Respondent.

As *amicus* has set out in its upcoming law review article, *Judicial Aiding and Abetting of Terror*, *Halberstam* should not be interpreted in a way that is incompatible with the realities of how terrorist financing works in practice. Terrorist organizations follow developments in law and adapt accordingly. They have clearly noted the development of ATA caselaw and have adjusted their activities to avoid liability under the ATA by only intimating their planned use of support provided by groups like Respondent, rather than explicitly sharing details of terror plans, while continuing to engage in terrorist activities and fundraising for those activities. Since BDS operatives, including Respondent, know exactly what the terror groups they support plan to do, there is no need to explicitly state how the support will be utilized. In many ways, the relationship between “humanitarian” groups like Respondent and terror groups like Hamas resembles that of a Mafia boss and an eager Mafia underling, where all that is needed is a “take care of this” type of message and everything else is understood.

In terms of the knowledge standard required under JASTA, the District of Columbia Circuit’s baseless conclusion that “. . . there are no facts from which we can infer that [Respondent] was ‘generally aware’ that its role of providing funds to the Boycott National Committee was ‘part of an overall illegal or tortious

activity’”<sup>24</sup> is at odds with the numerous reports and studies that document the history of BDS as the funding and public relations arm of designated foreign terror organization and the interlocks between Respondent and Hamas as members of the BNC.

The relationship of Respondent and Hamas is, in fact, far more extensive than the relationship between the primary and secondary actors in *Halberstam*, as *amicus* explained in the *RWU Article* and as the State of Israel documented in its report, *Terrorists in Suits*. It is typical within the Palestinian Arab terror ecosystem for purported humanitarian groups to have designated terror organization officials embedded in their management structure, as explained in *Judicial Aiding and Abetting of Terror*.<sup>25</sup>

Existing caselaw on the role of *Halberstam*’s factors under JASTA properly take into account that when it comes to a purported secondary actor such as a financial institution, the knowledge factors are appropriate since financial institutions are not fronts for terrorist organizations nor are they part of an ecosystem of terror. Facially humanitarian groups like Respondent, on the other hand, must be examined with the understanding that they are alter egos of the terror groups they support and have built-in firewalls to obfuscate the ties that establish secondary liability. Had

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<sup>24</sup> 66 F.4th 1007 at 1017.

<sup>25</sup> *Judicial Aiding and Abetting of Terror* at 49-57.

Petitioners been allowed discovery, this would have been amply documented.

It is critical for this Court to examine the District of Columbia Circuit's application of *Halberstam* to cases such as this, where the Respondent demonstrably has knowledge that it is supporting terror and its role in terrorism has been carefully designed to exploit conflicting legal standards, to ensure that the purpose of JASTA, "provid[ing] civil litigants with the broadest possible basis, consistent with the Constitution of the United States, 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", is not thwarted.

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## CONCLUSION

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

Respectfully submitted,  
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