NO. 22-238

In the
Supreme Court of the United States

CHARTER DAY SCHOOL, INC., ET AL.,

Petitioners,

v.

BONNIE PELTIER, AS GUARDIAN OF A. P., A MINOR CHILD, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* JOHN LOCKE FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The John Locke Foundation is a North Carolina 501(c)(3) nonprofit public policy organization. The John Locke Foundation commissions academic studies and polls, publishes research, hosts events, and engages with the North Carolina General Assembly to advance school choice. As part of that mission, an affiliate of the John Locke Foundation, the Civitas Institute, filed an *amicus curiae* brief when this case was before the Fourth Circuit Court of Appeals.

This case is important to *amicus* because it addresses a question fundamental to charter schools' relationship with the State. If charter schools are state actors, then charter schools will become little more than another branch of traditional public schools. That result would end the independence *amicus* have advocated and is enshrined in North Carolina law.

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[1] As provided by Supreme Court Rule 37.2(a), *amicus* provided Petitioners' and Respondents' counsel of record timely notice of *amicus'* intent to file this brief. Petitioners and Respondents consent to the filing of this brief. As required by Supreme Court Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus* and their counsel made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

Charter schools exist between traditional public schools and fully private schools—they are publicly funded but privately managed. Unlike private schools, they are open to the public and receive state funds. Unlike traditional public schools, charter schools are governed by nonprofit corporations with independent boards of directors.

The specifics of charter schools' relationship to the State can be difficult to discern. The Fourth Circuit Court of Appeals misunderstood this relationship. It acknowledged the State does not compel or coerce the policy Peltier challenges. But it held that charter schools are state actors because state law labels them public schools and obligates the state to provide public education.

Treating every organization offering services to the public as a state actor ignores the complexity of charter school law and creates a dangerous precedent for other public entities.

Because charter schools operate independently, they are not state actors. This Court should grant certiorari to address this issue of national importance, defend its precedent, and resolve a clear circuit split.

ARGUMENT

I. Whether Charter Schools Are State Actors is an Issue of National Importance.

More than 3.4 million students attend the 7,696 charter schools in the United States. Chester E. Finn, Jr. & Bruno V. Manno, *Charter Schools at 30: Looking back, looking ahead*, Fordham Institute (3 June 2021)[2] Forty-four states and the District of Columbia authorize charter schools. *Id.* Since the 2005-2006 school year, charter school enrollment has more than tripled. *Id.*

Charter schools are "independently operated public schools" with the "freedom to design classrooms that meet their students' needs." *What Are Charter Schools*, Nat'l Alliance for Pub. Charter Sch., https://www.publiccharters.org/about-charter-schools/what-charter-school (last visited Oct. 13, 2022). Each school "ordinarily has its own governing board," which is a "nonprofit corporate body that receives a charter from the authorizer." Bruno v. Manno & Chester E. Finn, Jr. *A Progress Report on Charter Schools*, 24 Nat'l Affairs 3, 11 (2015). The nonprofit board is "legally responsible for operating the school." *Id.* The authorizer is the arm of the government granting the school its charter. It is "in effect, a state licensing agent that determines which prospective school operators deserve charters; enforces whatever rules and procedures the schools

[2] The citations in this brief embed hyperlinks to the cited authority.

are subject to," and revokes or renews charters. *Id*. at 8.

The principle governing charter schools is that they are "held accountable for results—gauged primarily by academic achievement—in exchange for freedom to produce those results as they think best." *Id* at 4. This autonomy with accountability makes charter schools hard to place within the dichotomy of traditional public schools and purely private schools. They are "a new species of school"—an independent school that is "open to all comers, paid for by taxpayers[,] and licensed by the state." Chester E. Finn Jr., Bruno V. Manno, & Brandon L. Wright "Charter Schools Are Reinventing Local Control in Education" Wall Street Journal (5 September 2016).

Charter schools differ from both private and traditional public schools. Their "private management" is a "difference in kind" from traditional public schools. Aaron Saiger, *Charter Schools, the Establishment Clause and the Neoliberal Turn in Education*, 34 Cardozo L. Rev. 1163, 1195-1196 (2013). The difference between charter schools' funding and funding private schools, like the funding this Court considered in *Rendell-Baker*, is a difference "only in degree, not in kind." *Id*. at 1995. Likewise, the "differences between charter and private school regulation" are "differences only of degree, and not in kind." *Id*.

Charter schools have thrived because of their independence from the state. North Carolina law

recognizes the purpose of charter school legislation is "to establish and maintain schools that operate independently of existing schools." N.C. Gen. Stat. § 115C-218(a) (2021). Independence allows expanded choices for parents and students, creates new opportunities for teachers, increases learning opportunities for students, and fosters different and innovative teaching methods. Treating charter schools as state actors endangers that independence and frustrates these purposes.

Independence means charter schools can innovate and offer unique educational choices. Charter Day school does just that. Its dress code is part of the unique educational experience it offers—an experience that has produced superb results. As is her right, Peliter disagrees with that dress code. But Peltier tries to transform her right to disagree into a right to prevent Charter Day School from offering its unique and innovative learning opportunity to other parents and students. If plaintiffs are correct, no charter school can offer a similar policy and no parent or student can choose to attend a similar public school.

Removing that choice removes parents and students' choices to obtain a unique education. Almost three and a half million students have chosen charter schools because they are different from traditional public schools. Their independence and innovation is attractive. Treating charter schools as state actors would damage that independence and innovation and foreclose those choices.

II. The Decision Below is Incorrect and Sets a Damaging Precedent.

The decision below directly conflicts with this Court's precedent. That conflict will yield damaging results.

State actor analysis applies historical Common Law agency principles to § 1983 claims. At Common Law, the acts of an agent are the acts of her principal. Joseph Story, Commentaries on the Law of Agency 328 (3d ed. 1846). So a private party can act for the state when that private party is the state's agent. This "close nexus between the State and the challenged action" is essential to the state action doctrine. *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001).

For the State to be liable for private decisions it must have "exercised coercive power" or "provided such significant encouragement . . . that the choice must be deemed in law to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Joint participation with the State can satisfy this requirement. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). But merely providing public services—even extensively regulated public services—does not transform a private party into a state actor. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 43 (1999). That is true even when the state creates a public utility monopoly. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974).

The decision below recognizes that "there was no 'coercion' or 'pervasive entwinement' by the state with the challenged conduct." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 116 (4th Cir. 2022). But it concludes Charter Day School is a state actor because public education is a public function under North Carolina law. *Ibid.* Public education is a public function, it reasoned, because North Carolina has "constitutional duty to provide free, universal elementary and secondary schooling." *Ibid.*

The Fourth Circuit's analysis misapplies *Blum*. Simply exercising a public function is not enough—otherwise the public utility in *Jackson* would have been a state actor. *Blum* addressed an argument that nursing homes were state actors because "both the Medicaid statute and the New York Constitution make the State responsible for providing every Medicaid patient with nursing home services." *Blum*, 457 U.S. at 1011. Those provisions didn't create state action because they didn't "mandate the provision of any particular care." *Ibid.* And, even if these provisions made nursing home care a public function, the nursing home may not be a state actor. The challenged decision had to be "the kind of decision[] traditionally and exclusively made by the sovereign for and on behalf of the public." *Id.* at 1012.

Where there is neither coercion nor entwinement, a private party fulfilling a public function must make a decision that is the kind of decision traditionally and exclusively made by the sovereign for and on behalf of the public. The decision below does not address this

aspect of *Blum*'s holding. Nor does it try to tie Charter Day School's dress code to the kind of decisions traditionally and exclusively made by the sovereign.

Blum does not stand alone in requiring some connection between the challenged action and the state, even when the private actor fulfills a government function. State action is not present "unless the Government affirmatively influenced or coerced the private party to undertake the challenged action." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 411 (1995). "Mere acquiescence" is not enough to make private action state action. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978). Delegating a function isn't enough; the state must delegate authority. *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 195 (1988). Outsourcing constitutional obligations to a private entity does not *per se* make that entity a state actor. *See, Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 n.1 (2019); *West v. Atkins*, 487 U.S. 42, 56 (1988).

The decision below correctly recognized that there is neither coercion nor entwinement here, but it incorrectly treated the State's delegation of part of its obligation to educate the public to charter schools as dispositive. The State of North Carolina delegated no authority to Charter Day School. Unlike the inmates in *West*, the students here are free to choose to attend a traditional public school, a charter school, or a private school.

Suppose the Fourth Circuit were correct. That decision would have harmful implications for North Carolina and many other states. North Carolina offers public funds to private educational institutions from pre-k through to college. North Carolina's constitution likewise obligates it to "maintain a public system of higher education" that "as far as practicable" is offered "free of expense." N.C. Const. Art. IX, §§ 8, 9.

In North Carolina, state funding for private educational institutions comes from four sources. First, the Opportunity Scholarships program provides state-funded needs-based private school "vouchers" for K-12 students. N.C. Gen. Stat. § 115C-562.1 (2021), *et seq*. Second, North Carolina offers grants for disabled K-12 and higher education students. N.C. Gen. Stat. § 115C-590, *et* seq; § 116-295 (2021). Third, at the college level, North Carolina provides needs-based tuition grants as well as payments to private colleges that enroll North Carolina residents as full-time students. N.C. Gen. Stat. § 116-209.80, *et seq*. (2021). Fourth, North Carolina offers public funds to private preschools through the NC-Pre-K Program. N.C. Gen. Stat. § 143B-168.10, *et seq*. (2021). In each case, the recipients of these funds provide education to the public and must comply with basic state regulations.

The decision below risks expanding the state actor doctrine to cover almost all North Carolina educational institutions, public or private. If charter schools are state actors because they offer education to the public, are subject to minimal educational regulations, and receive direct funding from the State,

then others could argue that private schools participating in the Opportunity Scholarship program and private colleges receiving Needs Based Tuition Grants are state actors too.

Treating these private institutions as state actors could create the very disparities plaintiffs seek to prevent. If a private school is a state actor with respect to students receiving Opportunity Scholarships but not a state actor with respect to other students, the school would effectively have two different bodies of rules for its students. Separate rules for separate groups of students, this time segregated by their parents' income, is unacceptable.

The harmful effects of the decision below do not stop with schools. Charter schools are not the only private entities that receive charters from North Carolina's government, are subject to state regulation because they perform a public function, and receive targeted tax incentives or direct appropriations. Public utilities and hospitals are organized by private entities. North Carolina heavily regulates these industries because utilities and health are public functions. The North Carolina Utilities Commission determines the rates public utilities can charge and their terms of service. N.C. Gen. Stat. § 62-31, *et seq*. (2021). Under the precedent set by the decision below, these private entities could be considered state actors.

Nor are these effects limited to North Carolina. In the 2021-2022 school year sixteen states, Puerto Rico, and the District of Columbia offered state-funded

voucher programs. *School Choice in America*, EdChoice, https://www.edchoice.org/school-choice-in-america-dashboard-scia/ (last visited Oct. 13 2022). Every state offers some form of college grant. Letting the decision below stand doesn't just leave this Court's decisions undefended, it places state programs throughout the nation in doubt.

III. Further Percolation is Unnecessary and Unwise.

Finally, this Court should grant certiorari because further percolation in the circuit courts will not resolve this dispute.

None of the Fourth Circuit Court of Appeals' reasons for finding Charter Day School is a state actor are new. Many of its arguments made their debut in 2001. Other circuits have rejected the same arguments the Fourth Circuit accepted. Denying certiorari will not allow circuit courts more consideration because the relevant arguments have been fully aired.

The Fourth Circuit believed the "state action inquiry in this case is not complicated." *Peltier*, 37 F.4th at 122. The inquiry is so simple the Fourth Circuit resolved it with just three factors. First, "North Carolina is required under its constitution to provide free, universal elementary and secondary schooling to the state's residents." *Id.* Second, "North Carolina has fulfilled this duty in part by creating and funding the public charter school system." *Id.* Third,

"North Carolina has exercised its sovereign prerogative to treat these state-created and state-funded schools as public institutions that perform the traditionally exclusive government function of operating the state's public schools." *Id*.

Every argument the Fourth Circuit accepted has been rejected by at least one other circuit court.

The First Circuit addressed—and dismissed—an argument that a constitutional and statutory right to education makes the private institutions offering public education state actors. Maine has "undertaken in its constitution and statutes to assure secondary education to all school-aged children." *Logiodice v. Trs. of Maine Cent. Inst.*, 296 F.3d 22, 29 (1st Cir. 2002). But this did not make the providers of that education state actors. This Court has not recognized that the delegation of a public duty is, by itself, enough to make a private actor a state actor. So *Logodice* rejected the argument that a constitutional duty transformed a private actor into a state actor because "creating new exceptions is usually the business of the Supreme Court." *Id*. at 30.

The Fourth Circuit distinguished North Carolina because of its constitutional obligation to provide a public education—but this a false premise. North Carolina is far from unique in having a state constitutional requirement to provide a public education. Indeed, it would be the unique state that does not have such a state constitutional requirement. "Most state constitutions" recognize a "state duty to

establish schools and students' rights to attend them." *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 Cardozo L. Rev. at 1195. If delegating a public obligation to a private actor made that actor per se a state actor, the public function doctrine would be functionally obsolete. Solely exercising a public function does not make a private actor a state actor; it must be a function that is traditionally and exclusively the prerogative of the state.

The Ninth Circuit directly rejected the Fourth Circuit's argument that the public label made charter schools state actors. *Caviness v. Horizon Cmty. Learning Ctr, Inc.*, 590 F.3d 806, 815-816 (9th Cir. 2010). The plaintiff in *Caviness* argued *Rendell-Baker* was not controlling because Arizona called charter schools public schools. But this argument just "restate[d]" the plaintiff's "erroneous argument that the state's statutory characterization is necessarily controlling." *Id.* The state's labeling of an institution as public or private does not determine whether it is a state actor. *See*, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974).

Three circuits have rejected the argument that public education can be distinguished from education when deciding whether a function is traditionally and exclusively a government function. The plaintiff in *Robert S.* argued educating sex offenders was a traditional and exclusive government function. *Robert S. v. Stetson Sch., Inc.,* 256 F.3d 159, 165-166 (3d Cir. 2001). *Caviness* sought to distinguish "public

educational services" from educational services generally. *Caviness*, 590 F.3d at 814-815. The *Logiodice* plaintiffs tried to narrow education to a "publicly funded education available to all students generally." *Logiodice*, 296 F.3d at 27. All three circuits rejected that argument for the reasons the First Circuit gave in *Logodice*. This Court did not have "this kind of tailoring of adjectives in mind when it spoke of functions 'exclusively' provided by the government." *Id*. And "publicly funded education of last resort was not provided exclusively by the government in Maine." *Id*.

What was true in Maine is also true in North Carolina: from the beginning of its history private actors have offered education with public funds. As early as 1786 North Carolina provided public support to private educational entities. Several early acts appropriated state or county resources directly to private academies.[3] *E.g.*, 1786 N.C. Sess. Laws XXVIII (An Act for Establishing a School-House in the Town of Newbern); 1796 N.C. Sess. Law LXI (An Act to Authorize the Trustees of the Lumberton Academy to Lay off and Sell a Part of the Town Common; to Raise a Fund for the Purpose of Building Said Academy); 1805 N.C. Sess. Law XL (An Act Respecting the Warrenton Academy); 1809 N.C. Sess.

[3] The term "academy" as used in North Carolina almost always signified a private educational institution. *E.g.* 1785 N.C. Sess. Law XXX ("An Act to Erect and Establish an Academy in the County of Duplin"); Charles Lee Coon, NORTH CAROLINA SCHOOLS AND ACADEMIES 1790-1840: A DOCUMENTARY HISTORY, 821-822, Edwards & Broughton Printing Company (1915).

Law LXII (An Act to Amend an Act, Entitled "An Act to Establish an Academy in the City of Raleigh," Passed in the Year One Thousand Eight Hundred and One).

The nature of charter schools is not going to change. They will continue to be private institutions offering education to the public. Nor will the nature of education change. The real argument here is not the nature of charter schools or education; it is the level of generality to apply. There are no new arguments to air here. Many of the arguments are twenty-one years old.

Delaying addressing this case will have only one result: uncertainty for private institutions providing education to the public with public funds. Until the decision below, the federal circuit courts of appeal uniformly held these schools were not state actors. Now there is dissent and schools outside those circuits can only guess whether they are state actors or not. This Court should not leave them guessing, its precedent undefended, or this issue of national importance unaddressed.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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