No. 22-2742

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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GLEN WILKOFSKY,
*Appellant,*

v.

AMERICAN FEDERATION OF MUSICIANS LOCAL 45;
ALLENTOWN SYMPHONY ASSOCIATION INC,
*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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# REPLY BRIEF OF APPELLANT

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## I. REPLY

The ultimate question in this appeal is not whether Appellee Allentown Symphony Association Inc ("Symphony") is a private actor whose conduct should be deemed the state's. Rather, it is whether the actions of a state entity—a public employer—were within its official power, such that it is state action. And on that question, the Symphony has already conceded—it acknowledged to the district court (and the district court also recognized) that it is a public employer when it acts to collectively bargain under Pennsylvania's Public Employe Relations Act ("PERA").[1] Because the injuries the Symphony caused Mr. Wilkofsky are due to collective bargaining, they occurred in the exercise of the Symphony's power as a state actor or entity. That fully states Mr. Wilkofsky's claim for violation of constitutional rights. Appellees' analysis is incomplete and, thus, misses the mark in a variety of ways.

### A. The Symphony Is a Public Employer and, Thus, a State Actor, for Some Purposes and Not Others

Mr. Wilkofsky does not argue that the Symphony is a state actor at all times and for all purposes. Nor does his argument convert every action by the Symphony into one with constitutional significance.

[1] Appx18; Br. for Def.-Appellee Allentown Symphony Ass'n Inc. at 11, ECF No. 31 ("Symphony Br."); Br. Behalf Appellee, Am. Fed'n Musicians Loc. 45 at 21, 22, ECF No. 29 ("Union Br.").

Appellee American Federation of Musicians Local 45 ("Union") argues that Mr. Wilkofsky has ignored the "prefatory phrase" in PERA that states "[a]s used in this act" and goes on to state that "the Symphony is defined as a public employer in PERA for purposes of self-organization and collective bargaining, it is not considered a public employer for any other purpose." Union Br. 21–22. That is precisely Mr. Wilkofsky's argument. When it comes to matters related to collective bargaining for its public employees, the Symphony acts as a public employer (the state)—but only then.

In fact, this Court contemplated in *Krynicky v. University of Pittsburgh* that an entity could be a state actor in some circumstances but not one under other portions of state law. 742 F.2d 94, 103 n.12 (3d Cir. 1984). That is the situation here; the Symphony is a state actor for purposes of collective bargaining matters under PERA.

Because the Symphony is a public employer as to actions taken under PERA, it has the same obligation not to violate a person's constitutional rights in collective bargaining as do all other public employers. *Griffin v. Maryland*, 378 U.S. 130, 135 (1964) ("If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law."). While this does not invoke Section 1983 liability for all of the Symphony's actions at large, *see Boykin v. Bloomsburg Univ. Pa.*, 893 F. Supp. 409, 417 (M.D. Pa. 1995), *aff'd*, 91 F.3d 122 (3d Cir. 1996), when the

Symphony acts in its capacity as a public employer concerning matters of collective bargaining under PERA, it has all of the responsibilities, obligations, and liabilities of one under Section 1983.[2]

### B. Appellees' Arguments Against the Presence of State Action Fail

Appellees base most of their opposition to being state actors on the false premise that they are simply two private parties negotiating a collective bargaining agreement. This misses Mr. Wilkofsky's argument and leads to their applying incorrect tests. As all Parties agree, state law grants the Symphony the power to act as a public employer under PERA. Symphony Br. 11; Union Br. 21, 22. This means that, for purposes of collective bargaining, the Symphony acts as the state and is not a private actor, so state action is present when Appellees negotiate, implement, and enforce their collective bargaining agreement. *See, e.g.*, *West v. Atkins*, 487 U.S. 42, 50 (1988) ("[A] public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law."); *Screws v. United States*, 325 U.S. 91, 109–10 (1945) (collecting cases in which defendants' actions were under color of state law when "performing official duties" required by state law).

[2] Union concedes that if the Symphony is a state actor, it, too, "[f]or purposes of its Motion to Dismiss," is a state actor. Union Br. 16 n.1.

### 1. The Symphony and the Union Both Apply the Wrong Analysis for State Action

The Symphony and Union start with the incorrect presumption that they are both private actors when it comes to collective bargaining. Union Br. 16; *see* Symphony Br. 10–13. This is the same mistake made by the court below in its analysis. *See* Appx14 ("Since the Defendants in this case are private actors . . . ."), Appx18. Their analysis begins at the wrong starting point, taking private action for granted instead of inquiring whether it is present, and then proceeds down the wrong path.

Appellees base their arguments on the three tests for finding state action by private parties set forth in *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1142 (3d Cir. 1995). Union Br. 17–19; Symphony Br. 12–13. However, the Appellees concede, Symphony Br. 11; Union Br. 21, 22, and even the court below agreed, Appx18, that the Symphony is a public employer under PERA. This makes the Symphony a state actor when acting, as it has, in matters related to collective bargaining. Therefore, a private party test as set forth in *Mark* or even *Angelico v. Lehigh Valley Hospital*, 184 F.3d 268 (3d Cir. 1999), is inappropriate for determining whether the Symphony has liability under Section 1983. This Court need not analyze whether the Symphony is a private party acting with state authority because it is a literal state actor—it acts as the

state under PERA because it is a public employer with public employees in that situation.[3]

The only party to which these tests would be appropriate is the Union. However, the Union has already conceded in its briefing that it would be a state actor if the Symphony is found to be a state actor. Union Br. 16 n.1. But should this Court wish to analyze this, the Union is a state actor under the second test set forth in *Mark*, whereby the private actor (Union) has acted with and received significant aid from state officials (Symphony) in the negotiating and implementation of collective bargaining, evidence of which is clearly set forth throughout Mr. Wilkofsky's opening brief. *See* Opening Br. of Appellant at 6–17, ECF 23 ("Appellant Br.").

Even if this Court believes that the Symphony is not a state actor despite its decision to act as a public employer in the state's statutory scheme for collective bargaining for public employees, Mr. Wilkofsky set forth in his opening brief how the actions alleged here also qualify as state action under this Court's three tests for action by private parties. Appellant Br. 15–16.

Because the Symphony is a state actor in its role as a public employer operating under PERA, the Union's and Symphony's arguments and analysis in their briefs are

[3] The Union and Symphony both note that Mr. Wilkofsky has not alleged that the Symphony has received help from state officials. Union Br. 18–19; Symphony Br. 13. No such allegation is necessary because the Symphony is the relevant state entity when operating under PERA and there is no need for an allegation of joint action with another state actor.

simply irrelevant. *See* Symphony Br. 12–17; Union Br. 16–19, 22–27 (all arguments relying on the incorrect assertion that the Symphony and Union are both private entities).

### 2. There Is State Action, Not Because the Symphony and the Union Have Collectively Bargained Under PERA, But Because the Symphony Is a State Entity in the Statutory Scheme

Appellees pick up the lower court's error, arguing that simply availing themselves of the collective bargaining procedures under state law does not make the Symphony a state actor. Symphony Br. 17; Union Br. 27. But that is not Mr. Wilkofsky's theory. Again, the Symphony is a state actor because the Commonwealth has chosen to define it as a public employer for purposes of a statutory scheme establishing collective bargaining in public employment, and because the Symphony took action under that power. When the Symphony operates under PERA, it is not merely a private party acting as authorized by state law; it is a state actor acting under authority granted only to state entities under state law. Therefore, any actions taken by the Symphony under PERA are state action.

This nuance makes the Symphony's authority distinguishable and unavailing. *See* Symphony Br. 16 (citing *Angelico*, 184 F.3d 268 (private attorneys acting under the law); *White v. Commc'n Workers of Am., Loc. 13000*, 370 F.3d 346 (3d Cir. 2004) (private party engaging in practice authorized by the state)).

*White*, for instance, addressed a completely different theory of state action—whether two private parties acting pursuant to a collective bargaining agreement constitutes state action. *See White*, 370 F.3d at 349. Similarly, the Symphony uses *Angelico* as support to state that "the state's authorization given to nonprofit corporations to collectively bargain does not make the nonprofit a state actor." Symphony Br. 16. But Mr. Wilkofsky's theory is not simply that action under a statutorily-authorized collective bargaining agreement results in state action—it is that the Symphony itself is a state actor, and the Union has acted in concert with the Symphony to deprive Mr. Wilkofsky of his First Amendment rights. *See supra* Section B.1 (discussing state action). The trigger is not that the Commonwealth allows Appellees to bargain; it is that Appellees can, and do, bargain under the statutory scheme for collective bargaining by public employers with public employees.

### C. States Have the Authority to Determine to Whom and What They Extend State Power and Status

Appellees try to turn a key concept of federalism on its head, when they argue that it works against Mr. Wilkofsky to "point[] out that the Symphony would not be a state actor if it were located in, for example, New York, California, or Ohio, owing simply to the definitions used by state legislatures of those states." Symphony Br. 11. That, however, supports the very argument Mr. Wilkofsky seeks to make. Each state can decide for itself to whom and to what it extends state power and defines as the state. That's simply our federalist system at work.

Pennsylvania already has a broader array of public employees than some other states, even beyond the public employee statutory definition at issue in this appeal. For instance, many states do not have public employees involved in the sale of alcohol. Pennsylvania does. Just because those employees would be private in another state does not prevent their being public employees in Pennsylvania. *See, e.g.*, 47 P.S. § 3-301 (requiring the Pennsylvania Liquor Control Board to operate liquor stores); 47 P.S. § 2-206.1 (subjecting Pennsylvania Liquor Control Board employees to the Pennsylvania Public Official and Employee Ethics Law, reenacted at 65 Pa. Cons. Stat. §§ 1101–13); *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012) ("Although in ordinary parlance it may seem incongruous to couch liquor and gambling ventures as 'governmental functions,' they plainly are so in the sense that they are core activities assigned to and undertaken by government agencies.").

The Union argues that the parties' conduct is the "sole determinant of whether state action exists, not the statutory declaration," Union Br. 24, but provides no authority for its assertion. While courts have observed that a statutory text may not be determinative, *cf. Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the statutory scheme here is not simply incantation of the word "public" in one definition. Rather, in its full context, the statutory text treats the Symphony as it does all other public entities with the power to collectively bargain for public employees as part of the provision of an entire scheme regulating public employment. The Union acknowledges that the other "public employers," "[t]he Commonwealth, the County,

and the City are, without dispute, state actors." Union's Br. 16. But how does one actually know that "without dispute" these entities are state actors under PERA? It is because state law defines them, too, as public employers—and, thus, state actors—along with and in the same provision as the Symphony. 43 P.S. § 1101.301(1).

Just because Appellees may not like the fact that the Symphony is a state actor when it operates under PERA does not mean they can substitute their own policy for defining the scope of state employers. Pennsylvania's choice to make certain employers public for collective bargaining, if they receive significant state funding, may be a rather unique experiment for a state to undertake.[4] But it is no less deserving of respect. In fact, encouraging such state-level experimentation is a feature of our federalist system, not a bug. "Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018).

### D. To the Extent Appellees Argue that Mr. Wilkofsky Seeks a Remand to Amend His Complaint, They Misstate His Requested Relief

Mr. Wilkofsky does not seek remand to amend his complaint. *Contra* Symphony Br. 17–18. Rather, he seeks reversal and remand for the case to proceed to discovery and, ultimately, summary judgment motions or trial. Appellant Br. 19.

[4] Other states' alternative ways of defining public employees are collected in Appellant Brief at 10 n.2.

## CONCLUSION

For all the reasons set forth above, and those in Mr. Wilkofsky's opening brief, this Court should reverse the lower court's decision and remand this matter to the lower court for further proceedings.

Respectfully submitted,

January 26, 2023

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## CERTIFICATIONS

The undersigned hereby certifies the following:

a. All attorneys whose names appear on this brief are a member of the bar of this Court.

b. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7). It contains 2,290 words according to the word processing system used to prepare this brief.

c. The text of the electronic version of this brief is identical to the text in the paper copies of this brief sent to this Court and opposing counsel.

d. The virus protection program, Sophos Endpoint Agent V.2022.2.2.1, has been run on the electronic, PDF file of this brief and related attachments and no virus was detected.

e. This brief has been electronically filed and served this day with the Clerk of Court using the Court's CM/ECF system. Appellees were served on this day electronically through the Court's docketing system which constitutes service under Local Appellate Rule Misc. 113.4(a). One (1) paper copy of this brief was mailed to opposing counsel on this day via commercial carrier as follows:

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