NO. 21-_____

In the Supreme Court of the United States

DR. MIRIAM BRYSK,

Petitioner,

v.

HENRY HERSKOVITZ, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit erred by holding that the use of multiple signs in front of a synagogue in Ann Arbor, Michigan, every Saturday morning for eighteen (18) years, some of which address the Israeli-Palestinian conflict, in combination with flagrantly anti-Semitic signs which state, "Resist Jewish Power," "Jewish Power Corrupts," and "No More Holocaust Movies," is absolutely protected by the Free Speech provision of the First Amendment, and may not be restricted in any way by an injunction which places reasonable time, place and manner conditions on the protesters' conduct.

2. Whether the United States Court of Appeals for the Sixth Circuit, after reversing the decision of the United States District Court for the Eastern District of Michigan which held that Petitioner's emotional distress did not constitute a sufficient concrete injury to afford her standing to sue, erred by proceeding to address the First Amendment free speech issue, rather than remanding the case back to the District Court in order to develop the record on the First Amendment, and other issues.

3. Whether the United States Court of Appeals for the Sixth Circuit erred by holding that the protesters' conduct does not violate 42 U.S.C. § 1981, where the conduct violates the Michigan anti-stalking statute, M.C.L. § 750.41h.

4. Whether the United States Court of Appeals for the Sixth Circuit erred by holding that the protesters' conduct does not violate 42 U.S.C. § 1982, where Petitioner, who is a Holocaust survivor, experiences severe

emotional distress from seeing the signs, and is a dues paying member of the synagogue, by virtue of which she is a *pro rata* owner of the synagogue property.

5. Whether the United States Court of Appeals for the Sixth Circuit erred by holding that the conduct of the protesters and of the City of Ann Arbor does not violate 42 U.S.C. § 1983, where the City of Ann Arbor has had a content and viewpoint neutral sign ordinance in place which is unambiguous and which prohibits the protesters' placing their signs in the public right-of-way in front of the synagogue, but the City of Ann Arbor has failed and refused to enforce the sign ordinance against the protesters for the entire eighteen (18) year period.

6. Whether the United States Court of Appeals for the Sixth Circuit erred by holding that the conduct of the protesters does not violate 42 U.S.C. § 1985(3), where the emotional distress which the signs cause Petitioner inhibits her from traveling to attend Sabbath services at the synagogue, or at its annex.

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant Below

- Dr. Miriam Brysk

Respondents and Defendants-Appellees Below

- Henry Herskovitz
- Gloria Harb
- Tom Saffold
- Rudy List
- Chris Mark
- Jewish Witnesses for Peace and Friends
- City of Ann Arbor, MI
- 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
- Senior Assistant City Attorney Kristen Larcom, in her official and individual capacities

Respondent and Plaintiff-Appellant Below

- Marvin Gerber

LIST OF PROCEEDINGS

United States District Court (E. D. Mich.)

No. 2:19-cv-13726-VAR-MJH

Brysk, et al v. *Herskovitz, et al.*

Order Granting Defendants' Motion to Dismiss: Aug 19, 2020

Order Denying Motion for Reconsideration and Denying Motion for Leave to File Supplement: Sept 3, 2020

United States Court of Appeals for the Sixth Circuit

No. 20-1870

Brysk, et al v. *Herskovitz, et al.*

14 F.4th 500 (6th Cir. 2021)

Opinion and Judgment: Sept 15, 2021

Order Denying Petition for En Banc Rehearing: Nov 2, 2021

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OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, Case No. 20-1870, 14 F.4th 500 (6th Cir. 2021), is included below at App.1a, *reh'g denied,* (6th Cir. November 2, 2021) included below at App.53a. The order of the U.S. District Court for the Eastern District of Michigan, (E.D. Mich. Aug. 19, 2020), is included below at App.43a, *reconsideration denied,* (E. D. Mich. Sep. 3, 2020), included below at App.55a.

JURISDICTION

The Court of Appeals entered Judgment on September 15, 2021, 14 F.4th 500 (6th Cir. 2021) (App.1a), *reh'g denied,* (6th Cir. November 2, 2021) (App.53a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY PROVISIONS AND ORDINANCES INVOLVED

A. Constitutional Provisions

- U.S. Const. amend. I (App.57a)
- U.S. Const. amend. XIV, § 1 (App.57a)

B. Federal Statutory Provisions

- 42 U.S.C. § 1981 (App.58a)

- 42 U.S.C. § 1982 (App.58a)
- 42 U.S.C. § 1983 (App.59a)
- 42 U.S.C. § 1985(3) (App.59a)

C. State and Local Statutes and Ordinances

- M.C.L. § 750.41h (App.61a)
- Signs Ordinance of the City of Ann Arbor, Michigan (App.65a)

STATEMENT OF THE CASE

Every Saturday morning since September, 2003, for 18 years, a group of protesters, numbering from 6 to 12 individuals, have appeared in front of Beth Israel Synagogue ("Synagogue"), located on Washtenaw Ave. in Ann Arbor, Michigan, and have placed numerous signs and miniature American flags on the grass section adjacent to the sidewalk in front of the Synagogue, as well as on the grass section across Washtenaw Ave., facing the Synagogue.

The signs bear such statements as: "Resist Jewish Power"; "Jewish Power Corrupts"; "Zionists are Nazis"; "Dual Loyalty?"; "Fake News: Israel Is A Democracy"; "Stop Funding Israel"; "End the Palestinian holocaust"; "No More Holocaust Movies"; "The United States of Israel?!"; etc. (Photographs of the signs were attached to the Complaint and the First Amended Complaint. App.93a-110a)) They number 18-20 signs. Most of the signs are placed on the grass sections leaning against trees and portable chairs. Some of the protesters also carry signs, either holding them in their hands or

attached to twine hanging from their necks. They also place a large banner of the Israeli flag directly in front of the Synagogue, with a red circle and a red slash across it covering the Star of David.[1]

The grass sections are designated as part of the public right-of-way. The Synagogue is located in an area of Ann Arbor which is zoned residential. The protesters belong to an organization originally named "Jewish Witnesses for Peace and Friends" ("Witnesses"), which has organized the protests.[2] The protesters arrive every Saturday morning, the Jewish Sabbath, at approximately 9:30 A.M., position their signs in place, and stay until approximately 11:00 A.M. The time period coincides with the time when members of the Synagogue arrive to enter the Synagogue, or to attend Sabbath services in the annex next door, in order to conduct and participate in the Sabbath service.

Several of the signs are flagrantly anti-Semitic, *e.g.*, "Resist Jewish Power"; "Jewish Power Corrupts"; "Zionists Are Nazis"; "End the Palestinian holocaust"; "Dual Loyalty?"; and "No More Holocaust Movies." These signs promote age-old anti-Semitic tropes about purported Jewish outsized influence in world finance, controlling power in international political affairs, and dual national loyalties. The messages on the signs are readily visible to the congregants, many of whom are accompanied by children, as they enter the Synagogue.

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[1] The red circle with a red slash through it is the international symbol for "Prohibited." The Star of David is the recognized symbol representing Judaism and the Jewish people.

[2] In 2017 the organization dropped the word "Jewish" and is now known as "Witnesses for Peace and Friends."

During this entire time period, the City of Ann Arbor ("City") has had in place several City Code provisions which either required that the protesters have a permit to engage in their conduct of placing their signs in the public right-of-way, or prohibited their placing the signs in the public right-of-way altogether. The protesters do not have a permit to engage in their conduct and the City has never required they obtain a permit. In addition, throughout the 18-year period, the City has had a sign ordinance which is content and viewpoint neutral, and which unambiguously prohibits the placement of any signs in the public right-of-way, with or without a permit. App.81a[3] Under the express, unambiguous terms of Section 5.24.10, the miniature flags which the protesters have been placing on the grass sections in front of the Synagogue, and on the grass section across the street, are, and have been, prohibited by sub-section B. All of the signs which the protesters placed on the grass sections which were freestanding and not permanently anchored or secured to either a building or the ground are, and have been, prohibited by sub-section H. All of the signs were, and have been, further prohibited by sub-section L, since they did not come within any of the exemptions in any of the Sections listed in sub-section L.

Despite the fact the City has been aware of the protests since their inception, it has never charged the protesters with violating the ordinance and has

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[3] The sign ordinance included in the Appendix was enacted on July 16, 2018. A predecessor with the exact same language, but with different numbering, was adopted on June 9, 1975, and was in place the entire time prior to the adoption of the current version.

never required they stop placing their signs on the grass sections. On numerous occasions Ann Arbor police have been present when the protesters have been engaged in their protest and they have never told them to remove their signs and have in fact told them their conduct does not violate the sign ordinance.

The Synagogue's administration has on several occasions requested that the City take action to curtail the protesters' conduct. On two occasions, the mayor and the City Attorney have addressed the members of the Congregation and indicated there was no action the City could take to limit or restrict the protesters' activity.

On October 18, 2004, the City passed a Resolution which stated, in relevant part:

> Whereas, State of Michigan laws prohibit interference with religious services; Whereas, the City of Ann Arbor is home to many cultures and denominations of worship;
>
> Whereas, In the City of Ann Arbor, at least one house of worship has been subjected to weekly picketers who confront worshipers and ask passersby to honk their horns and cause a disturbance to worship services;
>
> RESOLVED, That the Ann Arbor City Council affirms the right of people in the City of Ann Arbor to attend services at houses of worship without interference or obstruction; and RESOLVED, That the Ann Arbor City Council condemns the picketing of houses of worship during the hours when congregants are attending worship services.

After the Resolution was passed, the protesters continued to appear every Saturday morning in front of the Synagogue and placed their signs on the grass sections in clear violation of the ordinance. They have engaged in this conduct over 890 times since the Resolution was passed, with full knowledge of the City, and despite the City's acknowledgement that "Michigan laws prohibit interference with religious services" and that the protesters "confront worshipers and ask passersby to honk their horns and cause a disturbance to worship services," yet the City has never enforced its ordinance and ordered them to remove their signs from the grass sections.

The instant lawsuit was commenced on December 19, 2019, in the United States District Court for the Eastern District of Michigan. Marvin Gerber was named as the single Plaintiff. Mr. Gerber alleged he was a long-time dues paying member of the Beth Israel Congregation and that he had seen the signs on numerous occasions as he approached the Synagogue. He further alleged, "The Antisemitic messages of several of the signs, as well as the virulently anti-Israeli messages, offend and anger [me], cause [me] extreme emotional distress, significantly diminish [my] enjoyment in attending the Sabbath services, and have adversely affected [my] willingness to travel to the Synagogue's location to attend Sabbath services in order to exercise [my] 1st Amendment right of freedom of religion." The Complaint named several of the protesters, the City, and several of the City's administrators as Defendants.

After the Defendants had been served, a First Amended Complaint ("FAC") was filed by right pursuant to Fed. R. Civ. P. 15(a)(1)(A). The FAC added

one additional Plaintiff, Dr. Miriam Brysk. Dr. Brysk alleged that she was a long-time dues paying member of the Pardes Haanah Congregation, which conducts its Sabbath services in an annex located next to the Synagogue. She also indicated she is a Holocaust survivor and had seen the protesters' signs on numerous occasions as she approached the annex to participate in the Sabbath service. She stated, "As a Holocaust survivor, the Antisemitic messages of several of the signs, as well as the virulently anti-Israeli messages, offend and anger [me], cause [me] extreme emotional distress, significantly diminish [my] enjoyment in attending the Sabbath services, and have adversely affected [my] willingness to travel to the Synagogue's location to attend Sabbath services in order to exercise [my] 1st Amendment right of freedom of religion."[4]

In the FAC, the Plaintiffs indicated that they were seeking an injunction which would place reasonable time, place and manner restrictions on the protesters' conduct. Throughout the litigation, they acknowledged the protesters had a 1st Amendment right to engage in their conduct–including expressing their anti-Semitic views-elsewhere in Ann Arbor, but not in proximity to a Jewish house of worship. In addition, they sought damages for their emotional distress, asserting the

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[4] The undersigned attorney, Marc Susselman, originally represented both Mr. Gerber and Dr. Brysk, *pro bono*. After the Sixth Circuit dismissed the lawsuit, Mr. Gerber sent Mr. Susselman an email terminating him as his attorney. Mr. Susselman filed a motion to withdraw as Mr. Gerber's attorney, which the Court granted. Thereafter, he filed a petition for *en banc* rehearing on behalf of Dr. Brysk only. Mr. Susselman is filing the instant petition for a *writ of certiorari* on behalf of Dr. Brysk, only.

protesters' conduct, and the City's failure to enforce its sign ordinance, violated 42 U.S.C. §§ 1981, 1982, 1983, 1985(3) and 1986.

The Defendants filed motions to dismiss based on Fed. R. Civ. P. 12(b)(1) and 12(b)(6). With respect to 12(b)(1), they maintained the District Court did not have jurisdiction over the lawsuit because the Plaintiffs did not have standing to sue. They argued that none of the claims pled in the FAC were cognizable because the protesters' conduct was protected by the First Amendment.

On August 19, 2020, the District Court issued an Order granting the Defendants' motion to dismiss based on Fed. R. Civ. P. 12(b)(1). App.43a The Court held the Plaintiffs' emotional distress did not constitute a concrete injury sufficient to afford them standing in the face of a First Amendment defense. Plaintiffs filed a motion for reconsideration, which the Court denied on September 3, 2020. App.55a

The Plaintiffs filed a Claim of Appeal in the Sixth Circuit Court of Appeals on September 20, 2020. After briefing and oral argument, the Court issued its decision on September 15, 2021, 14 F.4th 500 (6th Cir. 2021). App.1a The Court reversed the District Court's ruling that the Plaintiffs did not have standing to sue. However, it proceeded to rule on the 12(b)(6) motion and held that the protesters' conduct constituted speech addressing a matter of public concern in a traditional public forum, and therefore was protected by the First Amendment and dismissed the lawsuit. The Court granted the Appellants' motion to extend the deadline for filing a petition for *en banc* rehearing until October 13, 2021. Dr. Brysk filed a petition requesting *en banc* rehearing on October 8, 2021. Mr.

Gerber, represented by new counsel, filed a petition for *en banc* rehearing on October 13, 2021. On November 2, 2021, the Court issued an Order denying both petitions. App.53a

ARGUMENT

I. THE COURT OF APPEALS MISAPPLIED RELEVANT SUPREME COURT DECISIONS RELATING TO THE FREE SPEECH PROVISION OF THE FIRST AMENDMENT.

A. The Court Erroneously Held That All of the Signs Which the Protesters Were Using, Including the Flagrantly Anti-Semitic Signs, Addressed Matters of Public Concern.

At the heart of the Court's decision that the protesters' speech was protected by the First Amendment is the following passage from the Court's decision, App.11a:

> 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 Court held that because the protesters were engaging in speech which addressed matters of public concern–the Israeli-Palestinian conflict–and were doing so in a traditional public forum–a street in a residential area in front of the Synagogue–the use of the signs was absolutely protected by the 1st Amendment and any injunction which placed reasonable time, place and manner limitations on their conduct would violate their freedom of speech. The signs which display anti-Semitic hate speech, however, do not relate to matters of public concern, and the fact that they are commingled with signs which address matters of public concern does not clothe the hate speech with the mantle of 1st Amendment protection.[5]

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[5] In his concurrence, Judge Clay stated, App.31a, "Plaintiffs never dispute that, as offensive as they find the Protester Defendants' speech, it pertains to an issue of public concern." It

The Court disregarded the exhortation in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), "Our cases make clear ... that even in a public forum the government may impose reasonable restrictions of the time, place or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"

Petitioner was seeking entry of an injunction which placed reasonable time, place and manner restrictions on the protesters' conduct.[6] The injunction

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was obvious, however, that by singling out the signs which Petitioner claimed were anti-Semitic, she was disputing that the anti-Semitic signs addressed matters of public concern. By definition, hate speech does not address matters of public concern, particularly where, as here, the targets of the hate speech are forced to see the hate speech in front of their house of worship. As will be discussed *infra,* cases in which hate speech has been deemed protected by the 1st Amendment, *e.g.*, *National Socialist Party v. Skokie,* 432 U.S. 43 (1977), *Collin v. Smith,* 578 F.2d 1197 (7th Cir. 1978), and *Snyder v. Phelps,* 562 U.S. 443 (2011), did not involve captive audiences.

[6] The Court objected that the request in the FAC's prayers for relief for a 1000-ft buffer zone and the proposed restriction to five protesters would not satisfy the requirement that the injunction be narrowly tailored. App.14a But a litigant is not limited to the exact terms expressed in a prayer for relief. A litigant who requests compensation for pain and suffering in the amount of $ 5 Million, for example, does not automatically lose because the amount exceeds reasonable compensation for the injury. Moreover, the protesters have continued with their protest to the present day. Dismissing the instant lawsuit because the requested injunction was deemed impermissible would not preclude Petitioner, or other congregants, from filing a new lawsuit requesting a 500 ft. or 300 ft., injunction, and no limita-

would have left open ample alternative channels throughout Ann Arbor for the protesters to communicate both their anti-Israeli and anti-Semitic messages. The Court's assertion, App.14a, that an injunction "would disproportionately affect one viewpoint on an issue of public concern" was inconsistent with the holding in *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753 (1994), in which the Court addressed the constitutionality of an injunction issued by a Florida state court which imposed distance and temporal restrictions on the protests of anti-abortion advocates in front of an abortion clinic. The Supreme Court rejected the applicability of the content-viewpoint neutrality requirement to an injunction, stating, *id.* at 762:

> To accept petitioners' claim would be to classify virtually every injunction as content or viewpoint based. An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, because of the group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public. The

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tion on the number of protesters, since entry of a judgment against Petitioner would not constitute *res judicata* or collateral estoppel precluding a subsequent lawsuit requesting different injunctive relief, as long as the protesters continued to protest in front of the synagogue, as they have.

> fact that the injunction in the present case did not prohibit activities of those demonstrating in favor of abortion is justly attributable to the lack of any similar demonstrations by those in favor of abortion, and of any consequent request that their demonstrations be regulated by injunction....

The *Madsen* Court's endorsement of injunctions as an appropriate means of restricting invasive speech, without violating the 1st Amendment, was reaffirmed in *McCullen v. Coakley*, 573 U.S. 464, 492 (2014). The fact the abortion protesters were not state actors did not preclude the state court from entering an injunction to protect the constitutional right to obtain an abortion. By the same token, state action was not required to protect the right of Petitioner and her fellow congregants to exercise their right under the 1st Amendment to freely exercise their religion without being harassed and insulted as they entered their Synagogue.

As in *Madsen,* the Supreme Court has held that where the exercise of free speech in a public arena conflicts with the exercise of other constitutional rights, government has a compelling state interest to restrict the speech in order to protect the competing constitutional right, and that such restrictions will survive strict scrutiny. *See Burson v. Freeman,* 504 U.S. 191 (1992) (A Tennessee statute which restricts the dissemination of political literature in proximity to a polling place, and which is therefore content-based, survives strict scrutiny because the statute serves the compelling state interest to protect "the right to cast a ballot in an election free from the taint of intimidation and fraud." *Id.* at 211.) Likewise, the

state has a compelling state interest to protect the right of its citizens to enter their house of worship without being harassed by picketers.

B. The Court Ignored the Convergence of Factors Which Rendered the Free Speech Provision of the First Amendment Inapplicable.

In the FAC and briefs, Petitioner had cited the following factors which she maintained, taken together, divested the protesters' conduct of 1st Amendment protection.

(1) Since the Synagogue is located in a residentially zoned area, the protesters' conduct constituted targeted picketing in a residential area which the Supreme Court held could be restricted via an ordinance in *Frisby v. Schultz,* 487 U.S. 474 (1988). While the ordinance related to targeted picketing of a home, the conventional terminology "house of worship" recognizes their shared character as places of retreat and contemplation. Moreover, although *Frisby* addressed the constitutionality of an ordinance, under *Madsen, supra,* that same rationale applied to the constitutionality of an injunction.

(2) Petitioner and her fellow congregants were a captive audience, forced to see the abusive signs against their will. *Lehman v. City of Shaker Heights,* 487 U.S. 298 (1974). The fact that *Lehman* involved the confines of a bus did not make the protesters' repeated, uninvited confrontation of the congregants as they approached the Synagogue any less intrusive. *See* Note, *Picketing and Prayer: Restricting Freedom of Expression Outside Churches*, 85 CORNELL LAW REVIEW 272, 297-301 (1999) (Picketing).

The holding in *Snyder v. Phelps, supra,* demonstrated that whether a group of people in the outdoors can constitute a captive audience turns on the visibility of the offensive signs. The Court rejected the Appellee's claim that the funeral mourners constituted a captive audience because the homophobic signs were too far away from the funeral proceeding for the mourners to see them. The slain soldier's father did not learn about the signs until he watched the news coverage on television. Here, the protesters' multiple anti-Semitic signs are in close proximity to the Synagogue and are easily visible to the congregants, and their children, as they approach and enter the Synagogue.

In the Skokie case, *Colin v. Smith, supra,* the 7th Circuit held that the Jewish residents of Skokie were not a captive audience because they could avoid seeing the neo-Nazis by not going to downtown Skokie where they intended to march. *Collin v. Smith,* 578 F.2d at 1207. Here, Petitioner and the other congregants are not going out of their way to see the protesters' signs–the protesters are deliberately repeatedly going to the Synagogue every Saturday morning in order to confront the congregants and force them to see their anti-Semitic signs.

(3) The fact that the protests occurred in proximity to a house of worship implicated Petitioner's 1st Amendment freedom of religion and assembly rights, as fundamental in American jurisprudence as freedom of speech. *See Shaare Tefila Congregation v. Cobb,* 481 U.S. 615 (1987); *Zorach v. Clauson,* 343 U.S. 306 (1952); *S. Bay United Pentecostal Church v. Newsom,* 141 S.Ct. 716 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S.Ct. 63 (2020); Picketing, 292-

297. The City's repeated failure to enforce its unambiguous content and viewpoint neutral sign ordinance implicated state action.[7]

(4) The Court gave scant attention to the adverse emotional effect on children forced to see signs attacking their religion and ethnicity. Picketing, 291-292. The Court disregarded the affidavit of Gabrielle Shapo, who attended services at the Synagogue as a young girl for ten years and attested (App.88a-90a):

> Crossing a picket line to enter my place of worship was my reality growing up. As soon as they saw us, I felt physically targeted, as though there were walls closing in on us from the sides.... As I grew older, I would discuss this experience with my friends, many of whom practiced different religions from me. It didn't take long to realize that none of them ever had to endure protests on their religious Sabbath, and the sidewalks in front of their places of worship were not forums for these kinds of protests. I felt very isolated–why was I the only one? Why were people so mad at me for being a Jew?... I am retroactively disgusted by every moment that I thought this was a standard occurrence. I am disgusted by the fact that I had to wait until I was 12 years old and halfway across the country to discover what it is like to walk proudly and fear-free into my house

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[7] At no point during the litigation did the City or the protesters deny or dispute that the City's sign ordinance was content and viewpoint neutral, and unambiguously prohibited the placement of the protesters' signs on the public right-of-way.

> of worship. And above all else, I am saddened that my 3-year-old, 5-year-old, 7-year-old, 9-year-[o]ld, and 11-year-old brain was forced to absorb messages that slandered my people, when all I want[ed] to do was to peacefully enter my house of worship to pray.

(R.22, Exhibit 11, ¶¶ 4, 8, and 10)

According to the Court, "an interest in protecting children does not justify censoring speech addressed to adults." App.13a.

(5) The duration of the protests belied that their purpose was to engage in a dialogue, to inform or to persuade. It had been reduced to a campaign of harassment and bullying. The duration of the protests raised a factual issue regarding whether their protests were done "with the purpose of threatening or intimidating" the congregants, a motive which would strip their conduct of 1st Amendment protection. *Virginia v. Black,* 538 U.S. 343, 366 (2003). The protesters had ample other avenues of communication to convey both their anti-Semitism and their anti-Zionism.

Rather than addressing these factors as collectively divesting the protesters' conduct of 1st Amendment protection, the Court addressed them individually and held that each factor, by itself, was not sufficient to override the protesters' freedom of speech. App.12a-13a. But this was not Petitioner's argument. By disregarding the convergence of the unique factors of this case, the Court relied on decisions which lacked one or more of the above factors, and therefore do not properly constitute counter-examples which vitiate Petitioner's argument. *Bible Believers v. Wayne County,* 805 F.3d 243 (6th Cir. 2015) (*en banc*), App.12a, did

not involve speech in proximity to a house of worship; did not involve a captive audience, since patrons at the ethnic festival could walk away and avoid seeing or hearing the offensive speech of the Bible Believers; and only occurred once, not repeatedly. *Terminello v. City of Chicago,* 337 U.S. 1 (1949), App.34a, did not involve a captive audience, since those who did not wish to hear Terminello's speech were free not to attend his lecture; did not involve a house of worship; and did not involve children. While *Cantwell v. Connecticut,* 310 U.S. 296 (1941), App.36a, involved offensive anti-Catholic speech in a predominantly Catholic neighborhood, the events did not occur in proximity to a church; did not involve a captive audience; did not involve children; and did not occur repeatedly. *Pouillon v. City of Owosso,* 206 F.3d 711 (6th Cir. 2000), App. 38a, did not involve a captive audience; did not involve a protest in proximity to a house of worship; did not involve children; and did not involve hate speech. Moreover, the case was remanded to the District Court to resolve factual issues.

The Court disregarded the significantly different holdings in *Cantwell, supra,* and *Chaplinsky v. New Hampshire,* 315 U.S. 565 (1943). In *Cantwell,* the appellants, Jehovah's Witnesses, were arrested for violating a state statute which criminalized inciting a breach of the peace. Each of the appellants was equipped with a bag of books and pamphlets on religious issues, as well as a portable phonograph and a set of records. The Court recited the facts as follows, 310 U.S. at 302-03, 309:

> The facts which were held to support the conviction of Jesse Cantwell on the fifth count were that he stopped two men in the

> street, asked, and received, permission to play a phonograph record, and played the record "Enemies," which attacked the religion and church of the two men, who were Catholic. Both were incensed by the contents of the record and were tempted to strike Cantwell unless he went away. On being told to be on his way he left their presence. There was no evidence that he was personally offensive or entered into any argument with those he interviewed.
>
> * * *
>
> ... Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.
>
> We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener of what Cantwell, however misguided others may think him, conceived to be true religion. (Emphasis added.)

The facts in *Cantwell* are readily distinguishable from those here. The protesters have never requested permission of the congregants to engage in their protests, have never left when confronted with hostile responses from the congregants, and have continued with their protest, not just on a public street, but on

a public street in proximity to a synagogue, every weekend for 18 years.

In *Chaplinsky, supra,* the Court held that Chaplinsky's conduct was not protected by the 1st Amendment. Chaplinsky, also a member of the Jehovah's Witnesses, was charged with violating a New Hampshire statute which forbade under penalty that any person shall address "any offensive, derisive or annoying word to any other person who is lawfully in any street or any other public place." The charge arose when Chaplinsky, in proximity to the Rochester City Hall, stated to the complainant: "You are a God damned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." The Court, in holding Chaplinsky's speech was not protected by the 1st Amendment, stated, 315 U.S. at 572-74:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words–those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information

> or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." ...
>
> * * *
>
> Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace. (Citations omitted.)

The anti-Semitic slurs on the protesters' signs are far more offensive than calling someone a "God damned racketeer and a damned Fascist." There is no indication in *Chaplinsky* that an actual breach of the peace occurred, yet utterance of these words was sufficient to justify prosecution under a criminal statute. Request for an injunction placing reasonable time, place and manner restrictions on the protesters' anti-Semitic conduct would be justified in light of the holding in *Chaplinsky*.

6. The Court disregarded its own decision in *Phelps-Roper v. Strickland,* 539 F.3d 356 (6th Cir. 2008), which upheld the constitutionality of an Ohio statute which prohibited any protests, regardless of content, within 300 ft. of a funeral proceeding, including funerals conducted in houses of worship, one hour before until one hour after the funeral concluded. There is no basis for distinguishing religious services at a synagogue, or at any other house of worship, in terms of their solemnity.

7. *Survivors Network of those Abused by Priests, Inc. v. Joyce,* 779 F.3d 785 (8th Cir. 2015), App.36a, was inapplicable because the Court was addressing the constitutionality of a Missouri statute which made it a criminal offense to "[i]ntentionally and unreasonably disturb[], interrupt[], or disquiet[] any house of worship by using profane discourse, rude or indecent behavior, or making noise either within the house of worship or so near it as to disturb the order and solemnity of the worship service." *Id.* at 787. Petitioner has never argued the protesters can or should be criminally prosecuted. The *Survivors Network* decision has no bearing on whether an injunction placing reasonable time, place and manner restrictions on the conduct would be unconstitutional.

8. The Court disregarded the Supreme Court's decision in *Beauharnais v. Illinois,* 343 U.S. 250 (1954), in which the Court sustained the constitutionality of an Illinois statute which made it a crime to publicly distribute literature which "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." The use of the disjunctive indicated the statute applied even in the absence of a breach of the peace or riot. *Beauharnais* has never been overruled and was favorably cited in *R.A.V. v. St. Paul,* 505 U.S. 377, 383 (1992). If a state could constitutionally enact a statute criminalizing such conduct, then surely a federal court exercising its inherent equity jurisdiction is authorized to enter an injunction prohibiting such conduct in proximity to a house of worship without offending the 1st Amendment.

The concurrence asserted *Beauharnais* is no longer good law, App.29a, note 3, despite the fact that

the decision has never been overruled by another Supreme Court decision, and until this occurs, every lower Court, including the 7th Circuit decision cited by the concurrence, is bound by it, notwithstanding the *en banc* decision in *Bible Believers, supra. See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Hutto v. Davis*, 454 U.S. 370, 375 (1982). Likewise, the concurrence's assertion that the decision in *New York Times v. Sullivan,* 376 U.S. 254, 268-69 (1964), limited *Beauharnais* to its facts is erroneous. On the cited pages, the Court simply reasserted its authority to decide when statements constitute libel and under what circumstances they are not protected by the 1st Amendment. As Prof. Lasson stated in Lasson, *To Stimulate, Provoke, or Incite? Hate Speech and the First Amendment,* 8 ST. THOMAS LAW FORUM 49, 66 (1991), "Those who question the vitality of *Beauharnais* appear to be analyzing the case with a single-minded tunnelvision; reports of its death have been greatly exaggerated."

Petitioner's claim that the protesters' anti-Semitic signs in front of a Jewish house of worship are not protected by the 1st Amendment applies with equal force to comparable uses of hate speech in proximity to any house of worship–a Catholic or Protestant church; a Muslim mosque; a Hindu or Sikh temple. According to the Sixth Circuit, however, the use of hate speech in proximity to any house of worship, regardless how toxic, is impregnably protected by the Free Speech provision of the First Amendment. According to the Sixth Circuit, signs in proximity to a synagogue containing the message, "Kikes support Israel" would be impregnably protected. Signs in front of an Italian Catholic church stating, "Dagos support

pedophile priests" would be impregnably protected. Signs in front of a mosque stating, "Camel jockeys support Isis" would be impregnably protected. And signs placed in front of a predominantly African-American church by members of the Ku Klux Klan stating, "Nigger mothers give birth to crack babies" would be impregnably protected by the First Amendment. A decision that entails such consequences, which desecrates the First Amendment's protection of the freedom of worship and which allows ethnic and religious hatred to flourish, may not be allowed to stand under our Constitution.

II. THE COURT IMPROPERLY ADDRESSED THE MERITS OF THE 12(b)(6) MOTION AFTER RULING THE APPELLANTS HAD STANDING TO SUE.

Once the majority concluded the District Court's ruling on standing was incorrect, under Sixth Circuit precedent the panel should have remanded the case to the District Court for further development and clarification of the facts. A Court of Appeals is bound by its own precedent. *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S.Ct. 1642, 1650 (2016). In *Freed v. Thomas,* 974 F.3d 729 (6th Cir. 2020), the Court stated, *id.* at 741:

> We decline Freed's invitation for this court to render a decision on the merits of his claims. While this court has exercised discretion to decide issues on appeal that were not addressed by the district court, *see Hill v. Snyder,* 878 F.3d 193, 213 (6th Cir. 2017), "typically," we "will not address issues unless ruled upon by the trial court below." *Perez v. Aetna Life Ins. Co.,* 150 F.3d 550, 554-55 (6th Cir. 1998) (citation omitted).

> Here, remand is appropriate. The district court did not directly address the merits of Freed's constitutional claims. Additionally, the trial court is in the best position to resolve any dispositive issues on the merits in the first instance because it is most familiar with the factual and procedural background of this action.

See also Boler v. Earley, 865 F.3d 391, 414 (6th Cir. 2017) ("Even though we have determined that the § 1983 claims are not foreclosed, the Defendants seek affirmance under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. We may affirm the district court on any basis supported in the record.... We decline to do so here."); *Keweenaw Bay Indian Community v. Rising,* 569 F.3d 589, 597 (6th Cir. 2009) ("This issue was not addressed by the District Court, and we therefore do not address it here."); *Westside Mothers v. Haveman,* 289 F.3d 852, 864 (6th Cir. 2002) ("Michigan also asks us to affirm the dismissal of the suit even if we disagree with the district court's reasons for dismissing it.... The defenses raise factual and legal issues not addressed by the district court.... We decline to rule on the issues before the district court has made a factual record."); *Maldonado v. National Acme Co.,* 73 F.3d 642, 648 (6th Cir. 1996) ("In general, an appellate court will not address issues on appeal that were not ruled on below.").

The District Court did not "directly address the merits" of the parties' constitutional claims because it failed to discuss the numerous arguments and case law which the Plaintiffs had offered to demonstrate the protesters' conduct was not absolutely protected

by the 1st Amendment and could constitutionally be subject to reasonable time, place and manner restrictions. The court made broad and conclusory statements about the function of the 1st Amendment without engaging any of the arguments the Plaintiffs offered that in this particular context, where speech was being used to insult and harass the Plaintiffs and their fellow congregants as they entered their house of worship, their use of "free speech," assisted by the indifference of the City, infringed on their equally important 1st Amendment right to freely exercise their religion.

In *Hill v. Snyder,* 875 F.3d 193 (6th Cir. 2017), cited in *Freed, supra,* the Court observed, *id.* 213-14:

> The Supreme Court has instructed that claims are fit for review if they present "purely legal" issues that "will not be clarified by further factual development." ... This court has heeded these instructions and found pre-enforcement facial constitutional challenges ripe for review.... Plaintiffs' claims do not turn on the individual sentences class members have received or will receive, and, therefore, no further factual development is necessary to resolve Plaintiffs' claims. (Citations omitted.)

Here there were numerous factual issues which required "further factual development," and which bore directly on the 1st Amendment defense. These factual issues required further development before the legal claims they related to could be meaningfully resolved on appeal. Petitioner maintained the protesters' conduct interfered with her 1st Amendment right of freedom of worship, and that by virtue of the

failure of the City to enforce its sign ordinance, as well as by the police condoning the violation every Saturday morning by not enforcing the sign ordinance, the City's conduct constituted state action under 42 U.S.C. § 1983, and by its complicity with the protesters, the protesters likewise constituted state actors. Whether the protesters' conduct was motivated "with the purpose of threatening or intimidating" Petitioner and her fellow congregants, *Virginia v. Black, supra,* was a factual issue which required remand.

There were numerous other factual issues which the District Court did not address and which precluded the Court of Appeals from addressing the merits of the counts pled in the FAC. For example:

1. Regarding Count III of the FAC (Civil Conspiracy in violation of 42 U.S.C. § 1982), whether the concerted activity of the protesters constituted a conspiracy in violation of 42 U.S.C. § 1982 and/or whether the conduct of the City ignoring the protesters' violation of the sign ordinance over the then period of 16 ½ years constituted a civil conspiracy between the protesters and the City in violation of 42 U.S.C. § 1982.

2. Regarding Count IV (Violation of 42 U.S.C. § 1983 by the City), whether the conduct of the City ignoring the protesters' violation of the sign ordinance over a period of 16 ½ years constituted state action violating the Petitioner's freedom of religion under 42 U.S.C. § 1983.

3. Regarding Count V (Violation of 42 U.S.C. § 1983 by the protesters), whether the conduct of the City ignoring the protesters' violation of the sign ordinance over the then period of 16 ½ years constituted

state action by the protesters, violating Petitioner's freedom of religion under 42 U.S.C. § 1983.

4. Regarding Count VII (Violation of 42 U.S.C. § 1985(3) by the protesters), whether the protesters' cooperative conduct over a 16 ½ year period constituted a civil conspiracy violating Petitioner's freedom of religion under 42 U.S.C. § 1985(3).

5. Regarding Count VIII (Civil Conspiracy between the protesters and the City in violation of 42 U.S.C. § 1985(3)), whether the conduct of the City in conjunction with the protesters' violation of the sign ordinance over the then period of 16 ½ years constituted a civil conspiracy violating the Petitioner's freedom of religion under 42 U.S.C. § 1985(3).

The District Court dismissed the lawsuit based solely on standing without making a record regarding any of these factual allegations, all of which bore on the above claims in the FAC. Under the above Sixth Circuit precedents, the factual record as it existed was not sufficiently developed to address these issues as "purely legal" issues. Instead, the panel proceeded to address the merits of the lawsuit. In so doing they disregarded and misstated material facts set forth in the FAC. For example, at App.15a, the majority stated: "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." This assertion was erroneous. ¶ 184b of the FAC (R.11, PageID.284), stated:

> As dues paying members of the Beth Israel Congregation and Pardes Hannah, Plaintiffs possess a property interest in the Synagogue's property and therefore have standing to make

this claim. *See, e.g., Park Slope Jewish Center v. Congregation B'nai Jacob,* 90 N.Y.2d 517, 522 (N.Y. 1997).

Under the standard of review for a 12(b)(6) motion, this factual allegation was entitled to be accepted as true and asserted that Petitioner had a legally enforceable property interest more substantive than merely being a "member[] of a religious community." Petitioner was entitled to have her day in court in order to resolve this and other factual issues.

III. THE COURT ERRED BY IMPROPERLY DISMISSING THE 42 U.S.C. §§ 1981, 1982, 1983, AND 1985(3) CLAIMS.

The Court erroneously dismissed the following claims:

A. 42 U.S.C. § 1981

Jews qualify as a race for purposes of enforcement of the federal civil right statutes. *Shaare Tefila Congregation v. Cobb, supra.* Section 1981 was also intended to apply to discrimination based on ancestry and ethnicity. *Saint Francis College v. al-Khazraji,* 481 U.S. 604 (1987). Section 1981 applies to discriminatory acts by private citizens based on race and ethnicity of others, without state action.[8] *See Chap-*

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[8] Since 42 U.S.C. §§ 1981, 1982 and 1985(3) apply to discriminatory conduct by private citizens based on race or ethnicity, they apply with equal force to the anti-Israeli signs as well as the anti-Semitic signs, since they are targeting the congregants of the Synagogue based on their race and ethnicity. Given that §§ 1981 and 1982 were enacted pursuant to the authority granted to Congress under the Thirteenth Amendment, the statutes abrogate any First Amendment protection afforded political speech which is motivated by class-based animus. *See Jones v. Mayer*

man v. Higbee Co., 319 F.3d 825 (6th Cir. 2003), *cert. denied,* 542 U.S. 945 (2004). A violation of § 1981 can be based on the violation of another law, including a state law, intended to protect the Plaintiff's personal security. The protesters' repetitive picketing in front of the same location is a form of stalking. M.C.L. § 750.411h, App.61a defines "stalking" as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." (Emphasis added.) The statute prohibits "unconsented contact," which includes, "Following or appearing within the sight of that individual." The Court's denial of the claim, App.15a, because Petitioner "failed to allege that [she] lost out on the benefit of any 'law or proceeding'" ignored the violation of M.C.L. § 750.411h.

B. 42 U.S.C. § 1982

The statute applies to conduct by private actors. *Jones v. Mayer Co.,* 392 U.S. 409 (1968); *Tillman v. Wheaton-Haven Recreation Assn.,* 410 U.S. 431 (1973). "A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866 ... from which § 1982 was derived...." *Sullivan v. Little Hunting Park,* 396 U.S. 229, 237 (1969). The reference in the statute to "hold[ing]" real property applies to use of real property, as well as the right to come and go from the property

Co., 392 U.S. 409, 436-44 (1968).

as a guest, even if the citizen does not possess an ownership interest in the property. *See U.S. v. Brown,* 49 F.3d 1162 (6th Cir. 1995); *U.S. v. Greer,* 939 F.2d 1076 (5th Cir. 1991), *aff'd en banc,* 968 F.2d 433 (5th Cir. 1992), *cert. denied,* 113 S.Ct. 1390 (1993); *Olzman v. Lake Hills Swim Club, Inc.,* 495 F.2d 1333 (2d Cir. 1974). The statute applies to the right of Jews to use property without interference and harassment. *Shaare Tefila Congregation, supra; Brown, supra.* The protesters' conduct in using the signs to harass and intimidate Petitioner and other members of the Congregation in their use of the Synagogue's property violates 42 U.S.C. § 1982.

The Court rejected the claim, stating, App.15a, "[M]arginally making access to a facility a little harder– the most that could be said here—does not suffice." However, nothing in the history of § 1982 precludes its application to the use of speech motivated by class based animus. In evaluating a § 1982, the courts apply the same standard of proof under the Federal Housing Act, 42 U.S.C. § 3601 *et seq. Reeves v. Rose,* 108 F.Supp.2d 720 (E.D. Mich. 2000). *Reeves* held that under §§ 1981 and 1982, the courts apply the burden shifting test in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *See Daniels v. Board of Education of the Ravenna City School District,* 805 F.2d 203, 207 (6th Cir. 1986). Under that test, any conduct displaying discriminatory bias will suffice to make a *prima facie* case, even speech. The protesters have targeted the Synagogue for their abusive speech because the congregants are Jewish. This satisfies the *prima facie* case. The protesters would claim as their legitimate, nondiscriminatory reason they are expressing their disagreement with the oppressive

policies of Israel towards the Palestinians. This explanation is a pretext, since if they really wanted to convey this message effectively, they would not limit their venue to a single location–a Jewish house of worship–week after week. They would bring their message to various locations in Ann Arbor in order to reach a larger audience. That they have primarily picketed the Synagogue demonstrates "a discriminatory reason more likely motivate[s]" them. *Daniels, supra.* Contrary to the Court's claim, a violation of § 1982 does not require a violent act against persons or property. Racist speech, even symbolic speech, will suffice. *See Wells v. Rhodes,* 928 F.Supp.2d 920 (S.D. Ohio 2013) (placing a burning cross on the leased property of an African-American family, without causing any physical injury to the family members or to the property, violated both § 1982 and § 1985(3)).

C. 42 U.S.C. § 1983

By sustaining the City's claim it could not enforce its sign ordinance without violating the protesters' 1st Amendment rights, the Court failed to address Petitioner's contention the sign ordinance was content and viewpoint neutral, and therefore could be enforced without violating the protesters' free speech rights. *See R.A.V., supra; Jobe v. City of Catlettsburg,* 409 F.3d 261 (6th Cir. 2005); *Vittitow v. City of Upper Arlington,* 43 F.3d 1100 (6th Cir. 1995).

The Court in turn ignored Petitioner's contention that the City's failure to enforce the sign ordinance over a 16 ½ year period rendered it liable under 42 U.S.C. § 1983, enacted under the 14th Amendment, for thereby infringing on her freedoms of worship and assembly under the 1st Amendment. *See LeBlanc-*

Sternberg v. Fletcher, 67 F.3d 412, 426 (2d Cir. 1995). The Court's reliance on *Deshaney v. Winnebgo Cnty. of Social Services,* 489 U.S. 189 (1989), and *Town of Castle Rock v. Gonzales,* 545 U.S. 748 (2005), App.16a, was misplaced, in two respects. First, the City's knowledge of the repetitive nature of the protesters' violation of the sign ordinance for 858 consecutive weekends as of the filing of the lawsuit showed a callous, arbitrary indifference to the rights of Petitioner and her fellow congregants unlike that in either *Deshaney* or *Gonzales.* Second, the ordinance violations occurred in the presence of the police; they were weekly witnesses to the violations. This was not the case in either *Deshaney* or *Gonzales. See Okin v. Village of Cornwall-On-Hudson Police Dept.,* 577 F.3d 415 (2d Cir. 2009) (police held liable where the police ignored the plaintiff's repeated requests for help against domestic abuse by her boyfriend, and encouraged the boyfriend's continued abuse by engaging in cordial conversation with him); *Pena v. Deprisco,* 432 F.3d 98 (2d Cir. 2005) (police held liable where they witnessed an off-duty police officer enter his vehicle while intoxicated and took no action to stop him).

The failure of the City to enforce its sign ordinance over this duration also rendered the protesters liable as state actors under the *nexus*/entwinement test set forth in *Burton v. Wilmington Pkg. Authority,* 365 U.S. (1961), and *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,* 531 U.S. 288 (2001).

The decision in *Lansing v. City of Memphis,* 202 F.3d 821 (6th Cir. 2000), cited by the Court, App.16a, holding that the Memphis In May International Festival, Inc., did not qualify as a state actor is inapplicable. The Court reversed the District Court's

decision holding Memphis in May was a state actor. But the District Court's decision was rendered on a motion for summary judgment, after the parties had concluded discovery on the state action question. Here, there has been no discovery, including whether the City is enforcing its sign ordinance in a discriminatory, selective manner. *See Smith v. Ross,* 482 F.2d 33 (6th Cir. 1973). Dismissal of the claim against the City on a 12(b)(6) motion cannot be justified on the basis of a case which was decided on a summary judgment motion.

D. 42 U.S.C. § 1985(3)

The Court erroneously dismissed the § 1985(3) claim, incorrectly asserting it required state action. App.16a. Sec. 1985(3) applies to any conspiracy engaged in by private citizens to deprive any person or class of persons of equal privileges and immunities under the law, or to any conspirators who, in furtherance of the conspiracy, deprive any person of exercising any right or privilege of a citizen of the United States. *See Griffin v. Breckenridge,* 403 U.S. 88 (1971). It applies to any conspiracy of private citizens which is motivated by a class-based animus relating to race or religion. *See Bray v. Alexandria Clinic,* 506 U.S. 263 (1993); *Brokaw v. Mercer County,* 235 F.3d 1000 (7th Cir. 2000); *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.,* 968 F.2d 286 (2d Cir. 1992); *Wells v. Rhodes, supra.*

In *Carpenters v. Scott*, 463 U.S. 825 (1983). the Court held § 1985(3) applies only to private conspiracies which are "aimed at depriving the plaintiffs of rights protected by the Thirteenth Amendment and the right to travel guaranteed by the Federal Constitution." *Id.*

at 832. In *Johnson v. City of Cincinnati,* 310 F.3d 484 (6th Cir. 2002), the Court held the Constitution protects not only the right of inter-state travel, but also the right of intrastate travel. *See also Cole v. City of Memphis,* 839 F.3d 530 (6th Cir. 2016); *Spencer v. Casavilla,* 903 F.2d 171 (2d Cir. 1990). Petitioner's reluctance to attend services at the Pardes Hannah annex in order to avoid seeing the signs affects her willingness to engage in intrastate travel.

In *Wells, supra,* the Court held, "§ 1982 provides an adequate basis for a private conspiracy claim under § 1985(3)." 928 F.Supp.2d at 930. The protesters' conduct has violated Petitioner's property rights under § 1982, and therefore satisfies the predicate for a § 1985(3) claim.

CONCLUSION

Expressions of anti-Semitism in the United States, and around the world, are becoming more and more prevalent and acceptable. Anti-Semitism is becoming viewed as a mild, second-class form of racism. Lipstadt, ANTISEMITISM: HERE AND NOW, Schocken Books (2019); Baddiel, JEWS DON'T COUNT, TLS Books (2019). This trend is dangerous, and the decision by the Sixth Circuit Court of Appeals that such speech in proximity to a Jewish house of worship is permissible and impregnably protected by the First Amendment constitutes a condonation of that dangerous trend. The decision is wrong and must be reversed.

Respectfully submitted,

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