

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**

**BRIEF AMICUS CURIAE OF
FREEDOM FOUNDATION
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Does a First Amendment compelled speech and association claim for damages or restitution brought under 42 U.S.C. § 1983 require a plaintiff to prove malice or lack of probable cause?

(i)

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INTERESTS OF *AMICUS CURIAE*¹

The Freedom Foundation (the Foundation) is a 501(c)(3) nonprofit organization working to advance individual liberty, free enterprise, and limited government. The Foundation regularly files *amicus curiae* briefs with this Court in cases concerning the First Amendment rights of public employees. *See, e.g.*, *Thompson v. Marietta Education Association, et al.*, 972 F.3d 809 (6th Cir. 2020), *cert. pet. filed*, 20-1019 (2021); *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016). Given the Foundation’s mission, it has an interest in the Court accepting review of the instant case and addressing the standards applicable to alleged deprivations of First Amendment rights against compelled speech and association brought under 42 U.S.C. § 1983.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

The Court should grant the petition because the decision below involves important federal questions regarding the requirements, purpose, and function of 42 U.S.C. § 1983, which, simply put, “gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in the Federal courts.” Cong. Globe, 42d Cong., 1st Sess. 50 (1871).

¹ Pursuant to Rule 37.2, all parties received notice of the filing of this brief and granted consent to file. Pursuant to Rule 37.6, *Amicus* affirms that no party’s counsel authored this brief in whole or in part, and no person or entity, other than *Amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Even though § 1983 “is absolute and unqualified; [and] no mention is made of any privileges, immunities, or defenses that may be asserted,” *Owen v. City of Independence*, 445 U.S. 622, 635 (1980), the First Circuit nullified Petitioners’ ability to seek the remedy provided by Congress for the violation of their First Amendment rights against compelled speech based upon an inapt state tort (abuse of process). Rather than establishing a compelled speech claim under § 1983 through evidence of a First Amendment deprivation, the First Circuit imported a previously unrecognized “malice” requirement into Petitioners’ claims.

But this requirement is not supported by the text, purpose, or function of § 1983. First, whether claims under § 1983 are merely informed by possibly analogous state tort claims, or whether they are governed by those claims is an important federal question. Second, judges’ modification of § 1983 claims, which undercuts the statute’s purpose to discourage civil rights abuses by state officials, is an important federal question. Finally, the concern that the tort-based “malice” requirement may be applied to other civil rights claims under § 1983 warrants this Court’s review. For these reasons, the Court should grant the petition.

REASONS TO GRANT THE PETITION

I. THE REQUIREMENTS OF § 1983 IS AN IMPORTANT FEDERAL QUESTION

There is no indication in the text of § 1983 that Congress intended the cause of action to be *controlled* by state tort law. § 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). Liability imposed for deprivations of federally protected rights. Nothing more, nothing less.

While the contours of a claim under § 1983 are 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 § 1983 claims, *Hartman v. Moore*, 547 U.S. 250, 258 (2006) (common law principles serve “more as a source of inspired examples than of prefabricated components.”). § 1983 is not “a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution,” and specifically applicable to the instant case, abuse of process. *See Ruberg v. Paulk*, 132 S. Ct. 1497, 1504 (2012). Instead, torts should inform § 1983 claims only regarding the “tort concepts of duty, proximate cause, and cause in fact, as well as various defenses.”

Sheldon H. Nahmod, *Section 1983 and the “Background” of Tort Liability*, 50 Ind. L.J. 5, 32 (1974).

In determining the extent state torts should inform § 1983 claims, the Court should consider the *purpose* of a given federal right sought to be protected through a § 1983 claim, and whether such purpose squares with the intent behind a supposedly analogous tort. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1731-32 (2019) (Gorsuch, J., concurring in part and dissenting in part); *Carey v. Piphus*, 435 U.S. 247, 258 (1978) (“The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.”). While it is true that § 1983 claims and common law torts are similar in that they use monetary damages “to protect persons from injuries to particular interests,” *Carey v. Piphus*, 435 U.S. 247, 254-257 (1978); *Memphis Cnty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306-307 (1986), and sometimes share the common interest to protect constitutional rights, torts claims and §1983 claims protect entirely distinct and independent interests.

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. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”). There is nothing in the text of § 1983, nor the past precedents of this Court, that supports the lower court’s modification of a congressionally crafted cause of action. What § 1983 claims require, or do not require, especially in the context of speech compelled by public labor unions, is an important federal question meriting this Court’s review.

II. THE PURPOSE OF § 1983 IS AN IMPORTANT FEDERAL QUESTION

The Fourteenth Amendment and § 1983 were enacted against a specific background: the violation of the federally protected rights of former slaves through “legal” and extralegal means by southern state officials. The purpose of § 1983 is thus equally specific: the creation of a federal cause of action to remedy the deprivation of those rights under the Fourteenth Amendment. Nothing in the historical context of the Fourteenth Amendment or legislative history of § 1983 supports the conclusion that Congress intended state torts to control § 1983.

Efforts at 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).

Relying on the Thirteenth Amendment's enforcement clause, congressional Republicans concluded that a more direct civil rights protecting provision was necessary. Paul Finkelman, *"Let Justice Be Done, Though the Heavens May Fall": The Law of Freedom*, 70 Chi.-Kent L. Rev. 325, 357 (1994). The resulting Fourteenth Amendment thus guarantees all citizens "the equal protection of the laws," specifically the guarantees of the Bill of Rights. *Adamson v. California*, 332 U.S. 46, 92–110 (1947) (appendix to Black, J., dissenting); see also *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 829 (2010) (Thomas, J., concurring) (quoting Cong. Globe, 39th Cong., 1st Sess., 1088 (1866)). Rather than allow state law to limit available protections, the Fourteenth Amendment was intended as an explicit rebuke of state officials for on-going civil rights violations.

The legislative history of § 1983 further buttresses this point. Shortly after Congress approved the Fourteenth Amendment, it debated ways to make its guarantees enforceable. The result was the Civil Rights Act of 1871, which became codified as § 1983. As evidenced by its title, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States," Congress intended § 1983 to ensure that the protections of the Fourteenth Amendment extended to all citizens. When crafting

§ 1983, “Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982); *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 683-686 & n.45 (1978) (recounting history “corroborat[ing] that Congress . . . intended to give a broad remedy for violations of federally protected civil rights”).

Rather than being controlled by state tort law, Congress meant § 1983 to stand apart as an independent protection. *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 momentum behind this ‘force bill.’”). Citizens could not enforce their Fourteenth Amendment protections against state officials unwilling “to enforce their own laws against those violating the civil rights of others.” *Ngiraingas v. Sanchez*, 495 U.S. 182, 187 (1990) (quoting *District of Columbia v. Carter*, 409 U.S. 418, 423 (1973)). Thus, § 1983 provides “a remedy in the federal courts supplementary to any [state] remedy, because state law, including state tort law, does not adequately protect constitutional interests.” *McNeese v. Bd. of Educ. for Cnty. Unit Sch. Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 671-672 (1963). The historical context of the Fourteenth Amendment and legislative history of § 1983 demonstrate a clear congressional design to impose liability independent of common law principles, which may not protect constitutional principles. The “malice” requirement at the center of the decision below is precisely such a state tort principle which does not adequately protect First Amendment rights.

Proof of the deprivation of the constitutional right is sufficient to establish liability under § 1983, as far as its framers were concerned. Congress concerned itself

with vindicating past abuses and discouraging future abuses, it did not concern itself with the violator's subjective intent. The purpose of § 1983 is an important federal question meriting this Court's review.

III. THE FUNCTION OF § 1983 IS AN IMPORTANT FEDERAL QUESTION

The First Circuit analogized the claims in this case to the state tort of abuse of process because it purportedly involves "a private party having used a lawful-when-invoked, state-backed process to acquire [] property, even though that process was subsequently held to be unlawful due to a change in the law." *Doughty v. State Employees' Ass'n of New Hampshire, SEIU Loc. 1984*, 981 F.3d 128, 135–36 (1st Cir. 2020). Such a comparison led the First Circuit to add a previously absent malice requirement, and good faith defense, onto compelled speech claims under § 1983. *Id.* But given the broad application of the abuse of process tort, the First Circuit's ruling invites courts to apply the "malice" requirement to other causes of action under § 1983 in pursuit of preferred policy outcomes rather than what the statute actually requires.

Consider claims under § 1983 for alleged violations of *other* First Amendment rights. If a city council enacts an ordinance empowering the police to shut down peaceable public demonstrations deemed to be "distasteful," and an affected individual brings a § 1983 claim, would it make any difference whether the officials used a state-backed process or acted with malice? Or what if a law was put into effect creating a state agency to review news stories *before* they go to print or air for factual accuracy? Clearly, the process used to make such decisions, or the intent of the decision-makers would not affect the claims for

chilled speech available under § 1983. Seemingly, a restriction disproportionately impacting the free exercise of religion like the one recently enjoined by this Court in *Tandon v. Newsom*, 593 U.S. ____ (2021), could also be sanitized from § 1983 liability if a judge could make an argument analogizing it to the abuse of process tort. Applied at a high enough level of generality, it is difficult to conceive of what § 1983 claim would *not* be capable of qualifying as an abuse of process, giving district courts free reign to import state-based defenses to a federal cause of action.

Despite these implications, the First Circuit applied the same restriction on Petitioners' ability to seek redress of their First Amendment rights against compelled speech. An obvious response might be that federal judges would be unlikely to disturb such bedrock First Amendment protections as those described above. But therein lies the point. Under basic separation of powers principles, judges should not have the authority to modify the relief available under § 1983 by making distinctions between First Amendment rights. Or distinguishing between any other part of the Bill of Rights. It may be a good policy prescription to add a malice requirement onto § 1983 claims seeking compensation for compelled speech, but that prescription must be implemented by Congress, not federal courts. *See Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part) (“Our job isn’t to write or revise legislative policy but to apply it faithfully.”). The function of § 1983 is an important federal question meriting this Court’s review.

CONCLUSION

The decision below involves important federal questions that should be settled by this Court. The text, purpose, and function of § 1983 all show that it was enacted to enforce the “rights, privileges, or immunities secured by the Constitution and laws” of the United States, not to import purportedly analogous torts requirements or defenses. The rights protected by the First Amendment and other federal guarantees do not depend on the principles undergirding state-based tort law, and an exercise of this Court’s supervisory power is appropriate.

The petition should be granted.

Respectfully submitted,

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