

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

REPLY IN SUPPORT OF CERTIORARI

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I. This Court's Intervention Is Needed For The Continuing Vitality Of *Janus*.

As the Petition explained, a confluence of events have left this Court's *Janus* decision slipping toward functional obsolescence. *Janus* held that, under the First Amendment, a government employee's consent to support a public-sector union through payroll deductions must be demonstrated by clear and compelling evidence. But a raft of States now allow public-sector unions to self-certify their membership to employers with no cross-checking—and the Courts of Appeals have held that these self-certifications are not state action, and therefore not subject to the First Amendment. Without this Court's intervention, that will allow public-sector unions and supportive state governments to replace the constitutional requirement of clear and compelling evidence with a requirement of *no* evidence. Indeed, the growing rash of claims by plaintiffs like Mr. Todd indicate that this is already happening.

Council 5's response to the Petition only confirms this. The heart of its opposition is Council 5's assertion that Mr. Todd "has no answer for why state-law claims" against unions "would not be sufficient to address ... false assertions of [union] membership." (BIO at 11 (cleaned up)). But the Petition explained a very strong reason why state-law claims are insufficient: they would not require unions to show an employee's consent by clear and compelling evidence, as the *Janus* Court held the First Amendment requires. At best for employees who found their wages misappropriated by unions, state-law claims would apply a preponderance-of-the-evidence standard to the question of consent. Even that falls far short of the First Amendment

clear-and-compelling standard. But if a state government supports public-sector unions strongly enough to allow them to self-certify their membership, it also may well impose even more difficult burdens of proof for purposes of state-law claims.

Further, this case demonstrates that “state-law claims” often will not even be available to victimized government employees, but instead will be left in the hands of state government officials. The panel below based its no-state-action conclusion on its observation (App.8a) that forging or altering a union membership card is a crime under Minnesota law. But of course, Mr. Todd has no ability to bring criminal charges against Council 5. That decision lies in the hands of the same state government that allowed Council 5 to self-certify its membership in the first place. And even if such charges were brought, the burden of proof would be the opposite of the *Janus* standard: where *Janus* held that payroll diversions are unlawful unless the employee’s consent is demonstrated by clear and compelling evidence, criminal charges like these would not stick unless the *absence* of the employee’s consent was proved beyond a reasonable doubt.*

* On top of that, the decision below (and others like it) would absolve unions from constitutional liability even in situations where no state-law violation has occurred at all. The panel here engaged in no analysis of whether Council 5’s actions satisfied the elements of Minnesota’s crime of forgery—it just held that the Complaint’s mere *reference* to a “forged signature” defeated any possibility of state action. (See App.8a.) The panel relied on a similar ruling by the Ninth Circuit. *Wright v. SEIU*, 48 F.4th 1112, 1123 (9th Cir. 2022). These holdings therefore would absolve unions of First Amendment liability even in situations where an element of the state-law offense might ultimately prove

The Court therefore should grant review in this case to prevent the rule of *Janus* from being honored only in the breach.

The Court should also grant review in the related petition of *Klee v. UIOE, Local 51*, No. 24-1306, which presents a related question about similar threats to the ongoing viability of *Janus*. The question in this case is whether the First Amendment prevents a public-sector union from diverting a nonmember's wages by falsely telling the employer that the nonmember agreed to join the union. *Klee* presents the question on the other side of the coin: whether and when the First Amendment requires public-sector unions to honor requests by members to *leave* the union. Although the questions in this case and *Klee* are related and are both important, they appear to be different enough that a decision from this Court in just one of the cases is not likely to resolve the question presented by the other. So while the Court could grant review in just one case or the other—and should, if it finds that one of them is somehow inappropriate for review—the best path is to grant certiorari in both cases and coordinate their briefing and argument.

II. The Response Confirms That The Courts Of Appeals Have Badly Misconstrued *Lugar*.

As the Petition also explained, the threat to *Janus*'s viability arises from a misapplication of this Court's precedents by the lower courts.

1. The parties agree that the key state-action precedent is this Court's decision in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). *Lugar* involved the

to be missing, or where the union would have a valid defense to the state-law offense.

procedures by which a plaintiff in Virginia state court obtained pre-judgment attachment of certain property owned by Lugar. *Id.* at 925. After the state court dismissed the attachment under state law, *ibid.*, Lugar sued the state-court plaintiff in federal court, seeking damages for the wrongful attachment. He asserted three claims. First was “a pendent claim based on state tort law,” which this Court did not address. *Id.* at 940. Second was a claim that the attachment denied Lugar due process because it was “unlawful under state law.” *Ibid.* This Court held that claim to allege only “private misuse of a state statute,” and so not to “describe conduct that can be attributed to the State.” *Id.* at 941. Third, however, Lugar asserted a due process claim that Virginia’s prejudgment attachment statute was “procedurally defective under the Fourteenth Amendment,” so “whether or not” the attachment of his property was “in accordance with Virginia law,” it “was in violation of Lugar’s constitutional rights.” *Id.* at 941 & n.22. The Court held that this *did* satisfy the state-action requirement, because “the procedural scheme created by the statute obviously is the product of state action.” *Id.* at 941.

The central principles of *Lugar* therefore are clear enough. On the one hand, a plaintiff may not seek to constitutionalize state-law rules by arguing that a defendant’s conduct was unconstitutional only *because* the state had also made it illegal. That argument, the Court recognized, is inherently incompatible with attributing the alleged constitutional violation to the state itself. But, on the other hand, *Lugar* plainly does allow a plaintiff to claim (as Lugar himself did) that a defendant is liable both as a state actor for invoking unconstitutional state procedures, and also as a non-state actor for violating state law in the process. And

that makes perfect sense. If state-law procedures are independently unconstitutional, then a defendant's invocation of those procedures can fairly be attributed to the state even if the defendant also violated some other state law along the way.

But, unfortunately, the Courts of Appeals have misapplied these principles in the public-sector-union self-certification context. In this case, the Eighth Circuit reasoned that Mr. Todd's mere "allegation of forgery" precludes "the existence of state action" by Council 5, because "forging a union membership card" is a crime under Minnesota law. (App. 8a.) In doing so, it relied on the Ninth Circuit's similar holding that, because forgery is a crime under Oregon law, an allegation of a "forged dues authorization" cannot involve state action. *Wright v. SEIU*, 48 F.4th 1112, 1123 (9th Cir. 2022). That is wrong under this Court's decision in *Lugar*, which conclusively demonstrates that the state-action requirement permits allegations of state-law and constitutional violations to coexist in the same complaint. By applying the opposite rule, the Eighth and Ninth Circuits have imperiled the ongoing viability of *Janus*. This Court should grant review to correct matters.

2. In addition to flouting *Lugar*, the Courts of Appeals' no-state-action rulings in union self-certification cases would lead to a bizarre inversion of the parties' litigation positions in First Amendment cases like this one. Under the rule adopted by the Eighth and Ninth Circuits, unions like Council 5 could (and presumably would) often seek to avoid First Amendment liability by showing that their self-certifications had somehow violated state law—and plaintiffs like Mr. Todd would be forced to argue that the union was

liable because it *had not* violated state law. Here, for instance, if Minnesota law required a *mens rea* of intent in order to commit the crime of forgery, then Council 5 could be liable under the First Amendment if it created a membership card that it negligently believed Mr. Todd had authorized—but it could *intentionally* fake Mr. Todd’s signature with no First Amendment consequences. A union like Council 5 thus could defend a First Amendment case like this one by arguing that its misconduct was *more* egregious than the plaintiff claimed—and the plaintiff’s only route to First Amendment redress would be by proving that the union’s misconduct was *not as bad* as the union said.

That would be just as senseless as it seems. Like any such plaintiff, Mr. Todd’s constitutional grievance here has nothing to do with whether Council 5’s actions met the technical definition of forgery (or any other wrong) under Minnesota law. Instead, it is simply that Council 5 cooperated with the Minnesota government to divert part of his paycheck without the constitutionally required clear and compelling evidence of his consent—just as Minnesota law expressly permits. That constitutional defect in Minnesota’s statutory procedures remains exactly the same regardless whether Council 5’s particular method of exploiting it happened to violate some other Minnesota law. Council 5’s liability under the First Amendment therefore should not turn on that question, and this Court should grant review to make clear that it does not.

3. Finally, Council 5 cannot evade the First Amendment by contending (BIO at 5) that enforcing its requirements would “flood the federal courts with

lawsuits about alleged payroll errors.” There is no government-incompetence exception to the Free Speech Clause: compelling a citizen to speak or associate against his will remains a First Amendment violation even when it results from an alleged “error.” If Council 5 is concerned that a “flood” of such constitutional violations is occurring, that may be a reason for state governments to reconsider allowing union payroll deductions at all. But it certainly is no reason to close the doors of the federal courts to redressing such violations.

At the same time, Council 5 is likely overstating matters in suggesting that *every* mistaken deduction from a government employee’s paycheck somehow gives rise to a First Amendment claim. For instance, although Council 5 raises the specter of plaintiffs filing suit for mistaken deductions of “insurance premium payments” (BIO at 11), it does not explain why such deductions, even if wrongful, would violate an employee’s speech or associational rights. But even if they somehow would—and even if such violations were legion—the widespread nature of constitutional violations simply is no reason for the courts to over-look them.

*

To sum up: the Constitution does not permit government to outsource constitutional violations to closely allied “private” actors. But that is exactly what many states and public-sector unions appear to be attempting, following this Court’s *Janus* decision. *Janus* required clear and compelling evidence that a government employee consented to give part of his pay to a union. But numerous states, including Minnesota here, now allow unions to obtain dues deductions from

an employee's pay just by declaring—without presenting *any* evidence—that the employee agreed to join. When a union avails itself of that state-created right to receive dues deductions from the government, it readily qualifies as a state actor for constitutional purposes. The contrary conclusion reached by the Courts of Appeals threatens to all but neuter the First Amendment rights vindicated by *Janus*. This Court should grant review to amend that error.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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