

No. 21-1263

In The
Supreme Court of the United States

—◆—
MARVIN GERBER,

Petitioner,

v.

HENRY HERSKOVITZ, et al.,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

—◆—
**AMICUS BRIEF OF AGUDATH ISRAEL OF
AMERICA, COLPA, AGUDAS HARABONIM,
COALITION FOR JEWISH VALUES, ORTHODOX
JEWISH CHAMBER OF COMMERCE, RABBINICAL
ALLIANCE OF AMERICA, RABBINICAL COUNCIL
OF AMERICA, UNION OF ORTHODOX JEWISH
CONGREGATIONS OF AMERICA, TORAH
UMESORAH, AND NATIONAL COUNCIL OF
YOUNG ISRAEL IN SUPPORT OF PETITIONER'S
PETITION FOR WRIT OF CERTIORARI**

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JOSHUA A. KLARFELD
Counsel of Record
ULMER & BERNE LLP
1660 W. 2nd Street, Suite 1100
Cleveland, Ohio 44113
jklarfeld@ulmer.com
(216) 583-7000

*Attorney for Amici 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, Torah Umesorah,
and National Council of Young Israel*

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THE AMICI'S INTERESTS IN THIS CASE

This case is about vitriolic anti-Semitic picketing 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.¹ This *Amicus* Brief demonstrates the exceptional importance of the issues raised in Petitioner's petition for a writ of certiorari 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

¹ Petitioner filed blanket consent to the filing of *amicus* briefs in this matter. Counsel for Respondents provided written consent to the filing of this *amicus* brief via email correspondence with Counsel for *amici* on March 27, 2022 and March 30, 2022. This brief is being filed on April 5, 2022, more than ten days prior to the deadline for filing such briefs. Thus, all parties will have received adequate notice of the intention to file this brief. Counsel for Amici is the sole author of this *Amicus* Brief. No person or entity other than Amici and their counsel made a monetary contribution to fund preparation and submission of this *Amicus* Brief, and no party to this lawsuit authored this *Amicus* Brief in whole or in part.

continued security and well-being of the Jewish people in America.

The National Jewish Commission on Law and Public Affairs (“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”) 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.

The Coalition for Jewish Values (“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.

The 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.

The 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.

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

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

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

Since 1912, the National Council of Young Israel has served the broader Jewish community. With more than 25,000 member families and approximately 175

branch synagogues throughout the United States, Canada, and Israel, the National Council of Young Israel is a multi-faceted organization that embraces Jewish communal needs and often takes a leading role in tackling the important issues that face the Jewish community in North America and Israel, all while embracing Americanism and Zionism through the prism of Torah-true Judaism.

As national Jewish organizations with constituents throughout the country, Amici are deeply concerned that if the Sixth Circuit's decision stands, it would set a dangerous precedent indicating that the ability to freely worship one's religion can be obstructed by another group's persistent harassment and intimidation. Not only could the Sixth Circuit's decision lead to more intimidating picketing outside of synagogues and other houses of worship throughout the country, it could well result in violent confrontations, injuries, and deaths. It also could further deter other congregants or would-be congregants of Beth Israel and other religious organizations from attending and peacefully observing their religion.



SUMMARY OF THE ARGUMENT

The speech at issue in this case, which includes such historical anti-Semitic epithets as “Resist Jewish Power,” “Jewish Power Corrupts,” and “No More Holocaust Movies,” is not worthy of robust First

Amendment protection, particularly when used to obstruct other individuals' peaceful exercise of religion.

Anti-Semitism has existed for over two millennia.² 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.³ 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.⁴

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

² *Anti-Semitism*, HISTORY (June 10, 2019), <https://www.history.com/topics/holocaust/anti-semitism>.

³ *Id.*

⁴ *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>.

and as Jews. The protestors target congregants with harassing speech, including epithets that, throughout Jewish history – from ancient times through the present – have led to assaults, pogroms, and murder. The congregants of the Beth Israel Congregation, and would-be congregants, are being actively deterred from attending religious services at their place of worship as a direct result of the harassing protests taking place immediately outside. Allowing the protests to continue will erode the robust protection that the Constitution affords for *all* religious groups to peacefully observe and participate in religious services.



ARGUMENT

The sustained protests at the Beth Israel Congregation impede the religious freedom of congregants and warrants a writ of certiorari. The Sixth Circuit’s use of the term “Anti-Israel protest[s]” and its view that the “key obstacle” to Petitioner’s 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.)

At its core, this case involves the complicated intersection between the First Amendment’s protection of speech and religious freedom. The Amici are fervent supporters of the First Amendment’s protection of the Freedom of Speech. They are also, however, acutely aware of the deterrent effect that the continuous protests occurring at Beth Israel Congregation are having

on the Jewish Americans who attend this synagogue. When congregants are subjected to weekly harassing protests by anti-Semitic groups, as a result of the City of Ann Arbor's failure to enforce its permitting requirements, the congregants' right to freely exercise their religion is eroded. If behavior such as this is not strongly condemned, the freedom of religion for all religious groups is at risk.

The Sixth Circuit's decision sends a message that loud, consistent, and harassing picketers will find legal protection to obstruct congregants and would-be congregants from worshiping at their religious institution of choice. That type of behavior is not protected by the First Amendment. 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 Petitioner "sometimes foregoes attending services or visit[s] a different synagogue to avoid the signs." (*Id.*) For reasons that have not been developed in discovery, because this case was dismissed at the pleadings stage, police "at times have been present at the protests[.]" (*Id.*, 3.)

Respondent City of Ann Arbor is alleged to have content-neutral laws requiring permits in exactly the

setting at issue here. (Complt., 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.*) Respondent City of Ann Arbor’s argument merely *assumes* that its laws could not be applied without violating the First Amendment, without a record demonstrating that to be the case. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (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 allowed those congregants to remain targets of the protesters’ anti-Semitism.

The protests taking place at Beth Israel are actively deterring members of the congregation from attending services. The record reflect that Petitioner “sometimes foregoes attending services or visit[s] a different synagogue to avoid the signs.” (Opinion at 2.) It is no wonder Petitioner, and presumably others, has been deterred as a result of these protests. They are exactly the kind that throughout history, and recently in the United States, have erupted into terrifyingly dangerous encounters.

Context matters. Anti-minority activity, including hate crimes directed against Jews, is on the rise worldwide and in the United States.⁵ Synagogues like the synagogue where Plaintiff-Petitioner tries to pray, and where Defendants-Respondents have protested every Sabbath since 2003, have been targets for anti-Semitism. There have been cases of mass murder and hostage situations occurring at synagogues in Pittsburgh, Pennsylvania, Poway, California, and Colleyville, Texas. Anti-Semitic incidents at synagogues and Jewish institutions have been occurring with concerning frequency around the country over just the last few years.⁶

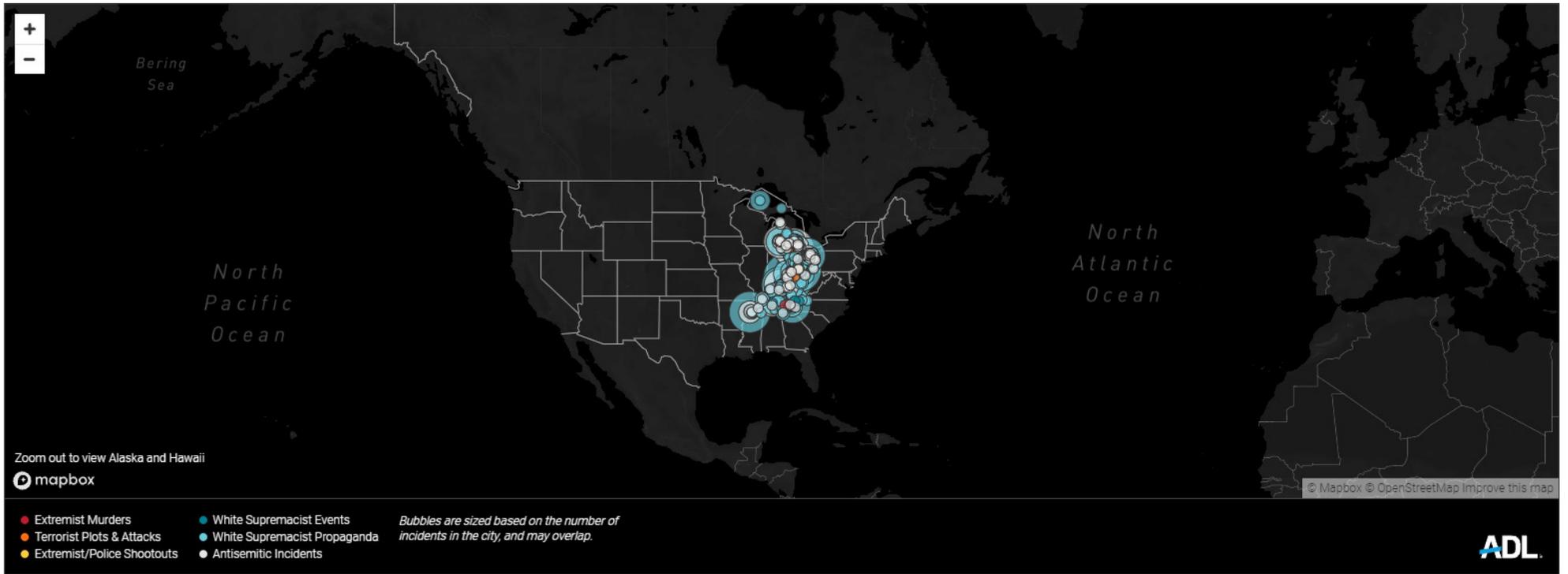
⁵ See, e.g., Roache, *Surge in Anti-Semitic Attacks Has Caused a 'Sense of Emergency' Among Jews Worldwide, New Report Says*, Time (May 2, 2019), <https://time.com/5580312/kantor-center-anti-semitism-report/> (“More Jews were killed in anti-Semitic violence around the world in 2018 than during any other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

⁶ See, e.g., Ortiz, *Antisemitic incidents heightened across U.S. amid Israel-Gaza fighting; mosques were damaged, too*, NBC News (May 5, 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 (Oct. 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; New York Times Editorial Board, *A Rising Tide of Anti-Semitism*, The New York Times, (April 30, 2019), <https://www.nytimes.com/2019/04/30/opinion/cartoon-nytimes.html>; Melina Delkic, *'Grateful to Be Alive': What We Know About the Synagogue Hostage Rescue*, The New York Times, (Jan. 18, 2022), <http://www.newyorktimes.com/2022/01/16/us/hostage-texas-synagogue.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.”⁷ Within the Sixth Circuit, those incidents can be depicted as follows:⁸

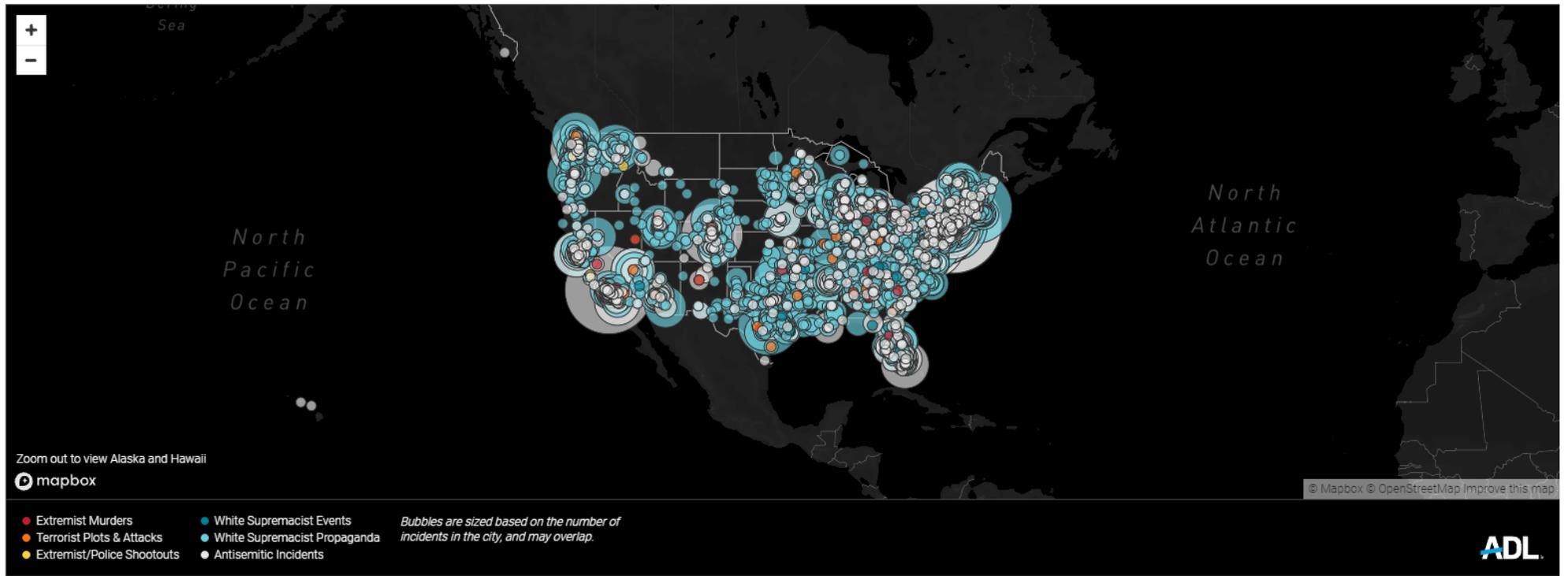
⁷ Anti-Defamation League, *ADL H.E.A.T. Map 2020-2021*, <https://www.adl.org/education-and-resources/resource-knowledge-base/adl-heat-map>.

⁸ *Id.* (reporting 499 incidents, including “Extremist Murders”).



When broadened to the United States as a whole, the following map highlights how rampant a problem anti-Semitism has become.⁹

⁹ *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.¹⁰ According to the FBI, in 2019 law enforcement agencies “reported 7,314 hate crime incidents involving 8,559 offenses.”¹¹ “Hate crimes motivated by religious bias accounted for 1,650” such reported offenses, with over 60% of them being anti-Jewish.¹²

As recently as January, 2022 four individuals were held hostage for twelve hours at the Congregation Beth Israel synagogue in Colleyville, Texas, when an armed gunman entered the synagogue during Saturday services.¹³ The hostages, including the rabbi of the congregation, were all released physically unharmed.¹⁴ However, as the FBI Director Christopher Wray stated

¹⁰ American Jewish Committee, *The State of Anti-Semitism in America*, <https://www.ajc.org/AntisemitismReport2020/Comparing-American-Jews-and-General-Public>.

¹¹ FBI Uniform Crime Project, *Hate Crime Statistics, 2019*, <https://ucr.fbi.gov/hate-crime/2019/topic-pages/incidents-and-offenses.pdf>.

¹² *Id.*

¹³ Melina Delkic, ‘*Grateful to Be Alive*’: *What We Know About the Synagogue Hostage Rescue*, *The New York Times*, (Jan. 18, 2022), <http://www.newyorktimes.com/2022/01/16/us/hostage-texas-synagogue.html>.

¹⁴ *Id.*

shortly after the event: “this was not some random occurrence. It was intentional, it was symbolic.”¹⁵

Anti-Semitic sentiment is repeatedly escalating into physical violence in the United States. When speech, such as that at issue here, is not strongly condemned the door opens to continued attacks on Jewish Americans. Based on the rise in attacks on Jewish congregations and institutions across the United States, the risk of anti-Semitic protests like those taking place at Beth Israel Congregation escalating to physical violence is not hypothetical; rather, it is imminent.

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.¹⁶ Amici are concerned that if the Sixth Circuit decision stands, there are likely to be additional protests at other houses of worship that could lead to assaults against Jews and others and further hinder their free exercise of religion.

Content matters. “Anti-Israel” sentiment often is “anti-Semitism” in disguise.

¹⁵ Anti-Defamation League, Fighting Hate from Home Webinar, *Remarks by Director Christopher Wray to Anti-Defamation League on Hostage Incident in Colleyville, Texas*. (Jan. 20, 2022), <http://fbi.gov/news/speeches/remarks-by-director-christopher-wray-to-anti-defamation-league-on-hostage-incident-in-colleyville-texas-012022.html>.

¹⁶ *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.***¹⁷

“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.”¹⁸ 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.”¹⁹ 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.

¹⁷ 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> (emphasis added).

¹⁸ *Id.*

¹⁹ *Id.*

The U.S. State Department defines anti-Semitism to include attempts to delegitimize Israel.²⁰ 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.***²¹

The Sixth Circuit’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

²⁰ *Defining Anti-Semitism*, U.S. Dep’t of State (June 8, 2010), <https://2009-2017.state.gov/j/drl/rls/fs/2010/122352.htm>.

²¹ *Id.* (emphasis added).

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.²² Likewise, the statements about the Holocaust are favorite themes not of legitimate political or public debate, but of rank anti-Semitism.²³ None of those examples constitutes political discourse, matters of public concern, or public debate. And here, they are alleged to have led directly to an encroachment on Plaintiff-Petitioner’s free exercise of his religious beliefs.



CONCLUSION

The Sixth Circuit’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 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.

²² *See, e.g., id.*

²³ *Id.*

For the foregoing reasons, Agudath Israel, 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, Torah Umesorah, and National Council of Young Israel respectfully ask this Court to accept Petitioner's petition for a writ of certiorari, reverse the Sixth Circuit's decision, and remand this case.

April 5, 2022

Respectfully submitted,

JOSHUA A. KLARFELD

Counsel of Record

ULMER & BERNE LLP

1660 W. 2nd Street, Suite 1100

Cleveland, Ohio 44113

jkларfeld@ulmer.com

(216) 583-7000

Attorney for Amici 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, Torah Umesorah, and National Council of Young Israel