

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KENNETH C. ROSSIGNOL, et al.,

Plaintiffs-Appellants

v.

RICHARD VOORHAAR, et al.,

Defendants-Appellees.

On Appeal From the United States District Court for the District of Maryland

Case No. WMN-99-CV-3302

The Honorable William M. Nickerson

BRIEF *AMICI CURIAE* OF REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
AMERICAN SOCIETY OF NEWSPAPER EDITORS,
ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES,
MARYLAND-DELAWARE-DC PRESS ASSOCIATION, AND MARYLAND MEDIA
IN SUPPORT OF APPELLANTS AND REVERSAL OF THE DISTRICT COURT

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INTEREST OF *AMICI CURIAE* AND STATEMENT OF AUTHORITY FOR FILING

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a nonprofit organization founded in 1922. It has a nationwide membership of approximately 850 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Association of Alternative Newsweeklies (AAN) is the not-for-profit trade association for 121 alternative newspapers in North America. Member publications have a total weekly circulation of more than 7 million and a reach of 20 million readers.

The MDDC Press Association, founded in 1908, is a nonprofit organization of 161 newspapers in Maryland, Delaware and the District of Columbia. Membership consists of all of the daily newspapers and nearly all of the non-

dailies in the region. The Association serves to bring together newspapers for the preservation and defense of the principles of the First Amendment to the Constitution and to promote the growth and development of the newspaper industry.

Maryland Media, Inc. (“Maryland Media”) is a non-profit Maryland corporation that operates four student publications at the University of Maryland, including the free daily student newspaper, *The Diamondback*. In 1994, the State of Maryland enacted the Newspaper Theft Act, Md. Ann. Code art. 27, § 345 (2001), in response to the Prince George’s County State’s Attorney’s inability to prosecute for theft two students who seized 10,000 copies of *The Diamondback*, which has a regular circulation of 17,000. Maryland Media is interested in the appeal in this action because it believes that the issues to be addressed by the Court of Appeals are of great importance to the preservation of First Amendment rights, particularly those of publishers and readers of smaller newspapers, including free newspapers.

This brief *amici curiae* is filed pursuant to Federal Rule of Appellate Procedure 29(b) and a motion has been filed herewith.

ARGUMENT

The Supreme Court has made clear that threats to First Amendment freedoms do not always come from official censors carrying out statutory programs. To the contrary, meaningful protection of the First Amendment requires courts to “look through the forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications” to warrant relief. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). That is precisely the case here: the Sheriff of St Mary’s County and his deputies plotted, funded, and executed the equivalent of an all-out seizure of a local newspaper on election morning *for the express purpose* of preventing the electorate from reading unfavorable press coverage of particular officials.¹

In holding that the Sheriff and his deputies could not be sued under 42 U.S.C. § 1983, the trial court effectively approved the efforts of renegade law enforcement officials to suppress constitutionally protected speech. The Defendants themselves admit that they took the actions at issue here to retaliate for press coverage critical of their performance in their official duties. But this is precisely what the First Amendment and § 1983 were designed to prohibit.

¹ Pursuant to Rule 29(c), *amici* do not provide a separate statement of facts.

Whether through formal lawmaking, active encouragement, informal inducement, or a wink and a nod, government officials – with the assistance of their private collaborators – have myriad ways to stifle the full and fair dissemination of information. In finding that a seizure committed by government officials, encouraged by government officials, funded by government officials, and done for the purpose of suppressing speech critical of those government officials does not trigger a remedy under § 1983, the trial court gives license to government actors to engage in all manner of conspiratorial conduct to get private actors to do what they themselves most clearly cannot.

If that decision were to stand, *amici*, as well as all members of the public, would suffer an enormous loss of liberty. *Amici* represent newspapers and reporters whose primary mission is the dissemination of information to the public, especially information on matters of public concern. Actions such as the seizure in this case threaten both the interests of *amici* in continuing to report the news – especially news critical of the government – and the interests of the public at-large, which has a right to receive timely and accurate news reporting on issues of public concern. The actions of the Sheriff’s Department in St. Mary’s County are particularly troubling because they attack core political speech on election day – at the point where the public’s right to know should be at its zenith.

Amici hope to assist the court by providing additional relevant information beyond that provided in the Appellants' brief concerning the history and genesis of the First and Fourth Amendments, as well as § 1983. First, the history of the First and Fourth Amendments amply demonstrates that those amendments were intended to protect the press and the public from all manner of state action, including state action carried out by purely private actors with the encouragement, assistance, or even tacit consent of the State. Second, § 1983 was designed to prevent constitutional violations by state officials who either refrained from enforcing the law or who engaged in conspiracies with private parties to violate civil rights in precisely the manner that occurred here. For all of these reasons, the trial court erred in dismissing Appellants' claim.

I. THERE CAN BE NO LEGITIMATE DISPUTE THAT THE ACTIONS OF THE ST. MARY'S COUNTY SHERIFF'S DEPARTMENT ARE A CONTENT-BASED PRIOR RESTRAINT ON FULLY PROTECTED SPEECH

As the Supreme Court has made clear:

Since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 381-82 (1973). The history of the First and Fourth Amendments teaches that it is not the precise manner in which the government imposes censorship that mattered to the Framers – all censorship where there is any government involvement is anathema. The First and Fourth Amendments were designed to be broad enough to prohibit all of it, including methods where the instrument of censorship was a private party. Thus, any involvement by government or its officials in censorship – such as the encouragement, inducement, and even funding by officials for the purpose of suppressing speech about them – constitutes state action and triggers the prohibitions of the Amendments.

A. The Seizure Violated Both the Publisher’s Right to Distribute Information *and* the Public’s Right to Receive Information.

It is well-established that the First Amendment accords “virtually absolute protection to the dissemination of information or ideas.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582 (1980) (Stevens, J., concurring). The right to distribute literature that the Sheriff’s Department violated in this case implicates two important First Amendment values, one connected to the speaker and the other connected to the listener. First, the right to distribute materials “follows

ineluctably from the *sender's* First Amendment right to send them.” *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. PICO*, 457 U.S. 853, 867 (1982) (emphasis in original). The Supreme Court recognized this aspect of distribution in *Lovell v. City of Griffin*, 303 U.S. 444 (1938), in which the Court ruled that a city ordinance prohibiting the distribution of leaflets without prior permission violated the speaker’s First Amendment right to distribute literature free from prior restraints. “[T]he prevention of that restraint was a leading purpose in the adoption of the constitutional provision.” *Id.* at 451-52.

The second aspect of the freedom to distribute information is that “the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.” *PICO*, 457 U.S. at 867 (emphasis in original). The right to free speech would have no practical value if it were not premised on the receiver’s right to receive that speech. *See, e.g., Richmond Newspapers*, 448 U.S. at 572, 576 (plurality) (“[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing”). Infringing on the purchaser’s right to buy a newspaper is as abhorrent as infringing on the publisher’s right to sell it, for “[i]t would be a barren marketplace of ideas that had only sellers and no buyers.” *Lamont v. Postmaster General of the United States*,

381 U.S. 301, 308 (1965). *See also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (“[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.”) (footnote omitted); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (“This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.”) (citation omitted). By seizing the newspapers, the Sheriff’s Department was infringing on a well-established right of both the publisher *and* the residents of St. Mary’s County.²

B. The First Amendment Protects Against Informal Censorship No Less than Formal Censorship.

The First Amendment protects against more than statutes that expressly prohibit speech. Government officials cannot through fiat or threats establish informal systems of censorship that prevent the full and free dissemination of

² Payment for the newspapers in no way lessens the curtailment of First Amendment freedoms. Compensation in the form of lost profits has never been held to be a sufficient remedy for the loss of First Amendment freedoms; it is for precisely this reason that speakers can obtain injunctions to prevent restrictions on speech. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). Indeed, a seizure of papers that are free to the public is equally a violation of the First and Fourth Amendments. *See Coming Up Inc. v. City & County of San Francisco*, 857 F. Supp. 711 (N.D. Cal. 1994).

ideas, especially when such censorship is content-based. *See Bantam Books*, 372 U.S. at 67; *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (“Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on government powers.”); *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (describing the Framers’ concern about differential taxation of the press which “can operate as effectively as a censor to check critical comment by the press, thus undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.”).

The forms of censorship are many, so the First Amendment prohibits “*any* action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights of citizens.” *Grosjean v. American Press Co.*, 297 U.S. 233, 249-50 (1936) (internal quotation marks and citation omitted; emphasis added). If the First Amendment protected only against legislation, but offered no guard against schemes by public officials to suppress speech critical of the government, such officials would simply use those less formal, but equally censorial, methods and would channel their efforts through private citizens.

Indeed, exactly those methods were the primary vehicles for censorship in 17th and 18th century England. And it was to put an end to exactly those methods that the First and Fourth Amendments were established.

II. THE FIRST AND FOURTH AMENDMENTS WERE ADOPTED EXPRESSLY TO PROHIBIT THE SORT OF CENSORSHIP – PERFORMED BY PRIVATE ENTITIES WITH THE ENCOURAGEMENT OF GOVERNMENT OFFICIALS – THAT IS AT ISSUE HERE

England’s extensive history of mixed public and private restraints on the press was “part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that search and seizure could also be an instrument of stifling liberty of expression.” *Marcus v. Search Warrants of Property at 104 East Tenth Street*, 367 U.S. 717, 729 (1961). A review of that history demonstrates that the actions of the St. Mary’s County Sheriff’s Department are precisely the sort of state action that led to the adoption of the First and Fourth Amendments. The First and Fourth Amendments were adopted to prevent government officials *and* private parties friendly with the Crown, or seeking to curry favor with Crown, from suppressing speech critical of the government by seizing papers and preventing their

distribution. The district court’s ruling ignores these historical roots of the Bill of Rights and thus erodes our most cherished liberties.

A. Like the Actions Taken in the Present Case, 17th and 18th Century Restrictions on the Press Were Enforced by Friends of the Crown Acting With the Crown’s Full Consent and Encouragement.

There can be no doubt that the First Amendment was adopted to prevent suppression of speech by *private* individuals or entities who acted with the encouragement or approval of the sovereign. Restrictions on the press in 17th and 18th century England were carried out *not* by uniformed police officers, but by individuals or groups seeking favor with the Crown and acting with the consent – but not always by order – of the authorities. Administration of the government’s regulations was carried out with only “occasional interference by a state official,” who otherwise left enforcement to trusted private associates. Fredrick S. Siebert, *Freedom of the Press in England 1476-1776* 143 (1952).

The regulation of the press against which the Framers were reacting was undertaken by *private* organizations acting with the Crown’s approval. The most prominent enforcer of press licensing requirements, for example, was not a state official at all, but a corporate trade organization of licensed printers and

publishers. *See id.* at 135. The Stationers' Company, chartered through a royal grant and charged with enforcing the Crown's licensing requirements, was formally distinct from the government, but functioned as its official censor with broad powers of enforcement. *See id.* at 257-58. The government also entrusted its regulatory responsibilities to the large printers to whom it had granted monopolies. These private entities were held in royal favor and thus were empowered to enforce regulations against less favored publishers. *See id.* at 132. The entire goal of this complex system of private regulation was to use private entities that had reason to curry favor with the Crown to suppress unwanted speech – especially speech critical of the government.

Similarly, even prosecutions for criminal libel could not begin without approval from important friends of the government who, in contrast to the present defendants, had no official portfolio. The Home Secretary began such prosecutions by seeking an opinion from the Attorney-General or Solicitor-General regarding whether the publication at issue was libelous and, if so, the best strategy for prosecution. Those persons, however, were not public officials but private officials who – like Mr. Fritz in the present case – aspired for posts in the government. Accordingly, it was in their self-interest to offer the opinion that the Home Secretary sought: that the speech was libelous and should be suppressed.

See William H. Wickwar, *The Struggle for the Freedom of the Press* 32-34 (1928).³

The First Amendment was created as a reaction to *precisely* these sorts of restrictions: the suppression of speech, taken with the full awareness, approval, and encouragement of state officials, but not always by state officials. The Framers were well aware that these were the forms of censorship that had stifled the press and the public in the past. See, e.g., Statement of Constitutional Convention Delegate Hugh Williamson (Feb. 25-27, 1788), in *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 110 (Neil H. Cogan ed. 1997) (“There was a time in England, when neither book, pamphlet, nor paper could be published without a license from Government.”). To interpret the First Amendment to apply only when government officials wear their official uniforms and flash badges would be completely foreign to those who drafted and adopted the First Amendment, which was designed to protect against censors who, unlike the present defendants, did not even hold official portfolios.

³ Private organizations with official ties also played a role in criminal libel prosecutions. In 1611, for example, King James I handed over the power to seize unlawful printing to private church officials. Siebert, *supra*, at 139. Similarly, the Society for the Suppression of Vice and the Encouragement of Religion and Virtue was formed in 1802 to assist in criminal libel prosecutions. By 1803, the group – with the Crown’s blessing – had gained nearly 700 convictions. See Wickwar, *supra*, at 36.

B. Like the Actions Taken in the Present Case, 17th and 18th Century Restrictions on the Press were Intended to Suppress Speech Critical of Government Authorities.

The Supreme Court has specifically noted that protection of the speech at issue here is foundational First Amendment law:

[A] principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Texas v. Johnson, 491 U.S. 397, 408-09 (1989) (internal quotation marks and citation omitted). Indeed, one of the principal evils that the First Amendment sought to combat – 17th and 18th century England’s criminal libel laws – involved just the sort of speech at issue here – speech critical of government officials that those officials wanted to suppress.

At common law, the publication of anything with a malicious intention to cause a breach of the peace constituted criminal libel. The defining element of criminal libel was that it caused a “breach of the peace.” In 17th and 18th century England that term had a very broad scope and proved to be an effective tool for censorship. One historian has indicated that “the King’s peace” was

as wide a phrase as the King’s English. To disturb the King’s peace of mind was probably a breach of the King’s peace. . . . [A criminal libel] might bring institutions or prominent persons into contempt, or hatred, or ridicule.

Wickwar, *supra*, at 19-21 (footnote omitted). Any publication that “excite[d] disaffection against . . . the administration of justice,” *id.* at 27, or “to create animosities,” 4 William Blackstone, Commentaries *150-51, was a criminal libel, as was anything “endeavouring to possess the people that the government is maladministered by corrupt persons,” Siebert, *supra* at 271 (quoting Chief Justice Holt in the 1704 case of *Rex v. Tutchin*). Thus criminal or seditious libel was not libel in the sense we understand it today, but in a much broader sense aimed specifically at publications like *St. Mary’s Today* that are in any way critical of government officials.

C. Like the Actions Taken in the Present Case, 17th and 18th Century Restrictions on the Press were Broadly Focused on Circulation and Distribution, not Mere Printing.

Although early British efforts at censorship had not focused on distribution and circulation, the government – like the Sheriff and his Deputies here – realized that it could not accomplish with its tried-and-true methods the complete suppression of unfavorable speech. “Underground” printers could easily escape monitoring, and once the publication left the printer’s hand, there was little that the government could do to suppress it. Accordingly, in 1637, Parliament and the

Court of Star Chamber issued separate proclamations that required submission to licensers and registration with the Stationers' Company before publication of any book or paper. Wickwar, *supra*, at 14. Criminal libel laws that outlawed publication of seditious materials

did not only mean publishing; [the laws] meant any kind of circulation. It included the wholesale selling which we call publishing; but it also included retailing, and booksellers and newsvenders were therefore publishers at law.

Id. at 19. Publication was thus defined in the broadest sense, and specifically included the circulation like that at issue here, where the Defendants trailed behind the delivery car and literally prevented willing customers from purchasing the newspaper.

These very restrictions motivated passage of the First Amendment. Thomas Jefferson, for example, wrote to a friend in 1787 – just years before the First Amendment's passage – that when he spoke of the importance of the free press, "I should mean that every man should *receive* those papers and be capable of reading them." Thomas Jefferson, Letter to Edward Carrington (Jan. 16, 1787), *in* The Founders' Constitution 121-22 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added). Likewise, the editor of the American edition of Blackstone's Commentaries noted that the freedom of the press in England was not achieved

until Parliament ended its restrictions on “the right of *vending* books,” not just printing them. St. George Tucker, 1 Blackstone’s Commentaries (1803), *in* The Founders’ Constitution, *supra*, 152-53 (emphasis added).

The Framers’ concern for the unfettered *distribution* of the press could not be more relevant to the present case. Like the British government 400 years earlier, the Defendants recognized that they could not stop the *St. Mary’s Today* at the printing press or with a libel action, so they focused on its point of distribution. They prevented the Plaintiff from circulating his protected speech, and deprived the readers – occasionally in face-to-face confrontations – from receiving the speech. They disabled Jefferson’s willing readers and Blackstone’s willing venders from exercising their constitutional rights.

D. Like the Actions Taken in the Present Case, 17th and 18th Century Restrictions on the Press Involved Wanton Seizures of Papers, Without Judicial Oversight.

Although the Fourth Amendment is now generally conceived as a safeguard against zealous criminal investigations, it was adopted primarily to prevent government officials from seizing papers and publications that they considered libels against the government or that lacked government licenses for distribution. It was adopted, in other words, because allowing government officials to seize

papers without judicial proceedings infringes on the most fundamental values of the free press.

Seventeenth and 18th century licensing and libel laws granted their enforcers sweeping powers to prevent the distribution of illegal materials, and the Court of Star Chamber issued broad warrants to that effect. The Court of Star Chamber's warrants seldom specified the person or papers to be seized, but rather authorized the search of any premises belonging to any person suspected of containing any offensive papers. *See* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 24-27 (1957). By the 18th century, the people revolted against these general warrants, and in the great case of *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), Lord Camden of the Court of Common Pleas concluded that such warrants had no place in a democracy. *See also* *Boyd v. United States*, 116 U.S. 616, 626 (1886) (hailing *Entick* as one of the “landmarks of English liberty”). Subsequent attempts to inhibit distribution would require a court's approval.

There was hardly a more celebrated villain in the Framers' eyes than the Court of Star Chamber that issued those general warrants. *See, e.g.*, St. George Tucker, 1 Blackstone's Commentaries (1803), *in* The Founders' Constitution, *supra*, 154 (noting that “the still odious court of star-chamber[']s . . . tyrannical

proceedings and persecutions, among other motives of the like nature, prompted and impelled our ancestors to fly from the pestilential government of their native country, to seek an asylum here”); *see also* Joseph Story, 3 Commentaries on the Constitution § 1876 (1833), *in* The Founders’ Constitution, *supra*, 182 (celebrating “the demolition of [the Star Chamber’s] odious jurisdiction”). Its excesses and the use of the general warrants to seize books and papers for libel prosecutions were “fresh in the memories of those who achieved our independence and established our form of government,” *Boyd*, 116 U.S. at 625. In response, the Framers adopted not simply the First Amendment, but also the Fourth. The Fourth Amendment’s text specifically protects individuals’ “papers and effects,” reflecting the central goal of the Amendment – to protect communication and ideas against government interference through seizure and prosecution under the libel laws.

As a result of this history, the Framers ensured that government seizure of papers could be undertaken *only* with stringent procedural safeguards that are not required even with respect to other constitutional rights. *See, e.g., Marcus*, 367 U.S. at 731-32 (determining that allegedly obscene material cannot be seized without opportunity for hearing); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*) (“Any system of prior restraints of expression comes

to this Court bearing a heavy presumption against its constitutional validity.”)
(internal quotation marks and citation omitted). As the Defendants’ Seizure demonstrates, those safeguards are for good reason: without them, free speech is at the whim of the Sheriff.

III. SECTION 1983 IS DIRECTED NOT SIMPLY AT ACTIONS BY GOVERNMENT OFFICIALS BUT ALSO AT ACTIONS OF PRIVATE INDIVIDUALS TAKEN WITH THE ENCOURAGEMENT OR INDUCEMENT OF GOVERNMENT OFFICIALS

The trial court premised its opinion not on an interpretation of the First Amendment, but rather on a narrow reading of the “color of law” requirement under 42 U.S.C. § 1983. That holding cannot be squared with the meaning of § 1983 intended by its framers.

A. Section 1983 Must Be Broadly Construed To Provide a Remedy for Any Violation of the First Amendment.

As an initial matter, the scope of § 1983 can only be understood by reference to the substantive rights for which it provides a remedy. In enacting § 1983, which was § 1 of the Ku Klux Klan Act of 1871, Congress sought to provide a broad and far-reaching remedy for violations of civil rights. *See Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 685

(1978) (noting that “Congress, in enacting § 1, intended to give a broad remedy for violations of federally protected civil rights”). The version of the bill that Congress finally adopted, after considering more moderate proposals, was that proposed by Congressman Shellabarger, a “recognized leader of the Republican Radicals” and advocate of far-reaching liability for constitutional violations. David Achtenberg, *A “Milder Measure of Villainy”: The Unknown History of 42 U.S.C. § 1983 and the Meaning of “Under Color Of” Law*, 1999 Utah L. Rev. 1, 56-58 (1999). Congressman Shellabarger described § 1 thus: “This act is remedial, and in the aid of the preservation of human liberties and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficially construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation.” Cong. Globe, 42d Cong., 1st Sess., Appendix at 68 (1871).

Not surprisingly, § 1983 provides a remedy for any violation of the Fourteenth Amendment, including violations of the Bill of Rights that are incorporated therein. As the Supreme Court has stated, “To read the ‘under color of any statute’ language of the Act in such a way as to impose a limit on those Fourteenth Amendment violations that may be redressed by the § 1983 cause of action would be wholly inconsistent with the purpose of § 1 of the Civil Rights

Act of 1871 . . . from which § 1983 is derived.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982). Congressman Shellabarger’s bill had expressly expanded the scope of prior versions of the bill to provide a remedy for *any* constitutional violation, not just violations of specific provisions. *Compare* H.R. 320, 42d Cong., § 1 (1871) (Shellabarger’s Bill) (“ . . . deprivation of *any* rights, privileges, or immunities secured by the Constitution of the United States . . .”) (emphasis added), *with* S. 243, 42d Cong., § 1 (1871) (Frelinghuysen’s Bill) (“ . . . any of the rights, privileges, or immunities intended to be secured *by the first section of article fourteen* of the amendments to the Constitution of the United States . . .”) (emphasis added).

If, as history demonstrates, the First Amendment was intended to prohibit exactly the type of state action that the St. Mary’s County Sheriff’s Department engaged in, then § 1983 provides a remedy.⁴ The legislative history of § 1983

⁴ The trial court’s opinion suggests that the motivation of government officials is irrelevant to an analysis of § 1983 coverage, but that cannot be true. Motivation is a critical part of any analysis of the First Amendment right protected by § 1983. In determining whether restrictions on speech are to receive strict scrutiny, courts are to look first “to the purpose behind the regulation” and whether it is “*justified* without reference to the content of the regulated speech.” *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (internal quotation marks and citation omitted; emphasis in original). *See also City of Los Angeles v. Alameda Books*, 122 S. Ct. 1728, 1737 (2002) (looking to the “predominate concerns” motivating the restriction) (citation omitted). In short, what the Sheriff’s Deputies intended to do is critical to assessing whether they violated Appellants’

could not be more clear – its framers intended it to be a remedy for *any* violation of a Fourteenth Amendment right. Thus, even if the trial court’s tortured interpretation of “color of law” would be correct in analyzing the application of § 1983 to *another* right,⁵ it could not be applied to actions brought to protect First Amendment rights, as the history of that Amendment makes clear that its scope prohibits both wholly public and partially private forms of censorship.

rights – which they did – and therefore must also be central to an analysis of § 1983.

⁵ As discussed above, based on the history of the First and Fourth Amendments, state action in that context can only be understood to include actions taken by private citizens with the encouragement or inducement of government officials; because other statutory or constitutional rights may have a different genesis and scope, state action may be more limited in those contexts. It is not unusual to give the First Amendment a broader sweep than other rights in the Constitution in recognition of its central place to a representative democracy. For example, the category of protected speech is recognized to have a buffer zone to prevent the chill of protected expression, *see Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973) (“It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.”), and content-based regulations lose their usual presumption of constitutionality, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

B. The Framers of § 1983 Were Most Concerned About Violations of Rights by Private Actors With the Tacit Assent, Encouragement, or Participation of State Officials.

The distinction that the trial court attempted to draw between state action and off-duty action by government officials would have been entirely unfamiliar to those who enacted § 1983 and its predecessor. The debates surrounding the Klan Act, which have been thoroughly discussed in numerous cases before the Supreme Court, *see, e.g., Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), make clear that Congress was most concerned about violations of rights committed by government officials for failure to act where required by law or for conspiring with or encouraging private individuals – usually the Klan – to terrorize and violate the rights of former slaves. *See, e.g.,* Congressman Hoar, Cong. Globe at 333 (discussing lawlessness in southern states and arguing for “a government in force; not a government administered by a conspiracy under the pretense and under the form of republican security.”); *id.* at 334 (“If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the class of

officers who are its representatives to afford the equal protection of the law to that class of citizens, has denied that protection.”).

Indeed, it was the public-private conspiracies that were perhaps of greatest concern to the Congress. A primary goal of § 1983 was to ensure that the federal court provided an avenue for redress. This was needed because the state court systems – particularly state judges, juries, and sheriffs – were not trusted to enforce the law fairly and impartially. Cong. Globe at 459 (Congressman Coburn) (commenting on how the judicial systems are “impotent” and the “laws are annulled”); *id.* at 394 (Congressman Rainey) (“[T]he courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?”). Many local law enforcement officers were members of the Klan or, at a minimum, were willing to stand aside and allow the Klan to terrorize the citizenry at will. It was against this backdrop that § 1983 was established.

C. Judicial Interpretation of § 1983 Reflects Its Roots and Ensures that the Statute Provides a Remedy for Public-Private Conspiracies.

Judicial interpretation of § 1983's "under color of law" requirement flows naturally from its genesis. The Congress that adopted the "under color of law" requirement would never have imagined it to refer only to acts done with full legal authority, for "[t]hrough the first half of the nineteenth century, *colore officii* was a common law term of art referring to the illegal or unauthorized actions of governmental officials." Steven L. Winter, *The Meaning of "Under Color Of" Law*, 91 Mich. L. Rev. 323, 326 & n.14 (1992) (citing *City of Lowell v. Parker*, 51 Mass. (10 Met.) 309, 313-14 (1845) (Shaw, C.J.)); *see also Buttner v. Miller*, 4 F. Cas. 926, 927 (C.C.S.D. Ala. 1871) (contrasting acts done "under the revenue laws" with acts done "under color thereof"). Indeed, an interpretation that limited § 1983's reach to officers wearing badges and on the clock would contravene centuries of interpreting the phrase specifically to cover officials' acts *outside* of their official authority. *See Winter, supra*, at 325-26 (quoting Sir Edward Coke's 1642 annotations to a thirteenth-century English statute as noting that an official "may do it *colore officii* in two manner of wayes: either when he hath no warrant at all, or when he hath a warrant, and doth not pursue it").

In accord with this history, the Supreme Court has held that § 1983 reaches any conduct that is “fairly attributable to the State.” *Lugar v. Edmondson Oil Co.*, 457 U.S. at 937. This functional calculus requires a court to analyze all of the facts and rejects simple distinctions, such as “on duty” versus “off duty” or “in uniform” versus “out of uniform.” *Revene v. Charles County Comm’rs*, 882 F.2d 870, 872 (4th Cir. 1989). Rather, it is the nature of the act that matters; small gradations of difference are irrelevant when the actual effect of the act is, for example, to suppress fully constitutional speech.

The trial court’s opinion ignores the history of § 1983 and the sorts of ills it sought to address. Rather than employing a functional calculus and examining all of the indicia of government involvement and encouragement, the trial court focuses only on whether the Deputy Sheriffs were off-duty or not and whether they directly exercised the coercive power of the state. In so doing, the court treats the conduct of the Sheriff’s Department as purely private conduct, by private actors, for purely private purposes and ignores the most basic fact that is undisputed in the record: government officials (most notably the Sheriff⁶) and

⁶ The trial court attempts to minimize the Sheriff’s role, but it is hornbook law that providing money for an enterprise makes one a co-conspirator. *See, e.g.*, 15A C.J.S. *Conspiracy* § 43(2) n.76 (1955).

private individuals engaged in a conspiracy to suppress speech critical of the government.

Here, public officials – the Deputy Sheriffs – were paid by their boss, also a public official, to ensure that political speech about that official never reached the eyes of the public. Under the trial court’s crabbed interpretation of “under color of law,” none of those facts are relevant. But they indisputably prove a conspiracy to suppress free expression. The elements of that conspiracy – payment of money to support the enterprise, approval by government officials, participation by government officials, and agreement that the enterprise would not be subject to arrest or prosecution – are the hallmark of the sorts of activities that § 1983 was intended to remedy. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (“involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of [the Fourteenth Amendment]”).

Legislative history demonstrates that the Congress in 1871 was most concerned about conspiracies between public and private actors to violate civil rights and about situations in which government officials were complicit by looking the other way while private citizens violate the law. Since then, courts have regularly found that § 1983 provides a remedy when government officials conspire with private officials, *see Adickes*, 398 U.S. at 152, or when the

government involvement does not rise beyond the level of encouragement or agreement to violate the rights of an individual. *See, e.g., El Fundi v. Deroche*, 625 F.2d 195 (5th Cir. 1980) (finding state action when city police permitted private security guards to detain shoplifters). Here, the Sheriff and his deputies agreed to do through ostensibly “private” actors what they knew they could not do while wearing their uniforms. It is exactly these types of situations – in the nineteenth century, involving law enforcement officials removing their uniforms and participating as part of the Klan – that § 1983 was intended to remedy. In addition, the Sheriff, as well as Mr. Fritz, agreed that those who conducted the seizure would not be prosecuted, despite the fact that the Maryland Newspaper Theft Act would appear to outlaw their conduct. *See* Md. Ann. Code art. 27, § 345. The trial court’s interpretation effectively gives license to outlaw conduct by government officials and thus eviscerates the very remedy the statute was created to provide.

D. If the Trial Court's Decision Is Allowed to Stand, It Will Give Public Officials Significant Incentives and Ability to Suppress Speech.

The ramifications of the trial court's opinion are significant for the press, and for all citizens. Although courts must leave some room for a full-time sheriff to have a private, non-official life, the trial court overlooked the real-world dynamics of how an official's influence operates. The power of high-ranking government officials is not merely in their immediate exercise of that authority; it is in the fact that such power can be exercised in the future and those who cooperate may eventually be rewarded with official patronage or other benefits. With that reservoir of power, powerful government officials can induce or encourage private individuals to take action (some of which may be unlawful) even if they do not offer anything immediate in return. This is especially true with respect to their power over subordinates. Sheriff Voorhaar, for example, may not have ordered his Deputies to conduct the seizure and may not have offered promotions to those who did, but he clearly has the power to do so. It goes no further than common sense to suggest that his subordinates would want to curry favor with him. His approval, financing, and participation in the Seizure thus left zero practical difference between his actions and an official order.

In addition to his own staff, there are all manner of people who have reasons to seek favor from the sheriff. If high-ranking government officials can encourage – indeed finance – people to take actions that the government otherwise is not allowed to take, there will be a line of people prepared to assist. And with a wink and a nod, private parties will be able to commit the violations of civil rights that the Constitution forbids public officials to commit. Although preventing the suppression of free expression is of greatest concern to *amici*, it is noteworthy that the trial court’s interpretation of § 1983 would apply not merely to violations of the First Amendment. According to the logic of the trial court’s opinion, if the Deputy Sheriffs had been compensated (for out-of-pocket costs) by the sheriff to assault a paper boy delivering papers in order to prevent speech critical of the sheriff, but had otherwise undertaken the same precautions to appear as if they were acting in their private capacity, that would not be redressable under § 1983. That result strains credulity and demonstrates again why the trial court’s decision is wrong.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

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