CASE NO. 20-1001 (L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BONNIE PELTIER, as Guardian of A.P., a minor child; ERIKA BOOTH, as Guardian of I.B., a minor child; and PATRICIA BROWN, as Guardian of K.B., a minor child,

Plaintiffs - Appellees, Cross-Appellants

v.

CHARTER DAY SCHOOL, INC.; ROBERT P. SPENCER; CHAD ADAMS; SUZANNE WEST; COLLEEN COMBS; TED BODENSCHATZ; and MELISSA GOTT in their capacities as members of the Board of Trustees of Charter Day School, Inc.,

Defendants - Appellants, Cross-Appellees

and

THE ROGER BACON ACADEMY, INC.,

Defendant - Cross-Appellee

On Appeal from the United States District Court
Eastern District of North Carolina, Southern Division
Case No. 7:16-cv-00030-H-KS

APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION & BACKGROUND

In 1996, a bipartisan majority of North Carolina's legislature enacted a charter-school program aimed at fostering innovation and expanding choice in education, particularly for low-income and rural residents who lack access to private schools. Unlike traditional public schools operated and supervised by government officials, charter schools are operated by a private nonprofit corporation with a volunteer board of directors. N.C. Gen. Stat. § 115C-218.15(b). This design allows charter schools to "operate independently" of the state when it comes to curriculum, pedagogy, dress codes, and most other matters. *Id.* § 218(a); *see id.* §§ 218.10, 218.15(d). Instead of overseeing day-to-day operations, the state sets minimum standards for schools through a contract—a charter—with the nonprofit corporation. *Id.* § 218.15(c). With broad freedom to experiment, charter schools offer varied alternatives to traditional public schools. Parents and students are empowered to choose the school that best serves their educational needs.

Defendant Charter Day School, Inc. (CDS, Inc.) has succeeded spectacularly in this competitive environment, operating four schools in rural and inner-city North Carolina. These schools, including Charter Day School (the School), employ an educational model that includes the "direct instruction" method, featuring "constant vocal responses," JA 1537, to increase student participation in lessons, JA 1588-90, 2079-80; a "classical curriculum," which includes classical literature and history,

Latin, sentence diagramming, and cursive handwriting, JA 1752; respectful forms of address ("Sir" and Ma'am"), JA 1967; and a traditional dress code (the "Uniform Policy"), JA 1985.

The results of this approach speak for themselves. With similar demographics to area public schools, the School's students far outperform their peers in traditional public schools. JA 1547, 1793-94, 2350-68, 2721. That is especially true for the School's female students, who equal or outperform the School's boys in math and science. JA 2786-90. Girls also succeed in extracurriculars, winning eight consecutive state championships in co-ed archery and nine national titles in cheerleading. JA 1548. This record has fueled the School's growth from 53 students to over 900 students, over half of whom are female. JA 1750. Parents often must enter a lottery to seek a coveted enrollment spot. JA 84-85, 469.

In this case, three students who chose to attend the School with full knowledge of the school's rules now wish to change its Uniform Policy—a policy designed by parents and implemented by CDS, Inc.'s volunteer board in 2000 without state input. JA 1756-57. Plaintiffs sued under 42 U.S.C. § 1983, alleging that CDS, Inc. and its board are state actors who violated the Equal Protection Clause. Plaintiffs also brought Title IX and state-law claims.

The panel ruled against Plaintiffs only on the Equal Protection claim, while largely accepting their Title IX arguments and remanding for further proceedings.

The panel's decision follows other circuits in holding that a private contractor that provides public schooling is not a state actor, absent a showing that the state influenced the particular challenged policy. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010) (private nonprofit corporation that operated public charter school); *Logiodice v. Trs. of Maine Cent. Inst.*, 296 F.3d 22 (1st Cir. 2002) (private entity that contracted with government to educate all public high-school students in the district).

The dissent did not attempt to distinguish *Caviness* or *Logiodice*, implicitly conceding that its position would break from two circuits. The Court ordinarily takes a case en banc to avoid a circuit split; here, ruling for Plaintiffs would create one. Nor is en banc rehearing necessary to ensure Plaintiffs have their day in court. Plaintiffs have every opportunity to prove their sex-discrimination case on remand under Title IX. Given the panel's holding that Title IX reaches dress codes, there is no compelling reason to expend en banc resources deciding whether to create a circuit split on state-action doctrine.

The panel, moreover, answered the state-action question correctly. Plaintiffs' petition rests on two crucial errors. First, it focuses relentlessly on the "public" label applied to the charter *school*. But Defendants are the private nonprofit that operates the school and its volunteer board. The state opted for *private* operation precisely to *remove* the charter school from pervasive state oversight that characterizes

traditional public schools. This choice means that Defendants are not state actors, absent governmental coercion of the challenged policy, which all agree is lacking here. The Defendants are no different than other private actors who contract to operate "public" utilities or build "public" roads. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982) ("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."); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350-52 & n.7 (1974) ("public" utility with state-granted monopoly not a state actor).

Second, Plaintiffs warn of a future in which charter-school students are deprived of constitutional rights. But the charters themselves impose constitutional protections, and the state may readily enforce them. JA 214. North Carolina's legislature opted for this method of safeguarding constitutional values, rather than inflicting burdensome, fee-shifting lawsuits on charter-school operators and their volunteer boards. Plaintiffs cannot explain why this approach, alongside Title IX and state-law remedies, is insufficient to secure students' rights.

The Court should deny rehearing en banc.

ARGUMENT

I. The panel correctly held that CDS, Inc. was not a state actor in promulgating the Uniform Policy.

A. A government contractor is a state actor only when it performs a "traditional and exclusive state function" or its specific challenged conduct is "compelled" by "extensive regulation."

"[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 (quotations omitted). Section 1983 therefore requires a "close nexus between the State and the challenged action." *Jackson*, 419 U.S. at 351.

For government contractors and school operators, two factors dominate the inquiry into whether the defendant's challenged conduct is "fairly attributable to the State": (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 840-42 (emphasis omitted); *see also Mentavlos v. Anderson*, 249 F.3d 301, 314-23 (4th Cir. 2001) (focusing analysis of public military college on whether educating students was "exclusive state function" and whether challenged action was "coerced, compelled, or encouraged by any law").

Plaintiffs do not dispute the panel's conclusion that CDS, Inc. does not perform a traditionally exclusive state function. Op. 23 ("Providing an alternative

method of primary education, even freely, is not one of [the very few functions that have been exclusively reserved to the State].”). Indeed, providing education to children has been performed by state and private actors alike for centuries. *Rendell-Baker*, 457 U.S. at 842 (“[T]he education of maladjusted high school students is [not] . . . the exclusive province of the State.”); *Caviness*, 590 F.3d at 816 (“Horizon’s provision of educational services is not a function that is traditionally and exclusively the prerogative of the state . . . .”); *Logiodice*, 296 F.3d at 26 (“[E]ducation is not and never has been a function reserved to the state.”). Nor do Plaintiffs dispute that North Carolina had no influence on CDS, Inc.’s development of the Uniform Policy. Op. 24-25; JA 1756-57.

Where these two state-action indicia are absent, the Supreme Court and appellate courts have consistently held that private entities who contract with the state to educate students cannot be held liable under § 1983. Op. 21-24; *Rendell-Baker*, 457 U.S. at 841-42; *Caviness*, 590 F.3d at 814-18; *Logiodice*, 296 F.3d at 26-28; *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 165 (3d Cir. 2001) (publicly funded private school for juvenile sex offenders was not a state actor because the government “did not ‘compel or even influence’ the conduct on the part of the Stetson staff that Robert challenged”). After all, how could a policy adopted by a private educational corporation with no state input nonetheless be “fairly attributable

to the State"? It is telling that Plaintiffs cite *no appellate case* holding that an educational contractor is a state actor.

Rather than contest these two outcome-determinative points, Plaintiffs propose two alternate routes to a state-action holding, while seeking to distinguish key cases. None of these efforts succeeds.

B. *West v. Atkins* does not support state action here.

Plaintiffs primarily contend that *West v. Atkins*, 487 U.S. 42 (1988), compels a finding of state action whenever the state delegates a "legal obligation" to a private entity, regardless of whether the private entity exercises a traditionally exclusive state function or whether the state influenced the challenged policy. Pet. 7-13. The Supreme Court's brief, unanimous opinion in *West* says nothing of the sort, and its limited holding has no application here.

In *West*, the Supreme Court found state action where a state prison delegated to a privately contracted doctor its "constitutional obligation" to provide inmate medical care. 487 U.S. at 54. The Supreme Court has never applied *West* outside this narrow context, much less suggested that it converts governmental contractors into state actors so long as they could be said to perform delegated legal obligations. *See Rendell-Baker*, 457 U.S. at 840-41 (no state action for educational contractor or "business[es] [that] depend[] primarily on contracts to build roads, bridges, dams, ships, or submarines for the government").

The panel correctly distinguished *West*. First, unlike in *West*, North Carolina did not outsource to private parties its constitutional obligation to Plaintiffs; North Carolina provides charter schools *alongside* traditional public schools. Op. 25 ("[U]nlike in *West*, the state here has not abdicated its constitutional obligation through a private contract."). In other words, "North Carolina has not delegated its obligation to provide a public education system; rather, it simply delegated the operation of charter schools, which were not necessary to fulfill its constitutional obligation to begin with." Op. 26.

Second, the majority noted that "the inmate in *West* had no choice but to submit to the services of the contracted physician the state provided," while "Charter Day students have a choice." Op. 26-27. Plaintiffs note that there was also a public employee on the prison's medical staff in *West*, Pet. 11, but there is no indication that the prisoner had the option of selecting either the public doctor or the private contractor, 487 U.S. at 44. Plaintiffs—who voluntarily attend the School instead of a traditional public school—are far afield from a prisoner who must accept whatever care the state chooses to provide.

The First Circuit likewise has rejected the Plaintiffs' understanding of *West*. In *Logiodice*, Maine contracted with a private entity to satisfy the state's obligation under its "Constitution and statutes to assure secondary education to all school-aged children." 296 F.3d at 29. The privately operated school in *Logiodice* was the only

option for free, public education in the district. *Id.* The First Circuit nonetheless distinguished *West* as a case where "the plaintiff was literally a prisoner of the state (and therefore a captive to whatever doctor the state provided)," while the student-plaintiff "was not required to attend [the school]." *Id.* Where the defendant did not exercise a traditionally exclusive state function and the government did not dictate the specific challenged action, it was irrelevant that "the school district acted by choosing . . . to 'contract out' to a private actor its own state-law obligation to assure education for students in the district." *Id.* at 31.

This Court's precedent applying *West* is in accord. In *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337 (4th Cir. 2000), the state delegated its traditional, exclusive governmental authority to a private fire department. *Id.* at 345 ("[T]he State of Maryland was the exclusive provider of firefighting services until it effectively delegated that function to state-funded private actors."). Moreover, the private firefighters were vested with "incidents of sovereignty," including "deputiz[ation]" as sheriffs with accompanying "police powers" like the ability to control people and private property in the interest of public safety. *Id.* *Goldstein* thus applies *West*'s delegation theory only where the state wholly outsources a traditionally exclusive state obligation. *Id.* at 348 ("[W]hen it has been established that the State has empowered, or is permitting, a private actor to homestead on territory that has heretofore been the *exclusive*, traditional province of the State, there

need be no specific demonstration of a nexus to the alleged constitutional violation.") (emphasis added).

The contrast with this case could hardly be more striking: Education is indisputably not a traditional, exclusive state function, and CDS, Inc. exercises no incidents of sovereignty.[1]

C. The School's "public" label does not transform the private Defendants into state actors.

Plaintiff insist throughout their petition that CDS, Inc. and its board members must be state actors because North Carolina statutes label charter schools as "public schools." Pet. 5, 9, 12 (citing N.C. Gen. Stat. § 115C-218.15(a)). Plaintiffs thereby attempt to distinguish *Rendell-Baker* and *Logiodice*, which involved private schools educating students at state expense. Plaintiffs are mistaken.

1. The charter school's "public" identifier carries little weight in the functional state-action analysis here. Op. 19-20. Indeed, the Defendants do *not* include the public charter school, which is a non-juridical entity created by the

[1] The private firefighting company also enjoyed sovereign immunity, *Goldstein*, 218 F.3d at 345, whereas the panel here correctly found the statute "silent" on that question, Op. 25 n.6. *Amicus* cites a North Carolina Court of Appeals decision according charter-school corporations sovereign immunity, but the Supreme Court granted review of that ruling. In that appeal, the Attorney General contends that the charter-school corporation is "not an arm of the State, because under the Charter School Act, charter schools—and especially the nonprofit corporations that run them—operate with significant autonomy from the State." State's New Br. 45, *State v. Kinston Charter Acad.*, No. 16PA20 (N.C.).

charter; Defendants are the private nonprofit that operates the school and its volunteer board. The same statute that designates charter schools as "public schools" expressly differentiates a charter school from the "private nonprofit corporation" that operates it. N.C. Gen. Stat. § 115C-218.15(a)-(b) ("A charter school . . . shall be a public school . . . operated by a private nonprofit corporation"). This was by design. Traditional public schools are operated and overseen by government officials and public-school agencies. But the legislature opted for *private* operation of charter schools precisely to *remove* them from the pervasive state oversight that characterizes traditional public schools.[2]

Consequently, privately run charter schools "operate independently" of state actors in all material, policy-making respects. *Id.* § 115C-218. They are generally "exempt from statutes and rules applicable to a local board of education or local school administrative unit." *Id.* § 218.10. And the nonprofit's board has authority to "decide matters related to the operation of the school, including budgeting, curriculum, and operating procedures." *Id.* § 218.15(d). Because charter schools are run by private actors outside the state educational hierarchy, the state regulates those schools primarily through the charter agreement, *id.* § 218.15(c)—just as states

[2] *See* DE 29-1, *Amicus Curiae Brief of Civitas Institute Inc. and Paul B. Stam, Jr.*, at 8 (explaining that "treating charter schools as state actors is inconsistent with North Carolina law," which "disentangles charter schools and the State"). *Amicus* Stam sponsored the charter-school bill when he was a state legislator. *Id.* at 1.

regulate other contractors who provide important public functions.[3] CDS, Inc. is therefore similarly situated to the defendants in *Rendell-Baker* and *Logiodice*: a private contractor that provides publicly funded educational services to students.[4]

2. The School's "public" label does not override the functional state-action analysis discussed above. The Ninth Circuit in *Caviness* squarely rejected the argument proffered by Plaintiffs here. The plaintiff there argued "that since charter schools are 'public schools' under Arizona law, they therefore engage in 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." *Caviness*, 590 F.3d at 814-15 (emphasis added). The Ninth Circuit properly rejected that distinction as "foreclosed by *Rendell-Baker*." *Id.* at 815. "Like the private organization running the school in *Rendell-Baker*, [the charter school's

[3] North Carolina could have maintained government management of charter schools, as other states have done, perhaps leading to a different outcome on the state-actor question. *See, e.g.*, Tex. Educ. Code § 12.001, *et seq.* (authorizing diverse range of charter-management arrangements, including direct management by government entities); Fla. Stat. § 1002.33 (similar).

[4] Plaintiffs attempt to distract from the private nature of CDS, Inc. and its board by noting that charter-school *teachers* are "eligible for public benefits." Pet. 10. But just as the Citadel professors' status as public employees was irrelevant to whether the defendant-cadets were state actors in *Mentavlos*, 249 F.3d at 314-23, charter-school teachers' eligibility for public benefits has no bearing on the "private nonprofit corporation['s]" status. Indeed, the statute's special dispensation for charter-school teachers cuts the other way, as its entire purpose is to extend public benefits to certain *private* employees.

nonprofit corporation] is a private entity that contracted with the state to provide students with educational services that are funded by the state." *Id.* *Rendell-Baker* therefore compelled the court's conclusion that "[the nonprofit corporation's] provision of educational services is not a function that is traditionally and exclusively the prerogative of the state." *Id.* at 816; *see also id.* at 815 ("The Arizona legislature chose to provide alternative learning environments at public expense, but, as in *Rendell-Baker*, that 'legislative policy choice in no way makes these services the exclusive province of the State.'").

Caviness faithfully applied Supreme Court precedent. In *Jackson*, for instance, the Supreme Court held that a heavily regulated electric monopoly was not a state actor despite being statutorily labeled as a "*public* utility." 419 U.S. at 350 & n.7 (emphasis added). The *Jackson* Court instead found no state action because the utility neither provided a traditionally exclusive state function nor was compelled by the state to engage in the specific challenged action. *Id.* at 350-54.[5]

[5] *Jackson* also negates Plaintiffs' argument that Defendants are state actors because they "would not exist but for" the charter-school statute. Pet. 3. The "public utility" in *Jackson* was likewise a product of the state's grant of a "certificate of public convenience" and the accompanying "monopoly status allegedly conferred upon Metropolitan by the State of Pennsylvania." *Jackson*, 419 U.S. at 351. Plaintiffs provide no authority for the notion that regulatory authorization or sole reliance on government contracts converts private entities into state actors.

The Supreme Court reached a similar conclusion regarding "public defenders," rejecting the argument that "a public defender's employment relationship with the State, rather than his function, should determine whether he acts under color of state law." *Polk Cty. v. Dodson*, 454 U.S. 312, 324 (1981); *accord Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 504 (9th Cir. 1989) (no state action although defendant was "designated as a political subdivision of the State" in the state constitution). By the same token, it has long been established that the lack of a public label does not preclude a state-action finding. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). In short, function—not label—controls. And here, "apart from the fact that Charter Day bears the public school label, the state takes a hands-off approach in deciding or supervising the school's policies." Op. 24-25.[6]

Logiodice illustrates the emptiness of Plaintiffs' labels-driven approach. There, a private school contracted with the state to provide free education for *every* public-school student in the district. 296 F.3d at 24-25. Yet, according to Plaintiffs, that school's private identity makes it *less* like a state actor than CDS, Inc., a private corporation that educates a mere fraction of public-school students in

[6] CDS, Inc. also lacks other functional indicia of public entities. The state refuses to pay judgments against it, it lacks eminent-domain authority, and its board is privately appointed. *See* N.C. Gen. Stat. §§ 115C-218.1, 218.15, 218.20; *see also supra* n.1.

a district. Pet. 15 n.3. Plaintiffs' arguments cannot be reconciled with the Supreme Court's functional approach to state action.

D. Plaintiffs' attempt to distinguish *Rendell-Baker* and *Caviness* as "employment" cases is unavailing.

Plaintiffs finally fault the panel's supposed lack of focus "on the specific conduct of which the plaintiff complains," Pet. 13 (quoting *Mentavlos*, 249 F.3d at 298)—here, "the enforcement of a school policy governing student conduct," Pet. 14. Plaintiffs thus seek to distinguish *Rendell-Baker* and *Caviness* as "employment" cases. *Id.* at 14-15.

Yet again, a sister circuit has already soundly rejected Plaintiffs' (and the dissent's) attempt to distinguish *Rendell-Baker*'s holding from cases (1) brought by "students," rather than "teachers," and (2) where the school "provid[ed] a publicly funded education available to all students generally." *Logiodice*, 296 F.3d at 27. The First Circuit dismissed those arguments because "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." *Id.* The court applied *Rendell-Baker* to hold that a *student's* constitutional claim challenging school disciplinary action could not be brought under § 1983. *Id.* at 27-31; *accord Robert S.*, 256 F.3d at 168 (refusing to "distinguish *Rendell-Baker* on the ground that the plaintiffs in that case were school employees, rather than students"). Whether the *claim* is brought by a student or employee, the question is whether the defendant's *function*—

providing education—is one that was historically and exclusively performed by the state.[7]

To be sure, identifying the "specific conduct" challenged by plaintiffs is relevant to assessing whether the state compelled that challenged conduct. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) ("A private entity can qualify as a 'state actor' . . . when the government compels the private entity to take a particular action"). Thus, in *Rendell-Baker* and *Caviness*, the courts inquired whether the state closely regulated the defendant's employment relationship with teachers, *Rendell-Baker*, 457 U.S. at 841-42; *Caviness*, 590 F.3d at 816-18, whereas here the analysis examines whether North Carolina closely regulates charter-school dress codes or otherwise involved itself in CDS, Inc.'s decision to implement the Uniform Policy, Op. 24-25; *accord Logiodice*, 296 F.3d at 28 (noting that "both sides concede that day-to-day operations, including discipline, are in the hands of [defendant]"). Plaintiffs do not contest the panel's conclusion that the state lacked input on that policy. Accordingly, Plaintiffs' effort to rely on the "specific conduct" at issue to avoid *Rendell-Baker* and *Caviness* is unavailing.

[7] Plaintiffs cite no authority for parsing education—or any other—function into its component parts, such as hiring employees, disciplining students, or designing curriculum. Nor would doing so make sense in determining whether education is a traditionally exclusive state function.

II. Charter-school students' rights are not at risk.

Plaintiffs close by warning that the panel decision "threaten[s] to deprive millions of students in charter schools of constitutional rights." Pet. 17. That is simply not the case, as the panel took pains to explain. Op. 28-29.

The charter agreement requires the nonprofit charter-school operator to "compl[y] with the Federal and State Constitutions." JA 214. The state has robust means to enforce this mandate, including immediately "terminat[ing]" the charter for any "material violation of . . . the charter." N.C. Gen. Stat. § 115C-218.95(a)(4).

What is more, Plaintiffs have a pending third-party beneficiary claim to enforce the charter against CDS, Inc. JA 2762-63. And, perhaps most importantly, the panel's decision empowers Plaintiffs to pursue identical relief on remand via their Title IX claim. Op. 29-41. The Court need not depart from the decisions of sister circuits to create a novel state-action remedy where "alternative means of redress" exist. *Logiodice*, 296 F.3d at 30.

CONCLUSION

Appellants request that the Court deny rehearing en banc.

September 3, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This response complies with the type-volume limitation of Fed. R. App. P. 35 because this brief contains 3,898 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman font, size 14.

/s/ Aaron M. Streett
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CERTIFICATE OF SERVICE

On this 3rd day of September, 2021 a true and correct copy of the foregoing was filed with the electronic case filing (ECF) system of the U.S. Court of Appeals for the Fourth Circuit, which currently provides electronic service to the following counsel of record:

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