No. _____

IN THE

Supreme Court of the United States

MARCUS TODD,

Petitioner,

—V.—

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 5,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Janus v. AFSCME*, this Court held that a public-sector union cannot obtain direct payroll deductions from a nonmember unless it has "clear and compelling evidence" that the nonmember consented. This protects nonmembers' First Amendment rights not to associate with the union or support union speech with which they disagree.

Following *Janus*, however, multiple Courts of Appeals have concluded that the First Amendment does *not* protect nonmembers from forced association when the union obtains payroll diversions by incorrectly telling a government employer that a nonmember has consented to join the union. Instead, the Courts of Appeals have concluded that public-sector unions are not state actors in that context, so the First Amendment does not apply and the nonmembers' only recourse is a state-law tort or contract claim.

The result is that unions can get the same payroll diversions forbidden under *Janus* by falsely asserting that an employee is a union member—even with little proof, no proof, or fraudulent proof—and the courts apply no First Amendment scrutiny at all.

The question presented is:

When a public-sector union gets the government to divert an employee's pay by stating that he consented to join the union, is it a state actor such that the "clear and compelling evidence" First Amendment standard of *Janus* applies?

PARTIES TO THE PROCEEDING

Petitioner Marcus Todd is an individual and was the Plaintiff-Appellant in the court below.

Respondent AFSCME Council 5 is a local union organization and unincorporated Minnesota association affiliated with the American Federation of State, County, and Municipal Employees and was the Defendant-Appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a corporation, so no corporate disclosure statement is required under Supreme Court Rule 29.6.

STATEMENT OF RELATED CASES

This case arises from and is related to the following proceedings:

- *Todd v. AFSCME*, 125 F.4th 1214 (8th Cir. 2025), judgment entered January 15, 2025; petition for rehearing denied on February 20, 2025; and
- *Todd v. AFSCME*, 571 F. Supp. 3d 1019 (D. Minn. 2021), judgment entered November 12, 2021.

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The district court's opinion and order dismissing Petitioner's complaint is reported at 571 F.Supp.3d 1019 and is reproduced at App. 9a. The Eighth Circuit's decision affirming that judgment appears at 125 F.4th 1214 and is reproduced at App. 3a.

JURISDICTION

The Eighth Circuit panel issued its order and judgment on January 15, 2025. App. 1a. The Eighth Circuit issued its order denying rehearing on February 20, 2025. App. 38a. On May 16, 2025, the Court extended by 30 days the deadline for filing any petition for a writ of certiorari for this case. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment states in pertinent part: "Congress shall make no law . . . 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." It is reproduced below under Appendix I. App. 95a.

The Minnesota's Public Employment Labor Relations Act Sections 179A.06 (2021), 179A.13 (2021), and 179A.20 (2021) are reproduced below under Appendix I. App. 96a – 113a.

STATEMENT OF THE CASE

I. *Janus* Required Clear and Compelling Proof for Mandatory Payroll Diversions from Nonmembers to Public Sector Unions.

For nearly 40 years, "public employees" could be "forced to subsidize a union, even if they cho[]se not to join and strongly object[ed] to the positions the union takes." *Janus v. AFSCME, Cncl. 31*, 585 U.S. 878, 884-85 (2018). But in *Janus*, the Court recognized that this conflicts with "[t]he right to eschew association for expressive purposes," and that "[c]ompelling a person to *subsidize* the speech of other private speakers raises … First Amendment concerns." *Id.* at 892-93 (emphasis original). Therefore, the Court held, "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id.* at 929.

The *Janus* Court further recognized that whether a non-union-member employee "consents" to such extractions is itself a question of constitutional dimensions. As the Court held, "such a waiver" of First Amendment rights "cannot be presumed," and "must be freely given and shown by clear and compelling evidence." *Id.* at 930 (cleaned up). Thus, the First Amendment does not permit public-sector unions—or state governments that might wish to cooperate with them—to simply declare that any nonmember's silence or continued employment amounts to 'consent' to payroll diversion. This is consistent with the general rule that "[m]ore than mere contract law . . . is involved" when analyzing restrictions on constitutional rights, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 183 (1972), and therefore "courts indulge every reasonable presumption against waiver." *Johnson v.*

Zerbst, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)). Constitutional waiver requires evidence that the employee knew his rights and intelligently and freely chose to waive them. *Ibid.*; *Curtis Publishing Co. v. Butts*, 388 U. S. 130, 145 (1967) (plurality opinion); *Janus*, 585 U.S. at 930.

II. The Courts of Appeals Have Allowed Unions to Circumvent *Janus*'s Clear-And-Compelling Requirement by Just Saying That Employees Agreed to Join the Union.

To the extent that States and public-sector unions were engaged in practices contrary to its holding, the *Janus* Court held that "[t]his procedure violates the First Amendment and cannot continue." *Janus*, 585 U.S. at 930. Unfortunately, however, such procedures *have* been allowed to continue. A combination of developments since *Janus* has effectively given public-sector unions free rein to obtain contributions from any or every nonmember, by incorrectly telling the government that nonmembers have consented to join the union.

First, following *Janus*, many States have enacted or reaffirmed statutes giving public-sector unions the exclusive power of identifying their members to government employers, for purposes of direct deductions of union dues from employee paychecks.[1] These States require government employers to rely on the union's

[1] *E.g.*, Or. Rev. Stat. § 243.806(7) ("A labor organization shall provide to each public employer a list identifying [its members]. A public employer shall rely on the list to make the authorized deductions and to remit payment to the labor organization.").

self-identification of membership,[2] and several of them expressly prohibit employers from asking for verification of membership unless an employee raises a dispute.[3] In such States, an employee who never joined a union, or who resigned from one, typically may not protest payroll deductions to the government employer. Instead, the employer is required by law to "[d]irect" such "requests" to the union itself, *e.g.,* Cal. Gov't Code § 1157.12(b)—and the payroll diversions will continue while the union considers the request. These statutes typically do not require unions to follow any particular procedure in obtaining employees' consent to be members. They do not require unions to obtain clear and compelling evidence that a nonmember agrees to join a union. And they certainly do not require unions to present such evidence to a government employer before deductions from an employee's pay may begin.

Second, in the past few years, a large number of plaintiffs have alleged that unions have taken advantage of such state rules by falsely telling government employers that the plaintiff consented to be in the union. Many plaintiffs have alleged that they never did anything to agree to union membership, but the unions simply fabricated their consent to

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[2] *E.g.,* Conn. Gen. Stat. § 31-40bb(j); 5 Ill. Comp. Stat. 315/6(f-20); Wash. Rev. Code § 1.80.100.

[3] *E.g.,* Cal. Gov't Code § 1153(b) (union "shall not be required to provide a copy of an individual authorization … unless a dispute arises…."); Colo. Rev. Stat. § 24-50-1111(2) (similar); Conn. Gen. Stat. § 31-40bb(j) (similar); Mich. Comp. Laws Serv. § 400.805 (similar, for home help caregivers) Minn. Stat § 179A.06, subd.6(b) (2024) (similar).

membership and dues diversions.[4] Dozens more plaintiffs have alleged that unions illegally refused to

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[4] *Baker v. Cal. Sch. Emps. Ass'n*, 2025 U.S. Dist. LEXIS 29754, at *5 (E.D.Cal. Feb. 18, 2025) ("Plaintiff had never seen this additional agreement before and had never provided her electronic signature that appeared on that document."); *Parde v. SEIU*, 2024 U.S. App. LEXIS 11457, at *2 (9th Cir. May 10, 2024) ("Parde alleges that SEIU … forged Parde's electronic signature on a dues authorization form."); *Craine v. AFSCME*, 2024 U.S. App. LEXIS 7758, at *3 (9th Cir. Apr. 2, 2024); *Bourque v. Eng's & Architects Ass'n*, 2023 U.S. Dist. LEXIS 73154, at *3 (C.D.Cal. Mar. 23, 2023); *Wright v. SEIU*, 48 F.4th 1112, 1116 (9th Cir. 2022) ("Plaintiff alleged that SEIU forged her signature on a union membership agreement."); *Ochoa v. Pub. Consulting Grp.,* 48 F.4th 1102, 1105-06 (9th Cir. 2022) (union "sent Ochoa a letter acknowledging that the signature on the [membership] card did not match the one on file for her"); *Zielinski v. SEIU*, 2022 U.S. App. LEXIS 26102, at *2 (9th Cir. Sep. 19, 2022) ("SEIU forged [plaintiff's] signature on a membership agreement and directed the State to deduct dues from his salary"); *Jimenez v. SEIU Local 775*, 590 F.Supp.3d 1349, 1355 (E.D.Wash. 2022) ("The IP address located next to [plaintiff's] digital signature belonged to a server located" far from her home); *Trees v. SEIU Local 503*, 574 F.Supp.3d 856, 860 (D.Or. 2021) ("allegation that SEIU 'forged' Plaintiff's signature in 2016 on a new union membership agreement and dues authorization form"); *Hubbard v. SEIU Local 2015*, 552 F.Supp.3d 955, 957 (E.D.Cal. 2021) ("Hubbard alleges she did not fill out the online membership application" but dues were deducted anyway); *Jarrett v. Marion Cty.*, 2021 U.S. Dist. LEXIS 4941, at *3 (D.Or. Jan. 6, 2021) (plaintiff "alleged forgery" of "membership card"); *Semerjyan v. SEIU Local 2015*, 489 F.Supp.3d 1048, 1053 (C.D.Cal. 2020) ("Plaintiff alleges that she never signed a union membership card authorizing the deduction of union dues from her paycheck, and that the Union forged her signature"); *Yates v. Wash. Fed'n of State Emples.*, 2020 U.S. Dist. LEXIS 169541, at *2 (W.D.Wash. Sep. 16, 2020) ("WFSE had forged [plaintiff's] signature on a … dues deduction authorization"); *Schiewe v. SEIU Local 503*, 2020 U.S. Dist. LEXIS 132638, at *4 (D.Or. July 23, 2020) ("Plaintiff did not sign this agreement" but union deducted dues anyway); *Quezambra v. United Domestic Workers*, 445 F.Supp.3d 695, 700 (C.D.Cal.

honor, or illegally delayed in honoring, their resignations from a union.[5] And these are just the reported

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2020) (after Plaintiff complained, "a Union official notified [her] that a review of her file revealed she 'did not properly authorize the dues deductions'").

[5] *Cox v. Ass'n of Or. Corr. Emps., Inc.*, 2025 U.S. App. LEXIS 8447, at *3 (9th Cir. Apr. 10, 2025); *Klee v. Int'l Union of Operating Eng'rs*, 2025 U.S. App. LEXIS 1247, at *3 (9th Cir. Jan. 21, 2025); *Goldstein v. Pro. Staff Cong./CUNY*, 96 F.4th 345, 348 n.2 (2d Cir. 2024) (three plaintiffs); *Barlow v. Serv. Emps. Int'l Union Loc. 668*, 90 F.4th 607, 610 (3d Cir. 2024) (two plaintiffs); *Wheatley v. N.Y. State United Tchrs.*, 80 F.4th 386, 388 (2d Cir. 2023); *Lutter v. JNESO*, 86 F.4th 111, 119 (3d Cir. 2023); *Baro v. Lake Cnty. Fed'n of Tchrs. Loc. 504*, 57 F.4th 582, 585 (7th Cir. 2023); *Burns v. Sch. Serv. Emps. Union Loc. 284*, 75 F.4th 857, 859-60 (8th Cir. 2023) (three plaintiffs); *Littler v. Ohio Ass'n of Pub. Sch. Emps.*, 88 F.4th 1176, 1179 (6th Cir. 2023); *Laird v. United Tchrs. L.A.*, 2023 U.S. App. LEXIS 28059, at *2 (9th Cir. Oct. 23, 2023); *Espinoza v. Union of Am. Physicians & Dentists, AFSCME Local 206*, 2023 U.S. App. LEXIS 28056, at *3 (9th Cir. Oct. 23, 2023); *Kant v. SEIU, Local 721*, 2023 U.S. App. LEXIS 28061, at *2 (9th Cir. Oct. 23, 2023) (two plaintiffs); *Hoekman v. Educ. Minn.*, 41 F.4th 969, 975 (8th Cir. 2022) (two plaintiffs); *Kumpf v. N.Y. State United Teachers*, 642 F.Supp.3d 294, 300 (N.D.N.Y. 2022); *Bennett v. Council 31 AFSCME*, 991 F.3d 724, 728-29 (7th Cir. 2021); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 955 (10th Cir. 2021); *Biddiscombe v. SEIU, Local 668*, 566 F.Supp.3d 269, 272 (M.D.Pa. 2021); *Smith v. SEIU, Local 668*, 566 F.Supp.3d 251, 254 (M.D.Pa. 2021); *Kurk v. Los Rios Classified Emples. Ass'n*, 540 F.Supp.3d 973, 977 (E.D.Cal. 2021); *Belgau v. Inslee*, 975 F.3d 940, 946 (9th Cir. 2020) (seven plaintiffs); *Woods v. Alaska State Emples. Ass'n/AFSCME Local 52*, 496 F.Supp.3d 1365, 1369 (D.Alaska 2020); *Marsh v. AFSCME Local 3299*, 2020 U.S. Dist. LEXIS 133767, at *2 (E.D. Cal. July 27, 2020) (ten plaintiffs) ("Union designed a 'multi-step revocation process[]' that made it 'effectively impossible' for Plaintiffs 'to resign Union membership or revoke Union dues and fee deductions.'"); *Cooley v. Cal. Statewide Law Enf't Ass'n*, 385 F.Supp.3d 1077, 1078 (E.D.Cal. 2019); *O'Callaghan v. Regents of*

court opinions. Because states are allowing unions to obtain deductions from government payrolls by simply asserting an employee's membership, without providing any documentation, false assertions of membership could be occurring and going undetected with alarming frequency.

Third, the Courts of Appeals have foreclosed any constitutional restrictions on these practices by holding that unions are not state actors when they self-certify their membership to government employers for purposes of payroll deductions. The Ninth Circuit held that a union's "transmission of [a] forged dues authorization" was not state action because it was in "express violation of existing state law." *Wright v. SEIU*, 48 F.4th 1112, 1123 (9th Cir. 2022). The Sixth Circuit similarly held that, although a plaintiff claimed that a union "violate[d] [her] agreement with [the union]" by "improperly instruct[ing] the school district to withhold her wages after she withdrew her union membership," there was no state action. *Littler v. Ohio Ass'n of Pub. Sch. Emps.*, 88 F.4th 1176, 1181 (6th Cir. 2023). And even before this case, the Eighth Circuit had held that a union's diversion of additional dues through an improper "delay" in processing a member's "resignation request" likewise was not state action. *Hoekman v. Educ. Minn.*, 41 F.4th 969, 978 (8th Cir. 2022). Instead, the Courts of Appeals have suggested that employees' only remedy for union misrepresentations about their membership is a state-law tort or contract claim.[6]

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the Univ. of Cal., 2019 U.S. Dist. LEXIS 110570, at *2-3 (C.D. Cal. June 10, 2019).

[6] *See also Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 961–62, 964 (10th Cir. 2021); *Bennett v. Council 31 of the*

The result is that public-sector unions face a bizarre and senseless disparity of standards in choosing how to treat nonmembers. If the union asserts that a nonmember has consented to having agency fees diverted from his government paycheck to the union, it must overcome the *Janus* "clear and compelling" standard under the First Amendment. In sharp contrast, if the union simply asserts that the same nonmember has consented to become a full-fledged union member, it can obtain the same payroll deduction—or an even larger one—with no First Amendment scrutiny at all.

This case well illustrates the senselessness of this state of affairs.

III. Council 5 Took Marcus Todd's Pay Based on a Forged Signature, And the Lower Courts Found No Constitutional Problem.

Plaintiff Marcus Todd alleges that a public-sector union got the government to divert dues from his paychecks based on a fabricated signature purporting to show that he agreed to union membership. The lower courts held that the First Amendment is no obstacle to this forced association because the union was not a state actor.

Mr. Todd works for the Minnesota Department of Human Services. App. 42a (Compl. ¶10). The Minnesota DHS has long recognized Defendant-Respondent, AFSCME Council 5, as the representative of employees in Mr. Todd's unit. *See* App. 42a (Compl. ¶¶11-12),

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AFSCME, 991 F.3d 724, 730-31 (7th Cir. 2021); *Fischer v. Gov. New Jersey*, 842 Fed. Appx. 741, 753 (3d Cir. 2021); *Belgau v. Inslee*, 975 F.3d 940, 950–52 (9th Cir. 2020).

67a. Mr. Todd would have preferred not to join the union because he did not feel membership was valuable and because he disagrees with much of its political advocacy. App. 43a-44a (Compl. ¶18). But, before this Court decided *Janus*, he did join the union because not joining would have required him to pay an "agency fee" of almost the full dues amount, while also forfeiting any say in how it was spent. App. 42a–45a (Compl. ¶¶11, 18, 23); 98a–99a (Minn. Stat. § 179A.06, subd. 3 (2021)).

In 2018, immediately after this Court's *Janus* decision, Council 5 representatives approached many of Mr. Todd's coworkers and asked them to sign revised consents to union membership and dues deduction. App. 43a (Compl. ¶¶14-15). Mr. Todd recalls Council 5's representatives using paper applications, not electronic devices. App. 43a (Compl. ¶¶15-16). No one approached Mr. Todd about this. *Ibid.* However, someone working for Council 5 forged Mr. Todd's signature on a consent card of this kind. App. 44a (Compl. ¶20).

Two years after *Janus*, Mr. Todd sought to exercise his right to resign from the union. App. 45a (Compl. ¶¶24-27). The union told him, however, that his purported 2018 "agreement" bound him to a requirement that he continue mandatory union contributions for nearly another year. App. 45a–46a (Compl. ¶¶25-29). Council 5 asserted that it had the right to keep Mr. Todd's money "based on the 2018 card," App. 4a, even if Mr. Todd had never actually signed the card. App. 46a (Compl. ¶29). The union therefore instructed the Minnesota DHS to continue to divert Mr. Todd's pay to the union for several more months, and the DHS did so. App. 46a (Compl. ¶¶29, 32-33).

Mr. Todd filed suit under 42 U.S.C. § 1983, alleging that Council 5 and the DHS "unlawfully deducted" union dues "from his paychecks without clear and compelling evidence of his freely given waiver of First Amendment rights," as required by *Janus*. App. 12a. As relevant here, Mr. Todd "alleged that the union violated his rights under the First Amendment by causing a deduction in dues based on th[e] authorization card … after his attempt to resign from the union." App. 6a.

The district court dismissed Mr. Todd's federal claims for failure to state a claim, and the Eighth Circuit affirmed. The panel acknowledged Mr. Todd's claim that the union had obtained payroll diversions by "forg[ing] his signature on an authorization card in 2018," but it held that "[t]he allegation of forgery does not establish the existence of state action." App. 8a. This, said the panel, was because "[t]here is … no state action where the union allegedly acted unlawfully." App. 8a (quoting *Roudybush v. Zabel*, 813 F.2d 173, 177 (8th Cir. 1987)). Since Minnesota prohibits forgeries of legal documents, the panel stated that fabricating a signature on a union card would be "an express violation of existing state law," *ibid.* (quoting *Wright*, 48 F.4th at 1123), and so determined that it was a mere "private misuse of a state statute" that is not subject to First Amendment scrutiny. *Ibid.* (quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982)).

The *en banc* Eighth Circuit denied review, and this petition follows.

REASONS FOR GRANTING THE PETITION

Following *Janus*, a serious practical problem has arisen from a misapplication of legal principles in the lower courts. The problem is that public-sector unions now can circumvent nonmembers' First Amendment rights with impunity, simply by falsely saying that they *are* members. According to the Courts of Appeals, the nonmembers' only recourse typically is a state-law contract or tort claim—so *Janus*'s "clear and compelling evidence" standard is a dead letter. This creates the potential that public employees who have not agreed to support unions will nevertheless be forced to subsidize them, to the aggregate tune of many millions of dollars.

The misapplied legal principles are this Court's precedents for identifying state action under the Constitution. This Court has long since established that a private party is a state actor when it uses unconstitutional state procedures to get state officials to confiscate someone else's property. That is exactly what Mr. Todd alleges Council 5 did to him here. By finding a lack of state action, the lower courts not only misconstrued this Court's precedents, but also inadvertently created a roadmap for states to evade judicial scrutiny for enormous unconstitutional transfers of money.

If this Court is going to correct matters, now is the best time. Multiple Courts of Appeals have adopted and then reiterated their no-state-action view. Unions are even starting to seek sanctions against plaintiffs who argue a different view. Further percolation therefore is unlikely. In short, this is the time when much of *Janus*'s ongoing practical significance will be determined—and that determination should come from this Court.

I. The Courts of Appeals Have Functionally Overruled Much of *Janus*.

This Court held in *Janus* that the First Amendment protects non-members of public-sector unions from being compelled to support the union. But, by finding no constitutional limits on who unions may claim are members for purposes of compelled support, the Courts of Appeals have effectively undone those protections.

The rule of *Janus* is clear: a nonmember may not be compelled to associate with or support unions in the absence of "clear and compelling evidence" that he "affirmatively" consented to it. 585 U.S. at 916. The Court's concern in formulating that rule is just as clear: Unions, or union-friendly state governments, may not circumvent the First Amendment by finding that a nonmember gave "consent" in some implicit, ambiguous, or informal manner.

Unfortunately, the no-state-action rule adopted by the Courts of Appeals now allows exactly that. Suppose that a nonmember wants nothing to do with a public-sector union; he never signs any agreement and steadfastly refuses all the union's overtures to join. According to the Courts of Appeals, however, such an employee *still* may find that the government has diverted his pay to support the union: the government can simply accept the union's incorrect self-certification that he is a member. Such a misrepresentation may result from a mere paperwork mistake or sloppiness by the union, or it may be a deliberate lie, or it may result from a variety of other circumstances.

Regardless, under the rule developed by the Courts of Appeals, such a nonmember often will have no way to enforce the constitutional clear-and-compelling-evidence standard. He will not be able to sue the union for a First Amendment violation because, according to the Courts of Appeals, the Constitution does not apply to its actions. If he brings a state-law contract or tort claim against the union, the clear-and-compelling-evidence First Amendment standard will not apply. The nonmember often will be unable to seek a refund from his government employer because of state sovereign immunity. And if he files suit against the employer for an injunction against future payroll deductions, that certainly will alert the employer that his consent is lacking, so it will cease future deductions and moot his claim—leaving much of the nonmember's money in the union's coffers. In other words, the *Janus* rule—that the Constitution requires a nonmember's consent to support a union be shown by clear and compelling evidence—has effectively been transformed to one where the Constitution allows consent to be *presumed* until and unless the nonmember sues over it.

There is no way to know how widespread this problem has become, or may become in the future. For every nonmember who sues to stop payroll deductions based on a union's incorrect assertion of his membership, there may be many others who will never realize that the deductions are unlawful, or who simply will not seek recourse. It is clear, however, that many dozens of plaintiffs have already brought such claims in court. *See supra* n.4. And it is equally clear that there are few limits on the number of nonmembers who *could* be similarly victimized in the future by flimsy or fraudulent assertions that they have agreed to join a union. As a result, the rule adopted by the Courts of Appeals has created at least the potential for unlawful transfers of many millions of dollars from unwilling government employees to union coffers. That is exactly what *Janus* held is prohibited by the Constitution.

II. The Courts of Appeals Have Misapplied This Court's State-Action Precedents.

This problem has arisen because the Courts of Appeals have misapprehended the rules for identifying "state action" to which constitutional restrictions apply. This Court has made clear that, when private parties seize property by demanding that state officials use state-law procedures that violate the federal Constitution, the parties are state actors. And that is exactly the situation in many States—including Minnesota—following this Court's decision in *Janus*. In State after State, the laws allow nonmembers' government paychecks to be drafted into supporting a public-sector union without clear and compelling evidence of the nonmembers' consent. Unions who demand that government employers follow that unconstitutional procedure—as AFSCME Council 5 did here—therefore are state actors.

A. Seizing Property Through Unconstitutional State-Law Procedures Is State Action.

This Court "ha[s] consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor.'" *Lugar*, 457 U.S. at 941. That is the situation here.

The Court has established "[a] two-part approach" for determining whether state action has occurred. *Id.* at 937. "First," the plaintiff must have been injured by "the exercise of some right or privilege created by the

State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Ibid.* "Second," the defendant must "fairly be said to be a state actor," either "because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." *Ibid.* A principal purpose of the state-action requirement is to protect "private parties" from "fac[ing] constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Ibid.*

The Court's decision in *Lugar* summarized how these principles apply to claims that a defendant has taken property using unconstitutional state-law procedures. The plaintiff there asserted a procedural-due-process claim: he alleged that, in prior state-court litigation, the defendant had obtained a pre-judgment attachment of his property under a "state statute" that was "procedurally defective under the Fourteenth Amendment." *Id.* at 924-25, 940-41. The Court held that this claim satisfied both prongs of the state-action test. First, the defendant had exercised a state-created right when it invoked "the procedural scheme created by the statute [that] obviously is the product of state action" and "subject to constitutional restraints." *Id.* at 941. And second, the defendant was fairly a state actor because it made demands under "a system whereby state officials will attach property on the *ex parte* application of one party." *Id.* at 942.

B. Union Assertions of Consent to Membership are State Action Under *Lugar*.

When public-sector unions obtain money by telling the government who their purported members are, they are engaged in state action exactly analogous to the attachment in *Lugar* and other similar cases.

1. Such unions are asserting state-created rights and privileges. Nothing requires state governments to pay their employees by diverting part of their earnings to unions—not even if the employees request it. *Certainly* nothing requires the government to give the unions themselves a role in determining which employees want to be compensated in this way. When state governments choose to let unions do these things anyway—typically by specifying when and how in detailed statutes, *see supra* nn.1 & 2—they are creating rights and privileges for the unions. In particular, when a State allows a public-sector union to self-certify its membership for purposes of payroll deductions—and especially when the State prescribes by law that the union can do so without any documentation, *see supra* n.3—it plainly is creating a right or privilege for the union. And when unions take advantage of these procedures, they are availing themselves of those rights and privileges.

This case illustrates. Minnesota owed money to Mr. Todd by virtue of his work for the State. Minnesota could have simply paid the money to Mr. Todd. Instead, the State made a choice to pay part of it to Council 5. Moreover, the State made a choice to take Council 5's word for it that Mr. Todd consented to that arrangement. Minnesota did not have to do either of those things. By doing them anyway, the State created rights or privileges for Council 5. And by making the self-certification to the State and accepting part of Mr. Todd's pay from the State, Council 5 exercised those rights and privileges.

This is no different from *Lugar*, or from this Court's similar precedents where defendants availed themselves of state-law procedures to assert a right to plaintiffs' property. In *Lugar*, a State created rights and privileges by prescribing procedures for a party to get government officials to create an *ex parte* attachment of someone else's property. A party who used those procedures to get government officials to seize property was a state actor. Here, when States allow public-sector unions to self-certify payroll deductions, they are doing precisely the same thing: prescribing procedures for a union to get government employers to create an *ex parte* diversion of someone else's money. Unions who use those procedures to get government officials to divert money therefore also are state actors.

2. Additionally, this Court's First Amendment precedents make clear that the state-created payroll-diversion procedures invoked by the unions are subject to constitutional constraints. Even decades before *Janus*, this Court recognized that States may not simply declare that all their employees must pay full union dues. *See generally Abood v. Detroit Bd. of Educ'n*, 431 U.S. 209 (1977). And after *Janus*, there can be no question that the Constitution prohibits a State from declaring that employees "consent" to pay *anything* to a union simply by working for the government, or by not objecting to it, or by doing anything else short of clearly and affirmatively consenting. *See Janus*, 585 U.S. at 930.

To be sure, these constitutional protections apply to *nonmembers* of a union. State employees remain free to join unions, and free to agree to support them through payroll deductions. If a government employee admitted that he had freely joined a union but disputed the extent of the support the agreement covered, his First Amendment protections might be significantly different. But for constitutional purposes, someone who has *not* agreed to join a union surely is not stripped of his First Amendment protections just because the union wrongly claims him as a member.

In other words, *Janus* holds that the Constitution requires procedures to protect nonmembers from being forced to financially support a union against their will. Therefore, at least the same constitutional procedures must protect nonmembers from being forced to *join* the union against their will. The infringement on associational and speech rights from coerced union *membership* is at least as great, and likely greater, as the infringement from coerced financial contributions to union. Nor is there any reason to think that coerced union membership is somehow less likely to occur than coerced union financial support.

3. Finally, diverting government employees' pay to unions requires the kind of hand-in-glove coordination between union officials and state officials that makes it eminently fair to call the union a state actor. This again is exactly analogous to *Lugar*, where this Court found it fair to call the state-court plaintiff a state actor because the plaintiff convinced government officials to issue and execute an attachment. 457 U.S. at 924, 941-42. Just so here: Minnesota, like many other States, allows public-sector unions to demand that government employers divert employees' pay to the unions, and then requires the employer itself to hand the money over to the union. Again, this case illustrates. Council 5 exercised its rights and privileges under Minnesota law by demanding that Minnesota

officials give it Mr. Todd's money, and then by accepting the transfer of that money directly from Minnesota officials.

*

In short: this Court in *Lugar* found state action where a party used unconstitutional state-law procedures to obtain an *ex parte* attachment of property. In recent years, claims have proliferated that public-sector unions are using unconstitutional state-law procedures to obtain *ex parte* diversions of public employees' money. This fits squarely within this Court's established state-action precedents.

C. The Courts of Appeals Have Misconstrued *Lugar* and *Janus*.

In this and other cases involving coerced union membership, the Courts of Appeals have mistakenly extracted from *Lugar* a rule that "[t]here is … no state action where the union allegedly acted unlawfully" under state law. App. 8a (quoting *Roudybush*, 813 F.2d at 177). The Eighth Circuit here held that any conduct in "violation of existing state law" amounts to mere "private misuse of a state statute" that cannot "be ascribed to any governmental decision." *Ibid.* The Ninth Circuit has held the same. *Wright*, 48 F.4th at 1123.

This rule is erroneous. If it really were the law, then no State would ever be held liable for any constitutional violation by anyone who was not the State's official agent. Every State could simply pass a statute admonishing that "all persons invoking state power shall comply with all requirements of the federal Constitution and laws," and presto—no one could ever claim unconstitutional state action by anyone other than an official state agent. The entire body of law on the state-actor doctrine could be retired.

Unsurprisingly, then, that is *not* the law. In fact, in *Lugar* itself the plaintiff asserted, as an alternative theory, that the defendant's attachment of his property deprived him of due process *because* it was "unlawful under state law." 457 U.S. at 940. The Court held that this particular claim did not allege state action. *Ibid.* But the Court still permitted the *Lugar* plaintiff's separate claim that the state-created procedural scheme itself was unconstitutional—notwithstanding his separate allegation that the particular way in which the defendant had used the procedure violated state law. *Id.* at 940-41.

Lugar therefore plainly forecloses the Courts of Appeals' apparent conclusion that conduct in violation of state law can never qualify as state action. Instead, *Lugar* holds only that a plaintiff may not claim that a private actor's conduct was unconstitutional *because* it violated state law. On the other hand, when a defendant harms a plaintiff using a state-law procedure that is independently unconstitutional, then under *Lugar*, the possibility that the defendant's particular use of the procedure may incidentally have violated state law does not foreclose a finding of state action.

This case illustrates the difference. The panel below noted that Minnesota has a criminal statute prohibiting forgeries, including forgeries of union membership cards. App. 8a. If Mr. Todd had alleged that Council 5 had violated the First Amendment *because* it had committed this state-law crime of forgery, then his claim would be foreclosed by *Lugar*. But Mr. Todd alleges nothing like that. His First Amendment claim in no way depends on whether Council 5's conduct met the technical elements of the state-law forgery crime, and the panel below engaged in no analysis of that question. Rather, Mr. Todd's claim is that whether or not Council 5's conduct was allowed by state law, the union (and the Minnesota DHS) violated *the First Amendment's* requirement of demonstrating his consent by clear and compelling evidence. The plain logic of *Lugar* permits that claim.

It bears noting, furthermore, that the Courts of Appeals have consistently found no state action even when plaintiffs allege constitutional defects in union-membership certifications that undisputedly comply with state law. The panel's decision below relied in part on *Hoekman v. Education Minnesota*, where the plaintiff alleged that the union complied with state law but still did not "obtain[] a valid waiver of First Amendment rights." 41 F.4th at 978. Even there, the Eighth Circuit held that the alleged harm came not from any state action but from "the private agreement" by which the employee joined the union. *Ibid.* The Ninth Circuit held similarly in *Belgau v. Inslee*, 975 F.3d 940, 946-47 (plaintiffs did not allege state-law defect but "claimed … that the agreements were signed without a constitutional waiver of rights").

This broader no-state-action rule misconstrues not just *Lugar*, but *Janus* as well. The Court in *Janus* clearly contemplated that unions and employees may make private agreements for the payment of agency fees. Indeed, the whole point of *Janus*'s clear-and-compelling-evidence requirement is that, if a union wants deductions from government payroll based on such a "private agreement," then the First Amendment regulates how the union must *prove* the existence of such an agreement. *See Janus*, 585 U.S. at 930.

If those constitutional protections apply to the agency-fees agreements that the Court contemplated in *Janus*, it is extraordinarily difficult to see why they should not also apply to full-blown union membership agreements. *See supra* Section II.B.2. The *Janus* Court itself held that "[n]either an agency fee *nor any other payment to the union* may be deducted from a nonmember's wages." 585 U.S. at 930 (emphasis added). The Ninth Circuit appears to have flouted that ruling in *Wright*, when it found "no affirmative duty on government entities to ensure that membership agreements and dues deductions are genuine." 48 F.4th at 1125. And the Eighth Circuit applied a similar principle in *Hoekman* and in this case. *See Hoekman*, 41 F.4th at 978; App. 7a. This Court's correction is needed.

III. Now Is the Time for This Court's Review and Correction.

Now is the time for this Court to clarify the law on this issue. Further percolation is unlikely, as the Courts of Appeals have repeated their holdings over several years and no disagreement appears to be forthcoming. Indeed, unions that have benefitted from the erroneous no-state-action rule are beginning to seek sanctions against plaintiffs who argue against it. *E.g., Baker v. Cal. Sch. Emps. Ass'n*, 2025 U.S. Dist. LEXIS 29754, at *31-32 (E.D. Cal. Feb. 18, 2025). Thus, if clarification is needed—and it is, as explained above—this Court should provide it promptly.

CONCLUSION

Petitioner respectfully requests that this Court grant a writ of certiorari.

Respectfully submitted,

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