ORAL ARGUMENT NOT YET SCHEDULED

No. 21-7097

In the United States Court of Appeals
for the District of Columbia Circuit

Keren Kayemeth LeIsrael - Jewish National Fund; Asher Goodman; Batsheva Goodman; Ephriam Rosenfeld; A. R., By and through his parents and guardians Ephriam and Kineret Rosenfeld; B. R., By and through his parents and guardians Ephriam and KineretRosenfeld; H. R., By and through her parents and guardians Ephriam and Kineret Rosenfeld; Bracha Vaknin; S. M. V., By and through his parents and guardians Bracha and Yosef Vaknin; E. V., By and through his parents and guardians Bracha and Yosef Vaknin; M. V., By and through her parents and guardians Bracha and Yosef Vaknin; S. R. V., By and through her parents and guardians Bracha andYosef Vaknin; A. V., By and through her parents and guardians Bracha and Yosef Vaknin,
Plaintiffs – Appellants
v.
Education for a Just Peace in the Middle East, doing business as US Campaign for Palestinian Rights,
Defendant – Appellee

On Appeal from the United States District Court for the District of Columbia, 1:19-cv-03425-RJL

BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici – Plaintiffs are Keren Kayemeth LeIsrael – Jewish National Fund, Asher Goodman, Batsheva Goodman, Ephriam Rosenfeld, A.R., B.R., H.R. (children of the Rosenfelds), Bracha Vaknin, S.M.V., E.V., M.V., S.R.V., and A.V. (children of the Vaknins). Defendant is Education for a Just Peace in the Middle East d/b/a US Campaign for Palestinian Rights.

(B) Rulings Under Review – The Memorandum Decision of the Hon. Richard J. Leon dated March 29, 2021, dismissing the complaint, is reported at 530 F. Supp.3d 8 (D.D.C. 2021) and found at JA__.

(C) Related Cases – None

CORPORATE DISCLOSURE STATEMENT

Keren Kayemeth LeIsrael – Jewish National Fund is a Public Benefit Company organized under Israeli law. It has no parent corporation and no publicly held corporation owns any of its stock.

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GLOSSARY OF ABBREVIATIONS

Boycott (or BDS) National Committee ("BNC")

Foreign Terrorist Organizations ("FTOs")

"Great Return March" ("GRM" or "the March")

Justice Against Sponsors of Terrorism Act ("JASTA")

Keren Kayemeth LeIsrael - Jewish National Fund ("KKL")

Palestinian National and Islamic Forces ("PNIF")

"US Campaign for Palestinian Rights" ("USCPR")

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1367. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The complaint was dismissed on March 29, 2021. A timely motion for reconsideration was denied by the District Court on August 2, 2021. The Notice of Appeal was filed on August 31, 2021. This is an appeal from a final order that disposed of all the plaintiffs' claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Complaint's plausible allegations stated a claim for direct liability under 18 U.S.C. § 2333(a).
2. Whether the Complaint's plausible allegations stated a claim for aiding and abetting liability under 18 U.S.C. § 2333(d)(2).

STATUTES AND OTHER AUTHORITIES

18 U.S.C. § 2333(a) provides:

> **(a) Action and jurisdiction. –** Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

18 U.S.C. § 2333(d)(2) provides:

> **(2) Liability.** – In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign

> terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. § 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.

STATEMENT OF THE CASE

(1) Introduction

Incendiary kites and balloons are new "weapons of incendiary terror" utilized by Hamas, a designated foreign terrorist organization, against residents of Israel in the "Gaza Envelope." Three American citizen families residing in the affected area who have been injured by such kites and balloons, joined by an Israeli environment-protection charity, initiated this lawsuit under the federal anti-terrorism laws. The plaintiffs seek to recover damages from a corporation with charitable Section 501(c)(3) status that has been a conduit for financial support of these terror activities and has actively promoted the "Great Return Marches" – violent gatherings within Gaza sponsored and supported by Hamas – during which the incendiary kites and balloons are launched.

In 196 detailed paragraphs, the Complaint (JA__. R.1, Complaint) details how the defendant, doing business as the "US Campaign for Palestinian Rights" (hereinafter "USCPR"), has exploited its tax-benefit validation to provide financial assistance and material support to this novel terrorist strategy. The District Court dismissed the Complaint on March 29, 2021, on the erroneous grounds (a) that the

plaintiffs' allegations did not "tie" USCPR "to the alleged terrorist acts that injured plaintiffs" (JA__. R.26, Memorandum Opinion, p. 5), (b) that the plaintiffs did not "allege a direct link between the defendants and the individual perpetrator" (JA__. R.26, Memorandum Opinion, p. 6), and (c) that "plaintiffs' allegations fail to establish that any assistance was 'substantial'" within the standard enunciated in *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983) (JA__. R.26, Memorandum Opinion, pp. 6-7).

Many critical portions of the text of the opinion issued by the District Judge in this case in March 2021 copy verbatim the text of the opinion that the same District Judge issued on July 17, 2020, when he dismissed claims under Sections 2333(a) and 2333(d)(2) of Title 18 – provisions of the federal Anti-Terrorism law – against entities that indirectly finance foreign terrorism that injures Americans. Compare the second paragraphs and the portions headed "Plaintiffs' ATA Claims" and "ANALYSIS" in *Atchley v. AstraZeneca UK Limited*, 474 F. Supp.3d 194, 208-214 (D.D.C. 2020), with *Keren Kayemeth LeIsrael v. Education for a Just Peace in the Middle East*, 530 F. Supp.3d 8, 11-15 (D.D.C. 2021). This Court reversed the Judge's dismissal in the *Atchley* case on January 4, 2022, rejecting the reasons that he had articulated. *Atchley v. AstraZeneca UK Limited*, No. 20-7077, 2022 WL 30153 (D.C. Cir. 2022).

The District Judge's word-for-word repetition of language when he terminated two very different cases involving financial support provided by American entities to foreign terrorist activities give the appearance of personal subjective hostility by the Judge to enforcing the Anti-Terrorism Act against American entities that finance terrorism abroad. We recognize this Court's reluctance to reassign a case to a different District Judge on remand. *Simon v. Republic of Hungary*, 911 F.3d 1172, 1190 (D.C. Cir. 2018); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 763 (D.C. Cir. 2014). There are, however, instances when such drastic relief is warranted sua sponte. *E.g.*, *Ligon v. City of New York*, 736 F.3d 118, 129 & n. 31 (2d Cir. 2013). The District Judge's hostility to plaintiffs who sue financers of international terrorism under Sections 2333(a) and 2333(d)(2) – demonstrated by his resort to identical language dismissing two cases that grow out of very different facts – may warrant the relief that this Court granted in *Cobell v. Kempthorne*, 455 F.3d 317, 331-335 (D.C. Cir. 2006), to "satisfy the appearance of justice."

(2) USCPR Finances and Partners With BNC

"BNC" is the Boycott (or BDS) National Committee. Among its members are "five US designated terror organizations" including Hamas. (JA__. R.1, Complaint, p. 12). The Complaint alleges (Para. 76) that BNC's "real purpose" is "the elimination of Israel as a sovereign nation-state." (JA__. R.1, Complaint, pp.

23, 35-36) Paragraphs 123-131 of the Complaint give a detailed description of how USCPR serves as a conduit for tax-exempt contributions in the United States to BNC. Donors make payments to USCPR with knowledge that the funds will be sent to BNC. The receipt that USCPR emails to donors explicitly declares that BNC "is fiscally sponsored" by USCPR. (JA__. R.1, Complaint, p. 36) (Para. 125). BNC calls USCPR "BNC's most important strategic ally and partner in the U.S." and declares that it is "heartened" to have USCPR as a "strategic partner." (JA__. R.1, Complaint, p. 36) (Paras. 130, 131; JA__).

(3) USCPR Supports the "Great Return March"

Paragraph 136 of the Complaint alleges that the "Great Return March" ("GRM" or "the March") is "an organized, violent gathering sponsored and supported by HAMAS, and other terrorist organizations, intended to sabotage Israel's border fence, plant explosive charges, and launch incendiary terror balloons and kites toward Israeli communities . . . to terrorize the people and citizens of Israel." (JA__. R.1, Complaint, p. 39) (JA__). Incendiary balloons and kites are launched at Sderot and the Gaza Envelope during the March. Paragraph 132 reproduces three USCPR endorsements and support of the March in Facebook, Twitter, and emails. (JA__. R.1, Complaint, p. 37) (JA__).

(4) American Citizens' Injuries

The individual plaintiffs are three American-citizen families with a total of 15 children who reside within the Gaza Envelope. The incendiary balloons and kites launched from Gaza by Hamas are a "more dangerous threat" to them and their children than even Hamas' rocket attacks. (JA__. R.1, Complaint, pp. 45-50) (Paras. 161-196; JA__). The American citizens have suffered "severe mental anguish and extreme emotional pain and suffering" (JA__. R.1, Complaint, pp. 7-11, 46, 50) (Paras. 12-21, 165, 195; JA__). The balloons and kites "involved violence and endangered human life" and were designed to "intimidate or coerce" them. JA__. R.1, Complaint, pp. 50-51 (Para. 201; JA__).

(5) The Complaint Is Filed

Keren Kayemeth LeIsrael - Jewish National Fund ("KKL") is an Israeli organization that has, for more than a century, planted forests in Israel (JA__. R.1, Complaint, pp. 42-44) (Paras. 144-156; JA__) and has been damaged in "tens of millions of dollars" by fires from Hamas' rockets and incendiary terror balloons and kites (JA__. R.1, Complaint, p. 45) (Para. 160; JA__). KKL joined the individual plaintiffs in this lawsuit, and it was filed on November 13, 2019. The first three claims of the Complaint – which are the focus of this appeal – invoke, on behalf of only the individual plaintiffs, the federal anti-terrorism laws (18 U.S.C. [§§] 2333(d), 2339A, 2339B(a)(1), and 2333(a)). The Fourth, Fifth, and Sixth

Claims are common-law claims for conspiracy made by KKL and two of the families.

(6) The Complaint Is Dismissed

USCPR moved on March 5, 2020, for dismissal of all claims under Rule 12(b)(6). On March 29, 2021, the District Court granted the motion to dismiss the federal anti-terrorism claims on their merits and declined to exercise jurisdiction over the common-law claims. The Court held that there was no direct liability under Section 2333(a) because the Complaint's allegations "do not establish the substantial connection between the defendant and the alleged terrorist acts or organizations necessary for proximate causation." (JA__. R.26, Memorandum Opinion, p. 6) (JA__). The Court placed principal reliance in this regard on *Owens v. BNP Paribas, S. A.* 897 F.3d 266 (D.C. Cir. 2018), and *Crosby v. Twitter, Inc.*, 921 F.3d 617 (6th Cir. 2019). The Court also rejected the claim that there was aiding-and abetting liability under Section 2333(d)(2) because (a) the Complaint alleged that the balloons and kites were launched by Hamas "and/or others," (b) "general support or encouragement" of Hamas was not enough to make USCPR liable, (c) there was no "direct link" between USCPR and Hamas, and (d) USCPR's assistance to Hamas was not "substantial" under the standards of *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). (JA__. R.26, Memorandum Opinion, p. 6) (JA__-__).

(7) Reconsideration Is Denied

Plaintiffs moved for reconsideration under FRCP 59(e) on April 26, 2021, noting that the judicial precedents on which the Court had relied all concerned claims made against huge banking institutions, governments, or other entities with "multifarious functions, missions, and objectives." The defendant in this case is "a single-purpose entity promoting Palestinian opposition to Israel." The District Court denied the motion for reconsideration on August 2, 2021.

SUMMARY OF ARGUMENT

1. The decision that this Court recently rendered in *Atchley v. AstraZeneca UK Limited,* No. 20-7077, 2022 WL 30153, reversed the District Judge's erroneous dismissal of a comparable case asserting liability under Sections 2333(a) and 2333(d)(2). The reasoning of the opinion in *Atchley* applies to this case and warrants reversal of the order dismissing this Complaint.

2. In rejecting direct liability under Section 2333(a), the District Judge erroneously concluded, as he did in *Atchley,* that the support provided by the defendant was not the proximate cause of plaintiffs' injury because support was provided through an "independent intermediary." The "intermediary" in this case – BNC – was not "independent" as were the entities in the cases cited by the District Judge. The allegations of the Complaint showed that tax-deductible contributions

were channeled by the defendant to Hamas through a single-purpose entity that was not "independent" but consisted of designated foreign terrorist organizations.

3. Direct liability for injury caused by Hamas, which was the beneficiary of the funds solicited by USCPR, is established by the rationale of the majority opinion in *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685 (7th Cir. 2008). That decision was rendered before aiding-and-abetting liability was enacted. This Court endorsed the *Boim* decision in its *Atchley* opinion and should, in this case, declare it to be the rule in this Circuit.

4. The District Judge also erred in rejecting plaintiffs' claim for aiding and abetting liability on the ground that USCPR's participation in Hamas' launch of terrorist balloons and kites failed to satisfy the standard prescribed by *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). Applying the *Halberstam* "elements" and "factors" as this Court did in the *Atchley* opinion, the Complaint contained ample plausible allegations.

STANDARD OF REVIEW

In his opinion for the Court in *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000), Judge Merrick Garland articulated the following three principles, established by cases he cited, governing this Court's standard of review of a dismissal under Rule 12(b)(6):

(1) This Court reviews *de novo* a District Court dismissal of a complaint under Rule 12(b)(6). See *Croixland Properties Ltd. v. Corcoran*, 174 F.3d 213, 215 (D.C. Cir. 1999)

(2) This Court "must treat the complaint's factual allegations as true." See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993)

(3) This Court "must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" See *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979)

The Supreme Court said in *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." See also *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 314-315 (D.C. Cir. 2014); *Atherton v. District of Columbia Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

This Court applied these standards when it recently reviewed the District Judge's comparable dismissal of a complaint in *Atchley v. AstraZeneca UK Limited*, 2022 WL 30153 (D.C. Cir. 2022), citing *Owens v. BNP Paribas, S.A. (Owens IV)*, 897 F.3d 266, 272 (D.C. Cir. 2018).

ARGUMENT

I.

THE COMPLAINT ADEQUATELY ALLEGES THAT USCPR IS DIRECTLY LIABLE UNDER 18 U.S.C. § 2333(a) FOR INJURY CAUSED BY HAMAS' INCENDIARY BALLOONS AND KITES

Whether the allegations of a complaint suffice to entitle plaintiffs to proceed with a direct liability claim under 18 U.S.C. § 2333(a) is now governed by this Court's recent decision in *Atchley v. AstraZeneca UK Limited*, No. 20-7077, 2022 WL 30153. In this case, as in *Atchley*, "the defendants gave [support] to a single agency that had been overtaken by terrorists." *Atchley* Opinion, p. 39. In its *Atchley* opinion (pp. 41-42), this Court approved and applied the reasoning of Chief Judge Richard Posner in his majority opinion in *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685 (7th Cir. 2008) (*en banc*). In this case, as in *Boim* and *Atchley*, the funds that USCPR provided to Hamas through BNC "foreseeably furthered [Hamas'] . . . growth and supported its terrorist acts." *Atchley* Opinion, p. 42.

A. BNC Is Not an "Independent Intermediary" in the "Chain of Causation."

As he did in *Atchley*, the District Judge rejected the claim of direct liability under Section 2333(a) on the ground that the defendant's conduct was not a "proximate cause" of the plaintiffs' injuries. See *Atchley* Opinion, pp. 12-13, 26. Quoting from the Second Circuit's opinion in *Rothstein v. UBS AG*, 708 F.3d 82,

97 (2d Cir. 2013), the District Judge held, as he did in *Atchley* (474 F. Supp.3d at 209), that the beneficiary of the defendants' support was an "independent intermediary" whose participation "create[s] a more attenuated chain of causation." (JA__). The Judge found that transmission of funds to BNC did not "provide direct support to Hamas," and concluded that USCPR's conduct was "simply too removed from a terrorist act or organization to state a claim under the ATA." (JA__).

This Court's reversal in *Atchley* rejected the District Judge's reasoning regarding allegations comparable to those in this case, and the *Atchley* decision requires reversal of his dismissal of this Complaint. In this case, as in *Atchley*, the District Judge's conclusion that USPCR's transmission of funds to Hamas through BNC was not the proximate cause of Hamas' launch of terrorist kites and balloons was based "on an untenably skeptical reading of the complaint that impermissibly draws inferences against the plaintiffs." *Atchley* Opinion, pp. 40-41.

The four precedents cited by the District Judge as supporting his conclusion that there was no "chain of causation" because support was provided through an "independent intermediary" concerned large international multi-purpose companies that were truly "independent intermediaries." USCPR is an American non-profit corporation that has a single purpose – to support Palestinian efforts against the State of Israel. BNC – the "intermediary" through which USCPR

funneled funds to Hamas to finance the terrorist kites and balloons – was not an "independent" intermediary. Paragraphs 70-85 of the Complaint allege that BNC is a coalition of entities that include US-designated Foreign Terrorist Organizations ("FTOs") that have the overriding purpose of eradicating Israel using, *inter alia*, terrorist means.

Wikipedia entries regarding the four reported cases cited by the Judge demonstrate that these decisions concerned truly "independent intermediaries:"

(1) *Owens v. BNP Paribas, S.A.*, 897 F.3d 266 (D.C. Cir. 2018) ("*Owens IV*") – According to its entry in *Wikipedia* BNP Paribas, S.A. is the world's eighth-largest bank by total assets and currently operates with a presence in 72 countries.

(2) *Crosby v. Twitter, Inc.*, 921 F.3d 617 (6th Cir. 2019) – According to its entry in *Wikipedia* Twitter, Inc. has more than 25 offices around the world and had more than 330 million monthly active users around the world in 2019.

(3) *Owens v. Republic of Sudan*, 864 F.3d 751 (D.C. Cir. 2017) ("*Owens III*")—According to its entry in *Wikipedia* the Republic of Sudan is Africa's third largest country by area and has a 2021 population of 44.91 million people.

(4) *Rothstein v. UBS AG* , 708 F.3d 82 (2d Cir. 2013) – According to its entry in *Wikipedia* UBS AG is a Swiss multinational investment bank and financial services company that maintains a presence in all major financial centers as the largest Swiss banking institution in the world.

BNC is no more an "independent intermediary" than was the Iraqi Ministry of Health in the *Atchley* case. This Court observed in its *Atchley* opinion that the Iraqi Health Ministry was not "an autonomous nation with many functions and priorities." *Atchley* Opinion, p. 39. In the present case, the alleged "intermediary" is an entity whose members include, as the Judge acknowledged, "Hamas and other U.S. designated FTO's." (J.A. __). BNC is far less "independent" than Iraq's Health Ministry – which was held not to be "independent" by this Court.

B. Detailed Factual Allegations in the Complaint Support Direct Liability Under the Anti-Terrorism Law.

The Complaint in this case contains detailed factual allegations that support a finding of direct liability.

In 2007 Hamas carried out a violent military coup and took over Gaza. The violent takeover gave Hamas complete control over the Gaza territory and over every aspect of life in Gaza. The Complaint plausibly alleges in Paragraph 48 that "[t]here is little to nothing that happens in Gaza that Hamas does not know about, approve and support." JA__. R.1, Complaint, p. 16. This includes directing, supporting, and acting in concert with other Foreign Terrorist Organizations that

comprise BNC and the Palestinian National and Islamic Forces ("PNIF"), and which operate in Gaza with the approval of Hamas which has full control of all governance and operational issues in Gaza.

The Complaint further alleges that Hamas plans and authorizes terror attacks. Paragraph 87 alleges plausibly that Great Return Marches are "sponsored and supported by Hamas and include organized efforts to terrorize Israel and those that reside in Israel." JA__. R.1, Complaint, p. 25. Paragraph 107 alleges that incendiary terror balloons and kites during the Great Return Marches cannot be launched without the "express support, permission, consent and control of Hamas." (JA__. R.1, Complaint, p. 30).

Paragraphs 100-104 detail activities of the "Sons of al-Zawari," a Hamas-inspired group that takes credit "for launching incendiary terror balloons . . . and declaring their intention to burn Israeli land." JA__. R.1, Complaint, pp. 27-28. Social media postings show members of the "Sons of al-Zawari" wearing Hamas regalia and report that the Al-Qassam Brigades (the military wing of Hamas) held a memorial service for "Sons of al-Zawari" members at which "Sons of al-Zawari" members held terror balloons and kites. JA__. R.1, Complaint, pp. 28-30. Such evidence is used by terrorism experts to establish the source of terror attacks. See, *e.g.*, *Lelchook v. Syrian Arab Republic*, 2019 WL 2191323, at *4 (D.D.C. Jan. 31,

2019), *report and recommendation adopted*, 2019 WL 2191177 (D.D.C. March 25, 2019).

Hence the terrorist acts committed by Hamas from Gaza are effectively subsidized by tax-deductible contributions made to USCPR. By dismissing this case at its inception, the District Court denied US nationals any avenue to discover additional facts supporting the Complaint's plausible allegations that Hamas, exploiting the financial and other support provided by USPCR, committed, planned, and authorized the attacks that caused the plaintiffs' injuries.

C. <u>The Seventh Circuit's *Boim* Precedent Establishes Direct Liability.</u>

In authorizing direct liability under Section 2333(a), this Court's *Atchley* opinion cited and applied the Seventh Circuit's *en banc* decision in *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685 (7th Cir. 2008). *Atchley* Opinion, pp. 41-42. In this case, as in *Boim*, the assistance provided by USCPR to Hamas is like providing a loaded gun to a child. Paragraph 24 of the Complaint alleges sufficient plausible facts to satisfy the "chain of incorporations" that Judge Posner invoked in affirming the *Boim* judgment that was rendered before the enactment of aiding-and-abetting liability under Section 2333(d)(2) ("JASTA") in 2016.

USCPR collects funds in the United States that are treated as charitable contributions to support BNC, which consists of at least five terror organizations

that include Hamas. Section 2332(c) criminalizes "physical violence" that causes "serious bodily injury." Section 2339A(a) also criminalizes anyone who, with guilty knowledge, provides "material support or resources" for such a violation. Hence the Complaint's allegations are more than adequate to establish direct liability under *Boim*.

Paragraph 25 of the Complaint buttresses the general allegations of Paragraph 24 by specifying USCPR's active promotion and sponsorship of the "Great Return March" which allegedly generates the "launchings of incendiary terror balloons, kites and other terror devices" that have injured US nationals. JA__. R.1, Complaint, p. 12. These allegations, if proved, establish direct liability under the federal anti-terrorism law.

D. This Court Should Expressly Adopt the Seventh Circuit and Fifth Circuit Views Regarding Direct Liability Under the Anti-Terrorism Law.

While citing and approving the *Boim* precedent, this Court's *Atchley* opinion did not definitively declare that *Boim*, rather than seemingly contrary Second Circuit decisions, will govern cases in this Circuit. The split in the Circuits over the reach of the *Boim* decision – whether Section 2333(a) authorizes direct liability today against funders of international terrorism – has been described in recent Supreme Court pleadings. See *Weiss v. National Westminster Bank,* US Supreme Court No. 21-381. The petitioners in the *Weiss* case noted the conflict between the

Seventh Circuit's decision in *Boim*, which was endorsed by the Fifth Circuit in *United States v. El-Mezain*, 664 F.3d 467, 483 (5th Cir. 2011), and several decisions of the Second Circuit. See Petition for a Writ of Certiorari, No. 21-381, pp. 21-29. On December 13, 2021, the Supreme Court issued an order requesting the views of the Solicitor General on the *Weiss* petition.

The Solicitor General's view regarding this split in the Circuits will not be known for some time. This Court can provide more immediate guidance for lower courts in this Circuit by explicitly joining the Seventh and Fifth Circuits in their endorsement of *Boim*.

II.

THE COMPLAINT ADEQUATELY ALLEGES THAT USCPR IS LIABLE AS AN AIDER AND ABETTOR UNDER 18 U.S.C. § 2333(d)(2) FOR INJURY TO US NATIONALS CAUSED BY HAMAS' INCENDIARY BALLOONS AND KITES

This Court's *Atchley* opinion held that "[i]n enacting the JASTA [Section 2332(d)(2)], Congress expressly embraced the aiding-and-abetting analysis in *Halberstam v. Welch*," 705 F.2d 472 (D.C. Cir. 1983). As was true in *Atchley*, the allegations of the Complaint in this case, if proved, establish that USCPR aids and abets "act[s] of international terrorism" and is liable under Section 2333(d)(2).

A. The Complaint's Allegations Satisfy the *Halberstam v. Welch* Elements and Factors.

This Court's *Atchley* opinion derives three "elements" and six "factors" from the *Halberstam* opinion that are relevant in determining aiding-and-abetting liability. *Atchley* Opinion, pp. 25-35. The complaint in this case amply satisfies these criteria.

(1) The Three Elements – The Complaint alleges that Hamas – "the party whom the defendant aids" – performs the "wrongful act that causes an injury" by launching incendiary balloons and kites. It also alleges that USCPR's own statements to its contributors demonstrate that it is "generally aware" of its "role as part of an overall illegal or tortious activity." The funds USCPR channels to Hamas through BNC "knowingly and substantially assist" the violation of the anti-terrorism law. These allegations satisfy the "general awareness" and "knowing and substantial assistance" elements of *Halberstam v. Welch*, as further defined in this Court's *Atchley* opinion.

(2) The Six Factors – This Court noted in its *Atchley* decision that the *Halberstam* opinion defined "knowing and substantial assistance" as dependent on six "factors" – "(i) the nature of the act assisted, (ii) the amount and kind of assistance, (iii) the defendants' presence at the time of the tort, (iv) the defendants' relationship to the tortious actor, (v) the defendants' state of mind, and (vi) the duration of assistance." *Atchley* Opinion, pp. 27-28. In the present case, as in

Atchley, weighing these six factors sustains the imposition of aider-and-abettor liability and warrants reversal of the District Court's dismissal of the Complaint.

(a) Factors 1 and 2– On the first and second factors the District Court erroneously held that USCPR's assistance was not "indisputably important" or an "essential part" of Hamas' terrorist acts and that Hamas was not "heavily dependent" on USCPR's support. (JA__). Paragraphs 202-210 and 214-222 of the Complaint were plausible allegations to the contrary that the District Court ignored. JA__. R.1, Complaint, pp. 51-54.

Financing like that provided to Hamas by USCPR matters greatly to terrorists. See, *e.g.*, *Boim*, 549 F.3d at 690-691 (explaining the importance of "financial angels" to terrorist operations). This Court's *Atchley* opinion confirmed that "financial support is 'indisputably important' to the operation of a terrorist organization, and any money provided to the organization may aid its unlawful goals." *Atchley* Opinion, p. 28. Paragraphs 123-125 of the Complaint plausibly alleged that USCPR served as the American-based fiscal sponsor for BNC. JA__. R.1, Complaint, pp. 35-36. USCPR raised money through its public website "donate" page and provided receipts for tax purposes that confirmed that USCPR was BNC's fiscal sponsor. JA__. R.1, Complaint, p. 35. These funds enabled Hamas to organize terrorist balloons and kites launched from Gaza.

The District Judge erroneously believed that USCPR could avoid aider-and-abettor liability because the complaint did not "allege that defendants directly assisted Hamas itself." JA__. R.26, Memorandum Opinion, pp. 7-8. But the word "direct" does not appear in Section 2333(d)(2). The Second Circuit said in *Siegel v. HCBC N. Am. Holdings, Inc.*, 933 F.3d 217, 233 n. 5 (2d Cir. 2019), that JASTA "does not, by its terms, limit aiding-and-abetting liability to those who provide direct support to terrorist organizations."

(b) **Factor 3** – It is true that the defendant in this case is not physically present when the tort is committed. This one factor was also absent in *Atchley* but did not foreclose liability under JASTA.

(c) **Factor 4** – The fourth factor was plausibly alleged. USCPR was BNC's fiscal sponsor and confirmed with receipts that the tax-deductible donations were for BNC. Paragraphs 76 and 99-103 alleged that BNC was supporting Hamas' incendiary terror attacks. JA__. R.1, Complaint, pp. 23-28. Hamas needed funding from BNC, and USCPR's fundraising established the substantiality of USCPR's relation to Hamas and its operations in Gaza.

(d) **Factor 5** – The fifth factor considers the defendant's state of mind. In this case, as in *Atchley*, "defendants' assistance was knowingly provided with a general awareness that it supported the terrorist acts of a notoriously violent terrorist organization." *Atchley* Opinion, p. 30. Paragraphs 132-137 of the

complaint allege that USCPR was actively promoting and sponsoring the Great Return March on its Facebook, Twitter and emails. JA__. R.1, Complaint, pp. 37-39 . Active promotion of the Great Return March presumptively endorsed the incendiary balloons and kites that the March launched.

(e) Factor 6 – The sixth factor – duration – strongly supports aiding-and abetting liability. As in *Atchley*, the relationship was "enduring" and "carefully cultivated." Atchley Opinion, p. 33. Paragraphs 86, 106, and 132 of the Complaint allege that USCPR has been actively promoting and sponsoring the Great Return March since March 2018. JA__. R.1, Complaint, pp. 25, 30, 37 . Paragraphs 122 and 123 allege that as early as 2008, USCPR began to partner and serve in the United States as the fiscal sponsor of BNC. JA__. R.1, Complaint, p. 35. In the *Halberstam* opinion Circuit Judge Wald held that the multiyear duration of the relationship between Linda Hamilton and Bernard Welch "***strongly*** influenced [the Court's] weighing of Hamilton's assistance." 705 F.2d at 488 (emphasis added). In this case, the duration of the relationship between USCPR and terrorist entities responsible for injuries to American citizens is significant.

B. USCPR Is More Clearly an Aider-and-Abettor Than the Defendant in *Halberstam v. Welch.*

Linda Hamilton was found by this Court to have aided and abetted Bernard C. Welch, the murderer of Michael Halberstam, on much weaker evidence than is alleged in the Complaint in this case. She was found to be "a willing partner in

[Welch's] criminal activities" despite her sworn testimony that she knew "nothing" of his unlawful conduct and with no proof that she ever encouraged or participated in any burglary or murder. She was found civilly liable for aiding and abetting murder because she must have known that "something illegal was afoot" and because she lived with Welch, benefited from ill-gotten riches, and acted as "secretary and recordkeeper" of transactions in which purloined goods were sold.

Comparing USCPR's assistance in the launching of rockets, incendiary balloons and kite attacks from Gaza to Israel with Linda Hamilton's role in the murder of Michael Halberstam is like comparing Goliath with Tom Thumb. The Complaint plausibly alleges that USCPR not only knew of the terrorist attacks that injured American plaintiffs, but that it facilitated them ***in advance*** by providing funds to Hamas through an intermediary. This is much more deliberate participation in the commission of tortious and criminal conduct than Ms. Hamilton's participation in the murder of Michael Halberstam.

CONCLUSION

For the foregoing reasons, the judgment dismissing plaintiffs' Complaint should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, counsel for Appellants and a member of the Bar of this Court, certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) that the foregoing Brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,017 words.

s/ Nathan Lewin
Nathan Lewin