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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (FEBRUARY 22, 2023)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARVIN GERBER (22-1097/1131);
DR. MIRIAM BRYSK (22-1075/1131),

Plaintiffs-Appellants/Cross-Appellees,

v.

HENRY HERSKOVITZ; GLORIA HARB;
TOM SAFFOLD; RUDY LIST; CHRIS MARK,

Defendants-Appellees/Cross-Appellants.

Case Nos. 22-1075/1097/1131

On Appeal from the United States District Court
for the Eastern District of Michigan

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

OPINION

SUTTON, Chief Judge.

Congregants of the Beth Israel Synagogue in Ann Arbor wanted to put a stop to the anti-Israel picketing of their Saturday worship services. They sued the protesters, city, and city officials. After we

affirmed the dismissal of the complaint, the district court granted attorney's fees to the protester defendants under 42 U.S.C. § 1988. Finding no abuse of discretion, we affirm.

I.

After enduring sixteen years of anti-Israel picketing at their weekly worship service, congregants of the Beth Israel Synagogue had had enough. Two congregants, Marvin Gerber and Dr. Miriam Brysk, filed a lawsuit, seeking to enjoin the protests.

The district court dismissed their complaint for lack of standing. *Gerber v. Herskovitz*, No. 19-13726, 2020 WL 4816145, at *4 (E.D. Mich. Aug. 19, 2020). We affirmed, but on different grounds. *Gerber v. Herskovitz*, 14 F.4th 500, 512 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1369 (2022), *and cert. denied*, 142 S. Ct. 2714 (2022). We held that the congregants had standing, but the complaint nevertheless failed to state a claim under Civil Rule 12(b)(6). *Id.* at 506, 512. Judge Clay concurred. He reasoned that the congregants lacked standing because they had not shown the invasion of a legally protected interest and they lacked even "a colorable legal claim" against the protesters. *Id.* at 514-15 (Clay, J., concurring).

Back in the district court, the prevailing protesters moved for attorney's fees under 42 U.S.C. § 1988 and for sanctions under 28 U.S.C. § 1927 and the court's inherent authority. The district court granted the motion in part, awarding $158,721.75 in attorney's fees. The two congregants separately appealed, and the protesters filed a protective cross-appeal.

II.

A court may award reasonable attorney's fees to a prevailing civil rights defendant after finding the lawsuit "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *see also* 42 U.S.C. § 1988; *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (per curiam) (applying *Christiansburg* to § 1983 actions). Two competing principles guide today's review. On the one hand, this court reviews fee awards for abuse of discretion. *Garner v. Cuyahoga Cnty. Juv. Ct.*, 554 F.3d 624, 634 (6th Cir. 2009). On the other hand, awarding fees to a prevailing civil rights defendant is "an extreme sanction, and must be limited to truly egregious cases of misconduct." *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986).

(As a side note, the district court awarded fees under § 1988 jointly and severally against the congregants and one of their attorneys, Marc Susselman. An award under § 1988 "may only be charged against the losing party," however, "not the party's attorney." *Smith v. Detroit Fed'n of Tchrs. Loc. 231*, 829 F.2d 1370, 1374 n.1 (6th Cir. 1987); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761 & n.9 (1980). But the congregants opted not to raise this non-jurisdictional issue on appeal, leaving us to accept the parties' framing of the issue.)

The district court did not abuse its discretion by awarding fees to the prevailing protesters. The congregants brought seven federal civil rights claims against the protesters. Each claim plainly lacked one or more elements required under settled precedent. The § 1981 claim lacked any allegation that the congregants "lost out on the benefit of any 'law or proceeding.'"

Gerber, 14 F.4th at 510. The § 1982 claim did not implicate a property interest, because the protesters never prevented the congregants "from using their synagogue." *Id.* at 511. The § 1983 claim lacked any semblance of state action. *Id.* So too for the § 1985(3) claim. *Id.* And the civil conspiracy claims under §§ 1982, 1983, and 1985(3) failed in short order because the congregants did not plead any "facts showing a single plan or a conspiratorial objective to deprive them of their rights." *Id.*

These kinds of unsupported claims permitted the district court to treat them as frivolous under *Christiansburg*. "[U]nambiguous" precedent "clearly barred" each civil rights claim. *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 183 (6th Cir. 1985). Through even the most cursory legal research, the congregants would have found that "no case law supported [their] arguments under §§ [1981, 1982, 1983, and] 1985." *Royal Oak Ent., LLC v. City of Royal Oak*, 316 F. App'x 482, 487 (6th Cir. 2009). And the congregants did not identify any reasonable basis for expanding the well-settled precedent interpreting and applying these statutes. Nor did complicating questions of fact arise during the pendency of the case. *See Lowery v. Jefferson Cnty. Bd. of Educ.*, 586 F.3d 427, 438 (6th Cir. 2009) (finding "legitimate" questions of fact and law precluded fee award). With no factual or legal foundation to speak of, the civil rights claims against the protesters meet the *Christiansburg* standard.

The congregants offer a medley of counterarguments.

They start with the standard of review, arguing that this court should review the district court's legal conclusions anew. But the abuse of discretion standard

already captures this point, because "[m]istakes of law by definition constitute an abuse of discretion." *Sisters for Life, Inc. v. Louisville-Jefferson County*, 56 F.4th 400, 403 (6th Cir. 2022).

What of the broader First Amendment issues implicated by the complaint, the congregants ask? The protesters' defense that their conduct enjoyed First Amendment protection, to be sure, "require[d] a context-driven examination of complex constitutional doctrine." *Gerber*, 14 F.4th at 508. But that does not help the congregants. Our First Amendment analysis largely centered on the claims against the city, *see id.* at 508-10, and the city did not seek fees. Whatever the difficulties of the broader First Amendment principles implicated by the lawsuit, the civil rights claims against the protesters turned on plainly inapplicable statutes.

The congregants make much of our statement in *Gerber* that their "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." *Id.* at 508. This statement, as they see it, precludes fees. But it's not that simple. 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 *Christiansburg*'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 court of subject matter jurisdiction. *See, e.g.*, *Garner*, 554 F.3d at 636-41; *Dubay v. Wells*, 506 F.3d 422, 431-32 (6th Cir. 2007); *Wolfe v. Perry*, 412 F.3d 707, 720-21 (6th Cir. 2005); *N.E. v. Hedges*, 391 F.3d 832, 836 (6th Cir. 2004); *Wilson-Simmons v. Lake Cnty. Sheriff's Dep't*, 207 F.3d 818, 823-24 (6th Cir. 2000); *Bowman v. City of Olmsted Falls*, 802 F. App'x 971, 974-75 (6th Cir. 2020); *Bagi v. City of Parma*, 795 F. App'x 338, 343-45 (6th Cir. 2019) (per curiam).

The congregants point out that the district court denied a stay without bond pending the appeal of the fee order. But that herring is red. The court's order shows only that their appeal was "not frivolous." R.119 at 8. We agree and would not sanction them for bringing it. Whether an appeal raises non-frivolous issues differs from whether the underlying complaint raises non-frivolous claims.

Gerber claims that the court could not assess fees against the congregants before this court's dismissal under Civil Rule 12(b)(6) because the frivolousness of the claims became evident only at that point. But district courts may award fees when, as here, a claim "was clearly defective at the outset of the case." *Wolfe*, 412 F.3d at 721.

The congregants say that the district court acted as a Monday-morning quarterback. The Supreme Court,

it is true, has directed courts to "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." *Christiansburg*, 434 U.S. at 421-22. This court has found impermissible hindsight logic when a case required extensive discovery or involved unsettled law. *E.g.*, *Tarter v. Raybuck*, 742 F.2d 977, 988 (6th Cir. 1984). But neither factual nor legal disputes beset the civil rights claims against the protesters. Because the claims' deficiencies appeared at the outset, no impermissible *post hoc* reasoning occurred. *See Bagi*, 795 F. App'x at 343.

Gerber argues that the protesters' failure to pursue Rule 11 sanctions dooms the fee award. Not only does Gerber fail to cite any authority for this point, but this court's precedent also confirms the opposite view. *See Dubay*, 506 F.3d at 432 (distinguishing fees under § 1988 from sanctions under Rule 11).

The congregants assert that the protesters challenged only the § 1983 claim as frivolous in their renewed fees motion. To the contrary, the protesters wrote in the motion that the "entire complaint" was frivolous, R.84 ¶ 3, and in their opening brief that the "entire case" lacked merit, *id.* at 30; *see also* R.96 at 7 (arguing that the claims under §§ 1981, 1982, 1983, and 1985(3), and the civil conspiracy claims "were equally without merit and lacking any arguable factual or legal basis"). Because the district court could find all of the claims against the protesters frivolous, it did not need to disaggregate fees for the frivolous claims from fees for the non-frivolous claims. *See Fox v. Vice*, 563 U.S. 826, 834-35 (2011). What is more, the congregants failed to make this argument before the district

court. Below, Gerber described the motion as "based primarily on the" § 1983 claims, R.99 at 11, and never disclaimed the possibility of fees for the other civil rights claims. And Dr. Brysk never even alluded to the issue. The congregants failed to preserve the issue for appeal. *See Thurman v. Yellow Freight Sys., Inc.*, 97 F.3d 833, 835 (6th Cir. 1996).

The possibility of chilling future civil rights plaintiffs does not warrant a different conclusion. The exacting standard for awarding fees to defendants already accounts for this chilling effect. *See Kidis v. Reid*, 976 F.3d 708, 722 (6th Cir. 2020). It balances the goal of encouraging plaintiffs to vindicate their civil rights with the opposing goal of compensating defendants for having to answer frivolous lawsuits. That the district court could award fees to the protesters under this standard means this balance weighs against the congregants today.

The congregants fault the court for including fees for time spent on the unsuccessful standing arguments. They cite three cases to support their contention that the fee award must exclude this time. But they are all inapposite. *Hensley v. Eckerhart*, 461 U.S. 424 (1983), explained that a partially prevailing civil rights plaintiff may recover only for the time spent on successful claims. *Id.* at 435. But *Hensley* considered claims for relief in a complaint, not different arguments or bases for dismissal in a motion to dismiss. The Court went on to say that "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Id.* Here, the protesters raised two grounds (Civil Rules 12(b)(1) and 12(b)(6)) to achieve the desired outcome (dismissal).

And *In re Bavelis*, 743 F. App'x 670 (6th Cir. 2018), and *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101 (2017), both dealt with sanctions under a court's inherent authority, not under § 1988.

Gerber—who retained new counsel for this appeal—insists that the court should leave him out of it and just sanction the congregants' counsel, Marc Susselman, under § 1927. He adds that, as a lay person, he did not understand the nuances of the First Amendment and civil rights law. While we sympathize with Gerber, courts hold litigants responsible for their attorneys' conduct. *Garner*, 554 F.3d at 644. The district court did not abuse its discretion in awarding fees under § 1988, as opposed to another mechanism, after finding that the standard had been met. *See id.*

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 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).

We affirm.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (FEBRUARY 22, 2023)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARVIN GERBER (22-1097/1131);
DR. MIRIAM BRYSK (22-1075/1131),

Plaintiffs-Appellants/Cross-Appellees,

v.

HENRY HERSKOVITZ; GLORIA HARB;
TOM SAFFOLD; RUDY LIST; CHRIS MARK,

Defendants-Appellees/Cross-Appellants.

Nos. 22-1075/1097/1131

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit

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

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Clerk

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN (JANUARY 25, 2022)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTICT OF MICHIGAN
SOUTHERN DIVISION

MARVIN GERBER, ET AL.,

Plaintiffs,

v.

HENRY HERSKOVITZ, ET AL.,

Defendants.

Case No. 19-13726

Before: Honorable Victoria A. ROBERTS,
United States District Judge.

ORDER: (1) GRANTING IN PART AND DENYING IN PART PROTESTOR DEFENDANTS' MOTION FOR ATTORNEY FEES AND SANCTIONS [ECF NOS. 84, 85]; (2) DEEMING MOOT PLAINTIFF MIRIAM BRYSK'S MOTION TO DISMISS PROTESTOR DEFENDANTS' MOTION FOR ATTORNEY FEES AND SANCTIONS [ECF NO. 86]; (3) GRANTING BRYSK'S MOTION FOR EXTENSION OF TIME TO RESPOND TO MOTION FOR ATTORNEY FEES AND SANCTIONS [ECF NO. 88]; AND (4) DENYING BRYSK'S MOTION FOR LEAVE TO FILE A SUR-REPLY CONCERNING MOTION FOR ATTORNEY FEES AND SANCTIONS [ECF NO. 98]

I. Introduction and Background

In January 2020, Plaintiffs Marvin Gerber and Miriam Brysk ("Plaintiffs") filed a 95 page, 23-count amended complaint against a group of protestors ("Protestor Defendants"), the City of Ann Arbor, and several of its employees ("City Defendants"). They alleged that the Protestor Defendants infringed their federal and state rights by regularly protesting on the sidewalk in front of the Jewish synagogue Plaintiffs attend and that the City Defendants contributed to the infringement by failing to enforce Ann Arbor City Code.

Plaintiffs alleged these federal claims against the Protestor Defendants: (1) violation of 42 U.S.C. § 1981; (2) violation of 42 U.S.C. § 1982; (3) civil conspiracy

between the Protestor Defendants and the City Defendants in violation of 42 U.S.C. § 1982; (4) violation of 42 U.S.C. § 1983; (5) civil conspiracy between the Protestor Defendants and the City Defendants in violation of 42 U.S.C. § 1983; (6) violation of 42 U.S.C. § 1985(3); and (7) civil conspiracy between the Protestor Defendants and the City Defendants in violation of 42 U.S.C. § 1985(3). The Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claims.

In August 2020, the Court entered an order granting Defendants' motions to dismiss. It found that Plaintiffs lacked Article III standing.

Plaintiffs appealed.

A three-judge panel of the Sixth Circuit affirmed this Court's dismissal in an opinion dated September 15, 2021. However, it did so on other grounds. A two-judge majority held that Plaintiffs had standing to assert their claims but that dismissal was appropriate because Plaintiffs failed to state a claim on which relief can be granted. *Gerber v. Herskovitz*, 14 F.4th 500, 504, 512 (6th Cir. 2021).

The third judge – Judge Eric L. Clay – issued a concurring opinion in which he "concur[red] with the majority's decision to affirm" but indicated that he "would do so on the basis of Plaintiffs' lack of standing rather than as a result of the complaint's failure to state a claim." *Gerber*, 14 F.4th at 512, 523 (Clay, J., concurring). After acknowledging that dismissal for lack of subject-matter jurisdiction/standing based on the inadequacy of the federal claim is proper only when the claim is "'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise devoid of merit as not to involve a federal controversy,'" Judge

Clay found that "Plaintiffs' claims are 'so frivolous as to be a contrived effort to create' federal jurisdiction." *Id.* at 522 (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998), and *Benalcazar v. Genoa Twp., Ohio*, 1 F.4th 421, 424 (6th Cir. 2021)).

Plaintiffs moved for rehearing *en banc*. The Sixth Circuit denied their request. No judge requested a vote on the motion for rehearing.

The Sixth Circuit issued the Mandate on November 12, 2021.

Before the Court are: (1) Protestor Defendants' motion for attorney fees and sanctions [ECF Nos. 84/85]; (2) Brysk's motion to dismiss the Protestor Defendants' motion for attorney fees and sanctions [ECF No. 86]; (3) Brysk's motion for extension of time to respond to Protestor Defendants' motion for attorney fees and sanctions [ECF No. 88]; and (4) Brysk's motion for leave to file a sur-reply concerning Protestor Defendants' motion for attorney fees and sanctions [ECF No. 98].

The motions are fully briefed. No hearing is necessary.

As set forth below, the Court GRANTS IN PART and DENIES IN PART the Protestor Defendants' motion for attorney fees and sanctions. Brysk's motion to dismiss is MOOT.

The Court GRANTS Brysk's motion for extension.

The Court DENIES Brysk's motion for leave to file a sur-reply.

II. Protestor Defendants' Motion for Attorney Fees and Sanctions

Protestor Defendants move for costs and attorney fees under 42 U.S.C. § 1988 and ask the Court to sanction Plaintiffs' counsel under 28 U.S.C. § 1927 or pursuant to its inherent powers.

A. Attorney Fees and Costs

i. Legal Standard

Under 42 U.S.C. § 1988(b), the Court has discretion to award the prevailing party, other than the United States, reasonable attorney fees in any action or proceeding to enforce 42 U.S.C. §§ 1981, 1981a, 1982, 1983, 1985, or 1986. *Shelton v. City of Taylor*, 92 Fed. Appx. 178, 185 (6th Cir. 2004) ("A district court's decision regarding attorney's fees under § 1988 is entitled to substantial deference. . . . [b]ecause an award of attorney's fees is predicated on factual matters.").

While courts routinely grant fee applications to prevailing plaintiffs, they "are reluctant to award fees to defendants for fear of chilling willingness to bring legitimate civil rights claims." *Id.* A prevailing defendant is entitled to attorney fees only if the Court finds that the plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); *Hescott v. City of Saginaw*, 757 F.3d 518, 529 (6th Cir. 2014). In making this determination, the Court must not "engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Id.* at 421-22.

If a suit contains both frivolous and non-frivolous claims, the defendant may recover fees attributable to frivolous charges, but is not entitled to fees related to non-frivolous claims. *Fox v. Vice*, 563 U.S. 826, 834-35 (2011) ("[A] court may reimburse a defendant for costs under § 1988 even if a plaintiff's suit is not wholly frivolous. Fee-shifting to recompense a defendant . . . is not all-or-nothing: A defendant need not show that every claim in a complaint is frivolous to qualify for fees.").

ii. Protestor Defendants are Entitled to Reasonable Attorney Fees Under 42 U.S.C. § 1988

Protestor Defendants say Plaintiffs' claims were "frivolous, unreasonable, groundless, without merit or foundation, and not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." [ECF No. 84, PageID.2317]. They say this was true from the onset and well known to Plaintiffs' counsel, and that Plaintiffs filed the suit for the improper and bad faith purpose of intimidating them into giving up their weekly protests. Thus, Protestor Defendants say they are entitled to recover their attorney fees and costs under § 1988(b) as prevailing defendants.

Plaintiffs say their claims had merit and were not frivolous, unreasonable, or groundless. To support this argument, they rely on the following statement by the majority opinion: "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." *Gerber*, 14 F.4th at 508. Plaintiffs say this statement

by the majority precludes the Protestor Defendants from recovering attorney fees or costs under § 1988(b).

The Court disagrees. In large part, the 14 pages the concurrence spent discussing the constitutional issues concerned whether Plaintiffs established standing – not simply whether Plaintiffs stated plausible claims.

Aside from standing, it was clear that Plaintiffs' claims against Protestor Defendants were groundless. Plaintiffs sought to restrict the Protestor Defendants from protesting on a public sidewalk regarding matters of public concern. However, a public sidewalk is a quintessential public forum, and case law is clear that speech at a public forum on a matter of public concern is entitled to "special protection" under the First Amendment – even if it is offensive or upsetting. *See Gerber*, 14 F.4th at 508-09.

Although the Protestor Defendants' "actions c[a]me squarely within First Amendment protections of public discourse in public fora," *id.* at 509, Plaintiffs baselessly claimed that the First Amendment did not protect their speech. However, the majority held that Plaintiffs' arguments that the First Amendment did not apply to the Protestor Defendants' speech lacked merit, stating that "each of [Plaintiffs' arguments] is old hat under the First Amendment" and "fall readily." *Id.*

The concurrence agreed that Plaintiffs' claims that the Protestor Defendants' conduct is not protected by the First Amendment fail. *Gerber*, 14 F.4th at 519. It further contended that it was "clear that [Plaintiffs were] bringing this suit to 'silence a speaker with whom [they] disagree,'" which is not allowed under the First Amendment. *Id.* at 522.

Contrary to Plaintiffs' argument, the majority opinion actually demonstrates that Plaintiffs' claims are meritless and without factual support. Indeed, the majority needed only five paragraphs – or just under two pages – to explain why Plaintiffs' seven federal claims against the Protestor Defendants fail to state a claim. *See Gerber*, 14 F.4th at 510-12.

As the majority explained, Plaintiffs' § 1981 claim is frivolous and lacks foundation because Plaintiffs "failed to allege that they lost out on the benefit of any 'law or proceeding.'" *See id.* at 510.

Plaintiffs' § 1982 claim is also frivolous and lacking evidentiary support. Unambiguous case law provides that to violate § 1982, the challenged action must impair a property interest by – for example – decreasing the value of the property or making it significantly more difficult to access. *See Gerber*, 14 F.4th at 510-11 (citing *City of Memphis v. Greene*, 451 U.S. 100, 122-24 (1981)). Plaintiffs failed to allege that the protests were even audible from inside the building or that the Protestor Defendants ever: (1) blocked them from using their synagogue; (2) trespassed on synagogue property; or (3) disrupted their services. *See Gerber*, 14 F.4th at 510-11 ("[M]arginally making access to a facility a little harder—the most that could be said here—does not suffice.").

Plaintiffs' § 1983 claim is frivolous, unreasonable, and without foundation as well. The Protestor Defendants clearly were not state actors and there is no plausible argument that they did act under color of law. *See id.* at 511; *Hashem-Younes v. Danou Enterprises, Inc.*, No. 06-CV-15469, 2008 WL 786759, at *3 (E.D. Mich. Mar. 20, 2008) ("Plaintiff's § 1983

[claim] was frivolous, unreasonable, and without foundation. From the outset, Plaintiff and her attorney knew or should have know[n] that the § 1983 claim was without merit because Defendants were not acting under the 'color of law.'"). Plaintiffs' 42 U.S.C. § 1985(3) claim is similarly groundless for lack of state action. *See id.*

Finally, Plaintiffs' civil conspiracy claims under §§ 1982, 1983, and 1985(3) are frivolous. To succeed on these claims, a plaintiff "must show that (1) a single plan existed, (2) the defendant shared in the general conspiratorial objective to deprive the plaintiff of his constitutional (or federal statutory) rights, and (3) an overt act was committed in furtherance of the conspiracy that caused injury to the plaintiff." *Gerber*, 14 F.4th at 511 (citation and internal brackets omitted). However, there is no evidence supporting these elements; Plaintiffs "failed to plead facts showing a single plan or a conspiratorial objective to deprive them of their rights." *Id.*

Plaintiffs are correct that "[a]llegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or 'without foundation.'" *Hughes v. Rowe*, 449 U.S. 5, 15-16 (1980). However, concluding that Plaintiffs' claims were meritless and failed under Rule 12(b)(6) required little examination.

The Court is aware that awarding attorney fees to defendants under § 1988 may have a chilling effect on the willingness to bring legitimate civil rights claims, and it acknowledges that "awarding attorney fees against a nonprevailing plaintiff in a civil rights action is 'an extreme sanction, and must be limited to truly egregious cases of misconduct.'" *Garner v.*

Cuyahoga Cty. Juv. Ct., 554 F.3d 624, 635 (6th Cir. 2009) (citation omitted). However, this is that rare case where such an award is appropriate and warranted. Plaintiffs failed to allege a basic element for each of their claims; their claims were groundless from the outset. As Judge Clay observed, it is "clear that [Plaintiffs brought] this suit to 'silence a speaker with whom [they] disagree,'" which the First Amendment does not permit. *Gerber*, 14 F.4th at 522.

Under the circumstances, Protestor Defendants are entitled to attorney fees and costs.

iii. Protestor Defendants are Entitled to Attorney Fees for Time Spent on Standing Arguments

Plaintiffs say that because the Court of Appeals held they had standing, the Protestor Defendants are not a prevailing party on the issue of standing and may not be awarded attorney fees for time spent on standing arguments.

In support of this argument, Plaintiffs rely on *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983), which held that a plaintiff who succeeded on certain claims but not on other unrelated claims cannot recover fees for services spent on the unsuccessful unrelated claims.

Plaintiffs mischaracterize the law. Protestor Defendants' argument that Plaintiffs lacked standing was not a "claim"; it was a contention. As the Supreme Court explained:

> [A] fee award should not be reduced simply because [a party] failed to prevail on every contention raised in the lawsuit. Litigants in

> good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Hensley, 461 U.S. at 435 (internal citation omitted).

Protestor Defendants achieved complete success – *i.e.*, dismissal of all of Plaintiffs' claims. The fact that not all of their contentions succeeded does not mean they achieved only limited success. Protestor Defendants are entitled to compensation "for the time [their] attorney[s] reasonably spent in achieving the favorable outcome, even if 'the[y] . . . failed to prevail on every contention.'" *See id. See also Fox*, 563 U.S. at 834.

Protestor Defendants are entitled to recover attorney fees for time spent on standing.

iv. The Amount of Costs and Fees

After finding that fees are appropriate, the Court must determine what amount of attorney fees are reasonable under the "lodestar" approach. *See Bldg. Serv. Loc. 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1401 (6th Cir. 1995). "In applying the lodestar approach, '[t]he most useful starting point . . . is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" *Id.* (alterations in original; citation omitted). When "'the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is *presumed* to be the reasonable fee to which counsel is entitled.'" *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564 (1986)

(citation omitted). In addition to fees incurred in district court, this Court may award a prevailing party reasonable attorney fees incurred on appeal. *Lamar Advert. Co. v. Charter Twp. of Van Buren*, 178 Fed. Appx. 498, 502 (6th Cir. 2006).

Protestor Defendants submit their attorneys reasonably expended 446.30 hours for a total of $176,357.50 in attorney fees, as set forth in the following charts:

Time Accrued through District Court Decision

Attorney	No. of Hours	Hourly Rate	Total Fee
Shea	95.50	$425.00	$ 40,587.50
Heenan	120.90	$400.00	$ 48,360.00
Mackela	85.20	$350.00	$ 29,820.00
Davis	13.40	$500.00	$ 6,700.00
TOTAL	315		$125,467.50

Time Accrued after District Court Decision

Attorney	No. of Hours	Hourly Rate	Total Fee
Shea	44.50	$425.00	18,700
Heenan	36.20	$400.00	14,480
Mackela	50.60	$350.00	17,710
Davis			
TOTAL	131.30		$50,890

[ECF No. 84, PageID.2333]. However, at the end of their motion, Protestor Defendants say their counsel

offers to reduce their request "by 10% to avoid the necessity of haggling over assertions that any of their time was not reasonable, duplicative, not adequately described or whatever nitpicking objections might be raised." [ECF No. 84, PageID.2349]. With this reduction, Protestor Defendants request $158,721.75 in attorney fees.

In support of their fee application, Protestor Defendants submit copies of billing invoices/timesheets for this action and affidavits from two of their attorneys. Each entry on the invoice is accompanied by a date, a description of the activity involved, the name of the attorney who completed the activity, the amount of time expended on such activity, and the total amount owed for that activity. Protestor Defendants also included the biography for each of their attorneys as well as affidavits from six unaffiliated attorneys to support the reasonableness of the hours expended and reasonableness of the hourly rate each attorney requests based on their experience and skill.

The Court finds that Protestor Defendants meet their burden to show that the billing rates and number of hours expended are reasonable. *See Grandview Raceway*, 46 F.3d at 1402 ("[A]ll that is necessary [to carry the burden to show that the claimed rate and number of hours are reasonable] is 'evidence supporting the hours worked and rates claimed.'" (citation omitted)). Thus, the amount requested is "presumed to be the reasonable fee to which [Protestor Defendants are] entitled." *See Delaware Valley*, 478 U.S. at 564.

Plaintiffs do not challenge the reasonableness of either the hourly rates sought or hours spent by defense counsel. Accordingly, the Court finds that

Protestor Defendants are entitled to $158,721.75 in reasonable attorney fees.

Protestor Defendants also seek to recover $63.80 in expenses; they indicate these expenses represent mileage incurred for a meeting. However, Protestor Defendants do not provide any support showing they are entitled to recover this type of expense. The Court denies Protestor Defendants' request to recover $63.80 in expenses.

v. Joint and Several Liability

Protestor Defendants say the Court should hold Plaintiffs and their attorneys – Marc Susselman and Ziporah Reich – jointly and severally liable for payment of attorney fees to ensure recovery of the awarded fees.

Brysk states that although Reich joined the lawsuit as Plaintiffs' co-counsel on behalf of The Lawfare Project – a civil rights organization dedicated to defending the civil rights of Jewish people – "[a]t no time did Reich have any decision-making authority regarding the content or filings of any part of the lawsuit." [ECF No. 99, PageID.2712]. Other than this, Plaintiffs do not address the issue of joint and several liability.

Because Reich did not have decision-making authority and did not file anything other than her notice of appearance, she is not liable for the attorney fees. However, the Court holds Plaintiffs and Susselman jointly and severally liable.

Plaintiffs' claims were jointly asserted, and they are equally responsible for Protestor Defendants' attorney fees. Moreover – although Plaintiffs do not make this argument – even if Susselman was to blame

for pursuing meritless claims, Plaintiffs cannot evade liability; "where a party has 'voluntarily chosen an attorney as his representative in the action . . . he cannot . . . avoid the consequences of the acts or omissions of this freely selected agent.'" *Garner*, 554 F.3d at 644 (citation and internal brackets omitted).

As to Susselman, even if Plaintiffs urged him to file the claims, he intentionally chose to pursue the meritless claims against Protestor Defendants despite an ethical obligation not to do so. He caused the Protestor Defendants to incur attorney fees to defend a frivolous case.

The Court holds that Plaintiffs and Susselman are jointly and severally liable to pay the attorney fees to Protestor Defendants.

B. Sanctions

Protestor Defendants say the Court should also sanction Plaintiffs' counsel under 28 U.S.C. § 1927 and pursuant to its inherent powers.

Section 1927 provides that attorneys "who so multipl[y] the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927; *Garner*, 554 F.3d at 644. The purpose of § 1927 is "to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy." *Id.* (citation omitted).

The Court also has the inherent power to sanction bad faith conduct in litigation. *See Dell, Inc. v. Elles*, No. 07-2082, 2008 WL 4613978, at *2 (6th Cir. June 10, 2008). To award attorneys' fees under this power,

the Court must find that: "[1] the claims advanced were meritless, [2] counsel knew or should have known this, and [3] the motive for filing the suit was for an improper purpose such as harassment." *Big Yank Corp. v. Liberty Mut. Fire Ins. Co.*, 125 F.3d 308, 313 (6th Cir. 1997).

As set forth above, Susselman intentionally chose to pursue the meritless claims against the Protestor Defendants for the improper purpose of silencing speech with which Plaintiffs did not agree. Sanctions under § 1927 and/or the Court's inherent authority are appropriate. *See id.*; *Garner*, 554 F.3d at 645 ("the district court found that Attorney Frost 'intentionally pursued meritless claims,' a finding that . . . satisf[ies] either standard" under § 1927).

Had the Court not already found Susselman jointly and severally liable for the attorney fees, it would be inclined to sanction him. Having done that, additional sanctions against Susselman are not warranted.

III. Brysk's Motions

Also before the Court are Brysk's: (1) motion to dismiss the Protestor Defendants' motion for attorney fees and sanctions [ECF No. 86]; (2) motion for extension of time to respond to Protestor Defendants' motion for attorney fees and sanctions [ECF No. 88]; and (3) motion for leave to file a sur-reply concerning Protestor Defendants' motion for attorney fees and sanctions [ECF No. 98].

Brysk says the Court should dismiss Protestor Defendants' motion for attorney fees and sanctions because the Sixth Circuit had not issued a mandate at

the time they filed their motion, such that this Court lacked jurisdiction over their motion.

Protestor Defendants filed their motion on October 13, 2021. Brysk filed her motion to dismiss on October 29, 2021. The Sixth Circuit issued a mandate on November 12, 2021. Because the Sixth Circuit has since issued its mandate, Brysk's motion to dismiss is MOOT.

Brysk failed to timely respond to Protestor Defendants' motion, so she moved for an extension of time to file her response. The Court retroactively GRANTS her motion for extension.

Brysk also moves to file a sur-reply concerning Protestor Defendants' motion for attorney fees and sanctions. The Court reviewed this motion and Brysk's proposed sur-reply. Neither adds anything relevant to the issues before the Court. The Court DENIES Brysk's motion for leave to file a sur-reply.

IV. Conclusion

The Court GRANTS IN PART and DENIES IN PART the Protestor Defendants' motion for attorney fees and sanctions [ECF Nos. 84, 85]. Plaintiffs Marvin Gerber and Miriam Brysk and attorney Marc Susselman are jointly and severally liable to Protestor Defendants in the amount of $158,721.75 in attorney fees.

Brysk's motion to dismiss Protestor Defendants' motion for attorney fees and sanctions [ECF No. 86] is MOOT.

The Court retroactively GRANTS Brysk's motion for extension to respond to motion for attorney fees and sanctions [ECF No. 88].

The Court DENIES Brysk's motion for leave to file a sur-reply concerning motion for attorney fees and sanctions [ECF No. 98].

IT IS ORDERED.

/s/ Victoria A. Roberts
United States District Judge

Dated: January 25, 2022

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING (APRIL 4, 2023)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARVIN GERBER (22-1097/1131);
DR. MIRIAM BRYSK (22-1075/1131),

Plaintiffs-Appellants/Cross-Appellees,

v.

HENRY HERSKOVITZ; GLORIA HARB;
TOM SAFFOLD; RUDY LIST; CHRIS MARK,

Defendants-Appellees/Cross-Appellants.

Nos. 22-1075/1131

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

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court.* No judge has

* Judge Davis recused herself from participation in this ruling.

requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Clerk

ATTORNEY SUSSELMAN COMPLAINT FILED IN SIXTH CIRCUIT AGAINST JUDGE ROBERTS FOR JUDICIAL MISCONDUCT (OCTOBER 18, 2022)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMPLAINT OF JUDICIAL MISCONDUCT BY THE HON. VICTORIA ROBERTS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Marc M. Susselman (P29481)
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Now comes attorney Marc M. Susselman and files the instant Complaint pursuant to 28 U.S.C. § 351(a) and alleges that the Hon. Victoria Roberts has violated Canons 1, 2, 2A, 3(A)(3) and 3(A)(4) of the Code of Conduct for United States Judges, and in support of the Complaint states as follows:

Judge Roberts has been the presiding judge in United States Eastern District Case No. 19-13726 in which Mr. Susselman represented two Jewish Plaintiffs who filed the lawsuit requesting that the court enter

an injunction placing reasonable time, place and manner restrictions on the picketing activity of a group of protesters who had been protesting in front of the Beth Israel Synagogue located on Washtenaw Ave. in Ann Arbor, every Saturday morning – the Jewish Sabbath – since September, 2003, a total of, then, 16 years as of the date of the filing of the lawsuit in December, 2019. The protesters, whose numbers varied form 4 to 20 over time, placed numerous signs in the public right-of way directly in front of the Synagogue, as well as in the public right-of-way across Washtenaw Ave. facing the Synagogue. The signs bore messages criticizing Israel's policies towards the Palestinians, *e.g.*, "Boycott Apartheid Israel"; "Fake News Israel is a Democracy"; "Boycott Israel"; "End Jewish Supremacism in Israel"; "No More Wars for Israel"; etc. Commingled with the signs related to Israel were (and are) flagrantly anti-Semitic signs, such as "Resist Jewish Power": "Jewish Power Corrupts"; "No More Holocaust Movies," signs which perpetuate anti-Semitic tropes which have been used to persecute Jews for centuries. (Photographs of the signs were attached to the Complaint, R. 1, and to the First Amended Complaint, R. 11; *see* Affidavit of Prof. Kenneth Waltzer, Prof. Emeritus of Jewish Studies at Michigan State University, describing the history of anti-Semitism, attached to R. 22.) Every week the protesters also placed the Israeli flag attached to a pole in front of the Synagogue, with the Star of David, the recognized symbol of the Jewish people, effaced by

a red circle bisected by a red slash, the international symbol for "Prohibited."[1]

Of the two Jewish Plaintiffs, one was a member of the Beth Israel congregation, the other was a Holocaust survivor who attended Sabbath services at an annex next to the Synagogue. Both attested in the Complaint, in the First Amended Complaint, and in affidavits that seeing the signs in front of the Synagogue as they entered the sanctuary to engage in the Sabbath prayer service caused them extreme emotional distress. In the Complaint and the First Amended Complaint, they alleged that their emotional distress constituted an injury which gave them standing to sue. Upon information and belief, Judge Roberts was aware that the Plaintiffs' attorney is also Jewish.

The undersigned maintains that in the course of this lawsuit, Judge Roberts made decisions which, taken together in their entirety, have the distinct appearance of being motivated either by anti-Semitic sentiments, and/or, sentiments opposed to Israel's policies with respect to the Palestinians. In either case, Judge Roberts has acted improperly and in violation of Canons 1 and 2. Clearly, a judge should not allow ethnic or religious bias to play any role in the judge's decision-making. Nor should a judge allow her personal views regarding a conflict in another country to influence her in determining the unrelated rights of the litigants before her. In this context, moreover, sentiments regarding the Israeli-Palestinian conflict often merge into anti-Semitism. As Deborah Lipstadt, the

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1 Two of the protesters are acknowledged Holocaust deniers and Nazi sympathizers. *See* Exhibits 2-4 attached to Appellants' Corrected Third Brief in Appeal Nos. 22-1075 and 22-1131.

current administration's Special Envoy to Monitor and Combat Antisemitism, wrote in Antisemitism Here And Now, Schocken Books (2019) (pp. 132-133): "There are ways of disagreeing with the policies of the Israeli government without sounding antisemitic. And blaming all Jews for something wrong that Israel has done – that's antisemitic. No one who offers the 'yes, but' rationalization actually engages in racist violence or even thinks that they are condoning it. But they are virtually guaranteeing that it will continue because what they are doing is facilitating it."

In addition, the undersigned has reason to believe that Judge Roberts and Judge Eric Clay have engaged in *ex parte* communications during the two appeals which have been taken in the course of this litigation, communications not about administrative matters, but about the substance of the issues involved in the two appeals, in violation of Canon 3(A)(4). Further, Judge Roberts' ruling with respect to the protesters' contention that Mr. Susselman violated 28 U.S.C. § 1927 has the appearance of having become a personal vendetta against Mr. Susselman, in violation of Canons 2A and 3(A)(3).

The undersigned is aware that under 28 U.S.C. § 352(b)(1)(A)(ii), that a Complaint may not be "directly related to the merits of a decision or procedural ruling." However, there is a recognized exception to this limitation. As the Supreme Court stated in *Liteky v. United States*, 510 U.S. 540, 545 (1994), in the context of a motion for recusal:

> [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, stated in a concurrence, joined by Justices Blackmun, Stevens and Souter, *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. So, in one sense, it could be said that any disqualifying state of mind must originate from a source outside law itself. That metaphysical inquiry, however, is beside the point. **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.

And in *King v. United States District Court for the Central District*, 16 F.3d 992 (9th Cir. 1994), the Court asserted, *id.* at 994

> [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." *United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988) (An exception to the extrajudicial bias rule is made "when a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party.") (Italics in the original; emphasis added; footnote omitted.)

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.")

The undersigned maintains that in this instance the exception applies - that Judge Roberts' rulings in the course of this litigation, taken together in their entirety, have the appearance of a pervasive bias against the Plaintiffs and their attorney and that they

can only be explained as being based on an improper sentiment of anti-Semitism and/or inappropriate sentiments of hostility towards Israel and its policies with respect to the Palestinian people. The undersigned wants to make clear that he is not claiming that Judge Roberts harbors neo-Nazi views, or that she is sympathetic to Hitler's Final Solution for the extermination of the Jewish people. The undersigned is claiming, rather, that Judge Roberts harbors sentiments hostile to Israel's policies towards the Palestinians, sentiments which are consonant with the anti-Israel messages expressed on some of the signs deployed by the protesters, sentiments which tainted her decision-making in favor of the protesters and against the Plaintiffs and their attorney – sentiments which, as Ambassador Liptstadt pointed out in the above quotation, merge with and facilitate anti-Semitism. This issue is too serious and too compelling to be left to a resolution of the legal issues alone. It goes to the heart of the administration of justice, and must be addressed and dealt with, separate and apart from the appellate decisions themselves.

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. In addition, the undersigned represented an Asian-American organization titled "American Citizen For Justice" seeking to obtain justice for Vincent Chin, a Chinese-American who was brutally beaten to death with a baseball bat in 1982 by two laid-off autoworkers who thought he was a Japanese-American, and who were sentenced in the Wayne County Circuit Court to probation and payment of a fine of $3,000.00.

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. As then Judge Kozinski stated, dissenting in *In re Complaint of Judicial Misconduct*, 425 F.3d 1179 (9th Cir. 2005), *id.* at 1183:

> Disciplining our colleagues is a delicate and uncomfortable task, not merely because those accused of misconduct are often men and women we know and admire. It is also uncomfortable because we tend to empathize with the accused, whose conduct might not be all that different from what we have done – or been tempted to do – in a moment of weakness or thoughtlessness. And, of course, there is the nettlesome prospect of having to confront judges we've condemned when we see them at a judicial conference, committee meeting, judicial education program or some such event.
>
> Pleasant or not, it's a responsibility we accept

> when we become members of the Judicial Council, and we must discharge it fully and fairly, without favor or rancor. . . .

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/); "We Feel His Presence in the Department Is Threatening" (https://foreignpolicy.com/2021/08/31/state-department-antisemitism-anti

semitism-blinken-fritz-berggren/); "Mastriano's Attacks on Jewish School Set Off Outcry Over Antisemitic Signaling" (https://www.nytimes.com/2022/10/10/us/politics/mastriano-shapiro-antisemitism.html).

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.[2]

STATEMENT OF FACTS AND PROCEEDINGS

The protesters filed a motion to dismiss the lawsuit on March 26, 2020, contending that the Plaintiffs did not have standing to sue under Fed. R. Civ. P. 12(b)(1), and that they had failed to state a cognizable claim for relief under Fed. R. Civ. P. 12(b)(6). (R. 45) On August 19, 2020, Judge Roberts issued an Order Granting Defendants' Motions To Dismiss. (R. 66). The court indicated that it was dismissing the lawsuit based exclusively on the protesters' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) because the Plaintiffs did not have standing to sue. Judge Roberts held

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[2] 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.

that the Plaintiffs' allegations that the signs caused them extreme emotional distress did not suffice to confer standing because it was not a "concrete injury," *i.e.*, it "must be "'*de facto*'"; that is, it must actually exist." (Citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2018) (R. 66, Page ID #6, 7) Judge Roberts went on to state that Plaintiffs "fail to provide any sources to support the notion that an intangible injury such as 'extreme emotional distress' confers standing in the First Amendment context." (R. 66, Page ID #8)

Judge Roberts proceeded to state in the Opinion's Conclusion: "[T]he First Amendment more than protects the expressions by Defendants of what Plaintiffs describe as 'anti-Israeli, anti-Zionist, an[d] antisemitic.' Peaceful protest speech such as this – on sidewalks and streets – is entitled to the highest level of constitutional protection, even if it disturbs, is offensive, and causes emotional distress." (Citation omitted.) (R. 66, Page ID #10) By so stating, Judge Roberts went beyond the scope of review of a 12(b)(1) motion based on lack of standing and in effect ruled on the merits of the lawsuit, granting the Defendants' motions based on Fed. R. Civ. P. 12(b)(6), without even addressing any of the numerous arguments and case law which Appellants had cited in their responses opposing the motions to dismiss based on Fed. R. Civ. P. 12(b)(6). In so stating, moreover, Judge Roberts exceeded her jurisdiction, since once she ruled that the Plaintiffs did not have standing to sue, the court did not have subject matter jurisdiction over the lawsuit and was precluded from addressing the merits of the case. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998); *H. L. v. Mattheson*, 450 U.S. 398, 430 (1981).

On appeal, this Court reversed Judge Roberts' ruling that the Plaintiffs did not have standing to sue, stating, in a 2-1 decision, 14 F.4th 500 (6th Cir. 2021), *id.* at 506: "We have 'consistently rejected' arguments that 'psychological injury can never be the basis for Article III standing.' . . . All in all, the congregants have standing to sue because they have credibly pleaded an injury – extreme emotional distress – that has stamped a plaintiff's ticket into court for centuries." (Citation omitted.) The Court proceeded to address the 1st Amendment freedom of speech issue and held, unanimously, that the signs being used by the protesters constituted protected speech under the 1st Amendment, stating, *id.* at 508-509: "Sidewalks are traditional public for a, meaning they 'occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate.' . . . 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.'" (Citations omitted.)[3] The majority also stated, *id.* at 508:

> The raw, calculated-to-hurt nature of today's speech in some ways parallels the speech in *Snyder*[*v. Phelps*]. Yet one cannot read *Snyder* and think the majority thought the state law tort action – premised on protests by members of the Westboro Baptist Church that disrespected the service and memory of

[3] After the Court issued its decision dismissing the lawsuit on First Amendment grounds, the protesters, emboldened by the decision, added a new sign to their panoply of insulting, anti-Semitic and anti-Israel signs, with the message, "Israel Attacked America – 9/11/21."

> a dead soldier and his grieving family – as frivolous under the First Amendment. Or think that Justice Alito's dissent in support of the family's action was frivolous. *See* Ruth Bader Ginsburg, Assoc. Just., U.S. Sup. Ct., *A Survey of the 2010 Term* or presentation to the Otsego County Bar Association Cooperstown Country Club (July 22, 2011) (praising Justice Alito's dissent and acknowledging that Justice Stevens would have joined it if he had been on the Court).
>
> Even after *Snyder*, there is still work to be done in resolving fact-driven claims of this ilk. One could colorably argue that signs that say "Jewish Power Corrupts" and "No More Holocaust Movies" directly outside a synagogue attended by holocaust survivors and timed to coincide with their service are more directed at the private congregants than designed to speak out about matters of public concern. The claims require a context-driven examination of complex constitutional doctrine. That doctrine is not always intuitive, as shown by the reality that the captive audience doctrine applies to civil regulation of protests outside homes and abortion clinics but not court-ordered injunctions outside houses of worship. Plaintiffs' claims may be wrong and ultimately unsuccessful, but the fourteen pages that the concurrence devotes to analyzing the constitutional issues **belie the conclusion that they are frivolous**. (Emphasis added.)

The undersigned filed a petition for a *writ of certiorari* in the Supreme Court, arguing that anti-

Semitic speech in proximity to a synagogue which congregants are forced to see as they enter their house of worship, and hate speech generally in proximity to the house of worship of any religion, does not constitute "speech on a matter of public concern," and therefore is not entitled to the protection of the 1st Amendment. The Supreme Court issued an Order on March 21, 2022, denying the petition.[4]

The majority's summary rejection of Judge Roberts' ruling that the extreme emotional distress suffered by the Plaintiffs was insufficient to provide them with standing to sue reflects the ruling's own inexplicability. But this was not the only questionable ruling by Judge Roberts during the course of the litigation. There were several others. Plaintiffs named Jewish Witnesses for Peace ("Witnesses") as a Defendant in the initial Complaint, a voluntary unincorporated organization of which the Protesters were members. The spokesperson for Witnesses was personally served with a copy of the First Amended Complaint ("FAC") on December 21, 2019. (R. 12). When Witnesses failed to file an Answer or otherwise plead, Plaintiffs requested that the Clerk enter a default against it (R. 14), and then filed a

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[4] The fact that the Supreme Court denied the petition for *certiorari* was not a decision on the merits and does not constitute affirmance of this Court's 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.")

motion for default judgment (R 16). On February 6, 2020, the attorney who had filed an Appearance on behalf of the individual Protesters on December 30, 2019, filed an Appearance on behalf of Witnesses (R. 18), and then moved to set aside the default and filed a response to the motion for default judgment (R. 20). In the response, while acknowledging Witnesses was a voluntary unincorporated organization, the protesters offered the fatuous argument that it did not constitute a legal entity subject to suit. In her decision setting aside the default and denying the motion for a default judgment (R. 40), Judge Roberts did not address the question whether Witnesses was a legal entity subject to suit, but instead held that the Court Rules prefer that cases be decided on their merits. Yet Judge Roberts later granted the protesters' 12(b)(1) motion to dismiss for lack of standing, a ruling which was ultimately reversed as contrary to law, even though so holding was not a decision on the merits, and precluded Judge Roberts from addressing the merits.

In the FAC, Plaintiffs included 10 pendent state claims, three of which (Counts XIV-XVI) pled claims under the Michigan Elliott-Larsen Civil Rights Act ("ELCRA"), M.C.L. § 37.2101, *et seq.*, alleging that the Synagogue qualified as a place of public accommodation under the Act, which prohibited denying any individual the "full and equal enjoyment of the goods, services, facilities, privileges . . . of a place of public accommodation or public service because of religion, race, . . . [or] national origin." The Plaintiffs alleged that, "The protesters' conduct creates, and has created for 16 years, a hostile environment by purveying invidious, virulently Antisemitic messages in front of a Jewish house of worship." In support of the ELCRA claims,

Plaintiffs cited *Williams v. Port Huron Area School Dist. Board of Education*, Case No. 06-14556 (E.D. Mich. 2010), a ground-breaking decision by Judge Roberts in which she held that the verbal harassment of a group of African-American students by the use of racial epithets constituted creation of a hostile environment in violation of the ELCRA, stating, *id.* at *25, "Because the ELCRA expressly prohibits discrimination based on race, this Court concludes that Michigan courts would recognize a hostile environment claim based on racial harassment." Judge Roberts also held that § 1983 claims against the School District's administrators asserted a cognizable claim, stating, *id.* at *33, "A jury could find that Defendants' actions were deliberately indifferent to Plaintiffs' allegations of harassment, and that they failed to act or acted ineffectively to prevent further harassment toward Plaintiffs." While Judge Roberts asserted supplemental jurisdiction over the ELCRA claim in *Williams*, she declined to assert supplemental jurisdiction over Plaintiffs' pendent claims, including the ELCRA claims. (R. 41) While Judge Roberts certainly had the discretionary authority to assert or decline supplemental jurisdiction, why did she exercise that discretion to deny jurisdiction over the ELCRA claims, which mirrored the ELCRA claim in *Williams*? Just as the racial epithets used in *Williams* did not address matters of public concern, and therefore were not protected by the First Amendment, Judge Roberts could have held that the anti-Semitic messages on several of the protesters' signs likewise did not address matters of public concern, and likewise were not protected by the First Amendment. Moreover, why did she hold that state action required under § 1983 was satisfied by

the school administrators' "failure to act or acted ineffectively," but never addressed Plaintiffs' argument that the City's failure to enforce its sign ordinance over a period of 17 1/2 years also demonstrated deliberate indifference to the Plaintiffs' allegations of harassment by the protesters, thereby stating a claim under § 1983?

On March 19, 2020, Judge Roberts entered an Order Concerning the Filing of Motions (R. 44). Under the terms of the Order, a party which proposed to file a motion first had to seek the concurrence of opposing counsel and, if concurrence could not be reached, the moving party was required to submit a joint letter, limited to three double spaced pages, and limited to five case citations by each party, setting forth the parties' respective positions. As required by Judge Roberts' Order, Plaintiffs filed a joint letter requesting leave to file a motion for entry of a preliminary injunction, seeking reasonable time, place and manner restrictions on the Protesters' conduct, pursuant to Fed. Rule Civ. P. 65(a). (R. 55) The Rule does not specify when a motion for a preliminary injunction may be filed, and does not preclude filing such a motion before defendants have answered the complaint, or have otherwise pled. *See Silber v. Barbara's Bakery, Inc.*, 950 F. Supp. 2d 432, 443, note 9 (E.D.N.Y. 2013). In fact, failing to file such a motion early may undermine the movant's claim that the injunction is necessary to avoid irreparable harm. *Id.* At 441. *See also Gidatex, S.R.L. v. Campaniello Imports, Ltd.*, 13 F. Supp. 2d 417, 419 (S.D.N.Y. 1998). The protesters' position was stated in a single paragraph. Despite the standard practice to decide such motions on the

merits, Judge Roberts refused to grant Plaintiffs permission to file the motion. (R. 58)

In compliance with the protocol which Judge Roberts imposed, Plaintiffs also filed a request to file a motion for partial summary judgment against the City regarding the interpretation of the sign ordinance and the City's failure to enforce it over a 17 1/2 year period. (R. 60) In the request, Plaintiffs noted that Under Fed. R. Civ. P. 57(b), a motion for summary judgment may be filed at any time, even prior to the defendant having filed an answer or otherwise pled, and before discovery has been commenced or completed, unless there is a local rule or an Order has been entered precluding such filing. There was no such local rule in the Eastern District. Judge Roberts' Order striking Plaintiffs' prior motion for partial summary judgment (R. 29) was based on Plaintiffs' failure to link the motion to legal claims pled in the FAC. Here, Plaintiffs linked their interpretation of the relevant Code provisions to 8 of the 9 counts, correcting the defect of their prior motion. Judge Roberts denied the request. (R. 63) Consequently, there has never been any ruling during the litigation or the appeal on the interpretation of the sign ordinance, or whether it was content and viewpoint neutral, and therefore could have been enforced without violating the protesters' freedom of speech, per the Supreme Court's decision in *R.A.V. v. St. Paul,* 505 U.S. 377 (1992). *See also 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)

In her decision dismissing the lawsuit (R. 66), Judge Roberts granted the 12(b)(1) motion on the basis that the Plaintiffs did not have standing to sue.

By virtue of that ruling, the court did not have jurisdiction over the lawsuit and was thereby precluded from addressing the merits of the 12(b)(6) motion. Judge Roberts in fact stated: "Plaintiffs do not sufficiently allege Article III standing. The Court lacks subject matter jurisdiction and must dismiss this case." Nonetheless, Judge Roberts addressed the merits of the First Amendment issue anyway, stating, R. 66, Page ID #1905, that the protesters' speech was entitled to "the highest level of constitutional protection, even if it disturbs, is offensive, and causes emotional distress," a *dicta* ruling on the merits that contradicted Justice Breyer's concurrence in *Snyder v. Phelps*, 582 U.S. 443 (2011), *id.* at 461-463. Why did Judge Roberts insist on addressing an issue on the merits which she acknowledged she did not have jurisdiction to address once she ruled that the Plaintiffs did not have standing to sue?

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 any 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. If 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 disputes – concealed sentiments which go unrebutted - to influence her decisions regarding the rights of the litigants before her.

In the same Opinion, Judge Roberts stated (R. 66, Page ID #1903), Plaintiffs "fail to provide any source to support the notion that an intangible injury such as 'extreme emotional distress' confers standing in the First Amendment context." In their motion for reconsiderations (R. 67), Plaintiffs noted that they had cited a First Amendment case in support of their position, *Wells v. Rhodes*, 928 F. Supp.2d 920 (S.D. Ohio 2013), which was comparable to the facts in the instant case and involved two Caucasian teenagers who had burned a cross on the lawn of a house being rented by an African-American family. The district court noted that the sight of the burning cross, which can qualify as a form of protected speech under *Virginia v. Black*, 538 U.S. 343 (2003), caused members of the African-American family "fear and anxiety," *id.* at 924. There was no indication in the decision that any of the plaintiffs had suffered a physical injury, or that the property, which they were renting, had been damaged. The plaintiffs sued the teen-agers alleging damages under 42 U.S.C. § 1981 and § 1985(3), the very same statutes which Plaintiffs relied on and cited in the FAC. The district court did not dismiss the lawsuit, ruling that the plaintiffs' "fear and anxiety" was not sufficient to grant them standing to sue. In fact, the court granted their motions for summary judgment pursuant to 42 U.S.C. § 1981 and § 1985(3). Judge Roberts denied the motion for reconsideration, without mentioning the *Wells* decision. (R. 69)

Plaintiffs raised this issue in their appellate brief, questioning why Judge Roberts had failed to cite or address the *Wells* case in her decision. At the oral argument on April 27, 2021, Judge Clay interrupted the Plaintiffs' counsel's presentation, asking him where he had found "the temerity" to imply that the district court judge was racially biased. Plaintiffs' counsel understood Judge Clay to be referring to a remark about the *Wells* decision in the appellate brief, and responded that it was a significant case in support of the Plaintiffs' position on standing and questioned why Judge Roberts had failed to address it. Judge Clay responded, "That doesn't matter. A judge may fail to cite a case for all kinds of reasons." Prompted by Judge Sutton, Plaintiffs' counsel - with thoughts running through his head of Shylock being humiliated and forced in a Venetian court to apologize for daring to challenge the integrity of a Christian debtor - apologized for the purported implication that Judge Roberts was racist, and proceeded with his argument. Yet, in her decision awarding attorney fees to the protesters (R. 103), Judge Roberts held that Plaintiffs' § 1981 and § 1985(3) claims were "frivolous" – contradicting the majority's assertion, quoted *supra*, that the claims were not frivolous - without, again, noting the relevance of the *Wells* decision, where the district judge, on similar and comparable facts, had not only not deemed the claims frivolous, but had granted summary judgment regarding those claims. How do we explain Judge Roberts' failure to acknowledge the relevance of the *Wells* decision, not just once, but three times – first in her Opinion and Order dismissing the lawsuit, wherein she improperly addressed the merits without mentioning the *Wells* decision, which had been cited in Plaintiffs' response opposing the

protesters' motion to dismiss (R. 54, Page ID #1740-1741, 1745, 1746); then in her Order denying Plaintiffs' motion for reconsideration; and third in her Opinion and Order granting the protesters attorney fees based on her conclusion that the claims pled by the Plaintiffs were frivolous. There is no question that seeing a burning cross would be traumatizing to an African-American family. But is the sight of the Star of David on the Israeli flag, positioned in front of a synagogue every Saturday morning for 17 1/2 years, with the centuries old symbol of the Jewish people effaced with the symbol meaning "Prohibited," not also traumatizing to Jewish congregants, particularly to an 87 year-old Holocaust survivor? Why did Judge Roberts again ignore the *Wells* decision in ruling that the Plaintiffs' identical legal claims were "frivolous"? What possible explanation is there for such an oversight being committed three times?

On October 13, 2021, the protesters filed a renewed motion for attorney fees and sanctions in the District Court, seeking an award of attorney fees pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1927, for "vexatious" filings. (R. 84) 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) In her Order, Judge Roberts held that the claims pled by the Plaintiffs in their FAC were frivolous and awarded the protesters $158,721.75 in attorney fees, to be paid jointly and severally by the Plaintiffs and their attorney. As the undersigned has argued in his appellate brief, Judge Roberts' ruling flies in the face of numerous Supreme Court precedents addressing the contours of 42 U.S.C. § 1988 which have held that the

fact that a plaintiff has not prevailed in a civil rights lawsuit is not, *per se*, a basis for awarding attorney fees to the defendants, but may only be awarded if the legal claims pled by the plaintiffs are "frivolous, unreasonable, or groundless." *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422 (1978). Judge Roberts' conclusion that the legal claims pled by the Plaintiffs were frivolous contradicts the majority's holding, quoted above, that none of the legal claims were frivolous, despite their being dismissed under Rule 12(b)(6). In defense of her ruling, Judge Roberts asserted that the majority's comment related only to the contention – not a legal claim - that the Plaintiffs had standing, when the majority's statement clearly and unambiguously referred to the legal "claims," not just the contention that the Plaintiffs' had standing. Moreover, how do we explain Judge Roberts' ruling that the time expended by the protesters' attorneys on the standing issue should be compensated, a ruling contrary to law, respecting an issue which was not a legal claim, and on which the protesters' attorneys did not even prevail? What could possibly explain Judge Roberts' motive for making such an antithetical decision, a decision requiring that an 87 year-old Holocaust survivor pay $158,721 to a group of anti-Semitic, neo-Nazis who had been picketing her house of worship every week for 17 1/2 years? What explains Judge Roberts' flagrant lack of empathy for an elderly Holocaust survivor? How can her contention that the protesters' 1st Amendment right to picket in front of a synagogue every Saturday morning for 17 1/2 years using signs bearing anti-Semitic stereotypes justify such an outrageous award?

At the conclusion of her decision, addressing the request for sanctions based on 28 U.S.C. § 1927, Judge Roberts wrote (R. 103, at *18): "Had the Court not already found Susselman jointly and severally liable for the attorney fees, it would be inclined to sanction him. Having done that, additional sanctions against Susselman are not warranted." Judge Roberts had thus already decided, without identifying what filings Mr. Susselman had filed qualified as "vexatious," that he was subject to being sanctioned for such purportedly vexatious filings. But there were none. The motion for partial summary judgment which the Plaintiffs filed relating to Ann Arbor's sign ordinance (R. 23) was stricken by Judge Robert because it was not linked to any specific count pled in the FAC (R. 29). Since the motion was stricken, the protesters' attorneys did not have to file a response to the motion, and it was not heard. The three joint letters which the Plaintiffs filed, for leave to file a motion for a preliminary injunction (R. 55); for leave to file a motion for partial summary judgment regarding the sign ordinance which corrected the error of the prior motion for partial summary judgment (R. 60); and for leave to file a Second Amended Complaint (R. 64) were all filed in accordance with Judge Roberts' Order Concerning the Filing of Motions (R. 44). How could Susselman be sanctioned for having complied with the very protocol which Judge Roberts established? Moreover, all of the motions for leave were denied by Judge Roberts (R. 58; R. 63; R. 65), so the protesters' attorneys were never required to expend time filing responses to the proposed motions.

The protesters filed their renewed motion for attorney fees and sanctions on October 13, 2021, while

a petition for *en banc* review, filed on October 8, 2021, was pending before the Court. Susselman filed a motion to dismiss the renewed motion on October 29, 2021, on the basis that the District Court did not have jurisdiction. (R. 86) The motion was not frivolous and was supported by legal precedent. Once Plaintiffs filed their Notice of Appeal from Judge Roberts' Order dismissing the lawsuit, the District Court no longer had jurisdiction over the case. *See United Nat. Ins. Co. v. RD Latex Corp.*, 242 F.3d 1102, 1109 (9th Cir. 2001) ("Once a notice of appeal takes effect, the district court loses jurisdiction over the matter placed before the appellate court."); *Rutherford v. Harris Cty.,, Tex*, 197 F.3d 173, 190 (5th Cir. 1999) ("A district court loses all jurisdiction over matters brought to the court of appeals upon the filing of a notice of appeal.") As long as the motion for *en banc* review was pending, jurisdiction over the case was exclusively in the 6th Circuit. The Court denied the request for *en banc* review on November 2, 2021, and issued its mandate on November 12, 2021. Until the motion for *en banc* review was denied and the mandate was issued, the District Court did not have jurisdiction over the case. *See Fieger v Gromek*, 373 F. App'x 567, 570 (6th Cir. 2010); *United States v. Cook*, 592 F.2d 877,880 (5th Cir. 1979); *Zaklama v. Mount Sinai Medical Center*, 906 F.2d 645, 649 (11th Cir. 1990). The protesters' filing of their renewed motion for attorney fees before the motion for *en banc* review was ruled on and the mandate was issued was therefore premature. The motion to dismiss the protesters' renewed motion for attorney fees was in accordance with the case law, was

not frivolous and consequently could not constitute a "vexatious" filing under 28 U.S.C. § 1927.[5]

In sum, none of the filings which were submitted in the course of the litigation constituted vexatious filings under 28 U.S.C. § 1927, yet Judge Roberts had determined that some of them were, without specifying which they were, and stating that, but for her having awarded attorney fees pursuant to 42 U.S.C. § 1988, she would have sanctioned Mr. Susselman.

VIOLATIONS OF THE CODE OF CONDUCT FOR UNITED STATES JUDGES

The undersigned maintains that the rulings of Judge Roberts identified above, taken together in their entirety, have the distinct appearance of being motivated by anti-Semitic sentiments, and/or, disgruntlement with Israel's policies with respect to its treatment of the Palestinians. By virtue of this motivation, the undersigned maintains that Judge Roberts has violated several of the Code's Canons. Plaintiff maintains that the appearance of impropriety in her rulings, taken in their entirety, is so pervasive that they constitute an exception to the requirement that a complaint of misconduct may not be related to the merits of a judge's rulings. *See Liteky, Davis*, *King, supra.*

The relevant Canons and Commentary state, in relevant part:

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[5] On February 7, 2022, the undersigned filed a Notice of Appeal regarding Judge Roberts' Order Granting In Part And Denying In Part Protestor Defendants' Motion For Attorney Fees And Sanctions. The appeal is currently pending, Case No. 22-1075, 22-1131.

Canon 1: A Judge Should Uphold the integrity and independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of the Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law and should comply with this Code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making

judicial decisions.

. . .

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities

(A) *Respect for Law*. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) *Outside Influence*. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

. . .

COMMENTARY

Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges, including harassment and other inappropriate workplace behavior. A judge

must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of the Code.

. . .

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased. The judge should adhere to the following standards:

(A) *Adjudicative Responsibilities*.

. . .

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should

require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

. . .

COMMENTARY

. . .

Canon 3A(3) The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice, or bias.

Canon 3A(4). The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participating in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A. Judge Roberts' Rulings, Taken Together in Their Entirety, have Violated Canons 1 And 2

Judge Roberts' rulings as outlined above have the distinct appearance of impropriety by virtue of being

motivated either by sentiments of anti-Semitism, and/or hostility towards the State of Israel and its policies relating to the Palestinians. The undersigned submits that there is no other rational, judicious explanation for Judge Roberts' combined rulings that the Plaintiffs attested extreme emotional distress upon seeing the protesters' signs – including flagrantly anti-Semitic signs in front of their house of worship every Saturday morning for 17 1/2 years - did not constitute a "concrete injury" sufficient to afford them standing to sue; her denial of jurisdiction over the Plaintiffs' ELCRA claim, when she had previously asserted jurisdiction over a comparable claim in *Williams v. Port Huron Area School Dist. Board of Education, supra*, and ruled that the verbal harassment of African-American students qualified as creating a hostile environment, in violation of the ELCRA; her assertion that the messages on the signs were "more than" protected under the First Amendment; her refusal to grant the Plaintiffs leave to file a motion for partial summary judgment regarding the failure of the City of Ann Arbor to enforce its sign ordinance over the entire 17-year period, notwithstanding that neither the protesters nor the City contested Plaintiffs' claim that the sign ordinance unambiguously prohibited placing any signs in the public right-of-way, and that the ordinance was content and viewpoint neutral, and therefore could have been enforced – requiring the protesters to remove every sign which they placed in the public right-of-way – without violating the protesters' right of free speech; her failure, not just once, but three times, to address the applicability of the decision in *Wells v. Rhodes, supra*, to the comparable facts in the Plaintiffs' lawsuit; and finally, her ruling granting the protesters' motion for attorney fees pursuant to 42

U.S.C. § 1983, on the basis that the claims pled in the FAC were "frivolous," a ruling contrary to numerous Supreme Court and lower federal court – including 6th Circuit – precedents, and in direct contradiction of the majority's holding that the legal claims pled in the FAC were not frivolous, and holding the undersigned and the Plaintiffs – including an 87 year-old Holocaust survivor – jointly and severally liable for paying the protesters' attorney fees in the amount of $158,721.75, an amount which includes attorney fees for time expended on the standing issue, an issue on which the protesters did not even prevail. What possibly rational explanation, other than bias, is there for this final decision?

The rulings, taken together in their entirety, do not help "to maintain public confidence in the impartiality of the judiciary." (Commentary to Canon 1) Nor do they comport with the directive that, "A judge must avoid all impropriety and appearance of impropriety." (Commentary to Canon 2A) Nor do they dispel concerns that Judge Roberts' rulings regarding signs condemning Israel's policies towards the Palestinians, in combination with blatantly anti-Semitic signs, were motivated by her personal political views, in violation of Canon 2(B).

At the end of the Ken Burns documentary, "The U.S. And The Holocaust," Guy Stern, one of the Jewish Ritchie Boys during World War II, states: "We have seen the nadir of human behavior and we have no guarantee that it won't recur. If we can make that clear, and graphic, and understandable, not as something to imitate, but as a warning of what can happen to human beings, then, perhaps, we have one shield against its recurrence." Judge Roberts' rulings,

with their distinct appearance of anti-Semitic and anti-Israeli subtext, have put a serious and dangerous crack in that shield. As was stated in *Lewis v. Curtis*, 671 F.2d 778 (3d Cir. 1982), *id.* at 789, *cert. denied*, 459 U.S. 889 (1982):

> Impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150, 89 S. Ct. 337, 340, 21 L.Ed.2d 301 (1968), the United States Supreme Court stated. "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

Judge Roberts' rulings, taken together in their entirety, do not satisfy this test.

B. Judge Roberts' Pre-Determination that She Would have Sanctioned Mr. Susselman for Violating 28 U.S.C. § 1927 If She had Not Already Awarded Attorney Fees Against Him Pursuant To 42 U.S.C. § 1988 has the Appearance of Being a Vendetta Against Susselman, in Violation of Canons 2 And 3

28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably

incurred because of such conduct.

As discussed above, none of the filings which the undersigned submitted in course of this litigation "multiplie[d] the proceedings . . . unreasonably and vexatiously." Of the seven filings which the protesters have claimed in their cross-appeal were vexatious, three of them were joint letters which were filed in order to comply with the protocol which Judge Roberts imposed, seeking leave to file a motion for a preliminary injunction ; a motion for leave to file a motion for partial summary judgment related to the sign ordinance; and a motion for leave to file a Second Amended Complaint. None of the requests for leave to just file the motions were granted by Judge Roberts, and therefore the protesters did not have to respond to the motions, and therefore they did not incur any excess costs or attorney fees. One of the filings was a motion for partial summary judgment, filed before the protocol was imposed, which Judge Roberts struck, therefore the protesters were not required to file a response to that motion.

The motion which the Plaintiffs filed for entry of a default judgment was supported by the case law. Judge Roberts did not deny the motion on the merits, but on the basis that a decision on the merits of the lawsuit itself was preferable to a default judgment. It was in fact the protesters' fatuous argument that Witnesses, a voluntary unincorporated association, did not constitute a legal entity subject to being sued which was vexatious. Likewise, Plaintiffs' motion to dismiss the protesters' renewed motion for attorney fees and sanctions because the appeal was still pending in this Court, and therefore the district court did not have jurisdiction to rule on the protesters'

motion, was supported by the case law, and therefore not vexatious. The 7th filing which the protesters claimed was vexatious was a motion the Plaintiffs filed for leave to file a sur-reply brief to an oversize reply brief filed by the protesters (R. 62), which Judge Roberts denied (R. 63).

None of the filings qualified as unreasonable and vexatious under 28 U.S.C. § 1927. Yet Judge Roberts indicated that she would have ruled that Susselman had violated the statute, but for her award of attorney fees under § 1988. One is prompted to ask why Judge Roberts would make a ruling which had absolutely no basis in the record? Had it become a vendetta against Susselman because of the argument he had made about the failure of Judge Roberts to address the applicability of the *Wells* decision? If so, such a vendetta would not promote confidence "in the integrity and impartiality of the judiciary" and would clearly constitute "behavior that could reasonably be interpreted as harassment, prejudice or bias," in violation of Canons 2 and 3A(3). As Justice Black stated in *Bridges v. California*, 314 U.S. 252 (1941), *id.* at 271, "[A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."

C. There Is Reason to Believe that, During the Pendency of the Two Appeals, Judge Roberts and Judge Clay have Engaged in *Ex Parte* Communications Relating to the Substantive Issues Raised in the Appeals, in Violation of Canon 3(A)(4)

The rationale for prohibiting *ex parte* communications was discussed in *In re Kensington International Ltd.*, 368 F.3d 289 (3d Cir. 2004), in which the Court stated, *id.* at 310:

> [*E*]*x parte* communications run contrary to our adversarial trial system. The adversary process plays an indispensable role in our system of justice because a debate between adversaries is often essential to the truth-seeking function of trials. *See Polk County v. Dodson*, 454 U.S. 312, 318, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) ("the system assumes that adversarial testing will ultimately advance the public interest in truth and fairness"). If judges engage in *ex parte* conversations with the parties or outside experts, the adversary process is not allowed to function properly and there is an increased risk of an incorrect result.
>
> Attuned to that concern, the Code of Conduct for United States Judges cautions that a judge should "neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." Code of Conduct for U.S. Judges Canon 3 § A(4) (2003). The rule is designed to prevent all of the evils of *ex parte* communications: "bias, prejudice,

> coercion, and exploitation." Jeffrey M. Sharman et al., *Judicial Conduct and Ethics*, § 5.02 (3d ed. 2000). The Code provides for only two narrow exceptions. First, "[a] judge may . . . obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond." Code of Conduct for U.S. Judges Canon 3 § A(4)(2003). Second, "[a] Judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters." *Id.*

Another problem with *ex parte* communications is that there is no record of what the participants discussed. *See City of Pittsburgh v. Simmons*, 729 F.2d 953 (3d Cir. 1984).

Neither of the exceptions noted in *Kensington* permits a trial court judge to have an *ex parte* communication with an appellate judge who has been assigned to an appellate panel to review the trial judge's decision, regarding any substantive matter relating to the decision on appeal. While the Commentary on Canon 3A(4) states, "A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities," in the context of a decision which is being reviewed on appeal, this refers to other appellate judges in the same Circuit Court, or from a different Circuit or District Court assigned to the appellate panel. It does not refer to the District Court judge whose decision is being reviewed on appeal. An *ex parte* communication

between a trial judge and an appellate judge while an appeal is pending regarding a decision rendered by the trial judge, on matters other than administrative, without the knowledge of the appellant's attorney, is disadvantageous to the appellant. The Commentary relating to Canon 2.9, of the ABA's Model Code of Judicial Conduct thus states: "[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified for hearing the matter, and with judges who have appellate jurisdiction over the matter."

Equivalent language is included in the Codes of Judicial Conduct of 27 states relating to the respective Code's Canon prohibiting *ex parte* communications: *See* the Code of Judicial Conduct of Arizona; Arkansas; Colorado; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Maryland; Minnesota; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Mexico; North Dakota; Ohio; Tennessee; Utah; Vermont; Washington; West Virginia; and Wyoming. *See, e.g., Harrington v. State*, 584 N.E.2d 558 (Ind. 1992) (trial judge improperly communicated by letter with state supreme court justice regarding the appellant's motion for rehearing). The Judicial Code of Conduct of Oregon provides that a judge may have an *ex parte* communication with another judge of the same level, only. *See In re Schenck*, 318 Or. 402; 870 P.2d 185 (Or. 1994) (trial judge improperly communicated by letter to supreme court justice while mandamus action appeal pending).

The undersigned acknowledges that he has no direct knowledge of whether Judge Roberts engaged in any *ex parte* communications with Judge Clay

during the pendency of either appeal. He has reason to believe, however, that they have known each other for several years and are friends, beginning when they contemporaneously practiced law in Detroit during the years 1977 to 1985 at different law firms, prior to being appointed to the federal bench, Judge Roberts in 1998, and Judge Clay in 1997. This, alone, of course, would not entail that they engaged in any *ex parte* communications while either appeal was pending. The undersigned submits, however, that the vehemence with which Judge Clay criticized the undersigned's argument regarding Judge Roberts' failure to address the similarity between the facts and law in the *Wells* decision and the instant case - to the extent of interrupting his oral argument - combined with his rejection of the majority's ruling reversing Judge Roberts' decision that the Plaintiffs did not have standing to sue, raises questions regarding his impartiality.

After the undersigned filed the appeal from Judge Roberts' judgment awarding attorney fees to the protesters, he filed a motion directly in the Sixth Circuit on February 8, 2022, requesting that the Court issue a stay of the judgment's enforcement pending the conclusion of the appeal. In so doing, he bypassed the requirement under Fed. R. App. P. 8(a)(1)(A), (B), (2)(A)(i) that a motion to stay a judgment be first filed in the trial court, unless such a motion would be impracticable. The undersigned argued that filing the motion before Judge Roberts would be impracticable, given her ruling that the claims filed in the FAC were frivolous, contrary to the majority's ruling that the claims were not frivolous.

On May 31, 2022, the Court, by a 2-1 majority, issued its decision denying the motion for a stay,

without prejudice to filing the motion in the District Court, ruling that filing the motion in the District Court was not impracticable under the meaning of the Rule. The majority also denied a motion to supplement the original motion as moot. Judge Clay filed a dissent, stating, at *3, "This Court found Brysk's claims to be meritless, and the Supreme Court apparently thought they were not worth reviewing." This assertion was erroneous in two respects. First, the majority did not rule that the claims pled in the FAC were meritless. Rather, the majority stated, 14 F.4th at 508, "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." Being "wrong" does not equate to being "meritless." And since being "meritless" would equate to being "frivolous," since the majority held that the claims were not frivolous, they were, accordingly, not meritless – they were wrong.

Second, the Supreme Court's denial of the petition for *certiorari* was not an assertion that the Court concluded that the issues raised in the petition "were not worth reviewing." The Supreme Court has repeatedly stated that its denial of a petition for *certiorari* is not a statement about the merits of the issues raised in the petition, and does not constitute an affirmance of the Circuit Court's decision. *See Young v. Fire Insurance Exchange*, *supra.*

At the end of his dissent, Judge Clay stated, at *4, "I would deny the motion to stay as to Brysk and dismiss the motion to supplement as moot; further, I would leave to her whatever remedies, if any, she may be entitled to pursue in the district court to stay enforcement of the judgment." Why did Judge Clay

feel a need to file his opinion as a dissent, rather than simply concurring with the majority? His actions, again, raise questions regarding his impartiality and whether he was motivated to do so by virtue of his friendship with Judge Roberts, in violation of the prohibition in Canon 2(B) that, "A judge should not allow . . . social . . . relationships to influence judicial conduct or judgment." They also raise questions regarding whether he and Judge Roberts have engaged in *ex parte* communications during the pendency of the appeals, in violation of Canon 3(A)(4). Are Judge Roberts and Judge Clay willing to swear under penalty of perjury, as the undersigned is required to swear under penalty of perjury, that they have not engaged in any *ex parte* communications relating to the issues raised in either appeal, while the respective appeal was pending?

CONCLUSION

The undersigned requests that pursuant to Rule 11(f) of the Rules For Judicial-Conduct And Judicial-Disability Proceedings that a Special Committee be appointed to review the instant Complaint. The undersigned further requests that pursuant to Rule 26 that the Chief Judge submit a request to Chief Justice Roberts that the Complaint be transferred to the judicial council of another Circuit.[6]

I declare under penalty of perjury that the statements made in this Complaint are true and correct to the best of my knowledge.

Marc M. Susselman (P29481)
Attorney at Law

Dated: October 18, 2022

[6] To preserve the confidentiality of this Complaint, the undersigned has not served a copy of the Complaint on any of the attorneys of record who have appeared in either appeal. If the Court believes that the undersigned has an obligation to provide opposing counsel with a copy, he requests that the Court so advise him and he will serve a copy on each of the attorneys of record.

PHOTOGRAPH OF DR. MICHAEL SIEGEL BEING MARCHED THROUGH THE STREETS OF MUNICH

The Photo that alerted the world

Posted on November 7, 2016

This is a photo shot on the streets of Munich, Germany on 10th March 1933; just six weeks after Hitler came to power. The picture, published across the world and later in many history books, was a chilling portent of the hellish events that were about to consume Germany and much of the rest of the planet. Many have seen this photo, but few know the background behind it.

Dr Michael Siegel, an eminent 50-year-old German Jewish lawyer, is shown in the photo, bruised, barefoot, trousers ripped, being marched by Nazi 'brown-shirt' auxiliary police. The sign hanging from his neck was scrawled with the message, *'Ich bin Jude, aber ich werde mich nie mehr bei der Polizei beschweren'* – **'I am a Jew, but I will never again complain to the police'.**