

Case No. 20-1870

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

Marvin Gerber, *et al.*,

*Plaintiffs-Appellants,*

v.

Henry Herskovitz, *et al.*,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
CASE No. 2:19-CV-13726

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**BRIEF OF *AMICI CURIAE* AGUDATH ISRAEL OF AMERICA, COLPA,  
AGUDAS HARABBONIM, COALITION FOR JEWISH VALUES,  
ORTHODOX JEWISH CHAMBER OF COMMERCE, RABBINICAL  
ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA,  
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,  
AND TORAH UMESORAH IN SUPPORT OF PLAINTIFFS-  
APPELLANTS' PETITIONS FOR REHEARING *EN BANC***

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46(a)(1)(D)

**DISCLOSURES OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule

26.1, Agudath Israel of America makes the following disclosures:

- (1) Is said party a subsidiary or affiliate of a publicly owned corporation?

If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named organization.

**No.**

- (2) Is there a publicly owned corporation, not a party to the appeal that has

a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

**No.**

/s/ Joshua A. Klarfeld  
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Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, The National Jewish Commission on Law and Public Affairs (“COLPA”) makes the following disclosures:

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**No.**

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**No.**

/s/ Joshua A. Klarfeld  
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**No.**

*/s/ Joshua A. Klarfeld*  
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Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, Orthodox Jewish Chamber of Commerce makes the following disclosures:

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- (2) Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

**No.**

*/s/ Joshua A. Klarfeld*  
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Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, Rabbinical Alliance of America makes the following disclosures:

- (1) Is said party a subsidiary or affiliate of a publicly owned corporation?

If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named organization.

**No.**

- (2) Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

**No.**

*/s/ Joshua A. Klarfeld*  
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Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, Rabbinical Council of America (“RCA”) makes the following disclosures:

- (1) Is said party a subsidiary or affiliate of a publicly owned corporation?

If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named organization.

**No.**

- (2) Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

**No.**

*/s/ Joshua A. Klarfeld*  
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Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, Union of Orthodox Jewish Congregations of America (“Orthodox Union”) makes the following disclosures:

- (1) Is said party a subsidiary or affiliate of a publicly owned corporation?

If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named organization.

**No.**

- (2) Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

**No.**

/s/ Joshua A. Klarfeld  
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Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, Torah Umesorah (National Society for Hebrew Day Schools) makes the following disclosures:

(1) Is said party a subsidiary or affiliate of a publicly owned corporation?

If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named organization.

**No.**

(2) Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

**No.**

/s/ Joshua A. Klarfeld  
Joshua A. Klarfeld (Ohio 0079833)  
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**IDENTITY, INTEREST, AND AUTHORITY TO FILE**

This case is about vitriolic anti-Semitic protests that have occurred week after week, year after year, since 2003, in front of the Beth Israel Congregation synagogue in Ann Arbor, Michigan every Sabbath morning as the congregants attend worship services. This *Amicus* Brief demonstrates the exceptional importance of the issues raised in Plaintiffs-Appellants' Petitions for Rehearing *En Banc* by highlighting the dangerously anti-Semitic nature of the conduct at issue in this lawsuit.

Agudath Israel of America (“Agudath Israel”) is a grassroots Orthodox Jewish organization founded in 1922, with constituents in Michigan and throughout the United States. In its early years, Agudath Israel helped rescue Jews during the Holocaust. Thereafter, it helped lead the Orthodox Jewish community’s renaissance in America. It has long sought to protect the religious liberties of Orthodox Jews and to fight anti-Semitism. Agudath Israel regularly advocates for the continued security and well-being of the Jewish people in America.

Agudath Israel, as a national Jewish organization with constituents throughout the country, together with the other national Jewish organizations joining this brief, are deeply concerned that if the Sixth Circuit’s panel decision stands and is publicized, it could lead to many protests outside of synagogues and other houses of worship throughout the country, which could well lead to violent confrontations, injuries, and deaths.

The following national Orthodox Jewish organizations join this *Amicus* Brief:

- **The National Jewish Commission on Law and Public Affairs (“COLPA”).** COLPA has spoken on behalf of America’s Orthodox Jewish community for more than half a century. COLPA’s first *amicus* brief in the United States Supreme Court was filed in 1967 in *Board of Education v. Allen*, 392 U.S. 236 (1968). Since that time, COLPA has filed dozens of *amicus* briefs to convey to the United States Supreme Court and to other courts around the country the position of leading organizations representing Orthodox Jews in the United States.
- **Agudas Harabbonim of the United States and Canada (“Agudas Harabbonim”).** Agudas Harabbonim is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social, and legal issues significant to the Jewish community.
- **Coalition for Jewish Values (“CJV”).** CJV is a national rabbinic public policy organization that represents more than 1,500 traditional Orthodox rabbis and advocates for classical Jewish ideas and standards in matters of American public policy.
- **Orthodox Jewish Chamber of Commerce.** Orthodox Jewish Chamber of Commerce is a global umbrella of businesses of all sizes, bridging the highest echelons of the business and governmental worlds together stimulating

economic opportunity and positively affecting public policy of governments around the world.

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

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

- **Union of Orthodox Jewish Congregations of America (“Orthodox Union”).** The Orthodox Union is the nation’s largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations coast to coast. The Orthodox Union has participated in many cases before this Court which have raised issues of importance to the Orthodox Jewish community. Among those issues, of paramount importance is the constitutional guarantee of religious freedom.

- **Torah Umesorah (National Society for Hebrew Day Schools).** Torah Umesorah serves as the preeminent support system for Jewish Day Schools and yeshivas in the United States providing a broad range of services. Its

membership consists of over 675 day schools and yeshivas with a total student enrollment of over 190,000.

In accordance with Rule 29(b)(3) of the Federal Rules of Appellate Procedure, *Amici* are contemporaneously filing a motion for leave to file this Brief.

**STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTION**

No party's counsel authored this Brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this Brief. No person other than Agudath Israel, its members, and its counsel contributed money intended to fund preparing or submitting this brief.<sup>1</sup>

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<sup>1</sup> Agudath Israel thanks Rutgers Law School-Newark graduate Tamar Gluck, Rutgers Law School-Camden students Yosef Herz and Barry Mermelstein, and Southwestern Law School student Yisrael Gelb for assisting with research for this Brief.

## ARGUMENT

### I. INTRODUCTION

Anti-Semitism has existed for over two millennia.<sup>1</sup> Hostility towards the Jewish people began in ancient Egypt, where the Jewish people were subjected to severe persecution; it continued in ancient Babylonia where, after the destruction of the first Jewish Temple in Jerusalem, Jews were persecuted for rejecting their conquerors' social norms and customs.<sup>2</sup> After the subsequent Roman destruction of the reconstituted ancient Jewish state and the second Jewish Temple in Jerusalem, anti-Semitism spread to most places where Jewish communities existed, resulting in violence against Jews during the Crusades, the Spanish Inquisition, incidents provoked by "blood libels," countless pogroms, and the Holocaust.<sup>3</sup>

With that backdrop, this case does not involve "public discourse" or a mere peaceful protest over an issue of "public concern." This case involves attacks on private citizens' rights to exercise their religion freely when faced with consistent and sustained vicious protests targeting them specifically – as private citizens and as

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<sup>1</sup> *Anti-Semitism*, HISTORY (6/10/2019), <https://www.history.com/topics/holocaust/anti-semitism>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; Ryan, *Spanish Inquisition*, Encyclopedia Britannica, <https://www.britannica.com/topic/Spanish-Inquisition>. Jews in medieval Europe were denied civil liberties and forced to live in ghettos. *Id.* From 1933-1945, the Nazis slaughtered 6,000,000 Jews. *What was the Holocaust?*, Yad Vashem, <https://www.yadvashem.org/holocaust/about.html>.

Jews – and where the State is not upholding its own content-neutral laws designed to protect private citizens like Plaintiffs-Appellants. The protests do not constitute speech entitled to the robust First Amendment protection the Sixth Circuit panel’s decision would afford. Rather, the speech includes epithets that, throughout the history of the Jewish people – from ancient times through the present – has led to assaults, pogroms, and murder.

This is a case of “exceptional importance.” Fed. R. App. P. 35(a)(2). For the reasons that follow, while fervently supporting the First Amendment’s free speech protections, *Amici* support Plaintiffs-Appellants’ Petitions.

## II. ARGUMENT

### A. THE CONTENT, FORM, AND CONTEXT OF THE SPEECH IN QUESTION WARRANTS *EN BANC* REVIEW

The Sixth Circuit panel’s use of the term “Anti-Israel protest[s]” and its view that the “key obstacle” to Plaintiffs-Appellants’ lawsuit “is the robust protections that the First Amendment affords to nonviolent protests on matters of public concern” both miss the mark. (6th Cir. Doc. 58-2 (“Opinion”), 2.) Analyzing the content, form, and context of the speech in question reveals that the protesters’ conduct does not address “matters of public concern,” but speech that is not entitled to robust First Amendment protection.

**Context matters.** The United States Supreme Court, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985), stated that

“[w]hether...speech addresses a matter of public concern must be determined by [the expression’s] content, form, and context....” Anti-minority activity is on the rise in the United States, and Jewish people have seen their share of that activity in recent years.<sup>4</sup> Synagogues like the synagogue where Plaintiffs-Appellants pray, and where Defendants-Appellees have protested every Sabbath since 2003, have been targets for anti-Semitism. There have been cases of mass murder occurring at synagogues in Pittsburgh, Pennsylvania and Poway, California, and other anti-Semitic incidents at synagogues and Jewish institutions around the country over the last few years.<sup>5</sup>

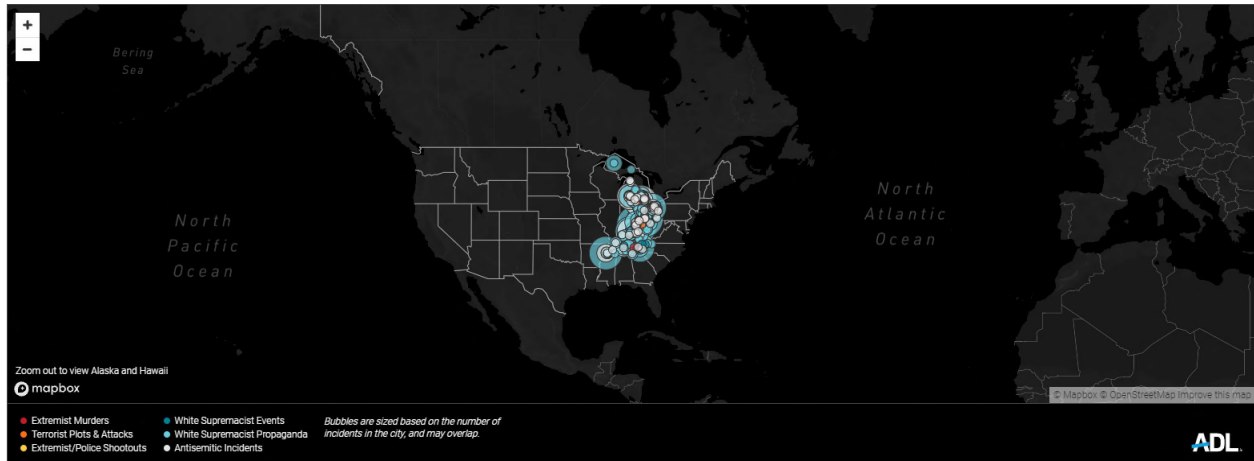
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<sup>4</sup> See, e.g., Roache, *Surge in Anti-Semitic Attacks Has Caused a ‘Sense of Emergency’ Among Jews Worldwide, New Report Says*, Time (5/2/2019), <https://time.com/5580312/kantor-center-anti-semitism-report/> (“More Jews were killed in anti-Semitic violence around the world in 2018 than during any other year in decades”).

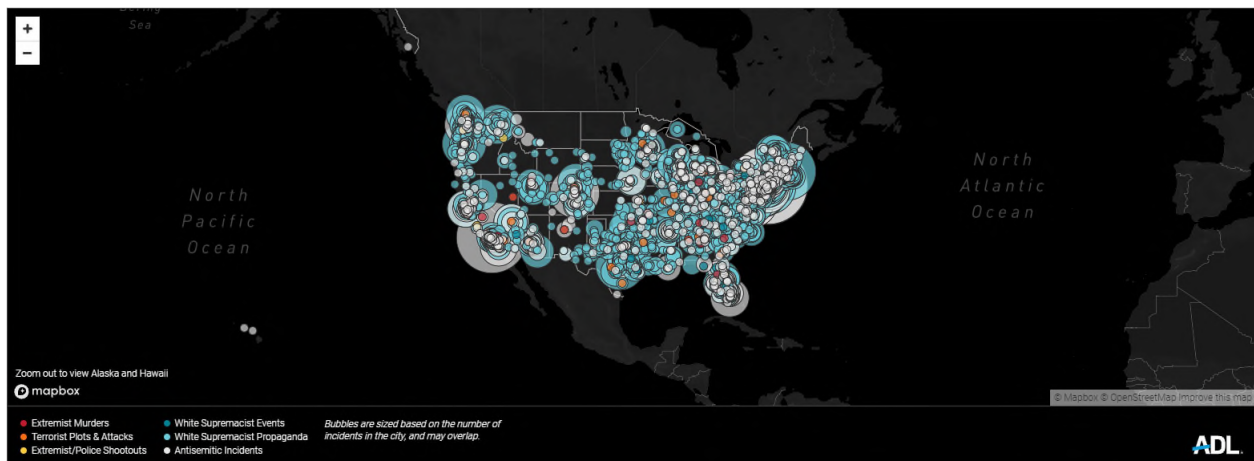
<sup>5</sup> See, e.g., Ortiz, *Antisemitic incidents heightened across U.S. amid Israel-Gaza fighting; mosques were damaged, too*, NBC News (5/21/2021), <https://www.nbcnews.com/news/us-news/antisemitic-incidents-heightened-across-u-s-amid-israel-gaza-fighting-n1268137>; McAuley, *How the Pittsburgh shooting compares to attacks on Jews in Europe, where anti-Semitism has been growing*, Washington Post (10/28/2018), [https://www.washingtonpost.com/world/2018/10/28/how-pittsburgh-shooting-compares-attacks-jews-europe-where-anti-semitism-has-been-growing/?noredirect=on&utm\\_term=.8784d233c4ca](https://www.washingtonpost.com/world/2018/10/28/how-pittsburgh-shooting-compares-attacks-jews-europe-where-anti-semitism-has-been-growing/?noredirect=on&utm_term=.8784d233c4ca); New York Times Editorial Board, *A Rising Tide of Anti-Semitism*, NY Times (4/30/2019), <https://www.nytimes.com/2019/04/30/opinion/cartoon-nytimes.html>.



Those publicized incidents are not isolated events. In 2020-2021, “there were 8,323 [reported] incidents of extremism or antisemitism in the United States.”<sup>6</sup> Within the Sixth Circuit, those incidents can be depicted as follows:<sup>7</sup>



When broadened to the U.S. as a whole, the following map highlights how rampant a problem anti-Semitism has become.<sup>8</sup>



<sup>6</sup> ADL H.E.A.T. Map 2020-2021, <https://www.adl.org/education-and-resources/resource-knowledge-base/adl-heat-map>.

<sup>7</sup> *Id.* (reporting 499 incidents, including “Extremist Murders”).

<sup>8</sup> *Id.*

Anti-Semitic sentiment is not restricted to peaceful speech and demonstrations. It has a tendency to escalate to physical violence. Over the past five years, more than one in three Jewish people in America has reported being the target of an anti-Semitic physical attack, or having been on the receiving end of anti-Semitic remarks.<sup>9</sup> According to the FBI, in 2019 law enforcement agencies “reported 7,314 hate crime incidents involving 8,559 offenses.”<sup>10</sup> “Hate crimes motivated by religious bias accounted for 1,650” such reported offenses, with over 60% of them being anti-Jewish.<sup>11</sup>

This is a growing problem, and the speech at issue here is not simply despicable or unsavory, but the type that goes hand in hand with assaults on Jewish people and other minorities in the United States.<sup>12</sup> *Amici* are concerned that if the Sixth Circuit panel decision stands, there are likely to be additional protests at other other houses of worship that could lead to assaults against Jews and others.

**Content matters too.** *Dun & Bradstreet*, 472 U.S. at 761. “Anti-Israel” sentiment often is “anti-Semitism” in disguise.

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<sup>9</sup> The State of Anti-Semitism in America, <https://www.ajc.org/AntisemitismReport2020/Comparing-American-Jews-and-General-Public>.

<sup>10</sup> FBI Uniform Crime Project, *Hate Crime Statistics, 2019*, <https://ucr.fbi.gov/hate-crime/2019/topic-pages/incidents-and-offenses.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (identifying hate crimes directed to other minority groups, including based on race, religion, and disability).

A particularly insidious form of antisemitism disguises itself as animus toward Israel....[T]he European Monitoring Centre...issued a Working Definition of Antisemitism that offered several examples of anti-Israel rhetoric that went beyond simple criticism of the country's policies and crossed the line into demonization, such as declaring Israel a racist state, holding it to higher standards than are applied to any other nation, or *drawing analogies between Israel and the Nazi regime. It noted that Jewish communities were frequently conflated with Israel, and therefore targeted for attack.*<sup>13</sup>

“Anti-Israel demonstrations in Europe have on occasion turned antisemitic and even violent, endangering Jewish lives and property, and in a number of cases police and prosecutors have been slow to respond to such obvious hate crimes.”<sup>14</sup> And, “[o]n some American college campuses, anti-Israel events have been accompanied by age-old antisemitic slurs, creating a hostile environment for Jewish students, leaving them feeling isolated, and even threatening their physical safety.”<sup>15</sup> This is not to suggest that the protests here have resulted in physical violence, only that they should not be viewed as political discourse but as the anti-Semitism they are, with public officials refusing to respond.

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<sup>13</sup> Anti-Zionism as a Form of Antisemitism, When criticism of Israel crosses the line, <https://www.ajc.org/anti-zionism-as-a-form-of-antisemitism>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

The U.S. State Department defines anti-Semitism to include attempts to delegitimize Israel.<sup>16</sup> It provides a list of “Contemporary Examples of Anti-Semitism,” many of which track the conduct alleged here:

- Making...*stereotypical allegations about Jews as such or the power of Jews as a collective*—especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
- *Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by...the state of Israel....*
- *Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.*<sup>17</sup>

The Sixth Circuit panel’s decision inadvertently falls prey to that failure to recognize anti-Israel discourse as anti-Semitism. There is no way to parse out the protestors’ statements that purport to be directed to American-Israeli relations from those that are classically anti-Semitic. Even assuming that *some* of the statements may be anti-Israel, those must be taken in context with the other statements that are purely anti-Semitic, having nothing to do with American-Israeli relations. For example, the statements “Resist Jewish Power” and “Jewish Power Corrupts,” are traditional anti-Semitic tropes.<sup>18</sup> Likewise, the statements about the Holocaust are favorite themes not of legitimate political or public debate, but of rank anti-

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<sup>16</sup> *Defining Anti-Semitism*, U.S. Dep’t of State (6/8/2010), <https://2009-2017.state.gov/j/drl/rls/fs/2010/122352.htm>.

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> *See, e.g., id.*

Semitism.<sup>19</sup> None of those examples constitutes political discourse, matters of public concern, or public debate.

**Location matters.** These are not protests occurring in front of places of public concern; they “target” members of a religious institution and “coincide with the arrival of the congregants to their worship service on Saturday morning,” when they are attempting to engage in the free exercise of religion. (Opinion, 2.) The protests are relentless, taking place for “over 935 weeks.” (*Id.*) They occur in view of “[t]he congregants and their children,” who “can see the signs as they enter their worship service.” (*Id.*) They have caused such distress that at least one Plaintiff-Appellant “sometimes forego[ing] attending services or visit[ing] a different synagogue to avoid the signs.” (*Id.*) For reasons that have not been developed in discovery, police “at times have been present at the protests[.]” (*Id.*, 3.)

Defendant-Appellee City of Ann Arbor is alleged to have content-neutral laws requiring permits in exactly the setting at issue here. (Compl., pp. 11-13.) Nonetheless, “[t]he protesters have not applied for or obtained a permit to engage in these activities.” (Opinion, 3.) “City employees have insisted that they cannot curtail the protesters’ conduct because the First Amendment protects it[.]” (*Id.*) This merely *assumes* the laws could not be applied without violating the First

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<sup>19</sup> *Id.*

Amendment, without a record demonstrating that to be the case. *See Dun & Bradstreet*, 472 U.S. 761 (recognizing need for complete record).

The fact remains – the protests have continued every week for years, in front of the same private, residentially zoned building designated for individuals attempting to peaceably exercise their religion. Instead of being allowed the free exercise of religion, the City’s refusal to uphold its content-neutral laws has kept those congregants as targets of the protestors’ anti-Semitism.

**B. “FREE AND OPEN DEBATE IS NOT A LICENSE” FOR VICIOUS ASSAULTS UNDER THE GUISE OF FREE SPEECH**

“Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.” *Snyder v. Phelps*, 562 U.S. 443, 463 (2011) (Alito, J., Dissenting). Settled Supreme Court precedent holds that free speech protections “are not absolute, and [has] long recognized that the government may regulate certain categories of expression consistent with the Constitution.” *Virginia v. Black*, 538 U.S. 343, 358 (2003) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 572 (1942)). The First Amendment allows “restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.* (quotations omitted).

The protestors’ speech here is of “slight social value,” if that. When the speech is placed in context, Justice Alito’s observation holds true, and the *Snyder*

majority opinion becomes readily distinguishable. In *Snyder*, the “speech” involved a protest of a military funeral with placards stating “‘God Hates the USA/Thank God for 9/11,’ ‘America is Doomed,’ ‘Don’t Pray for the USA,’ ‘Thank God for IEDs,’ ‘Thank God for Dead Soldiers,’ ‘Pope in Hell,’ ... ‘You’re Going to Hell,’ and ‘God Hates You.’” *Snyder*, 562 U.S. at 448. In the context of a military funeral, the Supreme Court agreed that First Amendment protection was warranted:

While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import.

*Id.* at 454.

The speech here is not of the same “value” as in *Snyder*. Although some of it may masquerade as touching on American-Israeli relations, as explained above that is just a proxy for anti-Semitic discourse, not public discourse. Most of the statements cannot even be characterized so charitably, but as the type of speech that has prompted pogroms and murders of Jewish victims for centuries. Beyond “fall[ing] short of refined social or political commentary,” the speech peddles in anti-Semitic tropes “targeted to” private citizens trying to exercise their religious beliefs and pray at synagogue on their Sabbath.

Further, the Supreme Court in *Snyder* explained that the plaintiff testified that he could not see the content of the picket signs as he drove to the funeral, and did

not see that content until later that night. *Snyder*, 562 U.S. at 449. Plaintiffs-Appellants have not been afforded the opportunity to testify (the case was dismissed on the pleadings), yet they allege that they and their fellow congregants and children can, in fact, see the offending signs every Sabbath. (Opinion, 2.)

Next, in *Snyder*, although the protest occurred partially outside the funeral, it also took place “on public land adjacent to public streets near the Maryland State House [and] the United States Naval Academy[.]” *Snyder*, 562 U.S. at 448. Here, the protests occur every week in front of a private synagogue. They do not occur at locations that could affect the political change the protestors claim they seek (*i.e.*, government offices, embassies, or even entertainment industry offices),<sup>20</sup> but “target the members of the Beth Israel Congregation, as they coincide with the arrival of the congregants to their worship service on Saturday morning.” (Opinion, 2.) The location of these protests are not designed to further public discourse; they are intended to intimidate and harass.

As it relates to Defendant-Appellee Ann Arbor, *Snyder* again is distinguishable. The protesters there “notified the authorities in advance of [their] intent to picket at the time of the funeral and the picketers complied with police

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<sup>20</sup> Again, targeting private Jewish congregants with signs saying “No More Holocaust Movies,” as if they play some role in what movies are produced, when the private citizens are simply attempting to attend religious services at their synagogue, is a well-worn anti-Semitic epithet of Jews controlling the media and Hollywood.



instructions in staging their demonstration.” *Snyder*, 562 U.S. at 448. Here, “[t]he protesters have not applied for or obtained a permit to engage in these activities.” (Opinion, 3.) The Supreme Court recognizes that “[e]ven protected speech is not equally permissible in all places and at all times.” *Snyder*, 562 U.S. at 456 (citing *Frisby v. Schultz*, 487 U.S. 474 (1988)). A protestor’s “choice of where and when to conduct its picketing is not beyond the Government’s regulatory reach—it is ‘subject to reasonable time, place, or manner restrictions’ that are consistent with the standards announced in [the Supreme] Court’s precedents.” *Id.* (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)). The Supreme Court noted that the state where *Snyder* arose “now has a law imposing restrictions on funeral picketing...as do 43 other States and the Federal Government,” and the Court has, in fact, identified “situations where the location of targeted picketing” indeed can be regulated. *Id.*

Ann Arbor has permit laws. (Complt., pp. 11-13.) That it chose not to apply them because it unilaterally decided they would violate the First Amendment places this case outside *Snyder*’s scope. Analysis of those laws and whether in fact they should have been applied is warranted.

### **III. CONCLUSION**

The Sixth Circuit panel’s opinion would set dangerous precedent, marking open season on private individuals attempting to enjoy their First Amendment Free

Exercise rights peacefully and without interference by protestors espousing epithets and non-protected fighting words, at houses of worship throughout the country. *Amici* are deeply concerned that, given the rise in anti-Semitism in the United States, the current decision will lead to additional protests around the country at synagogues and other houses of worship, leading to potentially violent confrontations, vandalism, injuries, and murder.

For the foregoing reasons, *Amici* respectfully ask this Court to accept Plaintiffs-Appellants' Petitions for Rehearing *En Banc*, reverse the Sixth Circuit panel's decision, and remand this case to the District Court.

October 14, 2021

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

1. This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

This Brief contains 2,599 words, excluding the parts of the Brief exempted by Appellate Rule 32 and Sixth Circuit Rule 32.

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October 14, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 14, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. A copy of the foregoing will be served on all parties via this Court's electronic filing system:

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