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

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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.

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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,

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