No. 12-35640

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAMILY PAC,
Plaintiff/Appellee,

v.

ROBERT W. FERGUSON, in his official capacity as Attorney General of Washington, and AMIT RANADE, BARRY SEHLIN, GRANT DEGGINGER, and KATHY TURNER, members of the Public Disclosure Commission, in their official capacities,
Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
No. C09-5662-RBL
The Honorable Ronald B. Leighton
United States District Court Judge

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION, FREEDOM FOUNDATION, AND THE CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF APPELLEE AND FOR AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Institute for Justice is a nonprofit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Institute for Justice does not have a parent corporation and does not issue stock. There are no publicly held corporations that own ten percent or more of the stock of the Institute for Justice.

The American Civil Liberties Union of Washington Foundation (ACLU-WA Foundation) is a nonprofit organization organized under Section 501(c)(3) of the Internal Revenue Code. The ACLU-WA Foundation does not have a parent corporation and does not issue stock.

The Freedom Foundation is a nonprofit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Freedom Foundation does not have a parent corporation and does not issue stock.

The Center for Competitive Politics is a nonprofit corporation exempt from taxation under Section 501(c)(3) of the Internal Revenue Code and organized under the laws of Virginia. The Center for Competitive Politics has no parent companies, subsidiaries, or affiliates and does not issue shares to the public.

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STATEMENT OF *AMICI CURIAE*[1]

The Institute for Justice (the "Institute") is a nonprofit, public interest legal center dedicated to defending the essential foundations of a free society. It routinely represents campaigns, campaign committees, individual candidates, and independent political committees in cases brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, at all levels of federal and state courts, including *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Farris v. Seabrook*, 677 F.3d 858 (9th Cir. 2012); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc); and *San Juan County v. No New Gas Tax*, 157 P.3d 831 (Wash. 2007). The position taken by the Washington Public Disclosure Commission (PDC) in this case would seriously threaten the Institute's ability to represent clients exercising their right to enforce the protections of the U.S. Constitution and other federal civil rights under 42 U.S.C. § 1983 ("Section 1983"). If the Institute's legal representation in Section 1983 cases is considered a campaign contribution, it would compromise the Institute's nonprofit status and interfere with its ability to associate with people involved in campaigns in order to vindicate civil rights through the courts. The Institute is a plaintiff in a state court constitutional challenge to the PDC's claim that pro bono representation in Section

[1] No party counsel authored any portion of this brief, and no party, party counsel, or person other than each *amicus* or its counsel paid for this brief's preparation or submission. Appellee has consented to the filing of this brief, Appellants did not consent, and *amici* have therefore moved for leave to file this brief.

1983 cases is a contribution that must be disclosed to the PDC. *See Inst. for Justice v. Washington*, No. 13-2-10152-7 (Wash. Super. Filed June 13, 2013). A Washington Superior Court has preliminarily enjoined the PDC from applying this policy to the Institute until a trial can be held on the merits. Order Granting Pls.' Mot. Prelim. Inj., *Inst. for Justice v. Washington*, No. 13-2-10152-7 (filed in Pierce County Superior Court June 21, 2013) (a certified copy of this order is attached to Appellee's Answering Brief, Docket Entry 46-1).

The American Civil Liberties Union of Washington Foundation (ACLU-WA Foundation) is a nonpartisan, nonprofit 501(c)(3) organization that protects and maintains civil liberties and civil rights and takes action to further those liberties and rights. ACLU-WA Foundation has participated in numerous First Amendment and Section 1983 cases, as *amicus curiae*, as counsel to parties, and as a party itself. It also regularly files petitions for attorneys' fees under 42 U.S.C. § 1988.

The Freedom Foundation is a nonpartisan, nonprofit 501(c)(3) organization whose mission is to advance individual liberty, free enterprise, and limited, accountable government. The Freedom Foundation routinely participates in litigation seeking to vindicate citizens' exercise of liberties protected by the First Amendment and other provisions of the U.S. and Washington Constitutions, as counsel, as a party, and as a friend of the court.

Founded in 2005 by former Federal Election Commission Chairman Bradley Smith, the Center for Competitive Politics (CCP) is a 501(c)(3) organization that seeks to educate the public about the effects of money in politics and the benefits of increased freedom and competition in the electoral process. CCP works to defend First Amendment rights of speech, assembly, and petition through scholarly research and state and federal litigation. CCP has participated in many of the notable cases concerning campaign finance laws, including *Citizens United v. FEC*, 558 U.S. 310 (2010), and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). It has represented, and continues to represent, parties challenging state campaign finance laws under the First Amendment. *See, e.g.*, *Corsi v. Ohio Elections Comm'n*, No. 12-1442 (U.S. petition for cert. filed June 11, 2013); *Coal. for Secular Gov't v. Gessler*, No. 1:12-cv-01708-JLK (D. Colo. filed July 2, 2012), *certified questions accepted*, 2012SA312 (Colo. Nov. 2, 2012); *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D.N.D. 2012).

INTRODUCTION AND SUMMARY OF ARGUMENT

The PDC argues here that, in cases brought pursuant to 42 U.S.C. § 1983 ("Section 1983"), Washington law requires it to treat pro bono legal services provided to those involved with campaigns as "in-kind" contributions that may be regulated and restricted by state governments. The PDC's interpretation is a direct assault on the provisions of Section 1983 and the attorneys' fee statute, 42 U.S.C. § 1988 ("Section 1988"), which authorize an attorneys' fee award to those who prevail in vindicating their constitutional or civil rights.[2] The PDC's position opposing an award of attorneys' fees in this case undermines these provisions of federal law, directly interferes with the ability of campaigns to access the courts, frustrates the ability of law firms to provide pro bono assistance to their clients, and cripples the ability of lawyers and their clients to pursue civil rights objectives through litigation. *Amici* are aware of no other regulatory agency in the country that has adopted the PDC's position. If this Court were to accept the PDC's argument, it would severely limit the applicability of Sections 1983 and 1988 and insulate the PDC from many constitutional challenges.

The PDC makes this radical and unprecedented position in the course of asserting that there are "special circumstances" that would render an award of

[2] Because the issue before this Court is an award of attorneys' fees in Section 1983 litigation, *amici* use the term "civil rights" in the same way Section 1983 does: It encompasses constitutional and federal statutory rights enforceable under Section 1983.

attorneys' fees to Appellee Family PAC "unjust." Specifically, it argues that Family PAC did not report pro bono legal representation in its Section 1983 case as an "in-kind" contribution to the campaign. Appellants' Opening Br. 23-25. The district court correctly concluded that the award of attorneys' fees "further[s] the purposes of [42 U.S.C.] § 1988" and rejected the PDC's "special circumstances" argument. ER 9-10 (quotation omitted). This Court should do the same.

If this Court were to consider the PDC's argument, however, this Court must recognize that the PDC's position raises serious issues of federal constitutional law. Although couched as a routine matter of disclosure, the PDC's interpretation is more than that. If accepted, it would block the ability of Washington citizens to access pro bono legal services in constitutional challenges to the PDC's actions. Put another way, while the immediate issue here is whether the PDC can avoid paying fees, the PDC's policy would have the end result of weakening the vitality of Section 1983 litigation.

In this brief, *amici* focus on the PDC's argument that pro bono services in Section 1983 cases may be restricted and regulated by the government under state campaign laws. In particular, *amici* will analyze the PDC's argument to expose its legal flaws, explain the harmful consequences of treating pro bono representation in Section 1983 cases as "in-kind" contributions, and explain how the PDC's reading of Washington campaign finance law violates the First Amendment. *Amici*

conclude by requesting that this Court reject the PDC's attempt to turn litigation to vindicate federal civil rights into a campaign contribution subject to the PDC's own regulation and control.

ARGUMENT

Accepting the PDC's argument would have dire consequences for both a wide spectrum of nonprofit organizations and for for-profit attorneys who donate their services to people and groups associated with campaigns. In the following sections, *amici* address how the PDC's policy interferes with the fundamental First Amendment rights of lawyers and their clients to pursue civil rights objectives through the courts and how the PDC has failed to justify its interference with these constitutional rights. Finally, *amici* discuss how the PDC's position directly conflicts with Congress's goals in passing Sections 1983 and 1988.

A. Washington's Regulation Of Campaign Contributions

Washington law comprehensively regulates "contributions" to campaigns. A "contribution" includes "[a] loan, gift, deposit, subscription, forgiveness of indebtedness, donation, advance, pledge, payment, transfer of funds between political committees, or anything of value, including personal and professional services for less than full consideration." Wash. Rev. Code

§ 42.17A.005(13)(a)(i).[3] The PDC appears to view pro bono representation in a federal civil rights lawsuit as "professional services [provided] for less than full consideration." *See* Appellants' Opening Br. 3; *see also* Wash. Admin. Code § 390-05-210(1) ("The term 'contribution' as defined in RCW 42.17A.005 shall be deemed to include . . . furnishing services . . . at less than their fair market value . . . for the purpose of assisting any candidate or political committee. When such in-kind contribution of . . . services is provided, it shall be reported at its fair market value . . . .").

If a transaction is deemed a "contribution," significant restrictions and regulations then apply. Washington law caps contributions to campaigns for the state legislature ($900 per election), all statewide offices ($1800 per election), judicial races ($1800 per election), county offices ($900 per election), city council offices ($900 per election), mayoral offices ($900 per election), school board offices ($900 per election), and recall campaigns ($900 per election). Wash. Rev. Code §§ 42.17A.405, .410; Wash. Admin. Code § 390-05-400. Campaigns must also regularly report to the PDC the amount of contributions received or expenditures made. Wash. Rev. Code §§ 42.17A.235, .240.

[3] As discussed below, there is an exception to this rule. Professional services at less than full market value for purposes of complying with state election or disclosure laws are not considered "contributions." Wash. Rev. Code § 42.17A.005(13)(b)(viii)(B).

Failure to comply with these restrictions and requirements can result in fines and criminal penalties. Under Washington law, penalties can include $10,000 per violation, a $10 per day penalty for delinquent reports, and a penalty equal to the amount of an unreported contribution. Wash. Rev. Code § 42.17A.750. Both the contributor and the recipient may be fined. *Id.* The PDC may also refer for criminal prosecution any person who commits a violation with "actual malice." Wash. Rev. Code § 42.17A.750(2)(a).

B. The Consequences Of Treating Pro Bono Legal Services In Section 1983 Cases As A Contribution Under Washington Law

The results of treating pro bono legal services in Section 1983 actions as campaign "contributions" would be severe and far-reaching. The PDC's policy turns the fulfillment of *amici*'s nonprofit, nonpartisan purposes into a vehicle by which *amici* may lose their nonprofit status. For nonprofits like *amici*, the PDC's policy presents an insoluble dilemma in cases involving campaigns: *Amici* can either continue to fulfill their mission of representing people whose rights have been violated by the government—thereby risking their nonprofit status and their very existence—or they may refuse to take such cases and protect their nonprofit status by abandoning the core mission of their organizations. Neither choice is acceptable.

The PDC's position sharply limits the ability of nonprofit, public interest law firms to vindicate First Amendment rights in court. Under federal law,

organizations like *amici* that are organized under 26 U.S.C. § 501(c)(3) and exempt from federal taxation under 26 U.S.C. § 501(a) are barred from engaging in partisan politics and may not support or oppose candidates for elective offices. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550-51 (1983) (IRS may deny tax-exempt status to organizations that engage in substantial lobbying); *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 854-56 (10th Cir. 1972) (nonprofit lost its tax-exempt status because it engaged in campaigns by attacking politicians). Such organizations also may not expend a substantial part of their resources influencing or attempting to influence legislation either through lobbying or participating in ballot measure campaigns, such as initiatives or referenda. Even the accusation that a nonprofit is engaged in partisan politics is often enough to trigger an expensive audit from the IRS. *See* Gina M. Lavarda, *Nonprofits: Are You At Risk Of Losing Your Tax-Exempt Status?*, 94 Iowa L. Rev. 1473, 1492 (2009) (Focus on the Family experienced an audit resulting from complaints of political activity based on newspaper articles).

Under the PDC's reading of Washington law, however, any time each of *amici* provides pro bono assistance to a campaign or candidate in Section 1983 cases, it is making a massive *political* donation, often valued in excess of hundreds of thousands of dollars, in violation of federal law. Under the PDC's interpretation, *amici* are risking their very existence by fulfilling their mission.

Should the PDC's view prevail, groups like *amici* will find the risk of losing their tax-exempt status and incurring federal penalties simply too great and most will stop representing campaigns and people involved in campaigns. Such a result would directly interfere with the ability of *amici* to represent their clients and frustrate those clients' ability to exercise their rights.

Second, compelling a client to report legal representation in a Section 1983 case as a political "contribution" from the client's attorney would associate attorneys, including *amici*, with political positions they do not hold. It would also convey false information to the public, other clients, *amici*'s allies and opponents, and their donors and potential donors about the true positions of organizations like *amici*. Public interest organizations often represent clients whose political positions the organizations themselves do not share. Take, for instance, the American Civil Liberties Union, which represented members of the National Socialist Party of America (that is, American Nazis) all the way to the U.S. Supreme Court. *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977). Under the PDC's view, if the ACLU's representation occurred during a campaign, it would constitute a massive "in-kind" contribution from one of America's premier civil rights organizations to a political party devoted to racism, anti-Semitism, and political violence.

The PDC's policy does not harm just nonprofit lawyers, however. It also threatens the volunteer efforts of private attorneys who are not tax exempt charities. These lawyers will effectively be prohibited from providing pro bono Section 1983 representation to a variety of political campaigns in Washington because the value of any such representation would exceed any applicable contribution limit. Washington law currently caps contributions to campaigns for the Washington legislature, all statewide offices, judicial races, county office, city council office, mayoral office, school board office, and recall campaigns. Wash. Rev. Code §§ 42.17A.405, .410. Under the PDC's rule, no attorney could provide any pro bono services to any campaign for these offices beyond the amount of the cap. In other words, once a lawyer provides $900 (in most cases) of pro bono legal service—that is, around two hours of time for an experienced attorney—to a campaign in a Section 1983 case, they must stop representing the campaign for free or face the possibility of fines or even criminal penalties. This severely limits the associational rights of all attorneys, while leaving the PDC effectively immune from being held to account for violating the constitutional rights of campaigns.

C. The PDC's Argument Conflicts With The First Amendment

The PDC's position directly conflicts with the fundamental First Amendment rights of lawyers and clients to promote civil rights through the courts.

The PDC argues that performing pro bono legal services in a civil rights case is a "contribution" under Washington law because it constitutes the provision of "personal [or] professional services for less than full consideration." Wash. Rev. Code § 42.17A.005(13)(a)(i). Appellants' Opening Br. 6. Because "contributions" must be reported, Wash. Rev. Code § 42.17A.235, and may be limited, Wash. Rev. Code §§ 42.17A.405, .410, the PDC's policy means that pro bono legal services in a civil rights case must be reported and may be limited.

This argument conflicts with the fundamental right of public interest lawyers and clients to work together through the courts to pursue civil rights objectives. Because accepting the PDC's argument would cause serious constitutional violations, this Court should reject it.

1. The PDC's Policy Interferes With The Fundamental Right To Associate To Pursue "Civil-Rights Objectives"[4] Through The Courts

Decisions of the U.S. Supreme Court "establish[] the principle that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *In re Primus*, 436 U.S. 412, 426 (1978) (quotation marks omitted).[5] This is especially true for

[4] *In re Primus*, 436 U.S. 412, 424 (1978).

[5] The right is guaranteed not only under the First Amendment's protections for freedom of speech and association, but also under the right to petition to the courts to resolve legal disputes. *See Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488,

public interest law firms, for whom "litigation is not a technique of resolving private differences" but a "form of political expression" and "political association." *NAACP v. Button*, 371 U.S. 415, 429, 431 (1963); *see also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995) ("There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer."). Each of the *amici* regularly litigates on behalf of campaigns and associated individuals, not to further the electoral goals of these groups, but to enforce the Constitution and other federal civil rights and to establish a rule of law that is consistent with the ideological and philosophical positions of *amici*. For each of the *amici*, litigation is not simply a resolution of private issues and interests, but a form of political expression and activism unquestionably protected by the First Amendment.

Laws that chill the right to pursue "civil rights objectives of the organization and its members" through the courts are subject to strict scrutiny. *Primus*, 436 U.S. at 424, 426; *Button*, 371 U.S. at 434-35, 438. "[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms," and the PDC must prove that its reading is narrowly tailored to achieve such a compelling interest. *See Button*, 371 U.S. at 438.

2500 (2011) (First Amendment right to petition includes the right of access to the courts).

In both *Primus* and *Button*, the Supreme Court struck down state laws that chilled the ability to bring civil rights lawsuits, even though those laws could be applied in different contexts. In each case, the Court struck down prohibitions on the solicitation of clients for lawsuits when those laws were applied to civil rights lawsuits involving the NAACP (in *Button*) and the ACLU (in *Primus*), because the activities of those groups did not implicate the state interests that gave rise to such prohibitions. *Primus*, 436 U.S. at 427-32; *Button*, 371 U.S. at 438. Accordingly, the attorneys' association with pro bono civil rights plaintiffs in each case "[came] within the generous zone of First Amendment protection reserved for associational freedoms." *Primus*, 436 U.S. at 431.

2. The PDC Has No "Substantial Regulatory Interest"[6] In The Provision Of Pro Bono Services In Section 1983 Cases

The PDC can provide no reason—let alone a compelling one—for requiring that any political committee report Section 1983 legal representation as "contributions" to support the political committee's underlying causes. The enforcement of federal civil rights through Section 1983 litigation simply does not implicate the state interests that give rise to campaign finance laws.

[6] *Primus*, 436 U.S. at 425 (quotation marks omitted).

a. The PDC Has No Valid Authority Nor Compelling Reason To Regulate The Provision Of Pro Bono Legal Services In Section 1983 Cases

As noted above, the PDC's position will effectively cap the provision of pro bono legal services in Section 1983 cases when lawyers provide those services to entities to which a contribution cap applies. The government may constitutionally restrict contributions to candidates in order to limit *quid pro quo* corruption or its appearance in a system of privately financed elections. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976). But the PDC has produced no evidence that lawyers provide pro bono legal assistance to regulated political entities in civil rights cases in order to receive preferential treatment from elected officials. Instead, as *amici*'s experience demonstrates, lawyers provide pro bono legal assistance to regulated political entities in federal civil rights cases in order to vindicate federal civil rights.

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). Here, the PDC's position is both novel and implausible. It is incumbent on the PDC to produce significant evidence that restricting legal services in federal civil rights lawsuits limits *quid pro quo* corruption or its appearance. Instead, it has produced no evidence at all justifying this position. It therefore fails *any* scrutiny.

b. Lawyers Representing Clients In Section 1983 Litigation Are Not Promoting The Political Goals Of Their Clients

The purpose of disclosure is to associate a campaign with its "contributors." *See Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003) ("[B]y knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation."); *see also Buckley*, 424 U.S. at 67 (disclosure meant to "allow[] voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches" and to "alert the voter to the interests to which a candidate is most likely to be responsive"). But attorneys famously and nobly represent clients with whom they politically disagree, sometimes vehemently so. *See* Section B *supra*. Indeed, the Model Rules of Professional Conduct call on attorneys to represent those with whom they may disagree. Model Rules of Prof. Conduct R. 1.2, cmt. 5 (2013) ("Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval."). Moreover, the Model Rules expressly provide that representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." Model Rules of Prof. Conduct R. 1.2(b).

The PDC's forced political association in treating an attorney's representation of a client as equivalent to advocating for a client's underlying

political goals flies in the face of these long-standing legal obligations and aspirations. This forced political association would deter any lawyer from representing a client for fear of being labeled as having "endorsed" the client's political position, no matter how much the lawyer disagrees with that position. The PDC has no compelling reason to require such forced political association and, for this reason, the PDC's policy fails strict scrutiny.

3. The PDC's Position Fails Strict Scrutiny

Even if this Court were to conclude that the PDC's position is supported by a valid governmental interest, its position still fails strict scrutiny due to its underinclusiveness and lack of sufficiently narrow tailoring with regard to the treatment of legal assistance based on whether the lawyer provides that assistance to comply with or challenge the PDC's regulations. Under Washington law, legal services for the purpose of *compliance* with campaign finance laws are not contributions. Wash. Rev. Code § 42.17A.005(13)(b)(viii)(B). But services for the purpose of protecting civil rights are (at least according to the PDC) allegedly contributions. Legal services for any purpose on behalf of a "political party or caucus political committee" are also not contributions. Wash. Rev. Code § 42.17A.005(13)(b)(viii)(A). Accordingly, if this Court were to adopt the PDC's position, only those legal services provided by disfavored groups for disfavored reasons must be reported.

The PDC thereby either chills or outright prohibits constitutionally protected expressive association for the purpose of challenging the laws the PDC enforces, while favoring association to comply with those same laws. And the PDC's interpretation particularly affects groups, like *amici*, that exist to bring civil rights challenges to state laws instead of ensuring compliance with such laws. In other words, the PDC's interpretation punishes those who speak or associate to challenge the PDC's authority while exempting those who speak or associate to submit to the PDC's authority. Such uneven treatment violates the First Amendment. That a "regulation is wildly underinclusive when judged against its asserted justification . . . is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2740 (2011). Moreover, there is "no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers," as the PDC is doing. *Citizens United v. FEC*, 558 U.S. 310, 341 (2010).

The PDC may not arbitrarily choose to give preferential treatment to lawyers based on whether they are helping their clients comply with the PDC's regulations or whether they are providing such services to a party or caucus political committee, while at the same time claiming that legal services to political

committees in Section 1983 litigation that challenge the PDC's actions are campaign contributions. For this reason alone, the PDC's policy fails strict scrutiny.

D. Accepting The PDC's Argument And Denying Fees Would Undermine 42 U.S.C. §§ 1983 And 1988

By interfering with the ability of lawyers to volunteer their services to vindicate federal rights and robbing clients of their ability to hold state and local governments accountable, the PDC's policy frustrates the clear intent of Congress in passing Sections 1983 and 1988.

Congress's purpose in passing Section 1983 is well established: "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978).[7]

> [T]he central objective of the Reconstruction-Era civil rights statutes is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief. Thus, § 1983 provides a uniquely federal remedy against incursions upon rights secured by the Constitution and laws of the Nation and is to be accorded a sweep as broad as its language.

Felder v. Casey, 487 U.S. 131, 139 (1988) (quotation marks, ellipses, and citations omitted). "[T]he very purpose of § 1983 was to . . . protect the people from

[7] Though *amici* do not necessarily seek compensatory damages on behalf of their clients, their efforts to secure declaratory and injunctive relief, and to prevent future violations of the Constitution, are perfectly consistent with—indeed, further—Congress's goals.

unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982) (quotation marks omitted). Put another way, "[t]he 1871 Congress intended . . . to throw open the doors of the United States courts to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights." *Id.* at 504 (quotation marks omitted).

This was not the sole purpose, however. Another important purpose was "to serve as a deterrent against future constitutional deprivations." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). It was Congress's judgment "that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages." *Haywood v. Drown*, 556 U.S. 729, 737 (2009) (striking down a New York state law that restricted the ability of prisoners to seek restitution from correctional officers as preempted by Section 1983). The act thus stands as a warning to state and local authorities who decide to violate federal rights that the consequences will be severe.

"[T]he purposes and objectives of § 1983 are themselves broad . . . ." *Beeks v. Hundley*, 34 F.3d 658, 661 (8th Cir. 1994). The PDC's position directly conflicts with these broad purposes in a number of ways. First, by classifying the provision of pro bono Section 1983 representation as a campaign contribution, the PDC essentially bars, or at least severely limits, the ability of nonprofit, public

interest law firms to represent civil rights plaintiffs who are involved in campaigns. This is shutting the courthouse doors, not throwing them open.

Second, in campaigns where a contribution limit applies, the PDC's position explicitly limits the amount of pro bono legal assistance a campaign may receive in a Section 1983 case. Short of an outright ban, it is difficult to imagine something that would frustrate the purpose of Section 1983 more than imposing a cap on legal representation that applies to most elections in the state. *See* Wash. Rev. Code § 42.17A.405(3); Wash. Admin. Code § 390-05-400.

Third, the PDC's position directly contravenes Congress's intent to hold governmental agencies that violate federal civil rights accountable. By removing a vast number of potential plaintiffs and lawyers from the universe of opponents, the PDC's position insulates itself from liability when it violates federal civil rights. This encourages, not deters, the violation of such rights by the PDC and is inconsistent with Congress's goal of preventing abuses of power by state governments.

Not only does the PDC's position frustrate the purposes of Section 1983, but it also stands as an obstacle to Congress's goals in passing Section 1988, the fee-shifting provision of federal civil rights law. "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H. R. Rep. No. 94-1558,

p. 1 (1976)). "Congress enacted the fee-shifting provision as an integral part of the remedies necessary to obtain compliance with civil rights laws to further the same general purpose – promotion of respect for civil rights – that led it to provide damages and injunctive relief." *Evans v. Jeff D.*, 475 U.S. 717, 731 (1986) (citation and quotation marks omitted).[8]

"In every meaning of the word, 42 U.S.C. § 1988 was intended to be a pro-plaintiff law." Layne Rouse, *Battling for Attorneys' Fees: The Subtle Influence of "Conservatism" in 42 U.S.C. § 1988*, 59 Baylor L. Rev. 973, 978 (2007). Congress's goal was to provide an incentive to attorneys to represent people whose rights had been violated and were otherwise unable to pay. S. Rep. No. 94-1011, at 2, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5909-10 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer."). As the Senate sponsor of Section 1988 put it, "When Congress calls upon citizens . . . to go to court to vindicate its policies and benefit the entire Nation, Congress must also ensure that they have the means to go to court, and to be effective once they get there." 122 Cong. Rec. S17,051 (daily ed., Sept. 21, 1976) (statement of Sen. Tunney).

[8] An award of attorneys' fees to counsel who did not charge for its services does not change the pro bono character of the representation. *See* Model Rules of Prof. Conduct R. 6.1, cmt. 4 (2013) ("[T]he award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section.").

Thus, "the Fees Act has given the victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights by means of settlement or trial." *Evans*, 475 U.S. at 741. By imposing a risk of severe penalties on attorneys and firms that represent candidates free of charge, the PDC's policy strips this weapon from those who receive pro bono legal representation in Section 1983 cases and frustrates Congress's goal of enforcing the civil rights laws by empowering litigants to go to court and vindicate federal rights at no cost to themselves. The PDC's policy deprives litigants of even having the chance to get into court, much less recover attorneys' fees.

Because the PDC's position here directly clashes with Congress's goals in passing Sections 1983 and 1988, it must yield.[9]

CONCLUSION

In an attempt to avoid the financial consequences of having violated the U.S. Constitution, the PDC has attempted to piggy-back its novel interpretation of state law into the question of whether Family PAC, as a prevailing party, should receive

[9] Thus, if this Court were to accept the PDC's argument and hold that Family PAC was not entitled to fees because its failure to report pro bono legal representation in a Section 1983 case constituted a "special circumstance" warranting a denial of fees, this conclusion would raise a serious question of whether federal law preempts such an outcome. *See Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54*, 468 U.S. 491, 503 (1984) (if state law regulates conduct that is protected by federal law, "pre-emption follows . . . as a matter of substantive right").

any fees for having vindicated its First Amendment rights in Section 1983 litigation. The PDC's argument as to why it should avoid fees raises serious issues of constitutional law and, if this Court were to accept it, would cause irreparable damage to the ability of lawyers and clients to work together to vindicate constitutional and other federal civil rights. The undersigned *amici* therefore request that this Court explicitly and unequivocally reject the PDC's attempt to avoid paying fees, along with its attendant effort to weaken the vitality of Section 1983.

Dated this 28th day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 29(c)(5) & (d) and Rule 32(a)(5) & (7) that the attached brief was prepared using a proportionally spaced, 14—point typeface and contains 5,530 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

Dated this 28th day of August, 2013.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 28th day of August, 2013, I caused this Brief of *Amici Curiae* Institute for Justice *et al.* In Support of Appellee and Affirmance to be filed electronically with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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