Case No. 20-1870

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Marvin Gerber and Dr. Miriam Brysk

Plaintiff-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, jointly and severally.

Defendant-Appellees

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

APPELLEES' CORRECTED BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST (FRAP 26.1)

Pursuant to 6th Cir. R. 25, Defendant-Appellees make the following disclosure;

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

No.

If the answer is YES, list below then identify of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

No.

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

Respectfully submitted,

/s/Cynthia Heenan

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants have attempted to frame this case as presenting novel legal issues of "first impression." It does not. The controlling law is well established. Appellees would like to have and participate in oral argument to assist and support the panel in keeping the focus on the actual legal issues presented and to respond to any inquiries or issues that may concern the panel after fully reviewing the briefs. Additionally, Appellees anticipate that oral argument may be necessary to respond to any new arguments or issues raised in Appellants' Reply Brief.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

For the reasons set forth in this brief, Defendant-Appellees contend that the District Court (and by extension, this Court) lack subject-matter jurisdiction as a result of Plaintiff-Appellants' failure to establish Article III standing. "Article III demands that an actual controversy persist throughout all stages of litigation," therefore, "standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705, 133 S. Ct. 2652 (2013)

STATEMENT OF ISSUES PRESENTED

I. DID THE LOWER COURT CORRECTLY HOLD THAT APPELLANTS LACKED STANDING FOR THEIR CLAIMS AGAINST THE PROTESTER DEFENDANTS?

Plaintiffs-Appellants answer:	**No.**
Protester Defendants-Appellees Answer:	**Yes.**
This Court Should Answer:	**Yes.**

I. Should Appellants' claims against the Protester Defendants be dismissed for failure to state a claim pursuant to F.R.Civ.P. 12(b)(6)?

Plaintiffs-Appellants answer:	**No.**
Protester-Defendants Answer:	**Yes.**
This Court Should Answer:	**Yes.**

II. Should the district court judge be disqualified from presiding over further proceedings in the event that her dismissal is not upheld?

Plaintiffs-Appellants answer:	**Yes.**
Protester Defendants-Appellees Answer:	**No.**
This Court Should Answer:	**No.**

STATEMENT OF THE CASE

The procedural history and posture of this case, as set forth by Appellants' brief, are correct.

Appellants brought a plethora of causes of action against a small number of people engaged in peaceful protests near a synagogue in Ann Arbor that Appellants attend. Those Defendants, identified by Appellants as "Protester Defendants" (on account of their protest speech, hereinafter sometimes referred to as "PD" or "PDs"), carry or display signs that convey various anti-Israel and pro-Palestinian messages, including criticism of U.S. government support for Israel's policies regarding the Palestinian people. Protests begin immediately prior to the time when the synagogue holds weekly Sabbath services. Appellants acknowledge that the protest speech occurs in the public right-of-way on both sides of Washtenaw Ave, a major highway bisecting Ann Arbor -- among the most traditional of all public fora. [Amended Complaint, RE 11, Para. 26, PageID#221] Appellants describe [para. 24, PageID#220] 18-20 different signs displayed over the years. Some of the signs are held by the protesters. Others are propped against folding chairs (occupied by PDs and not) or otherwise temporarily positioned in the grass, but not affixed to any signs or telephone poles, etc. The protesters and their signs are visible to pedestrians and vehicle occupants, including congregants en route to the Synagogue.

Appellants do not allege that the PDs obstruct congregants from attending

services, or involve "fighting words" or unlawful "incitement." Likewise, they do not contend that the PDs and their signs are on Synagogue property, visible from inside the synagogue, or disrupt services. There is no dispute that the PDs depart before Appellants leave.

Appellants' claims include theories of concerted action between the PDs and City Defendants regarding a sign ordinance which Appellants assert should be enforced against PD speech. However, there are no allegations of PD behavior that discouraged the City defendants from enforcing its ordinances. Indeed, Appellants acknowledge the City's consistent position that the PDs' protest speech is protected under the First Amendment notwithstanding its sign ordinances.

The purpose of the City's sign ordinance is "to protect public safety, health, and welfare; minimize abundance and size of Signs to reduce visual clutter and motorist distraction; promote public convenience; preserve property values; and enhance the aesthetic appearance and quality of life within the City," Section 5.24.1, while "[p]rotect[ing] the public right to receive messages, especially noncommercial messages, such as religious, political, economic, social, philosophical, and other types of information protected by the First Amendment of the U.S. Constitution. Nothing in this section is intended to limit the expression of free speech protected by the First Amendment." Section 5.24.1.A. [Amended Complaint, RE 11-7, PageID#352, Emphasis added] Of critical importance, the City does not have any ordinance

governing the time, place and manner of the PDs protected speech activities in this traditional public forum.

Appellants complain about the district court's decision to set aside the default against Defendant Jewish Witnesses for Peace and Friends and not to hear their motions for partial summary judgment, a preliminary injunction and to amend their complaint, while Defendants' Rule 12(b) motions were pending. However, Appellants did not move below to disqualify the district court judge. The district judge's rulings were entirely within her sound judgment and discretion to manage her docket and conserve judicial resources, and were consistent with the general practices of the bench of the Eastern District of Michigan. PDs have filed a Fee Petition and Motion for Sanctions, which sets forth in detail the Appellants' (counsels') unending volley of vexatious and harassing filings both before and after the district court entered its Order Concerning Filing of Motions. [Motion for Attorney Fee, RE 73, PageID#2003-2007]

STANDARD OF REVIEW

A district court's decision to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is reviewed *de novo*.

Likewise, "[t]he district court's grant of a [12(b)(6)] motion to dismiss is reviewed de novo." *Strayhorn v. Wyeth Pharms., Inc.*, 737 F.3d 378, 387 (6th Cir. 2013). Therefore, the reviewing court must "construe the complaint in a light most

favorable" to the non-moving party and accept their factual allegations as true. *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), citations and internal quot. marks omitted.) "Factual allegations must be enough to raise a right to relief above the speculative level … on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id*. at 556-557, 570. "In accepting the facts alleged as true, a court need not accept 'conclusory allegations on the legal effect of the events' or conclusory assertions which are unsupported and unsupportable." *Dry v. Methodist Med. Ctr., Inc.*, 893 F.2d 1334 (6th Cir. 1990) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1357).

To determine whether a pleading adequately states a plausible claim for relief, a court must first take "note of the elements a plaintiff must plead to state a claim." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Second, the court, drawing "on its judicial experience and common sense," must decide in the specific context of the case whether the factual allegations, if assumed true, allege a plausible claim. *Id*. at 679; *Wilson v. Birnberg*, 667 F3d 591, 595 (5th Cir. 2012). Courts are not bound to accept as true a legal conclusion couched as a factual allegation. *Twombly*, 550 U.S. at 555.

SUMMARY OF THE ARGUMENT(S)

The District Court properly held that Appellants lack standing because they failed to articulate a concrete injury in light of the fact that Appellees' conduct is entirely protected by the First Amendment. Alternatively, the District Court could have held that Appellants lack standing because the injury they claim is not redressable. If this Court determines that Appellants do have standing, it should dismiss their claim on the merits. Further, there is no basis to disqualify the district court judge on any remand of this case.

ARGUMENT

I. THE LOWER COURT CORRECTLY HELD THAT APPELLANTS LACKED STANDING FOR THEIR CLAIMS AGAINST THE PROTESTER DEFENDANTS

Appellants argue that the district court erred when it dismissed Appellants' suit for lack of standing. But the judicial power of federal courts is limited to actual cases and controversies before the Supreme Court and such inferior courts as Congress may create. U.S. Const. Art. III, §§1-2. This jurisdictional limitation requires, *inter alia*, that a party wishing to litigate a dispute before a federal court demonstrate standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-60, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) ("the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III").

Although Congress may by statute define the jurisdiction of the federal courts, a federal court's jurisdiction can never extend beyond the outer limits set by Article III. "[B]y the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred." *Muskrat v. United States*, 219 U.S. 346, 356, 31 S. Ct. 250, 55 L. Ed. 246, 46 Ct. Cl. 656 (1911).

The court is required in every case to determine—*sua sponte* if the parties do not raise the issue—whether it is authorized by Article III to adjudicate the dispute. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011) ("[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press."). An Article III court may not decide the merits of a claim for relief unless some party pressing the claim has standing to bring it. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650-51, 198 L. Ed. 2d 64 (2017).

> To demonstrate standing, [A] plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Tennessee v. United States Dep't of State, 931 F.3d 499, 507 (6th Cir. 2019) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)) The party seeking jurisdiction before a federal court bears the burden of showing these elements. *Lujan*, 504 U.S. at 561; *accord Durham v. Martin*, 905 F.3d 432, 433-34 (6th Cir. 2018).

A. Injury in Fact

The district court correctly ruled that Appellants failed to adequately allege an injury in fact. Appellants claim that their allegations of "extreme emotional distress," constitute an injury[1] sufficiently concrete to satisfy the first prong of the standing analysis, but in this context this is simply not so.

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[1] Appellants characterize emotional distress as a "tangible" injury, citing to *Corley v. Louisiana*, No. 06-882-SCR, 2011 U.S. Dist. LEXIS 119535 (M.D. La. Oct. 17, 2011). This case not only is not on point or binding on this Court, but appears to be one of a kind. The passage for which Appellants quoted *Corley* ("Compensatory damages for emotional distress and other tangible injuries are not presumed from the mere violation of constitutional or statutory rights.") cannot be found in any other case. However, a slightly different phrase—almost identical but with one notable difference—can be found in a number of federal cases: "Compensatory damages for emotional distress and other *intangible* injuries are not presumed from the mere violation of constitutional or statutory rights." *Decorte v. Jordan*, 497 F.3d 433, 442 (5th Cir. 2007) (emphasis added); *Miniex v. Hous. Hous. Auth.*, No. 4:17-00624, 2019 U.S. Dist. LEXIS 65486, at *9 (S.D. Tex. Apr. 17, 2019); *Benton v. United States EPA*, Civil Action No. 3:06-CV-1591-D, 2014 U.S. Dist. LEXIS 85308, at *22 (N.D. Tex. June 24, 2014); *Fairchild v. All Am. Check Cashing, Inc.,* No. 2:13-CV-92-KS-MTP, 2014 U.S. Dist. LEXIS 113653, at *12 (S.D. Miss. Aug. 15, 2014); *Watkins v. Hawley*, No. 4:12-CV-54-KS-MTP, 2013 U.S. Dist. LEXIS 132033, at *15 (S.D. Miss. Sep. 16, 2013). In total, undersigned counsel found 18 cases using the phrase, "emotional distress and other intangible

To be "concrete," an injury "must actually exist," that is, it must be "real, and not abstract." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id*. at 1547 (quoting *Lujan*, 504 U.S. at 560 n.l).

While tangible harms are most easily recognized as concrete injuries, *Spokeo* acknowledged that some intangible harms can also qualify as such. *See id*. at 1549. In deciding whether an intangible harm—such as emotional distress—manifests concrete injury, a court must look to Congress's judgment in affording a legal remedy for the harm. *See id*. (observing that "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is . . . instructive and important").[2] That said, Congress's

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injuries," including one within this Circuit, (*Marshall v. Rawlings Co., LLC*, No. 3:14-CV-359-TBR, 2018 U.S. Dist. LEXIS 32493 (W.D. Ky. Feb. 28, 2018)), but only one referring to "emotional distress and other tangible injuries,"—the *Corley* opinion cited by Appellants (which cited *Decorte*, *supra*, in the very same paragraph). The other cases cited by Appellants for the proposition that emotional distress may constitute a concrete injury all involved emotional distress plus other harms. Thus, Appellants' argument that emotional distress, standing alone, constitutes a tangible injury appears to rest entirely on a typographical error in one unpublished Louisiana district court opinion.

[2] In the context of intangible injuries, the Supreme Court has also instructed courts to consider "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1548. As a general matter, emotional distress has been regarded as a harm providing a basis for a lawsuit in English and American courts. See*, e.g., State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282, 284-85 (Cal. 1952). *See generally* John J. Kircher, *The Four*

"role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.; see Raines v. Byrd*, 521 U.S. 811, 820 n.3, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

Further, to qualify as a concrete injury, a statutory violation is not enough—the plaintiff must claim something more. *See Spokeo*, 136 S. Ct. at 1549 (2016) (holding that a plaintiff cannot allege a "bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III"). And if that "something more" is emotional distress, then emotional distress must be one of the harms that the statute in question was intended to remedy. *See Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1116 (9th Cir. 2017), cert. denied, 138 S. Ct. 931 (2018). (To determine whether standing has been established, courts inquire "(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests, and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests."); *see also*

Faces of Tort Law: Liability for Emotional Harm, 90 Marq. L. Rev. 789 (2007) (discussing the history of emotional harm as a basis for liability in English and

Ricketson v. Experian Info. Sols., Inc., 266 F. Supp. 3d 1083, 1089 (W.D. Mich. 2017) (plaintiff's 1681i claim related directly to harms the FCRA was meant to address—the risk of inaccurate information in a consumer's file and the inability of consumers to correct that information—and plaintiff's resulting emotional distress was therefore a sufficiently concrete injury); *see also Muransky v. Godiva Chocolatier, Inc.,* 922 F.3d 1175, 1188-89 (11th Cir. 2019) (where the Eleventh Circuit explained that "a plaintiff can establish Article III standing at the pleading stage by alleging a risk of harm of the type Congress elevated to the status of a concrete injury when it created procedures designed to minimize that risk." Thus, "if Congress adopts procedures designed to minimize the risk of harm to a concrete interest, then a violation of that procedure that causes even a marginal increase in the risk of harm to the interest is sufficient to constitute a concrete injury.")

In the instant case, Plaintiffs allege that their emotional distress arises as a result of the Protester Defendants' First Amendment speech activity. Specifically, Plaintiffs allege that they find Defendants' speech offensive and that the resultant emotional distress diminishes the enjoyment of their own First Amendment right to the free exercise of their religion. But the Free Exercise Clause was never meant to remedy emotional distress—let alone emotional distress caused by private actors. By its own terms, the Free Exercise Clause only restrains Congress from making any law

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American court systems).

prohibiting the free exercise of one's religion. U.S. Const. amend. I. It does not restrain private citizens from criticizing a religion, or the practitioners of a religion, even if such criticism caused emotional distress and made one's exercise of that religion less enjoyable.

To the extent that the civil rights statutes (42 U.S.C. §§1981, 1982, 1983, and 1985) under which Plaintiffs assert claims contemplate recovery in certain circumstances for tort injuries, including emotional distress, those circumstances do not include a defendant's exercise of protected speech activity. To the contrary, when emotional distress—even extreme emotional distress—is the result of peaceful protesting on matters of public concern in a traditional public forum, and thereby protected by the First Amendment, it is not redressable under tort principles. The Supreme Court made this clear in *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207 (2011), where it overturned a jury verdict finding the defendant liable for intentional infliction of emotional distress:

> Westboro's choice to convey its views in conjunction with Matthew Snyder's funeral made the expression of those views particularly hurtful to many, especially to Matthew's father. The record makes clear that the applicable legal term—'emotional distress'—fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a 'special position in terms of First Amendment protection.' *United States v. Grace*, 461 U.S. 171, 180, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983). '[W]e have repeatedly referred to public streets as the archetype of a traditional public forum,' noting that '[t]ime out of

> mind' public streets and sidewalks have been used for public assembly and debate.' *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988).
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> *Snyder*, 562 U.S. at 456

In so holding, the Court noted, "The Free Speech Clause of the First Amendment – 'Congress shall make no law . . . abridging the freedom of speech'--can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress." *Snyder*, 562 U.S. at 451 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)). This is in large part because:

> [A] jury is "unlikely to be neutral with respect to the content of [the] speech," posing "a real danger of becoming an instrument for the suppression of . . . 'vehement, caustic, and sometimes unpleasan[t]' " expression. *Bose Corp.*[*v. Consumers Union*, 466 U.S. 485, 510, 104 S. Ct. 1949 (1984)](quoting *New York Times* [*Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710 (1964)]) Such a risk is unacceptable; "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988) (some internal quotation marks omitted). What Westboro said, in the whole context of how and where it chose to say it, is entitled to "special protection" under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.
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> *Snyder*, 562 U.S. at 458.

And while indicating that each First Amendment case must be judged on its own facts, the *Snyder* Court laid down the fundamental principles that must underpin any action that seeks to stifle speech:

> 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.
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> *Id.* at 460-61.[3]

The High Court concluded that the defendants could not be held liable in tort—not for intentional infliction of emotional distress and not for intrusion upon seclusion (premised on the same "targeted picketing" theory that Plaintiffs espouse in the instant case). As such, no civil conspiracy claim could lie either, because there could be no tort liability arising out of the protected speech on matters of public interest. *Id*. at 460.

By the time *Snyder* was decided, the principles insulating protected speech from tort liability had been in force for many decades.

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[3] *See also, Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2009), where the Court (including retired Justice Sandra Day O'Connor) observed: "The Constitution embraces such a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race, where the risk of conflict and insult is high. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). Without the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched. *See, e.g., Gitlow v. New York*, 268 U.S. 652, 667, 45 S. Ct. 625, 69 L. Ed. 1138 (1925); *id*. at 673 (Holmes, J., dissenting). The right to provoke, offend and shock lies at the core of the First Amendment."

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."
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> Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.
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> *Hustler Magazine v. Falwell*, 485 U.S. 46, 53, 108 S. Ct. 876, 880-81 (1988) (quoting *Garrison v. Louisiana*, 379 U. S. 64 (1964))

The same principles that protect public debate about public figures also protect public debate about matters of public concern. *Snyder*, 562 U.S. at 451-52.

> Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," *Connick* [*v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684 (1983)], or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," *San Diego* [*v. Roe*, 543 U.S. 77, 83-84, 125 S. Ct. 521 (2004)]. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-494, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 387-388, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967). The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987).
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> *Snyder*, 562 U.S. at 453.

Thus, even if emotional distress could, as a general proposition, be considered a concrete and particularized injury, sufficient to satisfy the "injury-in-fact" prong of the standing analysis in some circumstances, it cannot do so here. The Protester Defendants' speech occurs on public sidewalks adjacent to public streets, a traditional

public forum, and is critical of the State of Israel and its policies—matters of public concern. This is core political speech entitled to the highest First Amendment protection. As such, there exists no avenue for tort liability where Appellants' alleged emotional distress arises out of speech activity alone.

The cases Appellants have cited do nothing to change that conclusion, as each of them involved non-speech conduct and some injury in addition to emotional distress. *Wells v. Rhodes*, 928 F.Supp. 2d 920 (S.D. Ohio 2013), a non-binding case upon which Appellants rely heavily, involved claims under 42 U.S.C. §§1982 and 1985(3), as well as an Ohio ethnic-intimidation statute. The case arose out of the acts of the defendants, who burned a cross in the front yard of an African-American family, accompanied by the words "KKK will make you pay," and "Nigger." The case is completely inapposite here: it involved neither the issue of standing, nor defendants proffering the defense of protected speech. In granting plaintiffs summary judgment, the court had little difficulty concluding that plaintiffs sufficiently demonstrated emotional distress flowing from defendant Rhodes' threatening and intimidating act of cross-burning on their property—an act so divorced from protected speech that, again, the defendant did not claim it as a defense.[4] The *Wells* court, in an analysis similar to

[4] Nor, contrary to Appellants' suggestion that Rhodes' action involved protected speech, *see* App. Br. pp. 21-23, could such a defense have been proffered. Defendant Rhodes, in a parallel criminal case, conceded that his actions in burning the cross on property that plaintiffs rented were intended to intimidate at least one

those in *Ricketson*, *supra*, and *Muransky*, *supra*, made explicit that the defendants' non-speech conduct (burning the cross) played an integral role in imposing §1982 liability:

> "Defendants' discriminatory conduct infringed on Plaintiffs' rights under §1982 to hold and use their property. As the case law detailed above indicates, intimidating and threatening acts—such as being subject to a burning cross on one's lawn—deny a person the equal right to hold property as enjoyed by other citizens. This is the type of conduct §1982 is meant to address."
>
> *Id*. at 927 (emphasis added).[5]

In their discussion of *Wells*, Appellants also cite to *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615; 107 S. Ct. 2019 (1987) and *Virginia v. Black*, 538 U.S. 343; 123 S. Ct. 1536; 155 L.Ed.2d 535 (2003). In *Shaare Tefila Congregation*, the sole issue before the court was whether Jews constituted a distinct racial group for purposes of §§1981 and 1982, a factor not in dispute in the instant case. Like in *Wells*, the matter had nothing to do with protected speech and everything to do with unprotected conduct. As the Supreme Court recounted, "the Congregation and some

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of the residents and interfere with that person's use of the property. *Id*., 928 F.Supp. 2d at 927, fn. 8. Although cross-burning may constitute "symbolic speech" in certain contexts, it is not protected under the First Amendment when intended to threaten or intimidate, *see Virginia v. Black*, 538 U.S. 343, 362-363; 123 S. Ct. 1536; 155 L.Ed.2d 535 (2003).

[5] Appellant's view that *Wells* did not involve a trespass by defendants onto the plaintiffs' property, *see* R.18, App. Br. p. 23, fn. 6, appears not to have been shared by the Ohio district court.

individual members brought this suit in the Federal District Court, alleging that defendants' desecration of the synagogue had violated 42 U. S. C. §§1981, 1982, 1985(3)," several months after "the outside walls of the synagogue of the *Shaare Tefila Congregation* . . . were sprayed with red and black paint and with large anti-Semitic slogans, phrases, and symbols." *Id.* at 616.

Virginia v. Black, while a First Amendment decision, likewise did not involve the issue of standing. Rather, it addressed a state statute proscribing cross-burning with the intent to intimidate. The Court upheld the statute as constitutional because cross-burning, when intended to intimidate, was akin to "true threats" which are not protected speech. Likewise, the decision recognized that the "symbolic speech" of cross-burning is protected when it is NOT accompanied by an intent to intimidate. Appellants use *Virginia v. Black* in an attempt to bolster their citation to *Wells v. Rhodes.* They argue that the cross-burning protections recognized in *Black* extend to the cross-burning in *Wells*, but did not defeat the plaintiffs' §1982 claim and damages for their emotional distress. The problem with this argument, of course, is that the cross-burning in *Wells* was NOT within the category of protected speech recognized in *Virginia v. Black* because defendant Rhodes conceded that at least one of his purposes in burning the cross was to "intimidate an African American juvenile who lived at the residence * * * ." *Wells, supra*, 928 F.Supp. 2d at 927, fn. 8.

In an attempt to draw in other cases wherein plaintiffs have successfully sued for hurtful speech (primarily hostile work environment or defamation cases), Appellants grossly mischaracterize the state of First Amendment jurisprudence, boldly claiming, "The 1st Amendment does not have a hierarchy of degrees of constitutional acceptability. With the exception of child pornography, all speech is entitled to 1st Amendment protection, regardless of how its social value may be regarded." (R. 18, Appellant's Brief on Appeal at Page: 43) To the contrary, there is a longstanding hierarchy of constitutional protection of speech, with some forms of speech (obscenity, fighting words) receiving the least protection (or none at all), commercial speech in the middle, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507, 101 S. Ct. 2882, 2892 (1981), and "at its zenith," the First Amendment protection afforded to core political speech. *Meyer v. Grant*, 486 U.S. 414, 425, 108 S. Ct. 1886, 1894 (1988) (When a person participates in "interactive communication concerning political change," this speech "is appropriately described as 'core political speech,'" *id*. at 422, and when the government regulates such speech, its burden to justify the restriction may be "well-nigh insurmountable." *Id*. at 425.)

For this reason, among others, the "hostile working environment" or defamation cases cited by Appellants are not a good fit here. Trying to equate a Title VII claim to the claims advanced here ignores that Title VII's intent is to remedy discrimination or harassment that "affect[s] a term, condition, or privilege of employment," *Moore v.*

Kuka Welding Sys., 171 F.3d 1073, 1078 (6th Cir. 1999). Furthermore, contrary to Appellants' contention, Title VII claims in fact do yield to First Amendment protections when the claimed harassment concerns pure speech. As observed in *Rodriguez*, 605 F.3d at 710,

> Harassment law generally targets conduct, and it sweeps in speech as harassment only when consistent with the First Amendment. *See R.A.V.*, 505 U.S. at 389-90. For instance, racial insults or sexual advances directed at particular individuals in the workplace may be prohibited on the basis of their non-expressive qualities, *Saxe*, 240 F.3d at 208, as they do not "seek to disseminate a message to the general public, but to intrude upon the targeted [listener], and to do so in an especially offensive way," *Frisby v. Schultz*, 487 U.S. 474, 486, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988). *See, e.g., Flores* [*v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1133, 1135 (9th Cir. 2003)]; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60, 73, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) But Kehowski's website and emails were pure speech; they were the effective equivalent of standing on a soap box in a campus quadrangle and speaking to all within earshot. Their offensive quality was based entirely on their meaning, and not on any conduct or implicit threat of conduct that they contained.

The 11th Circuit recognized the same distinction in *Booth v. Pasco Cty.,* 757 F.3d 1198 (11th Cir. 2014), noting that "anti-retaliation laws are generally directed at conduct rather than speech." *Id*. at 1210 n.17. Likewise, in *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) then-Judge Alito wrote, "There is no categorical 'harassment' exception to the First Amendment's free speech clause." Contrasting protected speech with unprotected speech proscribed by Title VII, Judge Alito first accepted that

> government may constitutionally prohibit speech whose non-expressive qualities promote discrimination. For example, a supervisor's statement "sleep with me or you're fired" may be proscribed not on the ground of any expressive idea that the statement communicates, but rather because it facilitates the threat of discriminatory conduct. Despite the purely verbal quality of such a threat, it surely is no more "speech" for First Amendment purposes than the robber's demand "your money or your life."

However, he then distinguished such "non-expressive" speech from similar speech that communicates ideas:

> "Harassing" or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
>
> *Saxe*, 240 F.3d at 208-209.

Likewise, the category of defamation cases relied upon by Appellants are a poor fit. Defamation is premised upon the publication of false facts. *Gertz v. Robert Welch*, 418 U.S. 323, 339-40, 94 S. Ct. 2997 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.") The speech at issue in this case does not involve facts, let alone false facts—instead, it involves ideas and opinions regarding political stances on matters of public concern.

To undersigned counsel's knowledge, no published opinion has ever held that such core political speech, advancing *ideas*, could be defamatory. To the contrary, courts have been guided by the principle "that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Hustler Magazine*, 485 U.S. at 51 (quoting *Abrams v. United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting)). This is so even when the ideas and opinions expressed are not "reasoned or moderate," but rather "vehement, caustic, and sometimes unpleasantly sharp." *Hustler Magazine*, 485 U.S. at 51.

Thus, the point made by the district court—that Appellants failed to support their claim that emotional distress can confer standing in the First Amendment context present in this case—was hardly erroneous. Appellants have failed to point to a single case in which emotional distress, standing alone, has constituted a concrete and particularized injury sufficient to confer standing where that distress arises solely from the viewing or hearing of core political speech unaccompanied by unprotected conduct, expressing ideas that the viewer finds offensive. Nor has research by undersigned counsel revealed any such case. Appellants' suit was therefore correctly dismissed by the district court for failure to satisfy the injury-in-fact prong of the Article III standing analysis.

B. Redressability

Alternatively, dismissal of Appellants' suit for lack of standing would be proper on the ground that the injuries alleged by Appellants could not be redressed by the district court.

> An injury is redressable if a judicial decree can provide "prospective relief" that will "remove the harm." *Warth v. Seldin*, 422 U.S. 490, 505, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). The relevant standard is likelihood—whether it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000).
>
> *Doe v. Dewine*, 910 F.3d 842, 850 (6th Cir. 2018)

Here, Appellants would not be able to establish standing because the redress they seek could not constitutionally be granted by the district court.

In their First Amended Complaint, Appellants sought two forms of injunctive relief—a flat prohibition on the Protester Defendants' speech ("a preliminary injunction against the Protester Defendants precluding them from engaging in the picketing conduct altogether,") or alternatively, what Appellants attempt to characterize as a reasonable time, place, and manner restriction ("or, alternatively, precluding them from engaging in any aspect of their protest within 1,000 feet of the Synagogue's property line, precluding them from engaging in such conduct between the hours of 9:00 A.M. and 12:00 P.M. on any Saturday, and on any Jewish holiday while services are being conducted in the Synagogue, limiting the

number of protesters to not exceed five protesters at any given time; and precluding them from placing any signs or placards on the grass section adjacent to the sidewalk in front of the Synagogue, or on the grass section across from the Synagogue on Washtenaw Ave.") (Amended Complaint, RE 11, Page ID.253-54)

On appeal, Appellants appear to have abandoned their request for the blanket ban upon the Protester Defendants' speech, perhaps finally recognizing just how breathtakingly overbroad and blatantly unconstitutional such relief would be. But the alternative injunctive relief they sought in the district court and continue to press here—a viewpoint- and content-based, judicially created time, place, and manner restriction—is likewise unconstitutional and could not be properly granted by the district court.

Time, place, and manner restrictions are generally a creation of the legislature; Courts have extremely limited authority to fashion time, place, and manner restrictions upon speech via injunction or otherwise. Indeed, the Supreme Court, in *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 114 S. Ct. 2516 (1994), reinforced this point: "Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree." *Id*. at 764 (citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633, 97 L. Ed. 1303, 73 S. Ct. 894 (1953)) In *Madsen*, the state court had entered an order enjoining anti-abortion

protesters "from blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic." *Madsen*, 512 U.S. at 758. When the protesters violated that decree, by continuing to impede access, the court broadened the injunction, effectively creating a time, place, and manner restriction—not due to the protesters' speech, but because of their conduct, which violated the prior decree. *Id*. at 758-59. In considering the constitutionality of the injunction, the *Madsen* court laid out an analytical framework that distinguishes between time, place, and manner *restrictions* (which are legislatively enacted) and time, place, and manner *injunctions* (which are judicially created).

1. Content-neutral time, place, and manner restrictions: Intermediate scrutiny

The threshold determination in any free-speech analysis is the type of forum in which the speech in question is taking place. Public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered to be "public forums." *See Perry Education Assn. v. Perry Local Educators' Assn*., 460 U.S. 37, 45 (1983); *Carey v. Brown,* 447 U.S. 455, 460, 100 S. Ct. 2286 (1980*)*; *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Hague v. CIO*, 307 U.S. 496, 515 (1939). In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations

only so long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Assn., supra*, at 45. *See*, *e.g., Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 654 (1981); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Cox v. Louisiana*, 379 U.S. 559 (1965) (*Cox II*). This is the lowest level of scrutiny for any governmental restriction on protected speech in a public forum, but even so, it is much more stringent than rational-basis review, reflecting the value placed on First Amendment activities in traditional public fora.

2. Content-based time, place, and manner restrictions: Strict scrutiny

A still higher bar is placed on restrictions that discriminate on the basis of content of the restricted speech. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). A content-based restriction is presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992); *see also, City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) ("This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.").

Generally, content-based restrictions on speech "can stand only if they satisfy strict scrutiny." *Reed v Town of Gilbert*, 576 US 155, 171; 135 S Ct 2218; 192 L Ed 2d 236 (2015). *Planet Aid v. City of St. Johns*, 782 F.3d 318, 326 (6th Cir. 2015) (alterations omitted) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000)). Therefore, legislatively enacted content-based regulation of protected speech will be upheld only where the State demonstrates that the limitation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Perry Educ. Ass'n*, 460 U.S. at 45. And, as noted above, the burden of justifying such a limitation when it comes to core political speech may be "well nigh insurmountable." *Meyer*, *supra*, 486 U.S. at 425.

3. Content-neutral time, place, and manner injunctions: Heightened scrutiny

Legislatively enacted time, place and manner restrictions are one thing, but when the restraint on speech is by way of an *injunction*, "we think that our standard time, place, and manner analysis is not sufficiently rigorous." *Madsen*, 512 U.S. at 765. In the context of a content-neutral injunction, then, the court "must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id*. (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916; 102 S. Ct. 3409 (1982) for the

proposition "when sanctionable conduct occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded.")

4. Content-based time, place, and manner injunctions: ???

Undersigned counsel have been unable to locate an opinion analyzing a content-based injunction on speech. It may well be that the courts, cognizant of the perils of such action, have properly avoided it. As the Supreme Court has cautioned, "Injunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances. 'There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.'" *Madsen*, 512 U.S. at 764 (quoting *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-113, 93 L. Ed. 533, 69 S. Ct. 463 (1949)).

In any event, *Madsen* makes clear that a content-neutral injunction is subject to more rigorous scrutiny than a content-neutral legislative restriction. It follows that a content-based injunction, if permissible at all, should face more rigorous scrutiny than a content-based legislative restriction. Regardless, whatever is the proper analysis for a content-based injunction, it could not be less exacting than strict scrutiny.

5. The relief sought by Appellants

Appellants seek injunctive relief, absent any statute or ordinance that creates the time-place-manner protections they seek. They cite no jurisprudence that supports a

court fashioning such relief, regulating core political speech in a traditional public forum, absent other violation of law. *Madsen* is distinguishable, because there the lower court was faced with protesters who were violating an already-existing injunction regulating conduct that was harassing and impeded access to a women's health clinic; that court merely was enforcing its prior order against further violations. Here, there is no suggestion that the Protester Defendants block or otherwise impede congregants from attending services, nor have they violated any previously imposed lawful restrictions, a point on which City authorities agree.

Frisby v. Schultz, 487 U.S. 474 (1988), another case relied upon by Appellants for the contention that the district court could have fashioned injunctive relief out of whole cloth, likewise is distinguishable. In fact, this Circuit already has rejected this argument. *Frisby* upheld the constitutionality of a statute regulating the time, place and manner of targeted picketing of a residence. In *Dean v. Byerly*, 345 F.3d 540, 551 (6th Cir. 2004), the plaintiff, relying on *Frisby,* sought an injunction against the picketing of his home even though there was no statute or ordinance regulating such picketing in that case. This Court rejected the argument, observing that *Frisby* did not abrogate the protected right to use streets for speech. Rather, this Court held, "Although the government may restrict that right through appropriate regulations [under *Frisby*], that right remains unfettered unless and until the government passes

such regulations." None exist here, and Plaintiffs have cited no authority for a court on its own to restrict otherwise protected speech in a public right of way.

Even if a court theoretically could issue injunctive relief in this setting, the relief sought by Appellants would not survive First Amendment scrutiny. Under *Madsen*, the only potential analyses that could apply are heightened scrutiny (if the relief sought were content-neutral) or at least strict scrutiny (if the relief sought were content-based).

Here, the Protester Defendants engage in core political speech. The injunctive relief sought by Appellants is expressly content-based, and at least inferentially viewpoint-based, to quash that core political speech. Appellants do not seek to enjoin all First Amendment activity, all protesting and picketing, or even just all political speech. Instead, they asked the district court to silence only the Protester Defendants' messages, which are critical of the State of Israel. Picketing in support of Israel, for instance, along with any other messages not offensive to the Plaintiffs, could continue unabated under the injunction sought.[6]

[6] This is not merely a hypothetical observation; media accounts indicate that pro-Israel picketing in fact occurs contemporaneously with the Protester Defendants' speech. *See* https://www.mlive.com/news/ann-arbor/2020/01/bitter-conflict-breeds-unlikely-friendships-in-ann-arbor-synagogue-protests.htm. Counsel recognizes that a 12(b)(6) motion tests the sufficiency of the pleadings alone, and offers this citation only to illustrate the point that Appellants' sought-after remedy is not content neutral.

Such suppression targeting a particular viewpoint has long been considered constitutionally problematic. The Supreme Court has

> implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious. If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Viewpoint discrimination is censorship in its purest form, and requires particular scrutiny. . . . [I]n general, viewpoint-based restrictions on expression require greater scrutiny than subject-matter-based restrictions.

R.A.V. v. St. Paul, 505 U.S. 377, 430-31, 112 S. Ct. 2538, 2568-69 (1992) (cleaned up).

Appellants' sought-after remedy being content-based, it would require strict scrutiny if it was before the court in the form of a statute or ordinance, already a standard so rigorous that the Supreme Court has expressed doubt it ever can be met. *Meyer*, 486 U.S. at 425. And because the relief sought is injunctive, *Madsen* suggests that it requires a review even more rigorous. And then, because it is also viewpoint-based, it requires "even greater scrutiny" than it would if merely content-based. Taken altogether, it is inconceivable that the district judge could have awarded the relief sought by Appellants, even if they had sufficiently alleged a "concrete injury" to establish standing. Appellants' requested relief, a blanket ban on the Protester Defendants' speech or alternatively, a time, place, and manner injunction targeting

both content and viewpoint, could not survive strict scrutiny, let alone something more exacting.

Appellants have not and cannot articulate a compelling state interest sufficient to justify the silencing of one point of view on political issues of public concern. A vast and established body of First Amendment jurisprudence makes clear that avoiding having to view an offensive message is nowhere near a compelling state interest. *See Bible Believers v. Wayne Cty.,* 805 F.3d 228, 243-48 (6th Cir. 2015) (discussing at length the problems inherent in silencing a point of view on the ground that the audience is offended and concluding, "A review of Supreme Court precedent firmly establishes that the First Amendment does not countenance a heckler's veto.")

Nor is the relief sought by Appellants narrowly tailored. The 1,000-foot buffer zone sought by Appellants goes far beyond the much smaller zones that courts have struck down as failing to satisfy the narrow tailoring required under strict scrutiny. *See, e.g., Madsen*, *supra* (300-foot buffer zone unconstitutional); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004) (500-foot buffer zone struck down as unconstitutional); *Kirkeby v. Furness*, 92 F.3d 655, 660 (8th Cir. 1996) (200-foot buffer zone "too large").

Even assuming, for the sake of argument, that the requested injunctive relief could be construed as content-neutral, it would still fail heightened scrutiny. No significant governmental interest is served by prohibiting only the Protester

Defendants from expressing their protected political speech to their intended audience. Nor can it be said that the relief sought "burdens no more speech than necessary." The geographic reach alone makes that clear, as do the requested restrictions on the number of Protesters at any time and the blanket prohibition against placing signs in the grass sections adjacent to the sidewalk.

In the end, contrary to Appellants' claims, it was not error for the district court to consider whether the Protester Defendants' speech was protected under the First Amendment for purposes of the standing analysis, because that question cannot be divorced from the threshold standing inquiries regarding injury-in-fact, traceability, and redressability. Even if, for the sake of argument, the district court erred in dismissing on the injury-in-fact prong, the fact remains that the injury alleged could not be redressed by the trial court because the injunctive relief sought would be unconstitutional. The district court's order dismissing Appellants' claims for lack of standing must therefore be upheld, whether for a lack of concrete injury, as the district court held, or alternatively, for lack of redressability.

II. ALTERNATIVELY, DISMISSAL WOULD HAVE BEEN WARRANTED FOR FAILURE TO STATE A CLAIM

The PDs' speech, as alleged by Appellants, is protected under the First Amendment, as affirmed by a long line of well-settled Supreme Court and Sixth Circuit precedent. Notably, Appellants practically admitted that there is no legal

precedent to the contrary, but asserted a unique "convergence of all of the above factors," including especially the 16 years of repetition of "deliberately harassing and insulting conduct," to argue for an expansion of the Free Exercise clause that would swallow up the free speech and assembly clauses of the First Amendment. [RE 11, end of para. 83, PageID#247]

It is black-letter constitutional law that "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,'" *Meyer v. Grant*, 486 U.S. at 421 (quoting *Roth v. United States*, 354 U.S. 476, 484, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957)), and that "political speech [is] at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. at 365.

Speech that addresses "matters of public concern . . . fairly considered as relating to any matter of political, social, or other concern to the community," is entitled, perhaps even specially entitled, to "special protection" under the First Amendment. *Snyder v. Phelps*, 562 U.S. at 459-60. *See also, Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017); *Doe v. McKesson*, 945 F.3d 818, 840-41 (5th Cir. 2019); *Davison v. Randall*, 912 F.3d 666, 693 (4th Cir. 2019). The PDs' signs, even as selectively represented by Appellants, are clearly political advocacy in opposition to the policies of the Israeli government toward the Palestinian people and the support of the U.S. government for said policies. This is particularly so if one accepts Appellants' premise

that Defendants' views on Israeli policy toward Palestine are in the minority of American thought. *Bible Believers v. Wayne Cty*, 805 F.3d 228, 243-244 (6th Cir. 2015) (*en banc*):

> 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. The protection would be unnecessary if it only served to safeguard the majority views. In fact, it is the minority view, including expressive behavior that is deemed distasteful and highly offensive to the vast majority of people that most often needs protection under the First Amendment. (Citations omitted.)

Appellants alleged that the PDs' activity violates a variety of civil rights statutes and/or that they conspired with one another and/or the City to violate same. However, Appellants have not cited a single case holding that 1st Amendment protected speech activity in a traditional public forum can be a violation of any of the civil rights acts.

1. Count I: 42 U.S.C. §1981

42 U.S.C. §1981 secures to all races the rights "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens …." The PDs do not dispute that Jews have been held to qualify as a race for purposes of the Federal civil rights statutes, nor that private conduct may be actionable where there is racially motivated interference with the making or enforcing of contracts or the full and equal benefit of laws for the security of persons and property.

Although not stated explicitly, it appears that Appellants rely on the latter for their claim, which must be reviewed under the following standard:

> The "security of persons and property" language limits the potential class of cases that may be brought under the equal benefit provision. A litigant must demonstrate the denial of the benefit of a law or proceeding **protecting his or her personal security or a cognizable property right**.
>
> *Chapman v. Higbee Co.*, 319 F.3d 825, 832-33 (6th Cir. 2003) (emphasis added)

Appellants do not identify any laws or proceedings for the security of persons or property which they are allegedly being intentionally denied the benefit of based on their Jewish ethnicity. Plaintiffs argued that it is "self-evident based on . . . the protesters' signs, that the protesters have targeted the members of the synagogue based on the fact that they are Jewish." [RE 11 para. 88, PageID#248] Even if that were true, they implicate no law or proceeding for the security of persons or property which has been violated.

Appellants therefore failed to state a §1981 claim against the PDs.

2. Count II: 42 U.S.C. §1982

42 U.S.C. §1982 states:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

In very limited circumstances the right to "hold" property has been construed to

mean the "use" of property not owned by the person in question. *United States v. Brown*, 49 F.3d 1162, 1167 (6th Cir. 1995) (citing with approval *United States v. Greer*, 939 F.2d 1076 (5th Cir. 1991). However, the acts of intimidation found in those cases to interfere with the "holding" of the synagogue property sufficient to constitute a §1982 violation were of an entirely different magnitude. Further, the allegedly intimidating activity was not protected speech, nor was it occurring on public property. Rather those cases involved criminal conduct including entering onto and physically damaging the property used by Jews for their religious services. *Brown* (drive-by shooting of a synagogue previously defaced with swastikas); *Greer* (criminal defacement and destruction of synagogue property that was racially motivated); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974) (complete bar to the use of a private club pool by black guests of white members).

The PDs' speech activity is constitutionally protected, and the sharing of their political views with the congregants and the thousands traveling Washtenaw Ave. during their picketing does not obstruct or interfere with Appellants' ability or capacity to "use" the Synagogue. Appellants have provided no viable argument for extending the §1982 cases cited to cover constitutionally protected speech on adjacent public property as "interference" with the right of the Appellants to hold property.

3. Count III: Conspiracy Between PDs and with City Defendants to violate §1982

> A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. . . . All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.
>
> *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir.1985)

The claim that the PDs conspired with each other fails first because Appellants have failed to state a claim that the PDs violated 42 U.S.C. §1982. Second, there is no allegation that the PDs knew their protest activities were unlawful or that they intended to violate any law. To the contrary, Appellants admit that City authorities told the PDs on multiple occasions that their protest activity was legal and "in absolute compliance." [Amended Complaint, RE 11, Para. 38 at PageID#224-225]

The claim that the PDs conspired with the City Defendants to violate 42 USC §1982 likewise fails. "It 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." *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987). *See also Hampton v. Hanrahan,* 600 F.2d 600, 620-21 (7th Cir.1979). There is nothing alleged, circumstantial or otherwise, to

suggest that the PDs formed any agreement with the City Defendants for the latter to not enforce City ordinances against them.[7]

4. Count V: 42 U.S.C. §1983 violation by PDs

42 U.S.C. §1983 provides a cause of action **against state actors** who personally deprive an individual of the "rights, privileges, or immunities secured by the Constitution." Appellants failed to articulate in this count any constitutional provision they claim has been violated. Presumably they refer to their right to free exercise of religion but, as previously noted, the PDs' exercise of protected speech does not obstruct Appellant's access to the synagogue let alone "deprive" them of their right to worship there. Moreover, as also discussed above, only governmental entities are prohibited by the First Amendment from interfering with their free exercise. The claim fails against the PDs, who are private individuals.

To avoid this outcome, Appellants asserted that PDs are cloaked with the color of law as state actors by virtue of the fact that City Defendants did not enforce its sign ordinance to remove the PDs' signs. However, the ordinance, by its own terms, does not reach protected speech, and even if the PDs' signs were not protected speech, mere regulation of private conduct (here the existence of the sign ordinances), even if extensive, is insufficient to support a finding of state action on the part of the private actors. To find state action, the state must participate in, order, coerce, or significantly

[7] The sign ordinance specifically precludes enforcement that would impinge on

encourage the contested activity. *American Mfrs. Mut Ins. Co. v. Sullivan*, 526 U.S. 40 (1999); *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522 (1987); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978). "There is no state action by private individuals unless the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004-05.

The sole case cited by Appellants in Count V to support the claim that the PDs are state actors, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), was decided by the Warren Court, which took an expansive view of state action in furtherance of its goal of eradicating societal racial discrimination. Although it has not been directly overruled, the Burger, Rehnquist and Roberts Courts reversed this trend so severely that, as early as 1979, one authority concluded that state action was "the clearest area of conservatism on the part of the Burger Court and the most unqualified reversal of position from that adhered to by the" Warren Court. *J. Choper, Y. Kamisar & L. Tribe, The Supreme Court: Trends and Developments 1978-1979* at 265. (National Practice Institute 1979).

The more restrictive approach was announced in the Court's 1982 decisions in

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First Amendment protected speech.

Rendell-Baker v. Kohn, supra, and *Blum v. Yaretsky, supra,* which found that the private party was not engaged in state action despite extensive government involvement. It is highly unlikely that *Burton v. Wilmington* would be decided the same way today. *See, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, *supra* (explaining that "*Burton* was one of our early cases dealing with 'state action' under the Fourteenth Amendment, and later cases have refined the vague 'joint participation' test embodied in that case").

Appellants' FAC does not even come close to asserting facts that cloak the PDs with the color of law and this claim too must fail.

5. Count VI: Conspiracy Between the Protesters and With the City Defendants to Violate 42 U.S.C. §1983

In the previous section, counsel explains why PDs' do not violate 42 U.S.C. §1983. Thus, they cannot be found to have conspired together to violate the Plaintiffs' right to free exercise of religion under §1983.

Nor, for the same reasons as explained in the discussion of Count III, above, is there any support for Plaintiffs' legal conclusion that the PDs conspired with the City Defendants to violate §1983. Thus, *Burkhardt v. United States*, 13 F.2d 841 (6th Cir. 1926) is inapplicable.

Appellants' FAC failed to factually support their claims of conspiracy among the PDs or between the PDs and the City Defendants.

6. Count VII: Violation of 42 U.S.C. §1985(3)

The elements of a section 1985(3) action are: "(1) 'two or more persons . . . conspire[d]' (2) 'for the purpose of depriving . . . [the claimant] of the equal protection of the laws' due to racial or class-based animus and that the conspirators (3) committed an act 'in furtherance of the object of such conspiracy' (4) that 'injured' the claimant." *Maxwell v. Dodd*, 662 F.3d 418, 422 (6th Cir. 2011) (quoting 42 U.S.C. §1985(3) and citing *United Bhd. Of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 828-29, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983)

The facts alleged do not support that PDs conspired against Appellants in violation of 42 U.S.C. §1985(3).

Absent state action, a §1985(3) claim of conspiracy by private parties to violate the rights protected by the First Amendment does not lie. In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278, 113 S. Ct. 753 (1993), the Supreme Court said:

> In *Carpenters*, we rejected a claim that an alleged private conspiracy to infringe First Amendment rights violated §1985(3). The statute does not apply, we said, to private conspiracies that are "aimed at a right that is by definition a right only against state interference," but applies only to such conspiracies as are "aimed at interfering with rights . . . protected against private, as well as official, encroachment." 463 U.S. at 833. There are few such rights (we have hitherto recognized only the Thirteenth Amendment right to be free from involuntary servitude, *United States v. Kozminski*, 487 U.S. 931, 942, 101 L. Ed. 2d 788, 108 S. Ct. 2751 (1988), and, in the same Thirteenth Amendment context, the right

> of interstate travel, see *United States v. Guest*, 383 U.S. at 759, n. 17 (1966)).

Bray's discussion of the limited scope of "protected rights" under 1985(3) precludes Appellants' claim under that statute of private interference with their free exercise of religion.

Under *Bray*, this leaves Appellants' §1985(3) claim for interference with their right to intra-state travel. Whether the recognized right to interstate travel extends to intra-state travel has not been addressed by the Supreme Court. The cases cited by Plaintiffs do not support any such application specifically to a claim under §1985(3). Rather, in *Volunteer Med. Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 226-28 (6th Cir. 1991) this circuit affirmed the dismissal of a §1985(3) claim alleging conspiracy by abortion clinic blockers to impede the interstate travel of the clinic's patients because none of the patients were alleged to have traveled from outside the state in which the clinic was located.

Even if a §1985(3) conspiracy claim alleging violation of the right to intra-state travel is actionable, it would not be applicable here. Appellants allege only that the PDs' speech activity decreases their willingness to travel from their home to the Synagogue, because they don't wish to see the PDs' signs. Appellants do not allege any actual impedance or obstruction by the PDs which prevents Appellants from traveling. The cases cited by Appellants in their FAC—*Spencer v. Casavilla, Griffin*

v. Breckenridge, 403 U.S. 88 (1971), and *Bray v. Alexandria Women's Health Clinic*, *supra*, are readily distinguishable—each of them involved an actual violent or other physical impedance of a person's ability to travel and are inapposite.

Plaintiffs' FAC fails to allege the elements of a §1985(3) claim.

7. Count VIII: Conspiracy Between PDs and With the City Defendants to Violate 42 U.S.C. §1985(3)

On its face, this one-paragraph Count does not allege any conspiracy among the Defendants. It alleges only that by not enforcing the sign ordinances the City Defendants conspired with the PDs to do something unspecified in violation of §1985(3). Presumably, though not stated, they refer to the PDs' alleged conspiracy to interfere with their right to travel set forth in the prior Count. For the same reasons as explained above, the FAC fails to state a conspiracy claim in this regard.

In addition, the City Defendants' alleged lack of enforcement of the sign ordinances is not the sort of state action that supports a conspiracy to interfere with the Appellants' free exercise of religion. Failing, or more correctly stated, properly choosing not to enforce the sign ordinances[8], does not rise to the level of state action that could make the PDs' alleged conspiracy to interfere with the Plaintiffs' right to free exercise of religion actionable under §1985(3), since there is no allegation that the

[8] Appellants' argument regarding the "failure" or "refusal" of the City to enforce the ordinance against the PDs ignores Section 5.24.1A's express carve-out for protected

sign ordinance was enacted to protect free exercise of religion.

Carpenters concluded "that an alleged conspiracy to infringe First Amendment rights is not a violation of §1985(3) unless it is proved that the State is involved in the conspiracy." 463 U.S. at 830-31. This is a high bar. The Sixth Circuit held in *Volunteer Med. Clinic*, *supra*, that the assertion that defendants had "greatly interfered and hindered the local police authority's ability to secure equal access to medical treatment for women who choose abortion[,]" did not render the defendants state actors for purpose of 1985(3), even though the intent of the private actor defendants was, at least in part, to overwhelm the ability of the police to protect the ability of patients to enter the clinic.

Here, the Appellants' allegations do not even rise to the level deemed insufficient in *Volunteer Med. Clinic*. Instead, the Appellants merely allege that the PDs were engaged in protest speech and that the City Defendants declined to shut down those protests (which action would have been contrary to the carve-out in the ordinance itself for protected First Amendment activity and would have violated the PDs' First Amendment rights). These allegations are insufficient to state a viable §1985(3) claim.

First Amendment speech. The City's so-called "failure" is therefore no failure at all. The City is following the ordinance as written.

III. ASSUMING THAT ANY PORTION OF APPELLANTS' CLAIMS WERE TO BE REMANDED TO THE LOWER COURT, APPELLANTS' REQUEST TO REASSIGN THE MATTER TO A DIFFERENT DISTRICT COURT JUDGE IS IMPROPER AND WITHOUT MERIT.

Appellants have asked this Court to reassign the case to a different judge on remand, pursuant to 28 U.S.C. §455. Assuming, *arguendo*, that there was anything to be remanded, Appellants' request amounts to a motion for recusal and is improper where no motion to recuse was ever filed in the trial court. Recusal pursuant to 28 USC §455(a) must be first be raised by motion in the trial court; otherwise it is deemed waived:

> Recusal arguments such as this one, based on 28 U.S.C. §455(a), which are not brought before the district court, are deemed waived. There is Sixth Circuit precedent directly on point addressing this issue. "Unless exceptional circumstances exist, this Court normally will decline to address an issue not raised in the district court. This general rule bars an appellate court from considering a recusal issue that was not initially raised in the trial court." *Callihan v. Kentucky*, 36 Fed. Appx. 551, 552 (6th Cir. 2002) (internal citation omitted); *see also In re Eagle-Picher Industries, Inc.*, 963 F.2d 855, 863 (6th Cir. 1992) (relying on the "general rule . . . that appellate courts are not to address issues not raised for the first time in the trial court" to conclude that it was appropriate to "decline to consider the issue of recusal because it was not raised in the bankruptcy court"); *Cook v. Cleveland State University*, 13 Fed. Appx. 320, 322 (6th Cir. 2001) ("Th[e] general rule bars an appellate court from considering a recusal issue that was not initially raised in the trial court.").
>
> *Grider Drugs, LLC v. Express Scripts, Inc.*, 500 F. App'x 402, 406-07 (6th Cir. 2012)

This is not a novel concept, whether generally or in the specific context of recusal (or as Appellants reframe it here, "reassignment") of a judge. Time and again, this Circuit has held that the trial judge must first have the opportunity to consider a party's accusations of bias:

> *Callihan*'s argument that the district court should have recused itself because of bias against him is not properly before this Court. A review of the record and docket sheet shows that Callihan never filed an affidavit accusing the district judge of bias and seeking his recusal. Unless exceptional circumstances exist, this Court normally will decline to address an issue not first raised in the district court. *Enertech Elec., Inc. v. Mahoning County Comm'rs,* 85 F.3d 257, 261 (6th Cir. 1996). This general rule bars an appellate court from considering a recusal issue that was not initially raised in the trial court. *In re Eagle-Picher Indus., Inc.,* 963 F.2d 855, 862-63 (6th Cir. 1992). As no exceptional circumstances exist in this case, this Court should decline to consider Callihan's argument that the district court was biased against him.
>
> *Callihan v. Kentucky*, 36 F. App'x 551, 552 (6th Cir. 2002)

The two cases above accord completely with a sizable body of cases in this Circuit and elsewhere holding, "A recusal motion is committed to the sound discretion of the district judge, and on appeal we ask only whether he has abused his discretion." *In re M. Ibrahim Khan, P.S.C.*, 751 F.2d 162, 165 (6th Cir. 1984) (quoting *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1021 (5th Cir. 1981); *see also Bell v. Johnson*, 404 F.3d 997, 1005 n.8 (6th Cir. 2005) (stating "we do not require that the case be transferred to another judge to determine the legal sufficiency of the affidavits" for disqualification); *Green v.*

Nevers, 111 F.3d 1295, 1303-04 (6th Cir. 1997) ("§§144 and 455 are to be read *in pari materia*, *Easley v. University of Michigan Board of Regents*, 853 F.2d 1351, 1355 (6th Cir. 1988), and . . . motions brought under both sections are entrusted to the sound discretion of the trial court"); *United States v. Hatchett*, No. 92-1065, 1992 U.S. App. LEXIS 27169, at *8 (6th Cir. Oct. 15, 1992); *Khan v. Yusufji (In Re Khan)*, 751 F.2d 162, 165 (6th Cir. 1984) (quotation and citation omitted) (stating "[a] recusal motion is committed to the sound discretion of the district judge" assigned to the case); *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988); *United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1986) ("We have held repeatedly that the challenged judge himself should rule on the legal sufficiency of a recusal motion in the first instance."); *United States v. Harrelson*, 754 F.2d 1153, 1165 (5th Cir. 1985); *United States v. Kwame*, No. 10-20403, 2019 U.S. Dist. LEXIS 85768, at *13 (E.D. Mich. May 22, 2019) ("it is proper for the challenged judge to rule on a motion to disqualify," citing *Hatchett, supra*); *Merriweather v. Hoffner*, No. 99-cv-75306, 2017 U.S. Dist. LEXIS 5246, at *2-3 (E.D. Mich. Jan. 13, 2017); *Lim v. Terumo Corp.*, No. 11-cv-12983, 2014 U.S. Dist. LEXIS 48881, at *6-8 (E.D. Mich. Apr. 9, 2014); *United States v. Greene*, No. 4:05-cr-15, 2013 U.S. Dist. LEXIS 140150, at *83-84 (E.D. Tenn. Sep. 30, 2013) ("Motions to disqualify under 28 U.S.C. §§144 and 455 are entrusted in the first instance to the sound discretion of the presiding judge."); *Duke v. Pfizer, Inc.*, 668 F. Supp. 1031, 1034-35 (E.D. Mich. 1987)

(quoting *United States v. Mitchell*, 377 F. Supp. 1312, 1315 (D.D.C. 1974)) ("A judge challenged under these [recusal] statutes ought to be willing to shoulder the responsibility of ruling in the matter . . . . If the judge errs in his determination, the proper remedy is in appellate review.")

Appellants never filed a motion for recusal or affidavits in the trial court. Therefore, they have waived the issue on appeal and in the event that this Court finds any issue to remand to the trial court, Appellants' request for "reassignment" must be denied.

But even if Appellants didn't waive the recusal issue by failing to raise it in the trial court, their argument fails on the merits. Appellants' primary quarrel is with the trial court's rulings. But "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555-56, 114 S. Ct. 1147, 1157 (1994) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S. Ct. 1698 (1966)). This is because a party moving for recusal must show bias or partiality based either upon (1) a judge's reliance upon an extrajudicial source; or (2) such a high degree of favoritism or antagonism as to make fair judgment impossible. *Id*.

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course

> of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Id. at 555.

Likewise, a party's subjective perception of bias is not a basis for recusal. *See Burley v. Gagacki*, 834 F.3d 606, 615-16 (6th Cir. 2016). "*Not* establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration -- even a stern and short-tempered judge's ordinary efforts at courtroom administration -- remain immune." *Liteky*, 510 U.S. at 556.

Here, the substance of Appellants' waived recusal argument can be distilled down to a subjective perception of bias, based upon unfavorable judicial rulings and the judge's exercise of courtroom and docket administration. Thus, even if Appellants had not waived their argument for recusal by failing to raise it below, they have failed to show proper grounds for recusal on the merits.

CONCLUSION

The district court's decision should be upheld for lack of standing or alternatively this Court can dismiss for failure to state a claim and the district court cannot be disqualified from further proceedings.

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CERTIFICATE OF COMPLIANCE

I certify that this brief is in compliance with F.R.A.P 32(a)(7)(C) and contains 12,812 words, excluding the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation, the Designation of the Contents of the Joint Appendix and this Certificate.

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This is to certify that a copy of the ***foregoing brief with Corrected Addendum*** was served upon all counsel of record via electronically this 12th day of January, 2021.

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ADDENEDUM

CORRECTED DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE#	Description	Page ID #
1	COMPLAINT	1-155
11	AMENDED COMPLAINT	210-377 220-221, 224-225, 247-248, 253-254,
11-7	Plaintiff's Exhibit 6, Unified Development Code	352
36	Amicus Curiae BRIEF by American Civil Liberties Union of Michigan	977-1008
45	CORRECTED MOTION to Dismiss by Protester Defendants by Gloria Harb, Henry Herskovitz, Jewish Witnesses for Peace and Friends, Rudy List, Chris Mark, Tom Saffold. (Heenan, Cynthia) (Entered: 03/26/2020)	1108-1147
57	REPLY to Response re 45 MOTION to Dismiss by Protester Defendants filed by Gloria Harb, Henry Herskovitz, Jewish Witnesses for Peace and Friends, Rudy List, Chris Mark, Tom Saffold.	1859-1871
61	ADDENDUM re 45 MOTION to Dismiss by Protester Defendants Supplemental Memorandum to Correct Citations in Corrected Motion to Dismiss (ECF No. 45)	1881-1884
66	ORDER Granting Defendants' 32 and 45 Motions to Dismiss. Signed by District Judge Victoria A. Roberts. (LVer) (Entered: 08/19/2020)	1896-1906
70	NOTICE OF APPEAL by All Plaintiffs	1982-1983
73	MOTION for Attorney Fees Pursuant to 42 U.S.C. §1983, MOTION for Sanctions Pursuant to 28 U.S.C. §1927 by Gloria Harb, Henry Herskovitz, Rudy List, Chris Mark, Tom Saffold.	1991-2072, 2003-2007