A120945
STATE OF MINNESOTA
IN COURT OF APPEALS

Minnesota Break the Bonds Campaign, Bil'in Popular Committee Against the Wall and Settlements, Women Against Military Madness-Middle East Committee, Lucia Wilkes Smith, Margaret Sarfehjooy, Catharine Abbott, Barbara Hill, Polly Mann, Leona Ross, Sylvia Schwarz, Nadim Shamat, Sarah Martin, Robert Kosuth, Mary Eoloff, Nick Eoloff, Vern Simula, Cynthia Arnold, Newland F. Smith, III, Ronnie Barkan, Ofer Neiman, David Nir, Leehee Rothschild, Renen Raz, Dorothy Naor, Gal Lugassi, Boycott From Within, and David Boehnke,

Appellants,

vs.

Minnesota State Board of Investment,

Respondent.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellants are aware of the political controversy underlying their legal action. Where the mere mention of criticism of Israel's oppression of Palestinians scares away politicians, it is predictable that jurists might want to avoid confronting a legal dispute which relates in some manner to this complex and controversial conflict.[1] Respondent SBI has sought to take advantage of the politically controversial nature of the underlying issues in its memoranda to the trial court and its Brief to this Court by magnifying the political overtones of the dispute as a diversion from the weakness of its legal position which it presents through misapplication and sometimes even misleading citation of legal authority.

Appellants, however, raise claims that are firmly rooted in and supported by the law, and are entitled to have a court address the claims on their legal merits. The judiciary is fully equipped to resolve the fundamental questions of statutory interpretation and the remaining questions of law which are presented. Appellants are entitled to the judiciary's well considered answers to the quintessentially *legal* questions they have raised.

I. RESPONDENT SBI'S CONTRIVED FOCUS ON APPELLANTS' MORAL OBJECTIONS CANNOT DISGUISE ITS FAILURE TO REFUTE APPELLANTS' OBVIOUS LEGAL STANDING IN THIS CASE.

The respondent has failed to substantively address Appellants' taxpayer,

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[1] See footnote 10, *infra.*

associational or injury-in-fact standing arguments. Instead, the SBI relies upon the tactic of pretending that Appellants have based their standing exclusively on "moral" grounds, which is simply not true. The SBI also manufactures a "zone of interest" requirement which no injured person or taxpayer could ever hope to satisfy.[2] SBI's arguments are neither factually nor legally supportable, and completely fail to substantively address the clear grounds for standing which Appellants actually presented in their opening brief.

Although the appellants oppose the SBI's investment in Israel Bonds on moral grounds, their standing is first and foremost based on the status of those appellants who are Minnesota residents and state pension plan beneficiaries who are challenging the SBI's illegal expenditure of state monies to purchase Israel Bonds in violation of Minn. Stat. § 11A.24, Subd. 2.[3] Additionally, standing is based on the actual injury-in-fact suffered by appellant Bil'in Popular Committee Against the Wall and Settlements (the

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[2] The SBI's so-called "zone of interest" limited to the goal of maximizing "the total rate of return" is based on the preamble at Minn. Stat. § 11A.01. According to the SBI, no person could ever have standing to challenge the SBI's investment decisions, however illegal. If the challenge fell outside this so-called zone of interest, there is no standing. If the challenge fell within the so-called zone of interest, it would be a mere "policy disagreement." Thus, any "policy" decision to invest, for example, in South American drug cartels in order "to maximize the total rate of return" is unassailable. Such a manifestly absurd result cannot have been intended by the Legislature.

[3] See the following portions of the record which demonstrate that, although Appellants obviously do have moral objections to the investments in Israel Bonds, their claims are certainly not *predicated* upon such moral grounds, but rather turn on justiciable questions of law: Appellants' Brief (hereinafter "AB"), at 6; Appellants' Appendix (hereinafter "App."), 59A; AB 6-8; App. 66A; AB 6; App. 69A-75A; App. 77A; App. 83A-86A; App. 15A-16A; App. 16A-24A; App. 24A-32A.

"Bil'in villagers"), which includes assault, death, arbitrary detention and land expropriation directly caused by illegal settlement activities financed by the purchase of Israel Bonds, all of which undoubtedly qualify as harms that are both concrete and non-conjectural. The standing of the few remaining appellants is predicated upon their associational status, and is thus derived from the taxpayer standing of the Minnesota resident appellants and the injuries-in-fact suffered the Bil'in villagers, two bases for standing which have notably *not* been addressed, let alone rebutted, by the SBI.

The SBI's only substantive response to the appellants' claims that they are entitled to sue based on taxpayer and injury-in-fact standing is relegated to footnote 4 of the SBI's brief where it merely asserts that "some of the Appellants are not Minnesota taxpayers." Because Appellants do not in fact rest their standing upon "moral opposition," "opinion," "social policy" or "personal feelings," the SBI's contentions in this regard are utterly beside the point and amount to little more than a smokescreen for the SBI's failure to address the strong bases for Appellants' standing.

This case does not simply involve a difference of opinion. The essence of the underlying complaint is a challenge to what Appellants contend constitutes an *illegal* expenditure of state money, which includes the violation of state laws which govern the SBI's investment decisions. It is not based, as the SBI falsely contends, on a simple disagreement with policy or upon the exercise of discretion in "maximizing the total rate of investment return without incurring undue risk." The SBI's attempt to circumscribe

standing to an excessively narrow economic "zone-of-interest" based solely on the statutory preamble at Minn. Stat. §11A.01 completely ignores its mandatory statutory obligations to Minnesota's taxpayers and pension plan beneficiaries under Minn. Stat. § 365A.05 to make only *lawful* investments, as well as its statutory fiduciary obligation under Minn. Stat. §§ 356A.02 and 356A.04 to make only "prudent" investments.

The zone of interest of a Minnesota taxpayer necessarily includes the right to restrain a public agency's *unlawful* use of public funds because "it has been generally recognized that a taxpayer has sufficient interest to enjoin illegal expenditures of both municipal and state funds." *McKee v. Likins,* 261 N.W.2d 566, 571 (Minn. 1977), *citing Arens v. Village of Rogers*, 61 N.W.2d 508, 513 (Minn. 1953).

The SBI has cited the completely irrelevant case of *Jones v. Baskin, Flaherty, Elliot & Marmaro, P.C.*, 738 F.Supp. 937, 942 (W.D. Penn. 1989), to support its fictional argument that Appellants are basing their standing on hurt "personal feelings." The only point that on which this case is common to *Jones* is that *Jones* involved a private pension plan beneficiary's objection to the purchase of Israel Bonds.[4] Beyond that solitary point, the facts in the *Jones* case are obviously radically different from those involved here. *Jones* did *not* involve a challenge to the alleged unlawful expenditure of public funds, or

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[4] The plaintiff in the *Jones v. Baskin* case alleged that his former employer had breached its fiduciary duty by investing in Israel Bonds because he was not Jewish and preferred investments other than Israel bonds. The plaintiff also alleged that he would have obtained a higher rate of return in a savings account.

actual injury caused by the use of the invested funds to violate international law. It is as irrelevant to this case as all of the SBI's other arguments regarding standing. In short, the SBI has failed to demonstrate that the Appellants lack standing and this Court should now proceed to consider the merits of the legal arguments Appellants have presented.

II. THE PLAIN AND ONLY VIABLE MEANING OF MINN. STAT. § 11A.24 DOES NOT AUTHORIZE THE SBI TO INVEST IN ISRAEL BONDS.

When interpreting § 11A.24, the Court must ascertain and effectuate the intent of the Legislature and may be guided by the presumption that the Legislature intended all of its subdivisions to be effective and certain. See Minn. Stat. §§ 645.16 and 645.17(3). The SBI engages in semantic gymnastics designed to obscure the significance of subd. 2 of § 11A.24 and thereby convince the Court that it may invest funds willy-nilly in any unspecified international securities. Such efforts, however, cannot alter the fact that the *unequivocal legislative intent* plainly expressed in § 11A.24 only authorizes the SBI to purchase the governmental bonds that are ***specified***, with certainty at § 11A.24, subd. 2.

Minn. Stat. §11A.24, subd 1, states that the SBI "is authorized to purchase . . . the securities ***specified in this section***" and that "[t]hese securities may be owned . . . subject to any ***limitations as specified in this section***." (Emphasis added.) While, subdivision 2 of § 11A.24 specifies that governmental bonds are an authorized security, the ***limitations as specified*** in subd. 2 on the purchase of governmental bonds exclude Israel Bonds. If it had been the Legislature's intent to authorize the SBI to invest in governmental securities

other than those listed in subd. 2, it could have relaxed the limitations specified in subd. 2 in its recent amendments to the statute. However, the Legislature not only kept the existing limitations on governmental bond investments but consciously stiffened the restrictive language in the statute.[5]

The language of § 11A.24 shows the degree of focused effort that was undertaken by the Legislature to categorize and specify with certainty the different types of securities the law authorizes the SBI to purchase with taxpayer funds. The Legislature has meticulously placed each of these ***specified*** and authorized investment securities into five (5) distinct categorical subdivisions with headings, included as part of the bill, describing each categorical subdivision followed by specified limitations.[6] The *only* specified governmental bonds in which the SBI is authorized to invest are those set forth with certainty under the **"Government obligations"** heading at subd. 2 of § 11A.24 and nowhere else, in other words, "guaranteed or insured" issues of:

> (1) the United States, its agencies, its instrumentalities, or organizations created and regulated by an act of Congress;
>
> (2) the dominion of Canada or any of its provinces, provided the principal and

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[5] Examples of such language in the amended version include the substitution of the words "may invest" with "is authorized to invest," the deletion of several government owned development banks from the list of authorized investments and the substitution of the word "include" with the word "are" in describing the types of government obligations in which the SBI is authorized to invest. Appellants' Addendum ("Add.") 22.

[6] Headings are relevant to legislative intent when they are present in a bill during the legislative process. *Minnesota Express, Inc., v. Travelers Insurance Co.*, 333 N.W.2d 871, 873 (Minn. 1983).

interest are payable in United States dollars;

(3) any of the states or any of their municipalities, political subdivisions, agencies or instrumentalities; and

(4) any United States government sponsored organization of which the United States is a member, if the principal and interest are payable in United States dollars.

Just because the SBI says that the plain meaning of the statute permits it to invest in Israel Bonds certainly does not make it so. The plain and express language of the statute does not authorize the SBI to invest in the governmental bonds of any country other than those specified and ***subject to the limitations as specified*** in §11A.24, subd. 2.

The phrase "in addition to" in § 11A.24, subd. 6, does not "open the door" as the SBI contends, nor does it authorize the SBI to invest in Israel Bonds which are nowhere specified and which are indeed *excluded* by the limitations specified in subd. 2. The words "in addition to" must be read in conjunction with the intent of the Legislature to categorize "international securities" under the heading "**Other investments,"** to mean only those types of investments that are *distinct from* those already described in prior subdivisions, which means that governmental bonds are necessarily excluded from the types of securities encompassed by the "international securities" clause in subdivision 6. *See generally, Moes v. City of Saint Paul,* 402 N.W. 2d 520, 526 (Minn. 1987) (reading in harmony the words "in addition to" with "distinct from"). This conclusion is compelled by Minn. Stat. § 645.16, which requires that "every law should be construed, if possible, to give effect to all of its provisions." To find otherwise would be to completely ignore

the *express* intent of the Legislature evident in the meticulously drafted limitations on the purchase of governmental bonds specified in subdivision 2, and would render those specified limitations ineffective, uncertain, superfluous and meaningless.

Finally, the fact that the SBI has broken the law and has purchased other governmental bonds which are *not* specified in subd. 2 is, as pointed out earlier in Appellants' opening brief, entirely irrelevant to the questions of whether such investments are legally authorized. The SBI's argument that it is required to diversify its investments certainly does not allow it to make either unauthorized investments or illegal investments with taxpayer funds. Consequently, the possibility that it could be required to divest "from a dozen of its current holdings" is not remotely relevant.[7] The fact that such investments may have acquired the patina of long use over the years is plainly insufficient to justify an inherently *unlawful* investment.

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[7] Notably, although the District Court adopted most of the SBI's arguments verbatim, it did *not* include the SBI's divestment argument in its dismissal order after Appellants pointed out that: (1) the SBI had evidently substantially increased its holdings of Israel Bonds, from $18 million to $27 million, *after* the lawsuit was filed in this case, (2) that Israel Bonds amounted to nearly *one-third* of the SBI's total so-called investments in all non-Canadian foreign governmental bonds, (3) that the SBI's investment in Israeli government bonds was 300% more than the SBI's next highest non-Canadian "government bond" investment (so much for diversification), (4) that several of the foreign investments that the SBI had identified as "government bond" investments did not even appear to be actual government bonds, and (5) that even if all of these investments were indeed foreign government bond investments, they amounted to only 1.5% of the SBI's total portfolio. (See pages 15-16 of the "Plaintiffs' Reply To Defendant's Opposition to Plaintiff's Motion for Summary Judgment on Count One" filed in the District Court on February 29, 2012.)

The SBI's reading of the statute, although purporting to rest upon the "plain meaning" of the statutory language, would, if adopted by this Court, involve dismantling the clear and plain intent that the Legislature has so carefully constructed. The SBI's self-serving but implausible interpretation cannot prevail.

III. THE SBI HAS FAILED TO REFUTE APPELLANTS' ARGUMENT THAT THE ACT OF STATE DOCTRINE IS WHOLLY INAPPLICABLE.

The SBI relies heavily on two easily discredited, obsolete and non-precedential federal district court decisions to argue that the Court is precluded under the act of state doctrine from recognizing the universally condemned illegality of Israeli settlement activity. Both of these cases are readily distinguishable. Significantly, neither of the two decisions include any considered discussion of the intra-territorial prerequisite, which is vital to any invocation of the act of state doctrine, and only one of these cases addressed the additional issue of *jus cogens,* but then proceeded to a conclusion diametrically opposite to the well-settled weight of far more persuasive authority. The SBI's position thus relies heavily upon two remarkably weak and slender reeds of purported authority.

In *Doe I v. State of Israel,* 400 F.Supp.2d 86, 113-114 (D.D.C. 2005), the District Court appears to have merely assumed that Israel's settlement activities in the occupied Palestinian territories were somehow within Israel's territorial borders, and thus revealed a (perhaps unconscious) bias which is nevertheless *not* shared either by the United

Nations,[8] *or by the United States Government.*[9] There is not even an acknowledgment in the *Doe I* decision that the occupied Palestinian territories are not within Israel's territorial boundaries, and yet the *Doe I* court nevertheless justified its ruling by noting that, "the federal courts have long recognized that the exploitation of natural resources and land *within a nation's own borders* is, by definition, an act of state." *Id.* at 114 *(emphasis added)*. The conclusion that Israel has every right to exploit the natural resources of the West Bank of Palestine was thus drawn entirely *ex nihilo*, by a court which relied on a completely false assumption about the legal status of the land involved.

Similarly, in *Corrie v. Caterpillar, Inc.,* 403 F.Supp.2d 1019,1032 (W.D. Wash. 2005), *aff'd,* 503 F.3d 974 (9th Cir. 2007), after noting that the plaintiffs had raised the intra-territorial prerequisite in objecting to the application of the doctrine, the District Court nevertheless immediately concluded that the act of state doctrine applied, without ever even addressing the question of whether the occupied Palestinian territories were or were not within the territorial boundaries of Israel. Furthermore, on appeal, although the Ninth Circuit affirmed the District Court's dismissal, it did so based solely on the distinctly different political question doctrine (after determining that the United States Government had financed the conduct which the plaintiffs sought to challenge). Thus, far from providing any approval of the District Court's incomplete handling of the act of

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[8] http://unispal.un.org/pdfs/OCHA_HumanitarianAtlas-1211.pdf

[9] http://www.state.gov/p/nea/ci/is/index.htm

state doctrine, the Ninth Circuit expressly *withheld* from its subsequent decision any determination of whether the District Court had properly invoked it. *Id.* at 977.

The manifest avoidance in the *Corrie* and *Doe I* cases of any substantive discussion of the required intra-territorial element before application of the act of state doctrine suggests an unfortunate judicial hostility to cases brought in the United States, at least in the trial courts, seeking justice for the Palestinians, a hostility that has not escaped the attention of at least one legal academic intimately familiar with the *Corrie* decision. [10]

Notwithstanding the questionable district court authorities relied upon by the SBI, the intra-territorial element is a well-settled requirement for invoking the act of state doctrine. Moreover, any district court decisions to the contrary (which do not constitute binding precedent in state court in any event), are trumped by the United States Supreme Court, which has imposed an intra-territorial requirement and which is, of course, authority which *is* binding upon this Court.[11]

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[10] See Gwynne Skinner, *The Nonjusticiability of Palestine: Human Rights Litigation and the (Mis)application of the Political Question Doctrine,* 35 Hastings Int'l and Comp. L. Review 99, 127-128 (2012) (noting "the number of problematic dismissals in cases involving Israeli actions in Palestine," resulting from the inconsistency in the application of the political question doctrine [and] the "high passion and tensions associated with the Israeli-Palestinian conflict, [which] has resulted in courts consciously or unconsciously finding that cases involving Israeli actions in Palestine are simply nonjusticiable"). Professor Skinner served as co-counsel for the Corries in the trial court and the Ninth Circuit, along with Jennifer Green, currently associate professor of international law at the University of Minnesota, and Erwin Chemerinsky, the current law school dean at the University of California, Irvine, who argued the *Corrie* appeal.

[11] *See generally*, *State v. Brist,* 812 N.W.2d 51, 54 (Minn. 2012) ("Supreme Court precedent on matters of federal law . . . is binding on this court.").

The United States Supreme Court has specifically determined that the act of state doctrine only precludes inquiry into acts of a foreign government committed *within its own territory*. *Sabbatino v. Banco Nacional de Cuba*, 376 U.S. 398, 401 (1964). In applying this rule, federal circuit courts have found that the act of state doctrine ordinarily does not preclude judicial review of the extraterritorial effects of acts of a state.[12] Furthermore, the burden of proving a non-justiciability defense, including the act of state doctrine, rests upon the SBI.[13] The SBI, however, has failed to carry its burden of showing that the actions which underlie the allegations of aiding and abetting against the SBI in this case occurred within the territorial boundaries of Israel.

The SBI's reliance on the *Doe I* decision as supposed support for its argument that *jus cogens* violations do not preempt the act of state doctrine is equally insupportable. The prevailing weight of persuasive authority simply does not support the SBI's position.[14] In

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[12] *See e.g.*, *Liu v. Republic of China*, 892 F.2d 1419,1433 (9th Cir 1989) (act of state doctrine not applicable to state-ordered murder planned in foreign country and carried out in California); *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972) (act of state doctrine did not bar former owners of Cuban corporation from suing third party in United States to preserve right to use United States trademark registered in name of confiscated corporation; declining to give "'extra-territorial effect' to a confiscatory decree of a foreign state"); *Republic of Iraq v. First National Bank*, 353 F.2d 47, 51 (2nd Cir. 1965) (act of state doctrine did not bar judicial review of Iraqi confiscation of assets located in United States).

[13] *See Liu*, supra, at 892 F.2d 1432 (citing *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694-95 (1976); *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988) (en banc).

[14] See, e.g., *Siderman de Blake v. Republic of Argentina,* 965 F.2nd 699, 718 (9th Cir. 1992), cert den. 507 U.S. 1017 (1993) (holding a violation of a jus cogens norm is

order to bolster its erroneous argument that the act of state doctrine can be applied to *jus cogens* violations, at page 20 of the Respondent's Brief, the SBI has also taken a statement made by the Supreme Court in the *Sabbatino v. Banco Nacional de Cuba* decision entirely out of context. In actually *reinforcing* the intra-territorial element necessary for invoking the act of state doctrine, the Supreme Court stated that, "the Judicial Branch will not examine the validity of a taking of property *within its own territory* by a foreign sovereign government, *extant and recognized by this country at the time of suit*, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." *Id.* at 428 (emphasis added). It was thus in this ***intra***-territorial context that the Supreme Court observed that "[T]he act of state doctrine is applicable even if international law has been violated," a contextual frame of reference which the SBI pointedly ignores.

In short, the SBI's arguments regarding the supposed application of the act of state doctrine present contentions based upon poorly reasoned non-binding federal district court authority, which is contrary to the weight of persuasive authority available from the federal circuit courts *and* to directly controlling United States Supreme Court authority.

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not a sovereign act); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 757 (9th Cir. 2011) (en banc) (holding that *jus cogens* norms are exempt from the doctrine, since they constitute norms from which no derogation is permitted); *Lizarbe v. Rondon,* 2009 U.S. Dist. Lexis 70647, *8 (D.C. Md.) (finding that the *Doe I* decision is in keeping with the rule that violations of customary international law are *exempt* from the doctrine, and that there is "no basis for substantial disagreement as to this point").

IV. THE SBI FAILS TO SATISFY ITS BURDEN OF SHOWING THAT THE POLITICAL QUESTION DOCTRINE IS APPLICABLE IN THIS CASE.

In their opening brief, Appellants provided the Court the most recent United States Supreme Court decision concerning the political question doctrine. Pursuant to *Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1427 (2012), "[A] controversy involves a political question where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." (Quotation marks and ellipses omitted.)

"Textually demonstrable" means demonstrable from the text of the Constitution itself, not from case law interpreting the constitutional text. *See Nixon v. United States*, 506 U.S. 224, 228, 113 S. Ct. 732 (1993). The SBI has not pointed to the text of a *single* constitutional provision supporting the application of the political question doctrine to this case, nor to any provision that would commit the questions raised in the complaint herein to any branch of the government *other than* the judiciary. Although the law to be applied here may emanate from international sources, this case "in no way calls upon the courts to judge the conduct of foreign relations by the United States Government." *Sarei, supra*, 671 F.3d at 756. That the trial court may be called upon to *apply* the law of nations, as manifested in customary international law integrated into the United States' own common law, does not create a political question. *Id.* Because the SBI has failed to identify a textually demonstrable commitment of the issues in this case to Congress or to the executive branch, it has therefore failed to demonstrate the applicability of the political

question doctrine. The SBI's "policy" snippets clipped from a hodgepodge of court decisions concerning the respective roles of these other branches of government simply do not satisfy the SBI's burden under *Zivotofsky* .

The SBI has also completely failed to address or carry its burden as to the second *Zivotofsky* factor, whether there is "a lack of judicially discoverable and manageable standards for resolving the question before the court." The SBI has pointed to no such lack of workable legal standards, and the courts have generally found that this question is not one which is appropriate for determination at the pleadings stage in any event. *See generally*, *Shakman v. Democratic Organization of Cook County,* 435 F.2d 267, 271 (7th Cir. 1970). Thus, in the absence of either a textually demonstrable constitutional commitment of the issue to a coordinate political department or a demonstrated lack of judicially discoverable and manageable standards for resolving the legal questions presented by the Appellants' complaint, the political question doctrine has no applicability to this case.

V. THE UNDISPUTED NON-CONCLUSORY FACTS ALLEGED IN THE COMPLAINT DEMONSTRATE THAT INVESTMENTS IN ISRAEL BONDS ARE QUALITATIVELY DIFFERENT THAN ORDINARY COMMERCIAL TRANSACTIONS.

Israel Bonds are war bonds, in part. The complaint details how sizeable portions of the money Israel obtains from the sale of its bonds are used to fund unlawful overlapping military occupation and settlement activities in the occupied Palestinian territories. For

this reason, the United States government has scaled back its guarantee of Israel's repayment of bond funds to avoid paying for these activities. App. 22A-23A. The SBI has not disputed these non-conclusory factual allegations and they must be accepted as true. *See Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). The SBI has also not disputed the non-conclusory factual allegations in the complaint showing that it *knows* that a portion of Minnesota's taxpayer funds that it gives to Israel will be ***directly*** used for these purposes, including the fact that Israel openly sells its government bonds to supporters to raise money for illegal settlement purposes. See AB at 34-39, App. 23A.

Nevertheless, the SBI argues erroneously that the case law supports its view that investments in Israel Bonds are nothing more than mere "commercial transactions." (Respondent's Brief, p. 21-23.) It primarily relies on the District Court *Corrie v. Caterpillar* decision (403 F.Supp.2d 1024) and the Second Circuit's decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc*, 582 F.3d 244 (2nd Cir. 2009), *cert. denied*, 131 S.Ct. 79 (2010) to support this contention. The *Corrie* decision however, offers the SBI no such assistance. The language the SBI cites from *Corrie* addressing aiding and abetting liability, including comments suggesting a specific intent requirement or that the aider and abettor must have the "the right and ability to control the Israeli *soldiers'* conduct," (emphasis added)[15] has been superceded by the more recent *Sarei v.*

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[15] The lower court, in adopting verbatim the language provided by the SBI in its proposed order, unwittingly incorporated the SBI's misleading and inaccurate representation that the test articulated in *Presbyterian Church of Sudan v. Talisman*

Rio Tinto (en banc) decision of the Ninth Circuit. The law as it now stands in the Ninth Circuit requires a showing only of "purposive" action in furtherance of a war crime to support an aiding and abetting allegation. *Id.* at 671 F.3d 772-774.

The law in the Second Circuit is similar to the law in the Ninth Circuit. The *Presbyterian Church of Sudan* decision held that aiding and abetting allegations must support an inference that the alleged aider and abetter acted with the "purpose" of advancing the perpetrator's international law violations. *Presbyterian Church of Sudan,* supra, 582 F.3d at 261-263. But this standard is not shared among all federal Circuits. Relying on the requirements set out in the Nuremberg Tribunals and various international courts created by the U.N., the District of Columbia Circuit has recently held that

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Energy, Inc. supposedly required that it must not only be shown that the SBI acted purposively in purchasing the Israel Bonds, but further that it must be shown "that the SBI has the right and ability to control the *country's* alleged conduct" (emphasis added). As shown above, that phrase – with the word "soldier" in place of the word "country" – is actually language taken from the *superceded* district court opinion in *Corrie*, and ***not*** from the Second Circuit's decision in the *Presbyterian Church of Sudan* case.

Despite the fact that this misleading representation was noted and discussed in Appellants' opening brief at 33-34, Respondent SBI has once again, at pages 21-22 of its brief, misleadingly paraphrased the *Presbyterian Church of Sudan* case in order to *falsely* assert that "the right and ability to control the *country's* alleged conduct" is a part of the Second Circuit's test. To misrepresent important case authority once can be a mere error. To persist in such a misrepresentation even *after* the error has already been pointed out, however, and to the extent of including false page references, is far less innocuous. It should, therefore, be most carefully noted that the standard which the SBI *still* falsely attributes to the Second Circuit Court's *Presbyterian Church of Sudan* decision is actually the SBI's own modification of language derived from a district court decision *which has now been superceded by the Ninth Circuit.*

knowledge is sufficient and that a showing of "purpose" is not required. *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 32-39 (D.C. Cir. 2011).

Because the Supreme Court has yet to resolve the split, a definitive test has not yet been established. Here, however, the variance between the "purposive" standard of the Second and Ninth Circuits, and the "knowing" standard of the District of Columbia Circuit is immaterial, since the factual allegations of Appellants' complaint meet even the stricter "purposive" test. The factual allegations regarding Israel's human rights abuses, the direct manner in which those abuses are funded through the purchase of Israel Bonds and the degree of knowledge the SBI has of Israel's use of bond funds to finance such activities (given the actions taken by the United States government related to Israel's use of the bond funds and Israel's open admissions regarding the use of the bond funds), are factual matters from which a "purposive" mens rea can readily be inferred. Thus, the *Presbyterian Church of Sudan* decision does nothing to support the SBI's argument that the purchase of Israel (war) Bonds amounts to mere "commercial activity," but instead highlights the qualitatively different kind of factual allegations which are involved here.[16]

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[16] Compare these facts with those presented in *Presbyterian Church of Sudan*, 582 F.3d at 263-264. In that case, where the plaintiffs repeatedly cited to the displacement of civilians from the oil fields, but could *not* allege that such displacement was "in itself a violation of international law," or that such displacement was "unlawful in itself," the court concluded that there were insufficient facts from which an intent to aid and abet could be inferred. Here, by contrast, it is alleged that the activities *directly* funded by the purchase of the Israel Bonds are both inherently unlawful *and* extra-territorial violations of international law. App. 1A, ¶¶ 17, 27-30, 38-40. Thus, unlike the allegations under consideration by the Second Circuit, this case does present factual allegations from which

In affirming the grant of summary judgment for the defendants in the *Presbyterian Church of Sudan* case, the Second Circuit specifically noted that "the activities which the plaintiffs identify as assisting the Government (of Sudan) in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry." In other words, the actions taken by the defendants which facilitated Sudan's human rights violations, such as building roads and airstrips, were done for the "benign" commercial purpose of oil exploration. The defendants in that case thus did not build the roads and airstrips for the *direct* purpose of supporting Sudan's human rights violations. *Presbyterian Church of Sudan,* 582 F.3d at 261-263.

There is, however, a significant and qualitative difference between building a road to an oil field which only incidentally provides access to a marauding militia versus giving money directly to a government with foreknowledge that it will then be used to *directly* pay the salaries of the marauding militia. It is not hard to conclude that the decision of the Second Circuit in the *Presbyterian Church of Sudan* case would have been categorically opposite if the latter circumstances had been before it.

Furthermore, because the uncontested non-conclusory factual allegations against the SBI in the complaint in this case more closely resemble the latter situation of *direct* material assistance, with full foreknowledge of the unlawful nature of the international law

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"a defendant's intent to aid and abet the principal could be inferred." *Presbyterian Church of Sudan,* 582 F.3d at 264.

violations, Appellants' have adequately pled aiding and abetting liability in Counts II and III in their complaint even under the "purposive" standard articulated by the Second and Ninth Circuits. Thus, the SBI's last argument is no more meritorious than any of its previous insupportable contentions.

CONCLUSION

For the foregoing reasons, Appellants renew their request that this Court reverse the judgment of the district, and remand the instant case for further proceedings on the merits.

Respectfully submitted,

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