Case No. 21-3749

UNITED STATE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARCUS TODD,

Plaintiff – Appellant

v.

AFSCME, COUNCIL 5,

Defendants - Appellee

On Appeal from the United States District Court of Minnesota, No. 21-cv-00637

BRIEF *AMICUS CURIAE* OF FREEDOM FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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Pursuant to F.R.A.P. 26.1 and Rule 26.1A of the Local Rules of the United States Court of Appeals for the Eighth Circuit, Freedom Foundation, a non-profit organized under the laws of Washington State, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Timothy R. Snowball

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Freedom Foundation (the Foundation) is a nonprofit organization working to protect the First Amendment rights of public workers. Pursuant to this mission, the Foundation regularly files *amicus curiae* briefs. *See, e.g.*, *Hoekman v. Educ. Minnesota*, 335 F.R.D. 219 (D. Minn. 2020), *appeal docketed*, No. 21-1366 (8th Cir. July 28, 2021); *Thompson v. Marietta Educ. Ass'n*, 141 S. Ct. 2721 (2021); *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31,* 138 S. Ct. 2448 (2018). Since the Foundation represents individuals facing the exact circumstances of the Appellants, *see, e.g.*¸ *Zielinski v. SEIU, Loc. 503*, 499 F. Supp. 3d 804 (D. Or. 2020), *appeal docketed*, No. 20-36076 (9th Cir. Feb. 15, 2020), and is active in Minnesota and other states where public sector workers are forced to associate with unions against their will, it has an interest in the Court's disposition of this case.

[1] In accordance with Fed. R. App. P. 29, all parties to this appeal have consented to the filing of this *amicus curiae* brief, and *Amicus* affirm that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *Amicus* made a monetary contribution to this brief's preparation or submission.

INTRODUCTION
AND SUMMARY OF ARGUMENT

Mark Janus signed nothing and spoke to no one. Yet his state employer deducted funds from his lawfully earned wages and gave them to AFSCME, a public employee union, without his consent. This was a violation of his First Amendment rights. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018) (despite being a private organization, union was held to be a state actor that could violate civil rights under 42 U.S.C. § 1983); *Janus v. AFSCME*, 942 F.3d 352, 361 (7th Cir. 2019) (same). The Appellant here is in the identical position: having spoken to no one and having signed nothing, the state deducted union dues from his wages without his consent and gave it to a union. In fact, his supposed "consent" was forged.

Yet unlike in *Janus*, the lower court here found that the union did not qualify as a state actor. In essence, the lower court's decision leads to the incredible conclusion that had AFSCME had simply forged Mark Janus's signature, his case would have been thrown out of court for lack of state action. This is absurd. What the union cannot do by law (*Janus*), it cannot do by forgery (this case). In *Belgau v. Inslee*, 975 F.3d 940, 951 (9th Cir. 2020), the Ninth Circuit found no state action because Ms. Belgau's initial contractual consent to join the union and pay dues supposedly eviscerated a later claim that the dues violated her First Amendment rights. Here, there was neither a contract nor consent; only forgery.

As documented at length *infra*, the union's fraudulent activities at the heart of the Appellant's case goes far beyond a one-off clerical error or ministerial oversight. Rather, the forgery of non-consenting public employee signatures on union membership and dues' authorization cards has become a systemic issue across the west coast, specifically enabled by those state's statutes. Additionally, the Appellant objects to the state diverting his lawfully earned wages to the union, and Section 1983's furnishes him a cause of action against both the state *and* union in federal court. The triggering injury in this case, and other pending similar cases, is the taking of lawfully earned wages without meeting the constitutional requirements, not the forgeries authorizing those violations. If they are already a state actor, as the union is here, the Constitution and Section 1983 do not allow them a safe harbor because they can recharacterize their alleged violation.

The decision of the District Court should be reversed.

ARGUMENT

A. Government Union Forgery of Employee Signatures Is a Systemic Issue.

In fourteen cases (collected below), all filed in district courts in the Ninth Circuit, unions have forged the signatures of unsuspecting public employees, just as AFSCME did to the Appellant. The state employer then gave part of Appellant's lawfully earned wages to the union, which then spent this money on political speech, clearly without the necessary affirmative consent required by the First Amendment.

When these unsuspecting public employees protested, their concerns were ignored by the perpetrators of the fraud, the unions, and the fraud's enforcers, the employers.

It is difficult to believe, in light of fourteen forgery cases,[2] that there is nothing "systemic" about this fraudulent practice. Rather, the practice of forging supposed members signatures is more than sloppy administrative work or a one-off mistake. Instead, it is an intentional effort by the unions to circumvent the Supreme Court's clear holding in *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018), and must be addressed by the courts. The union forgery cases described below all have one commonality: but for the statutes in place in Oregon, Washington and California, the unions' forgeries of non-members' dues authorization cards would not result in the unions obtaining any of the public employees' lawfully earned wages. The statutory schemes in these three states require only that the union certify to the state employer that an individual is a member and therefore dues must be deducted.[3] The individual employee whose dues the employer deducts can object, protest, and complain to her employer, but the state employer will do nothing. Nor can it, statutorily. Instead, the state employer must blindly comply. It is no surprise, then, that the unions take advantage of this state enabled system of unlimited authority.

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[2] These are only the cases that the Freedom Foundation has brought. The actual number of potential forgeries is substantially higher and should be further investigated.

[3] *See, e.g.*, California Government Code § 1157.12, Revised Code of Washington 41.56.110, Oregon Revised Statutes 243.806.

- In *Ochoa v. SEIU 775*, Case No. 19-35870 (9th Cir. 2019), SEIU 775 admitted to forging Ms. Ochoa's signature on a membership and dues' authorization card. As a home health care provider caring for her family member, she had no recourse with the State of Washington, who continued to take her lawfully earned wages for the union pursuant to state law.
- In *Yates v. Washington Federation of State Employees*, Case No. 20-35879 (9th Cir. 2020), WFSE forged Ms. Yates' dues authorization card, and the state then deducted dues from her lawfully earned wages pursuant to state law, despite numerous attempts to contact WFSE and her public employer.
- In *Zielenski v. SEIU 503*, Case No. 20-36076 (9th Cir. 2020), the state of Oregon deducted supposed union dues from Christopher Zielenski's lawfully earned wages for eleven years and paid the money to local SEIU 503 despite his objections. The forged signature on his dues authorization card simply had a squiggle of the letter "m", bearing no resemblance to his actual signature.
- In *Schiewe v. SEIU 503*, Case No. 20-35882 (9th Cir. 2020), the Oregon Department of Consumer and Business Services deducted supposed dues from Ms. Schiewe's lawfully earned wages and sent the

funds to the union for more than a year until she learned the truth – that her signature was forged and that SEIU 503 could provide no metadata to establish a valid signature.

- In *Wright v. SEIU 503*, Case No. 20-35878 (9th Cir. 2020), SEIU 503 forged Ms. Wright's signature using an iPad but could provide no data to confirm it was actually her signature. Nonetheless, the Oregon Health Authority continued to deduct supposed dues from her lawfully earned wages and sent the money to the union to be spent on political speech for nearly three years.
- In *Jarrett v. SEIU 503*, Case No. 21-35133 (9th Cir. 2021), Marion County deducted dues from Ms. Jarrett's lawfully earned wages pursuant to a forged certification made by SEIU 503. Ms. Jarrett was still subject to paying dues based on a forged card for two years because she was not permitted, under state law, to dispute that her signature was forged.
- In *Semerjyan v. SEIU 2015*, Case No. 21-55104 (9th Cir. 2021), SEIU 2015 forged Ms. Semerjyan's signature and enabled her employer, the County of Los Angeles, to deduct supposed dues from her lawfully earned wages for over five years.

- In *Hubbard v. SEIU 2015*, Case No. 21-16408 (9th Cir. 2021), the same union, SEIU 2015, forged Ms. Hubbard's signature electronically. Ms. Hubbard appealed repeatedly to her employer to no avail because California Government Code § 1153(a) requires her employer, Sacramento County, to ignore her pleas.
- In *Marsh v. AFSCME 3299* Case No. 21-15309 (9th Cir. 2021), Mr. Mendoza's dues authorization card was forged, while his employer, the University of California, continued to take supposed dues from his lawfully earned wages for more than a year, without any recourse under state law.
- In *Quezambra v. UDW AFSCME 3930* Case. No. 20-55643 (9th Cir. 2021), Ms. Quezmbra had to contact the union, UDW AFSCME 3930, multiple times to stop the unauthorized dues deductions based upon her forged signature. California Government Code § 1157 denied her the ability to simply ask her employer, Orange County, California, to stop the unauthorized deductions.
- In *Gatdula v. SEIU 775*, Case No. 2:20-cv-00476 (W.D. Wa. 2020), Washington State deducted supposed dues from Ms. Gatdula's lawfully earned wages for five years pursuant to RCW 41.56.113(1)(a) and

SEIU 775's certification based on its own forgery of Ms. Gatdula's signature.

- In *Araujo v. SEIU 775*, Case No. 4:20-CV-5012 (E.D. Wa. 2020), SEIU 775 forged Mr. Araujo's signature not only on a dues authorization card, but required his employer, the State of Washington, to deduct contributions to SEIU 775's political committee as well as dues from his lawfully earned wages, pursuant to RCW 42.17A.005(41).
- In *Jiminez v. SEIU 775,* Case No. 1:21-cv-03128 (E.D. Wa. 2021), SEIU 775 electronically forged Ms. Jiminez's signature. After several attempts to contact both the union and her public employer, Ms. Jimenez filed suit and included a state and federal racketeering claim. This was the third time SEIU 775 had forged an unsuspecting non-union members' dues authorization card.
- In *Trees v. SEIU 503*, Case No. 6:21-cv-0046 (D. Or. 2021), Ms. Trees' employer, the Oregon Department of Transportation, deducted supposed dues from her lawfully earned wages and gave the money to SEIU 503 despite Ms. Trees' objections that her signature was a clear forgery.

In each of these cases, as in the instant case, the union was able to forge a non-consenting employee's signature and with the force of state law enforced by state

officials, take their lawfully earned wages without any recourse for the employee. The state employer is obligated, by following the appropriate state statute, to rely solely on the union to determine membership and dues' authorizations. No procedures are set up to confirm that the certifications made by the union are true.

Nor has the state been held responsible for getting it wrong by deducting dues from a non-member whose signature the union forged. Most egregiously, there is no recourse for the public employee but to complain to a union that has every interest to ignore the pleas the continue to take the employee's money. This co-dependent, and insularly protective, public-private partnership is the hallmark of state action. Yet neither the state nor the union is held to account. The state blames the union, the union claims it is not a state actor, and employee rights are violated without recourse.

B. State law cannot restrict Section 1983 liability for state actors.

There is a vital difference between the forgery alleged in this and other cases, and the substance of the First Amendment rights being violated. Under Section 1983, the source of the harm is the taking of the Appellant's lawfully earned wages, not the forgery that enabled it. But you would not recognize this basic distinction by reading the briefing of the union in this case. After forging unsuspecting employees' signatures on union membership and dues' authorization agreements, many union defendants, including in the instant case, later claim that because their actions may have violated some *other state law* besides the *policy and practice* allowing them to

reach into employees' bank accounts based on fraud, they do not qualify as state actors and are beyond the reach of the federal courts provided by Congress through Section 1983. This conclusion is incorrect.

There is no indication in the text of Section 1983 that Congress intended the cause of action to be definitively limited by state law. Section 1983 reads, in relevant part, that: "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured* in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983 (emphasis added). Courts impose liability for deprivations of federally protected rights, regardless of whether the state actor complied with or violated other potentially applicable state law.

Neither does the historical context of the Fourteenth Amendment or legislative history of Section 1983 support the conclusion that Congress intended state law to control the availability of the Section 1983 cause of action.[4] Efforts at

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[4] While the contours of a claim under Section 1983 can be aided by considering "common-law principles that were well settled at the time of its enactment," *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997), these principles are meant to guide rather than to control the definition of Section 1983 claims, *Hartman v. Moore*, 547 U.S. 250,

reconstruction in the former confederate states after the conclusion of the Civil War were met with unprecedented, organized resistance. *See* Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877*, at 425-26 (1988). Newly elected officials, often former confederate soldiers, immediately began enacting legal regimes designed to target newly freed slaves. Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 Akron L. Rev. 671, 681 (2003); Paul Finkelman, *The Historical Context of the 14th Amendment*, 13 Temp. Pol. & Civ. Rts. L. Rev. 389, 400 (2004). Coupled with legal discrimination, white southerners also used outright intimidation and violence. Finkelman, 36 Akron L. Rev. at 681-85. By 1871, Ku Klux Klan violence against former slaves and Union supporters had only intensified. Michael F. Roessler, *Mistaking Doubts and Qualms for Constitutional Law: Against the Rejection of Legislative History as a Tool of Legal Interpretation*, 39 Sw. L. Rev. 103, 120 (2009). Thus, the Fourteenth Amendment was intended as an explicit rebuke of state officials.

Rather than being limited by state law, Congress intended Section 1983 to stand apart as an independent protection for federal rights. *Monroe v. Pape*, 365 U.S. 167, 174-75 (1961) ("It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful

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258 (2006) (common law principles serve "more as a source of inspired examples than of prefabricated components.").

momentum behind this 'force bill.'"); *Ngiraingas v. Sanchez*, 495 U.S. 182, 187 (1990) (citizens cannot enforce their Fourteenth Amendment protections against state officials unwilling "to enforce their own laws against those violating the civil rights of others."); *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, Cahokia, Ill, 373 U.S. 668, 671-672 (1963) (Section 1983 provides "a remedy in the federal courts supplementary to any [state] remedy, because state law…does not adequately protect constitutional interests."). While state law can help to define who qualifies as a state actor and the applicable statute of limitations for bringing a Section 1983 claim, it cannot deprive you of the federal cause of action provided by Congress for the deprivation of federal rights.[5]

This understanding agrees with how Section 1983 has functioned and been enforced independent of state law over the last one hundred and fifty years. Through Section 1983, Congress guaranteed a federal judicial forum to adjudicate civil rights

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[5] Also distinct are the remedies provided by federal and state law. "[A] deprivation of a [federal] constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Monroe*, 365 U.S. at 196. But whereas state tort law focuses exclusively on resolving disputes between individuals by mediating common law interests, *see, e.g., Sapp v. Ford Motor Co*., 687 S.E.2d 47, 49 (S.C. 2009) ("Tort law…seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property."), the Free Speech Clause of the First Amendment is designed to protect vital individual interests in free expression, *see, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Here, the state law against forgery may protect against forgeries, but it does nothing to protect against the violation of the Appellant's First Amendment rights.

deprivations by state officials. *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2167 (2019); *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). This is true even given the potential "variety of claims, claimants, and state agencies involved," *Patsy v. Bd. of Regents of the State of Fla*., 457 U.S. 496, 515 (1982), including claims arising in the context of labor law, *see, e.g., Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 869, 879 (1998); *Clark v. Yosemite Cmty. College Dist*., 785 F.2d 781, 790 (9th Cir. 1986) (First Amendment claim is not an unfair labor practices claim). Hence the "well-established rule that Section 1983 claimants are not required to exhaust state remedies prior to bringing their federal claims. *Patsy*, 457 U.S. at 515; *Hopkins v. City of Bloomington*, 774 F.3d 490, 492 (8th Cir. 2014). This means that even if state actors potentially violate some *other* state law than the one rendering them a state actor, the simple triggering of a federal constitutional violation allows for a party to seek remedies in federal court under Section 1983.

"Acting under" state law does not mean acting "pursuant to" state law, and acting contrary to state law does not deprive an individual of the cause of action provided by Section 1983. If the unions' theory of Section 1983 controlled, then not a single state defendant acting with the authority of the state during the Civil Rights Era of the 1950s and 60s would have been held liable for behavior that *clearly* violated the equal protection rights of African Americans, simply because they could have claimed to have acted contrary to *some other* state law. This cannot be correct.

Giving state actors the ability to remove the jurisdiction of federal courts by recharacterizing the alleged federal injuries as the basis for the injury in Section 1983 cases, rather than the policy and practice of allowing unions to take employees lawfully earned wages without affirmative consent, would defeat the very purpose of Section 1983. After all, if state law determines the scope of protection offered under federal law, then no "state actor" in a position of legal authority will ever allow themselves to be held liable under its provisions.

In this case and the fourteen other cases in which unions have forged employees' signatures on dues' authorization cards as the means of subvert the Supreme Court's holding in *Janus*, the claimed injury, actionable under Section 1983, is the taking of employees' lawfully earned wages without their affirmative consent as required by the First Amendment. It is not the forgeries themselves, no matter how strenuously the unions argue for this recharacterization of the plaintiffs' claims as the means to attempt to deny them access to federal courts.

CONCLUSION

As recognized long ago, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson, *Virginia Statute for Religious Freedom* (June 18, 1779). These concerns, and the attendant First Amendment prohibitions on coerced

speech, are just as strong where an individual alleges outright fraud on the part of state actors, as they were in the *Janus* case.

The decision of the District Court should be reversed.

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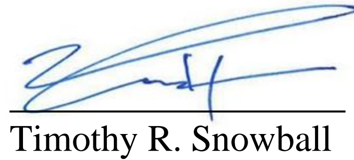
CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 3319 words and 281 lines, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).



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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2022, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Timothy R. Snowball