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 IN OPPOSITION

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QUESTION PRESENTED

Whether federal courts should bypass traditional state action analysis and rely on a state's label of an entity as "public" as the only criteria to determine that the entity has engaged in state action.

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SUMMARY OF ARGUMENT

The question presented should be answered in the negative because this Court has never relied on a state's label to determine if an entity has engaged in state action, and there is no split among the circuit courts of appeal that have addressed this issue.

In the litigation below, Petitioner sued two entities—the Allentown Symphony (the "Symphony") and the American Federation of Musicians, Local 45 (the "Union")—under 42 U.S.C. § 1983, alleging that they violated his civil rights. Plaintiff argued that the Symphony is defined in Pennsylvania law as a "public" entity, and therefore the relevant action committed by the Symphony is state action. But this argument misses the entire point of state action doctrine. It is not whether an entity is "public" or "private" that determines whether that entity is amenable to suit under § 1983. Instead, the proper test is whether the conduct that the entity engaged in was "under color of state law." Because Petitioner did not—and could not—allege state action on the part of the Symphony and the Union, the district court properly dismissed his claims, and the Third Circuit properly affirmed. For the same reason, this Court should deny the Petition.

Section 1983 applies only to conduct "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." § 1983. This Court's jurisprudence on the issue is clear: "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Further, under the precedent

of this Court, state action (or its absence) is not assumed on the basis of the label that an entity bears. "[O]ur cases are unequivocal in showing that the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). Instead, courts must analyze a "range of circumstances that could point toward the State behind an individual face." *Id.* at 295. Notwithstanding the clarity of this doctrine, Petitioner conjures up misguided (and erroneous) reasons as invitation for this Court to reverse the sound decision of the court below. The Court should not accept this invitation.

First, contrary to Petitioner's contentions, there is no "lack of guidance" over how to analyze state action when the state has labeled an entity "public." This Court has already established that a mere label—even where a state labels an entity as "public"—is insufficient on its own to establish state action. For example, this Court has determined that public defenders, notwithstanding the label placed on them by the state, are not state actors for purposes of § 1983. *See Polk County v. Dodson*, 454 U.S. 312, 319 (1981).

Additionally, Petitioner misreads the opinions of the Fourth, Eighth, and Tenth Circuits in arguing that those Circuits have applied a different rule than the Third Circuit applied in the decision below. Closer scrutiny reveals that this purported "circuit split" is entirely illusory. Contrary to Petitioner's contentions, in all his cited cases, the respective courts of appeals fully examined the circumstances attending the actions committed by the defendant entities. In some

cases, the court found state action, while in other cases it did not. But the relevant issue before this Court is not *whether* a given circuit court found state action, but *how it did so*. In no case cited by petitioner did a circuit court simply defer to a state's categorization of an entity as private or public without further analysis.

As this Court has explained, the state action doctrine is a "necessarily fact-bound inquiry." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). Petitioner seeks to turn the doctrine on its head, and create an automatic and irrebuttable presumption of state action whenever an entity is defined as "public." Petitioner's proposed rule would revolutionize rather than harmonize the state action doctrine. Rather than resolve the "confusion" hypothesized by Petitioner, his rule would have the opposite effect, and would massively confuse the lower courts and practitioners.

Given that there is no unanswered question of law and no split among the circuit courts, there is simply no reason for the Court to indulge Petitioner further. The Court should deny the Petition.

COUNTERSTATEMENT OF THE CASE

In his statement of the case, Petitioner quotes the Pennsylvania Public Employee Relations Act ("PERA") for the definition of "public employer" under PERA, which 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." Pet. at 3 (quoting 43 Pa. C.S. § 1101.301(1)). Petitioner further states that "[t]hroughout this litigation, Respondents have conceded the Symphony meets this definition."

Pet. at 3. This latter assertion is true but lacking in context.

The case below was decided in the procedural posture of a Rule 12(b)(6) motion to dismiss. In that posture, both the trial and appellate courts were required to accept the Petitioner's well-pleaded factual allegations. And here, Petitioner has conflated two different questions. Although PERA defines the Symphony as a "public employer," the Symphony did not (and does not) concede that the Symphony is a public employer *for purposes of federal state action doctrine*. This is a separate question, and the court below correctly determined that the Symphony is not a state actor "for § 1983 purposes." Pet. App. 5a.

REASONS FOR DENYING THE PETITION

I. This Court has offered consistent guidance that labels are not a dispositive factor in state action doctrine.

Contrary to Petitioner's claims, there is no lack of guidance on the state action doctrine. This Court has never relied on an entity's label to determine whether or not it had engaged in state action. Instead, this Court has consistently reviewed a "range of circumstances" that indicate whether an action is state action or private action. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). In the context of a state "disclaimer" of public status, a label does not control where a nominally private entity engages in traditional public action. In other words, a state may not circumvent the Constitution by outsourcing its traditional functions to entities that are arms of the state in all but name.

But likewise, even where a state has labeled some entity as public, it does not naturally follow that every act of that entity (and all of its members and employees) is therefore automatically state action. Petitioner argues that a state "invites constitutional accountability by expressly designating an entity 'public.'" Pet. at 7. But this conceit fundamentally misunderstands (and conflates) the difference between an entity being labeled public or private, and the action it undertakes being state action. Even where an entity is fulfilling a "public function," it is not the case that "such a status converts their every action, absent more, into that of the state." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 354 (1974).

Nor is Petitioner correct that this Court has examined only so-called "disclaimers" of public status. Petitioner claims that "[p]ast decisions of this Court … have dealt exclusively with statutory ***disclaimers*** of governmental status designed to insulate state actors from liability." Pet. at 2 (emphasis in original). But this Court *has* addressed cases where a state labeled an entity as public—and even then, the Court has looked beyond the label to determine if state action was present.

In *Polk County v. Dodson*, 454 U.S. 312 (1981), the defendant was a public defender's office, sued under § 1983 for what amounted to legal malpractice. *Id.* at 316-17. The plaintiff there specifically argued that it was "the public defender's employment relationship with the State, rather than his function, [that] should determine whether he acts under color of state law." *Id.* at 319. This argument is identical to the argument that Petitioner makes—that the label is what counts, and the nature and function of the action at question are irrelevant. This Court rejected that argument out of hand. "Although the employment relationship is

certainly a relevant factor, we find it insufficient to establish [state action] within the meaning of § 1983." *Id.* at 321. Despite the "public" label of the *Polk County* defendants, this Court analyzed the other relevant factors in determining that no state action had occurred. The rule that Petitioner advocates would require this Court to overturn *Polk County*, but the petition does not address *Polk County*, and on that basis alone, certiorari should be denied. More importantly, because the "guidance" that Petitioner seeks is already available, the Court need not address this issue again, and should deny the petition.

II. This case does not present a circuit split.

Petitioner asks this Court to grant certiorari to resolve what he describes as a circuit split over whether federal courts should defer to a state's designation of an entity as a public entity. According to Petitioner, some circuits follow this approach, while other circuits conduct the traditional state action analysis as required by this Court's decision in *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 292-93, 301 (2001). According to Petitioner, the Fourth, Eighth, and Tenth Circuits employ the former approach, while the Third and Ninth Circuits employ the latter. *See* Pet. at 6, 8.

However, even a cursory analysis of the cases that Petitioner cites demonstrates that any purported "circuit split" is illusory. In no case cited by Petitioner did the lower court blindly defer to the state's designation. Instead, in every circuit, the courts of appeals correctly follow *Brentwood*. Because the courts in every circuit follow the same mode of analysis, any divergence in results is properly attributed to the *factual* differences in the underlying

cases, rather than diverging application of a legal rule. The case below would not have been decided any differently in the Fourth, Eighth, or Tenth Circuits, and therefore there is no "circuit split."

In *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc), the Fourth Circuit found that a charter school engaged in state action. Petitioner admits that the "Fourth Circuit found state action based upon the 'public function test," Pet. at 8 n.4, but argues that the court "gave considerable weight" to the legislature's decision to designate the charter schools as public schools. To the contrary, the court was concerned not with the school's *label* but the *activity* in question. "[I]n operating a school that is part of the North Carolina public school system, *CDS performs a function traditionally and exclusively reserved to the state.*" *Peltier*, 37 F.4th at 119 (emphasis added). There is little doubt that a public school is quite different from a symphony orchestra, the operation of which is not a "function traditionally and exclusively reserved to the state."[1] Notwithstanding Petitioner's

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[1] Petitioner notes that in the case below, the court attempted to distinguish *Peltier* from the instant case because *Peltier* involved a public school rather than a symphony orchestra. Pet. at 8 n.4. According to Petitioner, "[t]his misses the point completely," *id.*, because the court in *Peltier* relied on the state's designation of the school as a "public" school: "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 school was not a state actor." *Id.* (quoting *Peltier* 37 F.4th at 120-21). But it is Petitioner who misses the point. As the *Peltier* court itself noted, it was not bound by related decisions which determined that public utility companies and public defender's offices were not state actors notwithstanding the labels placed on them by their respective states. "[A]lthough the 'primary object' of the law was 'to serve the interests of the public,' the 'public utility' designation

arguments, the decision in *Peltier* is in accord with the decision below.

Petitioner cites *Tarabishi v. McAlester Regional Hosp.*, 827 F.2d 648 (10th Cir. 1987) and *Beedle v. Wilson*, 422 F.3d 1059 (10th Cir. 2005) as cases where courts deferred to the label of an entity to find state action. Although the Tenth Circuit did find state action in these cases, it did not blindly rely on the label. As the court in *Tarabishi* recognized, the statutory provisions at issue went far beyond merely labeling the hospital a public entity. The statute required the trustees of the hospital to take the same oath of office as elected officials, declared them an "agency of the State," and granted them personal immunity from liability from lawsuit. *Tarabishi*, 827 F.2d at 652. It was these circumstances, not the mere label, that controlled. And in *Beedle*, the court relied on *Tarabishi* to determine, with minimal analysis, that county hospitals are state actors when engaging in official conduct. *See Beedle*, 422 F.3d at 1070.

Further, Petitioner ignores other precedent from the circuit that does analyze the circumstances that give rise to alleged state action. In both *Jojola v. Chavez*, 55 F.3d 488 (10th Cir. 1995) and *O'Connor v. Williams*, 640 F. App'x 747 (10th Cir. 2016) the Tenth Circuit declined to find state action despite a statutory "public" label. "[A]n individual's status as a state employee doesn't automatically mean her actions can be attributed to the state. … Instead, a plaintiff has the burden to establish a real connection between a defendant's actionable conduct and her badge of state

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merely indicated that the utility would provide a service to the public.'" *Peltier* 37 F.4th at 121 n.10 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-53 & n.8 (1974)).

authority." *O'Connor* 640 F. App'x at 751 (quoting *Jojola*, 55 F.3d at 493).

Petitioner ignores this more relevant precedent of the Tenth Circuit because it defeats his arguments regarding a circuit split. In the case below, the Symphony is putatively labeled a "public" entity by state law, but its managers are not described as public officials, and do not take an oath of office. Nor does the Symphony engage in activity traditionally with the exclusive domain of the sovereign. There is no evidence to indicate that the Tenth Circuit, were it to analyze the instant litigation, would review a state law designating a non-profit entity as "public" and automatically assume state action without further analysis. In short, had the instant litigation arisen in the Tenth Circuit, the outcome would have been the same.

Finally, Petitioner cites *Burns v. Sch. Serv. Emps. Union Loc. 284*, 75 F.4th 857 (8th Cir. 2023). But as Petitioner acknowledges, the court in *Burns* did not actually engage in any analysis of state action. Instead, the court assumed "for the sake of analysis" that there was state action, but affirmed dismissal on other grounds. *Id.* at 860. The court in *Burns*, rather than relying on a state's label to determine the existence of state action, simply declined to conduct any analysis of the question at all.

Ultimately, Petitioner fails to demonstrate a "circuit split." None of the courts in these cases blindly deferred to a state's label. The label may have been a factor in deciding the state action question, but it was only one factor among several. Petitioner's cited cases do not support the existence of a circuit split; rather, they demonstrate only different outcomes based on different facts.

III. Analysis of state action is appropriate and required under this Court's precedent.

Petitioner complains of the thorough analysis of state action employed by the court below. Petitioner ignores, however, that such analysis is not only appropriate, but is the only permissible approach as commanded by this Court's precedents, particularly in *Brentwood*. In *Brentwood*, the Court instructed lower courts to find "state action … if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the state itself.'" *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). As this Court further expounded, this question is not amenable of "rigid simplicity." *Brentwood*, 531 U.S. at 295. Instead, "[f]rom the range of circumstances that could point toward the State behind an individual face, *no one fact can function as a necessary condition across the board for finding state action*." *Id.* (emphasis added). Petitioner's approach would require this Court to overturn *Brentwood* and establish a new test, wherein a statutory label replaces "the range of circumstances" and becomes the sole "necessary condition … for finding state action." *Id.*

And nor is *Brentwood* an aberration. As the Court noted in *Brentwood*, "[o]ur cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not." *Id.* Hence, in *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988), in finding that the NCAA was not a state actor, the Court commented that "'[c]areful adherence to the "state action" requirement preserves an area of

individual freedom by limiting the reach of federal law' and avoids the imposition of responsibility on a State for conduct it could not control." *Id.* (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)). Likewise, the Court has explained that "[t]he purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in orignal). This requirement is especially important, "when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties." *Id.*

In *Brentwood*, the Court provided examples of the circumstances that lower courts must examine to find or rule out state action. These circumstances describe situations where the state is ultimately exercising "coercive power." *Brentwood*, 531 U.S. at 296 (citing *Blum*, 457 U.S. at 1004). Notably missing from the list of circumstances that lower federal courts must examine is the label a state places upon an entity. Nothing from *Brentwood* or any other case in the state action jurisprudence of this Court allows the lower federal courts to engage in the judicial shortcut that Petitioner urges. Rather, for all the reasons listed in *Brentwood*, the appropriate analysis is to peer beyond the labels that state law places on an entity, and to determine whether an entity, whether public or private, is truly a state actor.

Because the rule that Petitioner suggests would require this Court to abandon decades of precedent, and would replace the flexible circumstantial analysis of *Brentwood* with a "criteria [of] rigid simplicity," *Brentwood*, 531 U.S. at 295, the Court should deny the petition.

CONCLUSION

The court below correctly rejected Petitioner's invitation to blindly adhere to a label given an entity by a state. Instead, as required by *Brentwood* and other precedent, the court below examined the circumstances of the Symphony's actions, and determined that neither the Symphony nor the Union is a state actor. The purported "circuit split" is illusory, and this Court's decision in *Polk County* controls the outcome of this case. For all the foregoing reasons, the Court should **DENY** the petition for a writ of certiorari.[2]

Dated December 1, 2023

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[2] In addition to the arguments made below, Petitioner now raises for the first time the argument that the "anomalous 'union shop' arrangement that violates both public and private-sector rules designed to protect employees" places the Petitioner in a "twilight zone" because "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 NRLB." Pet. at 13-14. Petitioner did not make this policy argument below. As noted, Petitioner's arguments to the court below focused exclusively on the label that the state had placed on the Symphony. This new policy argument is not meritorious—perceived hardship suffered by the Petitioner and theorized similarly-situated potential plaintiffs cannot substitute for the state action required by § 1983. Further, even if this contention had merit, "[b]ecause this argument was not raised below, it is waived." *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n.4 (2002). Given that there are no "exceptional circumstances that would warrant reviewing a claim that was waived below," the Court should "adhere to [its] general practice and decline to address" this new argument. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994).

Respectfully submitted,

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