No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether "facial plausibility" of a complaint filed by a victim of international terrorism committed in Israel may be judged by a different standard than complaints filed by victims of international terrorism elsewhere in the world.

2. Whether an American tax-free charity whose functions include collecting and providing tax-deductible contributions that support pro-Palestinian organizations including designated Foreign Terrorist Organizations may avoid discovery designed to produce admissible evidence that the charity aids and abets, in violation of 18 U.S.C. § 2333(d)(2), Hamas' dispatch of terrorist incendiary balloons and kites that injure American citizens residing in southern Israel.

3. Whether the Rule 12(b)(6) standard that this Court applied in *Twitter, Inc. v. Taamneh*, and in *Gonzalez v. Google LLC* and that lower courts have applied to complaints in actions under 18 U.S.C. § 2333(d)(2) against international banks and massive corporate entities that provide extensive nonpolitical services should govern a lawsuit filed by US citizens injured by Hamas-directed terrorism against a US charity that has a single political focus and circuitously transfers contributed money to Hamas.

PARTIES TO THE PROCEEDINGS

Petitioners 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).

Respondent is Education for a Just Peace in the Middle East d/b/a US Campaign for Palestinian Rights.

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.

STATEMENT OF RELATED PROCEEDINGS

There are no related cases.

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The court of appeals' opinion (App., pp. 1-19, *infra*) is reported at 66 F.4th 1007. The district court's opinion (App., pp. 20-32, *infra*) is reported at 530 F. Supp.3d 8.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on May 2, 2023. A timely petition for rehearing was denied on June 5, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. §§ 2333(a), (d)(2) 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.

(d) Liability. —
* * *

(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.

PRELIMINARY STATEMENT

Petitioners are

(a) United States citizens residing in southern Israel in an area called "the Gaza Envelope" which has been targeted by thousands of rockets and incendiary device attacks from neighboring Gaza, and

(b) a Public Benefit Company ("Keren Kayemeth") organized under Israeli law that owns forests and land subjected to extensive damage from rocket and incendiary terror balloons, kites, and other attacks emanating in Gaza.

Hamas, a designated Foreign Terrorist Organization, now indisputably controls Gaza. Hamas has taken credit for past rocket attacks on southern Israel. The Government of Israel has responded militarily to past and current rocket attacks from Gaza militarily.

The Complaint addresses a "new form of terror" including the launch of incendiary terror balloons that was initiated from Gaza in March 2018. It injures Americans, Israelis, and nationals of other countries who reside or visit in the Gaza Envelope. The Complaint alleges that by November 2019 there were more than 600 launches of incendiary terror balloons and kites into the Gaza Envelope. They exploded and

caused significant harm to property and endangered human life and safety. These incendiary terror balloons and kites indisputably constitute instruments of international terrorism that is subject to US antiterrorism law.

No Israeli court has jurisdiction over the perpetrators of this international terrorism and can award damages to compensate for losses or otherwise deter this novel form of international terrorism committed against American victims.

United States' anti-terrorism law – particularly 18 U.S.C. § 2333 – is designed to give American nationals who are victims of international terrorism a legal remedy in an American court for injuries attributable to international terrorist conduct. The injured individual American plaintiffs in this action are invoking US law against an alleged aider and abettor of these terrorist acts. Keren Kayemeth is not a "national of the United States" but it has joined as a plaintiff with common-law claims in the Complaint's Fourth, Fifth, and Sixth Claims (JA 66-JA 71).[1]

Petitioners recognize that to prevail in a United States federal court in a proceeding under Section 2333 they will have to satisfy a finder of fact by a preponderance of the evidence that the defendant-respondent has aided-and-abetted these acts of international terrorism. The extensive roster of facts that petitioners have compiled from sources available to them without compulsory process support their plausible allegations that the respondent, an American tax-exempt organization known as

[1] "JA" is the Joint Appendix in the Court of Appeals.

"Education for a Just Peace in the Middle East," also doing business as "US Campaign for Palestinian Rights" ("USCPR"), solicits tax-deductible contributions in the United States and transmits funds circuitously, through various intermediaries (including the Boycott National Committee, which is the "coordinating body for the BDS [Boycott, Divestment, and Sanctions] campaign worldwide" and which includes multiple designated Foreign Terrorist Organizations), to assist in financing the "Great Return March" during which the incendiary devices are launched from Gaza into Israeli territory.

The district court dismissed the detailed 271-paragraph Complaint thereby preventing the plaintiff-petitioners from securing additional admissible evidence to support their plausible allegations that contributions solicited in the United States by the defendant-respondent are being circuitously funneled to Hamas to assist in the launchings of the incendiary devices. The court of appeals approved this denial of a right to discovery universally granted in federal courts on allegations that are far less detailed and much more conclusory. Petitioners ask this Court to correct this injustice that denies to Americans who reside in Israel the legal remedy provided by US antiterrorism law to Americans elsewhere in the world.

STATEMENT OF THE CASE

Incendiary terror balloons and kites 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 terror balloons and kites, joined by an Israeli environment-protection charity, initiated this lawsuit under the federal anti-terrorism laws. The plaintiff-petitioners seek damages from a United States corporation with a charitable Section 501(c)(3) status that has been a conduit for financial support of these terror activities, is a US partner of the movement to boycott Israel, and has promoted the "Great Return Marches" – parades within Gaza sponsored and supported by Hamas – during and from which the incendiary terror balloons and kites are launched against homes, schools, forests, and populated areas of southern Israel.

The Complaint (JA 1-72) details how the defendant-respondent, doing business as the "US Campaign for Palestinian Rights" ("USCPR"), has exploited its tax-exempt status to raise US tax-deductible contributions in order to funnel financial assistance and material support circuitously for this novel terrorist strategy. The district court dismissed the Complaint under Rule 12(b)(6) on multiple erroneous grounds such as (a) that the Complaint's allegations did not "tie" USCPR "to the alleged terrorist acts that injured plaintiffs" (App. p. 26, *infra*), (b) that the Complaint failed to "allege a direct link between the defendants and the individual perpetrator" (App. p. 28, *infra*), 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) (App. p. 28, *infra*).[2]

The Complaint alleges that USCPR solicits contributions in the United States and transmits the tax-deductible funds to the "Palestinian National and Islamic Forces" ("PNIF") and to the "Boycott National Committee," which are non-US entities serving as the coordinating body for the anti-Israel BDS [Boycott, Divestment, and Sanctions] world-wide movement and which includes five members that are designated Foreign Terrorist Organizations, including Hamas. The incendiary devices are launched from Gaza during the "Great Return March" which is allegedly organized and directed by Hamas.

Paragraphs 132-137 of the Complaint (JA47-JA 49) detail USCPR's promotion and sponsorship of the

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[2] Many critical portions of the text of the opinion issued by the district judge in March 2021 copy verbatim the text of the opinion that the same district judge issued in July 2020 when he similarly dismissed under Rule 12(b)(6) claims made by families of American military service members and civilians against large medical supply and manufacturing companies that had allegedly aided and abetted the Iraqi Ministry of Health, controlled by Jaysh al-Mahdi, allegedly established by Hezbollah (a designated Foreign Terrorist organization), to assist in attacking 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). The court below reversed the *Atchley* decision 22 F.4th 204 (D.C. Cir. 2022), but affirmed the dismissal by the same district judge of the complaint in this case.

"Great Return March." Paragraphs 86-111 (JA35-JA42) allege detailed facts that make it more than "plausible" that Hamas directs and arranges the launch of the incendiary terror balloons and kites during the "Great Return March."

Rather than reversing the district judge's dismissal of the Complaint and allowing discovery of admissible evidence, as it had done in the *Atchley* case and as federal courts have routinely done when a complaint is not a "formulaic recitation of the elements of a cause of action" (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) but specifies "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" (*Ashcroft v. Iqbal*, 556 U.S. 667, 678 (2009)), the court below affirmed the district court decision that had repeated verbatim the district court's rationale in his subsequently reversed *Atchley* opinion thereby terminating this litigation because of alleged insufficiency of the Complaint. The court of appeals described the Complaint as "conclusory" because it failed to allege details that are ordinarily discoverable. Inadvertently disclosing that it was making an impermissible credibility appraisal, the court called the Complaint's allegations "far less convincing" than those in *Atchley* (App. p. 17, *infra).* Its opinion presumed many facts tending to exonerate the defendant-respondent for its conduct based on a political view and bias relating to the Israeli-Palestinian conflict.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION DISCRIMINATES UNCONSTITUTIONALLY AGAINST TERRORISM VICTIMS LIVING IN ISRAEL

International terrorist acts against American nationals giving rise to liability under Sections 2333(a) and 2333(b) can be committed anywhere in the world. The judicial standards governing the adequacy of complaints filed by victims of terror should not depend on the location where the terror was committed.

Many lawsuits enforcing American anti-terrorism law have been brought by victims who suffered death or injuries while in Israel. Hamas and Hezbollah are active in this area, targeting Jews, including Jewish Americans. Victims in Israel should not be expected to know and allege more details in their complaints than victims of terror anywhere else in the world. The "facial plausibility" standard for sufficiency of a complaint that this Court articulated in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), was plainly satisfied by the detailed allegations of the Complaint.

Plaintiff-petitioners' complaint was dismissed and discovery barred on grounds that have not been invoked at this early juncture of litigation to dismiss complaints of plaintiffs who have suffered injuries in locations other than Israel. Compare, e.g., *Owens v. Republic of Sudan (Owens III)*, 864 F.3d 751 (D.C. Cir.

2017) (Kenya, Tanzania); *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir. 2004) (Lebanon); *Sotloff v. Qatar Charity*, 2023 WL 3721683 (S.D. Fla. May 30, 2023) (Syria); *Schansman v. Sberbank of Russia PJSC*, 565 F. Supp. 3d 405 (S.D.N.Y. 2021) (Russia).

The decisions rendered by the court below in this case and in the *Atchley* case prove this proposition. The complaint's allegations in *Atchley* charged that huge international pharmaceutical firms aided and abetted terrorist injury to United States citizens in Iraq because they provided bribes and medical goods to a corrupt Iraqi Ministry of Health that was allegedly controlled by a local terrorist entity that was, in turn, acting under the direction of Hezbollah, a designated Foreign Terrorist Organization. The attribution of blame to drug companies in *Atchley* is far less "plausible" and much more convoluted than the straightforward allegations made by the plaintiff-petitioners that funds raised and collected in the United States as charitable contributions were transmitted abroad by the defendant-respondent to finance the incendiary terror devices launched from Gaza to southern Israel.

The facts available to the plaintiff-petitioners in this case, recited in detail in their Complaint, provided "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). By terminating the litigation at its threshold, the courts below not only discriminated against Americans residing in Israel but also applied rules of detailed pleading that violate the directive in

Federal Rule of Civil Procedure 8(a)(2) that a complaint should state "a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiffs seeking damages for terrorism-related injuries in locations other than Israel, like plaintiffs in other personal-injury federal lawsuits, have not had their allegations subjected to the hostile, derogatory, and blatantly political criticism revealed in the appellate decision of this case.

The opinion of the court of appeals declares that, notwithstanding the recitation of details demonstrating the publicly known support of Hamas by the defendant-respondent, "the instant Complaint does not adequately plead that USCPR provided money to Hamas." (App. p. 10, *infra*). The opinion justifies this conclusory statement by relying on highly contested assertions that evidence an anti-Israel bias which holds the instant case to a different and higher standard than other cases arising from attacks which occurred in other jurisdictions:

> (1) The court's opinion declares that the Complaint "falls far short of establishing that the Boycott National Committee is an extension of Hamas or has been taken over by Hamas." (App. p. 11, *infra*) -- -- "Establishing" that allegation -- which the injured plaintiff-petitioners firmly believe can be proved by discovery relating to claims clearly stated in the Complaint, and is not an allegation of mere "guilt by association," – is for trial on the

merits, not for a judge's credibility judgment when the complaint is filed.

(2) In a footnote the court's opinion summarily rejects the inference that the Sons of al-Zawari who take credit for launching the incendiary devices during their Great Return March are controlled by Hamas. (App. p. 12, *infra*) notwithstanding Hamas' strong public endorsement of the group.

(3) Notwithstanding the specific allegations of the Complaint and numerous opinions of various courts in the District of Columbia Circuit that have found, in accordance with expert testimony, Hamas to be responsible for multiple acts of terror emanating from Gaza, the court's opinion declares that "it is far from clear who was responsible for the alleged acts of terrorism" and that "[t]he Complaint fails to plead that Hamas was responsible for the incendiary attacks." (App., p. 12, *infra*). – The opinion contrasts the Complaint's allegation of Hamas responsibility to the allegations of Hezbollah responsibility deemed sufficient in *Atchley* because the *Atchley* complaint cited "multiple reports by 'people on the ground in Iraq.'" The plaintiff-petitioners have

no access to "people on the ground" in Gaza but the specific details they allege plausibly support the allegations and the resulting inference that the incendiary devices are launched by a designated Foreign Terrorist Organization.

(4) Disclosing its own bias on political issues not properly before the court, the court's opinion judgmentally declares that the boycott of Israel ("BDS") that the respondent-defendant advocates and coordinates and that the Boycott National Committee promotes is nothing more than "a form of civil resistance" or "lawful civil resistance." (App., p. 15, *infra*). Federal law and the law of many States treat boycotts of Israel as contrary to US anti-discrimination policy and not merely "civil resistance."

(5) The court's opinion gratuitously displays its own political bias when it opines, with no shred of support in the record, that "the Boycott National Committee has extensive legitimate operations" and that it "engages in lawful advocacy to promote the boycott, divestment, and sanctions movement against Israel." (App. p. 18, *infra*). This is a shocking declaration relating to the larger

> Israeli-Palestinian conflict and is vigorously contested by the plaintiff-petitioners. If relevant to this litigation it should be included in an Answer and proved at trial. It is not a basis for granting a motion to dismiss the Complaint.

. . .

The Court should grant certiorari and review the adequacy of the Complaint by a fair nondiscriminatory standard that complies neutrally with pleading principles the Court has articulated in litigation that is not politically charged.

II.

THE COURT SHOULD CLARIFY AND LIMIT ITS RECENT DECISION IN *TWITTER v. TAAMNEH*

This Court's unanimous opinion in *Twitter, Inc. v. Taamneh*, No. 21-1496, 143 S. Ct. 1206 (2023), concerned a complaint that had alleged "failure to act" by "three of the largest social-media companies in the world." The Court held that the "world-spanning internet platforms" serving billions of people could not be plausibly alleged aiders-and-abettors liable under Section 2333(d)(2) for a 2017 ISIS attack on an Istanbul night club.

Many courts confronted with future Section 2333 cases will not limit the Court's holding in *Taamneh* to

(a) defendants that are "staggering" in size whose "platforms are global in scale and allow hundreds of millions [or billions] of people to upload vast quantities of information on a daily basis (143 S. Ct. at 1227) and

(b) defendants whose allegedly culpable conduct was "failure to act" or "mere passive nonfeasance" (143 S. Ct. at 1227) and not the "direct, active, and substantial" assistance by which the defendants "consciously, voluntarily, and culpably participate[d] in or support[ed] the relevant wrongdoing" (143 S. Ct. at 1230).

Failure to limit the Court's holding to "staggeringly" large companies that engage in "passive nonfeasance," will deny many American

citizens harmed by acts of international terror the recourse provided them by Section 2333, and will damage the law's deterrent impact. By granting certiorari and reversing the judgment below the Court will provide needed guidance for future Section 2333 claims.

The respondent in this case is an American charity that must comply with the laws of the United States. Its solicitation of tax-deductible contributions and its transmittal of funds outside the United States to support designated Foreign Terror Organizations that sponsor the "Great Return March" (plausibly controlled and directed by Hamas) amounts to active participation designed to facilitate the release of incendiary terror devices, including balloons and kites that are instruments of international terrorism and that have injured the plaintiff-petitioners, entitling the plaintiff-petitioners to recover damages under US law.

The plaintiff-petitioners' Complaint does not allege passive nonfeasance by massive multi-purpose international corporate entities. It alleges active and improper financial support of terrorist malfeasance by a relatively small American charity.

The borders of the *Taamneh* decision should be defined promptly in order to avoid future misapplications that will delay the administration of justice to victims of international terrorism. That can be accomplished by this Court's review and reversal of the court of appeals' decision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the decision of the Court of Appeals for the District of Columbia Circuit should be reversed with instructions to reverse the district court's dismissal of petitioner-plaintiffs' Complaint.

Respectfully submitted,

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