

App No. _____

IN THE
Supreme Court of the United States

MARCUS TODD,

Applicant,

v.

AFSCME, COUNCIL 5,

Respondent.

**On Application for an Extension of Time to File Petition for a Writ of
Certiorari to the United States Court of Appeals for the Eighth Circuit**

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May 9, 2025

To the Honorable Brett Kavanaugh, as Circuit Justice for the United States Court of Appeals for the Eighth Circuit:

In accordance with this Court's Rules 13.5, 22, 30.2, and 30.3, Applicant Marcus Todd respectfully requests that the time to file his petition for a writ of certiorari be extended for 30 days, up to and including June 20, 2025. The Court of Appeals issued its opinion on January 15, 2025 (Exhibit B) and denied rehearing en banc on February 20, 2025 (Exhibit A). Absent an extension of time, the petition would be due on May 21, 2025. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

Background

In *Janus v. AFSCME*, after ruling that public-sector employees have a First Amendment right not to have their pay diverted to a union without their consent, this Court emphasized that the nature of the required consent itself is of constitutional dimensions: “such a waiver cannot be presumed,” but “must be freely given and shown by clear and compelling evidence,” which requires that “employees clearly and affirmatively consent before any money is taken from them.” 585 U.S. 878, 930 (2018) (cleaned up). This case presents the important question, which has divided the Courts of Appeals, of whether the Court's “clear and compelling evidence” standard is enforceable.

The question is: when a union tells a government employer that an employee has consented to payroll diversion to the union, is it acting under color of state law, for purposes of 42 U.S.C. § 1983? If this is not state action, then the “clear and compelling evidence” standard is effectively a dead letter, since a union could present and an employer could accept whatever flimsy or fabricated evidence of “consent” that it chose, without First Amendment consequence. Indeed, that is exactly the situation presented by this case. The Plaintiff-Applicant, Marcus Todd, is a Minnesota state

employee who claims that his local union—an AFSCME affiliate—forged his consent to payroll-diversion documents without his knowledge or consent, and thus caused the government to divert a portion of Mr. Todd’s pay to the union pursuant to Minnesota law. When Mr. Todd filed suit claiming a First Amendment violation, the union argued that there is no state action, suggesting that this is merely a state-law tort or contract claim.

The Courts of Appeals have divided on this question. The Seventh Circuit has recognized that collecting union dues through public employees’ payroll deductions can be accomplished only through quintessential “joint participa[tion]” between the union and government, pursuant to state law. *See Janus v. AFSCME*, 942 F.3d 352, 361 (7th Cir. 2019) (“*Janus II*”). By contrast, this case is the third in a series of Eighth Circuit decisions holding that state action is entirely absent in such circumstances. *See* Exhibit B; *Burns v. Sch. Serv. Emps. Union Loc. 284*, 75 F.4th 857, 860 (8th Cir. 2023); *Hoekman v. Educ. Minn.*, 41 F.4th 969, 977–78 (8th Cir. 2022). And the Ninth and Sixth Circuits have suggested that they also believe no state action is present in most or all such circumstances. *See, e.g., Littler v. Ohio Assoc. of Pub. Sch. Emps.*, 88 F.4th 1176, 1181–83 (6th Cir. 2023); *Wright v. SEIU*, 48 F.4th 1112, 1121–25 (9th Cir. 2022).

As a result, in a broad swath of the nation, *Janus*’s First-Amendment requirement of “clear and compelling proof” has been effectively replaced with a requirement of “whatever proof the union and employer choose”—and the federal courts are closed to non-consenting employees who are harmed by union actions under this standard.

Reasons For Granting an Extension of Time

Counsel would greatly benefit from additional time to prepare the petition due to a recent change of law firms and to the press of business on numerous other matters. Counsel of Record joined the firm representing Mr. Todd on April 16, 2025, and has been required to familiarize himself with this and many other cases simultaneously. In addition, substantial commitments of counsel during the relevant time period include, among others:

- An opposition brief in the United States District Court for the District of Minnesota in *Lackie v. Students United*, No. 24-cv-01684, was due on April 17, 2025, and a hearing will be held on June 3, 2025.
- An opposition brief in Minnesota Ramsey County District Court in *Minnesota Gun Owners Caucus v. Walz*, No. 62-CV-25-1083, was due on April 29, 2025, a reply brief was due on May 6, 2025, and a hearing will be held on May 13, 2025.
- An amicus brief in the United States Court of Appeals for the Eighth Circuit in *Minnesota Chapter of Associated Builders and Contractors v. Blissenbach*, No. 25-1480, was filed on April 30, 2025.
- Oral argument in the Minnesota Supreme Court in *Walsh v. City of Orono*, No. A25-0354, was held on May 6, 2025.
- A brief in the United States Court of Appeals for the Eighth Circuit in *Jensen v. Minnesota Board of Medical Practice*, No. 25-1812, is due on June 13, 2025.

Conclusion

Applicant requests that the time to file a petition for a writ of certiorari in the above-captioned matter be extended 30 days, to and including June 20, 2025.

Dated this 9th day of May, 2025.

Respectfully submitted,



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