NO. _____

In the Supreme Court of the United States

DR. MIRIAM BRYSK AND MARC M. SUSSELMAN,

Petitioners,

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 Sixth Circuit Court of Appeals improperly affirmed a decision by the United States District Court for the Eastern District of Michigan which awarded attorney fees, pursuant to 42 U.S.C. § 1988, in the amount of $158,721.75 to the defendant protesters who had been picketing a synagogue in Ann Arbor, Michigan, every Saturday morning, the Jewish Sabbath, starting in September, 2003, for then 19 years, using anti-Semitic signs, such as "Resist Jewish Power," "Jewish Power Corrupts," "No More Holocaust Movies," and the flag of Israel with the Jewish Star of David effaced, in conjunction with signs related to the Israeli-Palestinian conflict, to be paid jointly and severally by the two Jewish plaintiffs, one of whom was a Holocaust survivor, and against the Jewish attorney who had filed the lawsuit in a good faith effort to obtain an injunction placing reasonable time, place, and manner restrictions on the anti-Semitic picketing directly in front of the synagogue.

2. Whether the Sixth Circuit Court of Appeals erroneously affirmed the decision by the United States District Court for the Eastern District of Michigan ruling that the claims which the plaintiffs pled in their First Amended Complaint, alleging violations of 42 U.S.C. §§ 1981, 1982, 1983, 1985(3), and 1986, were each frivolous, warranting an award of attorney fees against the plaintiffs and attorney pursuant to 42 U.S.C. § 1988 in the amount of $158,721.75, where the plaintiffs cited ample legal precedent in in the First Amended Complaint, and in their briefs, in support of each of the claims.

3. Whether the Sixth Circuit Court of Appeals improperly retaliated against the attorney representing the Holocaust survivor plaintiff because he raised the issue whether multiple rulings of the District Court judge, who is African-American, taken together in their entirety, evidenced a pervasive bias against the Jewish plaintiffs and the Jewish attorney, based on a combination of anti-Semitic and/or anti-Israel, pro-Palestinian sentiments, whether conscious or subconscious.

PARTIES TO THE PROCEEDINGS

Petitioner and Appellant/Cross-Appellee/ Plaintiff below

- Dr. Miriam Brysk, original Plaintiff

Petitioner and Appellant below

- Marc M. Susselman, Plaintiff's attorney sanctioned by the district court

Respondents and Appellee/Cross-Appellant below

- Gloria Harb
- Tom Saffold
- Rudy List
- Chris Mark
- Jewish Witnesses for Peace and Friends

Respondent and Appellant/Cross-Appellee, Plaintiff below

- Henry Herskovitz, original Plantiff

LIST OF PROCEEDINGS

U.S. District Court (E. D. Mich.)

No. 2:19-cv-13726

Brysk, et al. Plaintiffs v.
Herskovitz, et al., Defendants

Initial Proceedings

Order Granting Defendants' Motion to Dismiss:
August 19, 2020, Dkt No. 66.

Order Denying Motion for Reconsideration and Denying Motion for Leave to File Supplement:
September 3, 2020, Dkt. No. 69.

Proceedings following Remand and Dismissal

Order Granting in Part and Denying in Part Protester Defendants' Motion for Attorney Fees and Sanctions:
January 25, 2022, Dkt. No. 103.

Judgment For Attorney Fees:
January 25, 2022, Dkt. No. 104

U.S. Court of Appeals for the Sixth Circuit

Direct Appeal

No. 20-1870

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

Opinion and Judgment:
September 15, 2021, Dkt. No. 57
14 F.4th 500 (6th Cir. 2021)

Order denying petition for *en banc* rehearing:
November 2, 2021, Dkt. No. 83.

Appeal of Sanctions

United States Court of Appeals for the Sixth Circuit

No. 22-1075 (Lead), 22-1131, 22-1097

Brysk et al. v. Herskovitz et al.

Unpublished and Judgment, Affirmed:
February 22, 2023, Dkt. No. 49.

Order denying petition for *en banc* rehearing:
April 4, 2023, Dkt. No. 59.

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OPINIONS BELOW

The decision of the Court of Appeals affirming the district court's attorney fee award, dated February 22, 2023, is included below at App.1a, The decision of the U.S. District Court for the Eastern District of Michigan, (E.D. Mich. Jan. 25, 2022), awarding attorney fees is included below at App.13a.

JURISDICTION

The Court of Appeals entered Judgment on February 22, 2023 (6th Cir. 2023) (App.11a), *reh'g denied,* (6th Cir. April 4, 2023) (App.31a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1988(b)–Attorney's fees

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, the court, in its discretion, may allow the prevailing

party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

The instant lawsuit was commenced on December 19, 2019, against a group of protesters who were picketing in front of Beth Israel Synagogue ("Synagogue"), located in a residentially zoned district in Ann Arbor, Michigan. (Complaint, R.1) The protesters had been picketing the Synagogue every Saturday morning, starting in 2003, for then 16 years, using signs which included such anti-Semitic messages as "Resist Jewish Power"; "Jewish Power Corrupts"; "No More Holocaust Movies," commingled with signs relating to the Israel-Palestinian conflict. (Photographs of signs in front of the Synagogue, and the Israeli flag with the Jewish Star of David defaced, are attached as Exhibits 3 and 4 to the Complaint and to the First Amended Complaint ("FAC") (R.11))[1]

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[1] Several of the protesters are avowed Holocaust deniers, and have made public statements and writings denying that the Holocaust occurred, and blaming Israel for the September 11, 2001, attack on the Twin Towers in New York City. (*See* articles and photographs attached as Exhibits 1-4 to Brysk's Third Corrected Appellate Brief. (R.45)) (References to the district court's docket will be identified by the abbreviation "R."; references to

The lawsuit sought an injunction placing reasonable time, place and manner restrictions on the protesters' conduct, as well as damages for violating several federal statutes, 42 U.S.C. §§ 1981, 1982, 1983, 1985(3), and 1986. Two individuals who attended services at the Synagogue, and at an annex next to the Synagogue, were named as plaintiffs, Marvin Gerber and Dr. Miriam Brysk, a Holocaust survivor. Plaintiffs alleged in the FAC that seeing the signs as they approached and entered the Synagogue and annex in order to participate in the Sabbath prayer service caused them extreme emotional distress. Plaintiffs repeatedly made clear in the FAC and in their briefs they were not claiming the protesters' conduct was not protected by the 1st Amendment, and that they had the right under the 1st Amendment to express their anti-Israel and anti-Semitic sentiments anywhere in Ann Arbor, or elsewhere, but that their right to exercise their free speech to express these sentiments in proximity to a Jewish house of worship could legitimately be subject to reasonable time, place and manner restrictions imposed by an injunction, consistent with Supreme Court precedents.

The FAC also included claims against the City of Ann Arbor ("City") for failing to enforce an unambiguous sign ordinance which prohibited the placement of signs in the public right-of-way, which the protesters were violating. Plaintiffs maintained the sign ordinance was content and viewpoint neutral, and therefore could be enforced without violating the protesters' freedom of speech.

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the Sixth Circuit's docket will be identified by the abbreviation "Doc.")

The protesters filed a motion to dismiss the lawsuit pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). With respect to the 12(b)(1) motion, the protesters claimed the plaintiffs did not have standing to sue. On August 19, 2020, the district court entered an Order granting the motion to dismiss based on 12(b)(1). (R.66) The court held the plaintiffs' extreme emotional distress was not a sufficiently concrete injury to afford them standing to sue in the context of speech protected by the First Amendment. The court denied plaintiffs' motion for reconsideration and motion to submit supplemental authority on September 3, 2020. (R.69) Plaintiffs filed their Notice of Appeal on September 9, 2020. (R.70)

After briefing and oral argument, the Sixth Circuit Court of Appeals issued its Opinion and Judgment on September 15, 2021, 14 F.4th 500 (6th Cir. 2021). The Court, in a 2-1 decision, reversed the court's ruling regarding standing and held that plaintiffs' emotional distress sufficed to constitute an injury affording standing to sue. The Court proceeded to address the 12(b)(6) motion on the merits and held that the protesters' conduct was protected by the First Amendment, and accordingly held plaintiffs had failed to state a claim and dismissed the lawsuit.[2] Petitions for *en banc* rehearing separately filed by

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[2] After the decision was issued, the protesters added a new sign to their panoply of anti-Semitic signs, stating "Israel Attacked America 9/11/2001." They are continuing to picket in front of the Synagogue every Saturday morning, using the same anti-Semitic signs they have been using for the last 20 years.

Dr. Brysk and Mr. Gerber were denied by the Court on November 2, 2021.[3]

On October 13, 2021, the protesters filed a renewed motion for attorney fees and sanctions in the district court. (R.84) Dr. Brysk filed a Response to the protesters' renewed motion for attorney fees and sanctions. (R. 89)

On January 19, 2022, Dr. Brysk filed a petition for a *writ of certiorari* in the Supreme Court requesting that the Sixth Circuit's decision dismissing the lawsuit be reversed. On March 21, 2022, the Supreme Court issued an Order denying the petition for a *writ of certiorari.*[4]

On January 25, 2022, the district court issued its Order Granting In Part And Denying In Part Protestor Defendants' Motion For Attorney Fees And Sanctions. (R.103) App.13a. The court held that the claims in the FAC were frivolous and awarded the protesters $158,721.75 in attorney fees, to be paid jointly and severally by plaintiffs and their attorney.

Dr. Brysk filed an appeal on February 3, 2022. (R.107) The protesters filed a cross-appeal, seeking to reverse the district court's decision not to assess attorney fees against Brysk's attorney for purportedly violating 28 U.S.C. § 1927.[5]

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[3] After the Court dismissed the lawsuit, Mr. Gerber terminated Mr. Susselman and retained new counsel. Mr. Susselman continued to represent Dr. Brysk.

[4] Mr. Gerber's new attorney, Nathan Lewin, also filed a petition for *certiorari,* which the Court also denied.

[5] Gerber filed an appeal on February 14, 2022. (R.109) The protesters filed a cross-appeal on February 22, 2022, challenging

On October 18, 2022, Brysk's attorney filed a Complaint Of Judicial Misconduct By The Hon. Victoria Roberts Of The United States District Court For The Eastern District Of Michigan with the Sixth Circuit Court of Appeals. (Copy attached as Exhibit 1.) The Complaint alleged that nine rulings by Judge Roberts, taken together-including her ruling that the extreme emotional distress suffered by the Jewish plaintiffs caused by seeing the anti-Semitic signs in front of their house of worship every Saturday morning for, then 17 years, did not constitute a "concrete" injury sufficient to give them standing to sue, and her ruling that the lawsuit was frivolous and awarding attorney fees in the amount of $158,000 to the anti-Semitic, neo-Nazi protesters, to be paid jointly and severally by the Jewish plaintiffs, including a Holocaust survivor, and their Jewish attorney-had the distinct appearance of being biased against them and the product of either anti-Semitic sentiments on the part of Judge Roberts, and/or hostile sentiments against Israel. The Complaint was submitted to Chief Judge Jeffrey Sutton and designated as Complaint No. 06-22-90087. To date, the Complaint has not been dismissed and is still pending.

Despite Brysk's Request For Oral Argument, the Court issued a notice on February 21, 2023, that the appeal would be decided on the briefs, only. (Doc.48) On February 22, 2023, the Court issued an unpublished decision affirming the district court's award of attorney fees. (Doc.49) App.1a. Dr. Brysk and Marc Susselman filed a motion for rehearing and petition for *en banc*

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the court's denial of sanctions pursuant to 28 U.S.C. § 1927. (R.112)

review on March 9, 2023.[6] (Doc.52) On April 4, 2023, the Court issued an Order denying the petition for *en banc* review. (Doc.59) App.31a.

REASONS FOR GRANTING THE PETITION

I. THE LAWSUIT WAS FILED IN GOOD FAITH TO OBTAIN REASONABLE TIME, PLACE AND MANNER RESTRICTIONS ON THE PICKETING IN FRONT OF THE SYNAGOGUE, WHICH INCLUDED SIGNS WHICH WERE BLATANTLY ANTI-SEMITIC.

42 U.S.C. § 1988(b) states in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title … the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs …

In *Riverside v. Rivera,* 477 U.S. 561 (1986), the Court observed that one of the main purposes behind allowing attorneys who prevail in pursuing civil rights lawsuits to recover attorney fees is to serve as an incentive to encourage attorneys to represent individuals who have a colorable argument that their civil/constitutional rights have been violated, and in so doing, attorneys act as private attorneys general vindicating the rights not only of their clients, but of the public. Quoting from the Congressional Record, the Court stated, *id.* at 575, "If the citizen does not

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[6] Dr. Brysk passed away on May 28, 2022, at the age of 87. Her estate has not substituted in as Appellant.

have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney).

While recognizing a prevailing defendant may, under certain circumstances, be entitled to recover attorney fees under 42 U.S.C. § 1988, those circumstances should be narrowly construed so as not to punish a losing plaintiff simply by virtue of having lost under a sincere and genuine belief that his/her civil rights had been violated. Such an application of the fee shifting statute would be counter-productive to one of its main objectives-to foster challenges to civil rights violations by not inhibiting plaintiffs from taking the risk of litigation out of concern that, if they lose, they will have to reimburse the defendant's attorney fees. In keeping with this rationale, in *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n,* 434 U.S. 412 (1978), the Court stated, *id.* at 421-22:

> [A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.
>
> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage

> all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.
>
> … Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense. (Emphasis added; italics in the original; footnote omitted.)

The Court elaborated on its ruling in *Christiansburg* in *Hughes v. Rowe,* 449 U.S. 5 (1980), holding that the standard in *Christiansburg* applied to fee shifting under § 1988 as well, stating, *id.* at 15-16:

> Although arguably a different standard might be applied in a civil rights action under 42 U.S.C. § 1983, we can perceive no reason for applying a less stringent standard. The plaintiff's action must be meritless in the sense that it is groundless or without foun-

> dation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees.…
>
> … Allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, "groundless" or "without foundation" as required by *Christiansburg*. (Emphasis added.)

While acknowledging the above precedents, and purporting to adhere to them, the district court did the very opposite, ruling at *7 that plaintiffs' contention that the protesters' conduct was not absolutely protected by the 1st Amendment was frivolous, relying in large part on Judge Clay's concurrence. In ruling the First Amendment argument was frivolous, the court ignored plaintiffs' reliance on *Frisby v. Schultz,* 487 U.S. 474 (1988), in which the Supreme Court sustained the constitutionality of an ordinance restricting the right to picket in proximity to a private home located in a residential neighborhood. The Synagogue is likewise located in a residential neighborhood, and shares the character of a private home as a place of refuge. The court ignored plaintiffs' argument that the repeated picketing every Saturday morning for then 16 years made plaintiffs and their fellow congregants a captive audience, which the Court held in *Lehman v. City of Shaker Heights,* 487 U.S. 298 (1974), modified the scope of freedom of speech– no one has the right to force others to hear or see their message against the intended target's will. The court disregarded plaintiffs' distinguishing *Snyder v. Phelps,* 562 U.S. 443 (2011), and *Collin v. Smith,* 578 F.2d 1197 (7th Cir. 1978) (the Skokie neo-Nazi march

case), on the basis that in both cases the respective court held the plaintiffs did not constitute a captive audience, in *Snyder* because the signs were too far away from the funeral to be seen by the mourners; and in *Collin,* because the Holocaust survivors were not a captive audience, since they could avoid seeing the neo-Nazi marchers by simply not going to downtown Skokie where they intended to march. Here, the protesters, using their plainly visible anti-Semitic signs, were deliberately going where they knew they could find their Jewish targets; plaintiffs were not going out of their way to see the signs. The court ignored the factual question central to *Virginia v. Black,* 538 U.S. 343, 366 (2003), whether their repeated protests were conducted "with the purpose of threatening or intimidating" the congregants, given their use of anti-Semitic slurs and their display of the Israeli flag with the Star of David defaced.

The court also disregarded plaintiffs' reliance on *Ward v. Rock Against Racism,* 491 U.S. 781(1989), wherein the Court stated, *id.* at 791: "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.'" The protesters had ample other avenues in Ann Arbor where they could express their anti-Israel and anti-Semitic message without harassing plaintiffs and their fellow congregants as they entered their the Synogogue. The court disregarded plaintiffs' citation of *Madsen*

v. Women's Health Center, Inc., 512 U.S. 753 (1994), in which the Court held that restrictions placed on speech via an injunction is a constitutionally legitimate content neutral means to place narrowly tailored restrictions on intrusive speech in order to protect a countervailing significant government interest, in this case, to protect the right of plaintiffs and their fellow congregants to exercise their 1st Amendment freedom of religion without being harassed or bullied. The fact the Sixth Circuit rejected these arguments did not render them frivolous.[7]

The lawsuit addressed a conflict between (1) plaintiffs-two synagogue congregants, including a Holocaust survivor-exercising their First Amendment rights to worship on the Jewish Sabbath, without being verbally and visually harassed and (2) the protesters, who were exercising their First Amendment right to picket each Saturday for 16 years near the Synagogue as plaintiffs and other congregants entered the Synagogue to worship and could not avoid seeing the anti-Semitic signs insulting their race, ethnicity and religion.

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[7] The fact the Supreme Court denied Dr. Brysk's petition for *certiorari* was not a decision on the merits and did not constitute affirmance of the decision rejecting plaintiffs' 1st Amendment, or other arguments. *See Young v. Fire Ins. Exchange,* 338 U.S. 912, 919 (1950) ("Inasmuch … as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implications whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.")

The core of the lawsuit was (1) to apply reasonable "time, place, and manner" limitations on the defendant picketers; and (2) to seek enforcement of the content and viewpoint neutral Ann Arbor sign ordinance which prohibited the protesters' placement of their signs in the public right-of-way.

The Court's Opinion referred to the defendants' conduct as "anti-Israel picketing" and to defendants as "protesters." This highlights a misunderstanding of Jew-hatred and the emotional context of the lawsuit. The picketers expressed "anti-Israel" views, but they also expressed vile anti-Semitism. Their picket signs read "Jewish Power Corrupts" and "Resist Jewish Power." One sign offered a standard trope of neo-Nazis and Holocaust deniers: "No More Holocaust Movies." After the Court dismissed the lawsuit, they added a new sign, stating, "Israel Attacked America –9/11/2001." These Jew-hating expressions have nothing to do with Israel. They were directed at Jews—some Holocaust survivors—assembling to attend Sabbath services.

The picketers target Jews attending religious services in an Ann Arbor residential neighborhood. They make no distinction between "protesting" Israel and denigrating all Jews; the picketers do not differentiate between Jews and Israel supporters.

Protesting Jews at a synagogue is Jew-hatred—not "anti-Israel picketing." Zealously seeking reasonable "time, place, and manner, restrictions" of manifest Jew-hatred, restrictions permissible under civil rights statutes and constitutional law, is not, as the district court labeled it, a "frivolous" undertaking, but is consistent with the ruling in *Madsen, supra,* where the Court held the First Amendment right of anti-abortion

protesters in proximity to an abortion clinic could be protected by an injunction placing reasonable time, place and manner restrictions on their First Amendment right, at the same time they protected the (then) Fourth and Fourteenth Amendment rights of women seeking an abortion. Though plaintiffs ultimately were unsuccessful, they were entitled to their "day in court."

Plaintiffs stated repeatedly in their pleadings and briefs that they recognized the protesters had a First Amendment right to express both anti-Israel and anti-Semitic opinions on public streets, but not an unrestricted right to do so in proximity to a Jewish house of worship every Saturday morning for, then, 16 years. Plaintiffs argued that the use of hate speech in proximity to any house of worship of any religion under the purported guise of addressing issues of public concern-whether they be anti-Semitic protests in proximity to a synagogue; or anti-Muslim protests in proximity to a mosque; or anti-Christian protests in proximity to a Protestant or Catholic church; or racist anti-Black protests in proximity to a predominantly African-American church–were not entitled to the unqualified protection of the First Amendment and were not impregnable against the entry of any injunction placing reasonable time, place and manner restrictions on the protesters' conduct.

The Court's Opinion strongly disapproved of the too-broad allegations of possible judicial bias. The allegations, however, were based on plaintiffs' honest perception of a series of adverse rulings. (Doc.45, Page ID #48-61) As the Court stated in *Liteky v. United States,* 510 U.S. 540, 545 (1994):

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. (Italics in the original; emphasis added.)

Justice Kennedy, joined by Justices Blackmun, Stevens and Souter, concurring, stated, *id.* at 558:

> The statute does not refer to the source of the disqualifying partiality. And placing too much emphasis upon whether the source is extrajudicial or intrajudicial distracts from the central inquiry. One of the very objects of law is the impartiality of its judges in fact and appearance.... The relevant consideration under § 455(a) is the appearance of partiality ... not where it originated or how it was disclosed.... (Emphasis added; citation omitted.)

In *Davis v. Board of School Com'rs of Mobile City,* 517 F.2d 1044 (5th Cir. 1975), the Court articulated similar concerns, stating, *id.* at 1051:

> [T]here could be a case where the cause of the controversy with the lawyer would demonstrate bias of such a nature as to amount to a bias against a group of which the party was a member – *e.g.*, all Negroes, Jews, Germans, or Baptists. This, then

> would be bias of a continuing and "personal" nature over and above mere bias against a lawyer because of his conduct.

See also Wolfson v. Palmieri, 396 F.2d 121, 124 (2d Cir. 1968) ("[T]o establish the extra-judicial source of bias and prejudice would often be difficult or impossible and this is not required. Comments and rulings by a judge during the trial of a case may well be relevant to the question of the existence of prejudice." (Emphasis added.); *King v. United States District Court for the Central District,* 16 F.3d 992, 994 (9th Cir. 1994) ("[W]e have made it clear that there is an exception to the general rule that courtroom statements are not enough to warrant recusal and that '*extrajudicial*' bias is required. That exception is applicable when the petitioner can demonstrate through expressions of opinion and rulings made *in the course of judicial proceedings* that the bias is 'pervasive.'" Italics in the original; emphasis added.)

The Court's Opinion asserted that plaintiffs' perceptions employed, in some part, "offensive, essentialist stereotypes." At the same time, however, it characterized the picketers' sentiments as "anti-Israel." The Opinion did not mention the signs expressing Jew-hated and Holocaust denial—signs displaying the picketers' "offensive, essentialist stereotypes" which do not differentiate between Jews and Israel supporters. The picketers' "essentialist" Jew-hatred was a main factor in the congregants' efforts to secure reasonable time, place, and manner restrictions on the confrontational picketing.

The panel may have concluded that the perception of judicial bias was overwrought and oversensitive to perceived judicial disregard for the manifest and

confrontational Jew-hatred, and that the congregants were overzealous in self-defense. But the panel had no basis to doubt plaintiffs' sincerity in the circumstances of the case.

Zealous, good-faith advocacy on behalf of clients is a lawyer's professional responsibility. As held in *Christiansburg, supra, Hughes v. Rowe, supra,* and *Riddle v. Egensperger,* 266 F.3d 542 (6th Cir. 2001), the context in which zealous advocacy must be most rigorously protected is in civil rights litigation where, as here, there are conflicting constitutional rights *and* controversial and emotional issues, exacerbated by vile hate speech targeting Jews in an era of rising anti-Semitism in words and deeds. While the principle that the 1st Amendment affords protection even to "the thought that we hate," *Girouard v. United States,* 328 U.S. 61, 68 (1946), quoting from *United States v. Schwimmer,* 279 U.S. 644, 655 (1929) (J. Holmes, dissenting), entails that we must tolerate hate speech, it does not entail that we must reward and champion hate speech by requiring that its purveyors' attorney fees be paid by those who seek to limit-not entirely expunge, but limit-the contexts in which it may be purveyed, by requiring that an 87 year-old Holocaust survivor compensate a group of neo-Nazi, anti-Semites their attorney fees.

II. THE FEDERAL CLAIMS PLAINTIFFS PLED WERE SUPPORTED BY SUFFICIENT LEGAL AUTHORITY AS NOT TO BE FRIVOLOUS.

Dr. Brysk argued that the district court's conclusion that the claims pled in the FAC were frivolous was directly contrary to the majority's ruling in *Gerber*. The majority, in fact, asserted that none of

the legal claims pled in the FAC was frivolous, stating, 14 F.4th at 508:

> 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 brackets: substantive due process, religious liberty, general civil rights, and a constitutional right to petition the government. (Emphasis added.)

In making this ruling, the Court used the word "claims," not "contentions" or "positions." The word "claims" referred to the legal claims pled in the FAC, not to the "contention" or "position" that they had standing to sue, or that the protesters' conduct was not protected by the 1st Amendment. The fact that

the word "claims" referred to all of the legal claims pled in the FAC was reinforced in the next paragraph where the Court repeated the use of the word "claims," stating, "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." (Emphasis added.) The reference to "general civil rights" referred to the claims plaintiffs pled charging the protesters with violating 42 U.S.C. §§ 1981, 1982, 1983, and 1985(3).

In their decision affirming the district court's attorney fee award, the Court back-tracked from this position, stating, at *4-5:

> The fee issue was not before us in *Gerber;* what was before us was a question of subject matter jurisdiction. We considered only whether the complaint's deficiencies were so weak that they "raise[d] a jurisdictional problem." *Id.* Courts may dismiss a complaint for lack of subject matter jurisdiction due to the inadequacy of a federal claim "only when the claim is so insubstantial, implausible, foreclosed by prior decisions of [the] Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89 (1998) (quotation omitted). That does not happen often; it happens indeed only in vanishingly rare settings. That inquiry sets a much higher bar than *Chritiansburg's* "frivolous, unreasonable, or without foundation" standard. 434 U.S. at 421. The fee award cases confirm as much. We have routinely

> approved the award of fees to prevailing defendants without finding that the defects in the merits of the claims stripped the curt of subject matter jurisdiction.... (Citations omitted.)

This explanation was contrary to the Court's explicit statement in *Gerber* that the claims, themselves, as pled in the FAC, were not "frivolous." The Court did not state that the claims were not "so insubstantial, implausible, foreclosed by prior decisions" as to deprive the district court of jurisdiction. The Court stated that the claims were not frivolous. The Court proceeded in its fee award decision to introduce a *deus ex machina* two-tier level of "frivolousness"–a substantial level of "frivolousness" which deprives a court of jurisdiction; and a less substantial level of "frivolousness," which warrants the imposition of attorney fees. There is no Supreme Court precedent, or precedent in any other Circuit Court, which supports this two-tiered level of "frivolousness" analysis.

At *3 of its Opinion, the Court proceeded to assert that each of the federal claims pled in the FAC lacked one or more elements necessary to state a claim and was therefore frivolous. But this was not what the Court stated in *Gerber*. Rather, in *Gerber,* the Court stated that each of the claims was "incorrect," or "erroneous"; the majority did not state that any of the legal claims was "frivolous." A review of the FAC indicates the Court's revised assertion in its affirmance of the fee award is not accurate:

a. In Count I, plaintiffs pled a claim against the protesters under 42 U.S.C. § 1981, which protects all persons in the United States to full and equal benefits of all laws as enjoyed by white citizens and applies to

nongovernmental discrimination, *i.e.*, without state action. Plaintiffs cited *Shaare Tefila Congregation v. Cobb,* 481 U.S. 615 (1987), which held that under § 1981, Jews qualified as a race entitled to the statute's protection. They cited *Chapman v. Higbee Co.,* 319 F.3d 825 (6th Cir. 2003), *cert. denied,* 542 U.S. 945 (2004), which held § 1981 applied to discriminatory acts by private citizens based on race and ethnicity of others.

In ¶ 83 (a)-(j), anticipating the protesters would claim their conduct was protected by the First Amendment, plaintiffs cited doctrines which countered that claim, including the captive audience doctrine and the prohibition against targeted residential picketing, with ample case authorities. Plaintiffs distinguished the rulings in *National Socialist Party v. Skokie,* 432 U.S. 43 (1977); *Collin v. Smith, supra*; and *Snyder v. Phelps, supra*, because the courts held that the intended recipients of the messages did not constitute a captive audience. In *Skokie* and *Collin,* the Jewish residents could avoid seeing the neo-Nazis marching by avoiding the parade site in downtown Skokie. In *Snyder,* the funeral attendees could not see the homophobic signs because they were too far away to read. Here, plaintiffs and the congregants were not voluntarily going to where the protesters were protesting; the protesters were deliberately targeting them by going to the Synagogue, where plaintiffs and their fellow congregants, with their children, could not avoid seeing the signs, which were being deliberately placed in their field of vision. Plaintiffs also cited decisions which upheld the constitutionality of statutes which placed restrictions on protests being conducted by the Westboro Church at funerals: *Phelps-*

Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008); *Phelps-Roper v. City of Manchester,* 697 F.3d 678 (8th Cir. 2012).

The Court stated that plaintiffs' claim failed because there was no allegation the congregants "lost out on the benefit of any 'law or proceeding.'" But the right to exercise freedom of religion under the First Amendment surely qualifies as a law entitled to protection under § 1981 against the harassment of private citizens who are targeting Jews, threatening their personal security based on their Jewish race.

Even if the claim failed to state a cognizable claim, it was not so devoid of merit as to constitute a frivolous, egregiously erroneous claim, deserving the sanction of § 1988, particularly given the admonition in *Johnson v. City of Shelby,* 574 U.S. 10, 12 (2014), that litigants are not required to plead in such detail as "to stave off threshold dismissal for want of an adequate statement of their claim."

b. In Count II, plaintiffs pled a claim against the protesters for violating 42 U.S.C. § 1982, which protects the right of all citizens to "inherit, purchase, lease, sell, hold and convey real and personal property." The statute applies to conduct by private actors. *Jones v. Mayers Co.,* 392 U.S. 409 (1968). The reference in the statute to "hold[ing]" real property applies to a citizen's use of real property, as well as the right to come and go from the property as a guest, even if the citizen does not possess an ownership interest in the property, and therefore applied to plaintiffs even if they did not own the property. *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,* ___ U.S. ___, 113 S.Ct. 1390

(1993); The Court stated this claim was not cognizable because there was no allegation that "the protesters ever blocked them from using their synagogue." This assertion ignored *Olzman v. Lake Hills Swim Club, Inc.,* 495 F.2d 1333 (2d Cir. 1974), cited in ¶ 95, in which the Court held that the change in the rules by the board of the Lake Hills Swim Club reducing–not eliminating-the number of days on which a member of the club could bring Black children to the club as guests violated § 1982.

c. In Count V, plaintiffs alleged the protesters' conduct violated 42 U.S.C. § 1983. The Court asserted that this claim failed because "it lacked any semblance of state action." This assertion disregarded plaintiffs' contention that the failure of the City to enforce its sign ordinance over a 16-year period constituted such deliberate indifference by the City as to constitute the protesters as state actors under the *nexus* test set forth in *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 152 (1970), and *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 725 (1961). (¶ s 119-121) In order to determine whether this test applied, the Court had to analyze the City's sign ordinance to determine if it prohibited placing signs in the public right-of-way, and whether the ordinance was content and viewpoint neutral. The Court never conducted such an analysis.

d. The Court asserted the civil conspiracy claims pled in Counts III, VI, VII and VIII failed because plaintiffs "did not plead any 'facts showing a single plan or a conspiratorial objective to deprive them of their rights." This assertion disregarded the cases cited in Count III, thereafter incorporated by reference: "[S]uch 'conspiracies are by their very nature secretive

operations,' and may have to be proven by circumstantial, rather than direct evidence." *Pangburn v. Culbertson,* 200 F.3d 65, 73 (2d Cir. 1999). "Participation in the formation of the conspiracy was not essential … to culpability. If, after it was formed, [the governmental officer] aided or abetted it with an understanding of its purpose, he became a party to it." *Burkhardt v. United States,* 13 F.2d 841, 842 (6th Cir. 1926). These citations were sufficient for the conspiracy claims not to be deemed frivolous under *Johnson, supra.*

e. In Count VII, plaintiffs pled a claim against the protesters under 42 U.S.C. § 1985(3), which applies to any conspiracy of private citizens which is motivated by a class-based animus relating to race or religion. *Griffin v. Breckenridge,* 403 U.S. 88 (1971); *Bray v. Alexandria Clinic,* 506 U.S. 263 (1993); *Brokaw v. Mercer County,* 235 F.3d 1000 (7th Cir. 2000). It applies if the conspiracy interferes with the intra-state travel of citizens, without state action. *Spencer v. Casavilla,* 903 F.2d 171 (2d Cir. 1990); *Selevan v. New York Thruway Authority,* 584 F.3d 82 (2d Cir. 2009); *Johnson v. City of Cincinnati,* 310 F.3d 484 (6th Cir. 2002). (FAC, ¶ s 130-132) The fact the protesters had been meeting every Saturday morning, at the same place and time, for 16½ years was evidence they were engaging in concerted conduct pursuant to a single plan, constituting a civil conspiracy. The FAC alleged in ¶ 20 that the anti-Semitic signs caused Mr. Gerber such emotional distress he was reluctant to travel to the Synagogue, thus interfering with his intra-state travel.

The Court's rejection of these claims, as close as they came to stating cognizable claims, does not

entail they were "frivolous, unreasonable, or without foundation." The conclusion the claims missed the mark and were therefore frivolous constituted the very *post hoc* reasoning which the Supreme Court warned against in *Christiansburg, supra,* 434 U.S. at 422: "This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success."

III. THE SIXTH CIRCUIT IMPROPERLY RETALIATED AGAINST DR. BRYSK'S ATTORNEY FOR RAISING THE ISSUE OF WHETHER JUDGE ROBERTS' DECISIONS, TAKEN TOGETHER IN THEIR ENTIRETY, HAD THE DISTINCT APPEARANCE OF BEING ANTI-SEMITIC AND/OR ANTI-ISRAEL.

In her appellate briefs, Dr. Brysk identified a series of nine decisions by Judge Roberts which raised the distinct appearance that she was biased against plaintiffs and their attorney, based on a combination of their being Jewish and/or conscious, or unconscious, hostility towards the State of Israel and its treatment of the Palestinians. These decisions included her initial decision that their emotional distress at seeing the anti-Semitic signs in front of their house of worship week after week did not constitute a sufficiently "concrete" injury to give them standing to sue; her refusal to allow them to file a motion for a preliminary injunction placing reasonable time, place and manner restrictions on the protesters' conduct; her refusal to allow plaintiffs to file a motion for partial summary judgment regarding the interpretation of the City's sign ordinance, which they maintained was unambiguous and prohibited the protesters from placing their signs in the public right-of-way and was content and viewpoint neutral, therefore enforceable

against the protesters without violating their freedom of speech; her refusal to allow plaintiffs to file a motion for leave to file a Second Amended Complaint in order to name two additional plaintiffs and to add a claim against the City of violating the Equal Protections Clause by failing to enforce the sign ordinance in an even-handed manner; and finally, her outrageous, and frankly obscene, decision ordering that plaintiffs, including a Holocaust survivor, pay the anti-Semitic, neo-Nazi protesters who had been, and were continuing to, verbally berate, insult, and degrade their religion and ethnicity, week after week, year after year, attorney fees in the amount of $158,721.75.

While the appeal was pending. Brysk's attorney filed a Formal Complaint with the Sixth Circuit claiming that by her decisions, taken together in their entirety, Judge Roberts had violated several of the Canons of the Code of United States Judges (Exhibit 1). In the Complaint, Mr. Susselman stated, at pp. 7-11:

> One more issue calls for clarification. Judge Roberts and Judge Clay are African-American. The undersigned wishes to dispel any suspicion or thought that he is filing this Complaint based on racial bias against African-Americans, or because he is a sore loser. The undersigned has supported the struggle for civil rights of African-Americans since he was in elementary school. He is vehemently opposed to racism of any kind, against any racial, ethnic or religious group, and has acted through-out his life in accordance with his convictions. He has been practicing law for now 43 years, in the course of which he has represented African-

Americans in litigation in federal and state court, including representing an African-American female police officer employed by the Pontiac Police Dept. in a lawsuit in federal court alleging she had been discriminated against based on her race and gender, a lawsuit which resulted in a favorable monetary settlement for the plaintiff. And an African-American widow of an African-American public school teacher who sued in a Michigan circuit court claiming that the school district had failed to honor a life insurance policy pursuant to which she was entitled to life insurance proceeds, which resulted in a judgment in her favor.…

This Complaint is not motivated by any racial animus towards Judge Roberts; or Judge Clay, nor by any retaliatory motive for the adverse decision which was entered by the Sixth Circuit against the Plaintiffs. It is motivated by his commitment to seeing that justice is done, regardless of the race, ethnicity, or religion of the litigants, and regardless of the race, ethnicity, or religion of the presiding judge. On the lintel above the United States Supreme Court, the following message is engraved: "Equal Justice Under Law." This means equal justice regardless of the race, religion, or ethnicity of the litigants or their attorney, and regardless of the race, religion, or ethnicity of the presiding judge. Equal justice if the litigants are African-American, and/or their attorney is African-American, and the judge

is Caucasian and/or Jewish; equal justice which demands the abrogation of any appearance of impropriety. And it applies with equal force to an African-American judge presiding over a legal proceeding involving litigants who are Caucasian and/or Jewish, and whose attorney is Caucasian and/or Jewish. The fact that Judge Roberts is African-American does not insulate her from criticism that she has failed to adhere to her obligation to comply with the Canons of the Code of Conduct for United States Judges. And as distasteful and discomforting it may be for her fellow jurists to evaluate whether she has in fact complied with that obligation, their own obligation to uphold equal justice under law takes priority over any sense of fellowship they may have for a fellow jurist.

* * *

The issues raised in this Complaint are extremely serious, and, as stated above, go to the very heart of the administration of justice in the federal courts. The issues may not be rationalized away, ignored or swept under the carpet without doing serious harm to the administration of justice. If a scintilla of bigotry or racism of any kind insinuates itself into a judge's rulings, then the administration of justice suffers immeasurable damage. This is particularly true today, with respect to anti-Semitism. Acts and expressions of anti-Semitism are on the rise here in the United States, and around the world.

See, e.g., "ADL Audit Finds Antisemitic Incidents in United States Reached All-Time High in 2021" (https://www.adl.org/news/press-releases/adl-audit-finds-antisemitic-incidents-in-united-states-reached-all-time-high-in); "The Rise of Global Anti-Semitism" (https://www.wilsoncenter.org/event/the-rise-global-anti-semitism); "Antisemitism on the rise: A research roundup" (https://journalistsresource.org/home/antisemitism-on-the-rise-an-explainer-and-research-roundup/); "Congress's Anti-Semitism Act Won't Stop Hate Crimes Against Jews" (https://foreignpolicy.com/2019/05/01/congresss-anti-semitism-act-wont-stop-hate-crimes-against-jews/?gclid=CjwKCAjwqJSaBhBUEiwAg5W9py56sWwsOD01QFOj20pD; "Swastika carved into State Department elevator spurs investigation" (https://www.washingtonpost.com/national-security/2021/07/27/state-department-swastika-carving/)

…

It has been a mere 77 years since the Holocaust and chants of "Never Again" and "Never Forget" were being uttered publicly and printed in the press. We have already begun to forget. Vigilance against its ugly re-emergence in a federal judge's rulings must be addressed and condemned with expedition, lest anti-Semitism, and the perception that the expression of bigotry and racism against Jews no longer matters, is regarded as acceptable in our judiciary and in our society.[8]

> [8] The undersigned recognizes and acknowledges that Judge Roberts has a sterling history as a practicing attorney, former President of the State Bar of Michigan, and jurist, and is highly regarded by attorneys and fellow jurists alike. But even highly competent and respected judges can misstep, and can be guilty of violating the Code of Conduct for United States Judges, as former Chief Judge Kozinski could attest.

The Complaint is still pending, and appears, for all intents and purposes, to have been deep-sixed by the Court. Instead of directly addressing the question raised by Mr. Susselman in the appellate briefs and in the Formal Complaint regarding the distinct appearance of bias displayed in Judge Roberts' rulings, the Court lashed out at Mr. Susselman in their decision, accusing Mr. Susselman of being unprofessional for even having had the temerity to raise the question.[8] The Court stated, at *7-8:

> Lastly, Susselman, of his own accord, accuses the district court of antisemitism. The basis for this serious allegation? A "series of questionable rulings." Dr. Brysk's Br. 32. Not content to stop there, Susselman accuses Judge Clay of racially motivated hypocrisy too. Well-founded allegations of judicial bias, we appreciate, deserve a serious-minded

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[8] *See* photograph of Dr. Michael Siegel, at App.77a, forced to march through the streets of Munich in March, 1933, with a sign draped around his neck: "Ich bin Jude, aber ich werde mich nie mehr bie der Polizei beschweren" – "I am a Jew, but I will never again complain to the police."

> accounting. But Susselman grounds his allegations almost entirely in adverse rulings, which rarely "constitute a valid basis for a" claim of judicial bias. *Liteky v. United States,* 510 U.S. 540, 555 (1994). The only external source for the allegation is a study supposedly finding higher-than-average rates of antisemitic attitudes in the African American community. From this, Susselman concludes that the district judge-who is African-American-must have been biased against the congregants. This argument rests on offensive, essentialist stereotypes. It involves enormous logical leaps. And it disserves Susselman's client by distracting from the merits of the fee issue. If this is the quality of Susselman's advocacy, the fee award hardly comes as a surprise. Susselman's bias arguments "find no support in the record," *Dixon v. Clem*, 492 F.3d 665, 679 (6th Cir. 2007), and are "not well received," *Gerber,* 14 F.4th at 519 n.4 (Clay, J., concurring) (quotation omitted).

This was a distortion of the argument which was presented in Brysk's appellate briefs. In *Liteky* the Court in fact acknowledged that under some circumstances even intrajudicial comments, which would include court decisions, *will* satisfy the appearance of impropriety standard "if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." That was precisely what Dr. Brysk was claiming was the case with Judge Roberts' series of one-sided rulings. Judges Kennedy, Blackmun, Souter and Stevens, in their concurrence, agreed that

under certain circumstances evidence of intrajudicial bias would be sufficient to prove the standard had been violated. Nowhere in their decision did the Court make any effort to address the individual instances which were cited as cumulatively demonstrating a distinct bias.

The studies-and there were more than one-were offered not to prove Judge Roberts was anti-Semitic or harbored anti-Israel sentiments, but to cite empirical support for the proposition that such sentiments were not alien in the African-American community, and to account for a particular statement she made granting the motion to dismiss, as stated in the Corrected Third Appellate Brief, Doc.45, Page ID #54-57:

> 7. In her decision dismissing the lawsuit, Judge Roberts stated, R.66, Page ID#1905, "Indeed, the First Amendment more than protects the expressions by Defendants of what Plaintiffs describe as 'anti-Israeli, anti-Zionist, an[d] antisemitic.'" (Emphasis added.) Why would this particular speech be more protected than other speech? There are three possibilities. Judge Roberts could have been referring to the anti-Semitic speech as deserving more protection; or to the anti-Israeli, anti-Zionist speech as deserving more protection; or to the combination of the two as deserving more protection. All three explanations have support in the empirical data. A 2016 survey by the Anti-Defamation League indicated that the rate of anti-Semitism was significantly higher in the African-American community (23%) than in the general population (14%).... A study

published in the Social Science Journal 46 (2009), analyzing James Baldwin's 1967 essay, "Negroes Are Anti-Semitic Because They Are White," concluded: "One analysis indicates that while some anti-Semitic attitudes are strongly associated with anti-White attitudes, African-Americans are still significantly more likely than White, Latino, and Asian groups to express anti-Semitic views when the level of anti-White sentiment is held constant ($p < .05$)." https://scholar.harvard.edu/files/jsimes/files/ssj_simes_2009.pdf. This higher rate of anti-Semitism in the African-American community has been linked to the Israeli-Palestinian conflict and the tendency of African-Americans to identify with the Palestinians as the victims of Israeli oppression, which they equate to their oppression as the victims of slavery and segregation under the Jim Crow laws. ("'We Know Occupation': The Long History of Black Americans' Solidarity with Palestinians," POLITICO, https://www.politico.com/news/magazine/2021/05/30/black-lives-matter-palestine-history-491234.) In the publication "Black Antisemitism in America: Past and Present," https://www.inss.org.il/publication/black-antisemitism/, the author writes, at *19: "Although the [Black Lives Matter] movement has generally levelled its charges at 'Zionists,' frequently antisemitism appears undisguised. Updating the centuries-old blood libel, BLM marchers chanted, 'Israel, we know you kill children too!' and signs proclaimed, 'Defend

> Gaza: the New Warsaw Ghetto' – the Jews cast as the Nazis annihilating innocent people of color (Lapkin, 2020; Torok, 2021)." … The stigma of this country's reprehensible history of slavery and its continuing residual effects does not give Judge Roberts the liberty to express her own bias in her rulings, any more than the rulings of a Caucasian judge which had the distinct appearance of anti-Black bias would be tolerated. This is by no means a claim or suggestion that Judge Roberts is a neo-Nazi, or that she consciously or subconsciously supports Hitler's Final Solution. If, however, Judge Roberts' rulings, and her statement that the Protesters' speech was "more than protected" by the First Amendment, were in any way the product of empathy with the Palestinian cause and/or antipathy for Israel and Zionism, those rulings were improper. A federal judge should not allow her personal sentiments regarding international events–concealed sentiments which go unrebutted-to influence her decisions regarding the rights of the litigants before her.

Contrary to the Court's assertion, this argument did not rely on "offensive, essentialist stereotypes." In fact, the studies' conclusions were contrary to the expected stereotypical sentiment that as the victims of racism, African-Americans would be sympathetic to others, such as Jews, who were also the victims of racism for centuries.

The citation of *Dixon v. Clem,* 492 F.3d 665 (6th Cir. 2007), was inapposite. In *Dixon,* the trial court

sanctioned the appellant's attorney for violating 28 U.S.C. § 1927, by "multiply[ing] the proceedings unreasonably and vexatiously." Judge Roberts declined to charge Mr. Susselman with violating 28 U.S.C. § 1927, having already found that plaintiffs had violated 42 U.S.C. § 1988. Moreover, as demonstrated in Brysk's Response to the Appellees' Cross-Appeal, Doc.45, Page ID #63-71, and on pp. 35-37 of the Formal Complaint, there was no basis for charging Mr. Susselman with violating 28 U.S.C. § 1927. All of the motions, responses, and briefs he filed were either in response to motions the defendants had filed, or were filed in accordance with the protocol which Judge Roberts had imposed. The Court noted in *Dixon* the appellant's attorney had been "reprimanded and/or sanctioned on at least three separate occasions by three separate federal courts, including this one." *Id.* at 678. Prior to the Sixth Circuit's decision, Mr. Susselman had never been sanctioned by any court, federal or state, in his 44 years of practicing law. He had never been the subject of a bar grievance investigation; he had never been sued for legal malpractice. The Court chose to tarnish his professional reputation for the simple reason that he had the temerity to question the impartiality of an African-American federal judge.

Rather than dealing with the claim that Judge Roberts' rulings had the distinct appearance of being biased against plaintiffs and their attorney, the Court retaliated against Mr. Susselman, in effect accusing him of being racist for having even raised the issue. But Judge Roberts was not immune from having her rulings challenged as violating the Code of Conduct of United States Judges because she is African-

American. Her race was not the issue; her conduct was. The lintel of the Supreme Court states, "Equal Justice Under Law"–equal justice regardless the race, religion, ethnicity, gender, or age of the litigants, as well as of the judge(s) presiding over the case. Judge Roberts' race did not give her license to allow her biases, whether conscious or subconscious, to play any role in her rulings against plaintiffs or their attorney.

On August 26, 1963, standing in front of the Lincoln Memorial, Dr. King gave his eloquently moving "I have a dream speech": "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character." It is by the content of our character that we all should be judged, with no presumptions for or against us based on the color of our skin, our race, our religion, our ethnicity, our gender, or our age. None of these characteristics should be a basis for any adverse judgments; nor should they be a basis for refraining from judgment. Expiation for the sins of slavery and past discrimination will not be accomplished by introducing double standards. Judge Roberts' race or skin color did not vitiate the issue regarding whether her decisions showed a distinct bias against plaintiffs and their attorney based on their Jewish religion or heritage. What was at issue was the content of her character, and that content was revealed in the only available evidence-her distinctly biased rulings. J'accuse!

CONCLUSION

Plaintiffs' civil rights claims, though rejected, were brought in good faith, warranted by existing law and the facts. The Court's decision affirming the fee award misapplied Supreme Court precedents and unfairly and harshly judged plaintiffs and their *pro bono* counsel.

More broadly, the Opinion and fee award, if not reversed, will *undesirably* (1) *chill* future civil rights plaintiffs from seeking to vindicate their constitutional and statutory rights; (2) *chill pro bono* and other counsel from representing civil rights plaintiffs, particularly in controversial and emotional contexts; and (3) *chill* zealous airing of facts that create the appearance of injustice, particularly in circumstances involving perceived unconscious judicial bias.

Even if bias perceptions are misguided and oversensitive, litigants are entitled to air and be fully heard on their perceptions of judicial bias because, as the axiom goes, justice must satisfy the appearance of justice. The courthouse doors should be open to claims of perceived judicial bias—even if actual bias is rare—to foster the integrity of the judicial process and public confidence in the process.

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 awarding attorney fees to the anti-Semitic, neo-Nazi protesters constitutes a condoning disregard for this dangerous trend. The decision is profoundly dangerous and wrong. It must be reversed.

Respectfully submitted,

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