No. 22-1075, 22-1097, 22-1131

In the United States Court of Appeals
for the Sixth Circuit

Marvin Gerber [22-1097, 22-1131] and
Dr. Miriam Brysk [22-1075, 22-1131]
Plaintiffs-Appellants, Cross-Appellees
v.
Henry Herskovitz, Gloria Harb, Tom Saffold, Rudy List, Chris Mark, Deir Yassin Remembered, Inc., Jewish Witnesses for Peace and Friends,
Defendants-Appellees, Cross-Appellants

On appeal from the United States District Court
For the Eastern District of Michigan
Honorable Victoria Roberts, Case No. 2:19-cv-13726

BRIEF OF AMICI CURIAE NATIONAL JEWISH ORGANIZATIONS IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, the *Amici Curiae* make the following disclosures:

None of the A*mici Curiae* is a subsidiary or affiliate of a publicly owned corporation.

No publicly owned corporation, not a party to the appeal, has a financial interest in the outcome.

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INTEREST OF THE AMICI CURIAE[1]

The *amici* are American Jewish national organizations that have represented the American Jewish community before legislatures, courts, and other federal and state public agencies over many years. They are all concerned that the panel decision in this case will deter the future assertion of legal rights of minorities in the United States, including Jews, to prevent private conduct that violates civil rights guaranteed by law.

The *amici* organizations are:

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.

[1] Counsel for amici curiae authored this brief in its entirety. No attorney for any party authored any part of this brief, and no one apart from counsel for amici curiae made any monetary contribution intended to fund the preparation or submission of this brief. The Defendants-Appellees have not been asked to consent. A Motion for Leave to File is filed concurrently with this brief.

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.

Coalition for Jewish Values ("CJV") is the largest Rabbinic public policy organization in America, representing over 2,000 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, and does so through education, mobilization, and advocacy, including by filing amicus curiae briefs in defense of equality and freedom for religious institutions and individuals. 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.

The National Council of Young Israel has since 1912 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.

ISSUE PRESENTED

Whether a District Court may award attorneys' fees under 42 U.S.C. § 1988 against plaintiffs for filing a civil-rights lawsuit requesting that the court impose time, place, and manner restrictions on antisemitic demonstrators who surround a synagogue only on Saturday mornings to intimidate Jewish congregants gathering for Sabbath worship.

ARGUMENT

I.

PLAINTIFFS SHOULD NOT BE PUNISHED FOR FILING A GOOD-FAITH CIVIL RIGHTS COMPLAINT TO SECURE THEIR CONSTITUTIONAL AND STATUTORY RIGHT TO FREEDOM OF WORSHIP

By assessing attorneys' fees against plaintiffs who suffered, as this Court recognized, "extreme emotional distress" because they were intimidated in attending Jewish worship services at their synagogue on Saturday mornings, the panel decision effectively deters others from initiating legal proceedings that interfere with constitutionally protected rights. For reasons summarized briefly below, the panel's conclusion that "[e]ach claim plainly lacked one or more elements required under settled precedent" is highly debatable. The message of the panel's affirmance of the District Court's order is clear: Federal civil rights laws may not be invoked to ensure that Christians, Muslims, Jews, Sikhs, Hindus, or any religious denomination will be able to gather for worship free from intimidation that can be prevented by the imposition of reasonable time, place, and manner restrictions. Anyone who seeks judicial assistance to this end will be punished.

II.

ATTORNEYS' FEES WERE NOT AWARDED IN HISTORIC LITIGATION THAT VINDICATED CIVIL RIGHTS EVEN THOUGH IT APPEARED TO LOWER COURTS THAT THE PLAINTIFFS' CLAIMS WERE CLEARLY FORECLOSED BY PRECEDENT

The extreme severity and deterrence of an award of attorneys' fees against plaintiffs is demonstrated by comparing the history of other noteworthy litigation that resulted in substantial ultimate vindication of the plaintiffs' civil rights. In *Shaare Tefila Cong. v. Cobb*, 606 F. Supp. 1504 (D. Md. 1985), for example, the District Court dismissed the complaint of a synagogue and its members alleging violations of federal civil rights provisions. The Fourth Circuit affirmed that dismissal. 785 F.2d 523 (4th Cir. 1986). Even though dismissal of the complaint appeared to both courts to be required by existing precedent, there was no suggestion that the plaintiffs be penalized for filing a complaint with an award of attorneys' fees to the defendants. The Supreme Court ultimately vindicated the plaintiffs' complaint and reversed the lower-court decisions. *Shaare Tefila Cong. v. Cobb*, 481 U.S. 615 (1987).

Other historic civil rights that lower courts thought were clearly foreclosed by precedent were ultimately established, and the lower courts did not punish the plaintiffs although they dismissed their complaints. In *Baker v. Carr*, 179 F. Supp. 824 (M.D. Tenn. 1959), for example, a three-judge federal District Court held that

"there can be no doubt that . . . the federal courts . . . will not intervene in cases of this type to compel legislative reapportionment." 179 F. Supp. at 826. The Supreme Court concluded otherwise. *Baker v. Carr*, 369 U.S. 186 (1962). One may wonder whether the battle for equal legislative apportionment would have succeeded as it did if every plaintiff who lost in a lower court had been penalized by being ordered to pay defendants' attorneys' fees.

III.

THE PLAINTIFFS' ALLEGATIONS THAT THE DEFENDANTS' CONDUCT VIOLATED THE CIVIL RIGHTS LAWS WERE COLORABLY VALID

Without challenging, at this stage of the litigation, the panel's conclusion that all the plaintiffs' claims under the federal civil-rights laws were inadequate, we note briefly the component of each claim that the panel's opinion ignores:

(a) **Section 1981** – Contrary to the panel's conclusion the plaintiffs "lost out on the benefit of 'any law or proceeding.'" By being intimidated in gathering for Sabbath services they were denied the "right of religious freedom at a place of religious worship" that is secured by 18 U.S.C. § 248(a)(2).

(b) **Section 1982** – Contrary to the panel's conclusion that the complaint "did not implicate a property interest," the plaintiffs' "use" of the synagogue was "impaired" when they were intimidated from entering it for worship

on Saturday mornings. *City of Memphis v. Greene*, 451 U.S. 100, 120-122 (1981). This Court has held that a shooting into a synagogue impaired "use" of its premises. *United States v. Brown*, 49 F.3d 1162, 1165-1167 (6th Cir. 1995).

(c) **Section 1983** – Contrary to the panel's conclusion that this claim "lacked any semblance of state action," plaintiffs' complaint alleged that the City of Ann Arbor actively participated and encouraged the private defendants' conduct. Compare *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

(d) **Section 1985(3)** – Contrary to the panel's conclusion that this claim lacked state action and an allegation of "a single plan or a conspiratorial objective," the City of Ann Arbor participated in a private conspiracy of the kind described in *Griffin v. Breckenridge*, 403 U.S. 88, 101-102 (1971).

CONCLUSION

For the reasons stated above and those in the appellant's petition for rehearing and rehearing en banc, the full Court should rehear this case and reverse the judgment of the District Court.

Respectfully submitted,

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March 8, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 1,530 words.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface with 14-point Times New Roman font.