No. 23-10

In the Supreme Court of the United States

MIRIAM BRYSK, ET AL.,
Petitioners,

v.

HENRY HERSKOVITZ, ET AL.,
Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AND OTHER JEWISH ORGANIZATIONS IN SUPPORT OF PETITIONERS

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August 4, 2023

MOTION OF *AMICI CURIAE* TO WAIVE TEN-DAY NOTICE REQUIREMENT OF RULE 37

Amici hereby move for waiver of the 10-day notice requirement retained by Amended Rule 37.2 of the Rules of this Court.

1. Undersigned counsel for *amici* is an attorney in a family firm who has filed *amicus* briefs in this Court for more than 50 years.

2. Counsel learned of the revision to Rule 37 when it was issued by the Court, but failed, because of other professional and personal commitments and by a mistaken belief that the revised rule eliminated the requirement to provide advance notice of the submission of an *amicus* brief, to notify counsel in this case of the proposed filing of an *amicus* brief ten days before August 4, 2023, which is the due date for filing the *amicus* brief.

3. Undersigned counsel provided the required notice to all counsel by e-mail dated July 28, 2023.

4. Respondents' counsel had waived the filing of a response to the petition on July 14, 2023.

5. Notification of the proposed filing of the *amicus* brief under the revised Rule 37 would have had to be provided by July 23, 2023, which was after respondents filed their waiver.

6. The failure to provide timely notice did not, therefore, prejudice any party.

For the above reasons, the inadvertent failure to notify counsel of the planned filing of the attached *amici curiae* brief should be waived.

Respectfully submitted,

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August 2023

QUESTION PRESENTED

Whether Jewish plaintiffs who filed an unsuccessful federal lawsuit to move to 1000 feet away from their synagogue antisemitic harassers who intimidated them each Saturday morning when they came to weekly worship services may be sanctioned under 42 U.S.C. § 1988, with an order directing them to pay their harassers attorneys' fees of $158,721.75.

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INTEREST OF THE *AMICI CURIAE*[1]

Jewish Americans are living in perilous times. They must turn to the courts to respond to unprecedented antisemitism. The decision of the Sixth Circuit in this case carries a devastating message: "Don't dare initiate a good-faith lawsuit to protect your religious worship from proximate harassment. You will be heavily penalized if your lawsuit is unsuccessful." This message conflicts with the "American Rule" that requires each party to bear its own litigation expenses and particularly discourages civil-rights lawsuits.

The *amici* are national Jewish organizations that have frequently endorsed briefs filed by the National Jewish Commission on Law and Public Affairs ("COLPA") to express the interests of the American Jewish community on important legal issues considered by this Court and by other judicial bodies in the United States.

COLPA has spoken on behalf of America's Orthodox Jewish community for more than half a century. COLPA's first amicus brief in this Court was filed in 1967 in *Board of Education v. Allen*, 392 U.S. 236 (1968). Since that time, COLPA has filed more than 35 amicus briefs to convey to this Court the position of leading organizations representing Orthodox Jews in the United States. The following

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* made any monetary contribution intended to fund the preparation or submission of this brief. Notice of this filing has been provided less than 10 days before it is filed.

national Orthodox Jewish organizations join this amicus brief:

▪ Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization that articulates and advances the position of the Orthodox Jewish community on a broad range of issues affecting religious rights and liberties in the United States.

▪ Agudas Harabbonim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

▪ Coalition for Jewish Values ("CJV") represents over 2,500 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, and does so through education, mobilization, and advocacy, including by filing amicus curiae briefs in defense of equality and freedom for religious institutions and individuals.

▪ Orthodox Jewish Chamber of Commerce is a global umbrella of businesses of all sizes, bridging the highest echelons of the business and governmental worlds together stimulating economic opportunity and positively affecting public policy of governments around the world.

▪ Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

▪ Rabbinical Council of America ("RCA") is the largest Orthodox Jewish rabbinic membership organization in the United States comprised of nearly one thousand rabbis throughout the United States and other countries. The RCA supports the work of its member rabbis and serves as a voice for rabbinic and Jewish interests in the larger community.

▪ Torah Umesorah (National Society for Hebrew Day Schools) serves as the preeminent support system for Jewish Day Schools and yeshivas in the United States providing a broad range of services. Its membership consists of over 675 day schools and yeshivas with a total student enrollment of over 190,000.

▪ The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations coast to coast. The Orthodox Union has participated in many cases before various courts which have raised issues of importance to the Orthodox Jewish community. Among these issues, of paramount importance is the constitutional guarantee of religious freedom.

INTRODUCTION AND SUMMARY OF ARGUMENT

Marvin Gerber and Dr. Miriam Brysk (now deceased) alleged in a lawsuit brought by attorney Marc M. Susselman that they suffered severe emotional distress and were intimidated when they attempted to attend Sabbath-morning services at their Ann Arbor synagogue. The defendants are members of a group of 6 to 15 protesters who gather every Saturday morning since 2003 in close proximity to the synagogue with antisemitic signs that read "Resist Jewish Power," "Jewish Power Corrupts," "Stop Funding Israel," and "End the Palestinian Holocaust." The plaintiffs requested in their complaint that the protest either be enjoined or that the defendants be moved to "1,000 feet of the Synagogue's property line."

The district court dismissed their claim on the ground that the plaintiffs lacked standing. *Gerber v. Herskovitz,* 2020 WL 1307973 (E.D. Mich. March 19, 2020). The court of appeals reversed the dismissal because "emotional distress caused by offensive speech suffices to establish Article III standing." *Gerber v. Herskovitz,* 14 F.4th 500, 507 (6th Cir. 2021). Rather than remanding the case to the district court, the court of appeals held that the complaint should be dismissed under Rule 12(b)(6) because the defendants were engaged in constitutionally protected speech on a "public matter" -- "American-Israeli relations" (14 F.4th at 509), and that there was no merit in the

complaint's "bevy of claims" under the Civil Rights Act.[2]

Petitions for rehearing en banc and for certiorari were filed by both plaintiffs. The court of appeals denied a motion to stay the mandate pending this Court's ruling on the certiorari petitions so that the defendants would not be delayed in applying for attorneys' fees under 42 U.S.C. § 1988.

The defendants waived their right to respond to the petitions for certiorari, and this Court denied certiorari without requesting a response. *Brysk v. Herskovitz,* 142 S. Ct. 1369 (2022); *Gerber v. Herskovitz,* 142 S. Ct. 2714 (2022).[3]

The district court ordered the plaintiffs to pay $158,721.75 to the defendants under 42 U.S.C. § 1988. *Gerber v. Herskovitz,* 2022 WL 1087378 (E.D. Mich. April 11, 2022) The Sixth Circuit affirmed that decision because it held that the award of attorneys' fees was not an abuse of the district court's discretion. *Gerber v. Herskovitz,* 2023 WL 2155050 (6th Cir. Feb. 22, 2023)

1. The decision below conflicts with the principle articulated by this Court in *Hensley v. Eckerhart*, 461 U.S. 424, 429, n. 2

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[2] Petitioner Gerber demonstrated in his petition for a writ of certiorari that the court of appeals erred in rejecting valid claims made by the plaintiffs under 42 U.S.C. §§ 1981, 1982, 1983, 1985(3), and 1986. See Petition for a Writ of Certiorari, *Gerber v. Herskovitz,* No. 21-1263, pp. 9-12.

[3] Justice Kavanaugh also denied a motion to stay the mandate pending a decision on the Gerber's petition for certiorari.

(1983), that authorized attorneys' fees against a civil-rights plaintiff "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." This governing principle was applied by this Court in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978); *Hughes v. Rowe*, 449 U.S. 515-516 (1980); *Fox v. Vice*, 563 U.S. 826, 833 (2011); and *CRST Van Expedited, Inc. v. Equal Employment Opportunity Commission*, 578 U.S. 419, 432 (2016). Review of this case is warranted because the allegations that the defendants violated various provisions of federal Civil Rights laws were neither vexatious nor frivolous and were brought in good faith to enable the plaintiffs to worship without harassment.

2. Exceedingly harmful deterrent consequences will result if plaintiffs who initiate a civil rights action that seeks limited relief to protect their own constitutional rights are, with this decision as a precedent, punished for filing suit by being ordered to pay the defendants' attorneys' fees. This Court's recent docket of constitutional decisions demonstrates that lawsuits are won even though, when initially filed, they appear to conflict with this Court's precedents. These monumentally important decisions would not have issued if the plaintiffs had the

prospect of paying attorneys' fees to the defendants been a real danger.

3. This case concerns harassment of Jewish worship services. But the substantive decision of the court below and the sanction imposed against the Jewish plaintiffs will presumably apply if or when similar protests surround a mosque, a Catholic church, a Sikh temple, or any other place of denominational religious prayer. The obvious effect on religious exercise was patently misrepresented in the Sixth Circuit's decision as speech on "American-Israel relations." Comparable protests at other places of religious worship may be erroneously portrayed by future courts as mere debatable speech.

4. As they did when petitions for certiorari were filed to review the initial decision of the Sixth Circuit, the defendants have waived their right to file a response to this petition and the case has been calendared for consideration when the Court returns from its summer recess. This time the Court should at least request a response from the respondents.

ARGUMENT

I.

THE ATTORNEYS' FEES AWARD TO THE DEFENDANTS CONFLICTS WITH THIS COURT'S DECISIONS

Forty years ago in *Hensley v. Eckerhart*, 461 U.S. 424, 429, n. 2 (1983), this Court said that defendants who prevail in a civil-rights action may recover their attorneys' fees against plaintiffs only if the lawsuit was "vexatious, frivolous, or brought to harass or embarrass." The Court reaffirmed this principle in its more recent consideration of 42 U.S.C. § 1988. *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978); *Fox v. Vice*, 563 U.S. 826 (2011); *Hughes v. Rowe*, 449 U.S. 515-516 (1980), and *CRST Van Expedited, Inc. v. Equal Employment Opportunity Commission*, 578 U.S. 419 (2016). Petitioners allege that they suffered substantial emotional distress as a result of the antisemitic protests that greeted them when a group that assembled each week specifically to harass their religious observance. Their lawsuit was, on its face, plainly not "vexatious, frivolous, or brought to harass or embarrass." Hence the decision of the Sixth Circuit conflicts with the governing standard announced repeatedly by this Court.

II.

POTENTIAL ATTORNEYS' FEE SANCTIONS WOULD HAVE DETERRED PLAINTIFFS FROM BRINGING LAWSUITS THAT RESULTED IN THE COURT'S MOST IMPORTANT RECENT CASES

Would the plaintiffs who initiated lawsuits that resulted in landmark recent decisions by this Court have dared to file complaints if there were a real prospect of having to pay the attorneys' fees of the defendants if their lawsuits were unsuccessful? The possibility of crippling sanctions would have, we believe, deterred the plaintiffs in several of the major rulings rendered in the final two days of the 2022 Term. The petitioners who prevailed in this Court in *Students for Fair Admission, Inc. v. President and Fellows of Harvard College*, No. 20-1199, 143 S. Ct. 2141 (2023); *Groff v. DeJoy*, No. 22-174, 143 S. Ct. 2279 (2023); and *303 Creative LLC v. Elenis*, No. 21-476, 143 S. Ct. 2298 (2023), instituted their civil-rights claims in federal district courts based on legal contentions that were, at the time, contrary to precedents of this Court.

The plaintiffs in these cases would surely have been "chilled," if not totally deterred, if they believed that there was a realistic possibility that they would be held liable for the defendants' attorneys' fees if their lawsuits were unsuccessful. The decision of the Sixth Circuit in this case – imposing a very substantial financial penalty on individuals who sought limited legal relief to enable them to exercise freely the basic right of freedom of worship – will discourage and

obstruct future legal claims that should ultimately be validated.

III.

MEMBERS OF OTHER RELIGIOUS FAITHS VICTIMIZED BY SIMILAR CONDUCT WILL BE DETERRED FROM SEEKING LEGAL PROTECTION

This case was brought by Jewish Americans to secure legal protection from antisemitism – the world's oldest hatred. The speech that the court below erroneously viewed as nothing more than constitutionally protected comment on "Israeli-American relations" was subsequently condemned by the Ann Arbor City Council as antisemitism. See "Ann Arbor Council Votes To Condemn Synagogue Protests, Antisemitism," Ann Arbor News, Jan. 19, 2022. It is comparable to the cross-burning that generated local laws upheld by this Court. *Virginia v. Black*, 538 U.S. 343 (2003); see also *Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (2023).

Is similar harassment of worshippers at mosques, Catholic churches, Sikh and Hindu temples far off? If unsuccessful resort to a court to move such protests from proximity to prayer may be penalized with huge awards of attorneys' fees, the free exercise of religion by many of America's minorities is at serious risk.

IV.

THE COURT SHOULD REQUEST THAT RESPONDENTS REPLY TO THE PETITION

Respondents promptly waived their right to file a response and the petition has been calendared for the Court's conference of September 26, 2023. This tactic succeeded when petitions for certiorari were filed to review the initial decision of the Sixth Circuit.

By affirming an award of attorneys' fees to the defendant-respondents the Sixth Circuit has aggravated and amplified the impact of its initial ruling on the religious freedom of minorities in the United States. The respondents should be ordered to address this real concern.

CONCLUSION

For the foregoing reasons and those expressed by petitioners in the pending Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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