

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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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.

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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

* 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.

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

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

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

² <https://www.standwithus.com/factsheets-uscpr>

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

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/bd-s-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.

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-

20 (citing National Network of Fiscal Sponsors, Guidelines for Comprehensive Fiscal Sponsorship, Tides (Oct. 14, 2010) (www.tidescenter.org/n nfs)). 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

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



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.”

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

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

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 refugees³, and has been extensively reported upon in mainstream news outlets⁴ academi⁵, 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

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>

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 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

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

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:

CONCLUSION

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

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