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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The Symphony's Brief Grossly Oversimplifies the Question Presented

A notable thread running through the Symphony's opposing brief is consistent oversimplification of the question presented concerning labels and state action. The Symphony hyperbolically warns that answering this question in the manner urged by Petitioner would "create an automatic and irrebuttable presumption of state action whenever an entity is defined as 'public.'" Symphony's Br. at 3. But Petitioner seeks no such outcome, and no such inflexible rule would be required to decide this case in his favor. Instead, Petitioner is urging the Court to clarify that a "public" label is worthy of deference only when it reflects "a purposeful extension of sovereignty to address a public need . . . ." Petition at 11. Not every "public" label would meet this standard.[1] Therefore, the Symphony is wrong to claim that a ruling in Petitioner's favor would create a simplistic, binary test for state action and require this Court to "abandon decades of precedent . . . ." Symphony's Br. at 11.

By oversimplifying in this manner, the Symphony avoids engaging with a major component of the Petition: the circumstances surrounding PERA's designation of non-profit entities as "public." *See* Petition at 11–13. As the Petition points out, these circumstances are

[1] For example, if the purpose behind a state law's designation of a private entity as "public" is not clear, there would be no way to conclude that designation was purposefully directed at solving some societal problem. Furthermore, if a state law deemed an entity "public" without granting it any additional power or authority, that too would fail Petitioner's proposed test because a purely ceremonial designation could never meaningfully "address a public need . . . ." Petition at 11.

what differentiates this case from others involving statutory disclaimers of public status: they show that the Pennsylvania General Assembly used the "public" label to purposefully extend its sovereignty in furtherance of a public goal, specifically, maximizing opportunities for collective bargaining under the public-sector framework in non-profit workplaces. ***This*** is what makes that label worthy of deference in the state action analysis, not simply the fact that the word "public" was used.

II. *Polk County v. Dodson* Does Not Control

Though the Symphony claims this Court has offered "consistent guidance" on the question of how to treat "public" labels in state action analysis, it manages to cite only one case where the Court has supposedly done so. That case—*Polk County v. Dodson*, 454 U.S. 312 (1981)—does not settle the issue raised by the Petition. *Polk County* addressed whether the mere fact of state employment transformed a public defender's strategic litigation decisions into actions of the State. *Id.* at 317–24. The Court held it did not, in light of the public defender's professional obligation to advocate zealously against the position of the State "in adversary litigation." *Id.* at 318–19 n.8.

Critically, *Polk County* did not address any statutory "public" label or meaningfully grapple with any state statute in reaching its holding. *See id.* at 317–25. As such, it cannot be read as a holding on the question of the significance of labels in state action doctrine the way *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001) and *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), can. Those cases specifically addressed statutory disclaimers of public status. *Brentwood*, 531 U.S. at 292–93; *Lebron*, 513 U.S. at 391–92. By contrast, *Polk*

County addressed only the limited question of whether state employment, alone, transforms a government employee into a state actor for all purposes.[2] Here, Petitioner raises a different issue altogether.

III. There Is Indeed a Circuit Split

The Symphony misreads the cases that evidence a circuit split and introduces new cases from the Tenth Circuit that serve only to further illustrate the muddled state of the law on the labels issue.

First, the Symphony repeats the Third Circuit's erroneous rationale for distinguishing *Peltier v. Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2022). That is, it contends the Fourth Circuit did not defer to the North Carolina statute designating charter schools as "public schools" because the Court was applying the public function test for state action. Symphony's Br. at 7; Pet.App. 8a–9a. This is wrong.

As the Petition makes clear, this is not a basis for distinguishing *Peltier* because the Court's ***application*** of the public function test was clearly influenced by deference to the North Carolina statute creating the charter school system. Petition at 8–9 n.4. To take one of many examples from the *Peltier* Court's reasoning, it expressly distinguished the facts of its case from *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), by comparing the labels accorded to the different schools under state law. *Peltier*, 37 F.4th at 120.[3] There is simply no

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[2] Even on that question, other cases of this Court have sowed ambiguity. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 935 n.18 (1982) (acknowledging the holding of *Polk County* but nonetheless stating that "state employment is generally sufficient to render the defendant a state actor under our analysis").

[3] "In yet another telling distinction between the private school in *Rendell-Baker* and the public school at issue here, we observe

fair way to read this and *Peltier*'s numerous other instances of reliance on state-law labels and conclude that the Fourth Circuit was engaged in a purely functional analysis of state action.

The Symphony also unwittingly undermines its own argument by pointing out that *Peltier* "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," *i.e.*, *Polk County* and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Symphony's Br. at 7 n.1. While it is genuinely unclear how the Symphony intends this sentence to support its argument, that *Peltier* found itself unbound by *Polk County* buttresses Petitioner's position that *Polk County* did not squarely address the issue of statutory "public" labels and state action. *Jackson*, on the other hand, has no relevance to the instant case.[4]

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that the school's contracts with the state in *Rendell-Baker* specified that the school's employees were not government employees. Here, however, North Carolina law designates employees of charter schools as public employees eligible to receive certain state benefits, including state-employee health and retirement plans. ***The North Carolina legislature's action recognizing this special status of charter school employees and conferring eligibility for these substantial governmental benefits on them underscores the public function of charter schools within the state's public school system.***" *Id.* (emphasis added) (citations omitted).

[4] Some have cited footnote 7 of *Jackson* as a holding on the significance (or lack thereof) of the state ascribing a "public utility" label to a power company. *See Peltier*, 37 F.4th at 145 (Quattlebaum, J., concurring in part) ("[T]he Supreme Court has already instructed that statutory designations do not make a private actor's conduct state action.") (citing *Jackson*, 419 U.S. at

Next, the Symphony strains to read *Tarabishi v. McAlester Regional Hospital*, 827 F.2d 648 (10th Cir. 1987) and *Beedle v. Wilson*, 422 F.3d 1059 (10th Cir. 2005), as employing a purely functional analysis that does not defer to "public" labels under state law. The Symphony claims the *Tarabishi* Court's finding of state action did not turn on the hospital's designation as a "public trust" under Oklahoma law, but instead relied on three supposedly separate circumstances: (1) trustees of the hospital having to take an oath of office, (2) state law designating the trustees as an "agency of the State," and (3) state law granting the trustees immunity from liability arising from actions undertaken on behalf of the trust. Symphony's Br. at 8.

This hardly qualifies as a searching, fact-based functional approach. The first two circumstances are clearly extensions of the hospital's underlying "public" label—if, as the Symphony contends, labels mean nothing for state action purposes, uttering a ceremonial sequence of words should have no more effect than designating language in a statute. Furthermore, deeming trustees "an agency of the State," *see Tarabishi*, 827 F.2d at 652, is just another instance of labeling. Finally, the immunity provision seized on by the Symphony did not figure in the Court's holding, which expressly deferred to the "public" label of the Oklahoma statute:

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350 n.7). But the sentence to which that footnote is affixed merely articulates the separate, uncontroversial proposition that "[t]he 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." 419 U.S. at 350. The list of examples of "public utilities" in the footnote merely serves to illustrate the breadth of private actors covered by the regulatory scheme for public utilities—it does not make a separate point about the force of the "public utility" label.

> We hold that the actions of the appellee trustees in terminating Tarabishi's staff privileges were actions "fairly attributable to the state." The enabling legislation providing for the creation of [McAlester Regional Hospital] designates the trustees as public officers and an agency of the state.

Id. (cleaned up). As the Symphony notes, *Beedle* applied *Tarabishi*'s holding to county hospitals with "minimal analysis." Symphony's Br. at 8. But the absence of detailed analysis is precisely the point: The Court treated the hospital's state-actor status as settled based on its designation under state law; it saw no need to engage in a functional analysis. *Beedle*, 422 F.3d at 1065 ("***[B]y virtue of being designated a political subdivision,*** the Hospital stands on equal footing with a municipality, school district, and other similar governmental units. Just as action taken by such entities constitutes state action under § 1983, so too does such action taken by public trust hospitals.") (emphasis added) (citation omitted).

The Symphony goes on to cite two additional cases where the Tenth Circuit allegedly "declined to find state action despite a statutory 'public' label." Symphony's Br. at 8 (citing *Jojola v. Chavez*, 55 F.3d 488 (10th Cir. 1995); *O'Connor v. Williams*, 640 F. App'x 747 (10th Cir. 2016) (non-precedential)). That is a misreading of those decisions. Neither case analyzed the text of any state law in relation to the defendant's status as a state actor. Instead, like *Polk County*, they addressed only whether the fact of state employment was sufficient in itself to attribute the defendants' actions to the government. *See Jojola*, 55 F.3d at 492–94; *O'Connor*, 640 F. App'x at 751 ("[A]n individual's status as a state employee doesn't automatically mean her

actions can be attributed to the state." (citing *Jojola*, 55 F.3d at 493)). As such, *Jojola* and *O'Connor* are of no precedential value to the legal issue raised by the Petition.[5] And even if these cases squarely addressed the dispositive "labels" issue, they would prove only that the Tenth Circuit's jurisprudence is conflicted on this question, further underscoring the need for clarification from this Court.[6]

Lastly, the Symphony makes a revealing concession that places it at odds with the reasoning of the Third Circuit below. It concedes that, in the cases comprising the circuit split, "***[t]he label may have been a factor in deciding the state action question***, but it was only one factor among several." Symphony's Br. at 9 (emphasis added). Thus, the Symphony acknowledges that a State's designation of an entity as "public" must mean ***something*** in the state action analysis, but offers no coherent thought as to what role that label should play. The Third Circuit, by contrast, held that the use of labels in any fashion constitutes a "shortcut[]"

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[5] Not least because *O'Connor* is not even a precedential decision.

[6] The Symphony also attempts to brush aside *Burns v. School Service Employees Union Local 284*, 75 F.4th 857 (8th Cir. 2023), on the ground that the Court assumed without deciding the existence of state action. Petitioner has not attempted to hide this fact. Petition at 9. The case is still relevant to the labels issue because the Eighth Circuit's analysis shows it felt comfortable assuming the existence of state action precisely ***because of*** a clear provision of state law labeling the school district a "public corporation." *Burns*, 75 F.4th at 860 ("The school district, however, is a public entity, *see* Minn. Stat. § 123A.55, so our conclusion regarding deductions by a private entity does not control."). It is hard to imagine the Court would have made this assumption so casually if, as the Symphony contends, reliance on labels is strictly forbidden in state action analysis.

around the supposedly mandatory functional analysis. Pet.App. 6a. Rather than accept this theoretical muddle, this Court should grant the petition to consider whether state action analysis should defer to statutory "public" labels when they fairly represent "a purposeful extension of sovereignty to address a public need." Petition at 11.[7]

CONCLUSION

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

Respectfully submitted,

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[7] The Symphony's final maneuver is to contend Section III of the Petition presents an argument that is waived because it was not presented below. Symphony's Br. at 12 n.2. Rather than raising a novel argument, Section III articulates why this case presents issues of exceptional importance that merit review by this Court. *See* Sup. Ct. R. 10(c). Specifically, it describes how the Third Circuit's reasoning exemplifies the problems in state action doctrine that the Petition seeks to remedy. It also presents the predicament in which Petitioner is left by the Third Circuit's decision as an example of how others may be affected if the Court does not take the opportunity to clarify the state action issue at hand. Rather than raising a new substantive theory, the metaphor of a "twilight zone" simply furthers these points. It is thus fully appropriate on certiorari.