No. 23-____

IN THE

Supreme Court of the United States

GLEN WILKOFSKY,

Petitioner,

v.

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

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

NATHAN J. MCGRATH
Counsel of Record
STEPHEN B. EDWARDS
THE FAIRNESS CENTER
500 N. Third Street
Suite 600B
Harrisburg, PA 17101
(844) 293-1001
njmcgrath@fairnesscenter.org
sbedwards@fairnesscenter.org

Counsel for Petitioner

October 30, 2023

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

1. When applying the Fourteenth Amendment's requirement of "state action" as a predicate for constitutional claims, should federal courts defer to a state's legislative choice to deem an entity "public" for certain governmental purposes?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption identifies all parties to this action. Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

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

1. *Wilkofsky v. American Federation of Musicians, Local 45*, No. 22-2742, U.S. Court of Appeals for the Third Circuit. Judgment entered May 31, 2023.

2. *Wilkofsky v. American Federation of Musicians, Local 45*, No. 5:22-cv-1424, U.S. District Court for the Eastern District of Pennsylvania. Judgment entered August 22, 2022.

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The district court's opinion granting Respondents' motions to dismiss is reported at 609 F. Supp. 3d 360 and reproduced at Pet.App. 10a–26a. The Third Circuit's non-precedential opinion affirming that opinion is unreported and reproduced at Pet.App. 1a–9a. The Third Circuit order denying panel rehearing is reproduced at Pet.App. 27a–28a.

JURISDICTION

The Third Circuit issued its opinion on May 31, 2023, and denied a petition for panel rehearing on August 1, 2023. Pet.App. 1a–9a, 27a–28a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution, as well as relevant provisions of the Pennsylvania Public Employe[1] Relations Act ("PERA") and the National Labor Relations Act ("NLRA") are reproduced at Pet.App. 31a–34a.

PRELIMINARY STATEMENT

Intuitively, one would expect any "public employer" to be constrained by the Constitution, given the myriad ways the powers of an employer can touch on fundamental rights. But under the approach to state action embraced by the Third and Ninth circuits, some entities considered "public" under state law escape constitutional accountability altogether. In a sort of misguided, "piercing the veil" exercise, these courts

[1] Throughout PERA, "employee" is spelled "employe."

refuse to credit statutory "public" designations, assuming the true nature of these entities lies beneath mere labels. This approach fails to appreciate that, oftentimes, when a state designates an ostensibly private entity as "public," it deliberately expands its sovereignty in service of a public goal. Past decisions of this Court have not addressed this type of statutory label—instead, they have dealt exclusively with statutory ***disclaimers*** of governmental status designed to insulate state actors from liability. The statutory label in this case—namely, Pennsylvania's decision to define nonprofits that receive government funding as "public employers" for purposes of a public-sector collective bargaining law—is completely unlike these evasive maneuvers. When it enacted the relevant law in 1970, the state legislature purposefully broadened the notion of "public employment" to fill a gap in the coverage of private-sector labor laws. Labeling of this nature should be respected by federal state action doctrine, both to protect the constitutional rights of persons dealing with entities so labeled and to promote federalism, through respect for state decisions about the reach of state government.

STATEMENT OF THE CASE

A. Respondents' Labor Relationship

Since 1999, the American Federation of Musicians, Local 45 ("Union") has been the exclusive representative of the Allentown Symphony Association Inc.'s ("Symphony's") employees for purposes of collective bargaining.[2]

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[2] Under an exclusive representation scheme, the labor representative chosen by a majority of employees in a given workforce negotiates with the employer to set "terms and conditions of employment" for the entire workforce. *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

The Union attained this status by filing a petition under PERA and holding an election among the employees. *See* 43 P.S. § 1101.603(c).

The Union proceeded under PERA because that statute defines the Symphony as a "public employer." PERA defines that term as follows:

> "Public employer" means the Commonwealth of Pennsylvania, its political subdivisions including school districts and any officer, board, commission, agency, authority, or other instrumentality thereof ***and any nonprofit organization or institution and any charitable, religious, scientific, literary, recreational, health, educational or welfare institution receiving grants or appropriations from local, State or Federal governments*** . . . .

43 P.S. § 1101.301(1) (emphasis added). Throughout this litigation, Respondents have conceded the Symphony meets this definition. In turn, the Symphony's employees, including Petitioner, are "public employes" under the statute. 43 P.S. § 1101.301(2) (providing that "'public employe' . . . means any individual employed by a public employer . . . .").

Over the years, the Symphony and the Union (collectively, "Respondents") have structured their relationship by entering into collective bargaining agreements. These agreements set the terms and conditions of employment with the Symphony. They are authorized by PERA, which requires the Symphony and the Union to "meet . . . and confer . . . with respect to wages, hours and other terms and conditions of employment," and to "execut[e] . . . a written contract incorporating any agreement reached" with respect to such terms and conditions. 43 P.S. § 1101.701.

Respondents' collective bargaining agreements have always required Symphony employees to be members of the Union. Naturally, this requirement encompasses payment of full union dues and fees by every employee. Respondents executed the agreement pertaining to Petitioner's lawsuit (the "CBA") in 2019.

B. Petitioner Glen Wilkofsky

Petitioner first auditioned for the Symphony in 2001 and was selected for the role of Principal Timpanist. Consistent with Respondents' membership requirement, he joined the Union and began paying dues. He did so against his will and for the sole purpose of keeping his job.

Petitioner remained a dues-paying member of the Union until the 2020 concert season, when he stopped making payments. As a consequence, the Union suspended his membership, and the Symphony has since prohibited him from performing until he resolves his issues with the Union. The Symphony has also advised Petitioner he may be terminated if he does not "rejoin the union and pay the necessary dues." Pet.App. 14a.

C. Legal Proceedings

Petitioner sued Respondents in federal district court, arguing Respondents were violating his right under *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), to be free from involuntary payments to a labor union. The district court dismissed the suit on the theory that neither the Symphony nor the Union is a state actor. Pet.App. 12a. The court reasoned that, in taking the action that allegedly harmed Petitioner—entering into a CBA that required Petitioner to maintain union membership—Respondents did not wield the power of the state. Pet.App. 21a–23a. According to the court,

PERA's collective bargaining scheme merely ***permitted*** Respondents to enter such an agreement—the ultimate decision to do so sprung from Respondents, who in the court's view are private entities. Pet.App. 24a ("[T]he Symphony is a private non-profit corporation, and the Federation is a private entity too.").

In reaching this conclusion, the district court accorded no weight whatsoever to PERA's designation of the Symphony as a "public employer." Pet.App. 23a–24a. The court concluded that deferring to this label would amount to taking a "short cut" around what it saw as the proper state action analysis. Pet.App. 24a. ("Deciding whether there has been state action *requires* an inquiry into whether there is a sufficiently close nexus between the State and the challenged action of the Defendants . . . .") (cleaned up) (emphasis in original) (citing, among others, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

The Third Circuit affirmed in a non-precedential decision. *See* Pet.App. 1a–9a. Repeating the lower court's error, the circuit court treated PERA's "public employer" language as mere window dressing. Pet.App. 6a ("[T]here are no shortcuts to determining whether state action exists."). Discarding that statutory designation, it proceeded to analyze whether engaging in collective bargaining under PERA converted Respondents into state actors. Pet.App. 6a–9a. Like the district court, it found this insufficient to create state action. Pet.App. 7a ("Just because PERA permits the parties to negotiate the disputed contract . . . does not mean that [Petitioner] has established the requisite state action for purposes of a § 1983 lawsuit.").

REASONS FOR GRANTING THE PETITION

I. A Lack of Guidance Regarding the Significance of Statutory "Public" Labels in State Action Analysis Has Produced Conflicting Decisions in the Federal Circuits

This case presents the opportunity to resolve a lack of clarity in state action law that has led to confusion in the courts of appeals. Confusion on this issue has generated disparate results in cases assessing the state-actor status of entities labeled "public" under state law: some courts have deferred to this label, treating it as a meaningful legislative choice, while others have dismissed it as mere window dressing. *Compare Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 120–21 (4th Cir. 2022), *Burns v. Sch. Serv. Emps. Union Loc. 284*, 75 F.4th 857 (8th Cir. 2023), and *Tarabishi v. McAlester Reg'l Hosp.*, 827 F.2d 648, 652 (10th Cir. 1987), *with Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 814 (9th Cir. 2010).

The former line of cases is correct. In the absence of legislative gamesmanship designed to evade constitutional responsibility, statutory labels can be a meaningful guide to the presence of state action. This is because, in certain contexts, such labels reflect a deliberate extension of a state government's sovereignty. In short, state action doctrine should respect a state legislature's choice to address a given policy issue by extending the government's reach over a previously private entity. This Court should grant certiorari to install this view in national state action doctrine and thereby resolve the above-mentioned conflict in the courts of appeals.

A. This Court's Precedent Applying State Action Doctrine to Statutory Labels Has Addressed Only *Disclaimers* of Public Status

In the past, this Court's state action decisions have warned against attributing dispositive significance to a statute labeling an entity "private" or "non-governmental." *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 391–92 (1995); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 292–93, 301 (2001). These cases arise from concern over legislative gamesmanship: lawmakers should not be able to exempt organizations performing government functions from the Constitution simply by stating they're "not the government."[3] But this same precedent offers little guidance in the opposite scenario, namely, when a statute ***invites*** constitutional accountability by expressly designating an entity "public." As a result, when confronted with that scenario, the courts of appeals have issued disparate rulings.

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[3] In assessing whether the corporation that runs Amtrak is a state actor, the *Lebron* Court refused to defer to a disclaimer of governmental status in the corporation's enabling statute. 513 U.S. at 391–92. The Court evinced its concern with legislative sleight-of-hand by situating this disclaimer within a long history of government-chartered corporations designed to "enter[] . . . the private sector . . . with Government-conferred advantages" while simultaneously ducking governmental accountability. *Id.* at 390. Similarly, *Brentwood* rejected Tennessee's attempt to evade state action by a corporation charged with regulating high school sports by simply deleting regulatory language that acknowledged the corporation's regulatory role. 531 U.S. at 300–01. The Court noted the suspicious timing of the change (one year after a district court ruling that the corporation was a state actor) and denigrated it as a transparent effort to disguise the corporation's governmental character through "winks and nods." *Id.* at 301.

B. Differing Approaches in the Circuits

At least three federal circuits have deferred to statutory language designating a defendant-entity as "public," finding this language relevant to a finding of state action for federal constitutional purposes. *See Peltier*, 37 F.4th at 120–21; *Tarabishi*, 827 F.2d at 652; *Beedle v. Wilson*, 422 F.3d 1059, 1065 (10th Cir. 2005); *Burns*, 75 F.4th 857. In *Peltier*, the Fourth Circuit gave considerable weight to the North Carolina legislature's decision to label charter schools as "public schools" carrying out the state's duty, imposed by the North Carolina constitution, to provide universal public education. *Id.* at 117 (noting that "under the plain language of [statutes creating the State's charter school system] . . . charter schools in North Carolina are public institutions"). Importantly, the Court noted that ignoring this statutory designation altogether would "undermin[e] fundamental principles of federalism" by devaluing the State's "sovereign prerogative to determine whether to treat these state-created and state-funded entities as public." *Id.* at 121.[4]

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[4] The Third Circuit attempted to distinguish this case from *Peltier* on the ground that the charter schools were performing a "traditionally . . . exclusive government function." Pet.App. 8a–9a. This misses the point completely. While it is true that the Fourth Circuit found state action based on the "public function" test, *see* 37 F.4th at 118, its application of this test was still clearly influenced by statutory language affirming the public character of charter schools. *See id.* at 117 ("[U]nder the plain language of [statutes creating the charter school system], as a matter of state law, charter schools in North Carolina are public institutions."), 118 ("The statutory framework . . . compels the conclusion that the state has delegated to charter school operators . . . part of the state's constitutional duty to provide free, universal elementary and secondary education."), 120–21 ("We are not aware of any case in which the Supreme Court has rejected a state's designation of an entity as a 'public' school under the unambiguous language of state law and held that the operator of such a public

In *Tarabishi*, the Tenth Circuit relied almost entirely on statutory designations to hold that a hospital organized under Oklahoma law was a state actor. 827 F.2d at 652. The court's analysis centered on the hospital's status as a "public trust," which is basically an entity chartered under state law to accomplish a "public function," *see* 60 Okl. St. Ann. § 176(A), and a statute providing that the entity's trustees "shall be an agency of the State . . . ." *Tarabishi*, 827 F.2d at 652. In subsequent cases, the Tenth Circuit has reaffirmed this analysis and its reliance on "public" designations under Oklahoma law. *See Beedle*, 422 F.3d at 1065 ("On at least three different occasions, our court has noted that ***under Oklahoma law*** public trust and county hospitals, or the private entities who contract with such hospitals to provide day-to-day services, are state actors for § 1983 purposes.") (emphasis added) (collecting cases).

Finally, in *Burns*, the Eighth Circuit took a school district's statutory designation as a "public corporation" into account when deciding whether the district engaged in state action by deducting union dues from an employee's paycheck. 75 F.4th at 860 (citing Minn. Stat. § 123A.55). The Court ultimately assumed the existence of state action and decided the case on substantive grounds, but its decision to do so was clearly influenced by the statutory designation. *See id.* ("The school district . . . is a public entity . . . so our conclusion regarding deductions by a private entity does not control.").

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school was not a state actor."). Giving significance to the statutory label is what counts—this can still be done as part of applying one of this Court's established formulae for finding state action.

By contrast, other circuits, including the Third Circuit in this case, have given little to no weight to statutory "public" labels. In *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806, 814 (9th Cir. 2010), the Ninth Circuit refused to deem a charter school a state actor despite a clear statutory pronouncement that the entity was a "public school."[5] The Court's analysis gave no weight to this label, focusing instead on whether the school performed a "traditionally exclusive" public function and whether state government officials were directly involved in the employment decision challenged by the plaintiff. *Id.* at 816–18. The Court reasoned similarly in *Gorenc v. Salt River Project Agricultural Improvement & Power District*, 869 F.2d 503, 505–09 (9th Cir. 1989), by refusing to defer to a provision in the Arizona constitution labeling agricultural improvement districts "political subdivisions" of the State.

The Third Circuit's decision in this case fell on the latter half of this divide. It accorded no significance whatsoever to PERA's defining "public employer" to include "nonprofit organization[s] [and] institutions . . . receiving grants or appropriations from local, State or Federal governments," 43 P.S. § 1101.301(1), going so far as to describe Petitioner's reliance thereon as an illegitimate "shortcut[] to determining whether state action exists." Pet.App. 6a.

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[5] The Court also disregarded a statutory provision deeming charter schools "political subdivisions" for purposes of the state employee retirement system and an opinion from the Arizona Attorney General concluding that charter schools are "political subdivisions" under the State's Open Meetings Act. *Caviness*, 590 F.3d at 814.

The conflict evidenced by these decisions will only deepen if this Court declines the opportunity this case presents to clarify the role of statutory labels that affirm an entity's governmental status. This case is an ideal vehicle for such a holding because the statutory label at issue—PERA's defining certain entities as "public employers"—reflects a purposeful extension of sovereignty to address a public need, rather than an evasive disclaimer. It is precisely the type of label state action doctrine should respect.

II. State Action Doctrine Should Defer to Statutory Designations Like PERA's Definition of "Public Employer" Because They Represent Deliberate Extensions of State Sovereignty

The history of PERA's broad definition of "public employer" reveals the Pennsylvania General Assembly's intent to solve a policy issue—the absence of collective bargaining in certain sectors—by expanding the scope of the public sector in Pennsylvania. This good-faith expansion of government is completely unlike the disclaimers employed in *Brentwood* and *Lebron*. Accordingly, PERA's designation of nonprofit entities like the Symphony as "public employers" is well-suited to serve as a model for the type of statutory "public" label that should be entitled to deference in the federal state action analysis.

In its statement of policy, PERA declares its purpose is to "promote orderly and constructive relationships between all public employers and their employes" by imposing a scheme of mandatory collective bargaining. 43 P.S. § 1101.101; *see also Pa. Lab. Rels. Bd. v. State Coll. Area Sch. Dist.*, 337 A.2d 262, 267 (Pa. 1975) (PERA recognized the "importance of a meaningful system of collective bargaining in maintaining harmony

and order in the public sector . . . ."). In turn, in addition to more "conventional" public actors like the State and its "political subdivisions," the Act defines a "public employer" to include, "any nonprofit organization or institution" that "receiv[es] grants or appropriations from local, State or Federal governments . . . ." 43 P.S. § 1101.301(1).

This broad definition responds to a series of Pennsylvania Supreme Court cases restrictively interpreting Pennsylvania's private sector collective bargaining law ("PLRA") to apply only to employers engaged in "industrial pursuits." *In re Emps. of Student Servs.*, 432 A.2d 189, 193 (Pa. 1981) (holding that PERA's definition of "public employer . . . evidences a strong legislative intent to extend the [Pennsylvania Labor Relations Board's] jurisdiction over those nonprofit ventures that were excluded by court interpretation from the purview of the PLRA"). Moreover, at the time of PERA's enactment, the National Labor Relations Board's jurisdiction was similarly limited—since at least 1951, the Board had refused to apply the NLRA to nonprofit employers, so long as they refrained from engaging in commercial activity. *See Trustees of Columbia Univ.*, 97 NLRB 424, 427 (1951), *overruled by Cornell Univ.*, 183 NLRB 329, 334 (1970)[6]; *see also*

[6] *Cornell* only overruled *Columbia* with respect to institutions of higher education—it did not repudiate the Board's broader doctrine of declining to apply the NLRA to most nonprofit employers. *See Cornell*, 183 NLRB at 332 ("Syracuse and Cornell have called upon the Board to reexamine the soundness of the *Columbia University* doctrine ***as it applies to colleges and universities today.***") (emphasis added); *see also Ming Quong Child.'s Ctr.*, 210 NLRB 899, 900 (1974) ("[W]e did not intend, in *Cornell,* to change our policy of declining jurisdiction over what the Supreme Court referred to as 'religious, educational, and eleemosynary employers.'") (citation omitted). Thus, even though

United States Book Exchange, Inc., 167 NLRB 1028, 1029 (1967).

This legislative history shows that PERA's broad definition of "public employer" represents a purposeful extension of state authority to solve what the legislature perceived as a compelling public need: the absence of collective bargaining rights in certain sectors, such as those that already rely on public funding. Crucially, the General Assembly could have addressed this issue by amending the PLRA or by enacting a standalone labor relations regime for the nonprofit sector. But it didn't, choosing instead to extend its sovereign power to additional entities to engage in collective bargaining. Because this legislative decision does not exhibit the gamesmanship that concerned the Court in *Lebron* and *Brentwood*, it should be entitled to deference in the state action analysis.

III. This Case Is an Ideal Vehicle for Resolving the "Labels" Issue

This case squarely presents one of the chief problems with the current, conflicting posture of state action law: it strands individuals like Petitioner in a "twilight zone" between public and private employment where the rights of neither fully apply. If this Court refuses to recognize the Symphony's status as a state actor, Petitioner will be stuck in an anomalous "union

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the *Cornell* decision predates the enactment of PERA by approximately one month, at the time of the law's passage, the Pennsylvania General Assembly still confronted a broad federal policy of refusing to enforce the NLRA in the nonprofit sphere. *See Ming Quong*, 210 NLRB at 900–01 (referring to NLRB's "congressionally approved general practice of declining jurisdiction over nonprofit charitable organizations").

shop" arrangement[7] that violates both public ***and*** private-sector rules designed to protect employees who wish to dissociate from union political speech. But unlike those employees, Petitioner will have no recourse for the Union's spending his hard-earned money on its chosen political causes, because under the Third Circuit's decision, the Symphony is neither a state actor amenable to suit under 42 U.S.C. § 1983 nor an "employer" subject to the jurisdiction of the NLRB. *See* 29 U.S.C. § 152(2). Until the Court resolves the conflict presented by this Petition, it can expect problems like this to proliferate.

This Court's decision in *Janus* outlawed the "agency shop" in public-sector employment, under which unions could charge "agency fees" to public employees who chose not to join the union. 138 S. Ct. at 2460–61, 2486. At that time, while permitted, those fees could only cover "activities that are germane to the union's duties as collective-bargaining representative," such as negotiating and administering the collective bargaining agreement—they could not be used to further "the union's political and ideological projects." *Id.* at 2460–61 (cleaned up) (citation omitted). They thus amounted to a "percentage of [full] union dues." *Id.* at 2460.

Before *Janus* prohibited this compulsory agency fees arrangement altogether, this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), provided a set of procedures to ensure that public-sector unions actually observed the line between "chargeable" and "nonchargeable" expenses. *Janus*, 138 S. Ct. at 2461. Under *Hudson*, nonmember

[7] "Union shop" is a term used to refer to a workplace where union membership is a condition of employment. *See generally Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

employees were entitled to an accounting of the union's overall operating expenses, divided into "chargeable" and "nonchargeable" columns; an opportunity to challenge how particular expenses were characterized in this accounting ***before*** agency fees were deducted from their wages; and access to an impartial decisionmaker to adjudicate any disputes over chargeability. *Hudson*, 475 U.S. at 304–09.

In the private sector, agency shops are still permitted, but they are governed by a similar rule regarding "representative" and "political" expenditures. *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 762–63 (1988). Furthermore, similar to *Hudson*, the NLRB has endorsed procedures by which nonmember employees can object to how the union divides chargeable and nonchargeable expenses. *See generally Calif. Saw & Knife Works*, 320 NLRB 224 (1995).

The Symphony's "union shop," which requires payment of full union dues as a condition of employment, complies with neither *Janus* nor *Beck*. It clearly runs afoul of *Janus*, which outlawed compulsory payments of any amount. 138 S. Ct. at 2486 ("Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages . . . unless the employee affirmatively consents to pay."). It also violates *Beck* by making no effort to separate chargeable, representation-related expenses from funds expended on political advocacy. This is evident from the CBA between Respondents, which requires membership in the union and payment of full membership dues as a condition of employment, without indicating that the obligations of a dissenting employee might differ. *See* Pet.App. 13a ("Pursuant to the CBA, [Petitioner] was required to pay union dues as a condition of his employment.").

Petitioner has no mechanism to address these clear violations of both the public- and private-sector rules for protecting the rights of nonmember employees. This is because the Third Circuit's decision places the Symphony in limbo between public- and private-sector collective bargaining: It remains a certified "public employer" under PERA, and is thus not subject to the NLRA,[8] but, according to the Third Circuit, is simultaneously exempt from suit under the Constitution.

This predicament is constitutionally untenable. The Third Circuit's decision places Petitioner in a disfavored class of his own, the constraints of which leave him with no means of vindicating labor rights that are considered basic in virtually all other employment contexts. Left uncorrected, this problem has the potential to recur in any context where citizens deal with a statutorily designated "public" entity that is simultaneously insulated from the Constitution—they will be blocked from both public and private remedies for the entity's wrongdoing. To prevent the proliferation of these dilemmas, this Court should grant certiorari and reverse.

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[8] Though the NLRB no longer categorically refuses to exercise jurisdiction over nonprofit employers, *see St. Aloysius Home*, 224 NLRB 1344, 1345 (1976), Respondents cannot simultaneously engage in collective bargaining under two statutes.

CONCLUSION

For the reasons given above, this Court should grant the petition for certiorari and reverse the Third Circuit's decision.

Respectfully submitted,

NATHAN J. MCGRATH
Counsel of Record
STEPHEN B. EDWARDS
THE FAIRNESS CENTER
500 N. Third Street
Suite 600B
Harrisburg, PA 17101
(844) 293-1001
njmcgrath@fairnesscenter.org
sbedwards@fairnesscenter.org

Counsel for Petitioner

October 30, 2023

APPENDIX

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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 22-2742

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GLEN WILKOFSKY,

Appellant

v.

AMERICAN FEDERATION OF MUSICIANS LOCAL 45;
ALLENTOWN SYMPHONY ASSOCIATION INC

———

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

(D.C. No. 5-22-cv-01424)

District Judge: The Honorable Joseph F. Lesson, Jr.

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Submitted Under Third Circuit L.A.R. 34.1(a)

May 16, 2023

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Before: CHAGARES, *Chief Judge*,
GREENAWAY, JR.,
and PHIPPS, *Circuit Judges*.

(Opinion Filed: May 31, 2023)

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OPINION*

GREENAWAY, JR., *Circuit Judge*.

After the Supreme Court decided *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), Glen Wilkofsky stopped paying his union dues, arguing that such payments violated his free speech rights. He brought this 42 U.S.C. § 1983 litigation to avail himself of his constitutional rights. There is just one problem: the Defendants are not state actors and thus cannot be hauled into court for § 1983 claims. Accordingly, we will affirm the District Court's Order.

I. BACKGROUND

A. Factual Background

Glen Wilkofsky has been an employee of the Allentown Symphony Orchestra for more than two decades. Allentown Symphony Association (the Symphony) is his employer. As a member of the Union, Wilkofsky is represented by the American Federations of Musicians, Local 45 (the Union) for purposes of collective bargaining. The Pennsylvania Labor Relations Board certified the Union as the exclusive representative for certain employees of the Symphony, including Wilkofsky, pursuant to § 603(c) of the Public Employe Relations Act (PERA).[1]

Although reluctantly, Wilkofsky paid his dues as a union member for nearly twenty years, he stopped after the Supreme Court decided *Janus*. The Union

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] Employee is spelled "employe" in this context and in official documents referencing PERA.

notified Wilkofsky that his failure to pay his dues violated the 2019 Collective Bargaining Agreement (CBA) that the Union had entered into with the Symphony on behalf of the musicians. He continued to refuse to pay his dues and the Union subsequently expelled him from the Union. As a consequence of his expulsion, the Symphony prohibited Wilkofsky from performing with the orchestra and warned him that he may be fired if he did not rejoin the union and pay his dues. At the moment, he cannot perform as a member of the orchestra until he rejoins the Union as a member.

B. Procedural History

Wilkofsky filed a Complaint alleging the Symphony and the Union violated his First and Fourteenth Amendment rights by enforcing the CBA against him after *Janus*. He alleged that this enforcement is the foundation of his § 1983 action. The Defendants filed their respective motions to dismiss arguing that Wilkofsky cannot make out a § 1983 claim because they are not state actors.

The District Court agreed with the Defendants, dismissed Wilkofsky's Complaint without prejudice, and granted him leave to amend his Complaint. Wilkofsky filed a First Amended Complaint (FAC) raising the same allegations but with more facts. Again, the Defendants filed their respective motions to dismiss arguing that they were not state actors. And again, the District Court agreed, but this time, it dismissed the Complaint with prejudice because Wilkofsky "had an opportunity to cure his complaint's deficiencies but did not" and that any more amendments would be useless. App. 3 n.2.

Wilkofsky filed this timely notice of appeal.

II. JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The District Court's Order dismissing Wilkofsky's FAC with prejudice and disposing of all his claims is a final order. Thus, we have jurisdiction pursuant to 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

We exercise plenary review over a district court's grant of a motion to dismiss for failure to state a claim. *Talley v. Wetzel*, 15 F.4th 275, 286 n.7 (3d Cir. 2021). And for Wilkofsky to survive a motion to dismiss, his complaint must state a plausible claim for relief on its face. *Doe v. Princeton Univ.*, 20 F.4th 335, 344 (3d Cir. 2022).

IV. DISCUSSION

A. The Defendants are not State Actors.

On appeal, Wilkofsky incorrectly relies on PERA and misapplies our precedent to argue that the Defendants are state actors. They are not.

i. Public Employe Relations Act (PERA) and the Defendants

We start with PERA because Wilkofsky incorrectly assumes that the Symphony is a state actor because it is a public employer under PERA.

The Pennsylvania Labor Relations Board (PLRB) shoulders the responsibility of administering and enforcing the laws of the Commonwealth that pertain to labor-management relations. PENNSYLVANIA LABOR RELATIONS BOARD, bit.ly/3McjrUt, (last visited May 9, 2023). Established in 1937 by the Pennsylvania Labor Relations Act, the PLRB seeks to facilitate the resolution of private-sector disputes through collective bar-

gaining, safeguarding the rights of employees, employers, and labor organizations involved in lawful activities connected to the collective bargaining process. *Id.* A significant portion of the PLRB's work nowadays pertains to the public sector. *Id.* That is because the passage of PERA, in 1970, expanded collective bargaining rights and responsibilities to encompass most public employees and their employers across all strata of state government. PERA, Act of July 23, 1970, P.L. 563, 43 P.S. § 1101.101. Under PERA, public employees are granted the right to form unions and designate an exclusive representative to negotiate on their behalf with their public employer. *Id.* § 1101.401.

Relevant here, PERA defines a "[p]ublic employer" to include any "nonprofit organization . . . [that] receiv[es] grants or appropriations from local, State or Federal governments" and a "[p]ublic employe" as any individual employed by a "[p]ublic employer." *Id.* §§ 1101.301(1)-(2). By its admission, the Symphony, a nonprofit that receives funds from the government, is considered a public employer under PERA. The error that Wilkofsky makes, however, is to assume that because the Symphony is a public employer under PERA, it must then automatically be a state actor for § 1983 purposes. The following discussion will explain why that is not so.[2]

ii. State Action Doctrine when applied does not convert the Defendants into State Actors.

While there is no clear line between state and private actors, *Brentwood Acad. v. Tenn. Secondary*

[2] Wilkofsky also ignores the prefatory command contained in § 301 of PERA, which states that the designation of an entity as a "public employer" pertains to PERA. 43 P.S. § 1101.301.

Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001), the Supreme Court has made clear that "deciding whether there has been state action requires an inquiry into whether 'there is a sufficiently close nexus between the State and the challenged action'" of the Defendants "so that the action of the latter may be fairly treated as of the State itself." *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1142 (3d Cir. 1995) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Our inquiry into whether state action exists is a fact-specific one. *Groman v. Twp. of Manalapan*, 47 F.3d 628, 638 (3d Cir. 1995).

Wilkofsky's arguments below and on appeal rely on the Defendants' status as public employers or entities under PERA. In other words, Wilkofsky professes that the Defendants are automatically state actors because the Union was certified by the PLRB pursuant to PERA and because the Symphony is considered a public employer under PERA. This assertion cannot be correct. Put simply, there are no shortcuts to determining whether state action exists. *Mark*, 51 F.3d at 1142 ("[D]eciding whether there has been state action *requires* an inquiry" into the relationship between the State and the challenged action (emphasis added)).

Wilkofsky argues that "the Symphony is a state actor because the Commonwealth designated it as a state actor and cloaked it with the authority and power of [PERA] as a public employer." Appellant's Br. 8-9. That argument is explicitly foreclosed by our opinion in *White v. Commc'ns Workers of Am., AFL-CIO, Loc. 1300*, 370 F.3d 346, 350 (3d Cir. 2004). In *White*, then-Judge Alito, who also authored *Janus*, favorably quoted *Kolinske v. Lubbers*, 712 F.2d 471, 478 (D.C. Cir. 1983) in rejecting the argument that the statutorily permitted agency shop provisions in the

union's contract rendered the parties to that agreement state actors:

> While the NLRA provides a framework to assist employees to organize and bargain collectively with their employers, the NLRA is neutral with respect to the content of particular agreements. . . . The NLRA does not mandate the existence or content of, for example, seniority clauses, work rules, staffing requirements, or union security provisions like agency shop clauses or mandatory payroll deductions for union dues. Even though federal law provides an encompassing umbrella of regulation, the parties, like any two parties to a private contract, were still free to adopt or reject an agency shop clause with or without government approval. Thus, the authorization for agency shop clauses provided by NLRA section 8(a)(3) does not transform agency shop clauses into a right or privilege created by the state or one for whom the state is responsible.

White, 370 F.3d at 351. We then stated that "[i]f the fact that the government enforces privately negotiated contracts rendered any act taken pursuant to a contract state action, the state action doctrine would have little meaning." *Id.* Just because PERA permits the parties to negotiate the disputed contract, which Wilkofsky disagrees with, does not mean that he has established the requisite state action for purposes of a § 1983 lawsuit. *See id.* at 353-54 (stating that the Supreme Court rejected the argument that a legislature's express permission of a practice is enough to make that practice state action).

Wilkofsky's analogy to *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984) is unpersuasive. Wilkofsky argues that "[t]his situation is akin to" *Krynicky* "where the Commonwealth not only provided funding but also had statutorily entangled itself with the defendant" and that here, too, the Commonwealth has "acted by statute, capturing the Symphony within the public government umbrella." Appellant's Br. 15-16. But the University of Pittsburgh was "establish[ed] . . . as an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth System of higher education." *Krynicky*, 742 F.2d at 102 (emphasis omitted) (quoting 24 P.S. § 2510-202). The Commonwealth plays a significant statutorily required role in picking the trustees, managing and providing appropriations, setting tuition and fee schedules, auditing the university, and more. *Id.* There is no evidence, nor does Wilkofsky allege, that the Symphony was created in the same manner as the university or that the Commonwealth plays a statutorily required role in the same areas as the university. The Symphony is not like the University of Pittsburgh.

Wilkofsky's reliance on *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc), is also unavailing. Unlike the Symphony and the Union that represents the musicians, the charter schools in North Carolina were state-created and funded and were providing a service that is "traditionally [an] exclusive government function." *Id.* at 122; *see Borrell v. Bloomsburg Univ.*, 870 F.3d 154, 161 (3d Cir. 2017) (stating that if a private entity exercises powers that are "traditionally the exclusive prerogative of the state" it is a state actor (citation omitted)).

There is nothing in the Commonwealth's Constitution that required creating the Symphony, nor does Wilkofsky

argue, that the Commonwealth traditionally establishes symphonies. All the Commonwealth is doing is providing laws to guide labor relations between the Union and the Symphony. It is not creating or funding the Defendants. Thus, it cannot be said that our facts are like those in *Peltier*.

V. CONCLUSION

We will affirm the District Court's Order because the Defendants are not state actors.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 5:22-cv-1424

GLEN WILKOFSKY,

Plaintiff,

v.

AMERICAN FEDERATION OF MUSICIANS, LOCAL 45, and ALLENTOWN SYMPHONY ASSOCIATION INC,

Defendants.

OPINION

Defendants' motions to dismiss,
ECF Nos. 6 and 11 – Granted

June 29, 2022

Joseph F. Leeson, Jr., United States District Judge

I. INTRODUCTION

This case raises the question: does a private party act under color of state law simply because the state permits their conduct? The answer is no.

Glen Wilkofsky joined the Allentown Symphony Association as the principal timpanist in 2001. Shortly after the Symphony hired Wilkofsky, he became a member of a union of musicians and regularly paid the necessary union dues.

Wilkofsky did not want to be a part of the union, nor did he want to pay the union dues, but a collective bargaining agreement, which had been entered into by the union and the Symphony, requires union membership as a condition of employment. For that reason, Wilkofsky begrudgingly maintained his membership in the union.

Then the Supreme Court decided *Janus v. American Federation of State, County, and Municipal Employees, Council, 31, et al*., 138 S. Ct. 2448 (2018). In *Janus*, the Supreme Court held that it was unconstitutional to force public employees to pay union dues when they are not members of the union because the arrangement violated freedom of speech. *See id.* at 2460.

Relying on *Janus*, Wilkofsky decided to stop paying his union dues. As a result, he was expelled from the union, and the Symphony has not allowed him to perform since. Wilkofsky brought suit against the Symphony and the union's representative, American Federation of Musicians, Local 45, alleging that the collective bargaining agreement violates his First and Fourteenth Amendment rights by forcing him to maintain his membership status in the union. *See* Compl., ECF No. 1.

The Defendants filed a motion to dismiss the Complaint for failure to state a claim upon which relief can be granted. *See* Mot., ECF No. 6.[1] In their Motion, the Defendants contend that Wilkofsky's claim must fail because they are not state actors. In a response to the Motion, Wilkofsky contends that the Defendants are

[1] In truth, the Defendants each filed their own motions to dismiss. *See* ECF No.'s 6 and 11. However, the motions are substantively identical. So, the Court treats the two motions as one and analyzes them together in this Opinion.

state actors because, among other reasons, the state authorized them to engage in collective bargaining. *See* Resp., ECF No. 14.

The Court agrees with the Defendants. Wilkofsky has not alleged facts sufficient to show that the Defendants are state actors. The challenged conduct in this case is private conduct. Since the First and Fourteenth Amendments "erect[] no shield against merely private conduct, however discriminatory or wrongful," the Court dismisses the Complaint without prejudice. *See Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

II. BACKGROUND[2]

The Allentown Symphony Association, is a private, non-profit corporation, located in Allentown, Pennsylvania. *See* Mot., Ex. F. The Symphony employs multiple musicians to perform in the Allentown Symphony Orchestra. *See* Compl. ¶¶ 11, 17.

In 1999, musicians employed by the Symphony elected the American Federation of Musicians, Local 45, a private entity specializing in representing musicians, to act as their exclusive representative for the purpose of negotiating with the Symphony with

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[2] Most of the facts are taken from the Complaint and accepted as true, with all reasonable inferences drawn in Wilkofsky's favor. *See Lundy v. Monroe Cty. Dist. Attorney's Office*, No. 3:17-CV-2255, 2017 WL 9362911, at *1 (M.D. Pa. Dec. 11, 2017), *report and recommendation adopted*, 2018 WL 2219033 (M.D. Pa. May 15, 2018). Other facts are taken from an exhibit attached to the Complaint and exhibits attached to the Motion that are matters of public record and are not disputed by the parties. *See Mayer v. Belichick*, 605 F. 3d 223, 230 (3d Cir. 2010).

The Court's recitation of the facts does not include legal conclusions or contentions unless necessary for context. *See Brown v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*, No. 1:19-CV-1190, 2019 WL 7281928, at *2 (M.D. Pa. Dec. 27, 2019).

respect to wages, hours, and terms and conditions of employment. *See* Mot., Ex. E. Pursuant to the Public Employee Relations Act (PERA), the Pennsylvania Labor Relations Board certified the Federation as the exclusive representative for the musicians, giving the Federation the authority to engage in collective bargaining with the Symphony on behalf of the musicians. *See id*.

The Symphony and the Federation have entered into a series of collective bargaining agreements over the years. In 2019, the Federation entered into a new collective bargaining agreement with the Symphony on behalf of the musicians (the CBA). *See* Mot., Ex. A, CBA. All existing and new full-time and part-time musician employees are subject to the CBA.

The CBA states that the Symphony recognizes the Federation "as the sole and exclusive representative of the Musicians" it employs "in accordance with the certification issued by the Pennsylvania Labor Relations Board." CBA. The CBA also recognizes the existence of a union and a union steward that works to "assist the Union in the negotiation, enforcement and administration of" the CBA. *Id*. Under the CBA, each musician is required to become members of the union and maintain their union membership as a condition of employment. *See* Compl. ¶ 16. If a musician fails to maintain their membership in the union, then the Symphony may terminate their employment. *See id*. ¶ 17.

In 2001, Wilkofsky auditioned for the Symphony and was selected for the role of Principal Timpanist. *See id.* ¶ 18. Within one month of beginning his role, he became a union member at the direction of the Symphony. *See id.* ¶ 20. Pursuant to the CBA, he was required to pay union dues as a condition of his employment. *See id.* ¶ 21. Wilkofsky paid his union dues for nearly

two decades in order to remain employed with the Symphony even though he did not want to be a member of the union. *See id*. ¶ 22. However, he stopped paying union dues after the Supreme Court decided *Janus*. *See id.* ¶ 25.

The union notified Wilkofsky by email that he had been placed "on the suspended list" because he had not paid his dues in violation of the CBA. *See id.* ¶ 27. Wilkofsky still refused to pay the union dues, and the union sent him three separate letters informing him that he had been expelled from the union. *See id.* ¶ 28. Consequently, the Symphony prohibited Wilkofsky from performing with the orchestra and warned him that he may be terminated if he does not rejoin the union and pay the necessary dues. *See id.* ¶¶ 6, 35–36. Wilkofsky desires to perform with the orchestra, but he objects to paying the dues on the basis it violates his constitutional rights.

Wilkofsky brought suit under the Federal Civil Rights Act of 1871, 42 U.S.C. section 1983. He alleges that the Federation and the Symphony collectively violated his First and Fourteenth Amendment rights by forcing him to become a member of, and to financially support, the union or lose his position.

The Federation and the Symphony filed a motion to dismiss the Complaint, contending that they have not acted under color of state law for purposes of section 1983 because they are private actors.

III. LEGAL STANDARD

Under Rule 12(b)(6), a defendant may make a motion to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When ruling on a motion to dismiss, this Court must "accept all factual allegations as true [and] construe

the complaint in the light most favorable to the plaintiff." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)) (cleaned up). Only if "the '[f]actual allegations . . . raise a right to relief above the speculative level'" has the plaintiff stated a plausible claim. *Id.* at 234 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 540, 555 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* (explaining that determining "whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense"). The defendant bears the burden of demonstrating that a plaintiff has failed to state a claim upon which relief can be granted. *See Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005) (*citing Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)). Additionally, when ruling on a motion to dismiss, the Court may "consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputed authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F. 3d 223, 230 (3d Cir. 2010).

IV. ANALYSIS

"The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448,

2463 (2018). Equally important, however, is the right not to speak. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id*.

It was for that reason that the Supreme Court struck down an Illinois law in *Janus* that forced public employees to subsidize a union even if they chose not to join. *See id.* at 2478. The Supreme Court reasoned that such a law violated free speech rights because it compelled nonmembers to subsidize private speech on matters of public concern. *See id.* at 2460.

Relying on *Janus*, Wilkofsky brings a single claim under section 1983, alleging that the Defendants violated his First and Fourteenth Amendment rights while acting under color of state law. In their Motion, the Defendants contend that the Complaint should be dismissed because they did not act under color of state law.[3]

Since Wilkofsky's section 1983 claim relies entirely on PERA, the Court first briefly reviews that act. With that in mind, the Court then analyzes Wilkofsky's claim and whether the Defendants acted under color of state law, concluding that they did not.

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[3] The Defendants make an alternative argument that even if they were state actors, *Janus* would not apply in this case because Wilkofsky was a union member, not a nonmember. The Court does not address that argument in this Opinion because it determines that the Defendants did not act under color of state law, but it notes that, at least at first glance, it appears that the Complaint could be dismissed under the Defendants' alternative argument too.

a. PERA

PERA is a Pennsylvania act that was passed to "promote orderly and constructive relationships between public employers and their employees." Public Employee Relations Act (PERA), Act of July 23, 1970, P.L. 563, 43 P.S. § 1101.101. The act gives all public employees the right to form unions and to select an exclusive representative to bargain on their behalf with their public employer. *See id.* § 401.

The definition of "Public employer" for purposes of PERA is broad. Not only does it include "the Commonwealth of Pennsylvania" and "its political subdivisions", but it also includes any "nonprofit organization or institution and any charitable, religious, scientific, literary, recreational, health, educational or welfare institution receiving grants or appropriations from local, State or Federal governments." *Id.* § 301(1). It further defines "Public employee" to mean any individual employed by a "public employer" as that term is defined in the act. *Id.* § 301(2).

Under PERA, if thirty percent or more of employees employed by a public employer "desire to be exclusively represented for collective bargaining purposes by a designated representative," then the employees may hold an election to select a representative. *Id.* § 603. If the employees elect an exclusive representative by a majority vote, then the Pennsylvania Labor Relations Board may certify that representative. *See id.* §§ 603–5. PERA also provides a procedure for decertifying a representative if thirty percent of employees desire to do so or if a public employer desires to do so. *See id.* § 607.

Once certified, an exclusive representative has authority under PERA to engage in collective bargain-

ing with the public employer on behalf of the employees. *See id.* § 701. This includes the authority to enter into a collective bargaining agreement. *See id.* § 901. If a public employer and representative enter into an agreement, then the agreement must "be reduced to writing and signed by the parties." *Id.* § 901.

Although PERA allows employees to form unions and select representatives for the purpose of collective bargaining, it does not allow parties to "implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of" any Pennsylvania law. *See id.* § 703. Moreover, while PERA permits collective bargaining agreements that require employees to maintain membership in a union, *see id.* §§ 401,705, it does not require such provisions. Indeed, PERA does not mandate what, if any, provisions must be included in any collective bargaining agreement or whether parties must enter into an agreement.

In this case, musicians employed by the Symphony utilized PERA to form a union and elected the Federation to act as their exclusive representative. The representative and the Symphony then entered into the CBA, which requires Wilkofsky to maintain membership in the union and to pay the necessary dues.

Although the Symphony is a private entity, it is considered a "public employer" for purposes of PERA. But is that enough to transform the Defendants' actions in this case into state action? Having reviewed PERA, the Court turns next to that very question.

b. Section 1983 Claim

To bring a successful claim under section 1983, a plaintiff must prove two elements: "(1) that the conduct complained of was committed by a person acting

under color of state law; and (2) that the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Schneyder v. Smith*, 653 F.3d 313, 319 (3d Cir. 2011).

Relying on *Janus*, Wilkofsky asserts that the Defendants violated his freedom of speech by requiring him to maintain his union membership as a condition of employment. It is true that in *Janus* the Supreme Court held that collective bargaining agreements that compel public employee nonmembers to pay union dues are unconstitutional. However, the Supreme Court never addressed the issue of state action in *Janus* because the plaintiff was employed by the Illinois Department of Healthcare and Family Services. *See Janus*, 138 S. Ct. 2448, 2461 (2018). It was therefore clear that the defendant was acting under color of state law because the employer was the state itself.

The issue is not as clear here, and *Janus* does not offer much help in determining whether state action exists in this case. Indeed, the Supreme Court specifically chose not to answer the question of whether state action exists when the state allows, but does not require, private parties to enter into collective bargaining agreements that may contain certain provisions. *See id.* at 2479 n. 24. Since the Defendants in this case are private actors, the Court must first determine whether they acted under color of state law.

i. Defendants are not state actors because their conduct is not fairly attributable to the State.

"Most rights secured by the Constitution are protected only against infringement by governments."

Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978). This requirement for state action "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Thus, in order for a plaintiff to bring a claim alleging their constitutional rights have been infringed by a private actor, the plaintiff must show that the acts of the private actor are "fairly attributable to the State." *Id.* at 937.

Conduct that deprives a plaintiff of a federal right is fairly attributable to the state when (1) the deprivation is 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"; and (2) the party charged with the deprivation "may fairly be said to be a state actor." *Id*. The Defendants in this case take issue with the second element, arguing that they are not state actors.

A party may be found to be a state actor when (i) they are a state official, (ii) they act together with or obtained significant aid from state officials, or (iii) their conduct, by its nature, is chargeable to the state. *Id*. "Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Id*. In other words, courts consider "the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury to the plaintiff is aggravated in a unique way by the incidents of *governmental* authority." *White v. Commc'ns Workers of Am., AFL-CIO, Loc. 1300*, 370 F.3d 346, 350 (3d Cir. 2004) (cleaned up).

Wilkofsky contends that the Defendants are state actors for two reasons. First, because the Defendants engaged in collective bargaining under the authorization of state law. Second, because the Symphony is a "public employer" as that term is defined in PERA. Neither argument is persuasive.

According to Wilkofsky's first argument, because the state authorized the Defendants to enter into the CBA, and the Defendants did what the state authorized them to do, they are therefore state actors. The Supreme Court, however, has rejected that exact argument. *See White* at 353–54 ("the Supreme Court rejected the argument that a legislature's express permission of a practice is sufficient to make the act of engaging in that practice state action") (*citing Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999)). If parties became state actors simply because they engaged in conduct that has been permitted by the state, then the state action doctrine would be ineffectual. This determination is supported by how the Supreme Court applied the state action doctrine to a public utility company in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

In *Jackson*, the state issued a certificate of public convenience to a public utility company, allowing the utility company to deliver electricity to certain areas. *See id.* at 346. The state also gave the utility company a monopoly and heavily regulated its business. *See id.* at 346, 351–52. Under a provision of its "tariff" with the state, the utility company had the authority to turn off power to any customer for lack of payment so long as it gave reasonable notice to the customer. *See id.* at 346.

The utility company shut off the plaintiff's power, and the plaintiff filed suit against the utility company under the Civil Rights Act of 1871. *See id.* at 347. The

district court dismissed the plaintiff's complaint "on the ground that the termination did not constitute state action and hence was not subject to judicial scrutiny under the Fourteenth amendment." *See id*. at 349. The United States Court of Appeals for the Third Circuit affirmed, and the Supreme Court granted certiorari. *See id.*

The Supreme Court agreed with the lower courts, determining that the utility company was not a state actor. The Court reasoned that the "mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth amendment." *Id.* at 350. Even though the state approved the utility company's conduct by issuing it a certificate, provided it with a monopoly, and regulated its business, there was no state action because the state was "not sufficiently connected" with the utility's conduct of turning off the plaintiff's power. *See id.* at 358–59.

Simply put, conduct "allowed by state law where the initiative comes from [a private party] and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Id.* at 357. If this were not the case, then any person with a driver's license would become a state actor each time they got behind the wheel because they received their license to drive from the state.

Other examples of private individuals acting under the permission of state law, or examples of individuals who receive some sort of license from the state before participating in certain conduct, are too numerous to list in this Opinion. This is all to say that the question is not whether the state permits the challenged act, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged

action of the [private party] so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351.

In this case, the state permitted the Defendants to enter into the CBA. However, Wilkofsky does not allege any other involvement by the state that brought the CBA to fruition. It was the musicians who elected the Federation as their exclusive representative; it was the Federation who utilized PERA to engage in collective bargaining with the Symphony; and it was the Symphony and Federation who agreed to the terms of the CBA and entered into the same. "The fact that the parties availed themselves of the collective bargaining procedures established by PERA is not sufficient to establish state action." *Oliver v. Serv. Emps. Int'l Union Loc. 668*, 415 F. Supp. 3d 602, 611 (E.D. Pa. 2019).

Wilkofsky's first argument therefore fails as a matter of law. The fact that the state simply permitted the Defendants to enter into the CBA does not mean they acted under color of state law.

The Court now turns to Wilkofsky's second argument—that the Symphony is a state actor because it is considered a "public employer" under PERA. If accepted, this argument would also make the state action doctrine ineffectual because it evades the "fairly attributable" test altogether.

Wilkofsky suggests that the Court need not consider the challenged conduct here because PERA defines the Symphony as a public employer. According to Wilkofsky, PERA's broad definition of "public employer," which includes the Symphony, acts as a short cut to determine that the Defendants acted under color of state law. Indeed, in the Response, Wilkofsky does not even

attempt to apply the "fairly attributable" test that he relies on. *See* Resp. 4.

It is clear, however, that this Court cannot take a short cut when determining whether state action exists. "[D]eciding whether 'there has been state action *requires* an inquiry into whether there is a sufficiently close nexus between the State and the challenged action of [the Defendants] so that the action of the latter may be fairly treated as that of the State itself'" *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1142 (3d Cir. 1995) (emphasis added) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

That inquiry "begins by identifying the specific conduct of which the plaintiff complains." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (cleaned up). Here, Wilkofsky complains specifically about the provision in the CBA that requires him to maintain his membership in the union in order to remain employed with the Symphony. Having identified the challenged conduct, the Court next analyzes the conduct under the lens of the fairly attributable test.

Whether the Defendants are state officials. The first factor is straightforward and does not support a determination that the Defendants are state actors. Wilkofsky does not allege that either defendant is a state official. Indeed, the Symphony is a private non-profit corporation, and the Federation is a private entity too.

Whether the Defendants acted together with or obtained significant aid from state officials. The second factor does not suggest state action either. Wilkofsky does not allege that the Defendants acted with the state in drafting or entering into the CBA.

He does assert that the Defendants bring their conduct within the realm of state action by relying on the State to enforce the CBA. *See* Resp. 6. n. 5. However, "[i]f the fact that the government enforces privately negotiated contracts rendered any act taken pursuant to a contract state action, the state action doctrine would have little meaning." *White*, 370 F.3d 346, 351 (3d Cir. 2004). In order for the Defendants to be state actors, they must have obtained significant aid from state officials regarding the challenged conduct. Wilkofsky has not alleged any such aid.

Whether the Defendants' conduct, by its nature, is chargeable to the state. Finally, the third factor also weighs against state action. Wilkofsky has not alleged any facts as to why the challenged conduct is chargeable to the state by its nature. The crux of Wilkofsky's claim is that the Defendants may be held liable under section 1983 because the state authorized the challenged conduct. However, "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. 40, 53 (1999).

As PERA states, the Symphony may be considered a "public employer" for the purposes of the act. *See* Public Employee Relations Act (PERA), Act of July 23, 1970, P.L. 563, 43 P.S. § 1101.301. However, that does not automatically mean that the Symphony is a "public employer" for the purposes of section 1983. *See Oliver*, 415 F. Supp. 3d 602, 609 (E.D. Pa. 2019).

The Defendants do not perform a function delegated by the state, nor are they entwined with government policies or management. *See Id.* at 610. The leadership, bylaws, operations, and priorities of the union in this case are all determined by its membership, not by the state. *See id*. The union "has not been delegated any

state functions, nor does it rely upon material resources from the state in carrying about its own activities. Additionally, although public sector collective bargaining is sanctioned by the Commonwealth, [the union] does not play a managerial role in shaping government policies or management decisions." *Id.* "All these facts would indicate that [the Defendants are] not a state actors." *See id.*

Since Wilkofsky has not alleged any facts to support that the Defendants are state actors, the Complaint fails as a matter of law.

V. CONCLUSION

Wilkofsky's section 1983 claim against the private Defendants only lies if the Defendants acted under color of sate law. Wilkofsky has failed to allege any facts to support that the Defendants are state actors. The Complaint therefore fails as a matter of law. As a result, the Court grants the Defendants' motion and dismisses the Complaint without prejudice.

A separate Order follows.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2742

GLEN WILKOFSKY,

Appellant

v.

AMERICAN FEDERATION OF MUSICIANS LOCAL 45;
ALLENTOWN SYMPHONY ASSOCIATION INC

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5-22-cv-01424)

SUR PETITION FOR PANEL REHEARING

Present: CHAGARES, *Chief Judge*, GREENAWAY, JR.[*], and PHIPPS, *Circuit Judges*

The petition for rehearing filed by Glen Wilkofsky, Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby

ORDERED that the petition for rehearing by the panel is denied.

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[*] The Honorable Joseph A. Greenaway, Jr. was a member of the merits panel. Judge Greenaway retired from the Court on June 15, 2023 and did not participate in the consideration of the petition for rehearing.

BY THE COURT,

s/Michael A. Chagares
Chief Circuit Judge

Dated: August 1, 2023
Sb/cc: All Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 5:22-cv-1424

GLEN WILKOFSKY,

Plaintiff,

v.

AMERICAN FEDERATION OF MUSICIANS, LOCAL 45, and ALLENTOWN SYMPHONY ASSOCIATION INC,

Defendants.

ORDER

AND NOW, this 19th day of August, 2022, upon consideration of Defendants' motions to dismiss, Plaintiff's response in opposition, Defendants' replies, and for the reasons given in the Opinion issued on June 29, 2022[1], see ECF No. 19, IT IS HEREBY ORDERED AS FOLLOWS:

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[1] The Amended Complaint is substantively the same as the Complaint. And Plaintiff's argument alleging state action is the same: "The Symphony is a state actor because the Pennsylvania Legislature, in exercise of its sovereign prerogative, specifically recognized the Symphony as a public employer, and thus a state actor." ECF No. 25. As a result, the Court does not see the need to restate its reasoning for dismissal that it already gave in a prior opinion. *See* ECF No. 19.

Citations to exhibits in the prior opinion will not match exactly to those attached to the Amended Complaint and the newly filed briefs. However, all of the same documents the Court relied on in

1. Defendants' motions, ECF Nos. 22 and 24, are GRANTED;

2. Plaintiff's Amended Complaint is DISMISSED with prejudice[2]; and

3. This case is CLOSED.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

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its prior opinion are properly before the Court again now. *See* ECF No. 21, Ex.'s A–D; *see also* ECF No. 22, Ex. E.

[2] The Court dismisses the Amended Complaint with prejudice because Plaintiff had an opportunity to cure his complaint's deficiencies but did not. Any additional amendments would therefore be futile. *See Boyd v. New Jersey Dept. of Corrections*, 583 Fed. Appx. 30, 32 (3d Cir. 2014).

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

43 P.S. § 1101.101

The General Assembly of the Commonwealth of Pennsylvania declares that it is the public policy of this Commonwealth and the purpose of this act to promote orderly and constructive relationships between all public employers and their employes subject, however, to the paramount right of the citizens of this Commonwealth to keep inviolate the guarantees for their health, safety and welfare. Unresolved disputes between the public employer and its employes are injurious to the public and the General Assembly is therefore aware that adequate means must be established for minimizing them and providing for their resolution. Within the limitations imposed upon the governmental processes by these rights of the public at large and recognizing that harmonious relationships are required between the public employer and its employes, the General Assembly has determined that the overall policy may best be accomplished by (1) granting to public employes the right to organize and choose freely their representatives; (2) requiring public employers to negotiate and bargain with employe organizations representing public employes

and to enter into written agreements evidencing the result of such bargaining; and (3) establishing procedures to provide for the protection of the rights of the public employe, the public employer and the public at large.

43 P.S. § 1101.301(1)–(2)

As used in this act:

(1) "Public employer" means the Commonwealth of Pennsylvania, its political subdivisions including school districts and any officer, board, commission, agency, authority, or other instrumentality thereof and any nonprofit organization or institution and any charitable, religious, scientific, literary, recreational, health, educational or welfare institution receiving grants or appropriations from local, State or Federal governments but shall not include employers covered or presently subject to coverage under the act of June 1, 1937 (P.L. 1168), as amended, known as the "Pennsylvania Labor Relations Act," the act of July 5, 1935, Public Law 198, 74th Congress, as amended, known as the "National Labor Relations Act."

(2) "Public employe" or "employe" means any individual employed by a public employer but shall not include elected officials, appointees of the Governor with the advice and consent of the Senate as required by law, management level employes, confidential employes, clergymen or other persons in a religious profession, employes or personnel at church offices or facilities when utilized primarily for religious purposes and those employes covered under the act of June 24, 1968 (Act No. 111), entitled "An act specifically authorizing collective bargaining between policemen and firemen and their public employers; providing for arbitration in order to settle disputes, and requiring

compliance with collective bargaining agreements and findings of arbitrators."

43 P.S. § 1101.705

Membership dues deductions and maintenance of membership are proper subjects of bargaining with the proviso that as to the latter, the payment of dues and assessments while members, may be the only requisite employment condition.

29 U.S.C. § 158(a)(3)

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer—

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind

the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.]