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

SUPPLEMENTAL BRIEF FOR PETITIONERS

AARON M. STREETT
Counsel of Record
J. MARK LITTLE
TRAVIS L. GRAY
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, TX 77002
(713) 229-1234
aaron.streett@bakerbotts.com

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

The Government dutifully repeats Respondents' arguments, but the six dissenters below were correct: The Fourth Circuit's decision flouts this Court's precedent, creates an important circuit split, and threatens charter-school vitality.

I. THE DECISION BELOW CONTRADICTS THIS COURT'S PRECEDENTS

A. The Government defends the Fourth Circuit's reliance on *West* v. *Atkins*, 487 U.S. 42 (1988), to conclude that state action arises whenever the state contractually delegates the partial fulfillment of a state-constitutional obligation to a private entity. Under that sweeping view, state action would cover not only charter-school operators, but also highway and defense contractors, and even charities that assist states in delivering social-welfare

services. Pet. 28-29; Reply 5; Catholic Charities Br. 7-8; Jewish Coalition Br. 6-12. This Court never intended its narrow, unanimous decision in *West* to create such a sea change. See *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840-841 (1982) ("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," whose acts "do not become acts of the government" because they "perform[] public contracts.").

Indeed, the Court has sharply limited *West*'s scope. In *American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40 (1999), the Court explained that in *West*, "the State was constitutionally obligated to provide medical treatment to injured inmates, and the delegation *of that traditionally exclusive public function* to a private physician gave rise to a finding of state action." *Id.* at 55 (emphasis added). Thus, *West* does not extend to all delegations of "constitutional obligations," U.S. Br. 10, but only to those that involve traditionally exclusive government functions. *West* therefore is not a freestanding state-action category, but only a subset of the public-function category. Unsurprisingly, then, in *Manhattan Community Access Corp.* v. *Halleck*, 139 S. Ct. 1921 (2019), the Court demoted *West* to a footnote. *Id.* at 1929 n.1. While states have a constitutional obligation to administer government-run forums for free speech, state action does not arise when the state authorizes a private entity to operate a public-access cable channel. *Id.* at 1929-1930. That is because "hosting speech by others is not a traditional, exclusive public function," *id.* at 1930, and "the government has no such obligation to operate public access channels." *Id.* at 1929 n.1.

The Government and the Fourth Circuit ignore these key strictures on *West*. Providing primary education is not a traditionally exclusive state function. Pet. 20-24;

Reply 2-3; pp. 3-6, *infra*. And while North Carolina has an obligation to provide public schools—which it does—it has "no such obligation to operate" charter schools, *Halleck*, 139 S. Ct. at 1929 n.1. Consequently, no state action exists when private entities operate charter schools as an *additional* option. Pet. App. 73a (Quattlebaum, J., dissenting).

The Government cannot dispute that only the decision below extends *West* beyond correctional institutions. See Pet. 28-30; *Howell* v. *Father Maloney's Boys' Haven, Inc.*, 976 F.3d 750, 754 (6th Cir. 2020) (Sutton, J.) (collecting cases limiting *West* to state-run "correctional setting[s]"). And contrary to the Government's assertion (at 12), *West*'s correctional setting and the concomitant absence of inmate choice are important to its narrow holding. The Court emphasized that "it is only those physicians authorized by the State to whom the inmate may turn." 487 U.S. at 55. 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, in contrast, 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. Pet. App. 74a (Quattlebaum, J., dissenting).

B. The Government next defends the holding that Charter Day School, Inc. serves a traditionally exclusive public function. It declares that Charter Day School, Inc. operates a "public" school and thus attempts to limit the inquiry to whether "public" education is a traditionally exclusive state function. But the Government blurs the lines between petitioner Charter Day School, Inc.—a private, nonprofit corporation—and the public school it operates. Pet. App. 4a & n.1. And the Government never

responds to Petitioners' showing that the school's public label is immaterial to the state-action inquiry, especially when the state chose *private* operation to promote *independence* from the state. 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.'"). Nor does the Government explain why outcome-determinative modifiers like "free" or "public" are relevant to the *function* Charter Day School, Inc. serves. Pet. 20; Reply 2-3.

The Government trumpets that Charter Day School, Inc. holds a state charter. See U.S. Br. 13-14. But that does not support state-actor status. *San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522, 543-544 (1987) (private entities holding governmental charters "do not thereby lose their essentially private character"). Nor was the school (much less Charter Day School, Inc.) "established by state-granted charters" in any meaningful sense. U.S. Br. 14. Rather, the school arises from a "contract[ual]" partnership between the state and a preexisting private corporation. N.C. Gen. Stat. § 115C-218.15(c). Every contractor who creates an enterprise to fulfill governmental functions exercises "power possessed by virtue of state law," U.S. Br. 11, in precisely the same sense as Charter Day School, Inc. Such entities do not become state actors even "by reason of * * * total engagement in performing public contracts." *Rendell-Baker*, 457 U.S. at 841.

The Government sums up its case as follows:

> North Carolina's designation of charter schools as "public" * * * reflects North Carolina's decision to create a system of public charter schools established by state-granted charters, integrated into

> the State's public-school system, supervised by the State Board of Education, and treated as public institutions for a variety of state-law purposes—including, as particularly relevant here, student codes of conduct and disciplinary procedures.

U.S. Br. 14. Even if this accurately described Charter Day School, Inc., all of it could equally be said of the "public utility" in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974):

> [Pennsylvania's] designation of [public utilities] as "public" reflects [Pennsylvania's] decision to create a system of [utilities] established by state-granted charters,[1] integrated into the State's [utility-regulatory] system,[2] supervised by the [Pennsylvania Public Utility Commission],[3] and treated as public institutions for a variety of state-law purposes, including [for their obligation to serve all customers within their service area].[4]

Yet the public utility was not a state actor because "the supplying of utility service is not traditionally the exclusive prerogative of the State." *Id.* at 353. Neither is providing primary education. Pet. 22-24; Reply 2-3.

That same test illustrates why the decision below cannot be squared with *Rendell-Baker*. Just as providing education to "maladjusted" students is not a traditionally exclusive public function, 457 U.S. at 842, neither is providing education to mainstream elementary-school students. The facts that the *Rendell-Baker* school was "not established by a state-granted charter, is not designated or treated as a public entity by state law, is

---

[1] *Id.* at 346; *id.* at 366 (Marshall, J., dissenting).

[2] *Id.* at 346.

[3] *Ibid.*

[4] *Id.* at 353.

not required to comply with the state and federal constitutions, and is not required to be tuition-free and open to all," U.S. Br. 13, have no bearing on that dispositive inquiry.

II. THERE IS A SPLIT

The Government 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.

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 Government insists that "the Ninth Circuit rejected a distinct and broader theory of state action" by holding that the school's public character did not make "all charter schools" state actors "for all purposes." U.S. Br. 17. But the Fourth Circuit accepted an equally broad theory. Compare Pet. App. 22a ("It was North Carolina's sovereign prerogative to treat these state-created and state-funded entities as public. Rejecting the state's designation * * * would infringe on North Carolina's sovereign prerogative[.]"), with *Caviness*, 509 F.3d at 816 (rejecting the argument that "the state's statutory characterization is necessarily controlling").

The Government invokes *Caviness*'s "employment context" to modestly claim that its reasoning "did not foreclose the possibility" of finding state action for conduct "more closely tied to [charter schools'] educational mission." U.S. Br. 17-18. Even accepting the dubious premise that dress codes are more integral to education

than teacher-employment decisions, the Government is mistaken. While private entities can be state actors for some purposes and not others, U.S. Br. 17, that is because the state might compel some actions and not others. *Rendell-Baker*, 457 U.S. at 841. But the specific type of challenged conduct is irrelevant to whether education is a traditionally exclusive state function. See Pet. 21. Accordingly, courts have had no trouble applying *Rendell-Baker*—an employment 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); *Robert S.* v. *Stetson Sch., Inc.*, 256 F.3d 159, 168 (3d Cir. 2001) (rejecting distinction of *Rendell-Baker* as an employment case and applying it to student-discipline case). And Ninth Circuit courts readily perceive that *Caviness* precludes a state-action finding in charter-school student-discipline cases. *E.g.*, *I.H. ex rel. Hunter* v. *Oakland Sch. for Arts*, 234 F. Supp. 3d 987, 992-993 (N.D. Cal. 2017).

In the end, the Government is forced to concede that *Caviness* "rejected the plaintiff's argument that the school's provision of 'public educational services' was a traditional and exclusive state function." U.S. Br. 18. And the Government cannot contest that the Fourth Circuit did the opposite, accepting Respondents' gerrymandered formulation to hold that "free, public education" was a traditionally exclusive state function. Pet. App. 8a, 19a-22a. This admitted conflict with the Nation's largest circuit warrants review. The Government rejoins only that the Ninth Circuit did not consider "whether Arizona's constitution, like North Carolina's, imposes a duty to provide free public education" and "whether Arizona established charter schools to fulfill that duty." U.S. Br. 18. But that inquiry would go only to the Fourth Circuit's erroneous, freestanding *West*-delegation

theory of state action, not the public-function test that the *Caviness* court was applying. On that critical question, circuits are divided.

B. *Logiodice* involved (1) a student-discipline claim (2) against a private entity that contracted to operate the district's *only* publicly funded school (3) to fulfill the state's constitutional obligation to provide education. Pet. 14-15. As in *Caviness*, the *Logiodice* court refused to rig the traditionally-exclusive-state-function test by asking whether "public" education fits the bill. 296 F.3d at 27.

The Government notes that the *Logiodice* school was nominally "private," ignoring that it was tuition-free and open to all. In any case, Charter Day School, Inc. is also a "private" corporation, and a "public" or "private" label is irrelevant under this Court's caselaw. See Reply 2-3.

Logiodice's outcome did not turn on Maine's unique history of contracting with private entities to provide public education. U.S. Br. 16-17. The First Circuit spoke more broadly in applying the traditionally-exclusive-state-function test: "In Maine, *as elsewhere*, schooling, including high school education, is regularly and widely performed by private entities; this has been so from the outset of *this country's* history." *Logiodice*, 296 F.3d at 26-27 (emphases added); *id.* at 26 ("Obviously, education is not and never has been a function reserved to the state."). That same analysis would dictate that the primary education Charter Day School, Inc. provides is not a traditionally exclusive state function.

The Government suggests that the *Logiodice* school enjoyed more autonomy in setting discipline policies than Charter Day School, Inc. does. U.S. Br. 16. Even if that were true, it is undisputed that North Carolina law does not prescribe the content of charter-school dress codes. Pet. App. 12a. Regulation does not convert private be-

havior into state action unless the regulation compels or influences the challenged conduct. *Rendell-Baker*, 457 U.S. at 841.

Remarkably, the Government *completely omits* that *Logiodice* rejected the *West*-delegation theory that the Fourth Circuit embraced. 296 F.3d at 29. 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 that *West* "emphasized" that "the plaintiff was literally a prisoner of the state (and therefore a captive to whatever doctor the state provided)," unlike the student-plaintiff who "was not required to attend [the school]." *Id.* at 29. The First Circuit correctly understood *West*'s limits and declined to extend it to the education context; the Fourth Circuit (and the Government) advocate an extravagant reading of *West* that would revolutionize state-action law. That important conflict warrants review.

III. The Government's "Vehicle" Arguments Fall Short

A. The Government errs in claiming that resolving the state-action question will not "alter CDS's legal obligations" because the charter independently requires constitutional compliance. U.S. Br. 21-22. Subjecting charter-school operators to constitutional requirements as a contractual matter is a far cry from subjecting them to individual Section 1983 suits as state actors. Reversing here will eliminate the Section 1983-based injunction and thus alter Petitioners' current legal obligation to rescind its preferred policy. Such a decision would also wipe out the Fourth Circuit's constitutional ruling, leaving no judicial application of the Equal Protection Clause to bind Charter Day School, Inc. By contrast, the state may en-

force the charter's constitutional-compliance requirement only through revoking the charter or a state-court breach-of-contract action. N.C. Gen. Stat. § 115C-218.95. But the state has not asserted a constitutional violation against Charter Day School, Inc. for 20 years, and there is no indication it would act differently now. A speculative, discretionary action by the state—with an unknown outcome—is worlds away from this Section 1983 action enforced via federal-court injunction.

The Court should not await a case from a state that declines to impose constitutional requirements on charter schools. The existence (or not) of such contractual requirements is legally irrelevant to the state-action questions presented here, so plenary review would provide guidance to all charter-school operators. Reply 10. Plus, states and charter-school operators need answers now—not years later. See Great Hearts Academies Br. 3.

B. The potential outcome on remand of the Title IX and third-party-beneficiary claims should not discourage review of the separate and important state-action issue. Reply 9.[5] Cases invalidating dress codes under Title IX are virtually non-existent, Pet. App. 134a, and students cannot sue as third-party beneficiaries to enforce educational contracts. *E.g.*, *Schilling ex rel. Foy* v. *Employers Mut. Cas. Co.*, 569 N.W.2d 776, 783 (Wisc. App. 1997) (collecting cases). It is thus wholly speculative that Respondents will obtain relief on these claims. The Court does not deny review of certworthy issues merely because there is a theoretical possibility that the respond-

[5] The Government cannot dispute that the Title IX claim provides less relief than the Section 1983 claim because the Petitioner board members are not proper Title IX defendants. Reply 9. That Charter Day School, Inc.'s by-laws indemnify board members, U.S. Br. 22 n.5, cannot change that legal reality.

ent could obtain similar relief on other, independent grounds at some future date.

IV. THE ISSUE PRESENTED IS IMPORTANT

The Government asserts that the decision below "would leave [courts] free to reach a different conclusion about the status of charter-school operators in a State with a different history, different constitutional requirements, or a different statutory regime." U.S. Br. 19. Not so. The Government does not dispute that all states have a constitutional obligation to provide education. Pet. 33. Nor does it dispute that nearly all states treat charter schools as part of their "public school" system. Pet. App. 192a-194a. Under the decision below, that is sufficient for nearly all charter-school operators to be deemed state actors. States' Br. 3 ("The aspects of North Carolina law that led the Fourth Circuit to impose liability * * * are hardly unique to that State."); see *id.* at 19-20. Equally troubling, the Fourth Circuit has already applied its new, sweeping *West*-delegation theory to hold that private adoption agencies are state actors. *E.R.L.* v. *Adoption Advocacy, Inc.*, No. 21-1980, 2023 WL 1990300, at *2-3 (4th Cir. Feb. 14, 2023).

The Government beggars belief by asserting that deeming charter-school operators state actors will not constrain innovation. Petitioners and their seven *amici* disagree. See, *e.g.*, Pet. 30-32 (explaining various policies that could lead to constitutional claims); Great Hearts Academies Br. 18-23 (discussing threat to single-sex charters and charters with strict disciplinary policies); IWLC Br. 3 (discussing "constitutional litigation" over "hiring and firing, extracurricular activities, restroom assignments, and the composition of athletic teams"). Imposing a Section 1983, fee-shifting remedy has independent, tangible, and chilling consequences on charter-school operators and their volunteer boards.

Petitioners, their *amici*, and the dissenters do not fear the stifling effects of the decision below because they want to "experiment with unconstitutional discrimination." U.S. Br. 21. Many successful charter-school policies would be constitutionally questionable in government-run schools. Yet states have acted to "maximize" "individual choice," *Jackson*, 419 U.S. at 372 (Marshall, J., dissenting), by allowing private actors to offer a menu of creative options for parents. Even in states that require charter schools to follow constitutional norms, the specter of burdensome Section 1983 actions would allow disgruntled students or teachers to veto innovation that the contracting state applauds.

States and Congress—who fund charter schools— also need this Court's guidance. The Oklahoma Attorney General recently lamented that "the law is currently unsettled as to whether charter schools are state actors" and expressed "hope[] that the U.S. Supreme Court will definitively rule on this unsettled issue next term." Okla. Att'y Gen. Op. No. 2022-7.[6] The Congressional Research Service has likewise decried the "confusion" that the Fourth Circuit's opinion caused but explained that "[i]f the Supreme Court hears the case, its decision could help impose consistency as to whether public charters are state actors." Madeline W. Donley, *Are Public Charter Schools State Actors? Fourth Circuit Says "Yes"*, Cong. Res. Serv. (May 5, 2023).[7] The Court should grant review to relieve the legal uncertainty that now plagues charter schools nationwide.

---

[6] https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/rebecca_wilkinson_ag_opinion_2022-7_virtual_charter_schools.pdf

[7] https://crsreports.congress.gov/product/pdf/LSB/LSB10958

Respectfully submitted.

AARON M. STREETT
Counsel of Record
J. MARK LITTLE
TRAVIS L. GRAY
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, TX 77002
(713) 229-1234
aaron.streett@bakerbotts.com

Counsel for Petitioners

June 2023