No. _____

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

PETITION FOR WRIT OF CERTIORARI

FRANK D. GARRISON
Counsel of Record
MILTON L. CHAPPELL
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
fdg@nrtw.org

Counsel for Petitioners

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QUESTION PRESENTED

In 2018, this Court overruled *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), holding states and unions compel speech and association by exacting agency fees from nonconsenting public-sector employees and thus violate the First Amendment. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018).

Petitioners are or were New Hampshire state employees who, before *Janus*, had agency fees exacted from them by the State and respondent State Employees' Association of New Hampshire. After *Janus*, petitioners sued respondent seeking damages or restitution under 42 U.S.C. § 1983 for this violation of their First Amendment rights.

The First Circuit affirmed a district court order dismissing petitioners' complaint reasoning that their First Amendment claim could be analogized to the common-law torts of "abuse of process" and "malicious prosecution," which require a plaintiff to prove "malice" or "lack of probable cause" to recover damages or restitution under § 1983.

The question presented is:

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?

PARTIES TO THE PROCEEDING

Petitioners are Patrick Doughty, a New Hampshire state employee, and Randy Severance, a retired New Hampshire state employee. Petitioners were Plaintiff-Appellants below.

Respondent, the State Employees' Association of New Hampshire, is a labor union that represents public employees in New Hampshire. Respondent was Defendant-Appellee below.

RULE 29 STATEMENT

A corporate disclosure statement is not required under Supreme Court Rule 29.6 because no petitioner is a corporation.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and directly relates to these proceedings in the U.S. District Court for the District of New Hampshire and the U.S. Court of Appeals for the First Circuit:

Doughty v. SEA, 19-cv-53-PB (D. N.H. May 30, 2019).

Doughty v. SEA, 981 F.3d 128 (1st Cir. 2020).

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For many years, petitioners were compelled as a condition of employment to subsidize the respondent union's speech. But in 2018, this Court overruled *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977) in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018), finding that compelling nonunion member employees to subsidize a union's speech violates the First Amendment.

Petitioners then sued on behalf of themselves and other similarly situated employees to recover the money that respondent took from them, during the statutory limitations period, in violation of their First Amendment rights. They did so under 42 U.S.C. § 1983, which Congress enacted to provide a remedy for those who have suffered constitutional violations. Naturally, petitioners' claim sought damages or restitution for the respondent's constitutional violations under the First Amendment. After all, *Janus* held that identical compelled fee seizers violated public-sector employees' First Amendment rights.

But the District Court below dismissed petitioners' claim on two grounds unrelated to the First Amendment. First, the court held that it did not matter what constitutional right petitioners pled because the court could infer that § 1983 provided respondent an affirmative "good-faith" defense based on respondent's alleged reliance on *Abood*. The court then alternatively held it could analogize petitioners' First Amendment claim for compelled speech and association to the common-law tort abuse of process. And because that tort required proof of "malice" or "lack of probable" cause, which the court held petitioners could not prove, they

could not recover damages or restitution for their First Amendment claim.

The First Circuit rejected the District Court's primary holding that § 1983 contained an affirmative defense, but upheld the District Court on its alternative rationale that the common-law torts of abuse of process or malicious prosecution provided an analogue for petitioners' First Amendment claim. To justify this holding, the panel cited respondent's reliance interests and several cases applying these common-law torts to claims alleging Fourteenth Amendment procedural due process violations—not First Amendment violations.

The First Circuit's holding defies this Court's precedent and cannot stand. First, determining the elements of a claim under § 1983 requires courts first "to identify the specific constitutional right allegedly infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Then courts "must determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). And courts "must closely attend to the values and purposes of the constitutional right at issue" when determining the elements of a § 1983 claim. *Id.* at 921. The First Circuit's decision did not apply the values and purposes of the First Amendment nor this Court's interpretation of it under *Janus*. The First Amendment implicates different values and purposes than the Fourteenth Amendment's Procedural Due Process Clause—and the common-law torts that resemble it. The First Circuit should have applied the Constitution's First Amendment to determine whether respondents deprived petitioners of their First Amendment rights.

Second, the First Circuit's holding defies this Court's retroactivity jurisprudence. Courts cannot fashion legal rules to avoid applying this Court's holdings retroactively. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753–54 (1995). Yet the First Circuit's opinion, and the district court order it affirmed, did not hide the reason for grafting state-of-mind requirements onto petitioners' First Amendment claim. Both courts below repeatedly referred to respondent's reliance interests—reliance interests that this Court already held were insufficient to retain *Abood*—before analogizing inapt common-law torts and applying their state-of-mind requirements to petitioners' claim. This type of pretextual legal analysis defies *Reynoldsville Casket*.

The First Circuit's decision to import elements of a common-law tort into petitioners' First Amendment claims—based on its aversion to applying this Court's rules retroactively—undermines the Constitution and will have adverse consequences for civil rights plaintiffs. If lower courts can manipulate constitutional claims to achieve what they feel is the best policy, many victims of civil rights abuses will be left remediless. It is therefore exceptionally important that the Court take this case, overrule the First Circuit's decision, and direct it to apply the First Amendment to petitioners' First Amendment claims.

For these reasons, petitioners respectfully request this Court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The United States Court of Appeals for the First Circuit's opinion is reported at 981 F.3d 128 (1st Cir. 2020) and reproduced at App. 2–20. The United States District Court for the District of New Hampshire's unpublished Order and Transcript are reproduced at App. 21–47.

JURISDICTION

The First Circuit entered judgment on November 30, 2020. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution's First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

42 U.S.C. § 1983 provides in relevant part: "Every 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 * * *[.]"

STATEMENT

A. Legal Background

1. In 2018, this Court overruled *Abood* holding that it violates the First Amendment for states and unions to exact agency fees from nonconsenting employees. *Janus*, 138 S. Ct. at 2486. In doing so, the Court recognized that the freedom of speech includes the freedom to refrain from speaking—just as it protects the right to speak. *Id.* at 2463. For this reason, forcing individuals to subsidize the speech of another private speaker creates "similar First Amendment concerns." *Id.* at 2464. And, the Court found, a "'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'" *Id.* at 2463 (quoting *Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 310–11 (2012)).

The Court thus held "public-sector agency-shop arrangements violate the First Amendment[.]" *Id.* at 2478. Unions therefore cannot "extract agency fees from nonconsenting employees." *Id.* at 2486. And for a state and union to legally extract agency fees from public-sector employees, those employees must waive their First Amendment rights and affirmatively consent to pay. *Id.*

During the four-decade span between *Abood* and *Janus*, unions were allowed to exact vast amounts of money for their expressive activities from nonunion public employees' wages. As this Court noted in *Janus*, it is "hard to estimate how many billions of dollars" unions were allowed to unconstitutionally seize

and keep during that time. *Id.* The Court likewise found "unions have been on notice for years regarding this Court's misgiving about *Abood*" and that, since at least 2012, "any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain." *Id.* at 2484–85.

2. Congress enacted § 1983 to give victims of constitutional violations a cause of action to vindicate their constitutional rights in federal court. This purpose is clear from § 1983's text: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * 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.

The elements for establishing a "deprivation" for a constitutional claim under § 1983 depend on "the specific constitutional right allegedly infringed." *Albright*, 510 U.S. at 271. The Court "look[s] first to the common law of torts." *Manuel*, 137 S. Ct. at 920. Sometimes a review of the common law will "lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort." *Id.* But that is not always the case. Because "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'"

Id. at 921 (citation omitted). And § 1983 is not "a federalized amalgamation of pre-existing common-law claims." *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012).

The statutory text "'on its face admits of no immunities' * * * [i]ts language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Indep., Mo.*, 445 U.S. 622, 635 (1980) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)). Even so, this Court has found that if an immunity or defense was "so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine" when it enacted § 1983, then a court can find an immunity or defense. *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (quoting *Wyatt v. Cole*, 504 U.S. 158, 164 (1992)). But courts "do not have a license to create immunities based solely on [their] view[s] of sound policy," *Rehberg*, 566 U.S. at 363, and thus "do not have a license to establish immunities from § 1983 actions in the interests of * * * sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome." *Tower v. Glover*, 467 U.S. 914, 922–23 (1984).

B. Facts and Procedural History

1. Petitioner Patrick Doughty is a New Hampshire State employee and petitioner Randy Severance is a retired New Hampshire State employee. Respondent union represented both petitioners as their collective bargaining agent before *Janus*. At that time, pe-

titioners were not union members, but were compelled, as a condition of employment, by respondent to pay agency fees without their consent. App. 3–5, 52.

Shortly after this Court's holding in *Janus*, petitioners sued respondent under § 1983. They alleged that respondents violated their First Amendment rights as recognized in *Janus*, seeking damages or restitution for themselves, and a class of similarly situated employees, for the agency fees respondent unconstitutionally exacted from their wages during the statutory limitations period. App. 5–6, 54–56.

The District Court below dismissed petitioners' complaint. App. 44. The court first questioned whether it would be "right to require [respondent] to pay damages for acting consistent with the requirements of state law and … [S]upreme [C]ourt precedent." App. 7, 24. The court thus found it "incomprehensible" that "damages[s] actions [could] be maintained under these 'unique circumstances.'" App. 8, 37.

In line with its aversion to providing petitioners any relief for the deprivations they suffered before *Janus*, the District Court dismissed petitioners First Amendment claim for two alternative reasons. First, the court found that a "good faith defense must be available to protect defendants under these kinds of circumstances." App. 8, 42. The court thus held it could "infer[]" an affirmative defense to petitioners' First Amendment claim based on this Court's precedent "recognizing the qualified immunity doctrine." App. 42. Because petitioners could not overcome this affirmative defense, the District Court dismissed their claim on that basis. App. 42–46.

The court then alternatively held that it could dismiss petitioners' complaint because the most analogous tort to a compelled speech and association claim under the First Amendment is the common-law tort of abuse of process. App. 42–43. And petitioners could not prove the state-of-mind requirements for that tort. App. 43.

2. The First Circuit affirmed the District Court's order. App. 1, 20. The panel began its legal analysis by noting that it "must attend to the District Court's concern that the recognition of such a damages claim under § 1983 would unduly upset the justifiable reliance interests of the private defendant." App. 10. But the panel rejected the District Court's holding that § 1983 contains an affirmative defense based on reliance interests. *Id.* ("In attending to [the District Court's] concern, we do not embark on a free-wheeling assessment of whether to import into § 1983 a policy based on protection of reliance interests."). The panel, though, determined it would look to the common law in "defining the elements of damages and the prerequisites for their recovery" for petitioners' First Amendment claim. *Id.*

The panel looked to several cases in which other courts of appeal analogized First Amendment compelled speech and association claims brought under *Janus* to the common-law torts of malicious prosecution and abuse of process. App. 11–12. The court also looked to several cases that found Fourteenth Amendment procedural due process claims analogous to those common-law torts. App. 12–14. Because those torts include the state of mind requirements "malice" and "lack of probable cause," which petitioners could

not prove, they could not recover damages or restitution for their claim. *See id.*

Even so, the panel acknowledged that petitioners' First Amendment compelled speech and association claim "protects interests quite different from those protected by the common-law torts of malicious prosecution and abuse of process," yet found their claim "similar to claims for those common-law torts in that it seeks to compensate them for a private party having used a lawful-when-invoked, state-backed process to acquire their property, even though that process was subsequently held to be unlawful due to a change in the law." App. 14–15.

The panel likewise acknowledged "while [petitioners] are right that their *Janus*-based § 1983 claim * * * is distinct from the use of a court process to effect a seizure," the panel reasoned * * * "[s]ome divergence is to be expected even between a § 1983 claim and a common-law tort that it closely parallels." App. 15. The panel also concluded that petitioners' distinction "between their [First Amendment] § 1983 claim and the common-law torts of abuse of process and malicious prosecution might have force if there were any indication that the common law was as indifferent to reliance interests in a circumstance like the one at issue here." App. 16.

REASONS FOR GRANTING THE PETITION

It is hard to overstate this case's legal importance. Not only for remedying petitioners' First Amendment rights, but for many individuals who depend on the remedy Congress gave them to redress their constitutional rights under § 1983. The decision below determined that it could ignore the First Amendment, look

into the common law for inapt torts requiring a state-of-mind element, and essentially nullify petitioners' congressionally provided remedy.

First, the First Circuit's holding flouts this Court's precedent requiring courts to look to the constitutional right at issue in determining elements of a § 1983 claim. It likewise ignored this Court's holding in *Janus*, which did not suggest that "malice" or "lack of probable cause" played any part in a First Amendment compelled speech and association analysis.

Second, the decision flouts this Court's retroactivity jurisprudence. It does so by fashioning a pretextual rule to avoid the retroactive applicability of this Court's ruling in *Janus* and protecting a union's alleged reliance interests—reliance interests this Court already adjudicated in *Janus*.

Last, it is exceptionally important the Court take this case because the First Circuit's holding undermines the Constitution and will have adverse consequences for civil rights plaintiffs. The decision sets a precedent that courts can manipulate constitutional claims to predetermine the outcome of cases based on what they think is good policy. The Court should take this case and reject the proposition that courts can engage in such judicial gerrymandering. Certiorari is warranted.

I. The Decision Below Conflicts with this Court's Precedents.

A. The decision below conflicts with this Court's § 1983 jurisprudence and ignores this Court's holding in *Janus*.

The First Circuit's decision contravenes this Court's § 1983 precedents because it conflates the

First Amendment with the Fourteenth Amendment's Procedural Due Process Clause and the common-law torts that resemble violations under it. And in doing so, it ignored this Court's holding for what a compelled speech and association claim requires under *Janus*. That contravention demands this Court's intervention.

1. Section 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The statute does not include a "state of mind requirement." *Parratt v. Taylor*, 451 U.S. 527, 534–35 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). As this Court explained in *Parratt*, "[n]othing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights." *Id.* at 534.[1]

Several years later, the Court reaffirmed § 1983 does not have a general state of mind requirement. In *Daniels*, the Court explained that § 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." 474 U.S. at 330 (citing *Parratt*, 451 U.S. at 534–35). In other words, if a plaintiff must prove a defendant's state of mind, it is only because that constitutional right at issue requires that proof.

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[1] *See also Parratt*, 451 U.S. at 534 ("[§] 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement."); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part) ("[L]ook at [§ 1983] as long as you like and you will find no reference to the presence or absence of probable cause as a precondition or defense to any suit.")

In *Manuel*, this Court gave a guide to courts on how to determine the requirements for a constitutional claim under § 1983. There, the Court analyzed whether a plaintiff must bring a § 1983 pretrial detention claim under the Fourteenth Amendment's Due Process Clause or whether a plaintiff has a cause of action under the Fourth Amendment. *See* 137 S. Ct. at 917–20. The Seventh Circuit had determined that a plaintiff could not bring a pretrial detention claim under the Fourth Amendment once legal process had begun, because the Fourth Amendment no longer applies after arrest and the onset of legal process. *Id.* And thus the plaintiff had pled "the wrong part of the Constitution." *Id.* at 916. In rejecting that view, the Court analyzed the Fourth Amendment and the case law surrounding it to find that a pretrial detention is covered by that Amendment and thus the Court identified "the specific constitutional right at issue." *Id.* at 920 (citing *Albright*, 510 U.S. at 271).

But that only addresses the threshold inquiry of what constitutional right to apply. Courts must also "determine the elements of, and rules associated with, an action seeking damages for its violation." *Id.* (citing *Carey v. Piphus* 435 U.S. 247, 257–58 (1978)). In doing so, a court should "look first to the common law of torts" because sometimes "that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort." *Id.* "*But not always*. Common-law principles are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" *Id.* at 921 (emphasis added) (citation omitted). And "[i]n ap-

plying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Id.*

Sometimes that analysis will lead a court to find there is a state-of mind-requirement for this constitutional violation under § 1983. For example, an equal protection violation requires a plaintiff to prove an invidious discriminatory purpose before he or she can recover damages under § 1983. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). An Eighth Amendment claim for "cruel and unusual punishment" requires a plaintiff to prove "deliberate indifference" before recovery is available. *See Estelle v. Gamble*, 429 U.S. 97, 101–105 (1976). And, as most relevant here, some procedural due process claims under the Fourteenth Amendment sometimes require a plaintiff to prove "malice" or "lack of probable cause" as an element of the prima facie case. *See, e.g.*, *Wyatt v. Cole*, 994 F.2d 1113, 1119–20 (5th Cir. 1993). But those cases all concentrated on the constitutional provision at issue.

2. Applying these principles, the First Circuit's decision should have analyzed the First Amendment and this Court's case law to determine whether § 1983 required petitioners to prove respondent's state of mind when it deprived petitioners of their First Amendment rights. The decision instead did not "closely attend" to the First Amendment, ignored this Court's holding in *Janus*, and applied inapt common-law torts to graft on a state-of-mind requirement to petitioners' claim.

Indeed, the decision analyzed several cases that concerned the use of judicial or governmental processes to deprive someone of their property. App. 10–

12. Most of those cases trace to this Court's opinion in *Wyatt*, 504 U.S. 158, and the Fifth Circuit's holding on remand. *Wyatt*, 994 F.2d 1113. Those cases in the main were brought under the Fourteenth Amendment's Procedural Due Process Clause. The claim in *Wyatt*, for example, was that a private defendant deprived the plaintiff of due process of law when seizing his property through a judicial process under an *ex parte* replevin statute. *Wyatt*, 504 U.S. at 160. The Court found the plaintiff's due process claims analogous to "malicious prosecution and abuse of process," and recognized that at common law "private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause." *Id.* at 164–65; *see id.* at 172–73 (Kennedy, J., concurring) (similar). And that made sense to a degree. After all, the defendant in *Wyatt*, like most defendants in a common-law tort action for malicious prosecution or abuse of process, used the judicial system to deprive a plaintiff of their rights. There was a common link.

There is no common link between a First Amendment compelled speech and association claim under *Janus* and these torts other than there is property involved. As the Third Circuit observed in a post-*Janus* case with similar facts as here, "the torts of abuse of process and malicious prosecution provide at best attenuated analogies. It seems apparent that we are not dealing here simply with a civil 'process ... willfully made use of for a purpose not justified by the law,' * * * let alone 'the malicious institution of a civil suit'" *Diamond v. PSEA*, 972 F.3d 262, 280 (3rd Cir. 2020) (Fisher, J., concurring) (citing Thomas M. Cooley, *A Treatise on the Law of Torts* 187, 189 (1876)). The

First Amendment is different from the Fourteenth Amendment's Due Process Clause and the common-law torts applied in these cases.[2]

3. This Court held in *Janus* that the First Amendment protects public employees' freedom from being compelled to financially support a labor union's speech as a condition of employment without their affirmative consent. 138 S. Ct. at 2486. This is because "[c]ompelling a person to subsidize the speech of other private speakers" undermines "our democratic form of government" and leads to individuals being "coerced into betraying their convictions." *Id.* at 2464. Under the First Amendment as construed by this Court in *Janus*, then, all that is required for a defendant to "deprive" employees of their First Amendment rights is to compel speech by taking their money without affirmative consent. 138 S. Ct. at 2486.

The injury in *Janus* and here is thus unlike that caused by common-law torts. It is peculiar to the First Amendment. More importantly, a violation of First Amendment speech rights is nothing like a malicious prosecution or abuse of process tort. *See, e.g.*, *Tucker v. Interscope Recs., Inc.*, 515 F.3d 1019, 1037 (9th Cir. 2008) ("[T]he tort of abuse of process requires misuse of a judicial process."); *see also Diamond*, 972 F.3d at 289 (Phipps. J, dissenting) ("At most, a showing of good faith can negate a mental state element of a claim – such as gross negligence required for a procedural due process claim. But that is of no moment here

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[2] To be sure, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook Cnty.*, 506 U.S. 56, 70 (1992). But petitioners did not plead a deprivation of due process below—they pled a First Amendment violation. App. 54.

because a claim for compelled speech does not have a *mens rea* requirement.") (citations omitted). Those torts do not exist, as the First Amendment does, "to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

4. In sum, The First Amendment is not like the Fourteenth Amendment's Procedural Due Process Clause. And the common-law torts of malicious prosecution or abuse of process do not resemble a compelled subsidization of speech claim under *Janus*. Malice and lack of probable cause thus are not elements of a First Amendment claim under *Janus*. Respondent's intent when it compelled petitioners' speech was immaterial. With no common-law tort resembling a First Amendment compelled speech and association claim, the First Circuit should have looked to the First Amendment and this Court's opinion in *Janus* and applied it to petitioners' claim.

B. The decision below conflicts with this Court's civil-retroactivity jurisprudence.

The courts below reiterated a common theme throughout their decision-making: the respondent's reliance interests. App. 16–17, 24. But that reliance should have played no part in the lower courts' analysis. First, this Court adjudicated unions' reliance interests in *Janus* and found those interests insufficient to retain *Abood*. *See Janus*, 138 S. Ct. at 2484–86. But more importantly, this Court's retroactivity jurisprudence *forbids* lower courts from using reliance to formulate rules that foreclose retroactive liability for victims of unconstitutional laws.

1. In *Reynoldsville Casket Co.*, this Court held that "when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or not those cases involve predecision events." 514 U.S. at 752 (citing *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993)).[3] *Reynoldsville Casket* not only reiterated that lower courts must apply its decisions retroactively, but also further held courts cannot avoid retroactive applica-

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[3] As Judge Bibas recently explained (sitting by designation):

> The Supreme Court has the power to declare law, not make it. The Constitution vests "[a]ll legislative Powers in Congress. Courts are limited to judging 'Cases' and 'Controversies.' As Blackstone explained, they are 'not delegated to pronounce a new law, but to maintain and expound the old one.' Their only power is "to say what the law is." So federal courts cannot 'change' the law'; they can only, in deciding cases, say what a law 'has meant continuously since the date when it became law.'
>
> Because Supreme Court decisions clarify what the law 'ha[s] always meant,' their rulings apply to all open cases, even those whose facts predate the ruling. Otherwise, they would be 'not ... adjudication but in effect ... legislation.' In short, judicial decisions apply retroactively.

Franklin v. Navient, Inc., 2021 WL 1535575, at *2 (D.Del., 2021) (cleaned up). *See also Harper*, 509 U.S. at 107 (Scalia, J., concurring) ("retroactivity [i]s an inherent characteristic of the judicial power.").

tion of this Court's cases by fashioning contrary remedies based on a party's prior reliance on now a overruled law. *Id.* at 753–54.

2. The First Circuit's decision contravenes *Reynoldsville Casket*'s holding. The district court referred repeatedly to respondent's reliance interests before holding it could tack on state-of-mind elements to petitioners' First Amendment claim. App. 37. The First Circuit also "attended" to those reliance interests when affirming the District Court's order. App. 16–17. Indeed, the First Circuit's decision went out of its way to base its justification for adopting inapt common-law torts to petitioners' First Amendment claim so that respondent's alleged reliance interests were protected. *Id.*

To be sure, the Court's retroactivity doctrine permits courts to find "a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief." *Reynoldsville Casket Co.,* 514 U.S. at 759. But courts cannot fashion the elements of constitutional claims in a way to avoid applying this Court's cases retroactively. *Reynoldsville Casket* precludes this type of end-run around retroactivity. Indeed, in rejecting a similar attempt in that case, this Court put it aptly: "If *Harper* has anything more than symbolic significance, how could virtually identical *reliance*, without more, prove sufficient to permit a virtually identical denial simply because it is characterized as a denial based on 'remedy' rather than 'non-retroactivity.'" *Id.* at 754 (emphasis added).

So too here. When a court creates new elements to a constitutional claim that are predicated on a defendant's reliance on overturned law, the court is fashioning the law to avoid the retroactive application of this

Court's precedent. It is not engaging in a neutral analysis of the law. The First Circuit's decision engaged in just such an analysis to effectively render respondent's unconstitutional behavior constitutional. That conflicts with this Court's retroactivity doctrine and this Court's command that "other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or not those cases involve predecision events." *Id.* at 752.

II. This Case is Exceptionally Important.

This case is profoundly important not just for the vindication of petitioners' First Amendment rights, but also for other civil rights plaintiffs who rely on § 1983 to obtain a remedy for violations of their constitutional rights. Congress enacted § 1983 to give plaintiffs a mechanism to enforce the Constitution's mandates against those who use governmental power to invade protected liberties. But if lower courts, like the court below did here, can fashion constitutional claims brought under § 1983 to achieve what they feel is the best policy, it will undermine the Constitution and will leave many victims of civil rights abuses remediless. It is therefore exceptionally important that this Court take this case and make clear that the Constitution is the primary source for determining what constitutes a "deprivation" under § 1983.

1. Section 1983 is not "a federalized amalgamation of preexisting common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more." *Rehberg*, 566 U.S. at 366. While courts may use common law as a rough guide for determining the rules associated with certain deprivations, "[t]he

new federal claim created by § 1983 differs in important ways from those pre-existing torts. It is broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort." *Id.*

This principle conforms with § 1983's text, which only requires two prerequisites for a claim: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt*, 451 U.S. at 535. There is no mention of common-law torts for determining whether a deprivation of constitutional rights has occurred—it refers instead to depriving a person "of rights * * *secured by the Constitution * * *[.]"

2. The court below violated that principle by using tenuous common-law analogues to control and limit the scope of constitutional claim unlike any common-law tort: A First Amendment claim for compelled speech and association under *Janus*. That claim only requires for its violation that a union compel public-employees to subsidize its speech without employees' affirmative consent. 138 S Ct. at 2486. What is more, in analogizing common-law torts to petitioners' First Amendment claim, the court below undermined the value of the First Amendment, a "fixed star in our constitutional constellation" that prevents others from "forc[ing] citizens to confess by word or act" their belief on important matters of public concern. *See W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

The First Circuit should have looked to this Court's holding in *Janus* to determine whether respondent "deprived" petitioners of their constitutional

rights. Under *Janus*, no showing of malice or lack of probable cause is needed to establish that a union violates an employees' First Amendment rights when seizing money for union speech from them.

3. Any other rule of construction invites broad judicial policymaking and will have severe consequences for civil rights plaintiffs. Indeed, the First Circuit's is not an isolated holding. Other courts have likewise felt untethered from the First Amendment and this Court's holding in *Janus*, applying the same inapt common-law torts—or in some cases an affirmative "good-faith" defense—to deny public-employees' a remedy based on unions' reliance interests. *See, e.g.*, *Diamond*, 972 F.3d at 264–73 (Rendell, J., opinion) (applying both an affirmative "good-faith" defense and common-law torts to plaintiffs' First Amendment claims).

But it is not just the rights of public-employees' vindicated by *Janus* that the decision below threatens. The decision provides a road map for courts to disregard the values and purposes of any constitutional right this Court newly recognizes and circumvent the remedies Congress provided to vindicate those rights. It is thus exceptionally important that the Court take this case, overrule the First Circuit's decision, and direct it to apply the First Amendment to petitioners' First Amendment claims. Certiorari is warranted.

* * * * *

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK D. GARRISON
Counsel of Record
MILTON L. CHAPPELL
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
fdg@nrtw.org

Counsel for Petitioners

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