No. 24-1305

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 Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

JACOB KARABELL
(*Counsel of Record*)
BREDHOFF & KAISER,
P.L.L.C.
805 15th Street N.W.
Suite 1000
Washington, D.C. 20005
202.842.2600
jkarabell@bredhoff.com

Mosaic - (301) 927-3800 - Cheverly, MD

QUESTION PRESENTED

Whether a union engaged in state action for purposes of a First Amendment claim under 42 U.S.C. § 1983 where it allegedly forged a public employee's signature on a payroll dues-deduction authorization in violation of state law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

PRELIMINARY STATEMENT

Petitioner is a public employee in Minnesota. He brought suit against Respondent AFSCME Council 5 (Union) in federal court, alleging that the Union had forged his signature on a membership card that authorized his employer to continue deducting union dues from his paychecks. The district court dismissed Petitioner's 42 U.S.C. § 1983 claims on the ground that the Union's alleged conduct was not attributable to the state, because Petitioner alleged that the Union—a private party—had *violated* state law in availing itself of state dues-deduction procedures. The Eighth Circuit affirmed.

This case does not meet this Court's criteria for review. As the Petition acknowledges, every circuit to address a § 1983 claim like Petitioner's has held that there is *not* state action to support such a claim against the defendant union. These decisions have faithfully applied this Court's state-action decision in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). As the Eighth Circuit held, "[t]he union's alleged 'private misuse of a state statute' to collect dues from [Petitioner] after forging his signature 'does not describe conduct that can be attributed to the State.'" App. 8 (quoting *Lugar*, 457 U.S. at 941).

Petitioner does not dispute that the Union's alleged conduct, if true, would violate state law, nor does he dispute that he could receive monetary and injunctive relief under state law to remedy such a violation. Petitioner's proposed rule—that a private party's wrongful invocation of a state procedure subjects the private party to liability for a *constitutional* violation—not only would radically change this Court's state-action jurisprudence, it would open the federal courthouse doors to an onslaught of payroll-deduction disputes. The lower courts have wisely and correctly rejected such a dramatic expansion of § 1983.

This Court has denied numerous petitions in the last several years raising the same state-action question presented here, including eight petitions last Term. *See Bourque v. Eng'rs & Architects Ass'n*, 145 S. Ct. 592 (Nov. 25, 2024); *Parde v. SEIU, Loc. 721*, 145 S. Ct. 418 (Oct. 21, 2024); *Craine v. AFSCME Council 36*, *Loc. 119*, 145 S. Ct. 280 (Oct. 7, 2024); *Cram v. SEIU Loc. 503*, 145 S. Ct. 142 (Oct. 7, 2024); *Deering v. IBEW Loc.* 18, 145 S. Ct. 151 (Oct. 7, 2024); *Hubbard v. SEIU Loc. 2015*, 145 S. Ct. 151 (Oct. 7, 2024); *Kant v. SEIU, Loc. 721*, 145 S. Ct. 142 (Oct. 7, 2024); *Laird v. UTLA*, 145 S. Ct. 141 (Oct. 7, 2024). There have been no developments since then that have made this question more worthy of this Court's review.

STATEMENT OF THE CASE

A. Under Minnesota's Public Employment Labor Relations Act (PELRA), public employees have the statutory right to organize and designate, by secret-ballot vote, a labor organization to serve as their exclusive representative to negotiate terms and conditions of employment. Minn. Stat. § 179A.06, subdiv. 2.[1] Each individual employee in the bargaining unit, however, retains the choice of whether to become a member of a union that is certified as the exclusive representative. *Id.* Employees also "have the right to

[1] All citations to Minnesota statutes are to the version in effect in July 2020, when Petitioner resigned from the Union and requested that his dues deductions stop.

request and be allowed dues checkoff for the exclusive representative," *id.* § 179A.06, subdiv. 6, meaning that they may direct their public employer to automatically deduct union dues from their paychecks and remit those dues directly to their representative. It is an unfair labor practice for a union or an employer to "interfere with a nonunion employee's right to refuse [dues] checkoff." *Beckman v. St. Louis Cnty. Bd. of Comm'rs*, 241 N.W.2d 302, 305 (Minn. 1976). *See also* Minn. Stat. § 179A.13, subdiv. 1(i) (remedies for unfair labor practices include cease-and-desist order, monetary relief, and "any other remedies that make a charging party whole").

In addition, Minnesota has for decades criminalized forging a signature on a union membership card. *See* Minn. Stat. § 609.63, subdiv. 1(3) (felony to "falsely make[ ] or alter[ ] a membership card purporting to be that . . . of any labor union, or possess[ing] any such card knowing it to have been thus falsely made or altered").

B. In 2014, Petitioner Marcus Todd began working for the Minnesota Department of Human Services (DHS) in a bargaining unit represented by the Union. App. 42. He chose to become a member of the Union at that time. *Id.* In June 2018, a revised union membership and dues-deduction authorization card was electronically completed with Petitioner's name, contact information, and electronic signature. App. 44. By its terms, the dues-deduction authorization on the card was revocable only during an annual 15-day window period. App. 62–63. Based on this authorization, when Petitioner resigned his union membership and sought to stop his union dues deductions in July 2020, the Union asked DHS to continue deducting dues from Petitioner's paychecks until his window period opened in May 2021, at which point his deductions stopped. App. 5, 63. Petitioner, however, alleges that he never signed the 2018 card and that the Union forged his signature on it. App. 44.[2]

C. In March 2021, Petitioner filed suit in federal court against the Union. As relevant here,[3] Petitioner brought two claims under 42 U.S.C. § 1983 alleging that the deduction of his union dues beginning in July 2020 violated his First Amendment rights. App. 50–53. Petitioner also brought five claims under state law challenging those same dues deductions. App. 55–58. The district court dismissed Petitioner's § 1983 claims against the Union for lack of state action, after which it declined to exercise supplemental jurisdiction over Petitioner's state-law claims. App. 21–28, 33–34.

The Eighth Circuit, with Chief Judge Colloton writing, affirmed. The court of appeals first explained that the court's prior decision in *Hoekman v. Education Minnesota,* 41 F.4th 969 (8th Cir. 2022) (Colloton, J.), foreclosed Petitioner's state-action argument. The court of appeals went on to specifically address whether Petitioner's allegation that the Union forged his signature on the 2018 card could satisfy § 1983's

[2] In fact, Petitioner did sign the card through the Union's MemberLink portal, but Petitioner's allegation of forgery must be accepted as true at the motion-to-dismiss stage.

[3] The complaint also brought additional claims alleging that the deduction of Petitioner's pre-July 2020 dues violated his First Amendment rights and that any window period in a dues-deduction authorization is facially unconstitutional. App. 49–50, 53–55. The Petition does not argue that the Court should grant review of the dismissal of those claims. Consequently, those claims are forfeit. *See* Court Rule 14(1)(a).

state-action requirement. Under the Supreme Court's decision in *Lugar*, the court of appeals explained, "[t]he union's alleged 'private misuse of a state statute' to collect dues from Todd after forging his signature 'does not describe conduct that can be attributed to the State.'" App. 8 (quoting *Lugar*, 457 U.S. at 941). "The union's allegedly 'fraudulent act is by its nature antithetical to any 'right or privilege created by the State' because it is an express violation of existing state law.'" *Id.* (quoting *Wright v. SEIU Loc. 503*, 48 F.4th 1112, 1123 (9th Cir. 2022) (in turn quoting *Lugar*, 457 U.S. at 937)).

Petitioner filed a petition for rehearing en banc, which the Eighth Circuit denied without any judge calling for a response. App. 38.

REASONS FOR DENYING THE WRIT

More than 40 years ago, this Court made clear that where a private party is injured by another private party's misuse of a state procedure, the vehicle to remedy such an injury is a claim under *state* law—not a § 1983 claim under *federal* law. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 940 (1982). The lower courts have had no difficulty applying *Lugar* in both in labor and non-labor cases. There is no reason for this Court to step in and unsettle the law in this area, not least because doing so would risk federalizing every dues-deduction dispute involving a state or municipal employee. State laws cover this terrain and provide a complete remedy if a public employee's union dues are deducted without proper authorization, as Petitioner alleges here.

The Petition should be denied.

I. The Lower Courts Agree that, Under This Court's Decision in *Lugar*, There Is No State Action on the Facts Alleged Here.

The Petition acknowledges that the courts of appeals are in agreement that, where a union is alleged to have misused state law by requesting that a public employer deduct dues from an employee who has not authorized deductions, there is no state action to support a First Amendment claim against the union under § 1983. Pet. 7 (citing cases). Undaunted, Petitioner asks this Court to grant certiorari because, in his view, the lower courts all have "[m]isconstrued" this Court's seminal state-action decision in *Lugar*. Pet. 20. "Further percolation is unlikely," Petitioner suggests, because "the Courts of Appeals have repeated their holdings over several years and no disagreement appears to be forthcoming." Pet. 22.

But there is good reason for this Court's ordinary practice not to grant certiorari where an issue has had time to percolate in the lower courts and no split has developed: In such a situation, the lower courts are presumed to have gotten it right. That is the case here.

A. Section 1983, which provides a cause of action for deprivations of rights that occur under color of state law, "protects against acts attributable to a State, not those of a private person." *Lindke v. Freed*, 601 U.S. 187, 194 (2024). This limit tracks the state-action requirement of the Fourteenth Amendment, which "obligates *States* to honor the constitutional rights that § 1983 protects." *Id.* at 194–95 (emphasis in original). These limitations, if anything, apply with even more force to claims contending that a private party has violated the First Amendment. As this

Court has reiterated, "[t]he Free Speech Clause of the First Amendment constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 804 (2019). *See also Ciraci v. J.M. Smucker Co.*, 62 F.4th 278, 281 (6th Cir. 2023) (Sutton, J.) ("Applying ordinary First Amendment rules beyond the government would warp traditional principles of ordered liberty—impairing individual liberty and offering little order in return.").

This Court has set out a two-part test for determining whether a private party's actions can be "fairly attributable to the State" for purposes of a § 1983 claim. *Lugar*, 457 U.S. at 937. "First, the deprivation must be caused 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." *Id.* "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* Both parts of the test must be satisfied for a § 1983 claim to succeed. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999).

In *Lugar*, the Court applied this test to the plaintiff's two § 1983 claims challenging the private-party defendant's use of Virginia's statutory procedure, which allowed prejudgment attachment of a debtor's property. 457 U.S. at 924, 940. The Court interpreted count one of the plaintiff's complaint to be challenging the constitutionality of Virginia's statutory procedure as "procedurally defective under the Fourteenth Amendment." *Id.* at 941. In order words, count one alleged that the defendant's action violated the plaintiff's due process rights even if it was taken "line by line in accordance with Virginia law." *Id.* at 941 n.22. The Court had no trouble finding that this claim challenged a state rule of conduct: "[T]he procedural scheme created by the statute obviously is the product of state action." *Id.* at 941.

Count two of the *Lugar* plaintiff's complaint, however, alleged that the defendant had invoked Virginia's statutory procedure "without the grounds to do so." *Id.* at 940. But these allegations, as the plaintiff conceded, made out a *violation* of state law. *Id.* The private party's challenged action, the Court explained, "could in no way be attributed to a state rule or a state decision" and so did not satisfy the first prong of the state-action test—even though that action directly resulted in a government official seizing the plaintiff's property. *Id.* As the Court summarized, "private misuse of a state statute does not describe conduct that can be attributed to the State" for purposes of a § 1983 claim. *Id.* at 941.

Petitioner's § 1983 claims are on all fours with count two of the plaintiff's complaint in *Lugar*. Petitioner's challenge is *not* that Minnesota dues-deduction regime is facially defective. *See* App. 23 (observing that Petitioner "does not challenge the state's *general* authority to deduct dues pursuant to a private agreement, nor does he allege that PELRA is unconstitutional" (emphasis in original)). Rather, Petitioner's challenge is that the Union misused this procedure by requesting DHS to continue deducting his dues based on a forged membership card. Under *Lugar*, such alleged "private misuse of a state statute" is not state action. 457 U.S. at 941.

B. The courts of appeals have faithfully applied *Lugar* in the context of § 1983 claims, like Petitioner's, alleging that a union misused a state statute by requesting a public employer remit dues deductions from an employee who has not authorized them. In addition to the Eighth Circuit's decision below, the Sixth and Ninth Circuits have addressed such claims. All three circuits have applied *Lugar* to hold that the union's alleged actions are not attributable to the state and therefore cannot be the basis of a § 1983 claim.

In *Littler v. Ohio Ass'n of Public School Employees*, 88 F.4th 1176 (6th Cir. 2023), the plaintiff alleged that the defendant union violated her First Amendment rights by refusing to accept her request to withdraw her dues-deduction authorization—a request that Plaintiff believed had complied with the terms of the authorization (though the union disagreed). The court of appeals held that these allegations fell "within *Lugar*'s discussion of statutory misuse." *Id.* at 1181. The court summarized: "Littler alleges that [the union] improperly instructed the state to withhold union dues after she withdrew her union membership. The deprivation was caused by a private actor—[the union]—acting *contrary* to any rule of conduct imposed by the state, and thus cannot be attributed to the state." *Id.* (emphasis in original).

The Ninth Circuit is in accord. In *Wright v. SEIU Local 503,* 48 F.4th 1112 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 749 (2023), the plaintiff alleged that the union defendant forged her signature on a dues-deduction authorization. The court held that "this fraudulent act is by its nature antithetical to any 'right or privilege created by the State' because it is an express violation of existing state law." *Id.* at 1123 (quoting *Lugar*, 457 U.S. at 937). It therefore affirmed the dismissal of the plaintiff's constitutional claims against the union under § 1983.

Since *Lugar*, similar fact-patterns have been presented to the courts of appeals in cases outside of the labor-relations context. There, as well, the lower courts have held that there is no state action where a private party deprives another private party of property by misusing a state procedure. *See, e.g.*, *Cobb v. Saturn Land Co.*, 966 F.2d 1334, 1335–36 (10th Cir. 1992) (no state action where defendant wrongfully used ex parte statutory procedure to obtain liens on interests held by plaintiff); *Hoai v. Vo*, 935 F.2d 308, 314 (D.C. Cir. 1991) (no state action where defendant allegedly lied to court to receive property interest from plaintiff); *Roudybush v. Zabel*, 813 F.2d 173, 177 & n.7 (8th Cir. 1987) (no state action where defendant obtained supersedeas bond through fraudulent inducement and instructed sheriff to act on bond to detriment of plaintiff).

In short, under *Lugar* and its progeny, it is well-settled that there is no state action sufficient to support a § 1983 claim against a private party on facts like those alleged by Petitioner here.

II. There Is No Other Compelling Reason for This Court to Intervene.

The fact that there is no split of authority on the question presented is reason enough to deny certiorari. Nonetheless, there is no other "compelling reason[ ]" for this Court to grant the Petition. *See* Court Rule 10.

That is particularly the case given that, if the Union in fact had forged Petitioner's signature on a dues-deduction authorization card as he alleges, Petitioner would have a straightforward claim under Minnesota law to recover all wrongfully deducted dues in addition to other remedies. *See supra* p. 3. Of note in this regard, Petitioner brought five state-law claims against the Union on the same facts that served as the basis for his § 1983 claims. App. 55–58. Petitioner has no answer for why state-law claims—such as those brought in this very case—would not be sufficient to address an "alarming frequency" of "false assertions of membership," Pet. 7, were such conduct actually occurring.[4]

Petitioner's proposed revamp of this Court's state-action doctrine also would flood the federal courts with lawsuits about alleged payroll errors. About six million state and local public employees are union members.[5] Most of them pay their union dues through payroll deduction, so public employers process millions of dues deductions every month. Public employees also authorize voluntary payroll deductions for charitable contributions, insurance premium payments, and other purposes. The lower courts have wisely and correctly rejected a state-action analysis

[4] While the Petition contains a long citation of complaints in which plaintiffs have *alleged* that a union falsely claimed that an individual had agreed to have dues deducted from their paycheck (at 5 n.4), it does not cite a single case in which there was an actual *finding* of wrongdoing. In fact, in the only case cited in the Petition that actually went to trial on this issue, the trier of fact concluded that the individual, Staci Trees, *did* sign the union card. *See SEIU Loc. 503 v. ST*, 544 P.3d 440, 442 (Or. Ct. App. 2024) ("Following a three-day hearing, an ALJ determined that petitioner had signed the 2016 agreement and was bound by its terms."). *Cf.* Pet. 5 n.4 (citing only Trees' district-court complaint alleging that union "'forged' Plaintiff's signature in 2016 on a new union membership agreement and dues authorization form").

[5] News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2024 Table 3 (Jan. 28, 2025), https://www.bls.gov/news.release/pdf/union2.pdf.

that would turn the federal courts into substitutes for state labor boards and state courts in addressing disputes about employee payroll deductions, where state law already requires affirmative consent.

Because public employers process millions of voluntary payroll deductions every month, errors (and alleged errors) are inevitable. State law is more than sufficient to remedy any such errors. *Cf.* Pet. 12 (suggesting that unions should be subject to § 1983 claim even for "a mere paperwork mistake" regarding payroll dues deductions).

Finally, contrary to Petitioner's repeated arguments, the Eighth Circuit's state-action decision does not make a "dead letter" (at 11), "[f]unctionally [o]verrule" (at 12), or "effectively undo[ ]" (at 12) this Court's decision in *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018). In *Janus*, this Court held that "States with agency-fee laws have abridged fundamental free-speech rights" and that "*these laws* violate the Constitution." *Id.* at 929 n.28 (emphasis added). In other words, in *Janus*, the plaintiff's claim was that his constitutional rights were violated where the defendant union acted "line by line in accordance with [Illinois] law." *Lugar*, 457 U.S. at 941 n.22. There was no allegation that the compelled deduction of Mr. Janus' agency fees misused Illinois law in any way. *See also Janus v. AFSCME, Council 31*, 942 F.3d 352, 361 (7th Cir. 2019) (holding, on remand in *Janus*, that state-action requirement of § 1983 claim was satisfied).

Here, in contrast, Petitioner *is* alleging that the Union misused Minnesota's procedures that permit union dues deductions where a public employee has authorized them. Thus, unlike in *Janus*, the Union's alleged conduct "does not describe conduct that can be attributed to the State." App. 8 (quoting *Lugar*, 457 U.S. at 941). Petitioner's remedy for that alleged conduct is through state law, not through a § 1983 claim.

III. This Case Is Not a Proper Vehicle To Address Whether, and to What Extent, *Janus* Applies to the Deduction of Union Dues Pursuant to the Terms of a Membership Agreement.

Finally, and in all events, this case does not present the question of whether, and to what extent, *Janus*' constitutional holding applies to the deduction of dues pursuant to the terms of a union membership agreement. *Cf.* Pet. 12–13 (discussing *Janus*' holding that nonmembers of a union can only pay an agency fee or make another payment to the union if they have waived their First Amendment rights).

The only § 1983 claims remaining in this case are premised on Petitioner's allegations that he did *not* sign the 2018 card, which contained the dues-deduction authorization that the Union enforced from July 2020 until the window period on the card opened in May 2021. The Eighth Circuit, accepting those allegations as true, held that those claims failed for lack of state action. App. 7. It is a separate question whether, if a public employee *did* sign a union membership agreement and dues were deducted pursuant to the terms of that agreement, that agreement can only be enforced if a constitutional-waiver analysis is satisfied. While there is no circuit split on that question either—*see, e.g.*, *Bennett v. AFSCME Council 31*, 991 F.3d 724, 733 (7th Cir.) ("Having consented to pay dues to the union, regardless of the status of her membership, [the plaintiff] does not fall within the sweep of *Janus*'s waiver requirement."), *cert. denied*, 142 S.

Ct. 424 (2021)—that question is not presented by this case.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JACOB KARABELL
(*Counsel of Record*)
BREDHOFF & KAISER, P.L.L.C.
805 15th Street N.W.
Suite 1000
Washington, D.C. 20005
202.842.2600
jkarabell@bredhoff.com

Counsel for Respondent

Dated: September 2, 2025