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

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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 The Third Circuit's non-precedential opinion affirming that opinion is unreported and reproduced at Pet.App. 1a–9a.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,

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