No. _____

In the

Supreme Court of the United States

MARVIN GERBER,

Petitioner,

v.

HENRY HERSKOVITZ, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

NATHAN LEWIN
Counsel of Record
LEWIN & LEWIN, LLP
888 17th Street NW
4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

Counsel for Petitioner

March, 2022

QUESTIONS PRESENTED

Jewish worshippers entering their synagogue for worship on Saturday mornings for Sabbath services are harassed and intimidated by a group that assembles only and precisely at the times of prayer and displays anti-Jewish and anti-Israel placards on the sidewalk in front of the synagogue and across the street.

The Questions Presented are:

1. Whether the First Amendment's guarantee of the free exercise of religion requires restriction adjacent to a house of worship of harassing and intimidating speech that discourages and impedes prayer.

2. Whether the Court of Appeals' disregard of this Court's instruction that "a federal appellate court does not consider an issue not passed upon below" (*Singleton v. Wulff*, 428 U.S. 106, 120 (1976)) warrants summary reversal of the Court of Appeals' decision and remand for consideration by an impartial and unbiased District Court Judge.

PARTIES TO THE PROCEEDING

Petitioner is Marvin Gerber. A co-plaintiff who has filed a separate petition for a writ of certiorari (No. 21-1024) is Miriam Brysk.

Respondents are Henry Herskovitz, Gloria Harb, Tom Saffold, Rudy List, Chris Mark, Deir Yassin Remembered, Inc., Jewish Witnesses for Peace and Friends, the City of Ann Arbor, Ann Arbor Mayor Christopher Taylor, in his official and individual capacities, Ann Arbor Community Services Administrator Derek Delacourt, in his official and individual capacities, Ann Arbor City Attorney Stephen Postema, in his official and individual capacities, and Senior Assistant City Attorney Kristen Larcom, in her official and individual capacities.

STATEMENT OF RELATED PROCEEDINGS

A district court order granting respondents' motion for attorneys' fees in the amount of $158,721.75, entered on January 25, 2022, is on appeal to the United States Court of Appeals for the Sixth Circuit. *Gerber v. Herskovitz*, 2022 WL 246881 (E.D. Mich. 2022), appeal pending.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

OPINION BELOW

The Sixth Circuit's opinion (Pet. App. 1-45) is reported at 14 F.4th 500 (6th Cir. 2021).

JURISDICTION

The Sixth Circuit's judgment was entered on September 15, 2021. A timely petition for rehearing and rehearing en banc was denied on November 2, 2021 (Pet. App. 58-59). On January 19, 2022, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to April 1, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 248(a)(2) provides:

> Freedom of access to clinic entrances
>
> (a) Prohibited activities. – Whoever
>
> . . . .
>
> (2) by force or threat of force or by physical destruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship;
>
> . . . .
>
> shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c) . . . .

Additionally, 42 U.S.C. §§ 1981, 1982, 1983, 1985 and 1986 are set forth in the Appendix at Pet. App. 60-66.

STATEMENT OF THE CASE

(1) The facts -- The facts are stated as follows in the opinion of the Court of Appeals (Pet. App. 3-4).

Every Saturday morning since September 2003, protesters have picketed the Beth Israel Synagogue. Their group typically comprises six to twelve people, and they display signs on the grassy sections by the sidewalk in front of the synagogue and across the street from it. The signs carry inflammatory messages, with statements such as "Resist Jewish Power," "Jewish Power Corrupts," "Stop Funding Israel," "End the Palestinian Holocaust," and "No More Holocaust Movies." The protests apparently target the members of the Beth Israel Congregation, as they coincide with the arrival of the congregants to their worship service on Saturday morning. The congregants and their children can see the signs as they enter their worship service. But the protesters have never prevented them from entering their house of worship, have never trespassed on synagogue property, and have never disrupted their services.

(2) The complaint -- Petitioner Marvin Gerber initiated this action with a Complaint filed on December 19, 2019. In a First Amended Complaint filed on January 10, 2020, he was joined by Miriam Brysk, who is the petitioner in No. 21-1024.

The First Amended Complaint alleged, *inter alia*, that the defendants' conduct was "harassment of the congregants" and "deliberately harassing conduct" (Introduction paras. 3, 5), and that it constituted "verbal harassment" and "unreasoned bullying" resulting in "extreme emotional distress" to the two named plaintiffs (paras. 20, 21). Paragraph 21 alleged that the defendants' conduct "adversely affected . . . willingness to travel to the location of the Synagogue's annex to attend Sabbath services." Paragraph 83(c) alleged: "The conduct of the protesters is infringing on the 1st Amendment right of the congregants to exercise their freedom of religion without being harassed and insulted by the protesters." The Complaint alleged in 23 claims that the defendants' actions violated, *inter alia*, 42 U.S.C. §§ 1981, 1982, 1983, 1985(3), and 1986.

(3) Dismissal of the Complaint – The District Court dismissed the Complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure on August 19, 2020, on the ground that the plaintiffs' emotional distress was not a sufficient concrete injury to give them standing to maintain the lawsuit. The Court denied a motion for reconsideration on September 3, 2020. The District Court did not rule on the merits of the First Amended Complaint.

(4) The decision of the Court of Appeals – The Court of Appeals reversed the District Court's "standing ruling." It held that "the congregants have standing to sue because they have credibly pleaded an injury – extreme emotional distress – that "has stamped a plaintiff's ticket into court for centuries." (Pet. App. 8). The Court concluded this section of its

opinion as follows: "Plaintiffs' claims may be wrong and ultimately unsuccessful, but the fourteen pages that the concurrence devotes to analyzing the constitutional issues belie the conclusion that they are frivolous." (Pet. App. 12).

The substantive sufficiency of the Complaint had not been decided by the District Court and had been argued in the Court of Appeals only in the defendants' brief and in a secondary portion of the plaintiffs' reply brief. Nonetheless, the Court of Appeals proceeded to decide that "the complaint fails to state a claim for which relief can be granted." (Pet. App. 20). The Court acknowledged that it could be "colorably argued" that "signs that say 'Jewish Power Corrupts' and 'No More Holocaust Movies' directly outside a synagogue attended by holocaust survivors and timed to coincide with their services are more directed at the private congregants than designed to speak out about matters of public concern." (Pet. App. 11-12). It found, however, that the gathering and display of signs was "squarely within First Amendment protections of public discourse in public fora" because "the content and form of the protests demonstrate that they concern public matters: American-Israeli relations." (Pet. App. 13).

(5) <u>En banc rehearing denied and mandate issued</u> – A timely petition for rehearing en banc was filed on October 13, 2021, and denied on November 2, 2021. Petitioner moved on November 3, 2021, for stay of the mandate under Federal Rule of Appellate Procedure 41(d)(2) pending filing of a petition for a writ of certiorari. On the next day the motion was denied. Petitioner moved in this Court on

November 15, 2021, for a stay of the mandate on the ground that unless the mandate were stayed, the District Judge would entertain a motion to award attorneys' fees to the defendants. *Gerber v. Herskovits*, No. A-146. On November 19, 2021, Justice Kavanaugh denied the motion. Without any oral hearing, the District Judge issued an order on January 25, 2022, awarding $158,721.75 to the defendants as attorneys' fees. *Gerber v. Herskovitz*, 2022 WL 246881 (E.D. Mich. 2022). That order has been appealed.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals impairs and undermines the constitutional and statutory right of Jews and religious observers of other faiths to exercise their religious freedom by collective worship at a site designated for sacred observance. The Court of Appeals mistakenly characterized the respondents' antisemitic harassment as "public discourse" on "American-Israeli relations" and erroneously rejected, in summary fashion without full briefing, alleged violations of federal law that the petitioner will establish if he is permitted to proceed with his lawsuit.

This Court should grant this petition for a writ of certiorari to clarify that the freedom to worship guaranteed by the First Amendment and by federal law may not be impaired by individuals who surround a house of worship to harass and intimidate its congregants even if they claim that they are engaged in nothing more than free expression. Alternatively, the Court may choose summarily to vacate the decision below without plenary briefing and argument and remand the case to the district court so that it

may, for the first time, consider whether petitioner's complaint withstands a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I.

RESPONDENTS' CONDUCT HARASSED AND INTIMIDATED JEWISH "RELIGIOUS FREEDOM AT A PLACE OF RELIGIOUS WORSHIP" THAT IS GUARANTEED BY THE FIRST AMENDMENT AND BY 18 U.S.C. § 248(a)(2) AND MAY BE ENFORCED IN A LAWSUIT UNDER THE FEDERAL CIVIL RIGHTS LAWS

For more than 18 years respondents have surrounded the synagogue when congregants gathered to pray on Saturday mornings with placards bearing the following legends:

Jewish Power Corrupts
Resist Jewish Power
Israel: No Right To Exist
Dual Loyalty?
Atone for the Sin of Supporting Genocide
No More Wars for Israel
Zionism Is Racism
End Jewish Supremacism in Palestine
No More Holocaust Movies
Boycott Apartheid Israel
Fake News: Israel Is a Democracy
Stop U.S. Aid to Israel
End the Palestinian Holocaust
No More Wars for Israel

These posters expressed opposition to all Jews, as well as to Israel and the policies of its government. The respondents addressed these messages to Jews coming together once a week for religious services that they knew include prayers with multiple references to Jerusalem and to the land sanctified as a Jewish homeland by Biblical account. Were the respondents seeking by their meticulously timed assemblies and their condemnation of Jews and Israel to persuade their audience? Or were they threatening Jews and seeking to deter them from engaging in religious services in the synagogue?

In view of their timing and location, the conduct in this case was harassment and intimidation directed at individuals exercising the "right of religious freedom at a place of religious worship" within the language and policy of 18 U.S.C. § 248(a)(2). Just as "public safety and order" could override the speech of anti-abortion protesters in *Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357, 374-376 (1997), the constitutionally protected right to enter and pray at a synagogue, church, and mosque overrides the respondents' claim that their conduct was protected speech.

In *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court sustained a prohibition against "focused picketing" of a private residence. The Court said, "The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." 487 U.S. at 487. "To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself." *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949).

Under the standard that this Court has articulated time and again for deciding motions under Rule 12(b)(6) of the Federal Rules of Civil Procedure, petitioner is entitled to proceed with his claims and present evidence developed during discovery to a trier of fact to establish violations of federal law. *E.g.*, *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The Court of Appeals erred in assuming that this Court's decision in *Snyder v. Phelps*, 562 U.S. 443 (2011), governs this case. (Pet. App. 11). *Snyder* related to speech on a secular "matter of public concern" – homosexuality in America's military. The defendant-protesters, not the targets of their protests, were expressing opinions based on religious belief. Although the location of the protests in the case before the Court happened to be a church, the protesters also demonstrated at military funerals wherever they were located. And the case before the Court concerned a one-time event that happened at a church, not a course of conduct over many years directed to a church and its worshippers.

The decision below erroneously rejected valid claims petitioner has under the federal Civil Rights Act – Sections 1981, 1982, 1983, 1985(3), and 1986 of Title 42.

A. 42 U.S.C. § 1981 – Jewish Worshippers Are Protected by Federal Law Against Impairment of Their Right of Religious Freedom at a Place of Religious Worship.

This Court held in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987), that "Jews constituted a group of people that Congress intended to protect" when it enacted the Civil Rights Acts. Subsection (c) of Section 1981 protects individuals "against impairment by nongovernmental discrimination and impairment under color of State law."

The decision below rejected the Section 1981 claim because, it said, the plaintiffs had "failed to allege that they lost out on the benefit of any 'law or proceeding.'" Pet. App. 17. The "right of religious freedom at a place of religious worship" that 18 U.S.C. § 248(a)(2) secures is a "benefit" that federal "law" plainly protects. The conduct of the respondents was, and continues to be, "nongovernmental discrimination and impairment" of the statutory and constitutional rights of Jews just as was the synagogue desecration in the *Shaare Tefila* case.

B. 42 U.S.C. § 1982 – The Property Interests of Jewish Congregants in Use of the Beth Israel Synagogue Have Been Impaired.

This Court held in *City of Memphis v. Greene*, 451 U.S. 100, 120-122 (1981), that Section 1982 protects the "right to acquire and use property" and "not to have property interests impaired." See also the

concurring opinion of Justice Brennan in *Patterson v. McLean Credit Union*, 491 U.S. 164, 208 n.12 (1989). The Sixth Circuit had held in *United States v. Brown*, 49 F.3d 1162, 1165-1167 (6th Cir. 1995), that a one-time shooting into a synagogue impaired use of the premises by its congregants within the reach of Section 1982. Almost two decades of harassment of potential worshippers at Beth Israel Synagogue surely impaired use of its premises more than the single attack.

C. 42 U.S.C. § 1983 – The City of Ann Arbor Actively Participated and Encouraged the Harassment and Intimidation of Jewish Worshippers.

The highest officials of Ann Arbor knew of and approved the conduct of the individual defendants. Paragraphs 36-72, 72-78, and 110-121 of the complaint describe in detail how the City of Ann Arbor has participated in the harassment and intimidation of worshippers seeking to pray in a synagogue. Under the standard applied by this Court in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), this was more than sufficient to establish that Ann Arbor "elected to place its power, property and prestige behind" the private respondents' course of conduct.

The court below erroneously analogized this case to two of this Court's decisions involving government agencies that did no more than fail to protect against the misconduct of private parties. In *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), the state agency had not

removed a child from its father's custody. In *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748 (2005), the police had allegedly failed to enforce a restraining order against an abusive husband. The governmental participation in each of these cases may have amounted to negligent inaction. In neither instance did government agents actively consider and approve the tortious conduct of private tortfeasors as Ann Arbor did in this case.

D. 42 U.S.C. § 1985(3) – Class-Based Invidiously Discriminatory Animus Against Jews Was Behind The Respondents' Private Conspiracy.

The Court of Appeals erroneously declared that to come within Section 1985(3) a "conspiracy must involve state action." Pet. App. 18. This Court held in *Griffin v. Breckenridge*, 403 U.S. 88, 101-102 (1971), that Section 1985(3) covers private conspiracies if there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." Placards proclaiming "Resist Jewish Power," "Jewish Power Corrupts," "Dual Loyalty," "Atone for the Sin of Supporting Genocide," and "No More Holocaust Movies" manifest the requisite "class-based" animus against Jews. Moreover, if state action were indeed required, the substantial participation of the City of Ann Arbor in the alleged conspiracy meets that condition.

E. 42 U.S.C. § 1986 – The City of Ann Arbor Is a Lawful Co-Defendant in a Valid Lawsuit Under Section 1985.

Ann Arbor officials may be found liable under Section 1986 because there is liability under Section 1985.

II.

RELIGIOUSLY BIGOTED VIOLENCE HISTORICALLY BEGINS WITH CROWDS SURROUNDING PLACES OF WORSHIP

This case is important and warrants review and reversal of the decision below because acquiescence and legitimization of verbal harassment and incitement against worshippers gathering at a synagogue, church, mosque or other site of prayer has historically spawned violence. The Jewish community of Germany learned this lesson in the early 1930's with Nazi demonstrations around synagogues. Evans, The Coming of the Third Reich 431 (2004); The Holocaust Chronicle 48 (2009) (September 1931 Nazi attack in Berlin on Jews returning from synagogue on Jewish New Year).

This case concerns a synagogue and the Jewish faith. It is a deplorable instance of antisemitism that has finally been condemned in a resolution adopted unanimously in Ann Arbor. See "Ann Arbor Council Votes To Condemn Synagogue Protests, Antisemitism," Ann Arbor News, January 19, 2022. But it is a signal to adversaries of other religions that they may hinder, harass, and intimidate at the site where the faithful gather to pray to the Almighty – the

central observance of all creeds that believe in a Supreme Being.

III.

IF THE COURT CHOOSES NOT TO CONSIDER THE MERITS, SUMMARY REVERSAL IS APPROPRIATE BECAUSE THE COURT OF APPEALS IMPROPERLY DETERMINED ISSUES "NOT PASSED UPON BELOW"

This Court admonished in *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), that "a federal appellate court does not consider an issue not passed upon below." Courts of Appeals in all the federal circuits (including the Sixth Circuit) have followed this rule when presented with legal issues that the lower court has not reached and decided. *E.g., Hochendorfer v. Genzyme Corp.*, 823 F.3d 724, 735 (1st Cir. 2016); *Cuomo v. Crane Co.*, 771 F.3d 113, 117 n.2 (2d Cir. 2014); *Plains All American Pipeline L.P. v. Cook*, 866 F.3d 534, 545 (3d Cir. 2017); *Hulsey v. Cisa*, 947 F.3d 246, 252 (4th Cir. 2020); *Spec's Family Partners, Ltd. v. Nettles*, 972 F.3d 671, 680 n.8 (5th Cir. 2020); *St. Paul Guardian Ins. Co. v. City of Newport*, 804 Fed. Appx. 379, 385 (6th Cir. 2020); *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 325 F.3d 879, 884 (7th Cir. 2003); *Lynch v. National Prescription Adm'rs, Inc.*, 787 F.3d 868, 874 (8th Cir. 2015); *Davita Inc. v. Virginia Mason Memorial Hospital*, 981 F.3d 679, 696 (9th Cir. 2020); *Western Watersheds Project v. Michael*, 869 F.3d 1189, 1197-1198 (10th Cir. 2017); *Rayburn v. Hogue*, 241 F.3d 1341, 1349 n.11 (11th Cir. 2001); *Steele v. Schafer*, 535 F.3d 689, 695 (D.C. Cir. 2008).

In *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201-202 (2012), this Court followed the course it prescribed for Courts of Appeal in *Singleton v. Wulff*. Following reversal on a preliminary issue of law, it remanded the case to the Court of Appeals for its initial consideration.

In this case, the Court of Appeals violated this principle by proceeding to consider whether the Complaint stated a claim for which relief can be granted – the Rule 12(b)(6) standard – although the District Court had decided only that the Complaint should be dismissed under Rule 12(b)(1) because the plaintiffs lacked standing. Having reversed that decision, the Court of Appeals should have followed the instruction of *Singleton v. Wulff* and remanded the case for consideration of the respondents' Rule 12(b)(6) motion.

There are, to be sure, exceptions to the *Singleton v. Wulff* rule if a legal issue has been fully briefed and argued in the Court of Appeals. See, *e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488 (2008). But in this case the important issues resolved *sua sponte* by the Court of Appeals had not been fully briefed and argued. Petitioner addressed them only in a subsidiary portion of his reply brief.

These issues deserve plenary consideration by an unbiased and impartial District Judge and review, after full briefing, by an appellate court. The District Judge's alacrity in awarding the respondents attorneys' fees without an oral hearing while review was being sought in this Court may also raise issues

under 28 U.S.C. § 144 and 28 U.S.C. § 455(a) and *Liteky v. United States*, 510 U.S. 540 (1994).

If the Court does not grant plenary review in this case, it should, therefore, summarily reverse the decision of the Court of Appeals and remand for further proceedings. Compare *Rivas-Villegas v. Cortesluna*, No. 20-1539, decided October 18, 2021, 142 S. Ct. 4; *City of Tahlequah v. Bond*, No. 20-1668, decided October 18, 2021, 142 S. Ct. 9; *Dunn v. Reeves*, No. 20-1084, decided July 2, 2021, 141 S. Ct. 2405; *Pakdel v. City and County of San Francisco*, No. 20-1212, decided June 28, 2021, 141 S. Ct. 2226; *Alaska v. Wright*, No. 20-940, decided April 26, 2021, 141 S. Ct. 1467.

CONCLUSION

For the foregoing reasons, the Court should grant this petition and either set this case for plenary briefing and argument or summarily reverse the decision of the Court of Appeals and remand the case for further proceedings before an unbiased and impartial District Judge.

Respectfully submitted,

Nathan Lewin
Counsel of Record
LEWIN & LEWIN, LLP
888 17th Street NW
4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

Counsel for Petitioner

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 20-1870

[Filed: September 15, 2021]

MARVIN GERBER; MIRIAM BRYSK,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
HENRY HERSKOVITZ; GLORIA HARB; TOM SAFFOLD; RUBY LIST; CHRIS MARK; DEIR YASSIN REMEMBERED, INC.; JEWISH WITNESSES FOR PEACE AND FRIENDS; CITY OF ANN ARBOR, MICHIGAN; CHRISTOPHER M. TAYLOR, DEREK DELACOURT, STEPHEN K. POSTEMA, and KRISTEN D. LARCOM, in their official and individual capacities,	)
	)
Defendants-Appellees.	)

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:19-cv-13726—Victoria A. Roberts, District Judge.

Argued: April 27, 2021

Decided and Filed: September 15, 2021

Before: SUTTON, Chief Judge; CLAY and McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: Marc M. Susselman, Canton, Michigan, for Appellants. John A. Shea, Ann Arbor, Michigan, for Appellees Henry Herskovitz, Jewish Witnesses for Peace and Friends, Ruby List, Chris Mark, and Tom Saffold. Timothy S. Wilhelm, CITY OF ANN ARBOR, Ann Arbor, Michigan, for City of Ann Arbor Appellees. **ON BRIEF:** Marc M. Susselman, Canton, Michigan, Ziporah Reich, THE LAWFARE PROJECT, New York, New York, for Appellants. John A. Shea, Ann Arbor, Michigan, Cynthia Heenan, CONSTITUTIONAL LITIGATION ASSOC., P.C., Detroit, Michigan, for Appellees Henry Herskovitz, Jewish Witnesses for Peace and Friends, Ruby List, Chris Mark, and Tom Saffold. Timothy S. Wilhelm, CITY OF ANN ARBOR, Ann Arbor, Michigan, for City of Ann Arbor Appellees. Daniel S. Korobkin, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, for Amici Curiae.

SUTTON, C.J., delivered the opinion of the court in which McKEAGUE, J., joined, and CLAY, J., joined in

the result. CLAY, J. (pp. 14–30), delivered a separate concurring opinion.

OPINION

SUTTON, Chief Judge. Anti-Israel protesters have picketed services at the Beth Israel Synagogue in Ann Arbor, Michigan, every week going back to 2003, over 935 weeks in total. Understandably frustrated with this pattern, members of the congregation sued the protesters and the city. The district court granted the defendants' motions to dismiss for lack of standing. We disagree on that point, as the plaintiffs have alleged a concrete and particularized harm to a legally protected interest. But the reality that they have standing to bring these claims does not entitle them to relief. The key obstacle is the robust protections that the First Amendment affords to nonviolent protests on matters of public concern. We affirm the district court's dismissal on that basis.

I.

Every Saturday morning since September 2003, protesters have picketed the Beth Israel Synagogue. Their group typically comprises six to twelve people, and they display signs on the grassy sections by the sidewalk in front of the synagogue and across the street from it. The signs carry inflammatory messages, with statements such as "Resist Jewish Power," "Jewish Power Corrupts," "Stop Funding Israel," "End the Palestinian Holocaust," and "No More Holocaust Movies." R.11 at 2.3. The protests apparently target the members of the Beth Israel Congregation, as they coincide with the arrival of the congregants to their

worship service on Saturday morning. The congregants and their children can see the signs as they enter their worship service. But the protesters have never prevented them from entering their house of worship, have never trespassed on synagogue property, and have never disrupted their services.

The signs, the congregants allege, inflict extreme emotional distress on members of the synagogue. Marvin Gerber, for example, sometimes forgoes attending services or visits a different synagogue to avoid the signs. Dr. Miriam Brysk, a Holocaust survivor, feels extreme emotional distress when she sees the signs.

The protesters have not applied for or obtained a permit to engage in these activities. City employees have insisted that they cannot curtail the protesters' conduct because the First Amendment protects it. Ann Arbor police at times have been present at the protests and in those instances have not interfered with the protesters' activities. Counsel for Gerber and Dr. Brysk contacted city employees and claimed that the protests violated provisions of the municipal code regarding the placement of objects in public thoroughfares. But these communications did not go anywhere.

Fed up, Gerber and Dr. Brysk, referred to as the congregants from now on, filed a lawsuit in federal court against the protesters, the city of Ann Arbor, and various city officials. They brought thirteen federal claims and several state claims. As for the federal claims, the congregants alleged that the protests (and the city's failure to enforce a city sign ordinance against the protesters) violated various federal laws as

well as the congregants' substantive due process and free exercise rights. The congregants also claimed that the city violated their First Amendment right to petition the government when it instructed the congregants' lawyer not to discuss the sign ordinance with city officials other than the city attorney. The congregants asked for damages and an injunction prohibiting the protests or, in the alternative, one imposing time, place, and manner restrictions on the protests so that they did not take place near the synagogue during services, among other forms of relief.

The protesters and city moved to dismiss the complaint for lack of jurisdiction under Civil Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). The district court granted the 12(b)(1) motion, holding that the congregants lacked standing because their claims of emotional distress did not establish a concrete injury. The district court separately declined to exercise supplemental jurisdiction over the state claims and dismissed them without prejudice. The congregants appealed.

II.

We first take up the district court's standing ruling. The U.S. Constitution empowers the federal courts to decide "Controversies" and "all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States." U.S. Const. art. III, § 2. Consistent with the case-and-controversy requirement, several justiciability doctrines limit the judicial power, the most prominent being standing. To have standing, a plaintiff must allege (1) an injury in fact (2) that's traceable to the defendant's conduct and (3) that the

courts can redress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–61 (1992). The standing inquiry is not a merits inquiry. A merits defect deprives a court of subject matter jurisdiction only if the claim is utterly frivolous. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

The congregants readily satisfy the second and third prongs of the standing inquiry. As to traceability, a defendant's actions must have a "causal connection" to the plaintiff's injury. *Lujan*, 504 U.S. at 560. The congregants have alleged that the protesters' conduct and their conspiracy with city employees not to enforce the city's ordinances foreseeably caused members of the congregation extreme emotional distress. That creates the requisite causal link. As to redressability, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. at 561 (quotation omitted). If the district court awarded damages or enjoined the Saturday morning protests, that relief would redress the congregants' alleged injuries.

The key question is whether the congregants' allegation—that the protesters caused them extreme emotional distress—establishes a cognizable injury in fact. To satisfy this imperative, the claimant must establish the "'invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). To qualify as particularized, an injury "must affect the plaintiff in a personal and individual way," *Lujan*, 504 U.S. at 560 n.1, not in a

general manner that affects the entire citizenry, *Lance v. Coffman*, 549 U.S. 437, 439 (2007). The parties all agree that this injury is particularized. So do we. The protesters directed their picketing at the synagogue goers based on the time and location of their demonstrations, and the picketing indeed affected them in a "personal and individual way." *Lujan*, 504 U.S. at 560 n.1.

But is this particularized injury concrete? A "concrete" injury is one that "actually exist[s]." *Spokeo*, 136 S. Ct. at 1548. In the case of an intangible injury like this one, the claimant must establish "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id*. at 1549; *see TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Emotional distress fits that bill. "Distress," including "mental suffering or emotional anguish," forms "a personal injury familiar to the law." *Carey v. Piphus*, 435 U.S. 247, 263, 264 n.20 (1978). It carries a "close relationship" to a traditional harm. *Spokeo*, 136 S. Ct. at 1549. And it has "been part of our common-law tradition for centuries." *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 873 (6th Cir. 2020) (Murphy, J., concurring in part) (citing Joseph Henry Beale, *Collection of Cases on the Measure of Damages* 337–63 (1895); Arthur G. Sedgwick, *Elements of Damages: A Handbook for the Use of Students and Practitioners* 98–105 (1896)).

Any other conclusion would deprive a federal court sitting in diversity of authority to hear any state law intentional infliction of emotional distress claim. That

would be news to a lot of people, including many parties who have won and lost such claims on the merits in federal court over the years.

The congregants' allegations in the end come comfortably within the scope of this traditional harm. They have alleged that the protesters' relentless and targeted picketing of their services has caused them extreme emotional distress. Permitting the federal courts to handle injuries of this sort parallels causes of action permitted in other areas. In the Establishment Clause context, for example, "psychological injury" from "direct and unwelcome contact" with a poster of the Ten Commandments constitutes "injury in fact sufficient to confer standing." *Am. C.L. Union of Ohio Found. v. DeWeese*, 633 F.3d 424, 429 & n.1 (6th Cir. 2011) (quotation omitted); *see Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 682 (6th Cir. 1994). We have "consistently rejected" arguments that "psychological injury can never be the basis for Article III standing." *Am. C.L. Union*, 633 F.3d at 429 n.1.

All in all, the congregants have standing to sue because they have credibly pleaded an injury—extreme emotional distress—that has stamped a plaintiff's ticket into court for centuries.

The contrary arguments are unconvincing. "[A]llegations of a subjective 'chill,'" the district court ruled, "are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." R.66 at 9 (quotation omitted). As the district court saw it, the alleged distress and interference with religious services constituted a "subjective chill" that failed to reach the level of

concrete harm. But the congregants did not merely allege that the protesters "chilled" their First Amendment rights. They claimed that the protesters caused them extreme emotional distress on its own. The cases invoked by the district court involved only allegations that general state policies or surveillance chilled the plaintiffs' exercise of free speech. *See Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008); *Laird v. Tatum*, 408 U.S. 1 (1972); *Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft*, 459 F. Supp. 2d 592 (E.D. Mich. 2006). None of these cases involved allegations of extreme emotional distress. And none addressed harms arising from action targeting the claimants.

The defendants next argue that the requirement that claimants establish the violation of "a legally protected right or interest" creates an independent fourth requirement to establish standing. City Appellee Br. at 15. Our legal system, they add, does not protect the plaintiffs from offensive speech under the U.S. Supreme Court's First Amendment jurisprudence and thus the claim must be dismissed for lack of standing. But this phrase requires only that the plaintiff show she "has a right to relief if the court accepts the plaintiff's interpretation of the constitutional or statutory laws on which the complaint relies." *CHKRS, LLC v. City of Dublin*, 984 F.3d 483, 488 (6th Cir. 2021). In *CHKRS*, the district court found the plaintiffs lacked standing because they failed to allege a legally protected interest. But we reversed the decision because the trial court relied on Fifth Amendment takings precedent rather than cases articulating the requirements for Article III standing, blurring the lines

between standing and the merits. *Id*. at 489. "[J]ust because a plaintiff's claim might fail on the *merits*," we cautioned, "does not deprive the plaintiff of *standing* to assert it." *Id*.

Consistent with *CHKRS*, the Tenth Circuit, in interpreting "legally protected interest," explained that "the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1092 (10th Cir. 2006) (en banc). The defendants' position not only would require a close analysis of the merits in order to determine the question of standing, but it also would bar constitutional challenges on jurisdictional grounds in many cases where the argument faces adverse precedent—precedent that may one day be changed. Rather, the phrase requires only that the plaintiff have a "right to relief if the court accepts" the plaintiff's legal position about the meaning of a constitutional provision or a statute. *CHKRS*, 984 F.3d at 488; *see Steel Co.*, 523 U.S. at 89–90.

Defendants' invocation of *Snyder v. Phelps*, 562 U.S. 443 (2011), also fails to separate the standing and merits inquiries. At issue was whether the father of a soldier recently killed in combat could bring a state law tort claim for emotional distress against individuals who protested near the son's funeral. The Court held that the First Amendment served as a defense to the *merits* of the plaintiff's claim based on the picketing of his son's funeral. It did not, however, deprive the

plaintiff of *standing* to bring the claim. To the contrary, *Snyder* suggests (even though it does not say so expressly) that emotional distress caused by offensive speech suffices to establish Article III standing. How else did the Court have authority to resolve the merits of the claim?

A merits defect, it is true, may raise a jurisdictional problem when it renders a claim truly frivolous. *Steel Co.*, 523 U.S. at 89; *CHKRS*, 984 F.3d at 489. But that is not remotely this case, and not even the city argues otherwise.

We respect the concurrence's contrary position but ultimately find it unconvincing. The raw, calculated-to-hurt nature of today's speech in some ways parallels the speech in *Snyder*. Yet one cannot read *Snyder* and think the majority thought the state law tort action—premised on protests by members of the Westboro Baptist Church that disrespected the service and memory of a dead soldier and his grieving family—was frivolous under the First Amendment. Or think that Justice Alito's dissent in support of the family's action was frivolous. *See* Ruth Bader Ginsburg, Assoc. Just., U.S. Sup. Ct., A Survey of the 2010 Term for presentation to the Otsego County Bar Association Cooperstown Country Club (July 22, 2011) (praising Justice Alito's dissent and acknowledging that Justice Stevens would have joined it if he had been on the Court).

Even after *Snyder*, there is still work to be done in resolving fact-driven claims of this ilk. One could colorably argue that signs that say "Jewish Power Corrupts" and "No More Holocaust Movies" directly

outside a synagogue attended by holocaust survivors and timed to coincide with their service are more directed at the private congregants than designed to speak out about matters of public concern. The claims require a context-driven examination of complex constitutional doctrine. That doctrine is not always intuitive, as shown by the reality that the captive audience doctrine applies to civil regulation of protests outside homes and abortion clinics but not court-ordered injunctions outside houses of worship. Plaintiffs' claims may be wrong and ultimately unsuccessful, but the fourteen pages that the concurrence devotes to analyzing the constitutional issues belie the conclusion that they are frivolous.

III.

On the merits, the congregants' federal claims fall into four buckets: substantive due process, religious liberty, general civil rights, and a constitutional right to petition the government.

A.

Substantive due process. The congregants claim that the city violated the Fourteenth Amendment by failing to enforce the municipal code or otherwise failing to shut down the protests. This inaction, they say, violates their substantive due process rights. Abuse of executive power, it is true, may violate substantive due process in those rare instances when it "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). But the city's protection of the protesters' peaceful free-speech rights does not sink to the level of conscience-shocking state action. Substantive due

process does not require what the First Amendment prohibits.

Sidewalks are traditional public fora, meaning they "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (quotation omitted). "[T]he guiding First Amendment principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content applies with full force in a traditional public forum." *Id.* at 477 (quotation omitted). Speech "at a public place on a matter of public concern . . . is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt." *Snyder*, 562 U.S. at 458. We evaluate whether speech covers a matter of public concern based on "the content, form, and context of that speech." *Id.* at 453 (quotation omitted). And we are vigilant in monitoring efforts to suppress unpopular speech. It is usually "the minority view, including expressive behavior that is deemed distasteful and highly offensive to the vast majority of people, that most often needs protection under the First Amendment." *Bible Believers v. Wayne County*, 805 F.3d 228, 243 (6th Cir. 2015) (en banc).

The protesters' actions come squarely within First Amendment protections of public discourse in public fora. As in *Snyder*, the content and form of the protests demonstrate that they concern public matters: American-Israeli relations. As in *Snyder*, the protest location is a quintessential public forum: public

sidewalks. The context of being outside a house of worship at the time of a service cuts slightly towards being a private attack, but that factor alone was not heavy enough to tip the balance in *Snyder*, and it is likewise too feathery here. 562 U.S. at 454–55.

The congregants claim that the First Amendment does not apply to the unique features of this protest. Five considerations, they say, make this case novel: (1) the protests' proximity to a house of worship, (2) their location in a residential area, (3) the fact that the congregants are a captive audience, (4) the frequency of the protests, and (5) the exposure of congregants' children to the signs. But each of these factors is old hat under the First Amendment.

Take the first three. Courts have allowed speech restrictions based on concerns for a captive audience in a deliberately narrow context, and we see no justification for expanding it here. *Snyder* insisted on the concept's narrowness, applying it only to an individual's residence and declining to extend it to a church holding a funeral. *Snyder*, 562 U.S. at 459–60. Our sister circuits have likewise declined to allow restrictions on protesting near houses of worship, rejecting justifications like those the congregants offer. *See, e.g., Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 793 (8th Cir. 2015). Expressive activity in a residential area by itself does not suffice for an exception; an individual's home itself must be the focus of the protest. *Frisby v. Schultz*, 487 U.S. 474, 485–87 (1988) ("The type of focused picketing [of a home] prohibited by the Brookfield ordinance is fundamentally different from more generally directed

means of communication that may not be completely banned in residential areas.").

The congregants' fourth and fifth factors fall readily as well. The protesters' actions do not lose constitutional protection just because they have been protesting for a long period of time. Free-speech protections do not expire over time or come with a rule against perpetuities. And the Supreme Court has repeatedly held that an interest in protecting children does not justify censoring speech addressed to adults. *Reno v. Am. C.L. Union*, 521 U.S. 844, 875 (1997).

The congregants' proposed remedy—an injunction prohibiting protests within 1000 feet of the synagogue during Saturday morning services and limiting the number of protesters and signs—likely would violate the First Amendment anyway. State action "would not be content neutral," the Supreme Court has explained, "if it were concerned with undesirable effects that arise from the direct impact of speech on its audience or [l]isteners' reactions to speech." *McCullen*, 573 U.S. at 481 (alteration in original) (quotation omitted). Understandable though the congregants' reaction to the protesters' speech may be, that by itself—without physical impediments to their services or trespassing—cannot suffice as the kind of "content-neutral justification" needed to make the proposed injunction a reasonable time, place, and manner restriction. *Id.* The restriction, moreover, would disproportionately affect one viewpoint on an issue of public concern, which makes us pause before concluding it would be "justified without reference to the content of the regulated speech." *Id.* at 477 (quotation omitted).

Even if the request were eligible for treatment as a time, place, and manner restriction, the injunction would be overly broad. Neither the 1000-foot buffer zone nor the restriction to five protesters at *any* time is likely to satisfy narrow tailoring. *Madsen v. Women's Health Center* held that a 300-foot buffer zone was not narrowly tailored, 512 U.S. 753, 775 (1994), and our circuit has held that like-sized zones are overbroad, *Anderson v. Spear*, 356 F.3d 651, 657 (6th Cir. 2004).

B.

Religious liberty statutes: RFRA and RLUIPA. The congregants also seek relief under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). 42 U.S.C. § 2000bb – 2000cc-5. But RFRA has no role to play. It does not apply to state or local governments. *City of Boerne v. Flores*, 521 U.S. 507 (1997). And RLUIPA has no role to play either. Under the Act, a claimant must have a "property interest in the regulated land." 42 U.S.C. § 2000cc-5(5). A plaintiff under RLUIPA fails to state a claim when he does not have a legally recognized property interest in the property at issue. *Taylor v. City of Gary*, 233 F. App'x 561, 562 (7th Cir. 2007). The congregants have not alleged how their status as members of a religious community by itself gives them a property interest in this house of worship.

C.

The congregants also bring a bevy of claims under several other federal civil rights statutes.

42 U.S.C. § 1981. Section 1981 guarantees to persons of all races "the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981(a). The congregants say that the protesters violated § 1981 by targeting them for persecution because of their race. But they have failed to allege that they lost out on the benefit of any "law or proceeding." *Chapman v. Higbee Co.*, 319 F.3d 825, 832 (6th Cir. 2003).

42 U.S.C. § 1982. Section 1982 guarantees to all citizens the same rights "to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. To violate the statute, the challenged action must impair a property interest, say by decreasing the value of the property or making it significantly more difficult to access. *City of Memphis v. Greene*, 451 U.S. 100, 122–24 (1981). But marginally making access to a facility a little harder—the most that could be said here—does not suffice. While our circuit has held that the verb "hold" could encompass the "use" of the property by nonowner congregants, the impairment of use in that case differed in kind from those alleged here. *United States v. Brown*, 49 F.3d 1162, 1164 (6th Cir. 1995). The action in *Brown* involved white supremacists who shot into a synagogue with an assault pistol. But the congregants have not alleged that the protesters ever blocked them from using their synagogue or that the protests were even audible from inside the building.

42 U.S.C. § 1983. The congregants allege that the city and the protesters, acting under color of law, are

liable for failing to enforce the sign code and for failing to protect their free exercise rights. But § 1983 applies to harm inflicted by government officials, not to harm inflicted by third parties that the city fails to prevent. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989); *see Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005). The claims against the protesters fail because they do not satisfy any of the tests that would make them state actors: They did not perform a public function, the city did not force them to protest, and a symbiotic relationship does not exist between the protesters and the city. *See Lansing v. City of Memphis*, 202 F.3d 821, 828–31 (6th Cir. 2000).

42 U.S.C. § 1985(3). The congregants allege that the protesters and city have conspired to interfere with their right to free exercise of religion and intra-state travel. The conspiracy must involve state action, *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 832 (1983), which requires that the defendants acted under state authority or were themselves state actors, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938–39 (1982). We have suggested that *inter*-state travel is a prerequisite before the statute applies. *Volunteer Med. Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 226 (6th Cir. 1991). But even if intra-state travel suffices, the congregants have not alleged sufficient state action. The protesters did not act under color of state law, and the city was not otherwise responsible for their conduct. *See id.* at 227.

42 U.S.C. § 1986. The congregants claim that the city defendants failed to prevent the protesters'

conspiratorial conduct. Section 1986 provides a cause of action for additional damages against a party that fails to prevent a § 1985 violation. 42 U.S.C. § 1986. Because their § 1985 claim fails, however, their § 1986 claim must meet a similar fate.

Civil conspiracy under §§ 1982, 1983, and 1985(3). The congregants also bring civil conspiracy claims under §§ 1982, 1983, and 1985(3) against the city as well as the protesters. Such claims allege "an agreement between two or more persons to injure another by unlawful action." *Hooks v. Hooks*, 771 F.2d 935, 943–44 (6th Cir. 1985). The claimant "must show that (1) a single plan existed, (2) [the defendant] shared in the general conspiratorial objective to deprive [the plaintiff] of his constitutional (or federal statutory) rights, and (3) an overt act was committed in furtherance of the conspiracy that caused injury to [the plaintiff]." *Bazzi v. City of Dearborn*, 658 F.3d 598, 602 (6th Cir. 2011). These claims fail because the congregants have failed to plead facts showing a single plan or a conspiratorial objective to deprive them of their rights. They merely allege that city police witnessed some protests and that city lawyers knew of the demonstrations but did not stop them. Nothing in the complaint indicates that the city agreed to inflict emotional distress on the congregants or injure them in any way.

D.

Right to petition. The congregants allege that the city defendants have an obligation to provide them with accurate information about how they apply the city's sign code based on the congregants' First

Amendment right "to petition the Government for a redress of grievances." U.S. Const. amend. I. But the freedom to petition protects the public's right to address the government, nothing more. The government may refuse to listen or respond to the petitioner. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984). The right to petition simply does not include a right to a response from the government. The congregants' invocation of cases about the right to access the courts does not help because they have not shown that their lack of access to this information "hindered [their] efforts to pursue a legal claim." *Lewis v. Casey*, 518 U.S. 343, 351 (1996).

We affirm the district court's judgment dismissing the complaint on the grounds that the complaint fails to state a claim for which relief can be granted.

CONCURRENCE

CLAY, Circuit Judge, concurring. The district court concluded that Plaintiffs' allegations of emotional distress failed to confer standing in the First Amendment context and dismissed Plaintiffs' complaint for lack of subject matter jurisdiction. I concur with the majority's decision to affirm, but I would affirm the district court's dismissal of this action on standing grounds rather than on the basis of failure to state a claim. Under the majority opinion's arguments, a plaintiff would have standing to bring a claim even if the plaintiff has no legally protected interest and even if the plaintiff has no prospect of prevailing on the merits. In this case, under settled law, Plaintiffs had no prospect of success, yet the

majority opinion would nevertheless encourage the filing of Plaintiffs' futile lawsuit and others like it.

DISCUSSION

Plaintiffs Marvin Gerber and Dr. Miriam Brysk have appealed the district court's order dismissing their complaint for lack of standing under Federal Rule of Civil Procedure 12(b)(1). Plaintiffs filed this suit against a group of protesters, Henry Herskovitz, Gloria Harb, Tom Saffold, Ruby List, Chris Mark, Deir Yassin Remembered, Inc., and Jewish Witnesses for Peace and Friends (collectively, "Protester Defendants"), for demonstrating outside Plaintiffs' synagogue on a weekly basis for nearly two decades. Plaintiffs also sued the City of Ann Arbor, Michigan, and several of its officers (collectively, "City Defendants") for failing to stop the protests. Plaintiffs asserted causes of action under the First and Fourteenth Amendments; 42 U.S.C. §§ 1981, 1982, 1983, 1985(3), and 1986; the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*.; and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*.

Standard of Review

We review a district court's order dismissing an action for lack of subject matter jurisdiction *de novo*. *Does 1–10 v. Haaland*, 973 F.3d 591, 596 (6th Cir. 2020). "When a party makes a facial challenge to the district court's subject-matter jurisdiction under Rule 12(b)(1)—as is the case here—we must take as true all material allegations of the complaint." *Hale v. Morgan Stanley Smith Barney LLC*, 982 F.3d 996, 997 (6th Cir.

2020). We may affirm on any grounds supported by the record, even if different than those relied upon by the district court. *Wallace v. Oakwood Healthcare, Inc.*, 954 F.3d 879, 886 (6th Cir. 2020).

I. Standing

The district court properly concluded that Plaintiffs lacked Article III standing. If a plaintiff lacks standing, a federal court lacks subject matter jurisdiction and must dismiss. *Murray v. U.S. Dep't of Treasury*, 681 F.3d 744, 748 (6th Cir. 2012). "In reviewing a determination of standing, we consider the complaint and the materials submitted in connection with the issue of standing." *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722, 729 (6th Cir. 2009).

A. Elements of Standing

Standing "doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood . . . [, and it] limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 578 U.S. 856, 136 S. Ct. 1540, 1547 (2016). "[S]tanding is not dispensed in gross; rather plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

Standing is derived from Article III's case and controversy requirement. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court set forth now "well-worn yet enduring standards" for

standing. *Thomas v. TOMS King (Ohio), LLC*, 997 F.3d 629, 634 (6th Cir. 2021). Under *Lujan*, "the irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U.S. at 560. "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Id*. (citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of"—this element of standing is often referred to as traceability. *Id*. "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id*. at 561 (citation omitted).

Plaintiffs' primary argument on appeal is that the district court improperly reviewed the merits of their claims in dismissing their case for a lack of subject matter jurisdiction. (Appellants' Br. 39–45.) As we recently reiterated in *Benalcazar v. Genoa Township*, 1 F.4th 421 (6th Cir. 2021), "[s]ubject-matter jurisdiction over a dispute is one thing; the merits of the underlying dispute are another. Rarely do the twain meet." *Id*. at 424. We recognized that relevant to review of subject matter jurisdiction "is a threshold question, one distinct from the plausibility inquiry of Civil Rule 12(b)(6): Namely, do the federal questions raised by this complaint legitimately create federal court jurisdiction because they are not so frivolous as to be a contrived effort to create such jurisdiction?" *Id*. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the Supreme Court explained that "[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper

only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise devoid of merit as not to involve a federal controversy." *Id*. at 89 (quoting *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 414 U.S. 661, 666 (1974)).

Applying these standards, I conclude that the district court properly dismissed Plaintiffs' claims for lack of subject matter jurisdiction. I first discuss Plaintiffs' claims against Protester Defendants and then their claims against City Defendants.

B. Protester Defendants

I would affirm the district court's conclusion that Plaintiffs failed to allege an injury in fact required for standing, albeit on slightly different grounds.[1] The district court found that Plaintiffs' allegations that they had suffered emotional distress and that the protests interfered with Plaintiffs' enjoyment of religious services failed to allege a concrete injury. (R. 66, Page IDs ##1904–05.) Contrary to Plaintiffs' claim on appeal, the district court properly accepted as true Plaintiffs' allegations that the protests caused Plaintiffs'

[1] I reject the contention that because the Supreme Court decided an apparently similar case, *Synder v. Phelps*, 562 U.S. 443 (2011), on the merits, rather than dismissing for lack of subject matter jurisdiction, that the district court's Rule 12(b)(1) ruling in this case was inappropriate. The Supreme Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). Additionally, my determination that Plaintiffs' claims were foreclosed by prior decisions of the Supreme Court is informed, in large part, by the *Snyder* decision itself.

emotional distress. (Appellants' Br. 9–12; R. 66, Page IDs ##1901–02.)

The district court observed that the injury-in-fact prong of the standing inquiry "includes two sub-elements: (1) concreteness; and (2) particularization." (Order Granting Defs.' Mots. to Dismiss, R. 66, Page ID #1901.) Under this analysis, it properly rejected Plaintiffs' claims that Protester Defendants interfered with Plaintiffs' enjoyment of attending religious services since "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 418 (2013) (alteration in original) (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)); *see also ACLU v. NSA*, 493 F.3d 644, 662 (6th Cir. 2007) (opinion of Batchelder, J.) (approvingly cited by the Supreme Court in *Clapper*, 568 U.S. at 418) (rejecting standing on the basis of the plaintiffs' "subjective apprehension and a personal (self-imposed) unwillingness to" engage in First Amendment activity). (R. 66, Page ID #1905.)

But it is well-established that the extreme emotional distress alleged by Plaintiffs can suffice to establish Article III standing. *See Garland v. Orlans, PC*, 999 F.3d 432, 439–40 (6th Cir. 2021); *see also Huff v. TeleCheck Servs.*, 923 F.3d 458, 463 (6th Cir. 2019) (concluding that a plaintiff had failed to demonstrate standing, in part, because he did "not suggest that he wasted time or suffered emotional distress").

However, Plaintiffs' allegations of extreme emotional distress fail to establish standing in this case

because there is no legally protected interest in not being offended by the speech of others. Subsequent to entry of the district court's order, we clarified in *CHKRS, LLC v. City of Dublin*, 984 F.3d 483 (6th Cir. 2021), that there is a third element to the injury-in-fact inquiry, and that "[t]o establish the 'standing' required for jurisdiction under Article III of the Constitution, plaintiffs must allege the 'invasion of a legally protected interest.'" *Id.* at 485 (citation omitted). This standing requirement leads to "overlapping requirements for jurisdiction and the merits," but we explained that "[a]s long as a plaintiff has asserted a colorable legal claim (and has met standing's other elements), the plaintiff has satisfied Article III and the court may resolve the claim on its merits." *Id.* at 485–86. Given the clarity and consistency of First Amendment precedent, Plaintiffs have failed to assert a colorable legal claim against Protester Defendants and lack standing to pursue causes of action against them. *See id.*

1. First Amendment Principles

Plaintiffs raise a number of arguments as to why Protester Defendants' speech on a matter of public concern, American-Israeli relations, in a traditional public forum, the sidewalk, is not entitled to First Amendment protection. But Plaintiffs face a difficult task, since the Supreme Court has repeatedly observed that both these factors are indicative of speech at the core of First Amendment protection. "Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public is at its most

protected on public sidewalks, a prototypical example of a traditional public forum." *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997).

In *Schenck*, the Supreme Court confirmed that a record "show[ing] physically abusive conduct, harassment of the police that hampered law enforcement, and the tendency of even peaceful conversations to devolve into aggressive and sometimes violent conduct" could "make[] a prohibition on classic speech in limited parts of a public sidewalk permissible." *Id.* However, Plaintiffs present no allegations that Protester Defendants block or otherwise obstruct Plaintiffs or other members of their congregations from attending religious services. Instead, Plaintiffs' claims are based entirely on their own reaction to "[t]he messages on the signs/placards . . . ." (Am. Compl., R. 11, Page ID #212; *see id.* at Page ID #214 ("The conduct of the protesters is having an adverse emotional effect on Jewish children and young adults who, approaching the Synagogue, see the signs/placards insulting their religion and denouncing their loyalty to Israel.").) For example, Plaintiff Gerber alleged that "[t]he Antisemitic message of several of the signs, and the virulently anti-Israeli messages of the signs/placards, offend and anger him, cause him extreme emotional distress, significantly diminish his enjoyment in attending Sabbath services, and have adversely affected his willingness to attend Sabbath services at

the Synagogue in order to exercise his 1st Amendment right of freedom of religion." (*Id*. at Page ID #215.)[2]

Plaintiffs point to no case where a plaintiff's claimed injury due to the content of a protest has been determined to be "legally cognizable . . . ." *Lujan*, 504 U.S. at 578. Plaintiffs seek relief from Protester Defendants because of signs "which insulted [Plaintiffs'] ethnicity, their religion and their loyalty to Israel . . . ." (Appellants' Br. 36.) Contrary to Plaintiffs' argument in their reply brief, the Supreme Court's decision in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), partially upholding a buffer zone outside an abortion clinic, does not demonstrate Plaintiffs are entitled to pursue relief against Protester Defendants. (Reply Br. 13–15.) In *Madsen*, "[t]he accepted purpose of the buffer zone [was] to protect access to the clinic and to facilitate the orderly flow of traffic on Dixie Way." *Id*. at 771. In fact, the Supreme Court in *Madsen* struck down a part of the buffer zone that prohibited the display of "images observable"

---

[2] Plaintiffs Gerber and Brysk claimed in the amended complaint that they had taxpayer standing. (Am. Compl., R. 11, Page IDs ##215–16.) They do not raise these arguments on appeal, thereby forfeiting them. *See Berkshire v. Beauvais*, 928 F.3d 520, 530 (6th Cir. 2019). Moreover, "if the challenged local government action involves neither an appropriation nor expenditure of city funds . . . the municipal taxpayer [will] lack standing, for in that case he will have suffered no 'direct dollars-and-cents injury.'" *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 214 (6th Cir. 2011) (en banc) (quoting *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 285 (6th Cir. 2009)). Plaintiffs do not allege that the City's decisions regarding the enforcement of the sign ordinance involves the appropriation or expenditure of funds.

during certain times around the clinic. The Court reasoned that "[i]f the blanket ban on 'images observable' was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail. The only plausible reason a patient would be bothered by 'images observable' inside the clinic would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic. This provision of the injunction violates the First Amendment." *Id*. at 773; *see also McCullen v. Coakley*, 573 U.S. 464, 481 (2014) (recognizing that a law would not be content neutral if it were concerned with the undesired effects of speech on an audience). Contrary to Plaintiffs' contention that *Madsen* saves their claims, the Supreme Court's decision confirms the claims are not colorable, as required to demonstrate standing. *See CHKRS*, 984 F.3d at 485–86.

Plaintiffs' standing claim requires a finding that they have a legally protected interest in not being offended by Protester Defendants' speech. No such right exists, nor could it exist. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). The Supreme Court and this Court have repeatedly held that legal claims based on disagreement with speech must give way to "a profound national commitment to the principle that debate on

public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . . ." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

The law does not protect Plaintiffs' claimed right not to observe Protester Defendants' anti-Israeli, anti-Zionist, and anti-Semitic signs. In our pluralistic and diverse society, "[m]uch that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent . . . narrow circumstances . . . , the burden normally falls upon the viewer to 'avoid further bombardment of (his sensibilities) simply by averting (his) eyes.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) (fourth and fifth alterations in original) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). As discussed, in *Madsen*, an abortion clinic was required "to pull its curtains" before protesters were required to put away their "images observable." *Madsen*, 512 U.S. at 773. So too here.

A plaintiff's interest in avoiding the consequences of disagreement is often raised, and rejected, in cases involving what has come to be known as the heckler's veto. "A heckler's veto involves burdening speech 'simply because it might offend a hostile mob.'" *Bennett v. Metro. Gov't of Nashville & Davidson Cnty.*, 977 F.3d 530, 544 (6th Cir. 2020) (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992)).

While the heckler's veto is normally concerned with outbreaks of violence against the speaker—to justify either failing to protect the speaker against such violence or preventing the speaker from speaking in an effort to avoid violence in the first place—it represents a broader prohibition against allowing those who oppose the content of certain speech to force the government to censor that speech. *See Reno v. ACLU*, 521 U.S. 844, 880 (1997) (concluding that the Communications Decency Act's supposedly limited prohibition on knowingly sending indecent materials "would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech").

We have recognized that lawsuits may be the means of effecting a heckler's veto. *See, e.g., Jones v. Dirty World Ent. Records LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (describing lawsuit against interactive computer service providers as "'heckler's veto' that would chill free speech"). "By and large, however, the courts have recognized that we cannot allow the right of free speech to be restricted based on the hostile reaction of those who disagree with it." *Ams. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (en banc).

We reaffirmed our commitment to a robust rejection of the heckler's veto in *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015) (en banc).[3] In *Bible*

[3] Plaintiffs' suggestion in their reply brief that this Court should disregard the en banc court's decision in *Bible Believers* because that decision did not cite *Beauharnais v. Illinois*, 343 U.S. 250

Believers, we found that the plaintiffs, a self-described evangelical group known as the Bible Believers, and its members were entitled to summary judgment. They claimed, in part, that the government had violated their First Amendment right to freedom of speech by failing to protect them and eventually removing them from the Arab International Festival in Dearborn, Michigan. In the course of advocating for their Christian beliefs at the festival, the Bible Believers "parad[ed] around with banners, signs, and tee-shirts that displayed messages associated with those beliefs. Many of the signs and messages displayed by the Bible Believers communicated overtly anti-Muslim sentiments." *Id.* at 236; *see id.* at 244 (recognizing that "disparaging the views of another to support one's own cause is protected by the First Amendment"). The First

---

(1952), misunderstands the rules of precedent. (Reply Br. 15 n.1.) *Bible Believers* is binding since it has not been overruled by another decision of the en banc court. *See Miller v. Caudill*, 936 F.3d 442, 447–48 (6th Cir. 2019). Nor does an intervening Supreme Court decision require reconsideration of *Bible Believers*, since *Beauharnais* was decided over sixty years before *Bible Believers*. *See Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 471 (6th Cir. 2016). Substantively, in *Beauharnais*, the Supreme Court, over a vigorous dissent, upheld the defendant's conviction under an Illinois statute that prohibited publication of group libel, defined as portraying a lack of virtue of a class of citizens. While the decision has never explicitly been overruled, it appears that the case has been limited to its precise facts in subsequent decisions of the Supreme Court. *N.Y. Times*, 376 U.S. at 268–69; see *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 672 (7th Cir. 2008) ("Anyway, though *Beauharnais v. Illinois*, 343 U.S. 250 (1952), has never been overruled, no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited.").

Amendment conduct at issue in *Bible Believers* is very similar as this case, where Protester Defendants display signs with anti-Semitic messages.

Plaintiffs here are seeking relief in the form of an injunction removing Protester Defendants from their demonstration site. But in *Bible Believers*, that "relief" entitled the plaintiff protesters, and not the defendant county, to summary judgment, despite the fact that the protesters' speech was offensive and derogatory to those whom the speakers expected would be present. Like Protester Defendants in this case, the Bible Believers' offensive message did "not advocate, condone, or even embrace imminent violence or lawlessness." *Id*. at 244. Accordingly, "[t]his claim of injury by [Plaintiffs] is, therefore, not to a legally cognizable right." *McConnell v. FEC*, 540 U.S. 93, 227 (2003), *rev'd on other grounds, Citizens United v. FEC*, 558 U.S. 310 (2010).

Plaintiffs' assertion that their emotional distress overcomes Protester Defendants' right to free speech is foreclosed by the Supreme Court's decision in *Snyder*. In *Snyder*, the Supreme Court held that the First Amendment shielded members of the Westboro Baptist Church against tort liability for publicizing their anti-homosexuality message by picketing at military funerals. Specifically, the Supreme Court held it was unconstitutional to apply a state intentional infliction of emotional distress statute against the picketers.

The Supreme Court began its analysis by observing that "[w]hether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern,

as determined by all the circumstances of the case." *Snyder*, 562 U.S. at 451. Plaintiffs never dispute that, as offensive as they find Protester Defendants' speech, it pertains to an issue of public concern. "The arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.'" *Id*. at 453 (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)). Like the members of the Westboro Baptist Church, Protester Defendants are displaying signs relating to issues of interest to society, not a private dispute. Moreover, as with the members of the Westboro Baptist Church, Protester Defendants' "speech was at a public place on a matter of public concern, [and therefore] that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt." *Id*. at 458.

2. First Amendment Conduct

Plaintiffs' contrary arguments that the First Amendment context does not affect consideration of their claims or that Protester Defendants' conduct is not protected by the First Amendment are unavailing.

In their briefing, Plaintiffs emphasize a Southern District of Ohio decision in *Wells v. Rhodes*, 928 F. Supp. 2d 920 (S.D. Ohio 2013), that they argue shows that extreme emotional distress confers standing in the First Amendment context. (Appellants' Br. 21–24.) However, the Supreme Court explicitly held that the conduct in that case, cross burning with intent to intimidate, was outside the protection of the First Amendment in *Virginia v. Black*, 538 U.S. 343, 362

(2003).[4] The Supreme Court concluded that "[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation." *Id*. at 363.

Plaintiffs' other claims that Protester Defendants' conduct is not protected by the First Amendment also fail. First, Plaintiffs attempt to argue that Protester Defendants' speech can be regulated like verbal workplace harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., or defamation. Plaintiffs do not dispute that Protester Defendants' speech, as offensive as it may be, is on a matter of public concern, and that it is offensive because of its content. As the Supreme Court reiterated in *Snyder*, "[s]peech on matters of public concern is at the heart of the First Amendment's protection." *Synder*, 562 U.S. at 452 (cleaned up). And as the Supreme Court explained in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), "Title VII's general prohibition against sexual discrimination in employment

---

[4] Plaintiffs, in their brief, suggest that the district court's failure to cite *Wells* may have been indicative of racial bias. (Appellants' Br. 23–24.). We previously concluded that a "suggestion that bigotry underlay" the district court's decision, "a claim completely unsupported in the record before this court, was not well received [] and will not be countenanced in the future by this court. Counsel are advised that personal aspersions, whether they be cast at opposing counsel or members of the judiciary, have no place in argument before us unless they are strictly pertinent to a legal issue, such as the imposition of Rule 11 sanctions or claims of judicial or prosecutorial misconduct." *Howard v. Sec'y of Health & Hum. Servs.*, 932 F.2d 505, 509 n.2 (6th Cir. 1991).

practices . . . does not target conduct on the basis of its expressive content . . . ." *Id*. at 389–90.

Plaintiffs' invocation of defamation precedents also does not require a contrary result to the one reached by the district court. For example, in *United States v. Alvarez*, 567 U.S. 709 (2012), in which the Supreme Court struck down a federal law that prohibited false claims about military honors, Justice Kennedy, for a plurality, described the "legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation," neither of which are applicable here. *Alvarez*, 567 U.S. at 719. In fact, the plurality confirmed that "falsity and nothing more" is an insufficient basis to prohibit speech. *Id*.; *see R.A.V.*, 505 U.S. at 383–84 (recognizing that historically regulated categories of speech like defamation are not "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content").

Fundamentally, Plaintiffs' position misunderstands the First Amendment. It is not "an invasion of a legally protected interest" to be presented with offensive or disagreeable speech on matters of public concern. *Lujan*, 504 U.S. at 560. That "disagreement" cannot give rise to standing has been confirmed by the Supreme Court. For example, in *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, (1982), the Court denied standing in an Establishment Clause suit challenging the federal government's conveyance of land to a religious school. It found that the plaintiffs had

"fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485–86. In fact, the Supreme Court recognized in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* at 4. Accordingly, freedom of speech is "protected against censorship or punishment, unless likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Id.*; *see also Nwanguma v. Trump*, 903 F.3d 604, 609 (6th Cir. 2018) (explaining that "only speech that explicitly encourages the imminent use of violence or lawless action is outside the protection of the First Amendment").

As the Supreme Court concluded in *Snyder*:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires

> that we shield Westboro from tort liability for its picketing in this case.

Synder, 562 U.S. at 460–61.

Moreover, Plaintiffs' arguments that Protester Defendants' demonstrations are not protected by the First Amendment are completely unfounded. Plaintiffs point to a unique "concurrence of factors" in support of their contention, comprising of: "(1) protests in proximity to a house of worship; (2) located in a residential area; (3) where the members of that house of worship constitute a captive audience because the protesters are targeting them at their house of worship; (4) on a repeated weekly and yearly basis; [and] (5) where the congregants' children are also exposed to the signs." (Reply Br. 4–5.)

Plaintiffs have pointed to no case where "proximity to a house of worship" has reduced First Amendment protections. In fact, as referenced at oral argument, the Supreme Court's speech cases involving Jehovah's Witnesses recognized that location is a critical component to speech. Oral Argument at 09:50–11:50. For example, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Supreme Court overturned the convictions of Jehovah's Witnesses who were "going singly from house to house on Cassius Street . . . ." *Id.* at 301. As the Supreme Court explained, "Cassius Street is in a thickly populated neighborhood, where about ninety per cent of the residents are Roman Catholics. A phonograph record, describing a book entitled 'Enemies', included an attack on the Catholic religion." *Id.*: *see Bible Believers*, 805 F.3d at 263 (Boggs, J., concurring) ("The Jehovah's Witnesses in *Cantwell*, for

example, played phonographs criticizing the Roman Catholic Church in a large Catholic neighborhood, much like the Bible Believers criticized Islam at the Arab International Festival.").

Other circuits have rejected similar claims that houses of worship are entitled to special protection under the First Amendment. For example, the Eighth Circuit held that a Missouri law that prohibited disturbing religious services could not be sustained under the First Amendment in *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785 (8th Cir. 2015). The court found that the statute's locational ban—around churches and buildings used for religious purposes—was particularly concerning because "[t]hese locations are the most likely places for [the plaintiffs] to find their intended audience . . . ." *Id.* at 792. The Eighth Circuit rejected the argument presented here that government intervention was necessary to protect the parishioners' free exercise of religion, finding "the content based prohibitions the Act places on profane or rude speech are not necessary to protect that freedom." *Id.* at 793.

Plaintiffs' other arguments that Protester Defendants' conduct is not protected by the First Amendment are similarly unavailing. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the Supreme Court upheld an ordinance which prohibited picketing in front of a particular residence. In that opinion, the Supreme Court observed that "[o]ur prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood," squarely

foreclosing Plaintiffs' second argument that the First Amendment does not protect Protester Defendants' activity because the synagogue is located in a residential area. *Id.* at 480. Plaintiffs' argument that they are a "captive audience" is also unconvincing because, as also explained by *Frisby*, the captive audience doctrine has been linked to "residential privacy," which does not apply to a house of worship. *Id.* at 484–85. *Snyder* also recognized that the captive audience doctrine had been limited to cases involving a plaintiff's residence. *Snyder*, 562 U.S. at 459–60.

Nor do Plaintiffs provide any support for their contention that the long-running nature of Protester Defendants' demonstrations affects the First Amendment analysis. This Court in *Pouillon v. City of Owosso*, 206 F.3d 711 (6th Cir. 2000), confronted a challenge to a decision by a city to prevent an anti-abortion protester from demonstrating on the city hall steps and instead requiring him to protest on the sidewalk. The plaintiff in that case had "staged abortion protests for a portion of each day almost every weekday for over ten years." *Id.* at 713. Despite the duration and frequency of the plaintiff's protests, there was no question that the First Amendment protected his conduct, and we were required to answer "whether requiring Pouillon to move to the sidewalk was a reasonable time, place, and manner restriction that, as the First Amendment requires, left open ample alternative channels of communication." *Id.* at 717–18.

Finally, Plaintiffs' argument that the Protester Defendants are deprived of First Amendment protection because children see their anti-Israeli,

anti-Zionist, and anti-Semitic signs, has also been repeatedly rejected by the Supreme Court and this Court. For example, the Supreme Court in *Reno v. ACLU* reiterated that the interest in protecting children from harmful materials "does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno*, 521 U.S. at 875. Similarly, this Court in *Bible Believers* did not doubt that the plaintiffs' speech was entitled to First Amendment protections even though at one point, the crowd was "made up predominantly of adolescents . . . ." *Bible Believers*, 805 F.3d at 253 (majority opinion).

In light of the preceding analysis, and despite Plaintiffs' numerous arguments, it is clear that that they are bringing this suit to "silence a speaker with whom [they] disagree." *Id*. at 234. "The First Amendment simply does not countenance this scenario." *Id*. at 237.

"Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise devoid of merit as not to involve a federal controversy." *Steel Co.*, 523 U.S. at 89 (quoting *Oneida Indian Nation of N.Y.*, 414 U.S. at 666). Plaintiffs' claims that a federal court should punish or silence protesters exercising their First Amendment rights does not pass this threshold inquiry. Their claims are foreclosed by decisions of the Supreme Court, which in some cases, like *Madsen* and *Frisby*, Plaintiffs selectively cite in support of their own position. This supports the conclusion that Plaintiffs' claims are "so frivolous as to

be a contrived effort to create" federal jurisdiction. *Benalcazar*, 1 F.4th at 424. In light of this conclusion, the parties' arguments on the traceability and redressability elements of standing need not be considered. *See Brintley v. Aeroquip Credit Union*, 936 F.3d 489 (6th Cir. 2019).

C. City Defendants

Plaintiffs agree that if they lack standing against Protester Defendants on their 42 U.S.C. §§ 1982, 1983, and 1985(3) claims, that they also lack standing against City Defendants for their claims under those provisions and § 1986. (Mot. for Recons., R. 67, Page IDs ##1937–38.) In light of the prior discussion of the district court's dismissal for lack of standing on Plaintiffs' claims against Protester Defendants, I conclude that Plaintiffs lack standing against City Defendants for their claims under the civil rights statutes.

However, Plaintiffs maintain that the reasoning in the district court's dismissal order did not apply to four causes of action that they pled only against City Defendants: (1) substantive due process claim; (2) right to petition claim; (3) RFRA claim; and (4) RLUIPA claim.

As an initial matter, Plaintiffs cannot assert a colorable RFRA claim against the City of Ann Arbor, since the Supreme Court held in 1997 in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that RFRA could not constitutionally be applied to states and local governments, as at issue here and as Plaintiffs recognize in their amended complaint. (Am. Compl.,

R. 11, Page IDs ##276–280.) Accordingly, Plaintiffs lack standing for the RFRA claim against the City of Ann Arbor and its officers.

Plaintiffs also lack standing to pursue their substantive due process and RLUIPA claims. "[A] grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of law does not count as an 'injury in fact,'" and cannot establish standing. *Carney v. Adams*, 141 S. Ct. 493, 498 (2020); *see Allen v. Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."). Given that we have already concluded that the emotional distress Plaintiffs feel because of Protester Defendants' conduct cannot establish standing, Plaintiffs' disagreement with the City on how to interpret Ann Arbor's sign code cannot either. *See Carney*, 141 S. Ct. at 499. "A litigant 'raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.'" *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (quoting *Lujan*, 504 U.S. at 573–74).

Plaintiffs also do not have standing for their claim that the City violated their right to petition the government for redress of grievances and access to courts under the First and Fourteenth Amendments.

Plaintiffs argue that City Defendants violated these rights by requiring that Plaintiffs only seek information about the sign code from the City Attorney's office, rather than permitting them to speak with other City officials. Plaintiffs' petition claim is based on the premise that the First Amendment guarantees right of access to courts, and that right, in turn, encompasses the right to obtain information from governmental officials. (Am. Compl., R. 11, Page IDs ##271–72.) "The right of access to the courts is indeed but one aspect of the right to petition." *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The right of access to courts has often been explored in the context of prisoner suits.

In *Lewis v. Casey*, 518 U.S. 343 (1996), the Supreme Court confronted a claim that prisoners were entitled to a certain level of information from the state to help them pursue their legal claims. In that case, a particular level of law library facilities was at issue. *Lewis* observed that "[t]he requirement that an inmate alleging a violation of [the fundamental constitutional right of access to the courts] must show actual injury derives ultimately from the doctrine of standing . . . ." *Id*. at 349. The Court concluded that a plaintiff must allege that the government "hindered his efforts to pursue a [non-frivolous] legal claim" to demonstrate standing for his access to courts claim. *Id*. at 351.

Plaintiffs in this case have made no showing or allegation of how their failure to speak to particular City of Ann Arbor employees prejudiced their prosecution of this suit or their access to courts more generally. Nor have they otherwise alleged "a

freestanding right" to speak to any particular government official they choose. *Id.*; *see Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 840 (6th Cir. 2000) (recognizing that while "the First Amendment protects information gathering, it does not provide blanket access to information within the government's control"). Accordingly, Plaintiffs have failed to allege an actual injury and lack standing to pursue their right to petition claim.

For the reasons explained above, Plaintiffs lack standing to pursue any of their claims against City Defendants in this suit.

While I agree with the majority's determination that the district court's dismissal of Plaintiffs' complaint should be upheld, I would do so on the basis of Plaintiffs' lack of standing rather than as a result of the complaint's failure to state a claim.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 19-13726

[Filed: August 19, 2020]

MARVIN GERBER, et al.,

Plaintiffs,

v.

HENRY HERSKOVITZ, et al.,

Defendants.

HON. VICTORIA A. ROBERTS

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS [ECF No. 32] and [ECF No. 45]

I. INTRODUCTION

Marvin Gerber and Dr. Miriam Brysk ("Plaintiffs") allege a group of protestors infringes on their federal and state rights by regularly protesting in front of a Jewish synagogue where Plaintiffs attend religious services. Plaintiffs also allege the City of Ann Arbor ("City") and several of its employees contribute to this

infringement by failing to enforce the Ann Arbor City Code ("Code").

There are two groups of Defendants: (1) the protestors; and (2) the City and several of its employees (collectively "Defendants"). Each group of Defendants filed a Motion to Dismiss for lack of subject matter jurisdiction and for failing to state a claim.

Plaintiffs seek monetary damages and ask the Court to enjoin these Defendants from engaging in peaceful political speech in public areas. The Constitution simply does not tolerate such restraint.

Plaintiffs lack Article III standing. For that reason, the Court **GRANTS** the pending Motions to Dismiss for lack of subject matter jurisdiction.

II. FACTUAL BACKGROUND

The facts are taken from the First Amended Complaint.

Martin Gerber is a member of the Beth Israel Synagogue ("Synagogue"). Dr. Miriam Brysk is a Holocaust survivor and a member of the Pardes Hannah Congregation, located in an annex next door to the Synagogue.

Every Saturday since September 2003, Defendant Henry Herskovitz leads a group of protestors. They typically place 18-20 signs, posters, and placards on the grass section adjacent to the sidewalk in front of the Synagogue, as well as on the grass section across the street, facing the Synagogue. They also lean them against trees and portable chairs that the protestors

bring with them. The protestors also carry signs in their hands or attach them to twine hanging from their necks. The signs display statements such as "Resist Jewish Power," "Jewish Power Corrupts," "Fake News: Israel Is A Democracy," "Stop Funding Israel," and "End the Palestinian Holocaust." Plaintiffs say these signs are anti-Israeli, anti-Zionist, and antisemitic.

They show up every Saturday morning – the Jewish Sabbath – at approximately 9:30 AM, position their signs, and stay until approximately 11:00 or 11:30 AM. This time period coincides with the time Synagogue members arrive to conduct and participate in Sabbath service. The signs are readily visible to Synagogue members and their children.

Plaintiffs describe the signs as offensive; causing anger and extreme emotional distress significantly diminishing their enjoyment of attending Sabbath services; and, adversely affecting their willingness to attend Sabbath at this location.

Plaintiffs say this conduct violates the Code because it requires the protestors to have a permit to place the signs on the grass sections. They do not have one. Further, Plaintiffs say the protestors would not even qualify for a permit. The City Defendants disagree. They believe the Code does not prohibit the protestors' activities, nor does it require them to obtain a permit.

III. STANDARD OF REVIEW

Defendants bring their motions pursuant to Federal Rules of Civil Procedure 12(b)(1) and (12)(b)(6).

Fed. R. Civ. P. 12(b)(1) provides for dismissal if there is a "lack of jurisdiction over the subject matter." Where subject matter is challenged under Rule 12(b)(1), the plaintiff has the burden to prove jurisdiction to survive the motion. Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Without standing, the Court lacks subject-matter jurisdiction and "cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests a complaint's legal sufficiency. Although the federal rules only require that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief," *see* Fed. R. Civ. P. 8(a)(2), the statement of the claim must be plausible. Indeed, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible where the facts allow the Court to infer that the defendant is liable for the misconduct alleged. *Id.* This requires more than "bare assertions of legal conclusions"; a plaintiff must provide the "grounds" of his or her "entitlement to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007); *Twombly*, 550 U.S. at 555 (while detailed factual allegations are not required, a pleading must offer more than "labels and conclusions"

or "a formulaic recitation of the elements of the cause of action").

The Court is obligated to construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint contains enough facts to state a claim to relief that is plausible on its face. *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496, 502 (6th Cir. 2008). The Court "may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008)).

IV. ANALYSIS

A. Plaintiffs Lack Article III Standing

To show Article III standing, a plaintiff must demonstrate: (1) injury in fact; (2) a causal connection between the alleged injury in fact and the defendant's alleged conduct; and (3) a substantial likelihood that the requested relief will redress the alleged injury in fact. *Lujan*, 504 U.S. at 560; *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000).

At the pleading stage, the plaintiff must clearly allege facts demonstrating each element. *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 861 (6th Cir. 2020). The Supreme Court advises that "[a]t the pleading stage, general factual allegations of injury

resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561.

The first element – injury in fact – includes two sub-elements: (1) concreteness; and (2) particularization. *Id.* "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560)).

Plaintiffs allege that because of Defendants' conduct and speech, they suffer "extreme emotional distress," and that the conduct interferes with their right to practice their religion without being "harassed" under the Free Exercise Clause of the First Amendment. [ECF No. 11, PageID.219-220. ¶20-21)]. They say the protestors' conduct is not protected by the First Amendment, that placement of signs and placards on the grass sections violates the Code, and the City's failure to enforce its Code against the protestors contributes to Plaintiffs' injury.

Even taking all of these allegations as true, Defendants say Plaintiffs fail to demonstrate an injury in fact. They say Plaintiffs' allegation that they were injured by having to walk past the protestors' signs as they entered Synagogue property does not rise to the level of an "actual concrete particularized injury."

Plaintiffs certainly assert a particularized injury. "For an injury to be 'particularized,' it 'must affect the

plaintiff in a personal and individual way.'" *Id*. at 1548. However, the Supreme Court repeatedly makes clear that "an injury in fact must be both concrete *and* particularized." *Id*. A "concrete" injury must be "'*de facto*'; that is, it must actually exist." *Id*.

Plaintiffs fail to assert a concrete injury. They rely primarily on *Ricketson v. Experian Info. Solutions, Inc.*, 266 F.Supp.3d 1083 (W.D. Mich. Jul. 18, 2017). Ricketson sent a letter to three consumer-reporting agencies disputing a negative tradeline. *Id*. at 1086. Two of the three agencies removed the tradeline after conducting reinvestigations. *Id*. The third agency classified Ricketson's letter as "suspicious" and did not conduct a reinvestigation. *Id*. at 1087. Ultimately, Ricketson filed suit against the third agency and alleged he suffered "mental stress, lost sleep, and emotional distress" as a result of the agency's alleged violation of the Fair Credit Reporting Act ("FCRA"). *Id*.

In cross-motions for summary judgment, the parties disputed whether Ricketson suffered an injury in fact. *Id*. The court held that Ricketson's claim "relates directly to the harms the FCRA was meant to address – the risk of inaccurate information in a consumer's file and the inability of consumers to correct that information and receive assurance from a [consumer-reporting agency] after reinvestigation." *Id*. at 1089. The court also found Ricketson had standing because he suffered a type of "informational injury" that courts have found sufficient to confer standing. *Id*. at 1091.

Plaintiffs' reliance on *Ricketson* is misplaced. They fail to provide any sources to support the notion that an

intangible injury such as "extreme emotional distress" confers standing in the First Amendment context.

Although the Supreme Court held that intangible injuries can be concrete, *Spokeo*, 136 S.Ct. at 1549, it instructs that when determining whether an intangible harm constitutes injury in fact, "both history and the judgment of Congress play important roles," and "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id*. Congress can identify intangible harms that meet the minimum Article III requirements for standing; however, even when Congress elevates intangible harms, that "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement," because "Article III standing requires a concrete injury even in the context of a statutory violation." *Id*. The type of "informational injury" sufficient for standing in *Ricketson* is not sufficient for purposes of the First Amendment.

The Supreme Court is emphatic about the path to standing when it comes to First Amendment litigants: "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" *Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602, 608 (6th Cir. 2008) (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)). "'A subjective chill, without more, does not confer standing on a party.'" *Muslin Community Ass'n of Ann Arbor v. Ashcroft*, 459 F.Supp.2d 592, 597-98 (E.D. Mich. Sept. 29, 2006) (quoting *Fort Wayne Books, Inc., v. Indiana*, 489 U.S. 46, 60 (1989)).

There is no allegation that the protestors prevent Plaintiffs from attending Sabbath services, that they block Plaintiffs' path onto the property or to the Synagogue, or that the protests and signs outside affect the services inside. Plaintiffs merely allege that the Defendants' conduct causes them distress and "interferes" with their enjoyment of attending religious services. This is the "subjective chill" that is "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). This type of "chill" does not confer standing and is not actionable.

Plaintiffs fail to allege a concrete injury, and thus fail to allege an injury in fact. This is fatal to their lawsuit since they cannot satisfy an essential element of Article III standing.

The Court need not address whether Plaintiffs satisfy the last two elements of standing, nor must the Court address Defendants' arguments that Plaintiffs' fail to state a claim.

B. CONCLUSION

Indeed, the First Amendment more than protects the expressions by Defendants of what Plaintiffs describe as "anti-Israeli, anti-Zionist, an antisemitic." Peaceful protest speech such as this – on sidewalks and streets – is entitled to the highest level of constitutional protection, even if it disturbs, is offensive, and causes emotional distress. *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). The Defendants do nothing that falls outside of the protections of the First Amendment, since "a function of free speech under our

system of government is to invite dispute," *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). In public debate we must tolerate "insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (internal quotation marks and citations omitted).

Plaintiffs do not sufficiently allege Article III standing. The Court lacks subject matter jurisdiction and must dismiss this case.

Defendants' Motions to Dismiss are **GRANTED**.

IT IS ORDERED.

Date: August 19, 2020

s/ Victoria A. Roberts
Victoria A. Roberts
United States District Court
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 19-13726

[Filed: September 3, 2020]

MARVIN GERBER, ET AL.,

Plaintiffs,

v.

HENRY HERSKOVITZ, ET AL.,

Defendants.

Honorable Victoria A. Roberts

ORDER DENYING MOTION FOR RECONSIDERATION [ECF No. 67] AND MOTION FOR LEAVE TO FILE SUPPLEMENT [ECF No. 68]

On August 26, 2020, Plaintiffs filed a Motion for Reconsideration.

Plaintiffs' motion presents the same issues already ruled on by the Court. Further, Plaintiffs fail to

demonstrate a palpable defect by which the Court and the parties have been misled. L.R. 7(g)(3).

For these reasons, the motion for reconsideration is **DENIED**.

The Court **DENIES** Plaintiffs' motion to provide supplemental authority in support of their motion for reconsideration.

IT IS ORDERED.

s/ Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: 9/3/2020

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-1870

[Filed: November 2, 2021]

MARVIN GERBER; MIRIAM BRYSK,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
HENRY HERSKOVITZ, ET AL.,	)
	)
Defendants-Appellees.	)
	)

O R D E R

BEFORE: SUTTON, Chief Judge; CLAY and McKEAGUE, Circuit Judges.

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

42 U.S. Code § 1981 - Equal rights under the law

(a) Statement of equal rights
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined
For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment
The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S. Code § 1982 - Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

(R.S. § 1978.)

42 U.S. Code § 1983 - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S. Code § 1985 - Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties
If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror
If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any

manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of

damages occasioned by such injury or deprivation, against any one or more of the conspirators.

(R.S. § 1980.)

42 U.S. Code § 1986 - Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

(R.S. § 1981.)