NO. 23-10

In the Supreme Court of the United States

DR. MIRIAM BRYSK AND MARC M. SUSSELMAN,

Petitioners,

v.

HENRY HERSKOVITZ, ET AL.,

Respondents.

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

PETITION FOR REHEARING

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The decision of the Court of Appeals affirming the district court's attorney fee award is included below at Pet.App.1a, *reh'g denied* (6th Cir. April 4, 2023) is included below at App. The decision of the U.S. District Court for the Eastern District of Michigan, (E.D. Mich. Jan. 25, 2022), awarding attorney fees is included below at Pet.App.13a.

STATEMENT OF THE CASE

Petitioner incorporates herein the Statement of the Case included in the Petition for a Writ of Certiorari.

ARGUMENT

I. Rehearing Is Warranted Where There Are Competing Constitutional Rights and Denial of the Petition for Certiorari Will Result in Chilling Other Plaintiffs and Their Attorneys from Acting in Good Faith to Protect Their Perceived Constitutional and Civil Rights Out of Concern That They and Their Attorney Will Be Penalized by Being Assessed the Attorney Fees of Those Advocating for Competing Constitutional or Civil Rights.

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

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

In *Hensley v. Eckerhart,* 461 U.S. 424, 429, n. 2 (1983), the Supreme Court held that defendants who prevail in a civil rights action may recover their attorney fees against plaintiffs only if the lawsuit was "vexatious, frivolous, or brought to harass or embarrass." This threshold was set higher than that which plaintiffs must show in order to recover attorney fees if they prevail in a civil rights lawsuit for one main purpose: to encourage, rather than deter, attorneys to advocate on behalf of individuals who believe that their constitutional and civil rights are being compromised without fear that if they lose, they will be

penalized by being required to pay the defendants' attorney fees. Losing such a lawsuit on its merits did not entail that the lawsuit was "vexatious, frivolous, or brought to harass or embarrass." The Court subsequently reaffirmed this principle in numerous decisions: *Christiansburg Garment Co. v. Equal Employment Commission,* 434 U.S. 412 (1978); *Fox v. Vice,* 563 U.S. 826 (2011); and *Hughes v. Rowe,* 449 U.S. 515 (1980).

In their lawsuit, Petitioners alleged that seeing the anti-Semitic and anti-Israeli signs placed in front of their synagogue every Saturday morning by a group of protesters for, then, 17 years, as they entered the synagogue to exercise their First Amendment freedom to worship caused them extreme emotional distress. They accordingly sought an injunction to place reasonable time, place and manner restrictions on the use of the signs, a standard exercise of a federal court's equitable jurisdiction recognized in Supreme Court precedent as legitimate to protect the exercise of a constitutional right, even when applied to non-state actors. *See, e.g., Madsen v. Women's Health Center, Inc.,* 512 U.S. 753 (1994). The lawsuit, on its face, was plainly not "vexatious, frivolous, or brought to harass or embarrass." The fact that Petitioners lost the lawsuit on the merits did not entail that the lawsuit was "vexatious, frivolous, or brought to harass or embarrass."

Rehearing of the denial of the petition for *certiorari* is called for in order to reaffirm this principle yet again. Failure to grant the petition will have the counter-productive effect of vitiating that principle, with the consequence of chilling advocacy on behalf of citizens who believe, in good faith, that their constitutional or civil rights are being compromised, because of uncertainty that they will prevail on the merits. Without this principle, several cases recently addressed by the Supreme Court in which the Court ruled in favor of the plaintiffs would likely not have been filed, since they advanced positions which many thought were not sustainable, *e.g., 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).

II. Rehearing Is Warranted Where Silence in the Face of Anti-Semitic Harassment of Jewish Worshipers as They Enter Their House of Worship to Exercise Their First Amendment Freedom of Religion, and Then Penalizing Them for Seeking Reasonable Time, Place and Manner Restrictions on the Anti-Semitic Speech in Front of Their Synagogue, Will Constitute Complicity.

Signs in front of a synagogue, in Ann Arbor, Michigan. They state,

"Resist Jewish Power";

"Jewish Power Corrupts";

"No More Holocaust Movies."

The signs, testaments to anti-Semitism, appear every Saturday morning, as the congregants, with their children, enter their house of worship to pray.

The signs have been displayed every Saturday morning, since 2003, and continue to be displayed every Saturday morning, even in 2023.

Jewish worshippers, entering the synagogue with their children, cannot avoid seeing the signs.

They are a captive audience.

The flag of Israel, also placed directly in front of the synagogue, with the Star of David, the symbol of the Jewish people, encircled in red, bisected by a red slash, meaning "Prohibited."

Anti-Semitism – Jew hatred – out in the open for all to see.

Mingled with the anti-Semitic signs are other signs, denouncing Israel, signs which state:

"Stop Funding Israel";

"End The Palestinian holocaust";

"Boycott Israel";

"Fake News – Israel Is A Democracy";

"Israel Attacked America – 9/11/2001."

Revival of the good old, age-old blood libel.

Who places these signs there?

A group of protesters, some of whom have publicly denied the Holocaust occurred.

Two members of the synagogue, one of whom is a Holocaust survivor, file a lawsuit in a federal court in Detroit.

What do they request?

They request reasonable time, place and manner restrictions on the use of the signs — that the court place restrictions on how close to the synagogue the signs may be placed; during what time periods the signs may be displayed; and how many may be used at one time.

They acknowledge that the protesters have a First Amendment free speech right to express their anti-Semitism and their anti-Zionism in public, but not in proximity to a Jewish house of worship.

They assert that seeing the signs as they enter their sanctuary to pray, a right also guaranteed to them by the First Amendment, causes them extreme emotional distress.

They point out that the City of Ann Arbor has a sign ordinance that unambiguously prohibits placing any signs in the public right-of-way — where the protesters are placing their signs — and that the ordinance is content and viewpoint neutral and therefore may be enforced against the protesters without violating their freedom of speech, citing *R.A.V. v. St. Paul,* 505 U.S. 377 (1992).

What does the court do?

Does it take their grievance seriously, and arrange for a hearing?

No, it dismisses the lawsuit, asserting that the plaintiffs' emotional distress is not a "concrete" injury, and therefore they do not have standing to sue.

The Jewish plaintiffs file an appeal in the Sixth Circuit Court of Appeals.

The Sixth Circuit rules that their emotional distress is a concrete injury, recognized as such in thousands of cases, and therefore the plaintiffs do have standing to sue.

It proceeds to hold, however, that the signs – all of the signs, even the anti-Semitic signs-are impregnably protected by the First Amendment. Does it address the plaintiffs' claim regarding the failure of the City of Ann Arbor to enforce its unambiguous sign ordinance which is content and viewpoint neutral. No it does not. *Gerber v. Herskovitz,* 14 F.4th 500 (6th Cir. 2021).

According to the Court, no injunction of any kind, placing any restrictions on the use of the signs, may be issued.

The plaintiffs seek help from the Supreme Court.

They file a petition for certiorari.

They argue that hate speech in proximity to a house of worship, any house of worship, of any religion, is not, should not be, protected by the First Amendment.

Would signs used by the Ku Klux Klan in front of an African-American church using the N-word be protected by the First Amendment, they ask.

They repeat their argument regarding the failure of the City of Ann Arbor to enforce its unambiguous, content and viewpoint neutral sign ordinance.

What does the Supreme Court say?

It says, "Petition denied."

The anti-Semitic, Holocaust denying protesters then file a motion requesting that their lawyers be awarded attorney fees.

They claim that the lawsuit was "frivolous."

The judge — the same judge who ruled that the Jewish plaintiffs' emotional distress was not a concrete injury — agrees that the lawsuit was frivolous.

She awards the protesters' lawyers attorney fees in the amount of $158,721.75.

The attorney fee award even includes compensation for the time expended by the protesters' attorneys on the standing issue, an issue on which the protesters did not prevail.

She orders that the $158,721.75 must be paid by both of the Jewish plaintiffs, as well as their Jewish attorney.

An 87 year-old Holocaust survivor is ordered to pay $158,721.75 to a group of anti-Semitic Holocaust deniers.

They appeal again to the Sixth Circuit Court of Appeals.

Will the Sixth Circuit reverse this insanity?

No it will not. It issues an Order affirming the attorney fee award.

The plaintiffs once more file a petition seeking relief from the Supreme Court.

They argue that the lawsuit was not "frivolous."

That awarding attorney fees in a case such as this will only inhibit other citizens from seeking to protect their rights.

That it will chill advocacy by other well-intentioned attorneys.

They argue that the attorney fee award is directly contrary to the Supreme Court's decisions in *Riverside v. Rivera,* 477 U.S. 561 (1986), and *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n,* 434 U.S. 412 (1978).

Does the Supreme Court listen?

No, it does not, it issues an Order on October 2, 2023: "Petition denied.'

During the four years that the case was in the courts, the Supreme Court ruled that the City of Boston violated the Constitutional rights of a Christian organization by denying its request to fly a Christian flag from a flagpole in front of the Boston City Hall. *Shurtleff v. City of Boston, Mass.,* 142 S.Ct. 1583 (2022).

It ruled that a public school district violated the religious rights of a high school football coach by prohibiting him from reciting a religious prayer on the 50-yard line after every football game. *Kennedy v. Bremerton School Dist.,* 142 S.Ct. 2407 (2022).

It ruled that the religious rights of a Christian postal worker were violated by UPS because it failed to accommodate his request not to work on Sundays. *Groff v. DeJoy,* No. 22-174, 143 S.Ct. 2279 (2023).

It ruled that the State of Colorado violated the free speech rights of a Christian wedding announcement designer by ordering her to design wedding announcements for gay couples. *303 Creative LLC v. Elenis,* No. 21-476, 143 S.Ct. 2298 (2023).

All of these American citizens have rights protected by the Constitution or federal law, the Supreme Court states.

But the right of Jews to enter their house of worship without being insulted and verbally spat upon, according to the federal courts, is not protected by the Constitution or federal law.

Their lawsuit is ruled "frivolous" and they must compensate the anti-Semitic Holocaust denying protesters their attorney fees.

The federal courts, including the Supreme Court, issue decisions expressing their concern to protect the Constitutional rights of Christians.

But to the Jews, they issue decisions which say, "You must compensate your harassers for the time their attorneys spent reviling you!"

On October 7, 2023, members of the terrorist organization Hamas invade Israel, and indiscriminately slaughter Israeli men, women and children.

Perhaps they were inspired by the commitment of the U.S. government and its courts to protect Jews.

Enough is enough.

In several speeches following the Hamas massacre, President Biden stated that silence in the face of anti-Semitism constitutes complicity.

What message does the silence of the Supreme Court convey?

When will the Supreme Court stand by George Washington's pledge in 1790 to the Hebrew Congregation of Newport, Rhode Island, that, "the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean

themselves as good citizens, in giving it on all occasions their effectual support."

Did the plaintiffs who sued the anti-Semitic protesters seeking protection against their anti-Semitic slurs as they sought to exercise their freedom of worship fail to "demean themselves as good citizens" as not to be deserving of the protection of the United States government, or of the Supreme Court?

Did not the award of attorney fees give assistance to persecution by a group of anti-Semites?

The Jewish plaintiffs did the civilized thing and sought protection in the courts for their right to worship without being verbally harassed and to redress their grievance under the First Amendment.

For this they get penalized.

Would the courts prefer that next time the Jews resort to self-help?

CONCLUSION

Rehearing is warranted in order to reaffirm the principle that losing a lawsuit on the merits brought in good faith to protect perceived constitutional or civil rights will not subject the plaintiffs or their attorney to the sanction of having to reimburse the defendants their attorney fees, which will have the effect of deterring such advocacy. Keeping faith with George Washington's pledge to the Jews of Newport, Rhode Island, also warrants granting rehearing. Continued silence of the Supreme Court in the face of the flagrant expressions of anti-Semitism in front of a synagogue, and then sanctioning the plaintiffs and their attorney for seeking reasonable time, place and manner restrictions on the anti-Semitic harassment, will constitute complicity.

Respectfully submitted,

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October 27, 2023

RULE 44.2 CERTIFICATE

I hereby certify that:

1. This petition for rehearing is presented in good faith and not for delay.

2. The grounds of this petition are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

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October 27, 2023