No. __-____

IN THE
Supreme Court of the United States

CHARTER DAY SCHOOL, INC., ET AL,

Petitioners,

v.

BONNIE PELTIER, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

North Carolina—like most other states—authorizes private nonprofit corporations to operate charter schools that are open to all, tuition-free, and publicly funded, as an alternative to traditional, government-run public schools. Charter-school operators are broadly empowered to devise educational policies and pedagogical methods without state coercion or encouragement. They are generally exempt from the laws and the governmental chain of command that apply to traditional public schools and are governed instead by a charter contract with the State that imposes high-level performance and fiscal benchmarks. Petitioners operate such a charter school and exercised their independent policymaking authority to implement a school-uniform policy desired by parents who choose to send their children to the school. It is undisputed that the State played no role in creating the school-uniform policy.

The question presented is:

Whether a private entity that contracts with the State to operate a charter school engages in state action when it formulates a policy without coercion or encouragement by the government.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Charter Day School, Inc., Robert P. Spencer, Chad Adams, Suzanne West, Colleen Combs, Ted Bodenschatz, and Melissa Gott were defendants in the district court and appellants and cross-appellees in the court of appeals.

Respondents Bonnie Peltier, as Guardian of A.P., a minor child, Erika Booth, as Guardian of I.B., a minor child, and Keely Burks were plaintiffs in the district court and appellees and cross-appellants in the court of appeals.

The Roger Bacon Academy, Inc. was a defendant in the district court and a cross-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Charter Day School, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the U.S. District Court for the Eastern District of North Carolina and the U.S. Court of Appeals for the Fourth Circuit:

- *Peltier* v. *Charter Day School, Inc.*, No. 7:16-CV-30-H (E.D.N.C.), judgment entered Nov. 26, 2019;
- *Peltier* v. *Charter Day School, Inc.*, Nos. 20-1001, 20-1023 (4th Cir.), judgment entered June 14, 2022.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Charter Day School, Inc., Robert P. Spencer, Chad Adams, Suzanne West, Colleen Combs, Ted Bodenschatz, and Melissa Gott respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The court of appeals' en banc opinion (App., *infra*, 1a-100a) is reported at 37 F.4th 104. The court of appeals' panel opinion (App., *infra*, 101a-153a) is reported at 8 F.4th 251. The district court's opinion (App., *infra*, 154a-184a) is reported at 384 F. Supp. 3d 579.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on June 14, 2022. App., *infra*, 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the 14th Amendment of the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PRELIMINARY STATEMENT

North Carolina charter schools—like many throughout the Nation—build upon a critical insight: Empowering private entities to operate publicly funded schools with minimal government oversight supercharges educational innovation and expands parental choice. The decision below profoundly threatens this model. It declares the private educational corporations that run charter schools—along with their volunteer boards—to be state actors subject to suit under 42 U.S.C. § 1983, even for policies they design with no government input whatsoever. This holding undoes the central feature of charter schools by treating their private operators as the constitutional equivalent of government-run schools, squelching innovation and restricting parental choice. The six dissenters below perceived the harm wrought by this decision, decrying the "pall of orthodoxy" and "strangulation of litigation" it would impose on charter schools. App., *infra*, 81a, 100a (Wilkinson, J., dissenting).

"Prior to [the decision below], neither the Supreme Court nor any federal appellate court had concluded that a publicly funded private or charter school is a state actor under § 1983." *Id.* at 54a (Quattlebaum, J., dissenting). Following this Court's guidance in analogous state-action cases, the First, Third, and Ninth Circuits have all held

that a private education contractor does not engage in state action, unless the State coerced or encouraged the challenged conduct. See *Caviness* v. *Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010) (private operator of public charter school not a state actor when it fired teacher); *Logiodice* v. *Trs. of Maine Cent. Inst.*, 296 F.3d 22 (1st Cir. 2002) (private contractor providing exclusive source of public education not a state actor when it disciplined student); *Robert S.* v. *Stetson Sch., Inc.*, 256 F.3d 159 (3d Cir. 2001) (Alito, J.) (private contractor operating publicly funded school not a state actor when it disciplined student). The Fourth Circuit made no meaningful attempt to distinguish these cases. Indeed, it conceded that North Carolina did not coerce or encourage the dress code challenged here. App., *infra*, 12a.

At every turn, the court of appeals "misconstrue[d] and ignore[d] guidance from the Supreme Court and all of our sister circuits that have addressed either the same or very similar issues." *Id.* at 54a (Quattlebaum, J., dissenting). It held that providing education is a traditionally *exclusive* state function—like holding elections or exercising eminent domain—despite centuries of evidence to the contrary. And it relied heavily on the "public" label for charter schools, rather than examining whether the private operator was acting pursuant to state direction when it implemented the challenged policy. In these and other respects, the judgment below splits sharply with three circuits and this Court's binding precedent.

The Fourth Circuit's rationale lacks meaningful "limiting principles," *id.* at 79a, and would cover charter-school operators throughout the country. Most states authorize private entities to operate "public" charter schools with little state involvement in pedagogical policies. The Fourth Circuit's state-action finding "threatens these schools' independence and sends education in a

monolithic direction, stifling the competition that inevitably spurs production of better options for consumers." *Id.* at 90a-91a (Wilkinson, J., dissenting). This Court's review is urgently needed.

STATEMENT

I. BACKGROUND

A. North Carolina's Charter School Act aims to "[i]mprove student learning" and "[e]ncourage the use of different and innovative teaching methods." N.C. Gen. Stat. § 115C-218(a)(1)-(3). The goal is to "[p]rovide parents and students with expanded choices" in "educational opportunities." *Id.* § 218(a)(5).

The statute designates charter schools as "public school[s]," *id.* § 218.15(a), meaning they are tuition-free, App., *infra*, 13a, and open to voluntary attendance by all. N.C. Gen. Stat. § 115C-218.45(a)-(b). Charter schools receive state funding for each student who chooses to attend. *Id.* § 218.105(a).

The similarities with government-run public schools end there. Charter schools are operated not by a local public-school district, but "by a private nonprofit corporation." *Id.* § 218.15(b); see *id.* §§ 218.1(a), 218.15(a). The nonprofit's board of directors has sole authority to "decide matters related to the operation of the school, including budgeting, curriculum, and operating procedures." *Id.* § 218.15(d). The State has no role in selecting or approving the nonprofit's board members. C.A. App. 2497. Nor is the State liable "for any acts or omissions of the charter school." N.C. Gen. Stat. § 115C-218.20.

North Carolina gives charter-school operators wide berth to devise educational policies, free of government micromanagement. Charter schools "operate independently of existing schools." *Id.* § 218(a). And "a

charter school is exempt from statutes and rules applicable to a local board of education." *Id.* § 218.10. Instead of those laws, charter schools are governed by their charter—a contract between the private nonprofit corporation and the State. *Id.* § 218.15(c). The charter incorporates "terms and conditions imposed on the charter school by the State Board of Education," such as academic performance goals and financial recordkeeping requirements. *Ibid.*; see, *e.g.*, C.A. App. 220. The charter declares that "the granting of a Charter in no way represents or implies endorsement by the [State] of any method of instruction, practices, curriculum, or pedagogy used by the School." *Id.* at 221.

If the private operator violates its charter obligations, the State can revoke the charter or bring a breach-of-contract action. N.C. Gen. Stat. § 115C-218.95. Similarly, if a charter school underperforms, the State can revoke the charter, decline to renew it, or renegotiate it to add performance metrics. *Id.* § 218.6(a).

The State takes a hands-off approach regarding charter schools' "budgeting, curriculum, and operating procedures," leaving those decisions solely to the private operator. *Id.* § 218.15(d). While charter schools must "adopt policies to govern the conduct of students and establish procedures to be followed by school officials in disciplining students," the government does not approve or supervise the content of charter schools' discipline policies. *Id.* § 390.2(a). Nor does any state law or charter provision require charter schools to impose a dress code as part of their student-conduct policy. App., *infra*, 12a-15a.

B. Petitioner Charter Day School, Inc. is a nonprofit corporation that holds charters from the State to operate four charter schools in North Carolina. *Id.* at 4a & n.1. The remaining petitioners are the corporation's volunteer

board members (collectively with Charter Day School, Inc., "CDS"). *Ibid.* CDS's schools generally serve lower-income students and feature a demographic profile similar to nearby government-run schools. C.A. App. 1527-1528. For example, CDS operates Douglass Academy in inner-city Wilmington, which serves largely minority students. *Ibid.* This case involves Charter Day School, located in a rural area outside Wilmington. *Id.* at 1547.

CDS offers a classical, traditional-values-based education. App., *infra*, 6a. CDS's philosophy governs academic life, from the curriculum (which includes English grammar, Latin, and classical history), to an interactive method of "direct instruction," to students' manners ("Yes, Ma'am" and "No, Sir" are expected). *Ibid.*; *id.* at 57a-58a (Quattlebaum, J., dissenting).

At its founding, CDS implemented a parent-designed Uniform Policy that governs students' appearance. *Ibid.* All students must wear white or navy-blue tops, tucked into khaki or blue bottoms. *Id.* at 57a-58a (Quattlebaum, J., dissenting). Boys must wear pants or shorts with a belt, must keep their hair short, and must not wear any jewelry. *Ibid.* Girls must wear jumpers, skirts, or skorts, but have no hair-length restrictions and may wear jewelry. *Ibid.*

The Uniform Policy was designed to foster classroom discipline and mutual respect between boys and girls. *Id.* at 6a; *id.* at 57a (Quattlebaum, J., dissenting). The school's approach reflects the community values of parents who choose to send their children to Charter Day School. C.A. App. 1756-1757.

Charter Day School's educational philosophy has delivered outstanding academic and extracurricular achievements. C.A. App. 2786. Its students far surpass counterparts at local, government-run schools on test scores and other metrics. *Id.* at 2424. The school's fe-

male students outperform the school's male students and female peers at local, government-run schools. *Id.* at 2786-2787. The school's enrollment has climbed to nearly 1,000 students—a majority of whom are female—with students placed on a waiting list due to demand. *Id.* at 2341.

II. Proceedings Below

A. Respondents, three Charter Day School students and their parents, sued under 42 U.S.C. § 1983, alleging that the Uniform Policy's requirement that female students wear jumpers, skirts, or skorts violates the Fourteenth Amendment's Equal Protection Clause; Title IX, 20 U.S.C § 1681; and state law. App., *infra*, 7a. CDS responded that, as a private nonprofit corporation that contracts with the State to operate a charter school, it is not a state actor and therefore not subject to suit under Section 1983. *Id.* at 8a.

The district court granted summary judgment to respondents on the Equal Protection claim and to CDS on the Title IX claim. *Id.* at 154a-184a. The district court did not reach respondents' state-law claims. *Id.* at 182a. It instead entered final judgment under Federal Rule of Civil Procedure 54(b) on its Equal Protection and Title IX rulings and permanently enjoined the challenged portion of the Uniform Policy. *Id.* at 185a-191a. Both sides appealed.

B. A Fourth Circuit panel split 2-1 on the Equal Protection claim, with Judges Quattlebaum and Rushing holding that CDS was not a state actor and Judge Keenan dissenting. *Id.* at 101a-153a. The Fourth Circuit granted en banc rehearing. *Id.* at 9a.

C. Splitting 10-6, the court held that charter-school operators are state actors and therefore subject to Section 1983 liability. The court conceded that "the state of North Carolina was not involved in CDS' decision to im-

plement the skirts requirement," meaning "there was no 'coercion' or 'pervasive entwinement' by the state with the challenged conduct." *Id.* at 12a (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982); *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001)). Yet the court of appeals nonetheless held that the Uniform Policy was state action for three reasons.

First, the court emphasized that North Carolina labels charter schools as "public" schools and observed that CDS receives "95% of its funding directly from public sources." *Id.* at 14a-16a. The court also noted that state law defines charter-school employees as "public school employees," for the limited "purposes of providing certain State-funded employee benefits." *Id.* at 14a.

Second, the court of appeals held that because "[t]he state bears 'an affirmative obligation' under the state constitution to educate North Carolina's students and partially has 'delegated that function' to charter school operators," that delegation renders CDS a state actor. *Id.* at 16a (quoting *West* v. *Atkins*, 487 U.S. 42, 56 (1988) (private doctor who contracted with prison was state actor because he carried out state's constitutional obligation to care for prisoners)). In the court's view, "the fact that students are not compelled to attend CDS and have the option of attending a traditional public school does not bear on the question whether CDS is a state actor." *Id.* at 17a.

Finally, the court of appeals held that "in operating a school that is part of the North Carolina public school system, CDS performs a function traditionally and exclusively reserved to the state." *Id.* at 19a. The majority distinguished this Court's decision in *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982), because it involved a publicly funded school's "personnel decisions," while CDS's Uniform Policy "directly impacts the constitutional responsi-

bility that North Carolina has delegated to CDS." *Id.* at 20a.

In one paragraph, the court of appeals declared that the "decisions of our sister circuits" rejecting state-actor status for a public charter-school operator and other education contractors "do not impact our analysis." *Id.* at 22a-23a. Citing its "totality-of-the-circumstances" approach, the court "d[id] not read the decisions of [the] sister circuits as establishing bright-line rules applicable to every case." *Id.* at 22a. The court of appeals distinguished in a single footnote two of this Court's decisions holding that entities designated "public" by state law were not state actors. *Id.* at 21a n.10 (citing *Polk Cnty.* v. *Dodson*, 454 U.S. 312 (1981); *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345 (1974)).

Having concluded that CDS was a state actor, the court of appeals held that the Uniform Policy "fails intermediate scrutiny and facially violates the Equal Protection Clause." *Id.* at 31a.

D. Judges Wilkinson, Niemeyer, Agee, Richardson, Quattlebaum, and Rushing dissented in two separate opinions. Judge Quattlebaum charged that the majority "misconstrue[d] and ignore[d] guidance from the Supreme Court and all of our sister circuits that have addressed either the same or very similar issues." *Id.* at 54a.[1] He derived "three important principles" from "the leading case" of *Rendell-Baker*: "(1) near-total or even total state funding carries little weight; (2) regulation by the state of the conduct in question is insufficient—the state must compel or coerce the conduct; and (3) the conduct at issue must be the historic exclusive prerogative of

[1] Judge Quattlebaum concurred in part because he voted to reverse the grant of summary judgment against respondents' Title IX claim. App., *infra*, 55a.

the state to qualify as state action." *Id.* at 64a. He observed that "every other circuit to have analyzed whether private schools or charter schools are state actors has followed the reasoning in *Rendell-Baker*" and concluded that they are not. *Id.* at 64a.

In an "almost identical" case, "the Ninth Circuit held that a private nonprofit corporation that operated a public charter school was not a state actor when it took employment actions against a teacher." *Id.* at 65a (citing *Caviness*, 590 F.3d at 808). Likewise, "[t]he First Circuit rejected a claim that a privately operated school, which contracted with the state to be the exclusive provider of public education in a district, was a state actor when disciplining a student." *Id.* at 64a (citing *Logiodice*, 296 F.3d at 26-27). And "[t]he Third Circuit similarly concluded a publicly funded school that educated juvenile sex offenders was not a state actor." *Ibid.* (citing *Robert S.*, 256 F.3d at 165-166).

In those cases, other circuits found it dispositive that the State did not "compel or coerce the challenged conduct," just as here "no one even suggests North Carolina compelled or coerced CDS's dress code." *Id.* at 66a-67a. And, just as those cases held, "the education provided by CDS is not the exclusive, historic province of the state." *Id.* at 67a-69a. After all, private entities and home schools have provided primary education for centuries. *Id.* at 67a-68a.

Judge Quattlebaum added that the "public" label on charter schools should not obscure their function: to provide privately run educational alternatives free from state oversight. *Id.* at 70a-72a. Indeed, "the Supreme Court has already instructed that statutory designations do not make a private actor's conduct state action." *Id.* at 69a (citing *Jackson*, 419 U.S. at 350 n.7 ("public utility" operated by private company not state actor where state

did not dictate challenged policy); *Polk Cnty.*, 454 U.S. at 312, 324 ("public defender" not state actor because she exercises "independent professional judgment")).

Nor did North Carolina outsource to charter schools its constitutional obligation to provide public education. *Id.* at 73a. Unlike in *West*, the State "has not abdicated its constitutional obligation through a private contract." *Ibid.* The State continues to operate traditional public schools and simply offers charter schools as "another option." *Ibid.* "Thus, the principles on which the Supreme Court decided *Rendell-Baker* and which our sister circuits have adopted compel the conclusion that CDS is not a state actor." *Id.* at 69a-70a.

Judge Wilkinson's dissent echoed Judge Quattlebaum's state-action analysis and highlighted the stark consequences of the majority's holding. While "[t]he whole purpose of charter schools is to encourage innovation and competition within state school systems," this "expand[ed] * * * concept of state action" will "shift educational choice and diversity into reverse." *Id.* at 81a. (Wilkinson, J., dissenting). In Judge Wilkinson's view, the majority "stretch[ed] the Fourteenth Amendment to stamp out the right of others to hold different values and to make different choices." *Id.* at 86a.

REASONS FOR GRANTING THE PETITION

State-action doctrine strictly limits when private entities are treated as state actors to "preserv[e] an area of individual freedom by limiting the reach of federal law." *Brentwood*, 531 U.S. at 295. Charter schools exemplify this value. States contract with private entities to minimize government control and encourage educational diversity. The decision below perverts that model by subjecting charter schools to ongoing federal-court supervision under Section 1983.

For decades, courts of appeals have held that private educational contractors, including operators of "public" charter schools, are not state actors. Because education is not traditionally the exclusive prerogative of the State, states may authorize private entities to perform that function without transforming them into state actors. Thus, courts have long held that educational contractors are state actors only to the extent the State compels the particular conduct challenged in the lawsuit.

The decision below shatters that consensus and should be corrected without delay. It treats a charter-school operator as the State whenever it creates a policy related to educational philosophy. In doing so, it eliminates the independence of charter schools and constricts parental choice. Charter schools provide innovative options to millions of students who otherwise would have no alternative to their local, government-run school. But if the court of appeals' decision stands, charter schools may become nothing more than a promising "experiment that died aborning." App., *infra*, 92a (Wilkinson, J., dissenting).

I. THE CIRCUITS ARE DIVIDED OVER WHETHER A PRIVATE EDUCATIONAL CONTRACTOR IS A STATE ACTOR WHEN IT DEVISES POLICIES WITHOUT STATE COERCION

The decision below creates a sharp split over whether a private entity that contracts with the state to educate students—such as a charter-school operator—is a state actor. Other circuits consistently reject all the state-action theories employed below.

A. The First, Third, and Ninth Circuits hold that an educational contractor's uncoerced conduct does not constitute state action

Three circuits recognize that education is not a traditionally exclusive state function and reject the constitutional-delegation theory that the decision below embraces. They also assign little significance to the "public" school label and presence of public funding. Instead, these circuits hold that the dispositive question is whether the State coerced or encouraged the private contractor's challenged conduct. Under that test, CDS is not a state actor because the State did not coerce or encourage its Uniform Policy. The dissents below highlighted this circuit split, but the majority made no meaningful attempt to distinguish these persuasive precedents. Only this Court can restore uniformity to this important area of law.

1. The Ninth Circuit's decision in *Caviness* considered whether a private nonprofit corporation operating a "public" charter school in Arizona was "a state actor under 42 U.S.C. § 1983 when it took certain employment-related actions with respect to a former teacher." 590 F.3d at 808 & n.1. Applying this Court's precedents, the Ninth Circuit agreed with the district court that the charter-school operator "was not functioning as a state actor in executing its employment decisions." *Id.* at 811.

Judge Ikuta's opinion for the court first rejected the argument that the charter-school operator was a state actor because state "statutes designate[d] charter schools as 'public schools.'" *Id.* at 813-814. The court explained that "statutory characterization of a private entity as a public actor" does not "resolve the question whether the state was sufficiently involved in causing the harm to the plaintiff." *Id.* at 814 (citing *Jackson*, 419 U.S. at 350 n.7).

Second, the Ninth Circuit held that *Rendell-Baker* "foreclosed" any argument that charter schools provide a traditional and exclusive state function. *Id.* at 815 (citing 457 U.S. at 832, 835, 838, 842). The court refused to limit the analysis to "the provision of '*public* educational services,' [as opposed to] the 'educational services' that the Supreme Court held is not the exclusive and traditional province of the state." *Id.* at 814-815 (quoting *Rendell-Baker*, 457 U.S. at 832) (emphasis added). "Like the private organization running the school in *Rendell-Baker*," the charter-school operator "is a private entity that contracted with the state to provide students with educational services that are funded by the state." *Id.* at 815.

Having rejected those state-action theories, the Ninth Circuit recognized that the dispositive question was whether the State compelled the charter-school operator's decision to let the teacher's contract expire. It did not. Although Arizona law granted state benefits to charter-school employees, "[n]one of the regulations cited by Caviness contains substantive standards or procedural guidelines that could have compelled or influenced [the charter-school operator's] actions" in terminating the plaintiff. *Id.* at 818. Nor was the State otherwise "involved in the contested employment actions." *Ibid.* Rather, "[the charter-school operator's] actions and personnel decisions were made by concededly private parties, and turn[ed] on judgments made by private parties without standards established by the State." *Ibid.*

2. The First Circuit reached the same result in *Logiodice.* There, a Maine public-school district contracted with a private corporation to operate the only high school in the district. 296 F.3d at 24-25. The contract, entered pursuant to state statute, stipulated that the publicly funded school must "accept and educate all of the school district's students." *Id.* at 25. A student sued

the school under Section 1983, alleging that a disciplinary policy violated due process. *Ibid.*

The First Circuit—speaking through Judge Boudin—emphasized that "where the party complained of is otherwise private, the function must be one 'exclusively reserved to the State.'" *Id.* at 26. "Obviously, education is not and never has been a function reserved to the state." *Ibid.* The court rejected the plaintiff's attempt to frame the school's function as "providing *public* educational services." *Ibid.* (emphasis added).

The First Circuit further noted the lack of entwinement between the State and "the particular activity sought to be classed as state action * * * —namely, the imposition of discipline on students." *Id.* at 28. Because the private operator enforced the challenged disciplinary policy without state direction, it was not state action. *Ibid.*

Finally, the First Circuit rejected the student-plaintiff's reliance on *West*'s constitutional-delegation test. The court acknowledged that "Maine has undertaken in its Constitution and statutes to assure secondary education to all school-aged children" and "contract[ed] out to a private actor its own state-law obligation." *Id.* at 29, 31. But, the court observed, *West* "emphasized" that "the plaintiff was literally a prisoner of the state (and therefore a captive to whatever doctor the state provided)." *Ibid.* The First Circuit thus held *West* inapplicable because the student-plaintiff "was not required to attend [the school]." *Ibid.*

3. In *Robert S.*, a student brought Section 1983 claims against a private contractor that operated a school for juvenile sex offenders, alleging "physical and psychological abuse." 256 F.3d at 163. Then-Judge Alito held for the Third Circuit that "[i]n light of *Rendell-Baker*, it is apparent that many of the factors upon which Robert

relies here are insufficient to establish state action." *Id.* at 165. The court recognized that "it is clear that Stetson's receipt of government funds did not make it a state actor." *Ibid.* Likewise, the court held that the contractual "requirements are also insufficient because they did not 'compel or even influence' the conduct [by Stetson] that Robert challenged." *Ibid.* (quoting *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 52 (1999)).

The court next observed that the "mere fact that Stetson 'performs a function which serves the public does not make its acts state action.'" *Id.* at 166 (quoting *Rendell-Baker*, 457 U.S. at 842). That function must also be "traditionally the exclusive province of the state," and the school's educational services did not meet that "rigorous standard." *Id.* at 165-166.

The Third Circuit also rejected two additional arguments like those embraced in the decision below. First, the court refused to distinguish *Rendell-Baker* because the school provided "services that [the State] was required by state law to provide." *Ibid.* (noting the same was true in *Rendell-Baker* and citing 457 U.S. at 849 (Marshall, J., dissenting)). Second, the court emphasized the role of individual choice in defeating state action, noting that the plaintiff's "enrollment at Stetson was not 'involuntary' in the sense relevant here, *i.e.*, he was not deprived of his liberty in contravention of his legal custodian's (or his mother's) wishes." *Id.* at 167. The court therefore rejected the plaintiff's "argu[ment] that 'the involuntary nature of [his] commitment' made his situation there 'entirely analogous to the situation of either a prisoner or mentally committed individual held against his/her will.'" *Id.* at 166.

B. The decision below directly conflicts with sister-circuit precedent

The Fourth Circuit's decision broke from extant circuit caselaw in holding that CDS is a state actor. Both its analysis and its result are irreconcilable with the holdings of the First, Third, and Ninth Circuits. As Judge Quattlebaum put it, "the principles on which the Supreme Court decided *Rendell-Baker* and which our sister circuits have adopted compel the conclusion that CDS is not a state actor." App., *infra*, 69a-70a. Indeed, the court of appeals made no meaningful effort to deny that it was creating a circuit split. And the scant reasons it gave for ignoring the other circuits' approach are singularly unpersuasive.

1. The court of appeals' decision rested on materially indistinguishable facts from the decisions of its sister circuits. In *Caviness*—which Judge Quattlebaum aptly described as an "almost identical" case—the defendant, like CDS, was a private entity that held a charter from the State to operate a "public" charter school. *Id.* at 65a. Yet the Ninth Circuit held that the charter-school operator was not a state actor for conduct that was not compelled by the State.

Logiodice, in turn, did not involve a charter school, but it arguably presents an even more striking contrast. The private operator there "contracted with the state to be the exclusive provider of public education in a district." *Id.* at 64a. Thus, though the school was not formally designated "public," it shared all the public aspects of CDS and then some. Yet the First Circuit held that the private operator was not a state actor when it enforced its student-disciplinary policy without state involvement.

While *Robert S.* involved a more specialized school than CDS, the case is otherwise on-point, featuring a con-

tractor receiving substantial public funding; student choice; and a student's complaint about school conduct that was not coerced by the State. *Id.* at 64a-65a, 69a-70a.

There can be little doubt that the Fourth Circuit decided this case differently than the First, Third, and Ninth Circuits would have, in light of these materially indistinguishable facts.

2. Besides reaching a conflicting outcome on similar facts, the court of appeals embraced each state-action theory that its sister circuits rejected.

a. First, the court of appeals relied heavily on "the state's designation of [a charter school] as a 'public' school." *Id.* at 21a. Yet the same statutory "public" label carried little weight in *Caviness*. 590 F.3d at 814. "Caviness's reliance on Arizona's statutory characterization of charter schools as 'public schools'" did not "avail" the plaintiff because it did not "resolve the question whether the state was sufficiently involved in causing the harm to plaintiff." *Ibid.*

The court of appeals invoked other "public" aspects of charter schools, such as public funding and employee eligibility for state benefits. See App., *infra*, 15a-16a ("substantial public funding * * * is a factor we weigh in determining state action"); *id.* at 20a-21a (the "special status of charter school employees * * * underscores the public function of charter schools within the state's public school system"). But other circuits have accorded no significance to public funding in the context of education contractors. *Caviness*, 590 F.3d at 815; *Logiodice*, 296 F.3d at 26-29; *Robert S.*, 256 F.3d at 165. And the Ninth Circuit discounted the relevance of an Arizona statute making charter-school employees eligible for public benefits because it had no bearing on whether the State in-

fluenced the operator's challenged conduct. *Caviness*, 590 F.3d at 817.

b. Second, the decision below justified its state-action holding on the ground that "[t]he state bears 'an affirmative obligation' under the state constitution to educate North Carolina's students and partially has 'delegated that function' to charter school operators, who have carried out the state's obligation by virtue of their charters with the state." App., *infra*, 16a (quoting *West*, 487 U.S. at 56). The court of appeals relied on *West*, in which this Court deemed a private doctor a state actor when he contracted to provide medical services at a state prison, thereby fulfilling the State's Eighth Amendment obligation to inmates. Other circuits, however, have declined to extend *West* from prison to schoolhouse. "*Caviness* and *Logiodice* also involved private operators of schools funded by the state as part of Arizona and Maine's constitutional duties to provide public education." *Id.* at 75a (Quattlebaum, J., dissenting) (citing *Caviness*, 590 F.3d at 813-814; *Logiodice*, 296 F.3d at 26-27). Similarly, in *Robert S.*, "the services that Stetson provided were services that [the State] was required by state law to provide." 256 F.3d at 166. None of these arrangements converted education contractors into state actors.

Other circuits also disagree with the court of appeals conclusion that "the fact that students are not compelled to attend CDS and have the option of attending a traditional public school does not bear on the question whether CDS is a state actor." App., *infra*, 17a. The First and Third Circuits found it important that, unlike one who is "literally a prisoner of the state," the student-plaintiff was "not required to attend [the school]." *Logiodice*, 296 F.3d at 29; see *Robert S.*, 256 F.3d at 166-167 ("There is, however, no factual basis for analogizing Robert's situation at the Stetson School to that of a prisoner.").

c. Third, the decision below diverged from sister circuits in deciding whether CDS provided a historically exclusive state function. Rather than asking whether primary education fit that bill, the court of appeals asked the "circular" question of "whether 'free, public education' is traditionally an exclusive state function." App., *infra*, 75a (Quattlebaum, J., dissenting). *Caviness* and *Logiodice* rejected similar attempts to frame the question in a way that predetermined the state-action answer. In *Caviness*, the Ninth Circuit rejected the plaintiff's "reason[ing] that 'education in general' can be provided by anyone, while 'public educational services' are traditionally and exclusively the province of the state." 590 F.3d at 814-815. And in *Logiodice*, the First Circuit rejected a similar attempt "to narrow and refine the category" to "providing a publicly funded education available to all students generally," admonishing that "there is no indication that the Supreme Court had this kind of tailoring by adjectives in mind when it spoke of functions 'exclusively' provided by government." 296 F.3d at 27. This critical difference in framing the question explains why the judgment below holds that CDS provides a traditionally exclusive state function, while other circuits hold that similarly situated primary-education contractors do not.

d. Finally, because the court of appeals relied on these inapplicable theories of state action, it ignored the test that other circuits found dispositive on similar facts. Indeed, the court of appeals admitted that "the state of North Carolina was not involved in CDS' decision to implement the skirts requirement," meaning "there was no coercion * * * by the state with the challenged conduct." App., *infra*, 12a. That concession would have been the ballgame in the First, Third, and Ninth Circuits. See *Caviness*, 590 F.3d at 818; *Logiodice*, 296 F.3d at 28; *Robert S.*, 256 F.3d at 165. But as Judge Quattlebaum

observed, the court of appeals simply "ignore[d] that critical fact's pertinence to the state action analysis." App., *infra*, 77a.

3. Rather than grappling with these persuasive authorities, the court of appeals pronounced in a single paragraph that under its "totality-of-the-circumstances inquiry," it did "not read the decisions of our sister circuits as establishing bright-line rules applicable to every case." *Id.* at 22a. As the discussion above illustrates, however, other circuits had before them the same material "circumstances" and reached the opposite result, rejecting every state-action theory applied in the decision below. Nor did the court of appeals explain why it matters that *Logiodice* involved "Maine law" and *Caviness* involved "Arizona law," while this case involved "North Carolina law." *Id.* at 23a. That is an observation, not a legal distinction.

Also left opaque is why it matters that this case concerned "a dress code provision that is central to the [school's] educational philosophy," while *Logiodice* and *Caviness* concerned "personnel and student discipline decisions." *Id.* at 22a-23a. It is difficult to conceive why teacher hiring and student discipline are less central to "educational philosophy" than a dress code. In any event, those factual differences are legally immaterial to whether a "public" label is dispositive, whether primary education is a traditionally exclusive state function, or whether a *West* delegation theory applies here. See *id.* at 76a (Quattlebaum, J., dissenting). ("[N]othing in those cases suggests those decisions turned in any way on the fact that they involved personnel or student discipline decisions. And none implied that things might be different if the challenged conduct went to the school's educational philosophy."). Indeed, the First Circuit rejected a similar attempt to limit *Rendell-Baker* to personnel decisions. *Logiodice*, 296 F.3d at 27 ("*Rendell-Baker* did not

encourage such a distinction."). In sum, the court of appeals' decision clashes in both outcome and rationale with on-point decisions from three other circuits. The court of appeals disagreed with those decisions rather than credibly distinguishing them.

II. THE DECISION BELOW DEPARTS FROM THIS COURT'S PRECEDENTS

In addition to breaking from sister circuits, the judgment below contravenes this Court's state-action precedents. "[A] private entity can qualify as a state actor in a few limited circumstances." *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2019). "[T]he ultimate issue in determining whether a person is subject to suit under § 1983 is * * * [whether] the alleged infringement of federal rights [is] fairly attributable to the State." *Rendell-Baker*, 457 U.S. at 838. The undisputed facts and this Court's caselaw dictate that the Uniform Policy "is CDS's own conduct, not North Carolina's." App., *infra*, 77a (Quattlebaum, J., dissenting).

A. *Rendell-Baker* compels the opposite result in this case

In *Rendell-Baker*, this Court held that a school that contracted with the State to educate at-risk students was not a state actor when it allegedly fired a teacher without due process. The Court focused on two germane issues: (1) whether the function performed has been "traditionally the exclusive prerogative of the State," and (2) whether "extensive regulation" "compelled" the challenged conduct. *Rendell-Baker*, 457 U.S. at 840-842.

1. For the first test, "the relevant question is not simply whether a private group is serving a 'public function.'" *Id.* at 842. Only acts that fall within the State's "exclusive" prerogative qualify, meaning those "traditionally associated with sovereignty, such as eminent domain" or holding elections. *Jackson*, 419 U.S. at 353.

Unsurprisingly, "very few" functions count as exclusive state functions. *Halleck*, 139 S. Ct. at 1929.

The "exclusivity" requirement means that a history of private actors providing the same function precludes a state-action finding. See, *e.g.*, *id.* at 1929-1930; *Polk Cnty.*, 454 U.S. at 319. Thus, in *Rendell-Baker*, the Court asked whether "the education of maladjusted high school students" was "the exclusive province of the state" and concluded it was not because private entities historically provided that service. 457 U.S. at 842.

Straying from *Rendell-Baker*'s approach, the court of appeals did not frame its inquiry with respect to the *function* provided by CDS. It instead added outcome-determinative qualifiers that are irrelevant to that function. App., *infra*, 19a ("in operating a school *that is part of the North Carolina public school system*, CDS performs a function traditionally and exclusively reserved to the state") (emphasis added). But *Rendell-Baker* did not ask whether the education of maladjusted high school students *with public funding* was a historically exclusive state function. Indeed, it concluded that "the legislative policy choice" to fund that service "in no way makes these services the exclusive province of the State." *Rendell-Baker*, 457 U.S. at 482. Nor did *Polk County* ask whether providing indigent defense *as part of a public-defender system* was a historically exclusive state function. Instead, it concluded that "representing indigent criminal defendants" was not such a function. *Halleck*, 139 S. Ct. at 1929 (citing *Polk Cnty.*, 454 U.S. at 318-319).

A proper analysis would have recognized that CDS's function is to provide primary education. App., *infra*, 67a (Quattlebaum, J., dissenting). And that is plainly not a historically exclusive state function: "[P]rivate actors have a long history, both nationwide and in North Carolina, of carrying out primary education." *Ibid.* As Judge Wilkinson explained, the court of appeals avoided this

"commonsense conclusion" only by "gerrymander[ing] a category of free, public education that it calls a traditional state function." *Id.* at 90a. That is nothing more than "a circular characterization assuming the answer to the very question asked." *Ibid.*

2. The second relevant test in *Rendell-Baker* asks whether "extensive regulation" "compels" the challenged conduct. 457 U.S. at 841-842; accord *Halleck*, 139 S. Ct. at 1928. The Court held in *Rendell-Baker* that, despite "extensive regulation of the school generally," the "decisions to discharge the petitioners were not compelled or even influenced by any state regulation." 457 U.S. at 841.

The court of appeals conceded that "there was no 'coercion'" of CDS's Uniform Policy. App., *infra*, 12a. Under *Rendell-Baker*, "this absence of coercion is fatal to plaintiffs' claims." *Id.* at 66a (Quattlebaum, J., dissenting). As the dissenters wondered: "How are litigants and district courts supposed to view the Supreme Court's guidance that for private conduct to constitute state action, the state must compel or at least coerce it? Does that still apply in the Fourth Circuit?" *Id.* at 79a.

The coercion test also shows why the Fourth Circuit's attempt to distinguish *Rendell-Baker* misses the mark. See *id.* at 20a (noting that *Rendell-Baker* involved "personnel decisions" instead of a "dress code" that was central to "educational philosophy"). Regardless of the *nature* of the challenged action, the dispositive question is whether the State coerced it. The answer is "no" for both the Uniform Policy and for the personnel decisions in *Rendell-Baker*.[2]

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[2] The court of appeals also perceived a "telling distinction" from *Rendell-Baker* because the contract in that case "specified that the school's employees were not government employees." App., *infra*, 20a. But the same is true here: "An employee of a charter school is *not* an employee of the local school administrative unit

3. In a final contrast to the court of appeals, *Rendell-Baker* gave no weight to the fact that the school received over 90% of its funding from the government. Cf. *id.* at 15a-16a (public funding "is a factor that we weigh"). As this Court explained:

> The school * * * is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

Rendell-Baker, 457 U.S. at 840-841. The same is true of CDS, which is not converted into a state actor because it receives public funding. Contractors like CDS are regulated by the State via contract—here, their charter—not through Section 1983 suits by private citizens.

B. This Court has repeatedly emphasized that a "public" label carries no weight in the state-action analysis

The court of appeals relied heavily on charter schools' "public" moniker to distinguish *Rendell-Baker* and impute state-actor status to the private operators that run charter schools. App., *infra*, 20a-22a. This Court's decisions are directly to the contrary.

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in which the charter school is located." N.C. Gen. Stat. §§ 115C-218.90(a)(1) (emphasis added). The statute merely "deem[s]" such employees to be "employees of the local school administrative unit *for purposes of providing certain State-funded employee benefits*" and *only if* their employer opts not to provide benefits itself. See N.C. Gen. Stat. §§ 115C-218.90(a)(4) (emphasis added), 135-5.3. That arrangement is immaterial to state action. See *Caviness*, 590 F.3d at 817.

1. Regardless of the statutory "public" or "private" label, the dispositive inquiry is whether the State directed the defendant's challenged conduct or delegated to it a historically exclusive state function. In *Jackson*, for instance, this Court held that, despite being designated a "public utility" under state law, a privately operated electric utility was not a state actor because it neither provided a traditionally exclusive state function nor was compelled by the State to engage in the challenged conduct. 419 U.S. at 350 & n.7, 352-354. Likewise in *Halleck*, the "public access" cable operator was not a state actor because it did not provide a historically exclusive state function and its programming choices were not dictated by the State. 139 S. Ct. at 1929-1930. And in *Polk County*, this Court reasoned that acting as a "defense lawyer" is "essentially a private function, traditionally filled by retained counsel," and rejected state-actor status because the "public defender" exercises "independent professional judgment" rather than taking direction from the state. 454 U.S. at 319, 324.

2. While a statutory "public" designation may not be wholly irrelevant, the far more important question is what the statutory scheme conveys about the relationship between the private entity and the State. Here, North Carolina wished to preserve important "public" characteristics in its charter schools, such as free tuition and open enrollment. But beyond that, North Carolina selected *private* operation, empowering the private operator and its wholly private board to make all policy decisions for the school, free from the rules and regimented governmental chain of command that apply to traditional public schools. See *supra* pp. 4-5 (summarizing statutory and charter provisions). In short, "apart from the fact that CDS nominally bears the public school label, North Carolina takes a hands-off approach in deciding or supervising the school's policies." App., *infra*, 66a (Quat-

tlebaum, J., dissenting). This independence from government micromanagement is a defining characteristic of charter schools. *Id.* at 81a-82a (Wilkinson, J., dissenting).

3. Disputing none of these functional and statutory realities, the decision below nonetheless invokes "North Carolina's sovereign prerogative to determine whether to treat these state-created and state-funded entities as public." *Id.* at 22a. But that assertion presumes that North Carolina intended the "public" label for charter schools to convert their private operators into state actors, despite all evidence to the contrary in the statute and this Court's state-action caselaw. The court of appeals' myopic approach would have generated the wrong outcome in *Jackson*, *Polk County*, and *Halleck*.

The court of appeals consigned *Jackson* and *Polk County* to a single footnote, wholly ignoring that those cases' reasoning is rooted in this Court's well-established state-action tests. *Id.* at 21a n.10. The court below declared that the "public utility" designation in *Jackson* "merely indicated that the utility would provide a service to the public." *Ibid.* The public nomenclature for charter schools and utilities alike conveys the same concept: Both must serve all comers, thus providing a public service. But neither utilities nor charter-school operators are government actors because neither provide a historically exclusive state function. Cf. *Halleck*, 139 S. Ct. at 1932 ("public access" cable operator providing "free" air time and airing programs "on a first-come, first-served basis" not a state actor).

The court of appeals asserted that *Polk County* rejected state-actor status for public defenders because they "engage[] in functions adversarial to the state" and distinguished that case because there is no "value at odds" with assigning state-actor status to charter-school operators. App., *infra*, 21a n.10. But charter-school op-

erators exercise the same type of "independent judgment" as public defenders, *Polk Cnty.*, 454 U.S. at 321, and are free to design policies without state input. And, contrary to the court of appeals' assertion, treating charter-school operators as state actors would undermine the flexibility and diversity that charter schools were created to achieve. App., *infra*, 90a-91a (Wilkinson, J., dissenting).

C. The court of appeals erred in extending *West*'s narrow constitutional-delegation test

In a unanimous opinion just six years after *Rendell-Baker*, this Court found state action where a state-run prison delegated to a privately contracted doctor its "constitutional obligation" under the Eighth Amendment to provide inmate medical care. *West*, 487 U.S. at 54. The court of appeals relied on *West* to hold that "[t]he state bears 'an affirmative obligation' under the state constitution to educate North Carolina's students and partially has 'delegated that function' to charter school operators, who have carried out the state's obligation by virtue of their charters with the state." App., *infra*, 16a. In becoming the first circuit to expand *West* to schools, the court of appeals disregarded the limitations of *West*'s holding and the unique facts that drove its outcome.

1. This Court has never applied *West*'s delegation test to find state action in the 34 years since that case was decided. In *Halleck*, the Court emphasized the bounds of *West*'s holding, noting that a private entity "may, *under certain circumstances*, be deemed a state actor when the government has outsourced one of its constitutional obligations to a private entity." 139 S. Ct. at 1929 n.1 (emphasis added). The *Halleck* dissenters would have invoked *West* to deem the public-access cable operator a state actor because the State delegated its First Amendment obligation to administer a public fo-

rum. *Id.* at 1940 (Sotomayor, J., dissenting). The majority responded with a single sentence: *West*'s "scenario is not present here because the government has no such obligation to operate public access channels." *Id.* at 1929 n.1.

That rationale should have been dispositive below. While North Carolina has a state constitutional obligation to provide a system of free, public schools, it "has no such obligation to operate" charter schools in particular. *West* is not triggered by North Carolina's policy decision to contract out schooling it was not constitutionally obligated to provide in the first place. As Judge Quattlebaum explained, "the state here has not abdicated its constitutional obligation through a private contract." App., *infra*, 73a. North Carolina still operates a robust system of traditional public schools that satisfies its constitutional duty. Charter schools are "another option" beyond those schools. *Ibid.*

2. The court of appeals blew past another limitation inherent in *West*'s holding, declaring that student choice "does not bear on the question whether CDS is a state actor." *Id.* at 17a. To the contrary, the *West* Court reasoned that the state-run correctional setting meant that "it is *only* those physicians authorized by the State to whom the inmate may turn." 487 U.S. at 55 (emphasis added). Any harm was therefore "caused * * * by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the state to obtain needed medical care." *Ibid.* Charter-school students are far afield from prisoners. They choose to attend a charter school rather a government-run school, so any alleged harm they suffer does not stem from the State's denying them educational choice and forcing them into a state institution. Just the opposite. App., *infra*, 74a (Quattlebaum, J., dissenting) ("students at Charter Day have a choice that the inmate in *West* never had").

That is why courts have consistently declined to extend *West* beyond state-run "correctional setting[s]." *Howell* v. *Father Maloney's Boys' Haven, Inc.*, 976 F.3d 750, 754 (6th Cir. 2020) (Sutton, J.) (collecting cases).

By stretching *West* far beyond its unique context to "partial[]" delegations of state constitutional "obligations," the court of appeals' approach effectively overrules *Rendell-Baker* and swallows up this Court's longstanding, rigorous tests for state action.

III. This Issue Is Important And Arises In A Clean Vehicle

A. The state-actor status of charter schools is an important issue with national implications

1. The decision below poses an existential threat to the charter-school project. After all, the "whole purpose of charter schools is to encourage innovation and competition within state school systems." App., *infra*, 81a (Wilkinson, J., dissenting). Loosed from the top-down management and one-size-fits-all bureaucracy that often constrain traditional public schools, charter schools can experiment with diverse pedagogical approaches. These range from CDS's classical curriculum to charter schools that focus on math and science and even to single-sex charter schools. *Id.* at 92a.

Charter schools also cover an array of moral and cultural perspectives. CDS "espous[es] traditional, western civilization values." C.A. App. 80. Other charter schools may follow a progressive model. Schools will naturally have widely divergent approaches to curriculum, dress codes, library policies, campus security, school discipline, and teacher hiring. The common thread is that each child's parents are empowered to choose a school that matches their values and preferred educational methods. Cf. *Pierce* v. *Soc'y of the Sisters*, 268 U.S. 510, 534-535 (1925) (upholding the constitutional right of parents "to

direct the upbringing and education of children under their control").

Demand for these varied options has been enormous, spurring competition for students and teachers. "Since their introduction thirty years ago, charter schools have quickly spread to forty-five states and the District of Columbia." App., *infra*, 81a (Wilkinson, J., dissenting). Nearly 8,000 charter schools across the country serve over 3.4 million students. Nat'l Ctr. for Educ. Statistics, *Public Charter School Enrollment* (May 2022).[3] While serving all students, charter schools offer lower-income students a vital alternative to government-run schools that they would otherwise lack.

2. The decision below is antithetical to this popular and proven educational model. The court of appeals' "expansive view" of state action "will have real consequences on states' efforts to improve education by offering innovative educational choices for parents." App., *infra*, 79a (Quattlebaum, J., dissenting). Its approach "threatens these schools' independence and sends education in a monolithic direction, stifling the competition that inevitably spurs production of better options for consumers." *Id.* at 91a (Wilkinson, J., dissenting).

The reason for the dissenters' dire warnings is straightforward. Treating charter-school operators as state actors will undo "their very reason for being." *Id.* at 90a. While "[c]harter schools are expressly designed to be freer from state control," *ibid.*, the court of appeals' holding replaces state control with federal-court supervision at the behest of individual plaintiffs. By subjecting privately run charter-school operators to precisely the same constitutional status as government-run schools, the breadth of options at charter schools will correspond-

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[3] https://nces.ed.gov/programs/coe/indicator/cgb/public-charter-enrollment

ingly shrink to resemble those at traditional public schools. The court of appeals' "expand[ed] * * * concept of state action" will "drape a pall of orthodoxy over charter schools and shift educational choice and diversity into reverse." *Id.* at 81a.

In this way, the court of appeals' ruling nullifies parental choice. Hundreds of parents who choose a particular charter school for their children due to its educational methods or moral values will see their choices overridden by a lone parent who seeks a federal-court veto of policies he disfavors. Imagination is the only limit to the constitutional claims that could be brought against charter-school operators. "Will litigants seek to eradicate * * * single-sex charter schools? Will some charter schools' recruiting and admissions decisions, undertaken in pursuit of serving underserved and dispossessed populations, be challenged on Equal Protection grounds? What about charter schools offering a progressive culture and curriculum?" *Id.* at 92a.

Charter schools will steer away from these and countless other pedagogical possibilities out of fear of crushing, fee-shifting litigation. See 42 U.S.C. § 1988. "Regardless of the constitutional merits of such challenges, the costs of litigation may well accomplish opponents' lamentable goal." App., *infra*, 92a (Wilkinson, J., dissenting). Charter schools and their volunteer board members will suffer "the slow strangulation of litigation." *Id.* at 100a. Indeed, CDS and its board have now endured over six years of federal litigation and the risk of a seven-figure attorney-fee award, all to defend a policy designed by parents and known to everyone who voluntarily sends students to Charter Day School. Few litigants will be so hardy. Many potential charter-school operators and board members will be deterred from ever taking the first step by such daunting prospects.

3. The legal importance of the question presented and the accompanying circuit split would merit review even if the judgment below affected only North Carolina. But the court of appeals' rationale lacks "limiting principles" and sweeps far more broadly. See *id.* at 79a (Quattlebaum, J., dissenting). The two cornerstones of the court's reasoning—the charter school's "public" designation and the state constitution's right to free education—are common features nationwide. *Ibid.* Virtually every state considers its charter schools "public" or part of the public-school system,[4] and "[w]ithin the constitution of each of the 50 states, there is language that mandates the creation of a public education system." Parker, Educ. Comm'n of the States, *50-State Review: Constitutional obligations for public education*, at 1 (2016).[5] Most states, moreover, permit private, nonprofit corporations to operate charter schools, just as North Carolina does. Educ. Comm'n of the States, *Charter School Policies: Who may apply to open a charter school?* (Jan. 2020).[6]

Consequently, the court of appeals' state-action theory would apply with equal force to charter-school operators and volunteer boards across the country. Charter-school operators in the Fourth Circuit should not labor under different rules from those in other circuits, while the rest of the country remains under the Damoclean sword of threatened litigation. This is a national issue that needs resolution by the Nation's highest court.

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[4] See App. E, *infra*, 192a-194a.

[5] https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf

[6] https://reports.ecs.org/comparisons/charter-school-policies-06

B. This case presents a clean vehicle for resolving the state-action split

This case provides a strong vehicle to address the state-actor status of charter-school operators. The state-action issue is a threshold question, unimpeded by jurisdictional or other preliminary disputes. The court of appeals affirmed a permanent injunction on the Equal Protection claim. And the relevant facts are uncontested. Most importantly, the opinion below concedes that "the state of North Carolina was not involved in CDS' decision to implement the skirts requirement," such that "there was no 'coercion' or 'pervasive entwinement' by the state with the challenged conduct." App., *infra*, 12a. That reality would be dispositive in three other circuits on these facts. As a result, this case squarely presents the important, recurring question of whether an educational contractor is a state actor despite the lack of coercion by the State of the challenged conduct. All that remains is for this Court to resolve the purely legal issues surrounding the importance of a "public" school designation; whether the education offered by charter schools is a traditionally exclusive state function; and the scope of *West*'s delegation theory.

Those issues were fully vetted by an en banc court that debated the application of this Court's precedent across several opinions. Multiple circuits have weighed in with thoughtful decisions on each issue. No further percolation is necessary or desirable. This case provides the Court with an ideal platform for dispelling the confusion among the circuits and providing clarity to charter-school operators and other private educational contractors affected by state-action doctrine.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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