APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

Opinion of the United State Court of Appeals for the Sixth Circuit (September 15, 2021) 1a

Order Granting Defendants' Motions to Dismiss (August 19, 2020) 43a

REHEARING ORDERS

Order of the United State Court of Appeals for the Sixth Circuit Denying Petitions for Rehearing En Banc (November 2, 2021) 53a

Order Denying Motion for Reconsideration and Motion for Leave to File Supplement (September 3, 2020)..... 55a

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions 57a

Federal Statutory Provisions 58a

M.C.L. § 750.411 ..... 61a

City of Ann Arbor Signs Ordinance (July 19, 2018) 65a

OTHER DOCUMENTS

Affidavit of Gabrielle Shapo (January 23, 2020)..... 87a

Signs and Israeli Flag in Front of the Synagogue..... 93a

Signs Across Washtenaw Ave. Facing the Synagogue 103a

OPINION OF THE UNITED STATE COURT OF APPEALS FOR THE SIXTH CIRCUIT (SEPTEMBER 15, 2021)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARVIN GERBER; MIRIAM BRYSK,

Plaintiffs-Appellants,

v.

HENRY HERSKOVITZ; GLORIA HARB; TOM SAFFOLD; RUBY LIST; CHRIS MARK; DEIR YASSIN REMEMBERED, INC.; JEWISH WITNESSES FOR PEACE AND FRIENDS; CITY OF ANN ARBOR, MICHIGAN; CHRISTOPHER M. TAYLOR, DEREK DELACOURT, STEPHEN K. POSTEMA, and KRISTEN D. LARCOM, in Their Official and Individual Capacities,

Defendants-Appellees.

No. 20-1870

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:19-cv-13726
Victoria A. Roberts, District Judge.

Argued: April 27, 2021

Decided and Filed: September 15, 2021

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

OPINION

SUTTON, Chief Judge.

Anti-Israel protesters have picketed services at the Beth Israel Synagogue in Ann Arbor, Michigan, every week going back to 2003, over 935 weeks in total. Understandably frustrated with this pattern, members of the congregation sued the protesters and the city. The district court granted the defendants' motions to dismiss for lack of standing. We disagree on that point, as the plaintiffs have alleged a concrete and particularized harm to a legally protected interest. But the reality that they have standing to bring these claims does not entitle them to relief. The key obstacle is the robust protections that the First Amendment affords to nonviolent protests on matters of public concern. We affirm the district court's dismissal on that basis.

I.

Every Saturday morning since September 2003, protesters have picketed the Beth Israel Synagogue. Their group typically comprises six to twelve people, and they display signs on the grassy sections by the sidewalk in front of the synagogue and across the street from it. The signs carry inflammatory messages, with statements such as "Resist Jewish Power," "Jewish Power Corrupts," "Stop Funding Israel," "End the Palestinian Holocaust," and "No More Holocaust Movies." R.11 at 2–3. The protests apparently target the members of the Beth Israel Congregation, as

they coincide with the arrival of the congregants to their worship service on Saturday morning. The congregants and their children can see the signs as they enter their worship service. But the protesters have never prevented them from entering their house of worship, have never trespassed on synagogue property, and have never disrupted their services.

The signs, the congregants allege, inflict extreme emotional distress on members of the synagogue. Marvin Gerber, for example, sometimes forgoes attending services or visits a different synagogue to avoid the signs. Dr. Miriam Brysk, a Holocaust survivor, feels extreme emotional distress when she sees the signs.

The protesters have not applied for or obtained a permit to engage in these activities. City employees have insisted that they cannot curtail the protesters' conduct because the First Amendment protects it. Ann Arbor police at times have been present at the protests and in those instances have not interfered with the protesters' activities. Counsel for Gerber and Dr. Brysk contacted city employees and claimed that the protests violated provisions of the municipal code regarding the placement of objects in public thoroughfares. But these communications did not go anywhere.

Fed up, Gerber and Dr. Brysk, referred to as the congregants from now on, filed a lawsuit in federal court against the protesters, the city of Ann Arbor, and various city officials. They brought thirteen federal claims and several state claims. As for the federal claims, the congregants alleged that the protests (and the city's failure to enforce a city sign ordinance against the protesters) violated various federal laws as well as the congregants' substantive due process and free exercise rights. The congregants also claimed that the

city violated their First Amendment right to petition the government when it instructed the congregants' lawyer not to discuss the sign ordinance with city officials other than the city attorney. The congregants asked for damages and an injunction prohibiting the protests or, in the alternative, one imposing time, place, and manner restrictions on the protests so that they did not take place near the synagogue during services, among other forms of relief.

The protesters and city moved to dismiss the complaint for lack of jurisdiction under Civil Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). The district court granted the 12(b)(1) motion, holding that the congregants lacked standing because their claims of emotional distress did not establish a concrete injury. The district court separately declined to exercise supplemental jurisdiction over the state claims and dismissed them without prejudice. The congregants appealed.

II.

We first take up the district court's standing ruling. The U.S. Constitution empowers the federal courts to decide "Controversies" and "all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States." U.S. Const. art. III, § 2. Consistent with the case-and-controversy requirement, several justiciability doctrines limit the judicial power, the most prominent being standing. To have standing, a plaintiff must allege (1) an injury in fact (2) that's traceable to the defendant's conduct and (3) that the courts can redress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–61 (1992). The standing inquiry is not a merits inquiry. A merits defect deprives a court of

subject matter jurisdiction only if the claim is utterly frivolous. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

The congregants readily satisfy the second and third prongs of the standing inquiry. As to traceability, a defendant's actions must have a "causal connection" to the plaintiff's injury. *Lujan*, 504 U.S. at 560. The congregants have alleged that the protesters' conduct and their conspiracy with city employees not to enforce the city's ordinances foreseeably caused members of the congregation extreme emotional distress. That creates the requisite causal link. As to redressability, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotation omitted). If the district court awarded damages or enjoined the Saturday morning protests, that relief would redress the congregants' alleged injuries.

The key question is whether the congregants' allegation—that the protesters caused them extreme emotional distress—establishes a cognizable injury in fact. To satisfy this imperative, the claimant must establish the "'invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). To qualify as particularized, an injury "must affect the plaintiff in a personal and individual way," *Lujan*, 504 U.S. at 560 n.1, not in a general manner that affects the entire citizenry, *Lance v. Coffman*, 549 U.S. 437, 439 (2007). The parties all agree that this injury is particularized. So do we. The protesters directed their picketing at the synagogue goers based on the time and location of their demon-

strations, and the picketing indeed affected them in a "personal and individual way." *Lujan*, 504 U.S. at 560 n.1.

But is this particularized injury concrete? A "concrete" injury is one that "actually exist[s]." *Spokeo*, 136 S. Ct. at 1548. In the case of an intangible injury like this one, the claimant must establish "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 1549; *see TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Emotional distress fits that bill. "Distress," including "mental suffering or emotional anguish," forms "a personal injury familiar to the law." *Carey v. Piphus*, 435 U.S. 247, 263, 264 n.20 (1978). It carries a "close relationship" to a traditional harm. *Spokeo*, 136 S. Ct. at 1549. And it has "been part of our common-law tradition for centuries." *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 873 (6th Cir. 2020) (Murphy, J., concurring in part) (citing Joseph Henry Beale, *Collection of Cases on the Measure of Damages* 337–63 (1895); Arthur G. Sedgwick, *Elements of Damages: A Handbook for the Use of Students and Practitioners* 98–105 (1896)).

Any other conclusion would deprive a federal court sitting in diversity of authority to hear any state law intentional infliction of emotional distress claim. That would be news to a lot of people, including many parties who have won and lost such claims on the merits in federal court over the years.

The congregants' allegations in the end come comfortably within the scope of this traditional harm. They have alleged that the protesters' relentless and targeted picketing of their services has caused them

extreme emotional distress. Permitting the federal courts to handle injuries of this sort parallels causes of action permitted in other areas. In the Establishment Clause context, for example, "psychological injury" from "direct and unwelcome contact" with a poster of the Ten Commandments constitutes "injury in fact sufficient to confer standing." *Am. C.L. Union of Ohio Found. v. DeWeese*, 633 F.3d 424, 429 & n.1 (6th Cir. 2011) (quotation omitted); *see Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 682 (6th Cir. 1994). We have "consistently rejected" arguments that "psychological injury can never be the basis for Article III standing." *Am. C.L. Union*, 633 F.3d at 429 n.1.

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.

The contrary arguments are unconvincing. "[A]llegations of a subjective 'chill,'" the district court ruled, "are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." R.66 at 9 (quotation omitted). As the district court saw it, the alleged distress and interference with religious services constituted a "subjective chill" that failed to reach the level of concrete harm. But the congregants did not merely allege that the protesters "chilled" their First Amendment rights. They claimed that the protesters caused them extreme emotional distress on its own. The cases invoked by the district court involved only allegations that general state policies or surveillance chilled the plaintiffs' exercise of free speech. *See Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008); *Laird v. Tatum*, 408 U.S. 1 (1972); *Muslim Cmty. Ass'n of Ann Arbor*

v. Ashcroft, 459 F. Supp. 2d 592 (E.D. Mich. 2006). None of these cases involved allegations of extreme emotional distress. And none addressed harms arising from action targeting the claimants.

The defendants next argue that the requirement that claimants establish the violation of "a legally protected right or interest" creates an independent fourth requirement to establish standing. City Appellee Br. at 15. Our legal system, they add, does not protect the plaintiffs from offensive speech under the U.S. Supreme Court's First Amendment jurisprudence and thus the claim must be dismissed for lack of standing. But this phrase requires only that the plaintiff show she "has a right to relief if the court accepts the plaintiff's interpretation of the constitutional or statutory laws on which the complaint relies." *CHKRS, LLC v. City of Dublin*, 984 F.3d 483, 488 (6th Cir. 2021). In *CHKRS*, the district court found the plaintiffs lacked standing because they failed to allege a legally protected interest. But we reversed the decision because the trial court relied on Fifth Amendment takings precedent rather than cases articulating the requirements for Article III standing, blurring the lines between standing and the merits. *Id.* at 489. "[J]ust because a plaintiff's claim might fail on the merits," we cautioned, "does not deprive the plaintiff of standing to assert it." *Id.*

Consistent with *CHKRS*, the Tenth Circuit, in interpreting "legally protected interest," explained that "the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082,

1092 (10th Cir. 2006) (en banc). The defendants' position not only would require a close analysis of the merits in order to determine the question of standing, but it also would bar constitutional challenges on jurisdictional grounds in many cases where the argument faces adverse precedent—precedent that may one day be changed. Rather, the phrase requires only that the plaintiff have a "right to relief if the court accepts" the plaintiff's legal position about the meaning of a constitutional provision or a statute. *CHKRS*, 984 F.3d at 488; *see Steel Co.*, 523 U.S. at 89–90.

Defendants' invocation of *Snyder v. Phelps*, 562 U.S. 443 (2011), also fails to separate the standing and merits inquiries. At issue was whether the father of a soldier recently killed in combat could bring a state law tort claim for emotional distress against individuals who protested near the son's funeral. The Court held that the First Amendment served as a defense to the merits of the plaintiff's claim based on the picketing of his son's funeral. It did not, however, deprive the plaintiff of standing to bring the claim. To the contrary, *Snyder* suggests (even though it does not say so expressly) that emotional distress caused by offensive speech suffices to establish Article III standing. How else did the Court have authority to resolve the merits of the claim?

A merits defect, it is true, may raise a jurisdictional problem when it renders a claim truly frivolous. *Steel Co.*, 523 U.S. at 89; *CHKRS*, 984 F.3d at 489. But that is not remotely this case, and not even the city argues otherwise.

We respect the concurrence's contrary position but ultimately find it unconvincing. The raw, calculated-

to-hurt nature of today's speech in some ways parallels the speech in *Snyder*. 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 a dead soldier and his grieving family—was 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* for 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.

III.

On the merits, the congregants' federal claims fall into four buckets: substantive due process, religious liberty, general civil rights, and a constitutional right to petition the government.

A.

Substantive due process. The congregants claim that the city violated the Fourteenth Amendment by failing to enforce the municipal code or otherwise failing to shut down the protests. This inaction, they say, violates their substantive due process rights. Abuse of executive power, it is true, may violate substantive due process in those rare instances when it "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). But the city's protection of the protesters' peaceful free-speech rights does not sink to the level of conscience-shocking state action. Substantive due process does not require what the First Amendment prohibits.

Sidewalks are traditional public fora, meaning they "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (quotation omitted). "[T]he guiding First Amendment principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content applies with full force in a traditional public forum." *Id.* at 477 (quotation omitted). 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." *Snyder*, 562 U.S. at

458. We evaluate whether speech covers a matter of public concern based on "the content, form, and context of that speech." *Id.* at 453 (quotation omitted). And we are vigilant in monitoring efforts to suppress unpopular speech. It is usually "the minority view, including expressive behavior that is deemed distasteful and highly offensive to the vast majority of people, that most often needs protection under the First Amendment." *Bible Believers v. Wayne County*, 805 F.3d 228, 243 (6th Cir. 2015) (en banc).

The protesters' actions come squarely within First Amendment protections of public discourse in public fora. As in *Snyder*, the content and form of the protests demonstrate that they concern public matters: American-Israeli relations. As in *Snyder*, the protest location is a quintessential public forum: public sidewalks. The context of being outside a house of worship at the time of a service cuts slightly towards being a private attack, but that factor alone was not heavy enough to tip the balance in *Snyder*, and it is likewise too feathery here. 562 U.S. at 454–55.

The congregants claim that the First Amendment does not apply to the unique features of this protest. Five considerations, they say, make this case novel: (1) the protests' proximity to a house of worship, (2) their location in a residential area, (3) the fact that the congregants are a captive audience, (4) the frequency of the protests, and (5) the exposure of congregants' children to the signs. But each of these factors is old hat under the First Amendment.

Take the first three. Courts have allowed speech restrictions based on concerns for a captive audience in a deliberately narrow context, and we see no justification for expanding it here. *Snyder* insisted on

the concept's narrowness, applying it only to an individual's residence and declining to extend it to a church holding a funeral. *Snyder*, 562 U.S. at 459–60. Our sister circuits have likewise declined to allow restrictions on protesting near houses of worship, rejecting justifications like those the congregants offer. *See, e.g.*, *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 793 (8th Cir. 2015). Expressive activity in a residential area by itself does not suffice for an exception; an individual's home itself must be the focus of the protest. *Frisby v. Schultz*, 487 U.S. 474, 485–87 (1988) ("The type of focused picketing [of a home] prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas.").

The congregants' fourth and fifth factors fall readily as well. The protesters' actions do not lose constitutional protection just because they have been protesting for a long period of time. Free-speech protections do not expire over time or come with a rule against perpetuities. And the Supreme Court has repeatedly held that an interest in protecting children does not justify censoring speech addressed to adults. *Reno v. Am. C.L. Union*, 521 U.S. 844, 875 (1997).

The congregants' proposed remedy—an injunction prohibiting protests within 1000 feet of the synagogue during Saturday morning services and limiting the number of protesters and signs—likely would violate the First Amendment anyway. State action "would not be content neutral," the Supreme Court has explained, "if it were concerned with undesirable effects that arise from the direct impact of speech on its audience or [l]isteners' reactions to speech." *McCullen*, 573 U.S.

at 481 (alteration in original) (quotation omitted). Understandable though the congregants' reaction to the protesters' speech may be, that by itself—without physical impediments to their services or trespassing—cannot suffice as the kind of "content-neutral justification" needed to make the proposed injunction a reasonable time, place, and manner restriction. *Id.* The restriction, moreover, would disproportionately affect one viewpoint on an issue of public concern, which makes us pause before concluding it would be "justified without reference to the content of the regulated speech." *Id.* at 477 (quotation omitted).

Even if the request were eligible for treatment as a time, place, and manner restriction, the injunction would be overly broad. Neither the 1000-foot buffer zone nor the restriction to five protesters at *any* time is likely to satisfy narrow tailoring. *Madsen v. Women's Health Center* held that a 300-foot buffer zone was not narrowly tailored, 512 U.S. 753, 775 (1994), and our circuit has held that like-sized zones are overbroad, *Anderson v. Spear*, 356 F.3d 651, 657 (6th Cir. 2004).

B.

Religious liberty statutes: RFRA and RLUIPA. The congregants also seek relief under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). 42 U.S.C. § 2000bb–2000cc-5. But RFRA has no role to play. It does not apply to state or local governments. *City of Boerne v. Flores*, 521 U.S. 507 (1997). And RLUIPA has no role to play either. Under the Act, a claimant must have a "property interest in the regulated land." 42 U.S.C. § 2000cc-5(5). A plaintiff under RLUIPA fails to state a claim when he does not

have a legally recognized property interest in the property at issue. *Taylor v. City of Gary*, 233 F. App'x 561, 562 (7th Cir. 2007). The congregants have not alleged how their status as members of a religious community by itself gives them a property interest in this house of worship.

C.

The congregants also bring a bevy of claims under several other federal civil rights statutes.

42 U.S.C. § 1981. Section 1981 guarantees to persons of all races "the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981(a). The congregants say that the protesters violated § 1981 by targeting them for persecution because of their race. But they have failed to allege that they lost out on the benefit of any "law or proceeding." *Chapman v. Higbee Co.*, 319 F.3d 825, 832 (6th Cir. 2003).

42 U.S.C. § 1982. Section 1982 guarantees to all citizens the same rights "to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. To violate the statute, the challenged action must impair a property interest, say by decreasing the value of the property or making it significantly more difficult to access. *City of Memphis v. Greene*, 451 U.S. 100, 122–24 (1981). But marginally making access to a facility a little harder—the most that could be said here—does not suffice. While our circuit has held that the verb "hold" could encompass the "use" of the property by nonowner congregants, the impairment of use in that case differed in kind from those alleged here. *United States v. Brown*, 49

F.3d 1162, 1164 (6th Cir. 1995). The action in *Brown* involved white supremacists who shot into a synagogue with an assault pistol. But the congregants have not alleged that the protesters ever blocked them from using their synagogue or that the protests were even audible from inside the building.

42 U.S.C. § 1983. The congregants allege that the city and the protesters, acting under color of law, are liable for failing to enforce the sign code and for failing to protect their free exercise rights. But § 1983 applies to harm inflicted by government officials, not to harm inflicted by third parties that the city fails to prevent. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989); *see Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005). The claims against the protesters fail because they do not satisfy any of the tests that would make them state actors: They did not perform a public function, the city did not force them to protest, and a symbiotic relationship does not exist between the protesters and the city. *See Lansing v. City of Memphis*, 202 F.3d 821, 828–31 (6th Cir. 2000).

42 U.S.C. § 1985(3). The congregants allege that the protesters and city have conspired to interfere with their right to free exercise of religion and intra-state travel. The conspiracy must involve state action, *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 832 (1983), which requires that the defendants acted under state authority or were themselves state actors, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938–39 (1982). We have suggested that *inter*-state travel is a prerequisite before the statute applies. *Volunteer Med. Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 226 (6th Cir. 1991). But even if intra-state

travel suffices, the congregants have not alleged sufficient state action. The protesters did not act under color of state law, and the city was not otherwise responsible for their conduct. *See id.* at 227.

42 U.S.C. § 1986. The congregants claim that the city defendants failed to prevent the protesters' conspiratorial conduct. Section 1986 provides a cause of action for additional damages against a party that fails to prevent a § 1985 violation. 42 U.S.C. § 1986. Because their § 1985 claim fails, however, their § 1986 claim must meet a similar fate.

Civil conspiracy under §§ 1982, 1983, and 1985(3). The congregants also bring civil conspiracy claims under §§ 1982, 1983, and 1985(3) against the city as well as the protesters. Such claims allege "an agreement between two or more persons to injure another by unlawful action." *Hooks v. Hooks*, 771 F.2d 935, 943–44 (6th Cir. 1985). The claimant "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]." *Bazzi v. City of Dearborn*, 658 F.3d 598, 602 (6th Cir. 2011). These claims fail because the congregants have failed to plead facts showing a single plan or a conspiratorial objective to deprive them of their rights. They merely allege that city police witnessed some protests and that city lawyers knew of the demonstrations but did not stop them. Nothing in the complaint indicates that the city agreed to inflict emotional distress on the congregants or injure them in any way.

D.

Right to petition. The congregants allege that the city defendants have an obligation to provide them with accurate information about how they apply the city's sign code based on the congregants' First Amendment right "to petition the Government for a redress of grievances." U.S. Const. amend. I. But the freedom to petition protects the public's right to address the government, nothing more. The government may refuse to listen or respond to the petitioner. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984). The right to petition simply does not include a right to a response from the government. The congregants' invocation of cases about the right to access the courts does not help because they have not shown that their lack of access to this information "hindered [their] efforts to pursue a legal claim." *Lewis v. Casey*, 518 U.S. 343, 351 (1996).

We affirm the district court's judgment dismissing the complaint on the grounds that the complaint fails to state a claim for which relief can be granted.

CONCURRENCE

CLAY, Circuit Judge, concurring.

The district court concluded that Plaintiffs' allegations of emotional distress failed to confer standing in the First Amendment context and dismissed Plaintiffs' complaint for lack of subject matter jurisdiction. I concur with the majority's decision to affirm, but I would affirm the district court's dismissal of this action on standing grounds rather than on the basis of failure to state a claim. Under the majority opinion's arguments, a plaintiff would have standing to bring a claim even if the plaintiff has no legally protected interest and even if the plaintiff has no prospect of prevailing on the merits. In this case, under settled law, Plaintiffs had no prospect of success, yet the majority opinion would nevertheless encourage the filing of Plaintiffs' futile lawsuit and others like it.

DISCUSSION

Plaintiffs Marvin Gerber and Dr. Miriam Brysk have appealed the district court's order dismissing their complaint for lack of standing under Federal Rule of Civil Procedure 12(b)(1). Plaintiffs filed this suit against a group of protesters, Henry Herskovitz, Gloria Harb, Tom Saffold, Ruby List, Chris Mark, Deir Yassin Remembered, Inc., and Jewish Witnesses for Peace and Friends (collectively, "Protester Defendants"), for demonstrating outside Plaintiffs' synagogue on a weekly basis for nearly two decades. Plaintiffs also sued the City of Ann Arbor, Michigan, and several of its officers (collectively, "City Defendants") for failing to stop the protests. Plaintiffs asserted causes of action under the First and Fourteenth Amend-

ments; 42 U.S.C. §§ 1981, 1982, 1983, 1985(3), and 1986; the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*; and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*.

Standard of Review

We review a district court's order dismissing an action for lack of subject matter jurisdiction *de novo*. *Does 1–10 v. Haaland*, 973 F.3d 591, 596 (6th Cir. 2020). "When a party makes a facial challenge to the district court's subject-matter jurisdiction under Rule 12(b)(1)—as is the case here—we must take as true all material allegations of the complaint." *Hale v. Morgan Stanley Smith Barney LLC*, 982 F.3d 996, 997 (6th Cir. 2020). We may affirm on any grounds supported by the record, even if different than those relied upon by the district court. *Wallace v. Oakwood Healthcare, Inc.*, 954 F.3d 879, 886 (6th Cir. 2020).

I. Standing

The district court properly concluded that Plaintiffs lacked Article III standing. If a plaintiff lacks standing, a federal court lacks subject matter jurisdiction and must dismiss. *Murray v. U.S. Dep't of Treasury*, 681 F.3d 744, 748 (6th Cir. 2012). "In reviewing a determination of standing, we consider the complaint and the materials submitted in connection with the issue of standing." *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722, 729 (6th Cir. 2009).

A. Elements of Standing

Standing "doctrine developed in our case law to ensure that federal courts do not exceed their authority

as it has been traditionally understood . . . [, and it] limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 578 U.S. 856, 136 S. Ct. 1540, 1547 (2016). "[S]tanding is not dispensed in gross; rather plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

Standing is derived from Article III's case and controversy requirement. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court set forth now "well-worn yet enduring standards" for standing. *Thomas v. TOMS King (Ohio), LLC*, 997 F.3d 629, 634 (6th Cir. 2021). Under *Lujan*, "the irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U.S. at 560. "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Id.* (citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of"—this element of standing is often referred to as traceability. *Id.* "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted).

Plaintiffs' primary argument on appeal is that the district court improperly reviewed the merits of their claims in dismissing their case for a lack of subject matter jurisdiction. (Appellants' Br. 39–45.) As we recently reiterated in *Benalcazar v. Genoa Township*, 1 F.4th 421 (6th Cir. 2021), "[s]ubject-matter jurisdic-

tion over a dispute is one thing; the merits of the underlying dispute are another. Rarely do the twain meet." *Id.* at 424. We recognized that relevant to review of subject matter jurisdiction "is a threshold question, one distinct from the plausibility inquiry of Civil Rule 12(b)(6): Namely, do the federal questions raised by this complaint legitimately create federal court jurisdiction because they are not so frivolous as to be a contrived effort to create such jurisdiction?" *Id.* In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the Supreme Court explained that "[d]ismissal for lack of subject-matter jurisdiction because of 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." *Id.* at 89 (quoting *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 414 U.S. 661, 666 (1974)).

Applying these standards, I conclude that the district court properly dismissed Plaintiffs' claims for lack of subject matter jurisdiction. I first discuss Plaintiffs' claims against Protester Defendants and then their claims against City Defendants.

B. Protester Defendants

I would affirm the district court's conclusion that Plaintiffs failed to allege an injury in fact required for standing, albeit on slightly different grounds.[1] The

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[1] I reject the contention that because the Supreme Court decided an apparently similar case, *Synder v. Phelps*, 562 U.S. 443 (2011), on the merits, rather than dismissing for lack of subject matter jurisdiction, that the district court's Rule 12(b)(1) ruling in this case was inappropriate. The Supreme Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no

district court found that Plaintiffs' allegations that they had suffered emotional distress and that the protests interfered with Plaintiffs' enjoyment of religious services failed to allege a concrete injury. (R. 66, Page IDs ##1904–05.) Contrary to Plaintiffs' claim on appeal, the district court properly accepted as true Plaintiffs' allegations that the protests caused Plaintiffs' emotional distress. (Appellants' Br. 9–12; R. 66, Page IDs ##1901–02.)

The district court observed that the injury-in-fact prong of the standing inquiry "includes two subelements: (1) concreteness; and (2) particularization." (Order Granting Defs.' Mots. to Dismiss, R. 66, Page ID #1901.) Under this analysis, it properly rejected Plaintiffs' claims that Protester Defendants interfered with Plaintiffs' enjoyment of attending religious services since "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 418 (2013) (alteration in original) (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)); *see also ACLU v. NSA*, 493 F.3d 644, 662 (6th Cir. 2007) (opinion of Batchelder, J.) (approvingly cited by the Supreme Court in *Clapper*, 568 U.S. at 418) (rejecting standing on the basis of the plaintiffs' "subjective apprehension and a personal (self-imposed) unwillingness to" engage in First Amendment activity). (R. 66, Page ID #1905.)

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precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). Additionally, my determination that Plaintiffs' claims were foreclosed by prior decisions of the Supreme Court is informed, in large part, by the *Snyder* decision itself.

But it is well-established that the extreme emotional distress alleged by Plaintiffs can suffice to establish Article III standing. *See Garland v. Orlans, PC*, 999 F.3d 432, 439–40 (6th Cir. 2021); *see also Huff v. TeleCheck Servs.*, 923 F.3d 458, 463 (6th Cir. 2019) (concluding that a plaintiff had failed to demonstrate standing, in part, because he did "not suggest that he wasted time or suffered emotional distress").

However, Plaintiffs' allegations of extreme emotional distress fail to establish standing in this case because there is no legally protected interest in not being offended by the speech of others. Subsequent to entry of the district court's order, we clarified in *CHKRS, LLC v. City of Dublin*, 984 F.3d 483 (6th Cir. 2021), that there is a third element to the injury-in-fact inquiry, and that "[t]o establish the 'standing' required for jurisdiction under Article III of the Constitution, plaintiffs must allege the 'invasion of a legally protected interest.'" *Id.* at 485 (citation omitted). This standing requirement leads to "overlapping requirements for jurisdiction and the merits," but we explained that "[a]s long as a plaintiff has asserted a colorable legal claim (and has met standing's other elements), the plaintiff has satisfied Article III and the court may resolve the claim on its merits." *Id.* at 485–86. Given the clarity and consistency of First Amendment precedent, Plaintiffs have failed to assert a colorable legal claim against Protester Defendants and lack standing to pursue causes of action against them. *See id.*

1. First Amendment Principles

Plaintiffs raise a number of arguments as to why Protester Defendants' speech on a matter of public

concern, American-Israeli relations, in a traditional public forum, the sidewalk, is not entitled to First Amendment protection. But Plaintiffs face a difficult task, since the Supreme Court has repeatedly observed that both these factors are indicative of speech at the core of First Amendment protection. "Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public is at its most protected on public sidewalks, a prototypical example of a traditional public forum." *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997).

In *Schenck*, the Supreme Court confirmed that a record "show[ing] physically abusive conduct, harassment of the police that hampered law enforcement, and the tendency of even peaceful conversations to devolve into aggressive and sometimes violent conduct" could "make[ ] a prohibition on classic speech in limited parts of a public sidewalk permissible." *Id.* However, Plaintiffs present no allegations that Protester Defendants block or otherwise obstruct Plaintiffs or other members of their congregations from attending religious services. Instead, Plaintiffs' claims are based entirely on their own reaction to "[t]he messages on the signs/placards . . . ." (Am. Compl., R. 11, Page ID #212; *see id.* at Page ID #214 ("The conduct of the protesters is having an adverse emotional effect on Jewish children and young adults who, approaching the Synagogue, see the signs/placards insulting their religion and denouncing their loyalty to Israel.").) For example, Plaintiff Gerber alleged that "[t]he Antisemitic message of several of the signs, and the virulently anti-Israeli messages of the signs/placards, offend and anger him, cause him extreme emotional distress, significantly diminish his

enjoyment in attending Sabbath services, and have adversely affected his willingness to attend Sabbath services at the Synagogue in order to exercise his 1st Amendment right of freedom of religion." (*Id.* at Page ID #215.)[2]

Plaintiffs point to no case where a plaintiff's claimed injury due to the content of a protest has been determined to be "legally cognizable. . . . " *Lujan*, 504 U.S. at 578. Plaintiffs seek relief from Protester Defendants because of signs "which insulted [Plaintiffs'] ethnicity, their religion and their loyalty to Israel. . . . " (Appellants' Br. 36.) Contrary to Plaintiffs' argument in their reply brief, the Supreme Court's decision in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), partially upholding a buffer zone outside an abortion clinic, does not demonstrate Plaintiffs are entitled to pursue relief against Protester Defendants. (Reply Br. 13–15.) In *Madsen*, "[t]he accepted purpose of the buffer zone [was] to protect access to the clinic and to facilitate the orderly flow of traffic on Dixie Way." *Id.* at 771. In fact, the

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[2] Plaintiffs Gerber and Brysk claimed in the amended complaint that they had taxpayer standing. (Am. Compl., R. 11, Page IDs ##215–16.) They do not raise these arguments on appeal, thereby forfeiting them. *See Berkshire v. Beauvais*, 928 F.3d 520, 530 (6th Cir. 2019). Moreover, "if the challenged local government action involves neither an appropriation nor expenditure of city funds . . . the municipal taxpayer [will] lack standing, for in that case he will have suffered no 'direct dollars-and-cents injury.'" *Smith v. Jefferson Cnty. Bd. of Sch. Commis*, 641 F.3d 197, 214 (6th Cir. 2011) (en banc) (quoting *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 285 (6th Cir. 2009)). Plaintiffs do not allege that the City's decisions regarding the enforcement of the sign ordinance involves the appropriation or expenditure of funds.

Supreme Court in *Madsen* struck down a part of the buffer zone that prohibited the display of "images observable" during certain times around the clinic. The Court reasoned that "[i]f the blanket ban on 'images observable' was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail. The only plausible reason a patient would be bothered by 'images observable' inside the clinic would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic. This provision of the injunction violates the First Amendment." *Id.* at 773; *see also McCullen v. Coakley*, 573 U.S. 464, 481 (2014) (recognizing that a law would not be content neutral if it were concerned with the undesired effects of speech on an audience). Contrary to Plaintiffs' contention that *Madsen* saves their claims, the Supreme Court's decision confirms the claims are not colorable, as required to demonstrate standing. *See Chkrs*, 984 F.3d at 485–86.

Plaintiffs' standing claim requires a finding that they have a legally protected interest in not being offended by Protester Defendants' speech. No such right exists, nor could it exist. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). The Supreme Court and this Court have repeatedly held that legal claims based on dis-

agreement with speech must give way to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks. . . . " *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

The law does not protect Plaintiffs' claimed right not to observe Protester Defendants' anti-Israeli, anti-Zionist, and anti-Semitic signs. In our pluralistic and diverse society, "[m]uch that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent . . . narrow circumstances . . . , the burden normally falls upon the viewer to 'avoid further bombardment of (his sensibilities) simply by averting (his) eyes.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) (fourth and fifth alterations in original) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). As discussed, in *Madsen*, an abortion clinic was required "to pull its curtains" before protesters were required to put away their "images observable." *Madsen*, 512 U.S. at 773. So too here.

A plaintiff's interest in avoiding the consequences of disagreement is often raised, and rejected, in cases involving what has come to be known as the heckler's veto. "A heckler's veto involves burdening speech 'simply because it might offend a hostile mob.'" *Bennett v. Metro. Gov't of Nashville & Davidson Cnty.*, 977 F.3d 530, 544 (6th Cir. 2020) (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992)). While the heckler's veto is normally concerned

with outbreaks of violence against the speaker—to justify either failing to protect the speaker against such violence or preventing the speaker from speaking in an effort to avoid violence in the first place—it represents a broader prohibition against allowing those who oppose the content of certain speech to force the government to censor that speech. *See Reno v. ACLU*, 521 U.S. 844, 880 (1997) (concluding that the Communications Decency Act's supposedly limited prohibition on knowingly sending indecent materials "would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech").

We have recognized that lawsuits may be the means of effecting a heckler's veto. *See, e.g.*, *Jones v. Dirty World Ent. Records LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (describing lawsuit against interactive computer service providers as "'heckler's veto' that would chill free speech"). "By and large, however, the courts have recognized that we cannot allow the right of free speech to be restricted based on the hostile reaction of those who disagree with it." *Ams. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (en banc).

We reaffirmed our commitment to a robust rejection of the heckler's veto in *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015) (en banc).[3] In

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[3] Plaintiffs' suggestion in their reply brief that this Court should disregard the en banc court's decision in *Bible Believers* because that decision did not cite *Beauharnais v. Illinois*, 343 U.S. 250 (1952), misunderstands the rules of precedent. (Reply Br. 15 n.1.) *Bible Believers* is binding since it has not been overruled by another decision of the en banc court. *See Miller v. Caudill*, 936 F.3d 442, 447–48 (6th Cir. 2019). Nor does an intervening

Bible Believers, we found that the plaintiffs, a self-described evangelical group known as the Bible Believers, and its members were entitled to summary judgment. They claimed, in part, that the government had violated their First Amendment right to freedom of speech by failing to protect them and eventually removing them from the Arab International Festival in Dearborn, Michigan. In the course of advocating for their Christian beliefs at the festival, the Bible Believers "parad[ed] around with banners, signs, and tee-shirts that displayed messages associated with those beliefs. Many of the signs and messages displayed by the Bible Believers communicated overtly anti-Muslim sentiments." *Id.* at 236; *see id.* at 244 (recognizing that "disparaging the views of another to support one's own cause is protected by the First Amendment"). The First Amendment conduct at issue in *Bible Believers* is very similar as this case, where Protester Defendants display signs with anti-Semitic messages.

Supreme Court decision require reconsideration of *Bible Believers*, since *Beauharnais* was decided over sixty years before *Bible Believers*. *See Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 471 (6th Cir. 2016). Substantively, in *Beauharnais*, the Supreme Court, over a vigorous dissent, upheld the defendant's conviction under an Illinois statute that prohibited publication of group libel, defined as portraying a lack of virtue of a class of citizens. While the decision has never explicitly been overruled, it appears that the case has been limited to its precise facts in subsequent decisions of the Supreme Court. *N.Y. Times*, 376 U.S. at 268–69; *see Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 672 (7th Cir. 2008) ("Anyway, though *Beauharnais v. Illinois*, 343 U.S. 250 (1952), has never been overruled, no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited.").

Plaintiffs here are seeking relief in the form of an injunction removing Protester Defendants from their demonstration site. But in *Bible Believers*, that "relief" entitled the plaintiff protesters, and not the defendant county, to summary judgment, despite the fact that the protesters' speech was offensive and derogatory to those whom the speakers expected would be present. Like Protester Defendants in this case, the Bible Believers' offensive message did "not advocate, condone, or even embrace imminent violence or lawlessness." *Id.* at 244. Accordingly, "[t]his claim of injury by [Plaintiffs] is, therefore, not to a legally cognizable right." *McConnell v. FEC*, 540 U.S. 93, 227 (2003), *rev'd on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010).

Plaintiffs' assertion that their emotional distress overcomes Protester Defendants' right to free speech is foreclosed by the Supreme Court's decision in *Snyder*. In *Snyder*, the Supreme Court held that the First Amendment shielded members of the Westboro Baptist Church against tort liability for publicizing their anti-homosexuality message by picketing at military funerals. Specifically, the Supreme Court held it was unconstitutional to apply a state intentional infliction of emotional distress statute against the picketers.

The Supreme Court began its analysis by observing that "[w]hether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case." *Snyder*, 562 U.S. at 451. Plaintiffs never dispute that, as offensive as they find the Protester Defendants' speech, it pertains to an issue of public concern.

"The arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.'" *Id.* at 453 (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)). Like the members of the Westboro Baptist Church, Protester Defendants are displaying signs relating to issues of interest to society, not a private dispute. Moreover, as with the members of the Westboro Baptist Church, Protester Defendants' "speech was at a public place on a matter of public concern, [and therefore] that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt." *Id.* at 458.

2. First Amendment Conduct

Plaintiffs' contrary arguments that the First Amendment context does not affect consideration of their claims or that Protester Defendants' conduct is not protected by the First Amendment are unavailing.

In their briefing, Plaintiffs emphasize a Southern District of Ohio decision in *Wells v. Rhodes*, 928 F. Supp. 2d 920 (S.D. Ohio 2013), that they argue shows that extreme emotional distress confers standing in the First Amendment context. (Appellants' Br. 21–24.) However, the Supreme Court explicitly held that the conduct in that case, cross burning with intent to intimidate, was outside the protection of the First Amendment in *Virginia v. Black*, 538 U.S. 343, 362 (2003).[4] The Supreme Court concluded that "[t]he First

[4] Plaintiffs, in their brief, suggest that the district court's failure to cite *Wells* may have been indicative of racial bias. (Appellants' Br. 23–24.). We previously concluded that a "suggestion that bigotry underlay" the district court's decision, "a claim completely unsup-

Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation." *Id.* at 363.

Plaintiffs' other claims that Protester Defendants' conduct is not protected by the First Amendment also fail. First, Plaintiffs attempt to argue that Protester Defendants' speech can be regulated like verbal workplace harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, or defamation. Plaintiffs do not dispute that Protester Defendants' speech, as offensive as it may be, is on a matter of public concern, and that it is offensive because of its content. As the Supreme Court reiterated in *Snyder*, "[s]peech on matters of public concern is at the heart of the First Amendment's protection." *Synder*, 562 U.S. at 452 (cleaned up). And as the Supreme Court explained in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), "Title VII's general prohibition against sexual discrimination in employment practices . . . does not target conduct on the basis of its expressive content. . . . " *Id.* at 389–90.

Plaintiffs' invocation of defamation precedents also does not require a contrary result to the one reached by the district court. For example, in *United States v. Alvarez*, 567 U.S. 709 (2012), in which the

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ported in the record before this court, was not well received [ ] and will not be countenanced in the future by this court. Counsel are advised that personal aspersions, whether they be cast at opposing counsel or members of the judiciary, have no place in argument before us unless they are strictly pertinent to a legal issue, such as the imposition of Rule 11 sanctions or claims of judicial or prosecutorial misconduct." *Howard v. Sec'y of Health & Hum. Servs.*, 932 F.2d 505, 509 n.2 (6th Cir. 1991).

Supreme Court struck down a federal law that prohibited false claims about military honors, Justice Kennedy, for a plurality, described the "legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation," neither of which are applicable here. *Alvarez*, 567 U.S. at 719. In fact, the plurality confirmed that "falsity and nothing more" is an insufficient basis to prohibit speech. *Id.*; *see R.A.V.*, 505 U.S. at 383–84 (recognizing that historically regulated categories of speech like defamation are not "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content").

Fundamentally, Plaintiffs' position misunderstands the First Amendment. It is not "an invasion of a legally protected interest" to be presented with offensive or disagreeable speech on matters of public concern. *Lujan*, 504 U.S. at 560. That "disagreement" cannot give rise to standing has been confirmed by the Supreme Court. For example, in *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, (1982), the Court denied standing in an Establishment Clause suit challenging the federal government's conveyance of land to a religious school. It found that the plaintiffs had "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485–86. In fact, the Supreme Court recognized in *Terminiello v.*

City of Chicago, 337 U.S. 1 (1949), that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* at 4. Accordingly, freedom of speech is "protected against censorship or punishment, unless likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Id.; see also Nwanguma v. Trump*, 903 F.3d 604, 609 (6th Cir. 2018) (explaining that "only speech that explicitly encourages the imminent use of violence or lawless action is outside the protection of the First Amendment").

As the Supreme Court concluded in *Snyder*:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

Synder, 562 U.S. at 460–61.

Moreover, Plaintiffs' arguments that Protester Defendants' demonstrations are not protected by the First Amendment are completely unfounded. Plaintiffs point to a unique "concurrence of factors" in support of their contention, comprising of: "(1) protests in proximity to a house of worship; (2) located in a residential area; (3) where the members of that house

of worship constitute a captive audience because the protesters are targeting them at their house of worship; (4) on a repeated weekly and yearly basis; [and] (5) where the congregants' children are also exposed to the signs." (Reply Br. 4–5.)

Plaintiffs have pointed to no case where "proximity to a house of worship" has reduced First Amendment protections. In fact, as referenced at oral argument, the Supreme Court's speech cases involving Jehovah's Witnesses recognized that location is a critical component to speech. Oral Argument at 09:50–11:50. For example, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Supreme Court overturned the convictions of Jehovah's Witnesses who were "going singly from house to house on Cassius Street. . . . " *Id.* at 301. As the Supreme Court explained, "Cassius Street is in a thickly populated neighborhood, where about ninety per cent of the residents are Roman Catholics. A phonograph record, describing a book entitled 'Enemies', included an attack on the Catholic religion." *Id.*: *see Bible Believers*, 805 F.3d at 263 (Boggs, J., concurring) ("The Jehovah's Witnesses in *Cantwell*, for example, played phonographs criticizing the Roman Catholic Church in a large Catholic neighborhood, much like the Bible Believers criticized Islam at the Arab International Festival.").

Other circuits have rejected similar claims that houses of worship are entitled to special protection under the First Amendment. For example, the Eighth Circuit held that a Missouri law that prohibited disturbing religious services could not be sustained under the First Amendment in *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785 (8th Cir. 2015). The court found that the statute's locational

ban—around churches and buildings used for religious purposes—was particularly concerning because "[t]hese locations are the most likely places for [the plaintiffs] to find their intended audience. . . . " *Id.* at 792. The Eighth Circuit rejected the argument presented here that government intervention was necessary to protect the parishioners' free exercise of religion, finding "the content based prohibitions the Act places on profane or rude speech are not necessary to protect that freedom." *Id.* at 793.

Plaintiffs' other arguments that Protester Defendants' conduct is not protected by the First Amendment are similarly unavailing. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the Supreme Court upheld an ordinance which prohibited picketing in front of a particular residence. In that opinion, the Supreme Court observed that "[o]ur prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood," squarely foreclosing Plaintiffs' second argument that the First Amendment does not protect Protester Defendants' activity because the synagogue is located in a residential area. *Id.* at 480. Plaintiffs' argument that they are a "captive audience" is also unconvincing because, as also explained by *Frisby*, the captive audience doctrine has been linked to "residential privacy," which does not apply to a house of worship. *Id.* at 484–85. *Snyder* also recognized that the captive audience doctrine had been limited to cases involving a plaintiff's residence. *Snyder*, 562 U.S. at 459–60.

Nor do Plaintiffs provide any support for their contention that the long-running nature of Protester Defendants' demonstrations affects the First Amend-

ment analysis. This Court in *Pouillon v. City of Owosso*, 206 F.3d 711 (6th Cir. 2000), confronted a challenge to a decision by a city to prevent an anti-abortion protester from demonstrating on the city hall steps and instead requiring him to protest on the sidewalk. The plaintiff in that case had "staged abortion protests for a portion of each day almost every weekday for over ten years." *Id.* at 713. Despite the duration and frequency of the plaintiff's protests, there was no question that the First Amendment protected his conduct, and we were required to answer "whether requiring Pouillon to move to the sidewalk was a reasonable time, place, and manner restriction that, as the First Amendment requires, left open ample alternative channels of communication." *Id.* at 717–18.

Finally, Plaintiffs' argument that the Protester Defendants are deprived of First Amendment protection because children see their anti-Israeli, anti-Zionist, and anti-Semitic signs, has also been repeatedly rejected by the Supreme Court and this Court. For example, the Supreme Court in *Reno v. ACLU* reiterated that the interest in protecting children from harmful materials "does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno*, 521 U.S. at 875. Similarly, this Court in *Bible Believers* did not doubt that the plaintiffs' speech was entitled to First Amendment protections even though at one point, the crowd was "made up predominantly of adolescents. . . . " *Bible Believers*, 805 F.3d at 253 (majority opinion).

In light of the preceding analysis, and despite Plaintiffs' numerous arguments, it is clear that that they are bringing this suit to "silence a speaker with

whom [they] disagree." *Id.* at 234. "The First Amendment simply does not countenance this scenario." *Id.* at 237.

"Dismissal for lack of subject-matter jurisdiction because of 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." *Steel Co.*, 523 U.S. at 89 (quoting *Oneida Indian Nation of N.Y.*, 414 U.S. at 666). Plaintiffs' claims that a federal court should punish or silence protesters exercising their First Amendment rights does not pass this threshold inquiry. Their claims are foreclosed by decisions of the Supreme Court, which in some cases, like *Madsen* and *Frisby*, Plaintiffs selectively cite in support of their own position. This supports the conclusion that Plaintiffs' claims are "so frivolous as to be a contrived effort to create" federal jurisdiction. *Benalcazar*, 1 F.4th at 424. In light of this conclusion, the parties' arguments on the traceability and redressability elements of standing need not be considered. *See Brintley v. Aeroquip Credit Union*, 936 F.3d 489 (6th Cir. 2019).

C. City Defendants

Plaintiffs agree that if they lack standing against Protester Defendants on their 42 U.S.C. §§ 1982, 1983, and 1985(3) claims, that they also lack standing against City Defendants for their claims under those provisions and § 1986. (Mot. for Recons., R. 67, Page IDs ##1937–38.) In light of the prior discussion of the district court's dismissal for lack of standing on Plaintiffs' claims against Protester Defendants, I conclude that Plaintiffs lack standing against City

Defendants for their claims under the civil rights statutes.

However, Plaintiffs maintain that the reasoning in the district court's dismissal order did not apply to four causes of action that they pled only against City Defendants: (1) substantive due process claim; (2) right to petition claim; (3) RFRA claim; and (4) RLUIPA claim.

As an initial matter, Plaintiffs cannot assert a colorable RFRA claim against the City of Ann Arbor, since the Supreme Court held in 1997 in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that RFRA could not constitutionally be applied to states and local governments, as at issue here and as Plaintiffs recognize in their amended complaint. (Am. Compl., R. 11, Page IDs ##276–280.) Accordingly, Plaintiffs lack standing for the RFRA claim against the City of Ann Arbor and its officers.

Plaintiffs also lack standing to pursue their substantive due process and RLUIPA claims. "[A] grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of law does not count as an 'injury in fact,'" and cannot establish standing. *Carney v. Adams*, 141 S. Ct. 493, 498 (2020); *see Allen v. Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."). Given that we have already concluded that the emotional distress Plaintiffs feel because of Protester Defendants' conduct cannot establish standing, Plaintiffs' disagreement with the City on how to interpret Ann Arbor's sign code cannot either. *See Carney*, 141 S. Ct. at 499. "A liti-

gant 'raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.'" *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (quoting *Lujan*, 504 U.S. at 573–74).

Plaintiffs also do not have standing for their claim that the City violated their right to petition the government for redress of grievances and access to courts under the First and Fourteenth Amendments. Plaintiffs argue that City Defendants violated these rights by requiring that Plaintiffs only seek information about the sign code from the City Attorney's office, rather than permitting them to speak with other City officials. Plaintiffs' petition claim is based on the premise that the First Amendment guarantees right of access to courts, and that right, in turn, encompasses the right to obtain information from governmental officials. (Am. Compl., R. 11, Page IDs ##271–72.) "The right of access to the courts is indeed but one aspect of the right to petition." *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The right of access to courts has often been explored in the context of prisoner suits.

In *Lewis v. Casey*, 518 U.S. 343 (1996), the Supreme Court confronted a claim that prisoners were entitled to a certain level of information from the state to help them pursue their legal claims. In that case, a particular level of law library facilities was at issue. *Lewis* observed that "[t]he requirement that an inmate alleging a violation of [the fundamental constitutional right of access to the courts] must show

actual injury derives ultimately from the doctrine of standing. . . . " *Id.* at 349. The Court concluded that a plaintiff must allege that the government "hindered his efforts to pursue a [non-frivolous] legal claim" to demonstrate standing for his access to courts claim. *Id.* at 351.

Plaintiffs in this case have made no showing or allegation of how their failure to speak to particular City of Ann Arbor employees prejudiced their prosecution of this suit or their access to courts more generally. Nor have they otherwise alleged "a free-standing right" to speak to any particular government official they choose. *Id.*; *see Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 840 (6th Cir. 2000) (recognizing that while "the First Amendment protects information gathering, it does not provide blanket access to information within the government's control"). Accordingly, Plaintiffs have failed to allege an actual injury and lack standing to pursue their right to petition claim.

For the reasons explained above, Plaintiffs lack standing to pursue any of their claims against City Defendants in this suit.

While I agree with the majority's determination that the district court's dismissal of Plaintiffs' complaint should be upheld, I 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.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS (AUGUST 19, 2020)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARVIN GERBER, ET AL.,

Plaintiffs,

v.

HENRY HERSKOVITZ, ET AL.,

Defendants.

Case No. 19-13726

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

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS [ECF No. 32] and [ECF No. 45]

I. Introduction

Marvin Gerber and Dr. Miriam Brysk ("Plaintiffs") allege a group of protestors infringes on their federal and state rights by regularly protesting in front of a Jewish synagogue where Plaintiffs attend religious services. Plaintiffs also allege the City of Ann Arbor ("City") and several of its employees contribute to

this infringement by failing to enforce the Ann Arbor City Code ("Code").

There are two groups of Defendants: (1) the protestors; and (2) the City and several of its employees (collectively "Defendants"). Each group of Defendants filed a Motion to Dismiss for lack of subject matter jurisdiction and for failing to state a claim.

Plaintiffs seek monetary damages and ask the Court to enjoin these Defendants from engaging in peaceful political speech in public areas. The Constitution simply does not tolerate such restraint.

Plaintiffs lack Article III standing. For that reason, the Court GRANTS the pending Motions to Dismiss for lack of subject matter jurisdiction.

II. Factual Background

The facts are taken from the First Amended Complaint.

Martin Gerber is a member of the Beth Israel Synagogue ("Synagogue"). Dr. Miriam Brysk is a Holocaust survivor and a member of the Pardes Hannah Congregation, located in an annex next door to the Synagogue.

Every Saturday since September 2003, Defendant Henry Herskovitz leads a group of protestors. They typically place 18-20 signs, posters, and placards on the grass section adjacent to the sidewalk in front of the Synagogue, as well as on the grass section across the street, facing the Synagogue. They also lean them against trees and portable chairs that the protestors bring with them. The protestors also carry signs in their hands or attach them to twine hanging from

their necks. The signs display statements such as "Resist Jewish Power," "Jewish Power Corrupts," "Fake News: Israel Is A Democracy," "Stop Funding Israel," and "End the Palestinian Holocaust." Plaintiffs say these signs are anti-Israeli, anti-Zionist, and anti-semitic.

They show up every Saturday morning–the Jewish Sabbath–at approximately 9:30 AM, position their signs, and stay until approximately 11:00 or 11:30 AM. This time period coincides with the time Synagogue members arrive to conduct and participate in Sabbath service. The signs are readily visible to Synagogue members and their children.

Plaintiffs describe the signs as offensive; causing anger and extreme emotional distress significantly diminishing their enjoyment of attending Sabbath services; and, adversely affecting their willingness to attend Sabbath at this location.

Plaintiffs say this conduct violates the Code because it requires the protestors to have a permit to place the signs on the grass sections. They do not have one. Further, Plaintiffs say the protestors would not even qualify for a permit. The City Defendants disagree. They believe the Code does not prohibit the protestors' activities, nor does it require them to obtain a permit.

III. Standard of Review

Defendants bring their motions pursuant to Federal Rules of Civil Procedure 12(b)(1) and (12)(b)(6).

Fed. R. Civ. P. 12(b)(1) provides for dismissal if there is a "lack of jurisdiction over the subject matter." Where subject matter is challenged under Rule

12(b)(1), the plaintiff has the burden to prove jurisdiction to survive the motion. Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Without standing, the Court lacks subject-matter jurisdiction and "cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998).

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests a complaint's legal sufficiency. Although the federal rules only require that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief," *see* Fed. R. Civ. P. 8(a)(2), the statement of the claim must be plausible. Indeed, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). A claim is plausible where the facts allow the Court to infer that the defendant is liable for the misconduct alleged. *Id.* This requires more than "bare assertions of legal conclusions"; a plaintiff must provide the "grounds" of his or her "entitlement to relief." *League of United Latin Am. Citizens v. Bredesen,* 500 F.3d 523, 527 (6th Cir. 2007); *Twombly,* 550 U.S. at 555 (while detailed factual allegations are not required, a pleading must offer more than "labels and conclusions" or "a formulaic recitation of the elements of the cause of action").

The Court is obligated to construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint contains enough facts to state a claim

to relief that is plausible on its face. *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.,* 532 F.3d 496, 502 (6th Cir. 2008). The Court "may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n,* 528 F.3d 426, 430 (6th Cir. 2008)).

IV. Analysis

A. Plaintiffs Lack Article III Standing

To show Article III standing, a plaintiff must demonstrate: (1) injury in fact; (2) a causal connection between the alleged injury in fact and the defendant's alleged conduct; and (3) a substantial likelihood that the requested relief will redress the alleged injury in fact. *Lujan,* 504 U.S. at 560; *Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 771 (2000).

At the pleading stage, the plaintiff must clearly allege facts demonstrating each element. *Buchholz v. Meyer Njus Tanick, PA,* 946 F.3d 855, 861 (6th Cir. 2020). The Supreme Court advises that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561.

The first element—injury in fact—includes two sub-elements: (1) concreteness; and (2) particularization. *Id.* "To establish injury in fact, a plaintiff must

show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560)).

Plaintiffs allege that because of Defendants' conduct and speech, they suffer "extreme emotional distress," and that the conduct interferes with their right to practice their religion without being "harassed" under the Free Exercise Clause of the First Amendment. [ECF No. 11, PageID.219-220. ¶ 20-21)]. They say the protestors' conduct is not protected by the First Amendment, that placement of signs and placards on the grass sections violates the Code, and the City's failure to enforce its Code against the protestors contributes to Plaintiffs' injury.

Even taking all of these allegations as true, Defendants say Plaintiffs fail to demonstrate an injury in fact. They say Plaintiffs' allegation that they were injured by having to walk past the protestors' signs as they entered Synagogue property does not rise to the level of an "actual concrete particularized injury."

Plaintiffs certainly assert a particularized injury. "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id.* at 1548. However, the Supreme Court repeatedly makes clear that "an injury in fact must be both concrete *and* particularized." *Id.* A "concrete" injury must be "'*de facto*'; that is, it must actually exist." *Id.*

Plaintiffs fail to assert a concrete injury. They rely primarily on *Ricketson v. Experian Info. Solutions, Inc.,* 266 F.Supp.3d 1083 (W.D. Mich. Jul. 18, 2017). Ricketson sent a letter to three consumer-reporting

agencies disputing a negative tradeline. *Id.* at 1086. Two of the three agencies removed the tradeline after conducting reinvestigations. *Id.* The third agency classified Ricketson's letter as "suspicious" and did not conduct a reinvestigation. *Id.* at 1087. Ultimately, Ricketson filed suit against the third agency and alleged he suffered "mental stress, lost sleep, and emotional distress" as a result of the agency's alleged violation of the Fair Credit Reporting Act ("FCRA"). *Id.*

In cross-motions for summary judgment, the parties disputed whether Ricketson suffered an injury in fact. *Id.* The court held that Ricketson's claim "relates directly to the harms the FCRA was meant to address—the risk of inaccurate information in a consumer's file and the inability of consumers to correct that information and receive assurance from a [consumer-reporting agency] after reinvestigation." *Id.* at 1089. The court also found Ricketson had standing because he suffered a type of "informational injury" that courts have found sufficient to confer standing. *Id.* at 1091.

Plaintiffs' reliance on *Ricketson* is misplaced. They 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.

Although the Supreme Court held that intangible injuries can be concrete, *Spokeo,* 136 S.Ct. at 1549, it instructs that when determining whether an intangible harm constitutes injury in fact, "both history and the judgment of Congress play important roles," and "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has tra-

ditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* Congress can identify intangible harms that meet the minimum Article III requirements for standing; however, even when Congress elevates intangible harms, that "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement," because "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* The type of "informational injury" sufficient for standing in *Ricketson* is not sufficient for purposes of the First Amendment.

The Supreme Court is emphatic about the path to standing when it comes to First Amendment litigants: "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" *Morrison v. Board of Educ. of Boyd County,* 521 F.3d 602, 608 (6th Cir. 2008) (quoting *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972)). "'A subjective chill, without more, does not confer standing on a party.'" *Muslin Community Ass'n of Ann Arbor v. Ashcroft,* 459 F.Supp.2d 592, 597-98 (E.D. Mich. Sept. 29, 2006) (quoting *Fort Wayne Books, Inc., v. Indiana,* 489 U.S. 46, 60 (1989)).

There is no allegation that the protestors prevent Plaintiffs from attending Sabbath services, that they block Plaintiffs' path onto the property or to the Synagogue, or that the protests and signs outside affect the services inside. Plaintiffs merely allege that the Defendants' conduct causes them distress and "interferes" with their enjoyment of attending religious services. This is the "subjective chill" that is "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."

Laird v. Tatum, 408 U.S. 1, 13-14 (1972). This type of "chill" does not confer standing and is not actionable.

Plaintiffs fail to allege a concrete injury, and thus fail to allege an injury in fact. This is fatal to their lawsuit since they cannot satisfy an essential element of Article III standing.

The Court need not address whether Plaintiffs satisfy the last two elements of standing, nor must the Court address Defendants' arguments that Plaintiffs' fail to state a claim.

B. Conclusion

Indeed, the First Amendment more than protects the expressions by Defendants of what Plaintiffs describe as "anti-Israeli, anti-Zionist, an 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. *McCullen v. Coakley,* 573 U.S. 464, 476 (2014). The Defendants do nothing that falls outside of the protections of the First Amendment, since "a function of free speech under our system of government is to invite dispute," *Terminiello v. City of Chicago,* 337 U.S. 1, 4 (1949). In public debate we must tolerate "insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry,* 485 U.S. 312, 322 (1988) (internal quotation marks and citations omitted).

Plaintiffs do not sufficiently allege Article III standing. The Court lacks subject matter jurisdiction and must dismiss this case.

Defendants' Motions to Dismiss are GRANTED.

IT IS ORDERED.

/s/ Victoria A. Roberts
United States District Court Judge

Dated: August 19, 2020

ORDER OF THE UNITED STATE COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITIONS FOR REHEARING EN BANC (NOVEMBER 2, 2021)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARVIN GERBER; MIRIAM BRYSK,

Plaintiffs-Appellants,

v.

HENRY HERSKOVITZ; ET AL.,

Defendants-Appellees.

No. 20-1870

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

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

Entered by Order of the Court

/s/ Deborah S. Hunt
Clerk

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION FOR LEAVE TO FILE SUPPLEMENT (SEPTEMBER 3, 2020)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARVIN GERBER, ET AL.,

Plaintiffs,

v.

HENRY HERSKOVITZ, ET AL.,

Defendants.

Case No. 19-13726

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

On August 26, 2020, Plaintiffs filed a Motion for Reconsideration.

Plaintiffs' motion presents the same issues already ruled on by the Court. Further, Plaintiffs fail to demonstrate a palpable defect by which the Court and the parties have been misled. L.R. 7(g)(3).

For these reasons, the motion for reconsideration is DENIED.

The Court DENIES Plaintiffs' motion to provide supplemental authority in support of their motion for reconsideration.

IT IS ORDERED.

/s/ Victoria A. Roberts
United States District Judge

Dated: 9/3/2020

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTORY PROVISIONS

42 U.S.C. § 1981

(a) Statement of Equal Rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and Enforce Contracts" Defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection Against Impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1982

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit,

purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985(3)

(3) Depriving Persons of Rights or Privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under

the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

M.C.L. § 750.411

750.411h Stalking; definitions; violation as misdemeanor; penalties; probation; conditions; evidence of continued conduct as rebuttable presumption; additional penalties.

Section 411h.

(1) As used in this section:

(a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose.

(b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(c) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

(d) "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel

terrorized, frightened, intimidated, threatened, harassed, or molested.

(e) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

(i) Following or appearing within the sight of that individual.

(ii) Approaching or confronting that individual in a public place or on private property.

(iii) Appearing at that individual's workplace or residence.

(iv) Entering onto or remaining on property owned, leased, or occupied by that individual.

(v) Contacting that individual by telephone.

(vi) Sending mail or electronic communications to that individual.

(vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

(f) "Victim" means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

(2) An individual who engages in stalking is guilty of a crime as follows:

(a) Except as provided in subdivision (b), a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.

(b) If the victim was less than 18 years of age at any time during the individual's course of conduct and the individual is 5 or more years older than the victim, a felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00, or both.

(3) The court may place an individual convicted of violating this section on probation for a term of not more than 5 years. If a term of probation is ordered, the court may, in addition to any other lawful condition of probation, order the defendant to do any of the following:

(a) Refrain from stalking any individual during the term of probation.

(b) Refrain from having any contact with the victim of the offense.

(c) Be evaluated to determine the need for psychiatric, psychological, or social counseling and if, determined appropriate by the court, to receive psychiatric, psychological, or social counseling at his or her own expense.

(4) In a prosecution for a violation of this section, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented

contact with the victim, gives rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(5) A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct.

CITY OF ANN ARBOR
SIGNS ORDINANCE
(JULY 19, 2018)

CODE OF ORDINANCES

CITY OF ANN ARBOR, MICHIGAN

CHAPTER 55

UNIFIED DEVELOPMENT CODE

Adopted: July 16, 2018

Effective: July 29, 2018

5.24 Signs

Throughout this Section 5.24, all references to the City's sign regulation or to this Section 5.24 refer to and apply to both the substantive standards in this Section 5.24 and the procedural standards related to the administration and enforcement of sign regulations in Article V: Administrative Bodies and Procedures.

5.24.1 Intent

The intent of Section 5.24 is to regulate Signs within all zoning districts of the City to protect public

safety, health, and welfare; minimize abundance and size of Signs to reduce visual clutter and motorist distraction; promote public convenience; preserve property values; and enhance the aesthetic appearance and quality of life within the City. The regulations and standards in this Section 5.24 are considered the minimum amount of regulation necessary to achieve a substantial governmental interest for public safety, traffic safety, aesthetics, and protection of property values, and are intended to be content neutral. Those objectives are accomplished by establishing the minimum amount of regulations necessary concerning the size, placement, construction, Illumination, and other aspects of Signs in the City so as to:

A. Protect the public right to receive messages, especially noncommercial messages, such as religious, political, economic, social, philosophical, and other types of information protected by the First Amendment of the U.S. Constitution. Nothing in this section is intended to limit the expression of free speech protected by the First Amendment.

B. Recognize that the principal intent of commercial Signs, to meet the purpose of these standards and serve the public interest, should be for identification of an Business on the same Premises as the Sign.

C. Recognize that the proliferation of Signs is unduly distracting to motorists and nonmotorized travelers, reduces the effectiveness of Signs directing and warning the public, causes confusion, reduces desired uniform traffic flow, and creates potential for accidents.

D. Recognize that different areas of the City require different Sign regulations due to factors such as their intended audience and their ability to help promote the character of an area.

E. Prevent Signs that are potentially dangerous to the public due to structural deficiencies or disrepair.

F. Enable the public to locate goods, services, Buildings, and/or locations on which activities occur without excessive difficulty and confusion by restricting the number and placement of Signs.

G. Prevent placement of Signs that will conceal or obscure other Signs.

H. Prevent Off-Premises Signs from conflicting with land uses.

I. Preserve and improve the appearance of the City and road corridors through the City by encouraging Signs of consistent type and size that are compatible with and complementary with related Buildings and uses, and harmonious with their surroundings.

J. Prohibit portable commercial Signs in recognition of their significant negative impact on traffic safety and aesthetics.

5.24.2 Applicability

Signs may be erected or maintained in the City only as permitted by 5.24 and subject to other restrictions contained in this Code. The Sign regulations of this Section 5.24 are intended to ensure that Signs

are located, designed, sized, constructed, installed, and maintained in a way that protects and promotes safety, health, aesthetics, and the public welfare while allowing adequate communication. If any portion of the Sign regulations of this Section 5.24 is determined to be a violation of law, that portion shall be severed from the remainder of the chapter and shall be revised to reflect the least possible change that avoids the violation of law; and the remainder of this Section 5.24 chapter shall remain in effect and be interpreted as closely as possible to the original intent of this Section 5.24 without violating state or federal law. It is the specific intent of the City that if any portion of the Sign regulations of this Section 5.24 is determined to be an impermissible content-based regulation, such a determination shall not result in the invalidation of any other portion of this Section 5.24. Regardless of any other provision in this Section 5.24, noncommercial messages may be placed or substituted on any lawfully permitted Sign.

5.24.3 Measurement of Sign Height and Distance

A. Maximum Height

The maximum height of a Sign shall be measured from the lowest point of Grade beneath the Sign to the highest edge of the Sign.

B. Minimum Height

The minimum height of a Sign shall be measured from the highest point of Grade beneath the Sign to the lowest edge of the Sign.

C. Distance from a Building to a Sign

The distance from a Building to a Sign shall be measured from the nearest wall of the Building, or, in the case of a Fueling Station the nearest gasoline pump, to the farthest part of the Sign.

5.24.4 On-Premises Exterior Signs

A. Area and Placement

Each ground-level Business is permitted On-Premises Exterior Signs having an area totaling two square feet for each linear foot of Business Frontage. The total Sign Area of such Signs may not exceed 200 square feet. Such Signs may contain a total of ten Message Units and shall meet the following placement standards:

1. Attached to Building

Signs attached to a Building shall not extend more than three feet above the Building or four feet from the wall of the Building. The extension from the wall or Roof shall be measured from the location of attachment.

2. Ground Signs

Signs not attached to a Building shall be at least five feet from all Lot Lines. Such Signs shall be permitted a maximum height of one foot for each two feet the Sign is set back from the nearest Lot Line, provided that the maximum height of any such Sign shall not exceed 25 feet.

3. Marquee/Awning Signs

Signs may be located on a Building marquee or Awning that is over a public Sidewalk provided that the marquee or Awning shall not extend more than eight feet over the Public Right-of-Way nor be closer than three feet to the curb line.

4. Minimum Height Above Public Right-of-Way

No portion of any Sign that extends over the Public Right-of-Way shall be less than eight feet above the Public Right-of-Way.

B. Area and Message Unit Exceptions

The following Signs shall be exempt from the Message Unit and area limitations contained in Section 5.24.4A, but shall be subject to the placement regulations of this:

1. Gasoline Price Signs

A Fueling Station shall be permitted Signs on each pump island indicating the prices and types of fuel and the type of service. The Sign Area of such Signs shall not exceed 20 square feet per pump island.

2. Theater Signs

Theaters shall be permitted 200 square feet of additional Changeable Copy Sign Area that indicates the entertainment at the theater.

3. Business Center

A Business Center may have a Sign identifying, by name only, the Business Center and the Businesses

contained therein. Such a Sign may have a Sign Area of two square feet for each linear foot of Building Frontage, but not more than 200 square feet of total Sign Area. The Changeable Copy portion of such a Sign shall not exceed 50% of the Sign Area and shall not exceed 80 square feet per Sign and 15 square feet per Sign face. No such Sign may be erected until after the Planning Manager has reviewed the permit application to determine whether it meets the standards of this Section 5.24.

4. Alley Signs

A Business with an entrance on an Alley shall be permitted additional Sign Area of one square foot for each linear foot of Alley frontage and ten additional Message Units solely for Signs facing said Alley.

C. Message Unit Exceptions

The Message Unit restrictions of Section 5.24.4.B have the following exceptions, provided that the area and placement provisions of that section are met.

1. Business without Ground Level Frontage

A Business without ground-level Business Frontage shall be permitted Signs having ten Message Units to advertise that Business, provided that the total Sign Area of all Exterior Signs on any Building shall not exceed the total Sign Area permitted for Businesses in the Building having ground-level Business Frontage.

2. Business with Frontage on More Than One Street

A Business with Business Frontage on more than one street may be permitted ten additional Message Units on each additional street side.

3. Business Name

If the name of the proprietor of a Business exceeds ten Message Units, said name may be displayed on each Business Frontage provided no other Message Units are displayed by that Business on said frontage.

5.24.5 Interior Business Signs

A. Permanent

A Business shall be permitted Interior Signs that occupy not more than 25% of the window area of each ground level of that Business, provided that the Message Units on those Signs when combined with those on any Exterior Signs do not exceed the number permitted by Section 5.24.8C. If the permanent Interior Signs will exceed 25% of the window area of a ground level of a Business, they shall be treated as Exterior Signs and shall be permitted only if they meet all the requirements of Section 5.25.4.C

B. Temporary

A Business shall be permitted temporary Interior Signs that occupy not more than 25% of the window area of said Business. No such Sign shall be displayed for more than 30 business days in any 60 day period.

5.24.6 Residence Signs

A. Single-Family Dwellings, Two-Family Dwellings, and Townhouses

Single-Family, Two-Family, and Townhouse Dwellings are permitted Signs having a total Sign Area of three square feet indicating the address and names of the occupants.

B. Multi-Family Dwellings

Multi-Family Dwellings, Fraternity Houses, Sorority Houses, Student Cooperative Housing, Group Housing, Assisted Living Dwellings, Accessory Bed and Breakfasts and Religious Assemblies are permitted Signs having a total Sign Area of 12 square feet indicating only the address, the names of the occupants and the name, phone number and website of the Building or organization.

C. Residential Developments

A residential development of more than one Single, Two-Family, Multi-Family, or Townhouse Dwelling is permitted one Sign identifying the development at any entrance to the Development, with a maximum of two such Signs for each development. Such Signs shall have a maximum Sign Area of 50 square feet and a maximum height of eight feet.

5.24.7 Real Estate Signs

On-Premises Temporary Signs advertising real estate may be erected in accordance with the following regulations:

A. Single-Family and Two-Family Real Estate-For Sale, For Rent and Contractor Signs

A single Sign advertising the sale or rent of a Single-Family or Two-Family Dwelling or vacant property zoned for Single-Family or Two-Family Dwellings, or identifying the Contractors engaged in work that requires a building permit from the City, is permitted, subject to the following standards:

1. Size

Such Signs shall have a maximum height of 48 inches and a maximum width of 36 inches, including the support Structure and all riders, and with the bottom of the Sign face a minimum of six inches from the ground.

2. Placement

Such Signs shall be set back at least five feet from any Public Right-of-Way or affixed to a Building. If a legally existing obstruction on the property prevents such Signs from being seen from a Public Right-of Way, then the Sign may be affixed to or placed immediately in front of that obstruction, as long as the display face of the Sign is parallel to the Right-of-Way line and the Sign is not placed within the Public Right-of-Way.

3. Installation and Removal

Such Signs may not be installed until the dwelling or vacant property is listed for sale or rent, or the contractor has been issued a permit for the work to be done, and such Sign must be removed within 48 hours after the dwelling or vacant property is no

longer available for sale or rent or the contractor's work has been completed.

B. Other Real Estate-For Sale and For Rent Signs

A Sign with a maximum Sign Area not in excess of 12 square feet advertising the sale or rental of real estate other than Single or Two-Family Dwellings or vacant property is permitted pursuant to a permit having a maximum duration of 120 days. Such Signs shall have a maximum height of ten feet and shall be set back 25 feet from any Public Right-of-Way unless attached to a permanent Building.

C. Other Real Estate-Contractor Signs

A Sign identifying the contractors performing work on a Premises not containing or zoned for a Single or Two-Family Dwelling is permitted, subject to the following standards:

1. There shall be a maximum of one Sign per each Street Frontage that has a vehicular entrance.
2. The Sign shall have a maximum Sign Area of 50 square feet.
3. The Sign shall have a maximum height of ten feet.
4. The Sign shall be set back a minimum of five feet from the Public Right-ofWay, or affixed to a permanent Building, construction fence, or barricade.

5. Only a contractor who is engaged in work that requires a building permit from the City may erect the Sign.
6. The Sign shall not be installed until the building permit has been issued for the work.
7. The Sign shall be removed at the completion of the work.

5.24.8 Political Signs

A. General

A Political Sign is permitted subject to the following conditions:

1. The Sign shall have a maximum height of 48 inches and a maximum width of 36 inches, including the support Structure and all riders, and shall have the bottom of the Sign a minimum of six inches from the ground.
2. The Sign shall be set back at least five feet from the Public Right-of-Way or affixed to a Building. If a legally existing obstruction on the property prevents the Sign from being seen from the Public Right-of-Way when the Sign is placed in accordance with the foregoing placement requirements, then the Sign may be affixed to or placed immediately in front of that obstruction, as long as the display face of the Sign is parallel to the Right-of-Way line, and the Sign is not placed within the Public Right-of-Way. Permission to locate such Signs on private property shall be obtained from the owner or occupant of the property on which such Signs are located.

3. A Sign that advocates or opposes a candidate for public office or a position on an issue to be determined at an election shall be removed not more than 18 hours after the election.

4. Other Political Signs shall not be subject to any specified time limit but must be removed if they become dangerous or otherwise are prohibited by Section 5.24.10.

B. On Election Days

The following provisions apply on election days only, to Signs that directly or indirectly make reference to an election, a candidate, or a ballot question and that are erected on property on which a public polling place is located. Such Signs are not subject to the placement requirements of 5.24.8A, but no such Sign:

1. Shall be erected within 100 feet of any entrance to a Building in which a polling place is located.

2. Shall be erected in the Public Right-of-Way, except that a Sign that complies with all other provisions of this Section 5.24.8B may be erected in the Lawn Extension that is contiguous with and on the same side of the street as the property on which the polling place is located. Permission from the owner of the property on which the polling place is located shall not be required to erect such a Sign in the Lawn Extension.

3. Shall be erected such that it hinders or obstructs the free and safe passage of pedestrians and vehicles in the Public Right-of-Way.

4. Shall be erected more than 18 hours before the polls open.

5. Shall remain on the property on which the polling place is located or in the Public Right-of-Way more than 18 hours after the polls close.

5.24.9 Other Signs Exempt from Sign Permit Requirements

The following Signs are permitted in addition to the other Signs permitted by this chapter and do not require a Sign permit:

A. Address numbers with a numeral height not greater than 12 inches for residences and 24 inches for Businesses.

B. Names of Building occupants painted on or attached to the Building with a letter height not greater than two inches.

C. Exterior Signs having a total Sign Area of not more than three square feet on goods displayed within six feet of the front of the Building.

D. Portable real estate "open house" Signs with a Sign Area not greater than six square feet. One such Sign may be located on the Premises being sold. No more than two additional such Signs are permitted and may be placed in the Public Right-of-Way, notwithstanding the prohibition in Section 5.24.10L, but a property owner shall have the right to remove and destroy or otherwise dispose of without notice to any Person any Signs that

are placed without his or her permission on his or her property, including Signs placed in that portion of the Public Right-of-Way that is an easement across the property. All of the Signs permitted by this Section 5.24.9D and pertaining to a single property may be displayed only for six hours during one day in any seven-day period. All such Signs shall be located so as not to interfere with the free passage of vehicular and pedestrian traffic upon the Public Right-of-Way, and so as not to constitute a Hazard.

E. Paper notice placed on bulletin boards or on kiosks that have an area of no more than ten square feet.

F. Authorized Signs of the state or a political subdivision of the state.

G. Signs of a Religious Assembly, school, Museum, recreational facility or Library indicating the name, current displays or activities and having a Sign Area not greater than 50 square feet.

H. Memorial Signs or tablets, names of Buildings and date of erection, when cut into any masonry surface of a Building or when constructed of bronze or other incombustible material affixed to a Building.

I. Flags bearing the official design of a nation, state, municipality, educational institution or noncommercial organization, provided that the flag pole is set back from all Lot Lines a minimum distance of one foot for every one foot of pole height.

J. Special event Signs, banners or search lights approved by the City Council or the City Administrator.

K. Permanent Signs on vending machines, gas pumps or ice containers indicating only the contents of such devices provided that such devices must be located within ten feet of the Building. The Sign Area of each such device may not exceed six square feet.

L. Signs not exceeding six square feet each of which contain only noncommercial messages including designation of restrooms, telephone location, restrictions on smoking, door openings and private traffic control and parking Signs.

M. One Sign per Parking Lot not exceeding three square feet per Sign face and six feet in height identifying the Business and providing driving and parking information.

N. Interior Signs up to four square feet indicating property is for sale or for rent.

O. Plaques or Signs not exceeding two square feet designating a Building as historic.

P. Business Signs not exceeding two square feet per Sign face containing information on credit cards and Business affiliations.

Q. Signs affixed to a freestanding station that provides rental or sharing of bicycles to the public when the station is part of a system that has received funds or equipment from the City, including such a station that has been authorized by the City to occupy a

Public Right-of-Way. The maximum total Sign Area shall be 20 square feet, the maximum height of any Sign shall be eight feet, and no sign face shall exceed six square feet. Up to seven square feet of Off-Premises Signs shall be permitted and the provisions of Section 5.24.11 shall not apply.

5.24.10 Prohibited Signs

Any Sign that is not specifically permitted by this Section 5.24 is prohibited. The following Signs are prohibited:

A. Signs that incorporate in any manner or are Illuminated by any flashing, intermittent, or moving lights. This Section 5.24.10 does not include barber poles that meet the other requirements of this section.

B. Exterior banners, pennants, spinners and streamers, other than a banner or pennant used as a permitted Sign under Section 5.24.4 or a special event banner under 5:24.9.J.

C. Exterior string lights used in connection with commercial Premises, other than holiday decorations.

D. Any Sign which has any visible motion other than permitted flags or banners.

E. Any Sign which is structurally or electrically unsafe.

F. Any Sign erected on a tree or utility pole except Signs of any political subdivision of this state.

G. Any Business Sign or Sign Structure that no longer advertises a bona fide Business conducted or a product sold.

H. Except as provided in Section 5.24.9D and Chapter 47, Section 4:14, any freestanding Exterior Sign not permanently anchored or secured to either a Building or the ground.

I. Any Sign on a motor vehicle or trailer that is parked in front of a Business for the purpose of advertising a Business or product or service of a Business located on the Premises where such vehicle is parked.

J. Any Sign on a motor vehicle or trailer that projects more than 6 inches from the surface of that vehicle when it is parked at a location visible from a Public Right-of-Way street.

K. Any Sign Structure or frame no longer containing a Sign.

L. Any Sign erected on the Public Right-of-Way, except for Signs of a political subdivision of this state, portable "open house" Signs as permitted by Section 5.24.9D, Political Signs as permitted by Section 5.24.8B. The City may remove and destroy or otherwise dispose of, without notice to any Person, any Sign that is erected on the Public Right-of-Way in violation of this chapter.

M. Billboards.

5.24.11 Off-Premises Signs

Off-Premises Signs are permitted only in accordance with the following regulations and any other applicable provision of this Code:

A. An Off-Premises Sign shall have a maximum Sign Area of 200 square feet. For each Premises, the maximum permitted Sign Area for On-Premises Signs for all Businesses on the Premises shall be reduced one square foot for each square foot of Off-Premises Sign Area on the Premises.

B. An Off-Premises Sign shall have a maximum height of 25 feet.

C. An Off-Premises Sign shall be at least 300 feet from any other Off-Premises Sign.

D. An Off-Premises Sign shall have a maximum height of one foot for each two feet it is set back from the nearest Public Right-of-Way line and shall be at least 50 feet from any On-Premises Sign and at least 500 feet from any Lot Line of any playground, school, residential dwelling, Religious Assembly, or park.

5.24.12 Illumination

A. Only Signs permitted by Sections 5.24.3C, 5.24.5, 5.24.6, 5.24.11, and subsections A, B, G, K, and L of Section 5.24.9 may be illuminated.

B. All electric Signs and outline lighting shall be installed in accordance with the Electrical Code adopted by the City as referenced in Chapter 100 of this Code. Every electric Sign of any type, fixed or portable, shall be listed and installed in conformance with that

listing, unless otherwise permitted by special permission.

C. In order to prevent glare, Illuminated Signs shall not emit more than 5,000 Nits in full daylight and 100 Nits between dusk and dawn. All electronic Illuminated Signs shall have functioning ambient light monitors and automatic dimming equipment which shall at all times be set to automatically reduce the brightness level of the Sign proportionally to any reduction in the ambient light. In order to verify compliance with City Code or other applicable law, the interface that programs an electronic Illuminated Sign shall be made available to City staff for inspection upon request. If the interface is not or cannot be made available upon the City's request, the Sign shall cease operation until the City has been provided proof of compliance with City Code.

D. Regardless of any other requirement, Illuminated Signs shall not project light that exceeds 0.10 of a foot candle above the ambient light at any Lot Line bordering any R1, R2, R3, R4 or R6 zoning district.

5.24.13 Changeable Copy Signs

A. The Changeable Copy portion of a Sign shall not exceed 50% of the Sign Area of the Sign and shall not exceed 30 square feet per Sign and 15 square feet per Sign face.

B. Scrolling or traveling of a message on Changeable Copy is prohibited.

C. Changeable Copy shall not change more than once every 15 minutes.

D. Changeable Copy shall not appear to flash, undulate, pulse, blink, expand, contract, bounce, rotate, spin, twirl, or otherwise move.

5.24.14 Substitution

Noncommercial content may be substituted for other content on any Sign permitted by this UDC.

5.24.15 Liability Insurance

If any wall, projecting, pole or Roof Sign is suspended over a public street or property or if the vertical distance of such Sign above the street is greater than the horizontal distance from the Sign to the street property line or parapet wall and so located as to be able to fall or be pushed onto public property, then the owner of such Sign shall keep in force a public liability insurance policy in the amount of $50,000.00 for injury to one Person, $100,000.00 for injury to more than one Person and $25,000.00 for damage to property. In lieu of an insurance policy, an owner may present proof satisfactory to the City Attorney that the owner is financially capable of self-insurance in the above amounts. Any Sign subject to the provisions of this Section 5.24.15 may be routinely inspected once every calendar year.

5.25 Outdoor Lighting

5.25.1 Applicability

Unless exempted by the terms of this Section 5:25, all outdoor lighting installed or modified in the following situations shall comply with the following standards:

A. Whenever a site plan is required;

B. Whenever the estimated expenses of construction exceeds 50% of the appraised replacement cost of the entire Building or structure, exclusive of foundation, prior to its improvement (as determined by the Building Official).

C. Whenever a shared Driveway is provided within an easement.

5.25.2 All Exterior Lighting

All exterior lighting devices shall be adequately shielded and screened so that no light will glare directly onto any Public Right-of-Way or property principally used for residential purposes. Lighting devices shall be arranged and kept at a level so that the amount of light projected onto property principally used for residential purposes does not exceed 0.10 of a foot candle.

5.25.3 Parking Lots

A. General

Outdoor lighting for Parking Lots shall comply with the following standards:

1. Shall be Illuminated from one-half hour after sunset to one-half hour before sunrise at the levels specified in Table 5:25-1 below.

2. Shall be designed to provide Illumination levels at all unobstructed points of the Parking Lots in accordance with Table 5:25-1. Illumination levels shall be measured three feet above the Lot surface.

AFFIDAVIT OF GABRIELLE SHAPO
(JANUARY 23, 2020)

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

MARVIN GERBER, DR. MIRIAM BRYSK,

Plaintiffs,

v.

HENRY HERSKOVITZ; GLORIA HARB; TOM SAFFOLD; RUBY LIST; CHRIS MARK; DEIR YASSIN REMEMBERED, INC.; JEWISH WITNESSES FOR PEACE AND FRIENDS; THE CITY OF ANN ARBOR, Ann Arbor Mayor CHRISTOPHER TAYLOR, in His Official and Individual Capacities, Ann Arbor Community Services Administrator DERK DELACOURT in His Official and Individual Capacities, Ann Arbor City Attorney STEPHEN K. POSTEMA, in His Official and Individual Capacities, and Senior Assistant City Attorney KRISTEN D. LARCOM, in His Official and Individual Capacities,

Defendants,
Jointly and Severally

Case No. 2:19-cv-13726

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

AFFIDAVIT OF GABRIELLE F. SHAPO

State of Israel)
) ss
D.N. Evtah)

Gabrielle Shapo, being first duly sworn, deposes and states as follows:

1. I am 18 years old and am currently residing in Israel during my gap year between high school and attending college in the Unites States.

2. I was born in 2001 and during my childhood I lived in Ann Arbor, Michigan, where I attended services on a regular basis with my parents at Beth Israel Synagogue.

3. Over the course of my 10 childhood years going to Shabbat services at Congregation Beth Israel, I became an expert on the mental checklist my parents taught me about how I was to enter the synagogue: keep you eyes straight ahead; don't attract protesters' attention; don't engage with them if they speak with us on our way into services; and be sure to follow Mommy and Daddy's direction in case the protesters start walking toward us with their signs.

4. Crossing a picket line to enter my place of worship was my reality growing up. As soon as they saw us, I felt physically targeted as though there were walls closing in on us from the sides.

5. At the time, I was too young to understand the signs they would shuffle from different directions into our line of vision as we were mentally preparing for prayer. I tried to pronounce the complicated words I saw, words like "Apartheid," "Zionists," "Nazis,"

Although initially I did not know what those words meant, seeing them distressed me. Attached to my affidavit is a photograph of me clinging anxiously to my grandmother as we crossed Washtenaw Ave. in order to enter the synagogue to worship, confronted by the protesters and their signs.

6. I recall my confusion most specifically about why, on my Sabbath and day of rest, there was so much commotion about the political State of Israel, such as "Israel's Hold on Congress Must End."

7. There was one sign that read "Israel Lobby Inside." Being no older than 9, I did not understand the difference between the lobby inside my synagogue where I put my coat and friendly congregants said "Shabbat Shalom" to me, and the "Israel Lobby." What were the protesters talking about? I didn't see a special Israel lobby in my synagogue.

8. As I grew older, I would discuss this experience with my friends, many of whom practiced different religions from me. It didn't take me long to realize that none of them ever had to endure protests on their religious Sabbath, and the sidewalks in front of their places of worship were not the forums for these kinds of protests. I felt very isolated–why was I the only one? Why were people so mad at me for being a Jew?

9. My family moved to Washington, D.C., in 2014, when I was 12 years old, I remember feeling elated because I could finally be free of the mental checklist that range in my head all those years. Because I was preparing for my Bat Mitzvah that year, I was all the more excited that I didn't have to print a special insert for my Bat Mitzvah invitation providing a mental

checklist to my grandparents, cousins and friends who were coming to the synagogue to celebrate with me, to alert them about protesters. I could finally walk to my synagogue without feeling fearful of being outwardly identified as a Jew attending Shabbat services.

10. Over the course of my teenage years, I've developed more perspective on my nerve-wracking and emotionally stressful experience as a Jewish child growing up in Ann Arbor. I am retroactively disgusted by every moment that I thought this was a standard occurrence. I am disgusted by the fact that I had to wait until I was 12 years old and halfway across the country to discover what it is like to walk proudly and fear-free into my house of worship. And about all else, I am saddened that my 3-years-old, 5-years-old, 7-years-old, 9-years-old and 11-years-old brain was forced to absorb messages that slandered my people, when all I want to do was to peacefully enter my house of worship to pray.

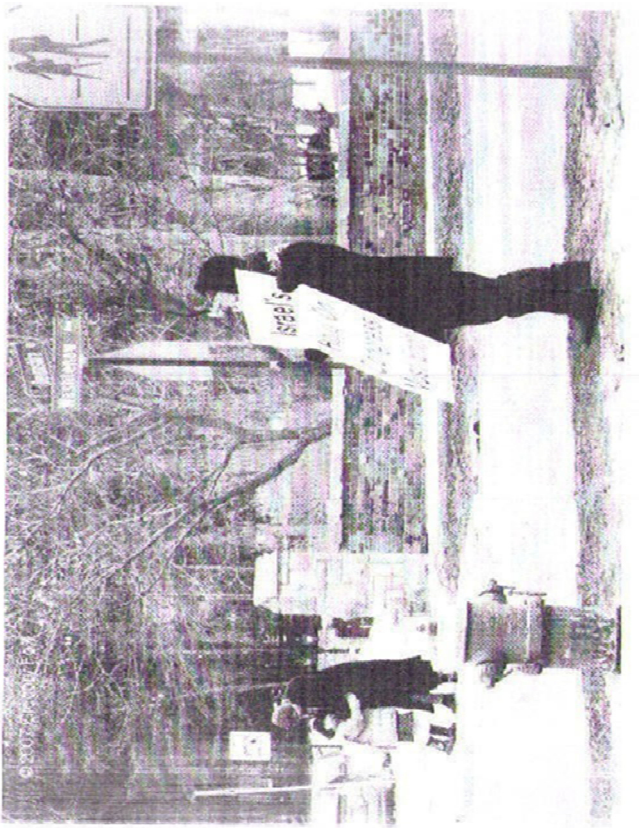
Further, affiant sayeth not.

/s/ Gabrielle F. Shapo

SUBSRIBED AND SWORN TO BEFORE ME, on the 23 day of January 2020.

/s/ Avraham Colthof
Notary Public

My commission expires 12.31.2020



Serial 337/2020

Authentication of Signature

I, the undersigned, Avaraham Colthof, Notary holding license no. 213535, hereby certify that:

On 23/01/2020 there appeared before me at my office, located at 1 Beer Sheva St., Beit Shemeshm Mrs. Gabriella Faith Shapo, whose identity has been proven to me by United-States Passport No. 567677236, issued on 28.9.2018

And I was convinced that the person standing before me fully understood the significance of the action and voluntarily signed the attached document, marked "A".

In witness whereof I hereby authenticate the signature of Mrs. Gabriella Faith Shapo by my own signature and seal, this day, 23/01/2020.

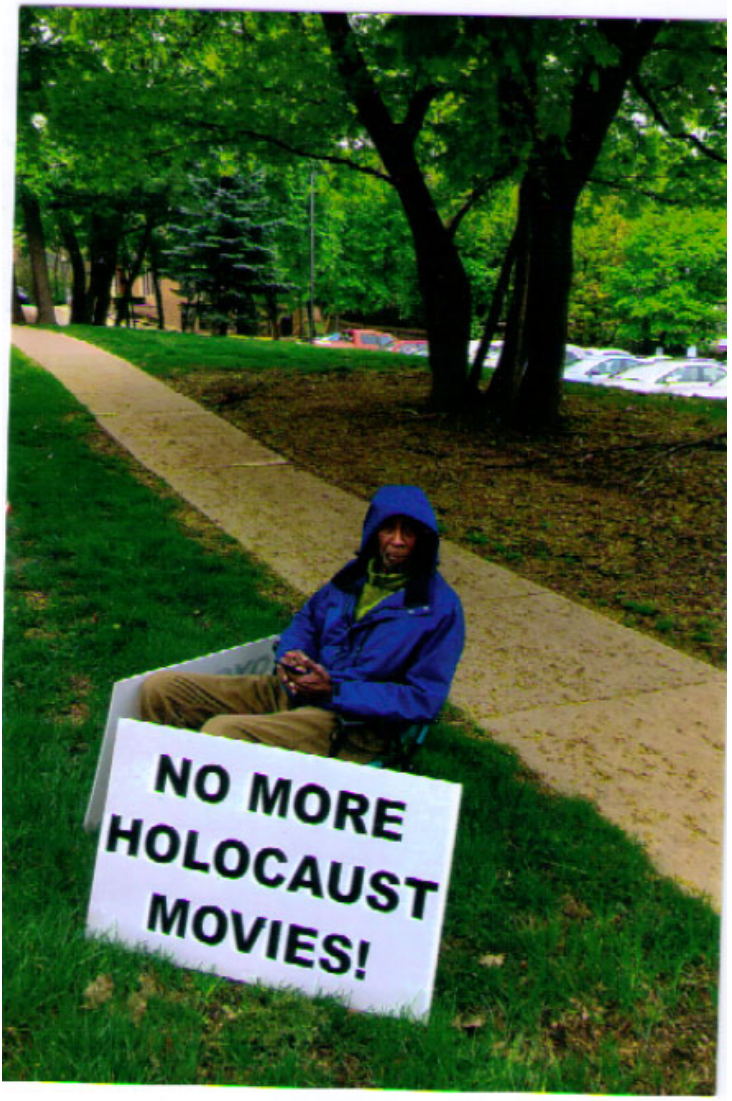
Notary fee: 167 NIS (VAT not included)

Notary fee: 195 NIS (VAT included)

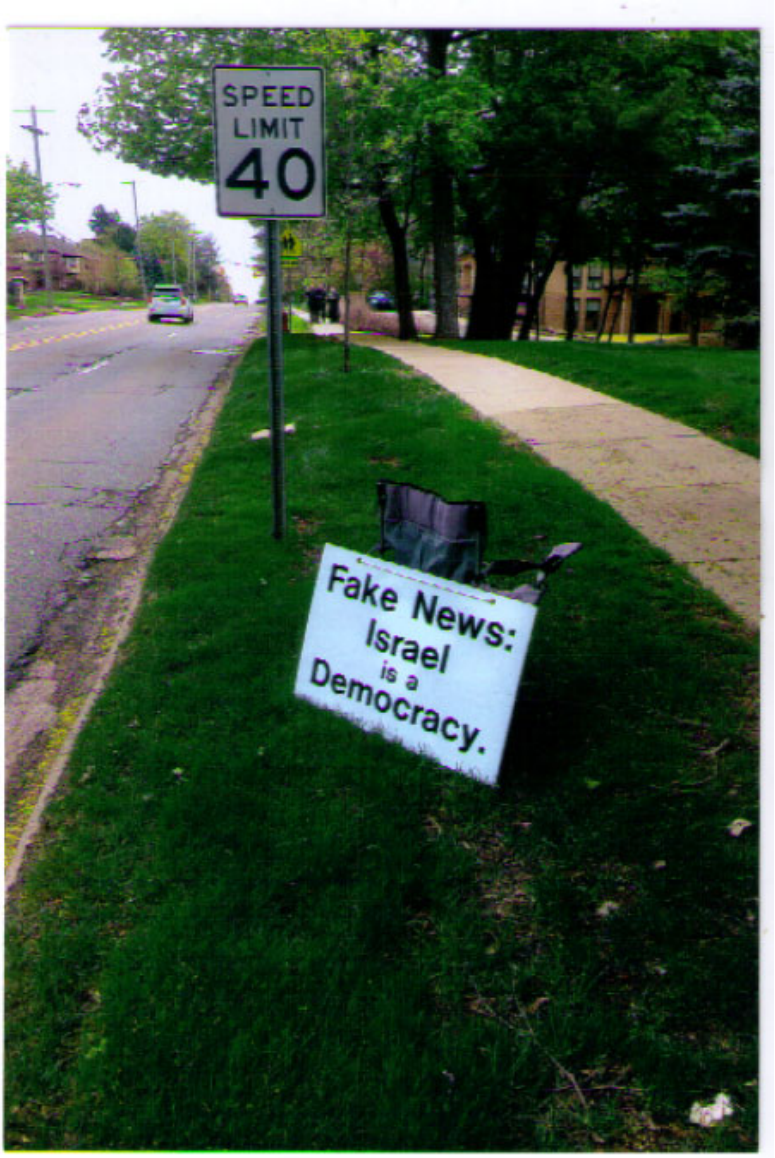
/s/ Avraham Colthof
Notary Seal and Signature

SIGNS AND ISRAELI FLAG IN FRONT OF THE SYNAGOGUE

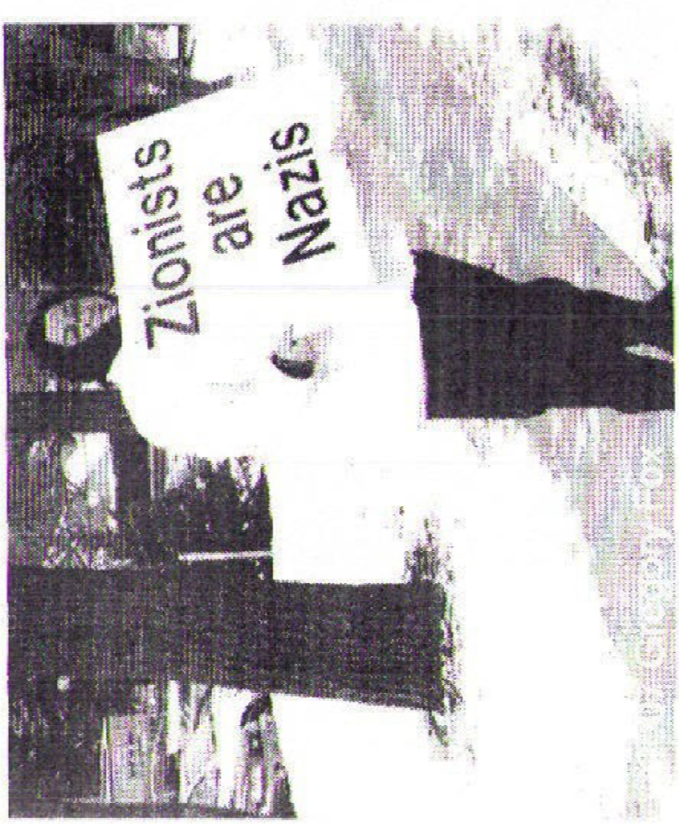

RESIST
Jewish Power


NO MORE
HOLOCAUST
MOVIES!


BOYCOTT
APARTHEID
ISRAEL


SPEED
LIMIT
40
Fake News:
Israel
is a
Democracy.

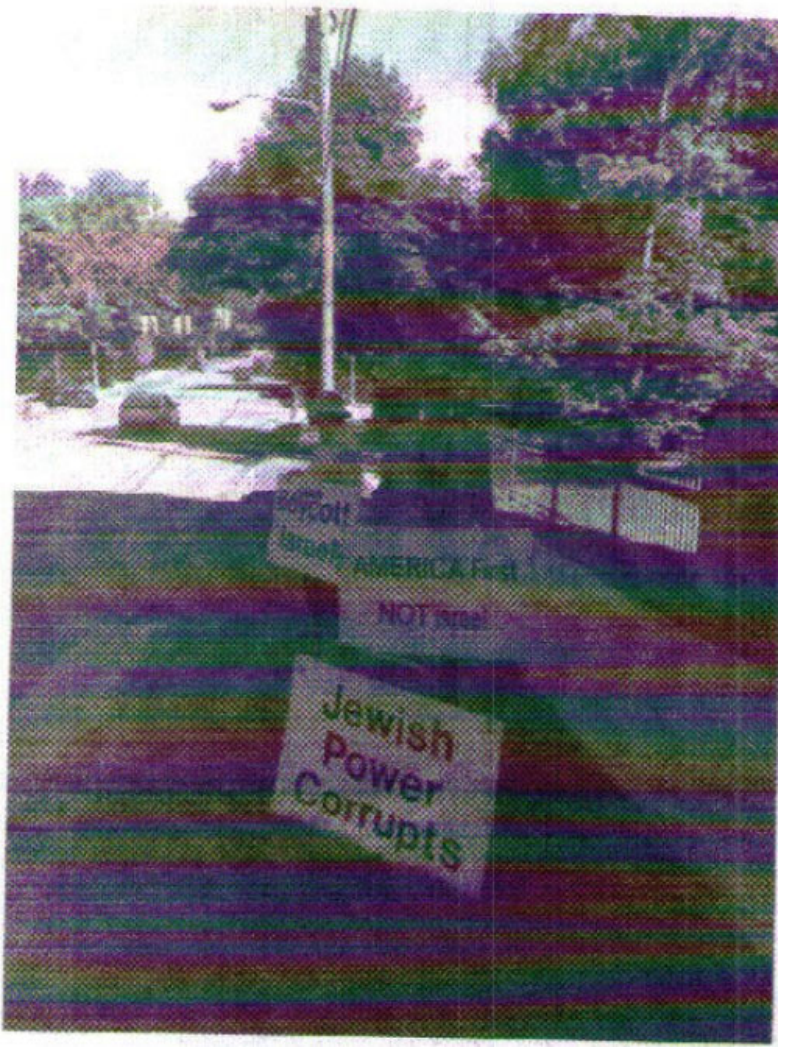

SOUTH
BUSINESS
23
Stop
U.S. Aid


Zionists
are
Nazis


Dual
Loyalty
?

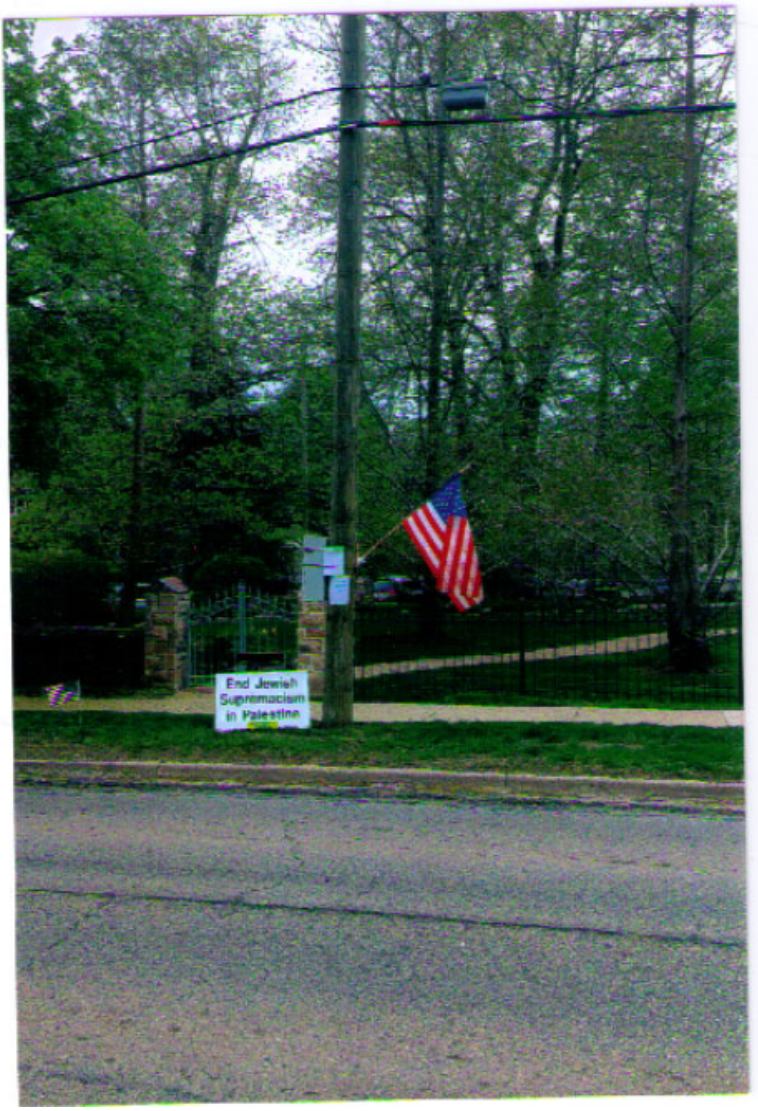

LIBERTY
Boycott
Israel

SIGNS ACROSS WASHTENAW AVE.
FACING THE SYNAGOGUE

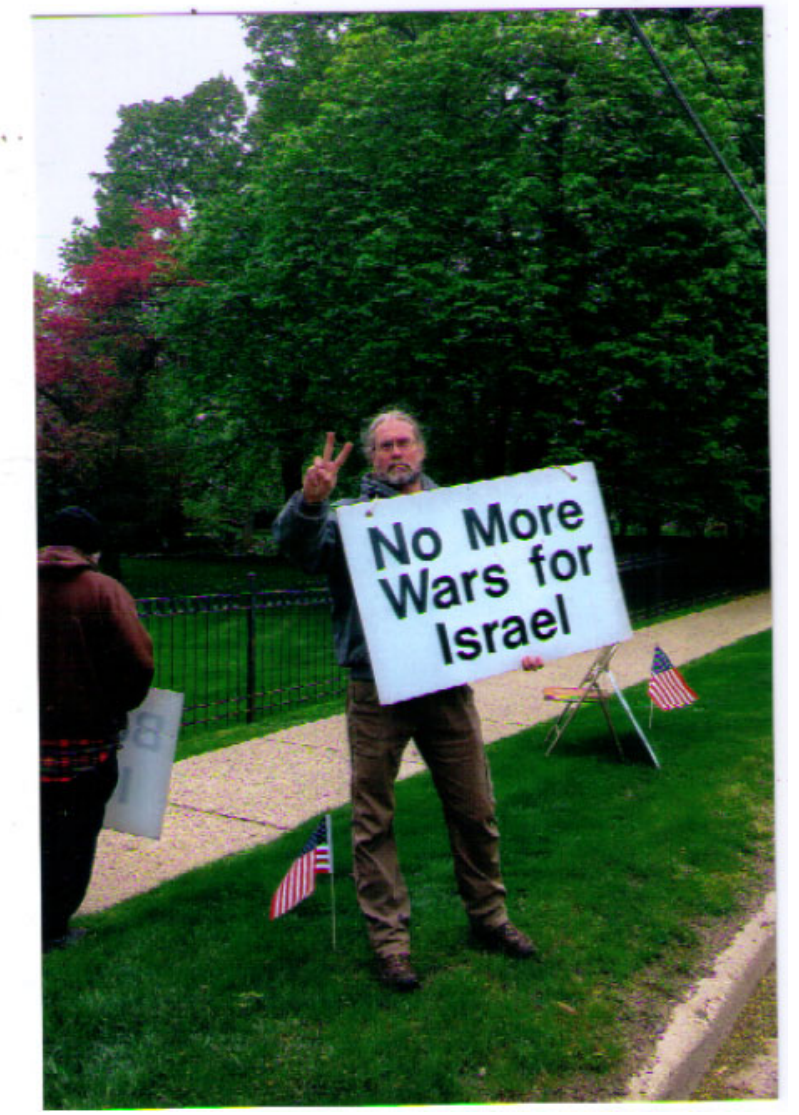



End the
Palestinian
holocaust
Fake News:
Israel
is a
Democracy.


Stop
Funding
Israel
End Jewish
Supremacism
in Palestine
BOYCOTT
ISRAEL


End Jewish
Supremacism
in Palestine


SENATE GAVE
ISRAEL
$38.5 BILLION
PAL


No More
Wars for
Israel


Stop
Funding
Israel


No More
Wars for
Israel