No. 20–1534

In the Supreme Court of the United States

PATRICK DOUGHTY AND RANDY SEVERANCE,

Petitioners,

v.

STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, SEIU LOCAL 1984, CTW, CLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY ARGUMENT

The issue here is whether a First Amendment compelled speech claim brought under 42 U.S.C. § 1983 requires a plaintiff to prove malice or lack of probable cause. Pet. Br. i. It does not. There is no basis in the First Amendment, this Court's First Amendment precedents, § 1983, or the common law for grafting a malice or probable cause requirement onto a compelled speech claim under § 1983. The First Circuit's decision to bootstrap elements from inapt common-law torts onto petitioners' First Amendment claim is untenable and defies this Court's precedents. *Id.* at 11–20.

Respondent does not confront petitioners' argument that the First Circuit's decision conflicts with this Court's precedents. But it instead reframes the question presented and asserts there is a "consensus" among lower courts that "the" good-faith defense is available to private parties. Res. Br. i, 6–9. Yet neither the First Circuit nor the Third Circuit in *Diamond v. PSEA*, 972 F.3d 262 (3rd Cir. 2020), *cert. filed*, No. 20-1383 (2021), found an affirmative good-faith defense. Both rejected an affirmative "good-faith" defense based on "a then valid" state law and this Court's repudiated *Abood* precedent. The lack of consensus in the lower courts over what type of defense is available to unions provides one of the reasons to grant, not deny, certiorari.

Respondent likewise uses this reframing to argue (at 10–11) pre-*Janus* agency fee cases are "most unusual" because this Court rarely overturns its precedents. But this obscures the First Circuit's actual decision, which used a policy justification to add elements to petitioners' First Amendment claim under § 1983. This reasoning not only defies this Court's

precedents, but also undermines § 1983's remedial scheme. Certiorari is warranted for this reason as well.

I. There is no Unanimity in the Courts of Appeals over "the" Good-Faith Defense.

The First Circuit added elements to petitioners' First Amendment claim for compelled-subsidization of speech by plucking those elements from the inapt common-law torts abuse of process and malicious prosecution. Why? Because the court believed the respondent's reliance interest justified it. App. 10. This deductive reasoning is policy analysis masquerading as legal analysis. And as petitioners demonstrated in their petition, the decision conflicts with not only the Court's §1983, First Amendment, and *Janus* precedents—it also conflicts with this Court's retroactivity jurisprudence. Pet. Br. 11–20.[1]

Rather than confront the conflict between this Court's precedents and the First Circuit's decision, respondent attempts to reframe the issue and argue there is "total unanimity in the lower courts as to the availability of the good-faith defense." Res. Br. 6. To the contrary, unlike several other circuit courts, the First Circuit did not hold reliance interests entitle private defendants in § 1983 actions to an affirmative good-faith defense. Indeed, the court went out of its way to note that it did "not embark on a free-wheeling

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[1] Respondent tries reframing petitioners' "merits" argument as asking the Court to correct an "error" made by the lower court. Res. Br. 9–10. But it is because that "error" conflicts with this Court's § 1983, First Amendment, and retroactivity precedents, Pet. Br. 11–20, that petitioners presented a quintessential justification for this Court to grant certiorari. *See* S. Ct. R. 10(c).

assessment of whether to import into § 1983 a policy based on protection of reliance interests." App. 10. (citation omitted). The First Circuit, instead, grafted elements—malice and lack of probable cause—onto § 1983 First Amendment claims brought under *Janus*.

Nor did the Third Circuit recognize an affirmative good faith defense in *Diamond*. *Diamond* was a fractured opinion in which two of the judges specifically *rejected* an affirmative good-faith defense. Judge Fisher rightly found "it is beyond our remit to invent defenses to § 1983 liability based on our views of sound policy." 972 F.3d at 274 (Fisher, J., concurring). Judge Phipps likewise found there is no basis for a good-faith affirmative defense under § 1983. He found this defense not only incompatible with § 1983's text, but also the common law and § 1983's history and purpose. *See id.* at 285–91 (Phipps, J., dissenting). Only Judge Rendell, writing for herself, found unions could assert an affirmative good-faith defense based in policy considerations. *Id.* at 271; *see also* Pet. Br. 15, 16, 22.[2]

Thus, contrary to the respondent's assertion, the lower courts disagree over whether there is an affirmative good-faith defense to § 1983 First Amendment claims brought under *Janus*. That disagreement is a reason to grant, not deny, certiorari.

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[2] While the First Circuit did not hold respondents are entitled to an affirmative good-faith defense, that question is raised in the *Diamond* petition for certiorari. Petition at i, *Diamond v. PSEA*, (No. 20-1383). In the event the Court wants to resolve both issues, these cases should be consolidated.

II. This Case is Exceptionally Important.

Respondent also argues this case is unimportant to civil rights plaintiffs because the "circumstances" where a private party "relies" on both this Court's overturned precedent and a law supported by that precedent is unlikely to reoccur. Res. Br. 10–11. But the First Circuit's decision is not limited to those circumstances. It announced a broader legal rule that adds new state-of-mind elements to a § 1983 First Amendment claim based on policy considerations.

The First Circuit's flawed reasoning could be applied whenever a new constitutional claim arises, and a court does not think it good policy to apply the Constitution under § 1983. This reasoning not only defies this Court's precedents, but also undermines Congress' remedial scheme.

Section 1983 "imposes liability upon 'every person' who, under color of state law or custom, 'subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Owen v. City of Indep.*, 445 U.S. 622, 635 (1980) (quoting 42 U.S.C. § 1983). The statute's text reflects Congress' intent to "provide protection to those persons wronged by the misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 650. Courts do not have a license to undermine the statute's purpose by creating defenses or immunities to § 1983 actions based on policy. *See Tower v. Glover*, 467 U.S. 914, 922–23 (1984). "It is for Congress to determine whether § 1983 litigation has become too burdensome." *Id.* at 923; *see also* Pet. Br. 7.

The First Circuit defied this principle by using policy considerations—respondent's alleged reliance interests—to justify importing state-of-mind elements into petitioners' § 1983 First Amendment claim. There is no limit to this reasoning because it permits courts to create new elements to constitutional claims whenever a court believes it may be unfair to enforce § 1983 as Congress wrote it.

This is not a speculative concern. Lower courts confront similar § 1983 claims as the one in this case. Those cases likewise concern First Amendment claims that would be susceptible to the First Circuit's deductive reasoning. *See, e.g.*, *Apodaca v. White*, 401 F. Supp. 3d 1040 (S.D. Cal. 2019) (holding a university's mandatory student fee policy compelled students' speech); *see also Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) (finding a university's policy requiring a professor to use students' preferred pronouns compelled speech and violated the First Amendment's Free Exercise Clause).

If a court does not think the required outcome will be fair or equitable, nothing stops the court from rummaging in the common law to find a tort and importing that tort's state-of-mind elements into the § 1983 claim. Without this Court's intervention, this pretextual analysis may become commonplace. It is thus important that the Court take this case and make clear to the lower courts that this type of judicial policymaking has no place in interpreting Congress' civil rights laws.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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