**No. 20-1870**

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

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MARVIN GERBER, DR. MIRIAM BRYSK,

*Plaintiffs/Appellants,*

v.

HENRY HERSKOVITZ, GLORIA HARB, TOM SAFFOLD, RUDY 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 DEREK DELACOURT, in his official and individual capacities, ANN ARBOR CITY ATTORNEY STEPHEN POSTEMA, in his official and individual capacities, and SENIOR ASSISTANT CITY ATTORNEY KRISTEN LARCOM, in her official and individual capacities,

*Defendants/Appellees.*

On Appeal from the United States District Court,
Eastern District of Michigan, Southern Division
Case No. 2:19-cv-13726, Hon. Victoria A. Roberts

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# BRIEF OF DEFENDANTS/APPELLEES CITY OF ANN ARBOR, MAYOR CHRISTOPHER TAYLOR, COMMUNITY SERVICES AREA ADMINISTRATOR DEREK DELACOURT, CITY ATTORNEY STEPHEN POSTEMA, AND SENIOR ASSISTANT CITY ATTORNEY KRISTEN LARCOM

***** ORAL ARGUMENT REQUESTED *****

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS**

Pursuant to 6th Cir. R. 26.1(a), City Defendants-Appellees, a municipal corporation and elected officials or employees of a municipal corporation, are exempt from the requirement of filing a corporate affiliate/financial interest disclosure statement.

*/s/ Timothy S. Wilhelm* (P67675)

Dated: January 4, 2021

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## STATEMENT IN SUPPORT OF ORAL ARGUMENT

Although the facts and legal arguments are fully presented and merit that the lower court's decision be affirmed, oral argument will allow the parties an opportunity to highlight important matters for the Court, explain how and why the lower court's decision is consistent with existing law, and explore any issues the panel would like to discuss. Oral argument also will provide the parties a forum to address any questions the Court may have before rendering a decision. As such, City Defendants/Appellees respectfully request that they be granted oral argument.

## STATEMENT OF JURISDICTION

Plaintiffs-Appellants Marvin Gerber and Miriam Brysk's claims are predicated upon alleged violations of both federal and Michigan law by Defendants-Appellees. By an order entered on March 19, 2020, the District Court declined to exercise supplemental jurisdiction, dismissing Plaintiffs' state law claims. (Order, R. 41, PG ID # 1100-1102). That Order is not before this Court on appeal. The District Court had federal question jurisdiction over the remaining federal claims pursuant to 28 U.S.C. § 1331.

The Protester Defendants and the City Defendants filed motions to dismiss Plaintiffs' remaining federal claims pursuant to Fed. R. Civ. P. 12(b)(1) and (6). (City Defendants' Motion to Dismiss, R.32, PG ID # 898-932; Protester Defendants' Motion to Dismiss, R.45 PG ID, # 1108-1147). The District Court granted the Defendants' Motions to Dismiss by an opinion and order entered on August 19, 2020. (Order, R.66, PG ID # 1896-1906). Plaintiffs filed a motion for reconsideration on August 26, 2020, which the District Court denied by an order entered on September 3, 2020. (Motion for Reconsideration, R.67, PG ID # 1907-1967; Order, R.69, PG ID # 1981-84).

Plaintiffs filed a timely Notice of Appeal from the Order Granting Defendants' Motions to Dismiss entered on August 19, 2020 and the Order Denying Motion for Reconsideration entered September 3, 2020. (Notice of Appeal, R.70,

PG ID # 1982-83). Jurisdiction is vested in this Honorable Court pursuant to 28 U.S.C. §§1291 and 1294.

## STATEMENT OF ISSUES FOR REVIEW

I. **Did the District Court properly dismiss Plaintiffs' federal claims pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and lack of standing on the basis that Plaintiffs' alleged injuries were insufficient to establish Article III standing?**

| | |
|---|---|
| City Defendants/Appellees Answer: | Yes |
| Protester Defendants/Appellees Answer: | Yes |
| Plaintiffs/Appellants Answer: | No |
| | |
| This Court Should Answer: | Yes |

## STATEMENT OF THE CASE

### Substantive Facts

Plaintiff's Marvin Gerber and Dr. Miriam Brysk ("Plaintiffs"), long-standing City residents and members of the Beth Israel Synagogue in Ann Arbor, allege that a group has regularly protested in front of the Synagogue every Saturday for several hours before and during the Sabbath services for 16 years. (First Amended Complaint, R.11, PG ID # 211-212, 219-221). The protests involve Defendant Protester Henry Herskovitz and sometimes a small number of other protesters holding signs or leaning them against trees or portable chairs on the sidewalk or in the lawn extension. (First Amended Complaint, R.11, PG ID # 211-212, 219-221; Photographs of signs in front of Synagogue, R.11-4, PG ID # 312-320; Photographs of signs across from Synagogue, R.11-5, PG ID # 321-328).

Plaintiffs allege the signs are anti-Semitic, anti-Israel, and anti-Zionist and relate to the "purported Jewish outsized influence in world finance and controlling power in international affairs," or the Israeli-Palestinian conflict. (First Amended Complaint, R.11, PG ID # 212, 220; Photographs of signs in front of Synagogue, R.11-4, PG ID # 312-320; Photographs of signs across from Synagogue, R.11-5, PG ID # 321-328). Plaintiffs further allege the Protesters' signs are visible to them as they pass by on the sidewalks to enter onto the Synagogue property to attend Sabbath services. (First Amended Complaint, R.11, PG ID # 219-220).

Plaintiffs allege that they have viewed the signs many times. (First Amended Complaint, R.11, PG ID # 219-220). Plaintiffs further allege the signs have caused them emotional distress and diminished their enjoyment of and willingness to attend Sabbath services. (First Amended Complaint, R.11, PG ID # 219-220).

But, Plaintiffs do not allege that the protests have prevented them from exercising their right to free exercise of religion or from attending Sabbath services. There is no allegation of any interference with Plaintiffs' access to the property or the Synagogue, nor is there any allegation that the Protesters ever interrupted or interfered with religious services once Plaintiffs are in the building. (First Amended Complaint, R.11, PG ID # 219-250).

The City has a Code of Ordinances ("Code") which regulates, among other things, streets and signs. (First Amended Complaint, R.11, PG ID # 222). Plaintiffs' interpretation of the Code as to the Protesters differs from the City's. (First Amended Complaint, R.11, PG ID # 222). Plaintiffs allege that the Protesters' conduct violates the Code. But the City takes the view that while the Protesters' protest tactics are offensive to some, their conduct is protected by the First Amendment precluding it from taking any enforcement action to prohibit the protests without violating the Protesters' First Amendment rights. (First Amended Complaint, R.11, PG ID # 222-224).

Consistent with the City's position on code enforcement, City police officers have been present at the Synagogue on various occasions during the many years of weekly Saturday protests (when responding to a complaint) but have not taken action to stop them because they are protected expression under the First Amendment. (First Amended Complaint, R.11, PG ID # 224). Moreover, because the protests are protected activity, the City has never required the Protesters to get permits for their activities or the placement of signs in the lawn extension. (First Amended Complaint, R.11, PG ID # 221).

In Spring 2019, Plaintiffs' attorney concluded that the Protesters' conduct violated the Code and should be prohibited or, at a minimum, subjected to the City's permitting process, which he asserted would prohibit their signs or conduct. (First Amended Complaint, R.11, PG ID # 225). Plaintiffs' attorney demanded that the City take enforcement action against the Protesters to prohibit their protests. (First Amended Complaint, R.11, PG ID # 225).

Plaintiffs' attorney presented his legal conclusions to the City on various occasions, including to Senior Assistant City Attorney Kristen Larcom,[1] Jon Barrett, City Zoning Administrator, and several City police officers. (First Amended

[1] After being told to direct all further communications on the matter to the City Attorney's Office, Attorney Susselman filed a grievance against Defendant Kristen Larcom which, after reviewing her response, the Michigan Attorney Grievance Commission rejected and closed in a letter dated November 15, 2019.

Complaint, R.11, PG ID # 225-234). The City heard his position but disagreed and refused to take enforcement action against the Protesters' on the basis that the Protesters' activities are protected by the First Amendment. (First Amended Complaint, R.11, PG ID # 225-234).

Plaintiffs themselves acknowledge that the City explained that the Protesters' activities were protected under the First Amendment and that the City could not legally take enforcement action against them. (First Amended Complaint, R.11, PG ID # 235).

**Procedural Facts**

Plaintiffs filed their original complaint on December 19, 2019 alleging numerous federal and state claims against the Protester Defendants and City Defendants. (Complaint, R.1, PG ID # 28-84). The District Court entered an Order granting the Protester Defendants' Motion for Additional Time, directing Plaintiffs to file an amended complaint, and setting dates for Defendants' first responsive motions and the briefing thereof. (Order, R.10, PG ID # 208-209).

Plaintiffs timely filed their First Amended Complaint adding allegations and claims. (First Amended Complaint, R.11, PG ID # 210-304). Plaintiffs First Amended Complaint contains 95 pages and asserts 23 claims against the Protesters and the City Defendants based on a variety of legal theories. Plaintiffs assert violations of their rights under §§1982, 1983, 1985(3), 1986, rights to free exercise

of religion, petition the government, freedom of travel, substantive due process, equal protection, RFRA, RLUIPA, and violations of provisions of the Michigan Constitution and state civil rights statutes prohibiting racial discrimination along with various state and common law tort claims. (First Amended Complaint, R.11, PG ID # 241-304).

Plaintiffs generally allege that the City Defendants violated Plaintiffs' purported right to enforcement of the Code which allegedly would have stopped the Protesters' activities. Plaintiffs further allege that by not enforcing the Code, the City Defendants conspired with the Protesters in their alleged violations of Plaintiffs' constitutional rights. Plaintiffs seek injunctive relief to compel the City to take specific enforcement action and preclude the Protesters from continuing their protests or to otherwise impose limits on their activities. (First Amended Complaint, R.11, PG ID # 303). Plaintiffs also seek to recover compensatory and punitive damages against the City Defendants.

By an order entered on March 19, 2020, the District Court declined to exercise supplemental jurisdiction, dismissing Plaintiffs' state law claims. (Order, R. 41, PG ID # 1100-1102). On March 10, 2020, the City Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6) seeking dismissal of Plaintiffs' remaining federal claims against the City Defendants for lack of subject matter jurisdiction due to the absence of Article III standing, and for failure to state any

cognizable claim against them on which relief could be granted. On August 19, 2020, the District Court granted the City Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of Article III standing. (Order, R.66, PG ID # 1896-1906).

The City Defendants contend that the District Court properly granted their motion to dismiss, dismissing Plaintiffs' federal claims against them for lack of Article III standing. Moreover, even apart from lack of standing, Plaintiffs' federal claims are properly dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state any cognizable federal claim against the City Defendants. In short, Plaintiffs have failed to allege any basis on which they may recover against the City Defendants. Thus, the District Court's order of dismissal should be affirmed.

## SUMMARY OF THE ARGUMENT

The District Court properly determined that Plaintiffs' subjective allegations of emotional distress from having to view the Protesters' peaceful, lawful and protected Anti-Israeli, Anti-Zionist, and Anti-Semitic protest signs as they arrive at and enter the Beth Israel Synagogue were insufficient to allege an actual concrete injury in fact needed to confer Article III standing for their federal claims against the City Defendants. Any other ruling would have turned First Amendment jurisprudence upside down and open the floodgates to myriad claims seeking damages and other redress for subjective emotional injuries based on disagreement

with the content of others' speech which would turn the federal courts into speech grievance tribunals.[2]

The District Court's decision correctly recognized the City's inability to take enforcement action against the Protester Defendants without violating the broad scope of First Amendment protection afforded to peaceful protest speech on public sidewalks "even if it disturbs, is offensive, and causes emotional distress." (Order, R. 66, PG ID # 1905). See, *Snyder v. Phelps*, 562 U.S. 443, 452, 131 S.Ct. 1207(2011) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710 (1964)) ("The First Amendment reflects a profound national commitment to the

[2] The idea that public political protests would give rise to individual lawsuits against a City that "allowed" them by not using the full force of government to prevent them is seriously disturbing and contrary to the fundamental First Amendment principles woven into the fabric of American democracy. The revered "marketplace of ideas" often takes place in public on streets, sidewalks, and public places. The consequence of a requirement that a city use governmental power against any protest speech that a person claimed caused them emotional injury would necessitate, in a politically active City such as Ann Arbor, a large municipal enforcement department dedicated to this political speech monitoring and limitation. There are regular public protests for and against every possible political issue. There are even counter-protests on issues at the same time. The positions advocated are deeply held and the messages displayed are sometimes graphic, offensive and may cause emotional distress to some segment of the population. These protests include, but are not limited to, anti-abortion/pro-life, pro-choice, anti-immigration, pro-immigration, anti-gun, pro-right to bear arms, anti-war, pro-war, anti-police brutality, and pro-police. There are protests against products made in other countries and actions of other countries targeted at businesses in the City. The protests are near private businesses, non-profits, social service agencies, places of worship, University buildings, government buildings, and busy intersections. These protests stir political debate in the streets of Ann Arbor and cities across the United States. It is not for the government to silence this. Nor for the law to require such action.

principle that debate on public issues should be uninhibited, robust, and wide-open."); see also, *Bible Believers v. Wayne County, Mich.*, 805 F.3d 228, 243 (6th Cir. 2015), cert. denied, —— U.S. ——, 136 S. Ct. 2013 (2016) ("The First Amendment offers sweeping protection that allows all manner of speech to enter the marketplace of ideas. This protection applies to loathsome and unpopular speech with the same force as it does to speech that is celebrated and widely accepted.").

Consistent with First Amendment jurisprudence, the District Court correctly recognized that some religious and political speech might be offensive, but the right to free speech cannot be restricted because the message is offensive to some of the audience; rather, it is because the content of the message is offensive to some that it requires First Amendment protection. *Hill v Colorado*, 530, U.S. 703, 716, 120 S. Ct. 2480 (2000); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55, 108 S. Ct. 876 (1988).

Here, the Protesters' protests and signs do not prevent Plaintiffs from accessing the property or entering the Synagogue, nor do they interfere with Plaintiffs' worship once inside. The Protesters' signs and messages relate to political issues and matters of public concern. They are not directed at the Plaintiffs or any specific person, nor do they advocate or incite direct violence against the Plaintiffs, their fellow congregants, the Synagogue, Israel, or Jews. Without something more, Plaintiffs' allegations of having suffered emotional distress from viewing the

Protesters' signs are insufficient to confer Article III standing on Plaintiffs to pursue their claims against the City Defendants in federal court.

This case is actually a political dispute between private parties -- the Plaintiffs, against the Protesters -- alleging the Protesters' speech inflicted emotional injuries on Plaintiffs. In making such claims, Plaintiffs seek to improperly use the First Amendment as a sword to impose a heckler's veto on the Protesters' lawful speech, through compelled enforcement by the City Defendants, because they do not like the content of the Protesters' speech.

This case differs from the typical heckler's veto case in that the reaction to the Protesters' offensive speech is not anger and violence putting public health and safety at risk but instead is the alleged subjective emotional distress of Plaintiffs. But federal law does not recognize Plaintiffs' subjective claims of emotional injury from the presence of disagreeable speech as sufficient to confer Article III standing or as otherwise actionable to allow them to pursue their claims against the City Defendants in federal court.

Additionally, this case involves Plaintiffs' claims against the City Defendants for allegedly conspiring with the Protesters by refusing to enforce the City Code consistent with Plaintiffs' preferred interpretation. Plaintiffs seek to hold the City Defendants responsible for declining to take government action against the

Protesters' First Amendment-protected speech which the City could not have taken without infringing on a fundamental, constitutional right to free expression.

While the City Defendants are sympathetic to and understanding of Plaintiffs' frustration and desire to eliminate the Protesters' distasteful tactics, Plaintiffs' claims improperly turn the First Amendment on its head and use it as a sword to prohibit lawful protest speech they find offensive. But Federal law does not recognize Plaintiffs' injuries or claims as pled as actionable. Rather, the First Amendment and federal law clearly protect and shield those engaged in lawful protected speech, even if distasteful, offensive, or insulting, from tort liability and the restrictions Plaintiffs seek in this case. See, *Snyder v Phelps*, 562 U.S. at 460; see also, *McCullen v. Coakley*, 573 U.S. 464, 477, 134 S. Ct. 2518 (2014) (". . . the government may not 'selectively . . . shield the public from some kinds of speech on the ground that they are more offensive than others.'" quoting, *Erznoznik v. Jacksonville*, 422 U.S. 205, 209, 95 S. Ct. 2268 (1975)).

In sum, the District Court correctly determined that that the Protesters' conduct was protected under the First Amendment, and that any emotional distress it caused or evoked in Plaintiffs was insufficient to confer Article III standing on Plaintiffs for federal claims. On this basis, the District Court's decision should be affirmed.

# ARGUMENT

## I. The District Court Properly Dismissed Plaintiffs' Federal Claims For Lack Of Subject Matter Jurisdiction Due To Lack Of An Actual Injury In Fact And Article III Standing.

### A. Standard of Review – Rule 12(b)(1).

A district court's order granting a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, including those for lack of standing, is generally reviewed de novo. *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 709 (6th Cir. 2015) (citing, *Miller v. Cincinnati*, 622 F.3d 524, 531 (6th Cir. 2010)). But "[w]here the district court does not merely analyze the complaint on its face, but instead inquires into the factual predicates for jurisdiction, the decision on the Rule 12(b)(1) motion resolves a 'factual' challenge rather than a 'facial' challenge, and we review the district court's factual findings for clear error." *Howard v. Whitbeck,* 382 F.3d 633, 636 (6th Cir. 2004).

A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegations of the complaint as true for purposes of Rule 12(b)(1) analysis. *United States v. Ritchie,* 15 F.3d 592, 598 (6th Cir. 1994). A factual attack challenges the factual existence of subject matter jurisdiction, and a court has broad discretion with respect to what evidence to consider in deciding whether subject matter jurisdiction exists, including evidence outside of the pleadings, and it has the power to weigh the evidence and determine whether it has jurisdiction to hear the case. *Id.*

A factual finding is clearly erroneous when, "although there is evidence to support that finding, 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *United States v. Russell,* 595 F.3d 633, 646 (6th Cir. 2010).

A federal court of appeals is not restricted to ruling on the district court's reasoning, and it may affirm an order granting a motion to dismiss on a basis not mentioned in the district court's opinion. *Phillips v. DeWine*, 841 F.3d 405, 413–14 (6th Cir. 2016).

**B. Article III Standing Requirements.**

Standing to pursue a claim is a threshold question in every federal case. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197 (1975). "The burden of establishing standing is on the party seeking federal court action." *Rosen v. Tenn. Comm'r of Fin. & Admin.,* 288 F.3d 918, 927 (6th Cir. 2002)(citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130 (1992)).

To establish Article III standing to sue in federal court, a plaintiff must demonstrate three elements: i) an actual, concrete and particularized injury in fact; ii) the injury must have a causal connection or be fairly traceable to conduct complained of; and iii) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560–61. Here,

Plaintiffs failed to satisfy any of the three elements of standing and thereby fail to establish Article III jurisdiction in this Court.

### C. The District Court Properly Found That Plaintiffs Failed to Allege an Actual Concrete Injury In Fact.

As the District Court correctly stated, the first element of standing is an injury in fact which must be both concrete and particularized. (Order, R.66, PG ID # 1901). "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*, 540 U.S. at 560). (Order, R.66, PG ID # 1901).

The District Court correctly determined that Plaintiffs alleged a particularized injury, but not a concrete one. (Order, R.66, PG ID # 1902). As to concreteness, while the District Court acknowledged that intangible injuries can be concrete, it correctly concluded that Plaintiffs' alleged injuries, specifically emotional distress from viewing the Protesters' signs, were insufficient to confer Article III standing in the First Amendment context. (Order, R.66, PG ID # 1904-1905). The reference to the First Amendment context is critical and controlling in this case.

The District Court's Order properly recognized that when determining whether an alleged intangible injury constitutes a concrete injury in fact, a court should look to both the judgment of Congress and whether the law has traditionally

treated the alleged injury as providing a basis for a lawsuit. (Order, R.66, PG ID #1903). *Spokeo*, 136 S. Ct. at 1549.

As to the judgment of Congress, the District Court noted that Congress cannot side-step Article III's standing requirements. (Order, R.66, PG ID # 1904). The United States Supreme Court stated "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing." *Spokeo*, 136 S. Ct. at 1547-1548, quoting, *Raines v Byrd,* 521 U.S. 811, 820, n. 3, 117 S. Ct. 2312 (1997), citing, *Summers v. Earth Island Inst.*, 555 U.S. 488, 497, 129 S. Ct. 1142 (2009); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S. Ct. 1601 (1979) ("In no event ... may Congress abrogate the Art. III minima").

The District Court rejected Plaintiffs' reliance on *Ricketson v Experian Info. Solutions, Inc.*, 266 F.Supp.3d 1083 (W.D. Mich. 2017) because it involved a statutorily created "informational injury" to establish Article III standing which the District Court noted Plaintiffs did not allege. The Order states, "[t]here is no allegation that the protesters 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." (Order, R.66, PG ID # 1904). It continues, "Plaintiffs merely allege that the Defendants' conduct causes them

distress and 'interferes' with their enjoyment of attending religious services." (Order, R.66, PG ID # 1904-1905).

The District Court refers to the Plaintiffs' alleged distress as "interfering" with their enjoyment of their religious worship – functionally, a subjective chill – which the federal courts have routinely ruled is, by itself, insufficiently concrete to confer standing in the First Amendment context. (Order, R.66, PG ID # 1905). Although not stated expressly, the overall rationale of District Court's Order shows that, in the First Amendment context, the emotional distress Plaintiffs allege to have suffered by having to walk past the Protesters' lawful and protected political signs as they enter the Synagogue does not sufficiently allege interference with a legally protected right or interest, and consequently they fail to establish a concrete injury in fact that provides them with Article III standing. *Hill v. Colorado*, 530 U.S. at 716 ("The right to free speech ... includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience.").

As to Plaintiffs' lack of an actual concrete injury in fact, the District Court reveals this by juxtaposing Plaintiffs' alleged emotional distress against the First Amendment's purpose of protecting free speech and case law upholding this fundamental American principle. (Order, R.66, PG ID # 1905-1906). A primary purpose of the free speech clause of the First Amendment is to protect the rights of

others to say things that invite dispute and are outrageous, offensive, and that may even cause emotion distress to others. (Order, R.66, PG ID # 1905-1906); see, e.g., *Texas v. Johnson*, 491 U.S. 397, 408–09, 109 S. Ct. 2533 (1989) (". . . a principal 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.").

In short, the District Court properly concluded that federal law does not recognize a subjective reaction to protected speech as an actual concrete and actionable injury. *Snyder,* 562 U.S. at 443. *Snyder* involved protests, including the display of signs, by members of the Westboro Baptist Church and its founder Fred Phelps outside a church which was the site of a funeral for a military soldier. Westboro's protests and their choice of location and timing were arguably intended to be sensational, attention-grabbing, and offensive, but it also allowed Westboro to express its criticism of the United States and its policies, mainly tolerance of homosexuality in the military. *Id.* at 448, 454.

While *Snyder* did not turn on standing, the Supreme Court's decision and rationale in that case are relevant to this case and support the District Court's decision and reasoning. In *Snyder*, the U.S. Supreme Court opined that lawful speech and picketing at a public place on a matter of public concern, even when the speech is offensive, insulting, and hurtful, is entitled to special protection under the First

Amendment. *Id* at 458 (citing *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574, 115 S.Ct. 2338 (1995) ("the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful")). Thus, federal law has historically very clearly rejected the notion that a plaintiff's distress from viewing or listening to protected speech can be an actual injury in fact which could provide Article III standing to sue in federal court. *Snyder*, 562 U.S. at 458. In fact, the *Snyder* opinion states when a person is offended by protected speech or finds it hurtful, "the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Id.* at 459 (quoting, *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–211, 95 S.Ct. 2268 (1975) (internal quotation marks omitted)). The federal courts have also declared that in the United States, when faced with offensive, insulting or disagreeable speech, the answer is not censorship but more speech. *Bible Believers*, 805 F.3d at 234.

In *Snyder*, Chief Justice Roberts ultimately concluded the majority opinion with the following statement:

> 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.

*Snyder*, *562* U.S. at 460-61.

Intangible and subjective injuries from having witnessed First Amendment-protected speech which the listener finds offensive and/or harmful have been consistently rejected as a basis for Article III standing needed to bring a lawsuit in American courts against the speaker. Stated differently, distress from hearing or seeing lawful protected expression is not actionable, and such an intangible subjective injury cannot establish Article III standing.

In addition to the foregoing, this Court's opinion in *Bible Believers v. Wayne County*, is also instructive. 805 F.3d at 228. That case involved government action to remove a group of Christian proselytizers from the Arab International Festival in response to the violent reaction to their anti-Islamic messages, and the opinion recites and relies on numerous bedrock First Amendment principles that similarly carry the day in this case, particularly as to the claims against the City Defendants. *Id*. at 233-34, 243. More specifically, in the context of evaluating Plaintiffs' alleged intangible injuries for concreteness, the *Bible Believers* opinion makes clear that "offensive religious proselytizing, as well as speech that drives a crowd to extreme agitation, is not subject to sanction simply because of the violent reaction of offended listeners." *Id*. at 249. The same reasoning applies to other subjective reactions to lawful protected speech such as emotional distress.

And, most importantly as to Plaintiffs' standing to pursue claims against the City Defendants, First Amendment precedent prohibits the City Defendants from taking sides in the tension between the Plaintiffs and Protesters. *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43-44, 97 S. Ct. 2205 (1977) (government prohibited from restricting neo-Nazis' First Amendment right to march in predominantly Jewish community with swastikas and to distribute racist and anti-Semitic propaganda). The City Defendants cannot shield Plaintiffs from the Protesters' speech just because Plaintiffs find it offensive, insulting or harmful. See, *McCullen v. Coakley*, 573 U.S. at 477 ("As a general rule, in such a [public] forum the government may not 'selectively shield the public from some kinds of speech on the grounds that they are more offensive than others.'").

Plaintiffs spend considerable space in their Brief attempting to explain that while their emotional distress may be an intangible injury, it is nonetheless a real and actual injury. There is no need to engage in an analysis of whether their injuries are real; the District Court ruled that Plaintiffs stated a particularized injury. (Order, R.66, PG ID # 1902).

But Plaintiffs take the actual "de facto" injury requirement too literally, and they miss the significance of the concreteness and injury in fact standing requirements in the First Amendment context. Plaintiffs cite to a litany of cases where intangible emotional injuries were held to be sufficient to provide those

plaintiffs with Article III standing, but those cases all involve conduct by the defendants that was either outside the protections of the First Amendment (e.g., cross burning) or violated a protected right or specific statutory provision (e.g., work place discrimination, fair housing, prohibitions on racial segregation). (Appellants' Brief, pp. 33-34).

Missing from Plaintiffs' Brief and arguments is an explanation of how, in the face of long-standing United States Supreme Court precedent protecting lawful protest speech from all manner of legal consequences, their subjective injuries from viewing the Protesters' lawful signs constitutes an actual, concrete injury in fact sufficient to meet the Article III standing requirements in the First Amendment context. Plaintiffs fail to address this portion of the District Court's decision and offer no legal authority on which this Court could reverse.

It is important to recognize that if Plaintiffs' subjective emotional distress resulting from viewing lawful protected protest activities is deemed a concrete injury in fact sufficient to provide Article III standing, then the federal courts should brace for the deluge of subjective speech grievances because then every listener or viewer of lawful political, religious, or even commercial speech will be able to file a federal claim to recover for every subjective emotional injury inflicted by a message they find disagreeable.

Turning to the claims against the City Defendants, the same standing analysis applies, but they are even more difficult to establish because they are derivative of and premised on the Protesters having violated Plaintiffs' protected rights, which is not the case. For the same reason Plaintiffs' lack Article III standing to sue the Protesters, they likewise lack standing to proceed on the claim against the City Defendants.

Here, Plaintiffs' alleged emotional distress from having to walk by the Protesters' lawful signs as they enter to observe the Sabbath is not a cognizable or actual concrete injury in fact. Plaintiffs fail to offer any legal authority on point that holds otherwise. As the District Court ruled, Plaintiffs failed to establish an actual concrete injury in fact, and thus, fail to satisfy an essential element of Article III standing.

Alleged emotional harm from hearing or seeing protected speech is not a recognized injury in fact on which one can sue the speaker. The District Court's decision that Plaintiffs failed to establish an actual concrete injury in fact, and thus failed to establish this element of Article III standing, should be affirmed.

### D. Plaintiffs' Alleged Injury is Not Causally Connected to the City Defendants' Actions.

Even if Plaintiffs could establish an actual concrete injury in fact, their alleged injury is not causally connected and fairly traceable to the City Defendants' conduct. Plaintiffs' alleged injuries, vis-à-vis the City Defendants, are premised on alleged

injuries inflicted by the Protesters' activities which Plaintiffs claim the City indirectly enabled by failing to enforce the Code.

But in cases involving indirect enforcement, standing is "substantially more difficult to establish." *Lujan*, 504 U.S. at 561–62. Indeed, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.* at 561–62 (much more is needed to establish standing in cases challenging the government's regulation of third parties).

Plaintiffs failed to meet this "substantially more difficult" burden. They cannot fairly trace their alleged injuries to the City's refusal to enforce the Code against the Protesters. Nor can Plaintiffs' use the injuries allegedly inflicted by the Protesters to establish standing for their claims against the City Defendants. Plaintiffs' reliance on the conduct of the third-party Protesters is too attenuated to establish the required causal connection that is reasonably traceable to the City Defendants' actions. *Id.*

In short, even taking Plaintiffs' allegations as true, Plaintiffs failed to sufficiently establish the requisite causal connection between their alleged injuries and any City Defendant's actions; therefore, Plaintiffs cannot establish Article III standing to proceed on their claims in federal court. The District Court's decision should also be affirmed on this basis.

### E. Plaintiffs' Alleged Injury Cannot Be Redressed by this Court.

As noted above, existing First Amendment law protects the Protesters' right to protest and display signs relating to matters of public concern on the public sidewalk in front of the Synagogue, and the District Court's Order correctly recognizes this.

As the District Court stated, "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.'" (Order, R. 66, PG ID # 1905). Because the Protesters have a right under the First Amendment to continue to their protests and display political signs, however offensive and insulting Plaintiffs may find them, based on the facts alleged in this case, Plaintiffs' alleged injuries cannot be redressed by a ruling by this Court. Plaintiffs failed to establish the redressability element for Article III standing. The District Court's decision should also be affirmed based on this basis.

## II. Alternatively, Plaintiffs Fail to State a Claim Against the City Defendants on Which Relief Could Be Granted.

### A. Standard of Review – Rule 12(b)(6).

An appellate court reviews de novo a district court's order granting a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Solo v. United Parcel Service Co.*, 819 F.3d 788, 793 (6th Cir. 2016). In evaluating a motion brought pursuant to Rule 12(b)(6), "[c]ourts must construe the

complaint in the light most favorable to plaintiff, accept all well-pled factual allegations as true, and determine whether the complaint states a plausible claim for relief." *Albrecht v. Treon*, 617 F.3d 890, 893 (6th Cir. 2010).

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. *RMI Titanium Co. v. Westinghouse Elec. Corp.,* 78 F.3d 1125, 1134 (6th Cir. 1996). Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." To survive a motion to dismiss, a complaint need not contain "detailed factual allegations," but it must contain more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action . . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not "suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557).

To survive a Rule 12(b)(6) motion, the complaint must contain specific factual allegations, and not just legal conclusions, in support of each claim. *Iqbal,* 556 U.S. at 678. Moreover, the Sixth Circuit has emphasized that the "combined effect of *Twombly* and *Iqbal* [is to] require [a] plaintiff to have a greater knowledge . . . of factual details in order to draft a 'plausible complaint.'" *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011) (citation omitted). A complaint is subject to dismissal unless, when all well-pled factual allegations are

accepted as true, the complaint states a "plausible claim for relief." *Id.* at 679. In deciding whether the plaintiff has set forth a "plausible" claim, the court must accept the factual allegations in the complaint as true. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). This presumption, however, is not applicable to legal conclusions. *Iqbal*, 556 U.S. at 668. Therefore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555).

### B. Plaintiffs Failed to State Any Violation of the U.S. Constitution or Federal Law On Which Relief Could Be Granted.

#### 1. Plaintiffs Fail to State a §1983 Civil Rights Violation Against the City Defendants.

Plaintiffs fail to identify specific conduct by any individual City Defendant that violated their rights at all. Simply alleging in conclusory terms that the City Defendants generally violated the Plaintiffs' unidentified rights is not enough. A critical aspect of a §1983 claim is that "to be held liable, a plaintiff must demonstrate that each government-Official defendant, through the individual's own actions, has violated the constitution." *Robertson v. Lucas*, 753 F.3d 606, 615 (6th Cir. 2014). "Simply put, to establish liability and to overcome a qualified immunity defense, an individual must show that his or her *own* rights were violated, and that the violation as committed *personally* by the defendant." *Id.* (Emphasis in Original). Plaintiffs

failed to allege any such liability, and thus, the individual capacity claims against these Defendants should be dismissed.

Moreover, Plaintiffs' official capacity claims against the individual City Defendants are duplicative of the claims against the City. *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). Such duplicative official capacity claims should be dismissed. *Doe v. Claiborne County*, 103 F.3d 496, 509 (6th Cir. 1996) (dismissing official capacity claims as duplicative of claims against municipal entity).

Further, to the extent Plaintiffs allege a §1983 custom and policy claim against the City under *Monell v. Dept of Soc. Services*, 436 U.S. 658, 694, 98 S. Ct. 2018 (1978), their efforts fail as a matter of law. "If no constitutional violation by the individual defendants is established, the municipal defendants cannot be held liable under §1983." *Watkins v. City of Battle Creek,* 273 F.3d 682 (6th Cir. 2001). As set forth above, Plaintiffs have failed to establish any constitutional violation by the individual City Defendants. Moreover, Plaintiffs failed to plausibly allege any custom or policy of the City that was the "moving force" behind any violation of their constitutional rights.

Ultimately, Plaintiffs fail to state a §1983 claim against the City because they have no right to enforcement of the City Code. *DeShaney v. Winnebago County Dept. of Soc. Servs*, 489 U.S. 998, 1003-1004 (1989); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146 (1973); see also, *B&B Entertainment, Inc. v. Dunfee*,

630 F.Supp.2d 870, 877-878 (S.D. Ohio 2009). Thus, Plaintiffs fail to state a cognizable §1983 claim.

**2. Plaintiffs Fail to State a Conspiracy Claim.**

Plaintiffs also attempt to allege the City Defendants conspired with the Protesters to violate the Plaintiffs' rights to free exercise of religion in violation of 42 U.S.C. §§1982, 1983, and 1985(3). They also allege the City Defendants violated §1986 by failing to prevent the Protesters' §1985(3) conspiracy to violate the Plaintiffs' constitutional rights.

Section 1982 provides that "[a]ll citizens of the United States" have the same right "as is enjoyed by white citizens" to "inherit, purchase, lease, sell, hold, and convey real and personal property." Basically, §1982 bars all racial discrimination in the sale or rental of property.

To state a claim action under § 1985(3), Plaintiff must allege: 1) a conspiracy; 2) 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; and 3) an act in furtherance of the conspiracy; 4) whereby a person is "injured in his person or property" or "deprived of having and exercising any right or privilege of a citizen of the United States." *United Bd. of Carpenters & Joiners of Am., Local 610 v. Scott,* 463 U.S. 825, 828–29, 103 S. Ct. 3352 (1983). Section 1985(3) applies only if there is a showing that some racial or other class-based

invidiously discriminatory animus motivated the conspirators' actions. *Griffin v. Breckenridge*, 403 U.S. 88, 102-103, 91 S. Ct. 1790 (1971).

Section 1986 provides a cause of action against a person who neglects to prevent a violation of section 1985. But, without a violation of §1985, there can be no violation of §1986. *Haverstick Enterprises, Inc. v. Financial Federal Credit, Inc.*, 803 F. Supp. 1251, 1260 (E.D. Mich. 1992).

Moreover, to state a claim for conspiracy, a plaintiff must show that, i) there was a single plan; ii) the defendant(s) shared in the general conspiratorial objective; and iii) an overt act by the defendant(s) was committed in furtherance of the conspiracy that injured the plaintiff. *B&B Entertainment*, 630 F.Supp.2d at 884. "[I]t is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under §1983." *Marvaso v. Sanchez*, 971 Fed. Appx. 599, 606 (6th Cir. 2020).

Plaintiffs failed to plead any of their conspiracy claims with specificity. Plaintiffs fail to allege specific facts showing that any City Defendants entered into an agreement with any of the Protesters or took any overt action which violated Plaintiffs' rights. Plaintiffs also failed to allege any facts showing that any City Defendants acted with racial animus or an intent to discriminate against Plaintiffs because of their religion.

Contrary to Plaintiffs' assertions, the City Defendants' decision not to enforce against the Protesters' protected conduct is not complicity with the Protesters. As set forth above, the City Defendants cannot prevent the lawful protests without violating the First Amendment. In sum, Plaintiffs have failed to plead facts to support the basic elements of a conspiracy under §§1982, 1983, 1985(3), or 1986 and those claims must be dismissed.

**3. Plaintiffs Fail to State a Substantive Due Process Violation.**

To establish a substantive due process claim, Plaintiffs must show that the City Defendants deprived them of a protected right or legitimate entitlement under color of law, and that such violation was arbitrary and capricious in the strict sense, and not based on any legitimate governmental interest. *Bowers v. Flint*, 325 F3d 758, 763 (6th Cir 2003). It is well-settled that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion. *Town of Castle Rock*, 545 U.S. 748, 756 (2005).

Plaintiffs' substantive due process claim fails because enforcement of the Code in Plaintiffs' preferred manner against the Protesters was not a constitutionally protected right to which Plaintiffs had a legitimate claim of entitlement. The City's discretionary decision not to enforce because the Protesters' were engaged in lawful conduct protected under the First Amendment did not rise to the level of shocking the conscience. See, *Clair v. N. Ky. Indep. Health Dist.*, 504 F.Supp.2d 206, 216

(E.D. Ky. 2006). Indeed, the City's decision was in compliance with the First Amendment, as set forth above.

**4. Plaintiffs Fail to State a Right to Petition Violation.**

The First Amendment includes a right to petition the government for a redress of grievances. *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292, 297 (6th Cir. 1992). Although the First Amendment protects information gathering, it does not provide a constitutional right to blanket access to all information within the government's control. *Putnam Pit, Inc. v. City of Cookeville, Tenn.*, 221 F.3d 834, 840 (6th Cir. 2000). Thus, while the First Amendment protects the right to petition and speak to the government, it does not require the government to listen or respond. See, *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 285, 104 S. Ct. 1058 (1984).

Plaintiffs fail state a cognizable claim for violation of the right to petition. Neither Plaintiffs, nor their attorney, had a right to compel any City employee to provide information. The refusal to respond to Plaintiffs counsel's demands for legal interpretations and other information was not a violation of the right to petition the government. Further, as the Michigan Grievance Commission acknowledged, City staff can refuse to communicate directly with the public and have legal questions addressed to the City Attorney's Office.

**5. Plaintiffs Fail to State a RFRA or RLUIPA Violation.**

Plaintiffs fail to state claims under the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000 42 U.S.C. § 2000bb, et seq. (RFRA) and Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000-cc (RLUIPA) because the City Defendants did not take any action which directly impacted Plaintiffs, their religious exercise, or the Synagogue property. In other words, the City did not compel or prohibit Plaintiffs from doing anything. The facts alleged simply do not trigger RFRA or RLUIPA.

More specifically, Plaintiffs cannot state a RFRA claim because the Supreme Court has held that it is not applicable to local government. *City of Boerne v. Flores,* 521 U.S. 507 (1997) (holding that, as applied to states and their subdivisions, RFRA was not a valid exercise of Congress's power to enforce the Fourteenth Amendment). Thus, RFRA is wholly inapplicable to the City, and any attempt to state a RFRA claim necessarily fails.

Similarly, Plaintiffs fail to state a claim under RLUIPA because they lack an adequate property interest on which to base such a claim. Membership in the Synagogue is insufficient to provide a property interest for purposes of RLUIPA, and Plaintiffs' First Amended Complaint lacks details showing how the City Defendants burdened their religious exercise.

## CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's decision granting the City Defendants' Motion to Dismiss.

Respectfully submitted,

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Dated: January 4, 2021

## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2021, I electronically filed the foregoing City Defendants/Appellees Appellee Brief with the Clerk of the Court using the CM/ECF Document Filing System, which will send notification of such filing to the registered participants of the CM/ECF Document Filing System, and I hereby certify that I have mailed by US Mail the document to the following non-ECF participants: None.

*/s/ Dawn M. Bagozzi*
Legal Assistant
Ann Arbor City Attorney's Office

# ADDENDUM

| **Originating Court Documents:** | **Date Filed** | **R.** | **Page ID#** |
|---|---|---|---|
| Complaint | 12/19/19 | 1 | 1-85 |
| First Amended Complaint | 1/10/20 | 11 | 210-304 |
| Exhibit 3 to First Amended Complaint, Photographs of signs in front of Synagogue | 1/10/20 | 11-4 | 312-320 |
| Exhibit 4 to First Amended Complaint, Photographs of signs across from Synagogue | 1/10/20 | 11-5 | 321-328 |
| Motion to Dismiss by City Defendants Pursuant to Rule 12(b)(1) and (6) | 3/10/20 | 32 | 898-932 |
| Order Declining to Exercise Supplemental Jurisdiction Over Plaintiffs' State Law Claims and Dismissing Without Prejudice Counts XIV to XIII of the First Amended Complaint | 3/19/20 | 41 | 1100-1102 |
| Motion to Dismiss by Protester Defendants | 3/26/20 | 45 | 1108-1147 |
| Order Granting Defendants' Motions to Dismiss | 8/19/20 | 66 | 1896-1906 |
| Motion for Reconsideration | 8/26/20 | 67 | 1907-1942 |
| Order Denying Motion for Reconsideration | 9/3/20 | 69 | 1981 |
| Notice of Appeal | 9/4/20 | 70 | 1982-1983 |