No. 23-462

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**

## BRIEF FOR AMERICANS FOR FAIR TREATMENT AS *AMICUS CURIAE* SUPPORTING PETITIONER

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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?

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## INTEREST OF *AMICUS CURIAE*[1]

Americans for Fair Treatment ("AFFT") is a national, nonprofit organization that educates public employees about their rights in a unionized workplace and connects these employees with all available resources to defend those rights. AFFT offers a free membership program, networking opportunities, and professional development scholarships to support qualifying public employees.

AFFT's membership includes unionized and non-unionized charter school teachers and other public employees in, among other states, Pennsylvania, New York, Connecticut, and Florida. These charter school teachers have something in common with Petitioner Glen Wilkofsky, a timpanist from Allentown, Pennsylvania. Under the Third Circuit's decision, neither of them be sure whether they will be treated as "public employees" entitled to certain statutory and constitutional protections, no matter how clear state lawmakers make it.

Unfortunately, however, the Third Circuit was only the latest among federal authorities to disregard a state legislature's "labeling" choice when it comes to labor relations for charter school employees. This selective disregard for state labels leaves everyone guessing as to which statutory or constitutional provisions will govern contentious union organizing

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[1] Americans for Fair Treatment states that it has provided timely notice of its intent to file this amicus brief to all counsel of record in the case pursuant to Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no persons other than *amicus curiae* or its counsel made any monetary contribution intended to fund the preparation and submission of this brief.

campaigns or protect their individual rights to speak and associate, if any.

Wilkofsky's case is a perfect vehicle to calm this uncertainty. Along the way, this Court should address the unique situation facing charter school employees. They—and the public-sector unions increasingly organizing them—should not have to question the applicability of important state labor laws.

## SUMMARY OF ARGUMENT

A state's choice to extend legal protections to certain workers should be respected, especially when doing so would be consistent with federal law and enhance individual freedoms. That is precisely the case here, where Pennsylvania elected to extend its labor relations protections to employees of certain nonprofit organizations not already subject to the National Labor Relations Board's ("NLRB's") jurisdiction.[2]

But Pennsylvania's choice isn't the only one entitled to respect in this case. Respondent American Federation of Musicians, Local 45 ("Union") chose to organize employees of Respondent Allentown Symphony Association, Inc. ("Symphony") under state law as a "public employer." *See* Nisi Order of Certification at 1, *In re the Employes of Allentown Symphony Ass'n*, No. PERA-R-99-252-E (Pa. Labor Rels. Bd. Nov. 23,

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[2] Pennsylvania's Public Employe Relations Act ("PERA"), 43 P.S. §§ 1101.101–1101.2301, defines "Public employer" so as to include "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," while specifically excluding "employers covered or presently subject to coverage under . . . the 'National Labor Relations Act.'" 43 P.S. § 1101.301.

1999).[3] Of the 52 Symphony employees eligible to vote, 43 chose to be represented by the Union. *Id.* at 2. And the Symphony chose not to contest its status under PERA as a "public employer." *See id.*[4]

Thus, in ruling that *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), did not apply to Wilkofsky, the Third Circuit overrode an arrangement set up by the state legislature, embraced by many of those involved, and under which otherwise-private actors may be fairly treated as public entities for purposes of labor relations.[5] But the Third Circuit held, over and against the obvious will of the state legislature, that constitutional protections attending such an arrangement were unavailable even to dissenting employees.

This is precisely the situation facing many charter school employees. In several states, the laws governing charter schools clearly label them "public" entities subject to state labor relations laws. Yet teacher

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[3] The nisi order certifying the Union as exclusive representative for certain Symphony employees is available at https://www.fairnesscenter.org/wp-content/uploads/2023/10/PLRB-Orders-Combined-2020-RTK.pdf, along with nisi orders certifying other employee organizations as exclusive representatives for small units of employees in other small, nonprofit organizations.

[4] At least one other nonprofit symphony in Pennsylvania organized as a nonprofit. *See id.*; Nisi Order of Certification, *In re the Employees of Pottstown Symphony Orchestra Ass'n*, No. PERA-R-07-353-E (Oct. 17, 2007).

[5] The Third Circuit also treated the decision between "public" and "private" in the context of labor relations as purely binary, despite this Court's observation in *Harris v. Quinn*, 573 U.S. 616, 646 (2014), that there is a public-private continuum in this area. Indeed *Harris* held that the First Amendment applied to certain "partial public employees" in the same manner that they now apply to "full-fledged" public employees under *Janus*. *Id.* at 647.

unions better known for representing teachers in traditional public schools are increasingly organizing charter schools with the NLRB's assistance, automatically depriving dissenting employees of important state law protections and likely converting them to "private" employees for constitutional purposes. If Wilkofsky cannot demonstrate that his employer—organized under PERA as a "public employer"—is a public entity for state action purposes, charter school employees will find it near impossible.

This would be a terrible result for charter school teachers, many of whom were attracted to the flexibility and innovation available in a nonunionized environment. Allowing federal courts and the NLRB to effectively disqualify charter school employees from the First Amendment protections articulated in *Janus*—or even *Harris v. Quinn*, 573 U.S. 616, 646 (2014)[6]—would incentivize their further unionization without any provision for dissenting employees. It would also be entirely inconsistent with principles of federalism to allow federal courts and the NLRB to cast state labels aside.

Accordingly, this Court should take this opportunity to address the "labels" issue, ultimately holding that federal courts must defer to state labels in the context of assessing state action, at least in the area of labor relations. Likewise, this Court should address the NLRB's practice of disregarding state labels and effectively depriving charter school teachers and other employees of important statutory and constitutional protections.

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[6] *See id.*

## ARGUMENT

It was not a good idea to unionize teachers at Westinghouse Arts Academy ("Academy"). The school, a dynamic charter school a dozen miles east of Pittsburgh, was founded in 2017 by locals with a vision for high-quality training in dance, theatre, music, fine art, literature, and culinary arts.[7] The whole idea depended on experimentation and flexibility of the sort that does not fit neatly into a collective bargaining agreement.[8] Evening productions, weekend exhibitions, and spontaneous, creative outbursts would mean irregular hours and workday interruptions for management and staff alike.

But in 2021, in the wake of the COVID-19 pandemic, the Academy was served with a representation petition addressed to the NLRB.[9] Less than two months later, the NLRB had mailed and tabulated ballots, declaring the union the winner despite receiving less than majority support—just 14 votes among 31 eligible voters.[10] Once installed as exclusive representative, the union began the difficult process of collective bargaining.

After a full year of bargaining with little to show for it—and in an apparent bid to prove it was making progress—the union shared a document with Academy

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[7] *Our History*, Westinghouse Arts Academy, https://westinghousearts.org/about/history/ (last visited Nov. 28, 2023).

[8] *See generally* ASHLEY JOCHIM & LESLEY LAVERY, AN UNLIKELY BARGAIN: WHY CHARTER SCHOOL TEACHERS UNIONIZE AND WHAT HAPPENS WHEN THEY DO (2019), https://crpe.org/wp-content/uploads/crpe-unlikely-bargain.pdf.

[9] NLRB Docket, *Westinghouse Arts Academy Charter Sch.*, No. 06-RC-273577, available at https://www.nlrb.gov/case/06-RC-273577.

[10] *Id.*

employees entitled "ASSOCIATION PROPOSAL." The document showed that the agreement would indeed restrict teachers' flexibility; it included proposals for strict observance of workday hours and meeting times, rigid salary schedules with limitations on extracurricular involvement, and a time-sensitive grievance process ending with mandatory, binding arbitration.

The union's proposal also included the following provision, entitled "Agency Fee," which would have instituted the same "agency shop" arrangement that *Janus* held to be unconstitutional in 2018 in the context of public employment:

> It shall be a condition of employment that those employees in the bargaining unit who are not members of the [union] shall pay to the [union] an agency fee in lieu of membership dues. The Employer shall deduct [union] agency fees through payroll deduction. The amount of the agency fee will be determined by the [union] and communicated to the Employer.

Teachers were not impressed. Eventually, a majority of those teachers were able to mount a successful campaign to oust the NEA affiliate before it could reach agreement with the Academy, going on to win a contentious decertification election by just one vote.[11] But not all charter school employees are so fortunate.

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[11] Jeremiah Poff, *Teachers at Pennsylvania charter school cut ties with state teachers union*, WASHINGTON EXAMINER, Aug. 20, 2022, https://www.washingtonexaminer.com/restoring-america/community-family/teachers-at-pennsylvania-charter-school-cut-ties-with-state-teachers-union.

## I. THE NLRB'S DISREGARD FOR STATE LABELS VIOLATES PRINCIPLES OF FEDERALISM AND DEPRIVES WORKERS OF IMPORTANT STATUTORY AND CONSTITUTIONAL PROTECTIONS

Pennsylvania could not have been clearer in communicating its intent to treat charter school employees as "public" employees for purposes of labor relations. Pennsylvania law provides, for example, that charter school employees "may organize under . . . the 'Public Employe Relations Act,'" ("PERA"), that charter school boards of trustees "shall be considered an employer for purposes of [PERA]," that boards of trustees "shall bargain with the employes based on the provisions of [PERA]," and that teacher union strikes are subject to state law restrictions ensuring children receive a constitutionally sufficient number of days at school. 24 P.S. § 17-1724-A(a).

Yet the NLRB doesn't think much of Pennsylvania's—or any other state's—clear legislative choice to label charter schools "public" entities. According to the NLRB,

> while a state's characteriz[ation of] charter schools as being within the public school system is worthy of careful consideration, such characterization is not controlling in ascertaining whether an entity is a political subdivision.

*Pa. Cyber Charter Sch.*, No. 06-RC-120811, 2014 WL 1390806, at *1 (NLRB Apr. 9, 2014) (internal quotation marks omitted).

Indeed, on a case-by-case since 2012, the NLRB or its regional offices have imposed federal jurisdiction—and, by implication, "private" employee status—on charter school employees across the country, disregarding various levels of state labeling in Arizona, California, Connecticut, Illinois, Louisiana, Michigan, New York, Ohio, Oregon, Pennsylvania, and Tennessee.[12] "The NLRB's current interpretation of its test for when an employer is an exempt political subdivision leads to only one result for most charter schools: NLRB jurisdiction over the labor dispute." Amelia A. DeGory, *The Jurisdictional Difficulties of Defining Charter-School Teachers Unions Under Current Labor Law*, 66 Duke L.J. 379, 415 (2016).[13]

The NLRB's encroachment on state jurisdiction theoretically allows union officials to go forum shopping, selecting the NLRB whenever it offers an easier path to organizing in any given unionization attempt. In some states, particularly those that allow unions to bypass union elections in favor of card check, unions have preferred to organize under the jurisdiction of state law and state labor boards.[14] But at the moment—that is, given the opportunity to avoid *Janus*

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[12] Thomas V. Walsh, *Update: Revamping ALF's Leveling the Playing Field Series on Labor Relations in Charter Schools*, ATLANTIC LEGAL FOUNDATION (Jan. 12, 2023), https://atlanticlegal.org/news/battle-over-federal-jurisdiction-of-charter-schools/.

[13] Texas may be the only state to have avoided the NLRB's assertion of jurisdiction over charter schools. *See, e.g., LTTS Charter Sch., Inc.*, No 16-CA-170669, 2018 WL 1365555 (NLRB Mar. 15, 2018).

[14] David B. Schwartz, *NLRB Jurisdiction over Charter Schools*, 39 HOFSTRA LAB. & EMP. L.J. 133, 134 (2021).

and to take advantage of *Cemex*[15] and other very recent NLRB innovations—calculating union officials will see greater opportunities to build unions and win elections under the NLRB's jurisdiction.[16]

Either way, that does not bode well for dissenting charter school employees who have no desire to be represented by a union. Not only have they lost procedural protections ensuring, say, a secret ballot vote[17] or the ability to bypass the state labor board for duty of fair representation claims,[18] they have arguably lost any real chance of showing they are public employees entitled to constitutional protection. Permitting union officials to organize under the NLRB's jurisdiction effectively rips away their "public" employee label and redubs them "private" employees, with the likely effect of blocking any attempt to be treated as public employees for purposes of *Janus*, among other rulings.[19]

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[15] *Cemex Constr. Materials Pac., LLC*, 372 NLRB No. 130 (Aug. 25, 2023).

[16] Some union officials may still see advantages to organizing under state law, as the United Federation of Teachers in New York did when it fought *against* the NLRB's assertion of jurisdiction, ostensibly preferring to organize under New York law allowing for "card check." *See KIPP Academy Charter School*, No. 02-RD-191760, 2020 WL 1550566 (NLRB Mar. 25, 2020).

[17] *See, e.g.* ALA. CONST., art VIII, § 177(d).

[18] *Dailey v. Pa. Labor Rels. Bd.*, 148 A.3d 920, 924 (Pa. Cmwlth. 2016) ("[B]reach of the duty of fair representation ... is within the exclusive jurisdiction of the courts of common pleas.").

[19] Unfortunately, this effect would be wholly inequitable, given that state action involves broader considerations than those at play under the NLRB's political subdivision test. Under the NLRB's interpretation of *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600, 604–05 (1971), an entity to establish it was "created directly by the state" to be exempt from

This result is untenable under any conception of federalism. States should be free to order their own systems of labor law, particularly in the context of a parallel educational structure. "The decentralization of education allows flexibility to identify effective educational approaches given the questions that exist regarding the best approaches." Kimberly Jenkins Robinson, *Education Federalism: Why it Matters and How the United States Should Restructure It*, in THE OXFORD HANDBOOK OF U.S. EDUCATION LAW 119 (Kristine L. Bowman, ed., 2021) (ebook). Meanwhile, "States and localities also can compete for citizens and businesses by offering high-quality education and other public services which can promote an efficient allocation of services." *Id.* States must be able to extend protections to certain employees as part of their overall regulatory regime.

Conversely, to disregard state labels would result in an overly complicated and counterintuitive legal regime in which employees bear the burden of navigating a morass in which they are "public" employees on one day but "private" employees the next. This has already been the result, arguably, for charter school teachers, but permitting the Third Circuit's decision to stand in Wilkofsky's case—and declining to clarify an apparent circuit split on state action between the Fourth[20] and Ninth[21] Circuits—would add to the confusion.

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the NLRB's jurisdiction, hardly a requirement for any version of federal courts' tests for state action.

[20] *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022), *cert. denied,* 143 S. Ct. 2657 (2023).

[21] *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 814 (9th Cir. 2010).

## II. THIS COURT CAN END INCREASING UNCERTAINTY REGARDING THE IMPORTANCE OF STATE LABELS IN ASSESSING STATE ACTION

The Third Circuit should have followed the lead of the Fourth Circuit in *Peltier v. Charter Day School, Inc.*, 37 F.4th 104, 119 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023), which held that a charter school was a state actor for purposes of a section 1983 claims. In doing so, the Fourth Circuit accorded great deference to North Carolina's statutory scheme:

> Charter schools in North Carolina do not function merely as "an alternative method of primary education," akin to private schools and homeschooling. Characterizing the function of North Carolina charter schools in this manner ignores both the "free, universal" nature of this education and the statutory framework chosen by North Carolina in establishing this type of public school. CDS operates a "public" school, under authority conferred by the North Carolina legislature and funded with public dollars, functioning as a component unit in furtherance of the state's constitutional obligation to provide free, universal elementary and secondary education to its residents.

*Peltier*, 37 F.4th at 119 (4th Cir. 2022).[22]

[22] This is not to say that every section 1983 claim against a charter school should be successful on the merits. *Peltier*, which

Instead, the Third Circuit chose a convoluted path resembling the Ninth Circuit's decision in *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806, 814 (9th Cir. 2010). In *Caviness*, the Ninth Circuit determined that Arizona's charter schools were not state actors subject to section 1983 claims despite Arizona's clear choice to extend the power of the state to charter schools by labeling them "public schools" and even designating them "political subdivisions" for purposes of open meetings laws. *Id.* at 813–14. Confusingly, the Ninth Circuit likened charter schools to private schools, concluded that "provision of educational services" *generally* was not an exclusive state function, and thereby deemed charter schools "public" for almost every conceivable purpose aside from the section 1983 claim raised by a former teacher. *Id.* at 815–16.

Charter school teachers—and symphony timpanists—reading the plain language of the statutes purporting to govern their workplace would have no idea that constitutional protections normally available to public employees may prove unwieldy in federal court. Neither can charter school operators, symphonies, or unions organizing those workplaces know for certain that First Amendment protections must be observed. The result is a mess of protracted litigation that, with each step, removes itself from the plain language of statutes duly enacted by state legislatures accountable to everyday people.

This mess could be resolved, at the very least, were federal courts to observe and apply this Court's

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also held that a school dress code violated the Equal Protection Clause, was not your run-of-the-mill dress code, but was instead based on overt gender stereotypes. *Peltier*, 37 F.4th at 113.

"partial public employee" analysis in *Harris*. In *Harris*, recall, Illinois labeled homecare workers "public employees" but "[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act." *Harris*, 573 U.S. at 625 (quoting Ill. Comp. Stat., ch. 20, § 2405/3(f)). This Court respected the label assigned by the state legislature and held, by implication, that the union involved was a state actor subject to First Amendment scrutiny.

This Court should bring certainty to this area and require that federal courts give deference to state labels, at least in the context of labor relations, where important but predictable interests require consistent treatment in federal courts across the country. Holding that entities held out by their respective states as "public" entities would go a long way toward establishing certainty in this area.

## CONCLUSION

This Court can bring clarity to the "labeling" issue raised by Wilkofsky by granting certiorari and correcting the Third Circuit's disregard for state law. In doing so, this Court should acknowledge the federalism concerns inherent in the NLRB's assumption of jurisdiction over entities labeled "public" by their respective state legislatures.

November 29, 2023 Respectfully submitted,

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