

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Marvin Gerber v. Henry Herskovitz

No. No. 20-1870, United States Court of Appeals for the Sixth Circuit (September 15, 2021)

SUMMARY

Congregants of a synagogue sued anti-Israel protesters and the city after weekly picketing outside their services. The Sixth Circuit held that the congregants had Article III standing based on allegations of extreme emotional distress from targeted, long-running protests, but affirmed dismissal on the merits because the nonviolent protests on public sidewalks addressed matters of public concern and were fully protected by the First Amendment. The court rejected claims under the First and Fourteenth Amendments, RFRA, RLUIPA, and various civil rights statutes (42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986), finding no legally protected interest in being free from offensive speech and no viable conspiracy or right-to-petition claim. The concurrence would have dismissed for lack of standing, arguing that emotional distress from speech on public matters does not invade a legally protected interest.

CASE DETAILS

COURT	United States Court of Appeals for the Sixth Circuit
WRITING FOR THE COURT	Sutton; Clay; McKeague
JURISDICTION	Federal
DECIDED	September 15, 2021
DOCKET	No. 20-1870
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the United States District Court for the Eastern District of Michigan at Detroit, Judge Victoria A. Roberts. The district court granted defendants' motions to dismiss for lack of standing under Rule 12(b)(1) and declined supplemental jurisdiction over state claims.
STANDARD OF REVIEW	De novo
PRECEDENTIAL VALUE	Published

PARTIES

Marvin Gerber and Miriam Brysk v. Henry Herskovitz, Gloria Harb, Tom Saffold, Ruby List, Chris Mark, Deir Yassin Remembered, Inc., Jewish Witnesses for Peace and Friends, City of Ann Arbor, Michigan, Christopher M. Taylor, Derek Delacourt, Stephen K. Postema, and Kristen D. Larcom

TOPICS

free speech first amendment free exercise clause subject matter jurisdiction civil procedure
appellate procedure injunctions

PRACTICE AREAS

Civil Rights Constitutional Law Appellate Procedure Standing

QUESTIONS PRESENTED

1. Whether the plaintiffs have Article III standing to sue based on allegations of emotional distress from the protests.
2. Whether the plaintiffs' federal claims for relief under the First Amendment, substantive due process, religious liberty statutes (RFRA and RLUIPA), and civil rights statutes (42 U.S.C. §§ 1981, 1982, 1983, 1985(3), 1986) can survive a motion to dismiss on the merits.

HOLDINGS

1. The plaintiffs have standing because emotional distress is a concrete and particularized injury in fact that has traditionally provided a basis for a lawsuit.
2. The plaintiffs' claims fail on the merits because the First Amendment protects the protesters' nonviolent speech on matters of public concern in a traditional public forum.

KEY QUOTATIONS

"All in all, the congregants have standing to sue because they have credibly pleaded an injury—extreme emotional distress—that has stamped a plaintiff's ticket into court for centuries." (at 5)

"Sidewalks are traditional public fora, meaning they 'occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate.'" (at 8)

"It is usually '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.'" (at 9)

"The First Amendment simply does not countenance this scenario." (at 23)

FACTUAL BACKGROUND

Every Saturday morning since September 2003, a group of protesters has picketed the Beth Israel Synagogue in Ann Arbor, Michigan. The protesters display signs with inflammatory messages such as 'Resist Jewish Power,'

'Jewish Power Corrupts,' 'Stop Funding Israel,' 'End the Palestinian Holocaust,' and 'No More Holocaust Movies.' The protests coincide with the arrival of congregants for their Saturday morning worship service. The congregants, including Marvin Gerber and Miriam Brysk, experience extreme emotional distress from the signs. Gerber sometimes forgoes attending services or visits a different synagogue. Dr. Brysk, a Holocaust survivor, feels extreme emotional distress. The protesters have never blocked entry to the synagogue, trespassed, or disrupted services. The city has not enforced its sign ordinance against the protesters.

PROCEDURAL HISTORY

The plaintiffs filed a lawsuit in federal court against protesters and the city, alleging that the protests and the city's failure to enforce a sign ordinance violated various federal laws and their constitutional rights. The district court dismissed the complaint for lack of standing, holding that the plaintiffs' emotional distress did not constitute a concrete injury. The court also declined to exercise supplemental jurisdiction over state law claims. The plaintiffs appealed.

DISPOSITION

affirmed

CASES CITED

- Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992)
- Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016)
- TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021)
- Carey v. Piphus, 435 U.S. 247 (1978)
- Snyder v. Phelps, 562 U.S. 443 (2011)
- McCullen v. Coakley, 573 U.S. 464 (2014)
- Bible Believers v. Wayne County, 805 F.3d 228 (6th Cir. 2015) (en banc)
- Frisby v. Schultz, 487 U.S. 474 (1988)
- Madsen v. Women's Health Center, 512 U.S. 753 (1994)
- Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)
- CHKRS, LLC v. City of Dublin, 984 F.3d 483 (6th Cir. 2021)
- County of Sacramento v. Lewis, 523 U.S. 833 (1998)
- City of Boerne v. Flores, 521 U.S. 507 (1997)
- DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989)
- Lewis v. Casey, 518 U.S. 343 (1996)