No. 22-238

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

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

Nothing in the Brief in Opposition should dissuade the Court from reviewing this vitally important case.

I. RESPONDENTS UNSUCCESSFULLY ATTEMPT TO REFRAME THE DECISION BELOW

Respondents seek to de-emphasize the court of appeals' sweeping rationales for state action while reframing the case on grounds purportedly "unique" to North Carolina's charter-school program. They use this reframing to downplay the split, minimize the case's importance, and avoid this Court's precedents. This effort fails for multiple reasons.

A. Respondents' 12-page tour of North Carolina statutes (BIO 3-14) cannot obscure the dispositive features. Petitioner CDS is a "private nonprofit corporation," and its board members are selected with no state

involvement. N.C. Gen. Stat. § 115C-218.15(b); C.A. App. 2497. CDS enters into a charter—a "contract"—with the state to provide education. N.C. Gen. Stat. § 115C-218.15(c); Pet. App. 13a. And CDS "is exempt from statutes and rules applicable to a local board of education." N.C. Gen. Stat. § 115C-218.10. CDS's Board—not a state entity—has sole authority to "decide matters related to the operation of the school, including budgeting, curriculum, and operating procedures." *Id.* § 218.15(d). While CDS must adopt a code of conduct for its schools, *id.* §§ 218.60, 390.2(a), it is undisputed that the state had no input into the Uniform Policy challenged here. Pet. App. 12a.

Those features—common to many states—dictate the outcome, confirm the circuit split, and demonstrate the case's importance. "[A] private entity"—like CDS—"can qualify as a state actor in a *few limited* circumstances." *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2019) (emphasis added). They include "when the private entity performs a traditional, exclusive public function"; "when the government compels the private entity to take a particular action"; and, "under certain circumstances," "when the government has outsourced one of its constitutional obligations to a private entity." *Id.* at 1928-1929 & n.1. None of these narrow tests encompasses a private contractor that independently adopts school policies pursuant to a state program to expand educational options.

B. Respondents' statutory overview demonstrates only that charter schools are deemed "public" in certain respects and that the state regulates charter schools to some degree. Neither is availing under this Court's state-action tests.

While North Carolina labels charter *schools* "public" in some respects, it remains undisputed that charter-school *operators* must be "private" entities with private

boards, and that the state opted for private operation precisely to facilitate innovation and independence from the state. N.C. Gen. Stat. § 115C-218.15(c); Moore *Amicus* Br. 9-13. Private contractors who merely execute a "public" function do not engage in state action. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982) ("The relevant question is not simply whether a private group is serving a 'public function.'"); *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 352 (1974) ("public function" and "essential public service" insufficient). For state action to exist, "the government must have traditionally *and* exclusively performed the function." *Halleck*, 139 S. Ct. at 1928-1929.

This case is thus controlled by *Jackson*, *Polk County*, and *Halleck*, all of which involved private or independent actors that operated entities deemed "public" by statute. *Jackson*, 419 U.S. at 350 n.7, 351-353 (private company operating "public utility" pursuant to state-granted monopoly not state actor); *Polk Cnty.* v. *Dodson*, 454 U.S. 312, 324 (1981) ("public defender" not state actor because she exercises "independent professional judgment"); *Halleck*, 139 S. Ct. at 1926 (private company authorized to operate "public access" network not state actor); see Pet. 25-28. Respondents' *complete failure* to address these cases is the proverbial dog that did not bark.[1]

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[1] Respondents' assertion that the state "intended its charter schools to be state institutions" (BIO 2, 27) is simply false. See *State ex rel. Stein* v. *Kinston Charter Acad.*, 866 S.E.2d 647, 659 (N.C. 2021) ("The General Assembly has not * * * chosen to categorize charter schools as state agencies or instrumentalities and has, instead, classified charter schools as entities that 'operate independently of existing schools' that are run by 'private non-profit corporations.'"). Respondents likewise misstate that charter schools "may assert governmental immunity," BIO 7 n.3 (citing Pet. App. 15a n.6), but the court below said no such thing and *Kinston* expressly reserved the question. 866 S.E.2d at 661 n.4 ("assuming, without in any way deciding," that charter could assert governmental immunity).

Nor is North Carolina's regulation of charter schools' financial health, academic performance, and other activities (BIO 28-30) relevant where the state undisputedly did not compel the Uniform Policy challenged here. *Rendell-Baker*, 457 U.S. at 841 (no state action despite "extensive regulation of the school generally" when the "decisions to discharge the petitioners were not compelled or even influenced by any state regulation"); *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 52 (1999) ("Action taken by private entities with the mere approval or acquiescence of the State is not state action."). The cited statutes illustrate only that there is interaction between charter-school operators and the state. But Respondents do not press a "pervasive entwinement" theory under *Brentwood Academy* v. *Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), and the court of appeals rejected that possibility. Pet. App. 12a.

C. Respondents' attempted narrowing of the case relies heavily on the contractual requirement that charter schools comply with the Constitution. *E.g.*, BIO 30. But this illustrates that charter-school operators are *not* state actors. After all, such a positive requirement would be unnecessary if charter-school operators were already bound by the Constitution as state actors. Unsurprisingly, this requirement played no role in the court of appeals' reasoning and thus cannot limit its holding.

Moreover, it is unexceptional that governments impose requirements on their contractors, including antidiscrimination requirements. See, *e.g.*, 41 C.F.R. § 60-1.4(a)(1) (prohibiting government contractors from "discriminat[ing] against any employee or applicant" based on protected characteristics). Where these regulations do not compel the challenged conduct they are irrelevant to state action. *Rendell-Baker*, 457 U.S. at 841; *Robert S.* v. *Stetson Sch., Inc.*, 256 F.3d 159, 165 (3d Cir. 2001) (Alito, J.) (no state action where "detailed requirements

set out in [the government's] contracts with [the school]" did not compel challenged conduct). Indeed, North Carolina provides that the remedy for violating charter requirements is charter revocation or a breach-of-contract suit by the state. N.C. Gen. Stat. § 115C-218.95. State law thus evinces an intent to address alleged constitutional violations through a bilateral contractual relationship. That is a far cry from opening charter-school operators to fee-shifting Section 1983 suits by any aggrieved litigant.

D. Respondents cannot escape that the Fourth Circuit grounded its state-action holding on three sweeping theories alien to this Court's caselaw and rejected by other circuits: (1) a function or entity's "public" label converts a private operator into a state actor, Pet. 25-28; (2) the function's "public" label can be used to predetermine the outcome of the historically-exclusive-state-function test, Pet. 22-24; and (3) whenever a state *expands* choice by contracting out any part of a state-constitutional obligation, state action exists under *West* v. *Atkins*, 487 U.S. 42 (1988), Pet. 28-30. These holdings not only condemn charter-school operators to state-actor status; they also capture numerous other entities that contract with states to provide "public" or "constitutionally" required services. See Catholic Charities *Amicus* Br.; Jewish Coalition *Amicus* Br. In sum, Respondents' attempt to reframe the dispute cannot avoid the clash between the decision below and core tenets of state-action doctrine.

II. THERE IS A SPLIT

Respondents strain credulity in asserting that other circuits' cases reflect "no disagreement as to the applicable law," but only "differences in the facts." BIO 18. The six dissenters correctly perceived a split. Pet. App. 54a, 64a, 69a-70a.

Indeed, Respondents cannot dispute the material similarities between the decision below and those of the First, Third, and Ninth Circuits. In all four cases: (1) the state contracted (2) with a private entity (3) to provide publicly funded education (4) but did not compel the action challenged in the lawsuit. Yet only the decision below found state action. Respondents thus turn to legally irrelevant differences between the cases—often facts not even mentioned in the opinions.

A. *Caviness* v. *Horizon Community Learning Center, Inc.*, 590 F.3d 806, 812 (9th Cir. 2010), involved a "private nonprofit corporation running a charter school that is defined as a 'public school' by state law"—exactly like this case. The Ninth Circuit rejected two central arguments that the Fourth Circuit embraced: (1) the school's "public" designation made the operator a state actor, *id.* at 813-814; and (2) the operator was exercising the traditionally exclusive government function of providing "*public* educational services," *id.* at 814-815 (emphasis added). See Pet. 13-14, 18, 20. Finally, *Caviness* held that the charter-school operator was not a state actor because the state did not "compel[] or influence[]" the decision to terminate the plaintiff's employment. 590 F.3d at 816-818. The same absence of state compulsion of CDS's Uniform Policy did not deter the Fourth Circuit. Pet. App. 12a. So much for "no disagreement as to the applicable law."[2]

Respondents invoke a welter of immaterial or nonexistent differences. They claim that "Arizona charter schools are expressly *exempt* from many rules governing the treatment of employees, the specific subject of dis-

[2] Respondents observe (at 20) that *Caviness* did not address *West*'s delegation theory, but that cannot eliminate *Caviness*'s conflict with the Fourth Circuit's other holdings or the fact that the First Circuit expressly rejected a delegation theory in this context. See Pet. 15.

pute in *Caviness*." BIO 20. But the statute Respondents cite mirrors North Carolina's; both generally exempt charters from rules governing traditional public schools. Compare Ariz. Rev. Stat. § 15-183(E)(5), with N.C. Gen. Stat. § 115C-218.10. Thus, CDS was free to establish a dress code without state involvement, just as the *Caviness* operator was free to establish employee-dismissal protocols.[3]

Respondents next note that *Caviness* examined the "specific conduct" at issue there—employee mistreatment—and suggest that a case about a student dress code would be decided differently. BIO 21. But the type of claim is irrelevant to whether education is a traditional, exclusive state function or whether a "public" label converts private contractors into state actors. Those are legal questions that do not turn on the conduct being challenged. See Pet. 21. Accordingly, courts have had no trouble applying *Rendell-Baker*—an employee case—to student-discipline cases. See *Logiodice* v. *Trs. of Maine Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002) ("*Rendell-Baker* did not encourage such a distinction" between employment and student cases). Of course, the "specific conduct" shapes the inquiry into whether the state compelled the challenged conduct. See *Caviness*, 590 F.3d at 817-818 (concluding that state did not compel personnel actions). But there is no dispute that the state was uninvolved in CDS's Uniform Policy, so the conduct at issue cannot distinguish *Caviness*.[4]

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[3] Respondents twice mention (at 20-21) that North Carolina requires charter schools to comply with the Constitution, but as explained above (at 4-5), that is irrelevant to state action and was not relied upon by the Fourth Circuit.

[4] Respondents declare (at 21) that *Caviness* "expressly distinguished * * * whether the school might be a state actor for purposes of regulating students," but it made no such distinction. See *I.H. ex rel. Hunter* v. *Oakland Sch. for Arts*, 234 F. Supp. 3d 987, 992-993 (N.D.

B. *Logiodice* involved (1) a student-discipline claim (2) against a private contractor that operated the district's *only* publicly funded high school (3) to fulfil the state's constitutional obligation to provide education. Pet. 14-15. Besides rejecting a *West* delegation theory of state action, 296 F.3d at 29, *Logiodice* rejected two more legal theories accepted below: gerrymandering the state-action inquiry by asking whether "public education" is a historically exclusive state function, *id.* at 27, and artificially limiting *Rendell-Baker* to employment claims, *ibid.* See Pet. 15, 19-22.

The only possible distinction is that the *Logiodice* school was nominally "private." But CDS is also a "private" corporation, and the school's "public" label is a distinction without a difference under this Court's caselaw (which Respondents ignore). See *supra* pp. 1-3; *Caviness*, 590 F.3d at 815-816 ("Caviness's argument that *Rendell-Baker* does not control this case since the school there was private, whereas here Horizon is a public school as a matter of Arizona law, merely restates his erroneous argument that the state's statutory characterization is necessarily controlling.").[5]

III. THIS IS A STRONG VEHICLE

Respondents cannot dispute that reversing on state action will vacate the injunction affirmed by the Fourth Circuit that bars Petitioners from reinstating their preferred policy. The Court need not address any other issue to afford that immediate relief. And there is no alternative basis for affirmance before this Court.

Cal. 2017) (no state action under *Caviness* for student's equal-protection claim against California charter-school operator).

[5] Likewise, despite the conflict between the decision below and the Third Circuit's rejection of a student-treatment claim in *Robert S.*, see Pet. 15-20, Respondents unsuccessfully seek to distinguish that decision as involving a "private" school.

A. The remand of Respondents' Title IX claim for an evidentiary hearing has no bearing on whether this case is a good vehicle to address state action. Denying certiorari would mean that Petitioners would remain enjoined from implementing their preferred policy *even if they prevail on the Title IX claim*. The Court should not countenance such a Catch-22 argument. Nor are Respondents correct that if Petitioners lose on Title IX, "the outcome of the equal protection claim will make no difference to [Petitioners'] obligations." BIO 22. CDS's board members—Petitioners here—cannot be liable under Title IX, so reversal on state action would relieve them of all potential liability. Pet. App. 164a n.4 ("Plaintiffs do not bring a Title IX claim against the board members."). In all events, the future, unknown outcome of the wholly separate Title IX claim should not discourage review of the important state-action issue.

B. Respondents similarly err in claiming that resolving the state-action question "will not alter [Petitioners'] obligations" because the charter independently requires compliance with the Constitution. BIO 23. Reversing on state action will eliminate Respondents' Section 1983 claim—along with its injunction and substantial attorney-fee price tag—in its entirety. Such a decision would also wipe out the Fourth Circuit's constitutional ruling, leaving no judicial application of the Equal Protection Clause on the books. While the state could attempt to enforce the charter's constitutional requirement through revoking the charter or a state-court breach-of-contract action, it has not done so for over 20 years and there is no indication it would act differently now. A discretionary contractual action by the state—with yet another speculative outcome—is worlds away from the present Section 1983 action enforced via federal-court injunction.

C. North Carolina's decision to require contractors to follow the Constitution does not somehow render this

case a faulty vehicle to address whether charter-school operators are state actors. BIO 23-24. That aspect of North Carolina's regulation neither compelled the challenged conduct nor is it otherwise relevant under this Court's state-action doctrine—as evidenced by the Fourth Circuit's declining to rely on it. It would therefore not impede this Court from pronouncing a rule that provides meaningful guidance. Plus, as Respondents admit, other states require charter schools to comply with the constitutional non-discrimination provisions at issue here. BIO 24 & n.24.

IV. THIS CASE IS IMMENSELY IMPORTANT

Ten states, North Carolina legislative leaders, a 25,000-student classical-charter-school network, religious groups, and a women's-policy organization all filed *amicus* briefs attesting to this case's importance. Amplifying the six dissenters below, *amici* identify numerous harms to charter-school innovation and even farther-reaching evils unleashed by the Fourth Circuit's sweeping holding.

Respondents attempt to limit the decision below to "one state's unique charter school system," BIO 24, but it cannot be so cabined. Respondents do not dispute that all states have a constitutional obligation to provide education. Pet. 33. Nor do they dispute that nearly all states treat charter schools as "public" or part of their public-school system. Pet. App. 192a-194a. Under the decision below, that is sufficient for virtually all charter-school operators to be deemed state actors. "The aspects of North Carolina law that led the Fourth Circuit to impose liability * * * are hardly unique to that State." States' *Amicus* Br. 3; see *id.* at 19-20.

Respondents beggar belief by asserting that deeming charter-school operators state actors will not constrain innovation. The *entire purpose* for state-action doctrine is protecting a "robust sphere of individual liberty," *Hal-*

leck, 139 S. Ct. at 1928, "in which the opportunity for individual choice is maximized," *Jackson*, 419 U.S. at 372 (Marshall, J., dissenting). Charter schools fit the bill, freeing private operators to create a menu of educational methods that may be impermissible if charter-school operators were treated like government-run schools. See, *e.g.*, Pet. 30-32 (explaining that policies relating to personnel, security, discipline, dress codes, library, curriculum, and inculcation of moral values could readily lead to constitutional claims); Great Hearts Academies *Amicus* Br. 18-23 (discussing threat to single-sex charters and charters with strict disciplinary policies); IWLC *Amicus* Br. 3 (discussing "constitutional litigation" over "hiring and firing, extracurricular activities, restroom assignments, and the composition of athletic teams").

Nor can Respondents credibly dispute the fears of *amici* religious social-service providers. For Respondents' counsel are *already* deploying the decision below against religious foster-care agencies that contract with the state. *Rogers* v. *U.S. Dep't of Health & Human Servs.*, No. 6:19-cv-01567-JD, ECF 243 at 26, 29 (D.S.C. Nov. 17, 2022).[6]

The North Carolina experience—where operators are contractually required to follow the Constitution—does not aid Respondents' effort to downplay the importance of the state-action question. The specter of bankrupting and burdensome Section 1983 actions would have a far greater chilling effect on innovation than the possibility that the state may choose to contractually enforce a charter requirement. And states presumably consider the educational value provided by a school alongside perceived constitutional issues before bringing suit. Plaintiffs' attorneys and disgruntled students or teachers have

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[6] https://www.aclu.org/legal-document/rogers-v-health-and-human-services-plaintiffs-motion-summary-judgment.

no such restraint. Reversal will not only remove this threat from North Carolina operators; it will also safeguard educational choice in states that do not impose constitutional requirements on charters.

The Court should grant review to provide immediate guidance to charter-school operators who now labor under a cloud of legal uncertainty.[7]

Respectfully submitted.

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[7] For instance, Oklahoma's Attorney General recently opined that Oklahoma's charter-school operators are not state actors, concluding that "the Ninth Circuit and the six dissenters in *Peltier* have the better of the argument, as their reading of *Rendell-Baker* is far more faithful to that decision's facts and principles than the Fourth Circuit's." Okla. Att'y Gen. Op. No. 2022-7 at 12, https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/opinions/2022/attorney_general_opinion_2022-7_stamped.pdf.