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 a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF LOUIS D. BRANDEIS CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE. 1

INTRODUCTION & SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. THE CIRCUITS HAVE SPLIT OVER WHETHER PROVIDING FINANCIAL SUPPORT TO A TERRORIST ORGANIZATION TRIGGERS DIRECT ATA LIABILITY. 8

II. THE D.C. CIRCUIT'S RELATED AIDING-AND-ABETTING CONCLUSION IS OUT OF STEP WITH HOW AIDING-AND-ABETTING LIABILITY WORKS IN OTHER CONTEXTS 10

III. NOW IS THE TIME TO RESOLVE THESE EXTRAORDINARILY IMPORTANT QUESTIONS 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Atchley v. Astrazeneca UK Ltd.,
22 F.4th 204 (2022)..11, 15

Boim v. Holy Land Foundation for Relief & Development,
549 F.3d 685
(7th Cir. 2008) 3, 4, 9, 10, 11, 12

Halberstam v. Welch,
705 F.2d 472 (D.C. Cir. 1983) 11

Holder v. Humanitarian Law Project,
561 U.S. 1 (2010) 13

Leisrael v. *Education for A Just Peace in the Middle East*,
66 F.4th 1007 (D.C. Cir. 2023)...............................8

Linde v. Arab Bank, PLC,
882 F.3d 314 (2d Cir. 2018)................................2, 8

Weiss v. Nat'l Westminster Bank PLC,
768 F.3d 202 (2d Cir. 2014)..............................5, 12

Statutes

18 U.S.C. § 2331...7

18 U.S.C. § 2333 ....8, 11, 13, 14, 16

18 U.S.C. § 2339A...13

18 U.S.C. § 2339B...13

Pub. L. No. 114-222, 130 Stat. 852, 853 (2016)..........6

Other Authorities

Press Release, U.S. Dep't of the Treasury, U.S. Designates Five Charities Funding Hamas and Six Senior Hamas Leaders as Terrorist Entities (Aug. 22, 2003), https://home.treasury.gov/news/press-releases/js672 15

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INTEREST OF AMICUS CURIAE[1]

The Louis D. Brandeis Center for Human Rights Under Law (the "Center") is an independent, non-partisan institution for public interest advocacy, research, and education. The Center's mission is to advance the civil and human rights of the Jewish people and to promote justice for all. The Center's education, research, and advocacy focus especially, but not exclusively, on the problem of anti-Semitism on college and university campuses.

[1] No counsel for any party authored this brief in whole or in part, and no party, party's counsel, or any person other than Amicus Curiae or its counsel contributed money intended to fund preparation or submission of this brief. All parties were given timely notice of Amicus Curiae's intent to file.

INTRODUCTION & SUMMARY OF THE ARGUMENT

The D.C. Circuit below adopted two holdings that create or deepen circuit splits, are plainly incorrect, and will have exceptionally dangerous real-world consequences. By rejecting both direct and aiding-and-abetting liability claims for providing financial support to Hamas under the Anti-Terrorism Act ("ATA"), the court of appeals has hamstrung a critical tool for combatting terrorism. Those holdings were both dangerous and naïve before the attacks of October 7. They are even more intolerable now, particularly as Hamas has provided a timely reminder of exactly what horrors it can unleash with foreign financial support. This Court should grant review.

Direct Liability. The court of appeals held that giving money to an organization that counts Hamas as a member does *not* suffice to establish even plausible liability under the ATA. It thus held that donations to the Boycott National Committee—which concededly includes Hamas as a member (along with numerous other terrorist organizations)—was not sufficient to establish direct liability. Liability for such donations, according to the D.C. Circuit, would constitute merely assigning "guilt by association." App. 11a. In doing so, it joined the Second Circuit, which also holds that "providing financial services to a known terrorist organization" does "not invariably equate to an act of international terrorism." *Linde v. Arab Bank, PLC*, 882 F.3d 314, 326 (2d Cir. 2018).

The D.C. Circuit's decision deepens an existing split between the Second and Seventh Circuits. The latter takes a much more expansive (and realistic)

view of liability premised on a practical and unassailable truth: money is fungible. For that reason, the Seventh Circuit, sitting *en banc*, held that "[g]iving money to Hamas, like giving a loaded gun to a child … is an 'act dangerous to human life,'" and can thus establish—without more—liability under the ATA. *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690 (7th Cir. 2008). To be sure, the D.C. Circuit denied choosing a position between the Second and Seventh Circuits, although its holding does just that. And, in any event, this case presents the same issue that has split the Second and Seventh Circuits, thus providing a vehicle to resolve that question before more direct support to terrorist groups escapes accountability under the ATA.

Aiding-and-Abetting Liability. The D.C. Circuit also departed from its sister circuits (and common sense) in rejecting Petitioners' aiding-and-abetting claim. That court held that donations to the Great Return Marches—which Respondent knows "includ[es] the launching of incendiary terror balloons and kites" from the Gaza Strip into Israel and which Respondent nonetheless "promotes and supports"—could not serve as a predicate for liability because "the Boycott National Committee *also engages in lawful civil resistance*." App. 12, 15 (emphasis added).

In other words, an organization engaging in some lawful activities immunizes donations to it under the ATA *even if* the organization also knowingly supports terrorist activities. But because money is fungible, this distinction makes no sense and is otherwise profoundly dangerous; donations cannot be so cleanly firewalled by the mere existence of non-terrorist activities on a group's agenda, and allowing this pass

means that organizations otherwise hell-bent on financing terror can sleep easy by, *e.g.*, posting "civil-resistance" messages on their preferred social-media site. Indeed, it is doubtful that *any* organization on Earth is engaged in 100 percent unlawful terrorist activities (Hamas itself isn't) and could not point to *some* lawful activities that it performs. Exemplifying its naïve approach, the D.C. Circuit further reasoned that Hamas's involvement in Gaza-launch terrorist attacks was inherently implausible as a matter of law "merely because it administers the Gaza Strip." App. 12.

Such credulity would never have flown in the Seventh Circuit. As that court squarely held: "if you give money to an organization that you know to be engaged in terrorism, *the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook*." *Boim*, 549 F.3d at 698 (emphasis added). The court—unlike the D.C. Circuit—also pragmatically accounts for the fungibility of money: "If Hamas budgets $2 million for terrorism and $2 million for social services and receives a donation of $100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking $100,000 out of its social services 'account' and depositing it in its terrorism 'account.'" *Id.*

The Second Circuit has also rejected the "some lawful activities" exception favored by the D.C. Circuit. It similarly allows liability predicated on "knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities." *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 207-08 (2d Cir.

2014); *id.* at 205 (ATA only requires showing that a defendant had "knowledge that, or exhibited deliberate indifference to whether, [the fund recipient] provided material support to a terrorist organization, irrespective of whether [that recipient] support aided terrorist activities of the terrorist organization."). This split also warrants this Court's review.

These issues are exceptionally important. The ATA serves the vitally important function of preventing terrorist attacks on citizens of the United States and its allies. Money matters, and civil liability under the ATA is a powerful way of shutting down financial streams that can often lead to calamity. The court of appeals' vitiation of that tool risks facilitating additional terrorist attacks. And that is particularly so given the outsized importance of the Second and D.C. Circuits on these issues—with the former having jurisdiction of the financial centers of the U.S. and the latter having venue over the headquarters of many nationwide and international organizations.

The importance of these issues has been laid bare by the attacks of October 7, which killed over 1,200 people, including over thirty Americans. Those attacks were made possible by foreign contributions to Hamas. And while that financial support may largely have come from Iran, other support came from organizations subject to the ATA to which the D.C. Circuit turned a blind eye. That court's naivete about the fungibility of money and the dangers of supporting Hamas was already flirting with disaster before October 7. The attacks of that day have shown just how calamitous that see-no-evil approach can be.

This Court should grant LeIsrael's petition and reverse the D.C. Circuit's judgment.

ARGUMENT

In the wake of September 11, the federal and state governments made targeting terrorism's financial angels a necessary priority. Though such interest may have waned in recent years, the unspeakable atrocities of October 7 remind us that we cannot ignore terrorism financing webs currently operating on U.S. soil. These operations ultimately finance and enable the torture, mutilation, rape, and death of citizens of the United States and of our allies.

The explicit purpose of the Justice Against Sponsors of Terrorism Act ("JASTA"), enacted in 2016, was to furnish civil litigants "with the broadest possible basis … to seek relief" against entities that have "provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." Pub. L. No. 114-222, 130 Stat. 852, 853 (2016).

At issue in this case is how liability attaches for ATA claims against financiers and non-profit corporations that provide funds to international terrorist organizations, like Hamas. Federal courts have recognized two distinct theories of liability under the ATA/JASTA—with the lower courts sharply diverging as to the contours of each.

The first is direct liability: *i.e.*, whether providing funds to terrorist organizations in and of itself fits the statutory definition of "international terrorism,"

defined broadly to cover "acts dangerous to human life that are a violation of the criminal laws of the United States or of any State." 18 U.S.C. § 2331(1)(A). The second is aiding and abetting liability, the legal parameters of which have similarly prompted heated debate among the lower courts.

Since October 7, 2023, resolving the issues that have flummoxed the lower courts has soared in urgency. As of the date of this filing, over 30 American citizens are reported to have been killed by Hamas on October 7, and as many as 9 more remain in Hamas captivity. There is little reason to doubt that similar instances of terrorism will afflict Americans who are currently located throughout the globe.

The D.C. Circuit's opinion, which deepens a split on direct liability and creates a split on aiding-and-abetting liability, provides a preproperate and timely vehicle for this Court to resolve these splits. Doing so now is critically important: delayed review may allow previous, ongoing, and not-yet-made financial contributions to Hamas and other terrorist organizations to escape accountability under the ATA, thereby facilitating more terrorist attacks against citizens of the United States and its allies along the lines of October 7.

I. THE CIRCUITS HAVE SPLIT OVER WHETHER PROVIDING FINANCIAL SUPPORT TO A TERRORIST ORGANIZATION TRIGGERS DIRECT ATA LIABILITY.

Although it couched its decision as one based on a (purported) pleading deficiency, the D.C. Circuit's opinion established, as a matter of law, that unless an ATA plaintiff can show that an organization receiving

money (1) is "an extension of" a terrorist organization or (2) "has been taken over by" a terrorist organization," ATA direct liability for an act of terror cannot attach. *Leisrael* v. *Educ. for A Just Peace in the Middle E.*, 66 F.4th 1007, 1015 (D.C. Cir. 2023). That is, unless the donor *is* effectively the terrorist organization itself. The act of giving to an organization that is known to funnel *some* of the funds to a terrorist group is, in the D.C. Circuit, insufficient to establish direct liability under Section 2333(a)/the ATA. That holding vitiates the ATA as a tool for preventing funding of terrorist organizations.

Although it denies formal adoption of the Second Circuit's standard, the D.C. Circuit's holding harmonizes with that court's precedents, which declare that the provision of financial support to a terrorist organization does not necessarily constitute an act of international terrorism itself under the ATA, because "providing financial services to a known terrorist organization [only] *may* afford material support to the organization even if the services do not involve violence or endanger life." *Linde v. Arab Bank, PLC*, 882 F.3d 314, 326 (2d Cir. 2018) (emphasis added). In the Second Circuit's view, donations to terrorist organizations "does not invariably equate to an act of international terrorism." *Id.*

This holding was outcome dispositive, with the Second Circuit reversing because, in its view, "it was incorrect to instruct the jury that a finding that Arab Bank provided material support to Hamas in violation of § 2339(b) was alone sufficient to prove the bank's own commission of an act of international terrorism under § 2333(a)." *Id.*

In contrast, the Seventh Circuit has held that providing direct financial aid to terrorists alone constitutes a complete and cognizable act of terrorism under the ATA: "Section 2331(1)'s definition of international terrorism includes not only violent acts but also 'acts dangerous to human life that are a violation of the criminal laws of the United States.' Giving money to Hamas, like giving a loaded gun to a child (which also is not a violent act), *is an 'act dangerous to human life*.'" *Boim*, 549 F.3d at 690.[2]

In other words, the Petitioners' allegations would have sufficed in the Seventh Circuit, but they failed as a matter of law in the D.C. Circuit (and would have similarly failed in the Second Circuit). Despite casting its position otherwise, it appears as if the D.C. Circuit has adopted the position of the Second Circuit—that financial assistance to a terrorist organization does not *per se* amount to an act of terror under the ATA.

To be sure, the court of appeals obscures this *de facto* adoption of the Second Circuit's standard by quibbling over the putative lack of "allegations about the nature and extent of USCPR's donations to the Boycott National Committee, how the Boycott National Committee spends its funds, or how donations to the Boycott National Committee are funneled to the PNIF or Hamas." None of these facts would have mattered in the Seventh Circuit, which recognizes that contributions to Hamas are *eo ipso* acts of terrorism under the ATA. The D.C. Circuit's fixation on the "nature and extent of … donations" and "how donations … [were] funneled to Hamas" would

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[2] *Boim v. Holy Land Found. for Relief & Dev.,* 549 F.3d 685, 690 (7th Cir. 2008), was issued prior to the enactment of JASTA.

not have mattered in the Seventh Circuit anymore than—in the latter court's example—what kind of "loaded gun" was being given to the child. *Boim*, 549 F.3d at 690. In short, LeIsrael's allegations thus would have easily sufficed in the Seventh Circuit but failed under the D.C. Circuit's *de facto* adoption of the Second Circuit's standard. This split warrants this Court's review.

II. THE D.C. CIRCUIT'S RELATED AIDING-AND-ABETTING CONCLUSION IS OUT OF STEP WITH HOW AIDING-AND-ABETTING LIABILITY WORKS IN OTHER CONTEXTS.

In the D.C. Circuit's view, an organization is immune from aiding-and-abetting liability for providing financial support to terrorist entities—no matter the organization's knowledge—so long as the coalition in which the terrorists are members "also engages in lawful civil resistance." App. 15. This putative "firewall" violates the ATA. Specifically, the D.C. Circuit expressly held that it "not enough" for Petitioners to "allege that the Boycott National Committee 'knows that the incendiary terror balloons and kites are launched during the Great Return March [("GRM")] protests' and nevertheless 'promotes and supports the Great Return March." *Id.* (quoting Compl. ¶ 119) (cleaned up). That was so, in the Court of Appeals' view, because "the Boycott National Committee *also* engages in lawful civil resistance." *Id.* (emphasis added). In other words, the D.C. Circuit held that the existence of lawful activities by the coalition immunized donations to the coalition from aiding-and-abetting liability under the ATA, even though numerous members were known to be engaged in terrorist activities.

The D.C. Circuit derived its some-lawful-activities get-out-of-jail-free card from the test outlined in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which JASTA codified as the proper aiding-and-abetting standard for 18 U.S.C. § 2333(d)(2). Under *Halberstom*, in order to find aiding-and-abetting liability, "(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." *Atchley v. Astrazeneca UK Ltd.*, 22 F.4th 204, 220 (2022). According to the D.C. Circuit, it was thus not enough for the Petitioners to allege that USCPR was "generally aware" of its role in the acts of terror committed during the Great Return Marches ("GRMs"), despite the fact the Complaint alleges the following: (1) USCPR donated funds to the BNC, (2) the BNC is a coalition that includes numerous terrorist organizations (including Hamas), and (3) the BNC and USPCR publicly supported the GRMs, while BNC member organizations actually carried out the GRMs.

The Seventh Circuit is not nearly as sanguine about donations to organizations engaged in a mix of lawful and terrorist activities. That court explicitly held that "if you give money to an organization that you know to be engaged in terrorism, *the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook*." *Boim*, 549 F.3d at 698 (emphasis added). That holding was explicitly grounded in the fungibility of money: "If Hamas budgets $2 million for terrorism and $2 million for

social services and receives a donation of $100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking $100,000 out of its social services 'account' and depositing it in its terrorism 'account.'" *Id.* The D.C. Circuit, in stark contrast, fails to account meaningfully for the fungibility of money at all. Indeed, despite it being a *central premise* of the ATA, the words "fungible" and "fungibility" cannot be found *anywhere* in the D.C. Circuit's opinion. And its analysis never grapples with it meaningfully, instead treating the mere possibility that funds could have instead flowed to "lawful civil resistance" activities as categorically barring aiding-and-abetting liability. App. 15.

The Second Circuit also has rejected the "some lawful activities" exception on which the D.C. Circuit rested its aiding-and-abetting holding. It similarly allows liability predicated on "knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities." *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 207-08 (2d Cir. 2014); *id.* at 205 (ATA only requires showing that a defendant had "knowledge that, or exhibited deliberate indifference to whether, [the fund recipient] provided material support to a terrorist organization, irrespective of whether [that recipient] support aided terrorist activities of the terrorist organization."). This split also warrants this Court's review.

The D.C. Circuit's holding is also at odds with the purpose of JASTA, which was designed to give victims of terrorism the opportunity to recover civil remedies from those who provide "substantial" support to the

terrorists who committed atrocities, as well as this Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010).

Section 2333 was envisioned as a civil analogue to Sections 2339A and 2339B, which criminalize the provision of material support for terrorist acts and terrorist organizations, respectively. *See* 18 U.S.C. §§ 2339A, 2339B. This Court, when assessing material support in the criminal context, has wholeheartedly rejected *any* proposition of a firewall because money is "fungible." *Holder*, 561 U.S. at 31. "[W]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put. But there is reason to believe that foreign terrorist organizations *do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations*." *Id.* at 31 (internal citations omitted) (emphasis added).

The D.C. Circuit's decision flouts *Holder*. Under this Court's decision, that the Boycott National Committee also engages "in lawful civil resistance" would not immunize donations to it from liability under the criminal provisions of Sections 2339A and 2339B and should not do so under the civil provision of Section 2333, which is explicitly premised on those criminal provisions.

Section 2333's higher scienter standard than that of Section 2339B does not render money no longer "fungible." The existence of mixed legal and terrorist purposes does not remove the duty from the

Defendant to ascertain the nature of the "mixed coalition."

For all of these reasons, the D.C. Circuit's aiding-and-abetting holding warrants review.

III. NOW IS THE TIME TO RESOLVE THESE EXTRAORDINARILY IMPORTANT QUESTIONS.

The D.C. and Second Circuit's holdings effectively vitiate Section 2333 of the ATA and drastically weaken its usefulness as a tool of combatting terrorism. Such damage to the ATA within those two circuits is particularly problematic given that the Second Circuit and the D.C. Circuit will have venue for a disproportionately large share of all ATA cases, either because many financial institutions are headquartered in New York City or because many national organizations are headquartered in D.C.

The D.C. and Second Circuit's erroneous gutting of the ATA is particularly concerning after the attacks of October 7. Those atrocities have demonstrated powerfully how much damage Hamas can do when it has unfettered access to robust financial support. But under the D.C. and Second Circuit's approaches, the ATA would be defanged as a tool of defunding Hamas's terroristic campaign of mass murder, mutilation, rape, and kidnapping. To that end, the behavior of USPCR is not novel. In fact, countless charities have been designated Specially Designated Global Terrorists (SDGTs) by the U.S. Department of the Treasury for funneling money to Palestinian

terrorist organizations.[3] But here, according to the Second Circuit and the D.C. Circuit, such alleged behavior will escape accountability under the ATA.

The most troublesome aspect of the D.C. Circuit's holdings is that it resolved these important questions on a motion to dismiss without allowing any opportunity for discovery. Because providing financial assistance to Hamas plausibly violates the ATA, the Petitioner has exceeded its pleading standard for purposes of surviving a motion to dismiss and proceeding to discovery regarding the contours of how Hamas and Hamas-aligned groups move and use money. The D.C. Circuit's contrary view is the sort of asleep-at-its-post complacency that prevents the ATA from serving its role of making attacks like October 7 far more difficult.

Proper discovery is warranted to uncover these terrorist financing networks, and depriving civil litigants of the opportunity to ascertain the degree of

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[3] *See, e.g.*, Press Release, U.S. Dep't of Treasury, Treasury Designates Al-Aqsa International Foundation as Financier of Terror Charity Linked to Funding of the Hamas Terrorist Organization (May 29, 2003), https://home.treasury.gov/news/press-releases/js439; Press Release, U.S. Dep't of the Treasury, U.S. Designates Five Charities Funding Hamas and Six Senior Hamas Leaders as Terrorist Entities (Aug. 22, 2003), https://home.treasury.gov/news/press-releases/js672; Press Release, U.S. Dep't of Treasury, Treasury Designates Charity Funneling Money to Palestinian Islamic Jihad --Action Marks 400th Designation of a Terrorist or Financier (May 4, 2005), https://home.treasury.gov/news/press-releases/js2426; Press Release, U.S. Dep't of Treasury, Treasury Designates the Union of Good [Palestinian Charity] (Nov. 12, 2008), https://home.treasury.gov/news/press-releases/hp1267.

financing is antithetical to the very purpose of Section 2333. But given their burden at the motion-to-dismiss state, Petitioners have demonstrated a plausible, clear financial connection between Boycott National Committee, the Defendant, and a web of other terrorist organizations and terrorist facilitators.

That should have sufficed. In the Seventh Circuit, it would have. The D.C. Circuit's contrary holding is wrong as a matter of law and dangerous and naïve as a matter of policy. This Court should grant review and reverse.

CONCLUSION

The petition for certiorari should be granted and the D.C. Circuit's judgment reversed.

Respectfully submitted,

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