No. __-____

IN THE
Supreme Court of the United States

CHARTER DAY SCHOOL, INC., ET AL,

Petitioners,

v.

BONNIE PELTIER, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

The question presented is:

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

PARTIES TO THE PROCEEDINGS BELOW

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

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

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

CORPORATE DISCLOSURE STATEMENT

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

STATEMENT OF RELATED PROCEEDINGS

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

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

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL PROVISION INVOLVED

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

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

PRELIMINARY STATEMENT

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

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

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

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

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

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

STATEMENT

I. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Proceedings Below

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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September 2022

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1001

BONNIE PELTIER, ET AL.,
Plaintiffs - Appellees,

v.

CHARTER DAY SCHOOL, INC. ET AL.,
Defendants - Appellants,

and

THE ROGER BACON ACADEMY, INC.,
Defendant.

No. 20-1023

BONNIE PELTIER, ET AL.,
Plaintiffs - Appellants,

v.

CHARTER DAY SCHOOL, INC., ET AL.
Defendants - Appellees,

and

THE ROGER BACON ACADEMY, INC.,
*Defendant*s

ON REHEARING EN BANC

PUBLISHED

Appeals from the United States District Court for the Eastern District of North Carolina, at Wilmington.
Malcolm J. Howard, Senior District Judge.
(7:16−cv−00030−H−KS)

Argued: December 10, 2021 Decided: June 14, 2022
Before GREGORY, Chief Judge, and WILKINSON, NIEMEYER, MOTZ, KING, AGEE, WYNN, DIAZ, THACKER, HARRIS, RICHARDSON, QUATTLEBAUM, RUSHING, and HEYTENS, Circuit Judges, and KEENAN and FLOYD, Senior Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Senior Judge Keenan wrote the opinion, in which Chief Judge Gregory and Judges Motz, King, Wynn, Diaz, Thacker, Harris, Heytens, and Senior Judge Floyd joined. Judge Wynn wrote a concurring opinion, in which Judges Motz, Thacker, Harris, and Senior Judge Keenan joined. Senior Judge Keenan wrote a concurring opinion, in which Judge Thacker joined. Judge Quattlebaum wrote an opinion dissenting in part and concurring in part, in which Judges Richardson and Rushing joined, and in which Judges Wilkinson, Niemeyer, and Agee joined dissenting in part. Judge Wilkinson wrote a dissenting opinion, in which Judges Niemeyer and Agee joined.

ARGUED: Aaron Michael Streett, BAKER BOTTS L.L.P., Houston, Texas, for Appellants/Cross-Appellees. Galen Leigh Sherwin, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellees/Cross-Appellants. **ON BRIEF:** J. Mark Little, Travis L. Gray, BAKER BOTTS L.L.P., Houston, Texas,

for Appellants/Cross-Appellees. Ria Tabacco Mar, Jennesa Calvo-Friedman, Louise Melling, Amy Lynn Katz, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Irena Como, ACLU OF NORTH CAROLINA LEGAL FOUNDATION, Raleigh, North Carolina; Jonathan D. Sasser, ELLIS & WINTERS LLP, Raleigh, North Carolina, for Appellees/Cross-Appellants. Jeanette K. Doran, NORTH CAROLINA INSTITUTE FOR CONSTITUTIONAL LAW, Raleigh, North Carolina, for Amicus North Carolina Institute for Constitutional Law. Paul B. Stam, Jr., R. Daniel Gibson, STAM LAW FIRM, PLLC, Apex, North Carolina, for Amici The Civitas Institute, Inc. and Paul B. Stam, Jr. Brian R. Matsui, Aaron D. Rauh, MORRISON & FOERSTER LLP, Washington, D.C., for Amici Society for Research in Child Development, Society for the Psychological Study of Social Issues, Cognitive Development Society, and Society for Research on Adolescence. Alice O'Brien, Eric A. Harrington, Rebecca Yates, NATIONAL EDUCATION ASSOCIATION, Washington, D.C.; Verlyn Chesson-Porte, NORTH CAROLINA ASSOCIATION OF EDUCATORS, Raleigh, North Carolina, for Amici The National Education Association and North Carolina Association of Educators. Emily Martin, Neena Chaudhry, Sunu Chandy, Adaku Onyeka-Crawford, NATIONAL WOMEN'S LAW CENTER, Washington, D.C.; Courtney M. Dankworth, DEBEVOISE & PLIMPTON LLP, New York, New York, for Amici National Women's Law Center and Coalition of Civil Rights and Public Interest Organizations. Jayme Jonat, Nina Kanovitch Schiffer, HOLWELL SHUSTER & GOLDBERG LLP, New York, New York, for Amicus Professor Ruthann Robson. Kristen Clarke, Assistant Attorney General, Thomas E. Chandler, Jason Lee,

Appellate Section, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus United States. Christopher A. Brook, PATTERSON HARKAVY LLP, Chapel Hill, North Carolina, for Amicus National Alliance for Public Charter Schools.

BARBARA MILANO KEENAN, Senior Circuit Judge:

Charter Day School (CDS),[1] a public charter school in North Carolina, requires female students to wear skirts to school based on the view that girls are "fragile vessels" deserving of "gentle" treatment by boys (the skirts requirement). The plaintiffs argue that this sex-based classification grounded on gender stereotypes violates the Equal Protection Clause of the Fourteenth Amendment, and subjects them to discrimination and denial of the full benefits of their education in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (Title IX).

In response, despite CDS' status as a public school under North Carolina law, CDS and its management company disavow accountability under the Equal Protection Clause by maintaining that they are not state actors. These entities also assert that Title IX, the federal statute designed to root out gender discrimination in schools, categorially does not apply to dress codes.

Upon our review, we affirm the district court's entry of summary judgment for the plaintiffs on their Equal

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[1] Charter Day School, Inc. operates four charter schools in North Carolina, including Charter Day School. The non-profit entity CDS, Inc. and its trustees, rather than the school itself, are the named defendants in this case. For ease of reference, we will refer to the school, its non-profit parent entity, and the trustees collectively as "CDS" throughout this opinion.

Protection claim against CDS, and the court's judgment in favor of the management company on that claim. We also vacate the court's summary judgment award in favor of all defendants on the plaintiffs' Title IX claim and remand for further proceedings on that claim.

I.

CDS, a public charter school in Brunswick County, North Carolina, educates male and female[2] students in kindergarten through the eighth grade. The founder of the school, Baker A. Mitchell, Jr., incorporated defendant Charter Day School, Inc. in 1999. The following year, he obtained a charter from the state of North Carolina, pursuant to the North Carolina Charter Schools Act of 1996, N.C. Gen. Stat. § 115C-218 *et seq.* CDS' policies are established by the volunteer members of its Board of Trustees (the Board). Mitchell initially served as the Board's chairman and now serves as its non-voting secretary.

Enrollment at CDS is open to all students who are eligible to attend North Carolina public schools. *See* N.C. Gen. Stat. § 115C-218.45(a). CDS receives 95% of its funding from federal, state, and local governmental authorities.

After applying for its charter, CDS entered into a "charter school management contract" (the management agreement) with defendant Roger Bacon Academy, Inc. (RBA), a for-profit corporation founded and owned by Mitchell. Under the terms of the management agreement, RBA is responsible for the day-to-day operations of CDS, including hiring school personnel and carrying out the

[2] Because the plaintiffs challenge the skirts requirement only as discriminatory toward cisgender girls, we do not address the effects of the policy on any other students.

school's education program. CDS maintains a bank account on which RBA is a signatory and from which RBA receives reimbursements for fees and operational expenses.

Since its inception, CDS, at the direction of Mitchell and the Board, has "emphasize[d] traditional values," including a "traditional curriculum, traditional manners and traditional respect." These stated priorities pervade many areas of the school's practices. For example, CDS teaches a "classical curriculum," utilizing a "direct instruction" method. Overall, as one Board member explained, CDS operates "more like schools were 50 years ago compared to now."

As part of this educational philosophy, CDS has implemented a dress code to "instill discipline and keep order" among students. Among other requirements, all students must wear a unisex polo shirt and closed-toe shoes; "[e]xcessive or radical haircuts and colors" are prohibited; and boys are forbidden from wearing jewelry. Female students are required to wear a "skirt," "jumper," or "skort." In contrast, boys must wear shorts or pants. All students are required to comply with the dress code unless they have physical education class, when they wear unisex physical education uniforms, or an exception is made for a field trip or other special event. A student's failure to comply with the dress code requirements may result in disciplinary action, including notification of the student's parent, removal from class to comply with the dress code, or expulsion, though no student has been expelled for violating the dress code.

In 2015, plaintiff Bonnie Peltier, the mother of a female kindergarten student at CDS, informed Mitchell that she objected to the skirts requirement. Mitchell responded to Peltier in support of the policy, stating:

> The Trustees, parents, and other community supporters were determined to preserve chivalry and respect among young women and men in this school of choice. For example, young men were to hold the door open for the young ladies and to carry an umbrella, should it be needed. Ma'am and sir were to be the preferred forms of address. There was felt to be a need to restore, and then preserve, traditional regard for peers.

Mitchell later elaborated that chivalry is "a code of conduct where women are treated, they're regarded as a fragile vessel that men are supposed to take care of and honor." Mitchell further explained that, in implementing the skirts requirement, CDS sought to "treat[] [girls] courteously and more gently than boys."

Peltier and two other CDS parents and guardians, on behalf of their female children (the plaintiffs), filed suit in the Eastern District of North Carolina against CDS, the members of the Board, and RBA (the defendants), alleging violations of the Equal Protection Clause and Title IX.[3] The plaintiffs alleged that the skirts requirement is a sex-based classification rooted in gender stereotypes that discriminates against them based on their gender. The parties later filed cross-motions for summary judgment.

In support of their summary judgment motion, the plaintiffs submitted evidence of the tangible and intangible harms they suffer based on the skirts requirement. One plaintiff testified that the skirts requirement conveys the school's view that girls "simply

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[3] The plaintiffs also alleged state law claims for breach of the charter and a violation of the North Carolina Constitution. These claims are pending in the district court and are not at issue in this appeal.

weren't worth as much as boys," and that "girls are not in fact equal to boys." Another plaintiff stated that the skirts requirement "sends the message that girls should be less active than boys and that they are more delicate than boys," with the result that boys "feel empowered" and "in a position of power over girls."

The plaintiffs also described the impact of the skirts requirement on their ability to participate in school activities. On one occasion, when a first-grade female student wore shorts to school due to a misunderstanding of the dress code, she was removed from class and was required to spend the day in the school's office. The plaintiffs also explained that they avoid numerous physical activities, including climbing, using the swings, and playing soccer, except for days on which they are permitted to wear their unisex physical education uniforms. The plaintiffs further testified that they cannot participate comfortably in school emergency drills that require students to crawl and kneel on the floor, fearing that boys will tease them or look up their skirts. Both parties presented evidence from expert witnesses regarding the effects that the skirts requirement and gender stereotypes have on female students.

The district court concluded that CDS, in imposing and implementing the skirts requirement, was a state actor for purposes of the Equal Protection claim brought under 42 U.S.C. § 1983. The court reasoned that CDS' provision of a free, public education is a function historically and exclusively performed by the state and that, therefore, CDS' conduct fairly is attributable to the state of North Carolina. However, with respect to RBA, the court concluded that RBA does not have a sufficiently close tie to the state to qualify as a state actor. On the merits of the Equal Protection claim, the court held that the skirts

requirement violates the Equal Protection Clause. The court therefore granted summary judgment to the plaintiffs on this claim against CDS.

The district court reached a different conclusion regarding the Title IX claim, holding that dress codes categorically are exempt from Title IX's prohibition against gender discrimination. The court reasoned that when the United States Department of Education rescinded a prior regulation governing dress codes, the Department reasonably had concluded that Congress did not intend for such policies to be subject to Title IX. The court thus granted summary judgment to the defendants on the Title IX claim. The district court denied summary judgment without prejudice on the plaintiffs' state law claims and entered partial final judgment on the remainder of the case.

On appeal, a panel of this Court reversed the district court's judgment on both the Equal Protection and the Title IX claims. *Peltier v. Charter Day Sch., Inc.*, 8 F.4th 251, 257 (4th Cir. 2021), *reh'g en banc granted*, 2021 WL 4892153 (4th Cir. 2021). That decision was vacated by a vote of the full Court, and we now consider this appeal en banc.

II.

We review de novo the district court's summary judgment decision. *Jessup v. Barnes Grp., Inc.*, 23 F.4th 360, 365 (4th Cir. 2022). Summary judgment may be granted only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(a)).

A. EQUAL PROTECTION CLAIM

We begin with the plaintiffs' Equal Protection claim. To prevail on this claim under Section 1983, the plaintiffs were required to show that: (1) the defendants deprived them of a constitutional right; and (2) the defendants did so "under color of [State] statute, ordinance, regulation, custom, or usage" (the state action requirement).[4] *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001) (alteration in original) (citation omitted). The state action requirement of Section 1983 "excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Id.* (citation and internal quotation marks omitted).

i. State Action Analysis

In assessing a private actor's relationship with the state for purposes of an Equal Protection claim, we must determine whether there is a "sufficiently close nexus" between the defendant's challenged action and the state so that the challenged action "may be fairly treated as that of the State itself." *Id.* at 314 (citation and internal quotation marks omitted). "What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. . . . [N]o one fact can function as a necessary condition across the board for finding state action." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

The Supreme Court has identified various circumstances in which a private actor may be found to

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[4] We treat the under-color-of-state-law requirement for a Section 1983 claim consistent with the state action requirement of the Fourteenth Amendment. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 341 (4th Cir. 2000).

have engaged in state action. The Court has held that when the state has coerced, or has provided "significant encouragement" to, a private actor, or if there is "pervasive entwinement of public institutions and public officials" with a private entity, that entity's conduct is considered state action. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Brentwood*, 531 U.S. at 298. Accordingly, a state's exercise of coercive power or compulsion is not a requirement for a finding of state action under Section 1983. *Brentwood*, 531 U.S. at 295.

A state also will be held responsible for a private actor's decision when the state's engagement or encouragement is so significant that "the choice must in law be deemed to be that of the State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). Both the Supreme Court and this Court have recognized the presence of such engagement or encouragement when a state has outsourced or otherwise delegated certain of its duties to a private entity, thereby rendering the acts performed under those delegated obligations "under color of law." *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 342 (4th Cir. 2000); *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 n.1 (2019) ("[A] private entity may, under certain circumstances, be deemed a state actor when the government has outsourced one of its constitutional obligations to [that] private entity."); *West v. Atkins*, 487 U.S. 42, 56 (1988) (holding that a state's delegation of its duty to provide medical care to prisoners rendered a contract physician a state actor). When the function at issue has been "traditionally the *exclusive* prerogative" of the state, a private entity executing that function has engaged in state action. *Rendell-Baker*, 457 U.S. at 842 (citation omitted); *see Goldstein*, 218 F.3d at 349 (holding that volunteer fire company in Maryland was state actor

because it performed essential governmental function traditionally and exclusively reserved to the state, received significant funding from state, was subject to extensive state regulation, and was deemed by state to be state actor); *see also Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1928-29.

The common foundation underlying these various and sometimes overlapping circumstances is that (1) there is no bright-line rule separating state action from private action, and that (2) the inquiry is highly fact-specific in nature. In other words, the state action analysis "lack[s] rigid simplicity" and, thus, a "range of circumstances" can support a finding of state action. *Brentwood*, 531 U.S. at 295, 303 (noting that "no one criterion must necessarily be applied" to establish state action); *Goldstein*, 218 F.3d at 343 (holding that no single factor standing alone establishes state action). We therefore consider the totality of the circumstances of the relationship between the private actor and the state to determine whether the action in question fairly is attributable to the state. *Goldstein*, 218 F.3d at 343.

ii. State Action Analysis—CDS

In the present case, because the state of North Carolina was not involved in CDS' decision to implement the skirts requirement, there was no "coercion" or "pervasive entwinement" by the state with the challenged conduct. *Blum*, 457 U.S. at 1004; *Brentwood*, 531 U.S. at 298. The plaintiffs argue, however, that CDS nevertheless qualifies as a state actor on a separate permitted basis, namely, that the operation of schools designated as "public" under North Carolina law is an exclusively public function that North Carolina, by statute, has delegated in part to charter school operators to fulfill the state's constitutional duty to provide free, universal elementary and secondary

schooling. *See Rendell-Baker*, 457 U.S. at 842; *West*, 487 U.S. at 56.

In response, CDS contends that like the private school at issue in *Rendell-Baker*, 457 U.S. 830, operators of North Carolina charter schools merely are private entities fulfilling contracts with the state. According to CDS, because no North Carolina student is required to attend CDS, the state has not delegated to charter schools its responsibility to educate North Carolina students. CDS also relies on the fact that the Supreme Court never has held that the provision of elementary and secondary education is exclusively a state function. Thus, CDS asks us to conclude that it merely is a private actor providing a service under its charter contract with the state. We disagree with CDS' argument.

The North Carolina Constitution mandates that the state "provide by taxation and otherwise for a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students." N.C. Const. art. IX, § 2, cl. 1. To fulfill this duty, in addition to establishing traditional public schools, the North Carolina legislature has authorized the creation of public charter schools that are overseen by a state board. N.C. Gen. Stat. § 115C-218; *see also* N.C. Const. art. IX, § 5 ("The State Board of Education shall supervise and administer the free public school system."). Charter schools may only operate under the authority granted to them by their charters with the state. *See id.* §§ 115C-218.15(c), 115C-218.5.

Among other requirements, charter schools must design their educational programming to satisfy student performance standards adopted by the state board of education, a requirement not applicable to non-public schools. *Id.* §§ 115C-218.85(a)(2), 115C-547 through -562.

The state may revoke a school's charter, among other reasons, for non-compliance with the terms of the charter, poor student performance, or poor fiscal management. *See id.* § 115C-218.95. Enrollment at charter schools is open to any student eligible to attend a public school in North Carolina. *Id.* § 115C-218.45.

In defining the nature of charter schools, North Carolina law expressly provides:

> A charter school that is approved by the State *shall be a public school* within the local school administrative unit in which it is located. All charter schools shall be accountable to the State Board for ensuring compliance with applicable laws and the provisions of their charters.

Id. § 115C-218.15(a)[5] (emphasis added); *see also id.* § 115C-218(c) (North Carolina Office of Charter Schools located within the Department of Public Instruction); *Sugar Creek Charter Sch., Inc. v. North Carolina*, 712 S.E.2d 730, 742 (N.C. Ct. App. 2011) (observing that charter schools are "indisputably public schools"); *Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ.*, 563 S.E.2d 92, 97-98 (N.C. Ct. App. 2002) (holding that charter schools are subject to same state budget format as traditional public schools, because the legislature "clearly expressed its intent" that charter schools "be treated as public schools"). And "for purposes of providing certain State-funded employee benefits," the North Carolina legislature has specified that "charter schools are *public schools* and that the employees of charter schools are *public school employees*." N.C. Gen.

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[5] Citing this statutory provision and the North Carolina Constitution, CDS' charter reiterates that charter schools are public schools under state law.

Stat. § 115C-218.90(a)(4) (emphasis added). Thus, under the plain language of these statutes, as a matter of state law, charter schools in North Carolina are public institutions.[6]

Consistent with this "public" designation, charter schools in North Carolina receive a per-pupil funding allotment from the state board of education based on the amount provided for students attending traditional public schools. *Id.* § 115C-218.105(a). The local school administrative unit where each student resides similarly transfers the student's share of local funding to the charter school that the student attends. *Id.* § 115C-218.105(c). As a result of these and other public funding mechanisms, CDS receives 95% of its funding directly from public sources.[7] Such substantial public funding,

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[6] The Supreme Court of North Carolina recently held that North Carolina charter schools are not state agencies entitled to sovereign immunity. *State ex rel. Stein v. Kinston Charter Acad.*, 866 S.E.2d 647, 650 (N.C. 2021). The court concluded that public charter schools are "local rather than statewide in character," and therefore cannot assert the immunity afforded to the state itself and to its agencies, but not to local government entities. *Id.* at 659. Thus, this holding recognizes that charter schools, like other public schools in North Carolina, are essentially local entities, as reflected in N.C. Gen. Stat. § 115C-218.15(a). As explained above, that provision states in part that "[a] charter school that is approved by the State shall be a public school *within the local school administrative unit* in which it is located." *Id.* (emphasis added). Accordingly, the court's holding that North Carolina charter schools are not state agencies is inapposite to our present analysis whether the challenged conduct of CDS, a non-profit corporation operating a North Carolina public school, constitutes state action.

[7] CDS also receives funding from the federal government pursuant to certain federal laws, including the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*

while not determinative, is a factor that we weigh in determining state action. *Goldstein*, 218 F.3d at 347.

The statutory framework of the North Carolina charter school system compels the conclusion that the state has delegated to charter school operators like CDS part of the state's constitutional duty to provide free, universal elementary and secondary education.[8] *See id.*, 218 F.3d at 342; *see also Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1929 n.1 (citing *West*, 487 U.S. at 56); N.C. Const. art. IX, § 2, cl. 1; N.C. Gen. Stat. § 115C-1. The state bears "an affirmative obligation" under the state constitution to educate North Carolina's students and partially has "delegated that function" to charter school operators, who have carried out the state's obligation by virtue of their charters with the state. *West*, 487 U.S. at 56; *see also Brent v. Wayne Cnty. Dep't of Hum. Servs.*, 901 F.3d 656, 676-77 (6th Cir. 2018) (holding that private foster care agencies were state actors because "Michigan is constitutionally required to protect children who are wards of the state from the infliction of unnecessary harm" and "contracted with [the defendants] to fulfill [the state's] duties" (citation and internal quotation marks omitted)). Thus, charter schools in North Carolina "exercise[] power possessed by virtue of state law and made possible only because the [school] is clothed with the authority of state law." *West*, 487 U.S. at 49 (citation and internal quotation marks omitted).

The Supreme Court has held that such a delegation of a state's responsibility renders a private entity a state

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[8] In implementing the state constitutional requirement to provide "a general and uniform system of free public schools," North Carolina guarantees students access to such education through high school, up to the age of 21. *See* N.C. Const. art. IX, § 2, cl. 1; N.C. Gen. Stat. § 115C-1.

actor. *See id.* at 56. In articulating the rationale for this rule, the Court explained that a state cannot delegate duties that "it is constitutionally obligated to provide and leave its citizens with no means for vindication of those [constitutional] rights." *See id.* at 56-57 & n.14 (citation omitted). So too, here. Were we to adopt CDS' position, North Carolina could outsource its educational obligation to charter school operators, and later ignore blatant, unconstitutional discrimination committed by those schools. We need look no further than the shameful history of state-sponsored racial discrimination in this country to reject an application of the Equal Protection Clause that would allow North Carolina to abdicate its duty to treat public schoolchildren equally. For the same reason, we will not assume that students' constitutional rights in these public schools will be protected merely because CDS' charter requires compliance with the federal and state constitutions. The right of Equal Protection under the Constitution inheres in the individual and is not dependent on the charter obligations of any North Carolina public school.

Next, the fact that students are not compelled to attend CDS and have the option of attending a traditional public school does not bear on the question whether CDS is a state actor. The ability of North Carolina's students to opt out of discriminatory treatment does not determine whether that treatment is attributable to the state. We look to the relationship between the charter school and the state to make this assessment. Otherwise, the state could be excused from engaging in discrimination because only some of its schools discriminate. *No* public school in North Carolina can violate the constitutional rights of its students. If a student wishes to attend a school with discriminatory policies, the student must select a private

institution not subject to the constraints of the Constitution.

CDS, however, attempts to distance itself from North Carolina's designation of charter schools as public institutions by characterizing its role as providing "educational services" generally, a function that has been fulfilled historically by both private and public entities. We disagree with CDS' use of this high level of generality. *See Rendell-Baker*, 457 U.S. at 842 (defining the school's function as the education of "maladjusted high school students," not "education" broadly); *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1929 (characterizing the holding in *Rendell-Baker* as applying to "special education"); *Mentavlos*, 249 F.3d at 316 (rejecting contention that "military-type training of non-enlisted students" was a power "traditionally reserved exclusively to the government"). Instead, the proper inquiry requires a narrower lens, namely, identifying the "function within the state system" that CDS serves. *West*, 487 U.S. at 55-56; *Rendell-Baker*, 457 U.S. at 838, 842.

Charter schools in North Carolina do not function merely as "an alternative method of primary education," akin to private schools and homeschooling.[9] First Dissent Op. 70-72. Characterizing the function of North Carolina charter schools in this manner ignores both the "free, universal" nature of this education and the statutory framework chosen by North Carolina in establishing this type of public school. CDS operates a "public" school,

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[9] As noted by the National Alliance for Public Charter Schools in their brief in support of the *plaintiffs'* petition for rehearing en banc in this case, North Carolina's Division of Nonpublic Education supervises private and home schools, while the state's Department of Public Instruction provides oversight for charter schools. *See* N.C. Gen. Stat. §§ 115C-548, 566(a), and 218(c).

under authority conferred by the North Carolina legislature and funded with public dollars, functioning as a component unit in furtherance of the state's constitutional obligation to provide free, universal elementary and secondary education to its residents. Accordingly, we hold that in operating a school that is part of the North Carolina public school system, CDS performs a function traditionally and exclusively reserved to the state. *Rendell-Baker*, 457 U.S. at 842.

Our conclusion is not affected by CDS' reliance on the Supreme Court's ultimate holding in *Rendell-Baker*, 457 U.S. 830. In evaluating whether a private entity's conduct amounts to state action, we "identify[] the specific conduct of which the plaintiff complains" to determine whether that conduct is "fairly attributable to the State." *Mentavlos*, 249 F.3d at 311 (citation and internal quotation marks omitted); *Brentwood*, 531 U.S. at 295. The challenged actions in *Rendell-Baker* involved certain personnel decisions at a private institution, matters clearly outside the purview of the state's regulation. 457 U.S. at 841-42.

In that decision, the Supreme Court explained that the private school's action in terminating the workers' employment was not attributable to the state for purposes of Section 1983, because "the education of maladjusted high school students" was not "traditionally the *exclusive* prerogative of the State." *Id.* at 834, 842-43 (citation omitted). The Court contrasted this narrow subset of education with "traditional public schools." *Id.* at 842. The Court thus explained that "the relevant question is not simply whether a private group is serving a 'public function.'" *Id.* Rather, "the relevant question" is whether "the function performed has been 'traditionally the *exclusive* [function] of the State.'" *Id.*

Thus, in *Rendell-Baker*, although the school's provision of education to those special students served a "public function" because that function largely was funded through the school's contracts with state and local governments, the Court reasoned that the private school was "not fundamentally different from many private corporations whose business depends primarily on contracts" to build physical infrastructure for the government. *Id.* at 840-42. "Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing" contractual services for public entities. *Id.* at 840-41.

In material contrast to the personnel decisions at issue in *Rendell-Baker*, CDS implemented its dress code, including the skirts requirement, as a central component of the public school's *educational* philosophy, pedagogical priorities, and mission of providing a "traditional school with a traditional curriculum, traditional manners[,] and traditional respect." By CDS' own admission, the skirts requirement directly impacts the school's core educational function and, thus, directly impacts the constitutional responsibility that North Carolina has delegated to CDS.

In yet another telling distinction between the private school in *Rendell-Baker* and the public school at issue here, we observe that the school's contracts with the state in *Rendell-Baker* specified that the school's employees were not government employees. *Id.* at 833. Here, however, North Carolina law designates employees of charter schools as public employees eligible to receive certain state benefits, including state-employee health and retirement plans. *See* N.C. Gen. Stat. § 115C-218.90(a)(4). The North Carolina legislature's action recognizing this special status of charter school employees and conferring

eligibility for these substantial governmental benefits on them underscores the public function of charter schools within the state's public school system.

These are not incidental or formalistic distinctions. We are not aware of any case in which the Supreme Court has rejected a state's designation of an entity as a "public" school under the unambiguous language of state law and held that the operator of such a public school was not a state actor.[10] We are not prepared to do so here. As discussed above, the North Carolina Constitution

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[10] The Supreme Court's decision in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), involving a public utility, provides a useful contrast to the point we make here. There, Pennsylvania had designated by statute "all companies engaged in providing gas, power, or water; all common carriers, pipeline companies, telephone and telegraph companies, sewage collection and disposal companies; and corporations affiliated with any company engaging in such activities" as "public utilit[ies]." *Id.* at 350 n.7. The Court nevertheless concluded that the defendant private power company was not a state actor, despite extensive state regulation and the company's state-granted monopoly status, concluding that the provision of utility services was neither a state function nor a municipal duty. *Id.* at 351-53. Thus, although the "primary object" of the law was "to serve the interests of the public," the "public utility" designation merely indicated that the utility would provide a service to the public. *Id.* at 351-53 & n.8.

Our conclusion also is not affected by the Supreme Court's decision in *Polk County v. Dodson*, 454 U.S. 312 (1981), in which the Court held that a public defender, employed by the state, does not act under color of state law for purposes of Section 1983 "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.* at 325. The Court reasoned that a public defender, like any defense attorney in a criminal case, engages in functions adversarial to the state and has a relationship with his client that is "identical to that existing between any other lawyer and client." *Id.* at 318, 320. Here, however, there is no such "value at odds with finding public accountability" for CDS. *Brentwood*, 531 U.S. at 303-04 (citing *Polk*, 454 U.S. at 323, and explaining that "[t]he state action doctrine does not convert opponents into virtual agents").

mandates the creation of free and uniform public schools, and the state fulfilled that obligation in part by enacting legislation authorizing the charter school system. It was North Carolina's sovereign prerogative to determine whether to treat these state-created and state-funded entities as public. Rejecting the state's designation of such schools as public institutions would infringe on North Carolina's sovereign prerogative, undermining fundamental principles of federalism.

Our conclusion likewise is not altered by CDS' reliance on the decisions of our sister circuits in *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806 (9th Cir. 2010), and *Logiodice v. Trustees of Maine Central Institute*, 296 F.3d 22 (1st Cir. 2002), which respectively held that certain schools were not state actors for purposes of personnel and student discipline decisions.[11] In the context of state-funded education, our totality-of-the-circumstances inquiry is guided not only by the factual circumstances of a plaintiff's claim, but also by the laws of the state regulating the school in question. We therefore do not read the decisions of our sister circuits as establishing bright-line rules applicable to every case, but

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[11] We also are unpersuaded by the first dissent's reliance on *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159 (3d Cir. 2001). First Dissent Op. 67-68. The school at issue was a private school providing education to juvenile sex offenders that was not obligated to accept any particular student or students. *Robert S.*, 256 F.3d at 162-63. The plaintiff had alleged that the school's staff had subjected him to physical and psychological abuse. *Id.* at 163. The Third Circuit found that the private school was not engaged in state action, relying primarily on the failure of the evidence to show that the school performed a function traditionally and exclusively reserved to the state, especially when the only schools offering similar services were also private schools. *Id.* at 166. This fact pattern does not bear any resemblance to the facts before us.

instead as evaluating the specific conduct challenged by the plaintiffs in the context of the governing state law. Here, the plaintiffs challenge a dress code provision that is central to the educational philosophy of a charter school deemed public under North Carolina law and funded accordingly. Thus, the Ninth Circuit's state-action analysis, involving Arizona law and a charter school's personnel decision, and the First Circuit's state-action analysis, involving Maine law and an issue of student discipline in a private school performing a state contract, do not impact our analysis here. *See Caviness*, 590 F.3d at 808; *Logiodice*, 296 F.3d at 24.

Ultimately, the state action inquiry in this case is not complicated: (1) North Carolina is required under its constitution to provide free, universal elementary and secondary schooling to the state's residents; (2) North Carolina has fulfilled this duty in part by creating and funding the public charter school system; and (3) 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. Accordingly, the public-school operator at issue here, CDS, implemented the skirts requirement as part of the school's educational mission, exercising the "power possessed by virtue of state law and made possible only because the [school] is clothed with the authority of state law." *West*, 487 U.S. at 49 (citation and internal quotation marks omitted). Under these circumstances, we will not permit North Carolina to delegate its educational responsibility to a charter school operator that is insulated from the constitutional accountability borne by other North Carolina public schools.

Contrary to our dissenting colleagues' views, nothing in our holding will stifle innovation in education provided by North Carolina's public charter schools. Innovative programs in North Carolina's public schools can and should continue to flourish, but not at the expense of constitutional protections for students.

The second dissent, however, in a non-sequitur that is both baffling and disturbing, suggests that historically black colleges and universities (HBCUs) will be imperiled if CDS is held to be a state actor. But the second dissent never explains its position, likely because it cannot. HBCUs that are public institutions have never been shielded from constitutional accountability. They have flourished because of the talent and hard work of their teachers and students. And these HBCUs have not been given the type of preferential treatment that all the dissenters would give CDS today.

Also, while purportedly addressing the state actor issue, the second dissent launches an attack on the merits of the case by lamenting the demise of chivalry in our society. In fact, the second dissent promotes chivalry during the age of knighthood as a model for CDS. Some scholars, however, paint a far grimmer picture of that age, describing it as a time when men could assault their spouses and commit other violent crimes against them with impunity. *See* Steven F. Shatz & Naomi R. Shatz, Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 Berkeley J. Gender L & Just. 64, 68-69 (2012) (citations omitted) ("[T]he 'Age of Chivalry' was a hard time for victims of domestic violence, when physically 'chastising' one's wife was considered an honorable knight's duty. . . . [T]he chivalrous knight [] was entitled to employ physical violence against his wife."). So, contrary

to the second dissent's view, chivalry may not have been a bed of roses for those forced to lie in it.

But there is much more for concern. The logical consequence of both dissents, and as freely acknowledged by CDS at oral argument in this case, is that innovation without accountability under the Equal Protection Clause could result in an African American student, another minority student, or a female student being excluded from full participation in North Carolina's charter schools with no recourse other than seeking to have the school's charter enforced or revoked. And how do a student and her parents go about that process? How many will just give up rather than having to confront the school system and to finance such a challenge?

The response of both dissents apparently is that these students should just move on to a different public school that values constitutional rights more than "innovative" exclusionary measures. That is no answer. Rather, the plain and obvious answer to the problem is to ensure that operators of public charter schools in North Carolina are not insulated from the constitutional accountability borne by the state's other public schools.[12] Courts may not subjugate the constitutional rights of these public-school children to the facade of school choice. Accordingly, we hold that the plaintiffs have established that CDS acted under color of state law for purposes of Section 1983.

iii. State Action Analysis—RBA

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[12] Contrary to our first dissenting colleague's attempt to sound the alarm that our decision will have a far-reaching impact on charter schools nationwide, First Dissent Op. 82, our analysis and conclusion narrowly focus on the statutory framework and language chosen by North Carolina's legislature in establishing North Carolina's charter schools, and on the conduct at issue affecting the state's core educational function.

We reach a different conclusion with respect to RBA, the for-profit management contractor of CDS. The plaintiffs assert that RBA's "intertwinement with CDS," its role in daily school operations, and its responsibility for enforcing the skirts requirement renders RBA a state actor. According to the plaintiffs, RBA and CDS are essentially indistinguishable entities and, thus, both qualify as state actors. Despite the close relationship between CDS and RBA, we disagree with the plaintiffs' argument.

There are several key differences between RBA, a for-profit management company, and CDS, the non-profit charter school operator authorized by the state to run a charter school. North Carolina has not chosen to delegate its constitutional duty to provide free, universal elementary and secondary education to for-profit management companies like RBA. To the contrary, RBA has no direct relationship with the state and is not a party to the charter agreement between CDS and North Carolina. Instead, RBA manages the daily functioning of the school under its management agreement with CDS. In working for CDS, rather than for the state of North Carolina, RBA's actions are more attenuated from the state than those of CDS, the entity authorized by the state to operate one of its public schools. We therefore conclude that RBA's actions implementing the skirts requirement are not "fairly attributable" to the state. *Brentwood*, 531 U.S. at 295.

iv. Merits of Equal Protection Claim Against CDS

Having determined that CDS is a state actor for purposes of Section 1983, we turn to consider the merits of the plaintiffs' Equal Protection claim involving CDS. The plaintiffs assert that the skirts requirement fails the rigors of heightened scrutiny, because CDS has not identified an

important governmental interest that justifies the sex-based classification. The plaintiffs contend that, instead, CDS merely has relied on gender stereotypes to support the skirts requirement, a plainly illegitimate justification under well-settled Supreme Court precedent.

In response, CDS argues that "comprehensive sex-specific dress codes" do not violate the Equal Protection Clause when male and female students are subject to comparable burdens under the policy. Thus, according to CDS, the skirts requirement does not violate the Constitution because boys also are limited in dressing and grooming options, including being subject to prohibitions on long hair and wearing jewelry, which are applicable only to male students. CDS further asserts that because its female students have achieved academic and extracurricular success, these students have not been "hobbled" by the skirts requirement. We disagree with CDS' arguments.

For many years, the Supreme Court and this Court have applied a heightened level of scrutiny to sex-based classifications like the skirts requirement. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017); *Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020). These decisions have been grounded on the Supreme Court's landmark decision in *Virginia*. There, the Supreme Court reviewed the Commonwealth of Virginia's attempt to preserve single-sex education for males at the Virginia Military Institute (VMI) by establishing a "leadership" program for women at a nearby private, women's college. *Virginia*, 518 U.S. at 519-20, 526. The Court rejected Virginia's attempt to

remedy its discriminatory treatment of women in this manner. *Id.* at 534.

In conducting its analysis, the Court emphasized that parties seeking to defend a state actor's sex-based classification "must demonstrate an exceedingly persuasive justification for that action." *Id.* at 531 (citation and internal quotation marks omitted). This "burden of justification" is a "demanding" one, and "rests entirely on the State." *Id.* at 533. The Court explained that the demanding review of intermediate scrutiny is required because of our nation's "volumes of history" demonstrating the denial of rights and opportunities to women because of their sex. *Id.* at 531. Accordingly, to satisfy such heightened scrutiny, a defendant "must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 533 (alterations, citation, and internal quotation marks omitted).

We approach sex-based classifications with skepticism because of the dangers enmeshed in such arbitrary sorting of people. As we have explained:

> [J]ustifications for gender-based distinctions that are rooted in overbroad generalizations about the different talents, capacities, or preferences of males and females will not suffice. Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection.

Knussman, 272 F.3d at 635-36 (citations and internal quotation marks omitted). In other words, we will reject sex-based classifications that "appear to rest on nothing

more than conventional notions about the proper station in society for males and females." *Id.* at 636; *see also Virginia*, 518 U.S. at 550 (rejecting defendant's reliance on "generalizations about 'the way women are'" to justify differential treatment); *Sessions*, 137 S. Ct. at 1692 (explaining that when the government's "objective is to exclude or 'protect' members of one gender in reliance on fixed notions concerning that gender's roles and abilities, the objective itself is illegitimate" (citation, quotation marks, and alteration omitted)).

In view of this precedent, we reject CDS' argument that the skirts requirement satisfies intermediate scrutiny because the dress code as a whole is intended to "help to instill discipline and keep order." Instead, we must evaluate whether there is an exceedingly persuasive justification for the *sex-based classification being challenged*, namely, the skirts requirement. CDS cannot justify the skirts requirement based on the allegedly "comparable burdens" imposed by other portions of the dress code that are applicable only to male students. A state actor's imposition of gender-based restrictions on one sex is not a defense to that actor's gender-based discrimination against another sex.[13]

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[13] To the extent that other courts have endorsed a "comparable burdens" test for sex-specific dress codes, we respectfully disagree with that view. *See Hayden v. Greensburg Comm. Sch. Corp.*, 743 F.3d 569, 577-82 (7th Cir. 2014) (in dicta, collecting cases and discussing principles of the comparable burdens test); *cf. Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc) (employing such a test in the Title VII context without considering the Equal Protection Clause). These cases rely heavily on precedent from the 1970s affirming the validity of dress codes based on "traditional" notions of appropriate gender norms. As explained above, any sex-specific dress or grooming policy, like any other sex-based classification, must be substantially related to an important

We also observe at the outset that the agreement of some parents to the sex-based classification of the skirts requirement is irrelevant to our Equal Protection analysis. No parent can nullify the constitutional rights of other parents' children.

Applying the demanding lens of intermediate scrutiny, we conclude that the skirts requirement is not supported by any important governmental objective and, thus, falls woefully short of satisfying this constitutional test. CDS does not attempt to disguise the true, and improper, rationale behind its differential treatment of girls, which plainly does not serve an important governmental interest. In his initial response to a parent's objection to the requirement, Baker Mitchell, the founder of CDS, explained that the skirts requirement embodies "traditional values." According to Mitchell, the requirement for girls to wear skirts was part of CDS' effort "to preserve chivalry and respect among young women and men," which also included requiring boys "to hold the door open for the young ladies and to carry an umbrella" to keep rain from falling on the girls. Mitchell later elaborated that chivalry is "a code of conduct where women are . . . regarded as a fragile vessel that men are supposed to take care of and honor." Mitchell explained that in implementing the skirts requirement, CDS sought to "treat [girls] courteously and more gently than boys." CDS' Board members agreed with these stated objectives, including CDS' goal of fostering "traditional roles" for boys and girls.

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governmental objective. *Virginia*, 518 U.S. at 533. Thus, applying the holding in *Virginia*, we do not compare the relative "burdens" that CDS' dress code places on its female and male students.

It is difficult to imagine a clearer example of a rationale based on impermissible gender stereotypes. On their face, the justifications proffered by CDS "rest on nothing more than conventional notions about the proper station in society for males and females." *Knussman*, 272 F.3d at 636; *see also Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (a sex-based classification reflecting "archaic and stereotypic notions . . . is illegitimate"); *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994) (rejecting "the very stereotype the law condemns" as a justification for a state's sex-based policy (citation omitted)). Under long-standing precedent of the Supreme Court and this Circuit, the sex-based stereotypes advanced by CDS utterly fail to supply the "exceedingly persuasive justification" necessary for the skirts requirement to survive constitutional scrutiny.[14] *Virginia*, 518 U.S. at 531; *Sessions*, 137 S. Ct. at 1698; *Grimm*, 972 F.3d at 608. Thus, in the absence of any important governmental objective supporting CDS' skirts requirement, we hold that the skirts requirement fails intermediate scrutiny and facially violates the Equal Protection Clause.

In reaching this conclusion, we observe that nothing in the Equal Protection Clause prevents public schools from teaching universal values of respect and kindness. But those values are never advanced by the discriminatory treatment of girls in a public school. Here, the skirts requirement blatantly perpetuates harmful gender

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[14] Because we conclude that CDS has not satisfied its burden to establish an "exceedingly persuasive" justification for the skirts requirement, we do not address whether the policy is "substantially related" to an important governmental objective. *Virginia*, 518 U.S. at 533. For the same reason, we need not consider the ample evidence of the harm the plaintiffs suffered due to the skirts requirement and the pernicious gender stereotypes that the dress code communicated to CDS' students.

stereotypes as part of the public education provided to North Carolina's young residents. CDS has imposed the skirts requirement with the express purpose of telegraphing to children that girls are "fragile," require protection by boys, and warrant different treatment than male students, stereotypes with potentially devastating consequences for young girls. If CDS wishes to continue engaging in this discriminatory practice, CDS must do so as a private school without the sanction of the state or this Court.

B. TITLE IX CLAIM

We next consider the plaintiffs' cross-appeal of the district court's summary judgment award on the Title IX claim in favor of the defendants. The plaintiffs allege that when the defendants imposed the skirts requirement, they violated Title IX by excluding the plaintiffs from participation in CDS activities, denying them the full benefit of their education and subjecting them to discrimination because of their sex. *See* 20 U.S.C. § 1681(a). According to the plaintiffs, the district court erred in holding that Title IX categorically does not apply to sex-based dress codes because the United States Department of Education (Department) rescinded an earlier regulation governing such policies. In the plaintiffs' view, the unambiguous language of Title IX prohibiting discrimination based on sex encompasses sex-based dress codes and, thus, no deference should be given to the Department's regulatory decision.

In response, the defendants contend that because Title IX does not explicitly reference dress codes, we should defer to the Department's "authoritative interpretation" of the statute. In the defendants' view, the Department's decision to rescind the regulation addressing dress codes manifested the agency's reasonable assessment that such

a regulation is not authorized under the statute. Separately, RBA also argues that it is not a recipient of federal funds and, thus, is not subject to Title IX. We disagree with the defendants' arguments.

i. Title IX Claim—RBA

Before addressing Title IX's applicability to sex-based dress codes, we begin with the preliminary question whether RBA is subject to the requirements of the statute. According to RBA, it does not qualify as a recipient of federal funds within the meaning of Title IX, because RBA benefits from such funds only by virtue of its contract with CDS and does not receive funding directly from the federal government. We find no merit in this argument.

Title IX applies to education programs and activities "receiving [f]ederal financial assistance," subject to enumerated exceptions. 20 U.S.C. § 1681(a). The accompanying regulation defines a "recipient" of federal funds to include, in relevant part:

> any public or private agency, institution, or organization, or other entity, or any person, to whom *[f]ederal financial assistance is extended directly or through another recipient* and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.2(i) (emphasis added).[15] The Supreme Court has clarified that "[e]ntities that receive federal assistance, whether directly *or through an intermediary*,

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[15] RBA does not dispute that it "operates an education program or activity" by managing the daily operations of CDS. 34 C.F.R. § 106.2(i). And neither CDS nor RBA challenges the definition of "recipient" included in the Code of Federal Regulations, *see id.*

are recipients within the meaning of Title IX." *NCAA v. Smith*, 525 U.S. 459, 468 (1999) (emphasis added).

In the present case, it is undisputed that RBA receives 90% of its funding from the four schools operated by CDS, Inc., which in turn receive nearly all their funding from public sources, including the federal government. RBA concedes that CDS uses its federal funding "in part to compensate RBA for services rendered under" the management agreement between CDS and RBA. Under these facts and circumstances, we easily conclude that RBA receives financial assistance "through an intermediary." *NCAA*, 525 U.S. at 468. We therefore hold that RBA, as a recipient of federal funds through an intermediary, is subject to the requirements of Title IX. *See* 20 U.S.C. § 1681(a); 34 C.F.R. § 106.2(i).

ii. Merits of Title IX Claim Against CDS and RBA

We turn to consider the merits of the defendants' contention that Title IX does not apply to dress codes. The defendants assert that because Title IX does not specifically reference dress codes, the statute's broad prohibition against sex discrimination in education is ambiguous. The defendants thus urge us to defer to the Department's decision to withdraw its prior regulation that had prohibited discrimination "against any person in the application of any rules of appearance."[16] Seven years after promulgating the regulation, the Department revoked it because, among other reasons, "[d]evelopment and enforcement of appearance codes is an issue for local

[16] Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24,141 (June 4, 1975).

determination."[17] However, as explained below, because we conclude that Title IX unambiguously applies to sex-based dress codes, we do not reach the question whether a department's rescission of its prior regulation would be entitled to deference.

In evaluating whether Title IX is applicable to sex-based dress codes, we use traditional tools of statutory construction to "determine whether Congress addressed the precise question at issue." *Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 504 (4th Cir. 2011) (citation and internal quotation marks omitted). Our inquiry begins with the text and the structure of the statute. *Id.* "If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (explaining that deference to agency interpretation not warranted when "Congress has supplied a clear and unambiguous answer to the interpretive question at hand"). However, if the statute is vague or ambiguous, we will defer to the agency's reasonable interpretation of a statute it administers, a practice known as "*Chevron* deference." *Amaya v. Rosen*, 986 F.3d 424, 429 (4th Cir. 2021); *Chevron*, 467 U.S. at 843.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §

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[17] Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 47 Fed. Reg. 32,526 (July 28, 1982).

1681(a). The statute enumerates several types of entities and activities that are excepted from this broad prohibition. *See id.* §§ 1681(a)(1)-(9), 1686. Among other examples, certain religious organizations are exempted from Title IX's mandate, as are sororities, fraternities, and scouting organizations. *Id.* § 1681(a)(3), (6). Exempted activities also include "separate living facilities for the different sexes," *id.* § 1686, as well as single-sex "beauty pageants" and "father-son" and "mother-daughter" activities when offered to members of both sexes, *id.* § 1681(a)(8), (9). Notably, dress, appearance, and grooming policies are not included among the listed exceptions to Title IX.

Based on the plain language and structure of the statute, we conclude that Title IX unambiguously encompasses sex-based dress codes promulgated by covered entities. "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). In selecting this format, "Congress did not list *any* specific discriminatory practices" and, thus, Congress' failure to prohibit explicitly sex-based dress codes does not suggest that such policies are beyond the reach of the statute. *Id.*

Instead, we view Congress' decision to include specific exceptions in Title IX as a deliberate choice to "limit[] the statute to the [exceptions] set forth."[18] *United States v.*

[18] Our colleagues in the second dissent ignore this cardinal principle of statutory interpretation to achieve their desired result that the statute is ambiguous. Instead, they rely on the absence of a regulation by the Department regarding Title IX's application to dress codes. Second Dissent Op. 97-98. However, the plain language of Title IX compels the defendants to comply with its terms. Likewise, this plain statutory language bars the defense advanced in the first instance by this dissenting opinion, namely, that the defendants were somehow

Johnson, 529 U.S. 53, 58 (2000) (interpreting 18 U.S.C. § 3624(e)); *see also Hillman v. Maretta*, 569 U.S. 483, 496 (2013) (interpreting 5 U.S.C. § 8705(e)). In doing so, Congress clearly articulated its intent regarding what conduct falls outside the statute's scope. If Congress had intended to exclude sex-based dress codes from the broad reach of Title IX, Congress would have designated such policies along with the other enumerated exceptions. But, as noted above, dress codes are not included in the exceptions listed in the statute. We thus hold that Congress intended that sex-specific dress codes imposed by covered entities be subject to the general prohibition against discrimination in Title IX.

Because we conclude that the statute unambiguously covers such sex-based dress codes, we do not defer to the Department's rescission of its regulation applicable to such policies. As the Supreme Court repeatedly has explained, "*Chevron* deference does not apply [when] the statute is clear."[19] *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2291 n.9 (2021); *see also Pereira*, 138 S. Ct. at 2113. For these reasons, we conclude that the district court erred in granting summary judgment to the defendants on the ground that the Department's decision to rescind its prior regulation is entitled to *Chevron* deference.[20]

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unaware of their obligation to provide equal educational programs and activities to students regardless of their sex.

[19] We therefore need not address the plaintiffs' argument that the Department's decision to revoke the regulation is due no deference, because that act of rescission does not interpret the meaning of the statute or carry the force of law.

[20] Nothing about our decision today permits the federal government to "prescribe student dress codes." Second Dissent Op. 100-02. Our holding merely permits the district court on remand to consider in the

iii. Title IX Standard

Finally, we briefly address the standard that the district court should apply to the plaintiffs' Title IX claim on remand. As discussed above, Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Thus, for the plaintiffs to prevail under Title IX, they must show that: (1) they were excluded from participation in an education program or activity, denied the benefits of this education, or otherwise subjected to discrimination because of their sex; and (2) the challenged action caused them harm, which may include "emotional and dignitary harm."[21] *Grimm*, 972 F.3d at 616, 618; 20 U.S.C. § 1681(a). In this context, the term "discrimination" "means treating [an] individual worse than others who are similarly situated." *Grimm*, 972 F.3d at 616 (citation, alteration, and internal quotation marks omitted).

As with their Equal Protection claim, the defendants urge that a "comparable burdens" test should be applied to the Title IX claim, by comparing the burdens inflicted by the dress code on female students as a group compared with male students. We disagree. Title IX protects the rights of "individuals, not groups," and does not ask whether the challenged policy "treat[s] women generally

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first instance whether this North Carolina public school's sex-based dress code violates Title IX.

[21] As noted previously, the plaintiffs also must establish that the defendants are recipients of federal funding. 20 U.S.C. § 1681(a); *Grimm*, 972 F.3d at 616.

less favorably than . . . men."[22] *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1740 (2020). The Supreme Court has emphasized this distinction in the employment context:

> Suppose an employer fires a woman for refusing his sexual advances. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. [Title VII] works to protect individuals of both sexes from discrimination, and does so equally.

Id. at 1741. Discriminating against members of both sexes does not eliminate liability, but "doubles it." *Id.*

The same reasoning applies here. Certain sex-based provisions of CDS' dress code may well violate the rights of both male and female students. However, the question that the district court must answer is not whether girls are treated less favorably than boys under the terms of the dress code. *See id.* at 1740. Instead, the court must determine whether the skirts requirement, the only challenged provision in this case, operates to exclude the

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[22] Although the Supreme Court in *Bostock* addressed Title VII rather than Title IX, we have used precedent interpreting the antidiscrimination provisions of Title VII in our analysis of comparable provisions in Title IX. *See Grimm*, 972 F.3d at 616; *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (en banc). Title VII's protections apply to any "individual," and Title IX similarly applies to any "person." *Compare* 42 U.S.C. § 2000e-2(a)(1), *with* 20 U.S.C. § 1681(a). Thus, both statutes focus on "individuals, not groups." *Bostock*, 140 S. Ct. at 1740-41.

plaintiffs from participation in their education, to deny them its benefits, or otherwise to discriminate against them based on their sex.[23] 20 U.S.C. § 1681(a); *see also Grimm*, 972 F.3d at 616; *Sheppard v. Visitors of Va. State Univ.*, 993 F.3d 230, 236 (4th Cir. 2021). For purposes of a claim of discrimination under Title IX, the plaintiffs are treated "worse" than similarly situated male students if the plaintiffs are harmed by the requirement that only girls must wear skirts, when boys may wear shorts or pants. Because the district court has not considered this question, we remand the Title IX claim for the district court to evaluate the merits of that claim in the first instance.

III.

In sum, we hold that CDS, a public school under North Carolina law, is a state actor for purposes of Section 1983 and the Equal Protection Clause. By implementing the skirts requirement based on blatant gender stereotypes about the "proper place" for girls and women in society, CDS has acted in clear violation of the Equal Protection Clause. We further hold that sex-based dress codes like the skirts requirement, when imposed by covered entities, are subject to review under the anti-discrimination provisions of Title IX. We therefore affirm the district court's award of summary judgment to the plaintiffs on their Equal Protection claim against CDS and affirm the court's award of summary judgment to RBA on that claim. We vacate the district court's judgment on the Title IX

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[23] The second dissent suggests that we are concluding that the skirts requirement is discriminatory under Title IX. Second Dissent Op. 97-98. This is inaccurate. Instead, our decision requires a remand for an evidentiary hearing applying the principles we announce today.

claim and remand for an evidentiary hearing on that claim asserted against all defendants.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED

WYNN, Circuit Judge, with whom Judge MOTZ, Judge THACKER, Judge HARRIS, and Senior Judge KEENAN join, concurring:

This case presents a simple question: is Charter Day School a state actor for the purposes of the Fourteenth Amendment? According to legal principles (and common sense), the answer is an unequivocal "yes." So, I fully concur in the well-reasoned majority opinion.

Yet, our good colleague Judge Wilkinson disagrees and pens a separate opinion (the second dissent). But instead of offering concrete legal or factual arguments, the second dissent time travels back to the Middle Ages, dons knightly armor, and throws down the challenge gauntlet, presenting two broad policy arguments for why finding state action here is a bad idea.[1]

First, the second dissent predicts a parade of horribles will follow in the wake of the majority's decision, including "collateral damage" to institutions like historically Black colleges and universities. Second Dissent at 89. Second, the second dissent claims that the majority opinion's holding will curtail "student and parental choice" by subjecting charter schools "to the slow strangulation of

[1] To be sure, the second dissent dresses its policy arguments in legal trappings by invoking vague notions of "due process" and repeatedly citing nonbinding Supreme Court concurrences. *See* Second Dissent at 89–92 (citing such concurrences five times). But the thrust of the opinion boils down to a policy argument: the "state action doctrine must not be warped to extinguish the vibrancy provided by school choice." *Id.* at 92. And "even the most sensible policy argument [does] not empower us to ignore . . . the demands of the Constitution." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2441 (2019) (Gorsuch, J., concurring); *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984) ("[P]olicy arguments are more properly addressed to legislators or administrators, not to judges.").

litigation." *Id.* at 88, 103. Both arguments are profoundly flawed.

I.

The second dissent's first policy argument is a familiar one. Namely, if we find state action in this case, a parade of horribles will follow, and we will begin sliding down the slippery slope to "social homogenization" and "mandat[ed] uniformity." *Id.* at 85, 94.

As an example, the second dissent posits that the majority opinion—an opinion on gender discrimination in charter schools—will effectively "extinguish the place of historically [B]lack colleges and universities (HBCUs) in the educational system." *Id.* at 89. The apparent premise of the second dissent's argument is that HBCUs—and HBCUs alone—are engaging in unconstitutional racial discrimination, making them vulnerable to what the second dissent characterizes as the majority's "throw the baby out with the bath water" approach to righting constitutional wrongs.[2] *Id.* at 90.

But HBCUs are not segregated schools—like other modern higher-educational institutions, they are open to students of all races. Their notable attribute, of course, is that they are *historically* Black; just as other higher-

[2] Despite what the second dissent may say, it is hard to see how today's majority opinion can have *any* impact on HBCUs. In North Carolina, five of the State's ten HBCUs are private institutions, which makes them largely immune to the sorts of constitutional challenges the dissent bemoans. *Historically Black Colleges & Universities: Federal and State Policy Scan Brief*, The Hunt Institute (2021), https://hunt-institute.org/wp-content/uploads/2021/11/HI-NC10-IB-112021.pdf (saved as ECF opinion attachment 1). The other five are undeniably public schools, and therefore already subject to constitutional scrutiny. *Id.* That means the majority opinion's state-action analysis would not make one whit of difference when it comes to HBCUs.

educational institutions are *historically* white (HWCUs). Thus, while the second dissent is correct that "HBCUs were *first* developed to educate and nurture many of the brightest [Black] students in a state who, without the efforts of historically [B]lack institutions, would have been left with nowhere to go," it is equally true that "[HWCUs] were *first* developed to educate and nurture many of the brightest [white] students in a state who, without the efforts of historically [white] institutions, would have been left with nowhere to go." *Id.* at 89 (emphasis added).

But the mere fact an institution is *historically* Black or *historically* white does not mean that school is *currently engaging in racial discrimination*. After all, just as HWCUs no longer exclusively cater to white students, so too do HBCUs no longer exclusively cater to Black students. *See United States v. Fordice*, 505 U.S. 717, 743 (1992) (repudiating the notion that HBCUs may persist as "exclusively [B]lack enclaves by private choice" nearly thirty years ago).[3] In fact, in 2020, "non-Black students made up 24 percent of enrollment at HBCUs, compared with 15 percent in 1976." *Fast Facts: Historically Black Colleges and Universities*, National Center for Education Statistics, https://nces.ed.gov/fastfacts/display.asp?id=66

[3] The Higher Education Act of 1965, as amended, defines an HBCU as "any historically Black college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans, and that is accredited by a nationally recognized accrediting agency or association determined by the Secretary [of Education] to be a reliable authority as to the quality of training offered or is, according to such an agency or association, making reasonable progress toward accreditation." 20 U.S.C. § 1061(2). But to be sure, the designation is based on *historical* laws, not modern-day laws because today, HBCUs offer *all* students, regardless of race, an opportunity to develop their skills and talents.

7 (last visited May 27, 2022) (saved as ECF opinion attachment 2).

Given these changed circumstances, it is puzzling why the second dissent assumes that HBCUs must still be benefitting from unconstitutional racial discrimination.[4] It is equally puzzling why it presumes that HWCUs are not engaging in similarly unconstitutional discrimination. Its decision to single out the former but not the latter as likely constitutional miscreants is ill-informed.[5]

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[4] In response to the points raised by this concurrence, the second dissent now acknowledges that HBCUs are open to "all races and ethnicities" and "were in no way discriminatory." Second Dissent at 89–90. But, if the second dissent believes HBCUs are not discriminatory, then there is no legal or rational argument connecting the majority opinion to HBCUs. That means HBCUs have nothing to fear from today's majority opinion. So, why even mention HBCUs in this matter? After all, this case is about discriminating against girls at a charter school, not HBCUs.

[5] The second dissent's proofless prognosticating does not stop with HBCUs, however. It also predicts that "single-sex charter schools," schools "serving underserved and dispossessed populations," and "charter schools offering a progressive culture and curriculum" will be the next victims of the majority's "lamentable" efforts to impose "conformity" on state public-school systems. Second Dissent at 85, 95. However, the second dissent never explains why these policies make these institutions vulnerable to constitutional challenge, whether any hypothetical challenges are imminent, and whether these schools are likely to survive these imaginary lawsuits. Even if it had, I fail to see how a hypothetical lawsuit preventing schools from engaging in unconstitutional discrimination is "really all that horrible." *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1020 (2019) (Gorsuch, J., concurring). Nor do I understand how these purportedly terrible consequences can stay our hand. If an application of law to fact here compels us to find that Charter Day is a state actor—and it does—then we must so hold.

II.

The second dissent's second policy argument—which is really just a riff on the first—presents a classic false dichotomy. It first posits that *declining* to find state action here will protect charter schools from scurrilous lawsuits, thereby promoting "student and parental choice," "independence," "competition," "use of different and innovative teaching methods," "diverse program[ming]," and ultimately "educational progress." Second Dissent at 84, 88, 93–95. *Finding* state action, on the other hand, will make "innovative" schools like Charter Day "more vulnerable to [legal] attack," which will inevitably "extinguish the vibrancy provided by school choice" and "send[] education in a monolithic direction" where "social homogenization," "conformity," "insularity," "uniformity," and educational "calcification" reign supreme. *Id.* at 85–86, 92–95.

Stripped of its euphemisms, the second dissent's argument seems to be that subjecting schools like Charter Day to the demands of the Constitution will frustrate parents' imaginary prerogative[6] to send their children to free, state-funded public schools practicing unconstitutional discrimination, thereby "stifling"

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[6] The second dissent weakly suggests that parents have a due-process right to send their children to public schools practicing unconstitutional discrimination. *See* Second Dissent at 90–92. As support, it cites *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923). However, these decisions say no such thing. *Pierce* merely held that states cannot force parents to send their children to public schools. *See* 268 U.S. at 535. *Meyer* overturned a statute that forbade teaching in any language except English. *See* 262 U.S. at 400–03. Neither held that parents have a due-process right to subject their offspring to traumatic psychologic damage at public schools that run afoul of the Equal Protection Clause.

educational progress. *Id.* at 93. The premise underlying this argument is that state schools must be allowed *to experiment with unconstitutional discrimination* to honor "consumer[]" demand and achieve said "educational progress." *Id.* at 93–94.

That premise is so plainly wrong it borders on the offensive. Must state-designated public schools like Charter Day be allowed to experiment with blatantly unconstitutional gender discrimination to satisfy "consumer[]" demand? Must public schools be allowed to develop racially segregated institutions in the name of "educational progress"?[7] Must state schools be allowed to develop pilot programs promoting certain handpicked religions if enough parents ask for them?

If we take the second dissent at its word, its answer to these questions must be "yes." That's because, in the second dissent's world, the ends—nebulously defined "educational progress"—justify the means—forcing girls to wear impractical, uncomfortable, and revealing skirts that negatively affect their development and self-esteem.

In that inverted world, the Constitution is not the primary safeguard of civil liberties but an inconvenient wellspring of frivolous lawsuits, *id.* at 94–95; equal protection of the law is not a basic principle of freedom but a "rigid" and "calcif[ying]" tool of "monolithic" thought that "stamp[s] out the right of others to hold different values and to make different choices," *id.* at 85, 89, 93, 95; and unconstitutional discrimination is not the scourge of

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[7] Though the second dissent does not truly tangle with the ramifications of its argument, the obvious implication of its opinion is that unconstitutional school segregation could have been maintained in the nation's public-school systems if only the segregationists had been clever enough to designate their racist institutions as "charter schools."

liberty and progress but the price of "innovation" and "diversity," *id.* at 84.

Two hundred and fifty years of innovation and ingenuity—*enabled* by our American constitutional system—say otherwise. For a shining example, look no further than the very North Carolina public schools the second dissent so casually demeans as mere tools of "social homogenization." *Id.* at 85. Though they are bound to follow the Constitution, these schools nevertheless offer diverse, innovative, and cutting-edge curricula to students of all ages, abilities, and beliefs. *See*, *e.g.*, Mary Ann Wolf, *N.C. Public Schools Offer Families More Choices than Ever*, WRAL.com (Dec. 20, 2021), https://www.wral.com/mary-ann-wolf-n-c-public-schools-offer-families-more-choices-than-ever/20043414/ (describing how North Carolina "school districts offer students options in Career and Technical Education; hands-on learning in STEM-focused schools and curricula; specialized programs focused on music, dance, or visual arts; virtual, personalized learning through the public school system through the NC Virtual Academy; and options to accelerate learning through early college high schools") (saved as ECF opinion attachment 3).

The second dissent retorts that there is still value in "[p]reserving [*additional*] variety," even if that means retaining educational philosophies—like the sexist dress code at issue here—that are arguably "coercive and antithetical to student choice." Second Dissent at 94. After all, the second dissent argues, "[n]o one is forced to go to a charter school, and certainly not to [Charter Day]." *Id.* And while discriminatory schools like Charter Day "may not suit the tastes of some, there should be no problem with letting others make that choice." *Id.* Criticizing others for making such a choice, according to

the second dissent, is akin to "[c]astigating the chef for including salmon as an option (or a fellow customer for ordering it) . . . when you can order steak for yourself." *Id.*

But comparing the decision to attend a traditional public school or a discriminatory charter school to selecting "steak" or "salmon" on a restaurant menu leaves a bad taste in the mouth. *Id.* Subjecting girls to gender discrimination that causes lasting psychological damage is not the same thing as ordering fish. And though the second dissent fails to note it, there may be many practical reasons why a parent would want to pick "salmon" and their send their child to Charter Day—the location, intellectual rigor, high-performing sports teams, excellent music program, carpool availability, connections with friends, etc.—and still be unhappy with the school's blatantly discriminatory dress code. That seems to be more or less true of the plaintiffs in this case. And as much as the second dissent may not like it, the Constitution provides them a remedy to redress that harm.

Even if the second dissent's "surf-or-turf" argument were relevant to the state-action question—which it is not[8]—its reasoning cannot be squared with settled constitutional jurisprudence. Under the second dissent's view, parents should have no constitutional remedy to address discrimination at their children's schools if those parents have *the option* of choosing between constitutional and unconstitutional alternatives. *See id.* at 88 ("So what if certain charter schools . . . reside at the more [unconstitutional] side of the spectrum? I'm okay; you're okay."). But if that were true, a protestor

[8] As the majority ably explains, the "ability of North Carolina's students to opt out of discriminatory treatment does not determine whether that treatment is attributable to the state." Majority Op. at 20.

unconstitutionally denied the right to assemble in one location has no claim if he could protest somewhere else; a Christian church denied the right to fly its flag in front of city hall has no constitutional redress if it could fly its flag at the courthouse next door; and a firearms enthusiast denied her constitutional right to carry a weapon in one city has no argument if she could exercise her right by moving up the interstate.

But no court has ever held that constitutional "dead zones" like these are permissible so long as enough people like them that way. *See Fordice*, 505 U.S. at 743 (rejecting plaintiffs' request to upgrade facilities at strictly Black colleges "*solely* so that they may be publicly financed, exclusively [B]lack enclaves by private choice" because such a schema would violate the Constitution). Therefore, the second dissent's attempt to work around the Constitution must fail.

III.

In the end, the second dissent's policy arguments must be rejected. The second dissent's borderline insulting insinuations regarding HBCUs do not support its flawed parade-of-horribles argument. And contrary to the second dissent's insinuations, the specter of parental choice is not a trump card that gives North Carolina public schools license to practice unconstitutional discrimination.

BARBARA MILANO KEENAN, Senior Circuit Judge, with whom Judge THACKER joins, concurring:

The defendants would have us believe that the skirts requirement is merely another school regulation largely endorsed by CDS parents. According to the defendants, because girls at CDS "succeed" in academic and extracurricular activities, the skirts requirement is harmless in its effect on CDS' students.

I write separately to emphasize my strong disagreement with this view, which not only is antediluvian but also answers the wrong question. Left unanswered is the full spectrum of success that female students *might have achieved* if they had not been subjected to the pernicious stereotypes underlying the skirts requirement. It is irrelevant how well these students performed *despite* carrying the burden of unequal treatment. We cannot excuse discrimination because its victims are resilient enough to persist in the face of such unequal treatment.

Our nation's public schools serve the crucial societal function of educating students not only in academics, but also in the fundamental principle of equality under the law. The defendants' narrow focus on girls' ability to achieve academic success despite the skirts requirement fails to address girls' psychological well-being, as well as the social development of both boys and girls.

The record is clear. By reducing girls to outdated caricatures of the "fairer" sex, the gender stereotypes animating the skirts requirement negatively impact female students throughout their educational experience. CDS' stereotyped rationale for the skirts requirement—that girls are "fragile" and require protection by boys—is both offensive and archaic. As one expert in the case explained, pants are a "ubiquitous," "uncontroversial,"

and "standard part" of women's professional wardrobes today.

Another expert opined that the skirts requirement "contradict[s] modern educational practices that foster independence, agency, and self-confidence," by "teach[ing] both boys and girls that girls should value appearance over agency, and attractiveness over autonomy." The record shows that these stereotypes can have dire psychological consequences for girls, including increased incidences of eating disorders, depression, anxiety, low self-esteem, and engagement in risky sexual behaviors.

This expert evidence confirms what we already know through common sense and lived experience, namely, that gender stereotypes are harmful to girls. As female students at CDS themselves explained, through the skirts requirement, CDS conveys its view that girls are not "worth as much as boys," are "not in fact equal to boys," and are "more delicate" than boys, which view results in boys being elevated to a "position of power over girls." What other conclusion can girls draw when they are told as kindergarteners to "sit like princesses" to avoid exposing their underwear, while boys may sit cross-legged? Or that girls cannot play as freely as boys during recess? Or that girls cannot participate comfortably in emergency drills for fear that boys will look up their skirts? When faced with this relentless messaging of inferiority, female students at CDS could only conclude that they must maintain constant vigilance about their physical appearance, and that the comfort of boys is more valued than their own.

The negative impact of such gender stereotypes is not limited to girls. Evidence in the record shows that children who believe in such views are more likely to

engage in gender-segregated play, which later can affect their communication skills and personal relationships. Most disturbingly, that evidence also shows that boys who hold stereotype-infused beliefs about gender are more likely to be the perpetrators of sexual harassment. Plainly, these outcomes are a far cry from "respect," traditional or otherwise, among and for all students.

Of course, the skirts requirement is merely one component of CDS' imposition of "traditional gender roles" on its young students. According to CDS, its female students are "fragile" and must acquiesce to having boys hold umbrellas over them when it rains. Considering this jaw-dropping assessment of girls' capabilities, we may never know the full scope or all the consequences of CDS' blatant, unapologetic discrimination against its female students. But the skirts requirement, harmless as it may seem to the defendants, requires only a pull of the thread to unravel the lifelong social consequences of gender discrimination. In 2022, there is no conceivable basis for allowing such obstacles to girls' progress in our public schools.

QUATTLEBAUM, Circuit Judge, with whom Judges RICHARDSON and RUSHING join dissenting in part and concurring in part, and with whom Judges WILKINSON, NIEMEYER and AGEE join dissenting in part:

The question is not whether we like or don't like Charter Day School's requirement that female students wear skirts, skorts or jumpers, or whether we think the requirement is good or bad for female students. We face a legal question—is Charter Day School a state actor? It's a question of our legal judgment, not our will. *See* The Federalist No. 78 (Alexander Hamilton) ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."). If Charter Day School is not a state actor, 42 U.S.C. § 1983 cannot be used to prevent it from requiring female students to wear skirts, skorts or jumpers as part of its dress code. If it is a state actor, it is subject to a § 1983 claim.

Prior to today, neither the Supreme Court nor any federal appellate court had concluded that a publicly funded private or charter school is a state actor under § 1983. The majority, however, breaks that new ground. In my view, in deciding that a private operator of a North Carolina charter school is a state actor, the majority misconstrues and ignores guidance from the Supreme Court and all of our sister circuits that have addressed either the same or very similar issues. The immediate casualty of the majority's decision is a small part of a dress code at a particular charter school. That is the least of my concerns. My worry is that the majority's reasoning transforms all charter schools in North Carolina, and likely all charter schools in the other states that form our

circuit, into state actors. As a result, the innovative alternatives to traditional public education envisioned by North Carolina when it passed the Charter Schools Act, and thus the choices available to parents, will be limited.

But the implications of the majority's decision extend beyond even charter schools. By casting aside guidance from Supreme Court precedent, the majority significantly broadens the scope of what it means for the actions of a private party to be attributed to the state for purposes of a § 1983 claim. Frankly, it is hard to discern, much less define, the limits of what constitutes "state action" after the majority's decision.

I would reverse the district court's equal protection ruling and its decision that the charter school operators here are state actors. Consequently, I dissent in part.[1]

I.

A.

In the mid-1990s, the North Carolina General Assembly passed the Charter School Act. *See* N.C. Gen. Stat. § 115C-218, *et seq.* The law "authorize[d] a system of charter schools to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently of existing schools." *Id.* § 115C-218(a). Charter schools were designed to "[i]mprove student learning" and "[e]ncourage the use of different and innovative teaching methods." *Id.* § 115C-218(a)(1), (3). The goal was to "[p]rovide parents and students with expanded choices in the types of educational opportunities that are available

[1] I agree with the majority that dress codes are not excluded from Title IX's reach. I also agree that because the district court did not address the merits of plaintiffs' Title IX claim, remand is appropriate. Thus, I also concur in part.

within the public school system." *Id.* § 115C-218(a)(5). Any child eligible to attend a public school may choose to attend a charter school, but no one has to attend one. *Id.* § 115C-218.45(a)–(b).

Although charter schools are nominally public schools under North Carolina law, they are operated by private, nonprofit corporations rather than the local public school board. *See id.* § 115C-218.15. In fact, the nonprofit's board of directors—not the state or local educational bodies or officials—must decide matters related to the school's operation. *Id.* § 115C-218.15(d). Charter schools have wide latitude to experiment with pedagogical methods and are exempt from statutes applicable to local boards of education. *See id.* § 115C-218.10. Instead, they are governed by their charter, or contract, between the nonprofit corporation and the state. *Id.* § 218.15(c). The charter provides the primary means of state accountability over charter schools. If the corporation violates any charter provision or underperforms, the state can revoke the charter. *See id.* § 115C-218.95. Although charter schools must adopt policies governing student conduct and discipline, the state does not supervise the content of those policies. *Id.* §§ 115C-218.60, 115C-390.2(a). Relevant here, no state law or charter provision requires a dress code nor dictates the contents of any such code that might be adopted. Further, the charter incorporates the protections of the United States and North Carolina constitutions, including their equal protection provisions.

B.

Charter Day School, Inc. ("CDS")[2] is a nonprofit corporation that holds a charter from North Carolina. Baker Mitchell incorporated CDS in 1999, intending to open a charter school in rural Brunswick County. CDS at first served just over fifty students. It has grown substantially and currently educates over 900 elementary and middle school students. CDS's volunteer board of directors sets the school's policies. Mitchell was first the chairman of the board, but he is now the board's secretary, a non-voting position.

CDS entered into an "educational management contract" with the Roger Bacon Academy, Inc. ("RBA") to manage day-to-day operations at CDS. RBA is a for-profit corporation, which Mitchell also founded and wholly owns. CDS's charter application was filed along with RBA, with Mitchell as the signatory. The charter incorporated the management agreement between CDS and RBA, which delegates to RBA management of all day-to-day operations of the school, including enforcement of "the rules, regulations and procedures adopted by [CDS]." *See* J.A. 360.

CDS operates as a school promoting traditional values. It advances a "traditional curriculum, traditional manners and traditional respect." J.A. 1719. Students must use polite forms of address, such as "Ma'am" and "Sir." J.A. 1967. It also embodies a classical curriculum, which focuses on literature, history and Latin. As part of this traditional approach, the school adopted a uniform policy.

The dress code, according to CDS and RBA, helps "instill discipline and keep order." J.A. 2079. All students

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[2] Like the majority, I use "CDS" to refer not only to the private operator of the school, but also Charter Day School.

must wear white or navy-blue tops and khaki or blue bottoms. Shirts must be tucked in and only closed-toed shoes are allowed. In addition, there are some requirements that apply only to males or females. Males may not wear jewelry and must keep hair "neatly trimmed and off the collar . . . and not below the top of the ears or eyebrows." J.A. 101. Males must also wear a belt. But while males may wear pants or shorts, females must wear skirts, jumpers or skorts, which can be paired with socks, stockings or leggings for warmth. On days with physical education class, however, students have different uniforms. On those days, females may wear gym shorts or sweatpants. The skirts requirement is sometimes waived on special occasions, such as field trips.[3]

If a student violates the dress code, the school typically notifies the parents, which is intended to be informative rather than punitive. A student may also be pulled from class to obtain compliant attire. And while students, in theory, may face expulsion for violating the school's disciplinary code, which includes the dress code, according to CDS no student has been expelled for a uniform policy violation.

One of the plaintiffs, Bonnie Peltier, a parent who chose to enroll her kindergartener at CDS, asked about the reasons for the skirts requirement at an orientation. School officials directed her to contact Mitchell. Mitchell responded to her email, explaining that Charter Day was "determined to preserve chivalry and respect among young women and men," and there was a need to "restore, and then preserve, traditional regard for peers." *See* J.A.

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[3] Because the parties and the majority refer to the requirement that girls wear skirts, jumpers or skorts as the "skirts requirement," I will as well for simplicity. By doing so, however, I do not intend to suggest that the options other than skirts are irrelevant.

70–71. Believing the skirts requirement to be discriminatory, Peltier, through counsel, requested the school change it. CDS denied that request, responding that the uniform policy was adopted "to establish an environment in which our young men and women treat one another with mutual respect." J.A. 427.

C.

Subsequently, three female students—a kindergartener and a fourth and eighth grader—through their parents, sued to challenge the skirts requirement as unlawful under Title IX, the Equal Protection Clause and North Carolina law. Naming CDS, its board members in their representative capacities and RBA as defendants, they asserted a Title IX claim, a § 1983 claim for violation of the Equal Protection Clause of the United States Constitution, an equal protection claim under the North Carolina Constitution, and third-party beneficiary breach of contract claims under North Carolina law based on the charter's incorporation of the equal protection provisions of the United States and North Carolina constitutions. After the district court denied defendants' motion to dismiss, the case proceeded to discovery.

During discovery, plaintiffs claimed the skirts requirement created practical problems. The girls testified that they could not move as comfortably in their skirts, which led them to avoid activities during recess. It also required them to cross their legs or keep their knees together while sitting and "distracted [them] from [their] academic work." *See* J.A. 503–04. They also testified that wearing leggings with a skirt did not keep them as warm in the winter as pants would have.

Along with these practical concerns, plaintiffs also expressed concerns about the psychological effects of the requirement. One plaintiff testified that the requirement

conveyed the message that "girls should be less active than boys and that they are more delicate than boys. This translates into boys being put in a position of power over girls." J.A. 499. Plaintiffs' expert, a developmental psychologist, testified that research shows "[r]equiring girls to wear skirts reinforces antiquated gender roles in which girls are viewed as passive and focused on their appearance instead of agency." J.A. 2467 n.3.[4]

CDS officials explained that the requirement promotes chivalry, models the difference between male and female students and promotes the proper treatment of young women. It also introduced evidence about the growth of the school and academic and extracurricular success of CDS's students.

D.

After discovery, the parties filed cross-motions for summary judgment, and the district court delivered a mixed ruling. The district court granted summary judgment for plaintiffs on the § 1983 claim against CDS, but not RBA. It granted summary judgment for defendants, however, on the Title IX claim. In its ruling on the § 1983 claim, the district court found that CDS was a state actor as it provided free public education. As for the Title IX claim, the district court found that Title IX did not apply to sex-specific school dress codes. The district court denied summary judgment without prejudice on the

[4] Plaintiffs seize on emails from Mitchell where he asserted the skirts requirement related to the view that females are "fragile vessels" deserving "gentle" treatment from male students. My dissent should not be construed to endorse those statements. But no matter how offensive, those comments should not distract us from the important legal principles at stake here.

state law claims, allowing for the possibility of further litigation on those claims.

Defendants sought to appeal the district court's ruling. The district court determined there was no just reason for delay and entered partial final judgment on its equal protection and Title IX rulings. *See* Fed. R. Civ. P. 54(b). In doing so, it permanently enjoined CDS from enforcing the skirt requirement. CDS timely appealed the grant of summary of judgment to plaintiffs on the equal protection claim, and plaintiffs cross-appealed the grant of summary judgment to defendants on the Title IX claim and to RBA on the equal protection claim.

As noted above, I join in the Title IX portion of the majority's opinion. Therefore, I limit my comments to the majority's determination that CDS is a state actor for purposes of plaintiffs' § 1983 claim.

II.

The critical question for plaintiffs' equal protection claim is whether CDS and RBA are state actors against which a § 1983 claim may be maintained. Following Supreme Court guidance and the persuasive authority of every one of our sister circuits that has addressed this or similar issues, they are not.

A.

A plaintiff can only succeed on a § 1983 claim if a defendant acts "under color of" state law. 42 U.S.C. § 1983. Therefore, § 1983 does not regulate "private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). In some cases, however, a private actor's conduct may be

considered state action rather than private action.[5] To determine whether a private actor engages in state action for § 1983, we ask, "is the alleged infringement of federal rights fairly attributable to the State?" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (internal quotation marks omitted). So in this case, "[i]f the action of the respondent school is not state action, our inquiry ends." *Id.*

I agree with the majority that the Supreme Court precedent lacks a neat analytical structure to answer this question. *See Arlosoroff v. Nat'l Collegiate Athletic Assoc.*, 746 F.2d 1019, 1021 (4th Cir. 1984) ("There is no precise formula to determine whether otherwise private conduct constitutes 'state action.'"); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 295–96 (2001) ("[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.").

But, even without a neat analytical structure, the Supreme Court has provided clear guidance for how we should analyze whether a privately operated school can be a state actor. The leading case in this area is *Rendell-Baker*. There, the Supreme Court analyzed whether a nominally private school that functioned almost exclusively as a government contractor was a state actor. 457 U.S. at 837. The private school was operated by a board of directors with no public affiliation. *See id.* at 832. It specialized in teaching students with drug or behavioral

[5] Whether a private actor's conduct is "under color of [state] law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States v. Price*, 383 U.S. 787, 794 n.7 (1966). Therefore, we are guided by cases dealing with both provisions.

problems, or other special needs. *Id.* Nearly all of the students were referred by the public school system or drug courts, and the local public school committees paid the tuition of students they referred, which, when combined with other state and federal funding, resulted in somewhere between 90–99% of the school's operating budget each year. *Id.* The school also issued diplomas certified by the local public school board. *Id.* In order to receive state funding, the school had to comply with a variety of "detailed regulations concerning matters ranging from recordkeeping to student-teacher ratios," as well as certain "personnel standards and procedures." *Id.* at 833. And as a "contractor" with the state and local public school committee, the school had to provide certain individualized services for students. *Id.* at 833.

Even though the school in *Rendell-Baker* derived nearly all its funding from, and was regulated by, the state, the Supreme Court held it was not a state actor when the school fired certain employees. *Id.* at 837. The Court began its analysis by discussing *Blum v. Yaretsky*, 457 U.S. 991 (1982), which instructed that near-total public funding does not turn private action into state action. *See Rendell-Baker*, 457 U.S. at 839–40. Then, the Court reasoned that although the state extensively regulated the school, "the decisions to discharge the [employees] were not compelled or even influenced by any state regulation." *Id.* at 841. Finally, in considering whether the school was performing a traditionally exclusive public function, the Court noted that although "the education of maladjusted high school students is a public function," it was not "the exclusive province of the State." *Id.* at 842. Instead, it was a "legislative policy choice" to provide that public function. *Id.*

Thus, *Rendell-Baker* provides three important principles for our state actor analysis: (1) near-total or even total state funding carries little weight; (2) regulation by the state of the conduct in question is insufficient—the state must compel or coerce the conduct; and (3) the conduct at issue must be the historic exclusive prerogative of the state to qualify as state action.[6]

And beyond the Supreme Court, every other circuit to have analyzed whether private schools or charter schools are state actors has followed the reasoning in *Rendell-Baker*. The First Circuit rejected a claim that a privately operated school, which contracted with the state to be the exclusive provider of public education in a district, was a state actor when disciplining a student. In reaching this decision, the court ruled the school did not perform an exclusive public function. *See Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 26–27 (1st Cir. 2002) ("Education is not and never has been a function reserved to the state."). It noted that "even publicly funded education of last resort was not provided exclusively by government in Maine." *Id.* at 27.

The Third Circuit similarly concluded a publicly funded school that educated juvenile sex offenders was not a state actor. It explained that "[a]s was true of the [school] in *Rendell-Baker*," the school did not perform a function traditionally within the exclusive province of the state. *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 166 (3d. Cir. 2001) (Alito, J.). The court also relied on the fact that the

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[6] *Rendell-Baker* also found no "symbiotic relationship" between the school and the state that would have been similar to the relationship in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). *See* 457 U.S. at 842–43. The same applies equally to Charter Day. There is no symbiotic relationship here.

state neither compelled nor influenced the conduct at issue. *Id.* at 165.

And in a case almost identical to this one, the Ninth Circuit held that a private nonprofit corporation that operated a public charter school was not a state actor when it took employment actions against a teacher. *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 808 (9th Cir. 2010). It began its analysis explaining that the state's statutory designation of the charter school as a public school was insufficient on its own to make the school a state actor for all purposes because that designation does not "resolve the question whether the state was sufficiently involved in causing the harm to plaintiff." *Id.* at 814 (internal quotation marks omitted). It then determined that *Rendell-Baker* "foreclosed" the argument that "public educational services" are "traditionally and exclusively the province of the state." *See id.* at 815. And because no regulation compelled the employment decision at issue, the court determined that the charter school was not a state actor. *See id.* at 816–17.

Accordingly, our sister circuits confirm what the Supreme Court taught in *Rendell-Baker*. First, state funding has little to no bearing in the state actor analysis. Second, the challenged conduct must be compelled or coerced by the state to constitute state action. And third, publicly funded education is not the traditional, historic province of the state.

B.

These principles the Supreme Court articulated in *Rendell-Baker* and followed by our sister circuits for determining whether a charter school is a state actor make clear that CDS is not subject to liability under § 1983.

First, while CDS receives over 90% of its funding from the state, so did the school in *Rendell-Baker*. And the schools in *Logiodice*, *Robert S.* and *Caviness* also received all or the vast majority of their funding through the state. Thus, this factor does not convert private conduct into state action.

Second, as the Supreme Court has made clear, the state must compel or coerce the challenged conduct. *Rendell-Baker*, 457 U.S. at 840–42; *Blum*, 457 U.S. at 1004 ("[O]ur precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."). Regulation is not enough. No one even suggests North Carolina compelled or coerced CDS's dress code. This absence of coercion is fatal to plaintiffs' claims.

Considering regulation more generally, charter schools in North Carolina operate independently of local school boards. N.C. Gen. Stat. § 115C-218.15. CDS's board of directors, which the government has no role in selecting, must—not may—"decide matters related to the operation of the school, including budgeting, curriculum, and operating procedures." *Id.* § 115C-218.15(d). CDS "is exempt from statutes and rules applicable to a local board of education." *Id.* § 218.10. And while charter schools must "adopt policies to govern the conduct of students and establish procedures to be followed by school officials in disciplining students," the state does not approve or supervise the content of those policies. *See id.* § 390.2(a). Put simply, apart from the fact that CDS nominally bears the public school label, North Carolina takes a hands-off approach in deciding or supervising the school's policies. North Carolina is so hands-off, in fact, that it disclaims

liability "for any acts or omissions of the charter school." *Id.* § 115C-218.20(b). Further, the Supreme Court of North Carolina held just last year "that the General Assembly did not intend for charter schools to be deemed to be agencies or instrumentalities of the State," thereby precluding those schools from sovereign immunity. *State ex rel. Stein v. Kinston Charter Acad.*, 866 S.E.2d 647, 659 (N.C. 2021).

Third, the education provided by CDS is not the exclusive, historic province of the state. *Rendell-Baker* instructs that in considering this issue, we should look to the function the school provided. There, the Court asked whether "the education of maladjusted high school students" was "the exclusive province of the State." *Rendell-Baker*, 457 U.S. at 842. That was the function the school provided, and the Court determined it to be outside the state's exclusive province.

Applying that approach here, charter schools are meant to provide alternative methods of education outside the traditional state school system. CDS fulfills this role by educating elementary and middle school students using a classical curriculum. Thus, its function is to provide an alternative method of primary education.

Initially, the standard on this issue is high. "While many functions have been traditionally performed by governments, very few have been exclusively reserved to the State." *Flagg Brothers Inc. v. Lefkowitz*, 436 U.S. 149, 158 (1978) (internal quotation marks omitted).

With that reminder from the Supreme Court in mind, private actors have a long history, both nationwide and in North Carolina, of carrying out primary education—especially alternative methods of primary education. From its early beginnings, the North Carolina legislature provided some public funds to private schools. *See*, *e.g.*,

1805 N.C. Sess. Laws 27 ("An Act Respecting the Warrenton Academy.") (granting a surplus of £250 in local tax revenue to Warrenton Academy).[7] And even with the growth of public schooling over time, private schools continued to provide alternative primary education opportunities. Indeed, the Supreme Court of North Carolina confirmed that "our constitution specifically envisions that children in our state may be educated by means outside of the public school system." *Hart v. State*, 774 S.E.2d 281, 293 (N.C. 2015).

In 2020, over 100,000 children in North Carolina attended a private school, including over 75,000 elementary and middle school students. *See* Chená T. Flood, N.C. Dep't Admin., *2020 North Carolina Private School Statistics* 2 (2020), *available at* https://files.nc.gov/ncdoa/Annual-Conventional-Schools-Stats-Report-2019-2020_1.pdf. Private schools, including both religious and independent schools, by their very nature provide diverse alternative curriculums and methods. Students that attend private schools in North Carolina may also receive state funding through scholarship grants based on financial eligibility. *See* N.C. Gen. Stat. § 115C-562.1, *et seq.* That is because North Carolina's constitution does not "prohibit the General Assembly from funding educational initiatives outside of [the public school system]." *Hart*, 774 S.E.2d at 290.

Along with private schools, homeschooling has always played a substantial role in our society as an alternative

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[7] This act by the legislature to benefit Warrenton Academy was recorded as likely "the first instance in the history of the State of local taxation for schools." *See* 2 United States Bureau of Education, Report of the Commissioner of Education for the Year 1896-1897 1393 (1898); *see also* Charles L. Coon, North Carolina Schools and Academies 1790-1840: A Documentary History, at xxxvi (1915).

primary education method. *See generally Delconte v. State*, 329 S.E.2d 636 (N.C. 1985). Considering the long history of private schools and home schooling in North Carolina, providing an alternative method of primary education is not a function exclusively reserved for the state.

Consistent with this analysis, *Logiodice* involved a private school funded by the state and provided the only education in a particular district. Even so, the First Circuit held it did not perform a traditional, exclusive state function. And in *Caviness*, which involved the precise situation we have here—a public charter school—the Ninth Circuit reached the same result. Considering all of this, I conclude that CDS does not perform a traditionally exclusive state function.

In sum, like the schools in *Rendell-Baker*, *Logiodice*, *Robert S.* and *Caviness*, CDS is run by private actors that contract with the state. Like the schools in those cases, CDS receives nearly all its funding from the state. Students could attend a general public school instead, so they effectively, if not explicitly, opt in to attending the school.[8] CDS is under even less state regulation than the school in *Rendell-Baker*. Indeed, the purpose of the charter school system in North Carolina is to promote experimentation and school choice through deregulation. *See* N.C. Gen. Stat. § 115C-218(a)(1), (3), (5), (6). In no way did North Carolina compel or coerce the dress code challenged by plaintiffs. And finally, the education provided by CDS is not the historic, exclusive province of North Carolina. Thus, the principles on which the

[8] *Logiodice* is the exception to this. But even though there was no choice for students in that Maine school district besides the privately operated school, the First Circuit held the school was not a state actor. *See* 296 F.3d at 31.

Supreme Court decided *Rendell-Baker* and which our sister circuits have adopted compel the conclusion that CDS is not a state actor.

C.

Although neither the Supreme Court nor any of our sister circuits have ever concluded that a publicly funded private or charter school is a state actor, the majority does so today. In my view, its analysis in reaching that conclusion varies between misconstruing and ignoring the principles provided by the Supreme Court.

The majority concludes that the "statutory framework of the North Carolina charter school system compels the conclusion that the state has delegated to charter school operators like CDS part of the state's constitutional duty to provide free, universal elementary and secondary education." Maj. Op. 19. To reach this conclusion, the majority relies on the requirement in North Carolina's Constitution that the state provide public education, *see* N.C. Const. art. IX § 2 (setting forth the state's obligation to provide for a "uniform system of free public schools"), and then on the statutory designation of a charter school in North Carolina as a "public school." But there are several problems with the majority's conclusion that North Carolina has in fact delegated its constitutional duty to charter schools.

1.

Let's begin with the majority's focus on North Carolina's designation of a charter school as a "public school." To be sure, the school in *Rendell-Baker* was a private school and CDS, although operated by a private nonprofit, is nominally a public school. But the Supreme Court has already instructed that statutory designations do not make a private actor's conduct state action. *See*

Jackson v. Metro. Edison Co., 419 U.S. 345, 350 n.7 (1974); *see also Brentwood Acad.*, 531 U.S. at 298 ("The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings . . . .").

On this point, the majority asserts "[w]e are not aware of any case in which the Supreme Court has rejected a state's designation of an entity as a 'public' school under the unambiguous language of state law and held that the operator of such a public school was not a state actor." Maj. Op. 24. That is true as far as it goes, which is not far. *Rendell-Baker*—which involved a publicly funded private school—is the Supreme Court's only state action case in the context of publicly funded private or charter schools. But at least two Supreme Court cases have, in fact, rejected a state's public designation of entities that were not schools. In *Jackson*, the relevant Pennsylvania statutory law defined "all companies engaged in providing gas, power, or water; all common carriers, pipeline companies, telephone and telegraph companies, sewage collection and disposal companies; and corporations affiliated with any company engaging in such activities" as a "public utility." 419 U.S. at 350 n.7. Yet the Supreme Court, after conducting a state actor analysis, found that the utility company at issue was not a state actor even though it was designated as public. *Id.* at 351–53. Also, in *Polk County v. Dodson*, 454 U.S. 312, 324 (1981), the Supreme Court held that a public defender was not acting "under color of state law in exercising her independent professional judgment in a criminal proceeding" despite its public designation. I see no basis for concluding that the Supreme Court's reasoning in these two cases would not apply to schools designated as public. Thus, *Jackson*

and *Dodson* undermine the majority's reliance on CDS's public designation.

And the Ninth Circuit in *Caviness* held that the operator of a public charter school, our situation here, was not a state actor. Unlike the majority, our sister circuit follows the guidance from the Supreme Court.

The majority also reasons that "substantial public funding, while not determinative, is a factor that we weigh in determining state action." Maj. Op. 18. I suppose weighing it is fine. But *Rendell-Baker* tells us that its weight is exceedingly light.

Finally, the majority argues that the public designation of charter schools represents North Carolina's exercise of its sovereign prerogative. It, therefore, reasons that concluding that CDS is not a state actor undermines principles of federalism. Maj. Op. 25 ("It was North Carolina's sovereign prerogative to determine whether to treat these state-created and state-funded entities as public. Rejecting the state's designation of such schools as public institutions would infringe on North Carolina's sovereign prerogative, undermining fundamental principles of federalism."). Aside from being inconsistent with the decisions described above, this position is inconsistent with North Carolina law. As noted above, the North Carolina Supreme Court has held "that the General Assembly did not intend for charter schools to be deemed to be agencies or instrumentalities of the State." *Kinston Charter Acad.*, 866 S.E.2d at 659. Any exercise by North Carolina of its sovereign prerogative in designating charter schools as public is at best limited. Last, the majority's reliance on federalism is indeed ironic when its holding stretches state action law to a place no federal appellate court has ever gone to impose federal § 1983

litigation on a separate sovereign's democratically enacted charter school system.

2.

Take next the majority's argument that North Carolina has, through its charter school system, delegated part of its constitutional duty to provide education. In this analysis, the majority relies primarily on *West v. Atkins*, 487 U.S. 42 (1988). This reliance is misplaced. In *West*, the Supreme Court held that a physician who contracted with the state to provide medical services to prison inmates was a state actor when treating patients. *Id.* at 54. The Court pointed to the constitutional obligation under the Eighth Amendment to provide medical care to inmates, and it concluded the state abdicated this obligation by deferring solely to the contracted-physician's professional judgment. The physician was therefore "authorized and obliged to treat prison inmates" and "clothed with the authority of state law." *Id.* at 55 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

But the circumstances in *West* are very different from those here. Unlike in *West*, the state here has not abdicated its constitutional obligation through a private contract. North Carolina never stopped providing a public school system free to all. It still operates public schools that can, and do, accommodate each child who wishes to attend. Providing an option of charter schools does not mean that North Carolina delegated its obligation to provide a public education system. To the contrary, charter schools are another option beyond the "traditional public schools that have been established in order to comply with [Article IX of the North Carolina Constitution]." *See Sugar Creek Charter Sch., Inc. v. State*, 712 S.E.2d 730, 742 (N.C. Ct. App. 2011).

Relatedly, students at Charter Day have a choice that the inmate in *West* never had. The inmate in *West* had no choice but to submit to the services of the contracted physician the state provided. The majority dismisses the point stating it "does not bear on the question whether CDS is a state actor." Maj. Op. 20. While it may be of little relevance to the majority, it is not to the Supreme Court. In fact, emphasizing this point, the Court noted that "[i]t is *only* those physicians authorized by the State to whom the inmate may turn." *West*, 487 U.S. at 55 (emphasis added). It thus concluded that if the physician was deliberately indifferent in providing treatment, that harm "was 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*." *Id.* (emphasis added). In other words, unlike the situation here, the inmate had no choice but to submit to the state's medical services, and the state chose to fulfill its obligation through a private actor wholesale.[9]

In contrast, CDS students have a choice. They were never "den[ied] . . . a venue independent of the State," nor were they "den[ied] . . . a venue" that North Carolina had a constitutional obligation to provide. *Id.* Any student in North Carolina may still attend a traditional public school—which the state still fully operates. Because no student must attend Charter Day, and every student may still attend a traditional public school, North Carolina has not delegated its constitutional obligation to CDS. Thus, *West* does not suggest that CDS is a state actor.

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[9] *West* is no outlier on this point. *Rendell-Baker* also supports the importance of choice. It noted that "[a] student identified as having special needs and recommended for placement in private school may remain in public school, if his parents object to a placement in a particular private school." 457 U.S. at 832 n.1.

Consistent with Supreme Court authority, *Caviness* and *Logiodice* also involved private operators of schools funded by the state as part of Arizona and Maine's constitutional duties to provide public education. *Caviness*, 590 F.3d at 813–14; *Logiodice*, 296 F.3d at 26–27. Yet both decisions concluded that those private operators were not state actors. Thus, the majority's reliance on North Carolina's obligation to provide public education conflicts with Supreme Court authority and persuasive guidance from our sister circuits.

3.

The majority also misapplies the traditional, historic state function analysis. In discussing this issue, it asks whether "free, public education" is traditionally an exclusive state function. That question is circular. By using outcome-determining adjectives such as "free" and "public," the majority "ignores the threshold state-action question." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (explaining that asking whether "the operation of a public forum for speech" was a traditional, exclusive government function improperly avoided the state action inquiry); *see also Logiodice*, 296 F.3d at 27 ("[T]here 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."). Instead, we must focus on what function the actor actually provides. As noted above, charter schools provide alternative methods of education outside the traditional state school system. That function is not the traditional, exclusive prerogative of the state.[10]

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[10] In fairness, while there is no support for the majority's approach, there is some support for a broader analysis. One could read decisions from our Court and the Ninth Circuit to suggest the proper analysis is education in general. *See Mentavlos v. Anderson*, 249 F.3d 301, 314–

4.

Then, the majority attempts to distinguish *Rendell-Baker*. It claims *Rendell-Baker* involved personnel decisions while the dress code goes to CDS's educational philosophy. The majority also suggests *Logiodice* and *Caviness* "do not impact our analysis" because they involve a personnel decision and a student discipline decision while CDS's dress code goes to its "educational philosophy." Maj. Op. 26. It is, of course, true that those decisions involved teacher personnel and student discipline issues. But nothing in those cases suggests those decisions turned in any way on the fact that they involved personnel or student discipline decisions. And none implied that things might be different if the challenged conduct went to the school's educational philosophy. It makes no sense to me that we would ignore the many similarities central to the reasoning of those cases and latch on to differences that played no part in the reasoning of those decisions.

5.

Finally, along with misapplying the principles provided by the Supreme Court, the majority ignores others. Most notably, the Supreme Court has told us that for private conduct to constitute state action, the state must compel or at least significantly encourage the conduct. *See*

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15 (4th Cir. 2001) (describing a public military college's function is not to provide military based education but rather to "to educate civilian students and produce community leaders" after looking to the school's stated mission); *Caviness*, 590 F.3d at 814–15 (holding *Rendell-Baker* "foreclosed" the argument that "public educational services" are traditionally an exclusive state function). If we were to adopt that approach, it would not change my analysis. There is no credible argument that education has been the traditional, exclusive prerogative of North Carolina.

Rendell-Baker, 457 U.S. at 840; *Blum*, 457 U.S. at 1004. Here, the majority properly concludes that North Carolina did not coerce or compel the dress code generally or the skirts requirement specifically. *See* Maj. Op. 15. But it then ignores that critical fact's pertinence to the state action analysis.[11]

We cannot do that. Supreme Court precedent is not like the green vegetables on a buffet line that we can simply pass by for more dessert. Recognizing the lack of state coercion is not enough. We must apply that fact's implication as the Supreme Court has instructed us to do. And when we do, plaintiffs' § 1983 claim fails.

D.

In sum, not all grievances are constitutional in nature. CDS's skirts requirement is not "fairly attributable" to the state. *Rendell-Baker*, 457 U.S. at 838.[12] Under Supreme Court precedent, as well as the persuasive reasoning of our sister circuits, the skirts requirement is CDS's own conduct, not North Carolina's. Because § 1983 does not

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[11] The majority cites to *Brentwood* as justification for brushing this issue aside. It insists "a state's exercise of coercive power or compulsion is not a requirement for a finding of state action under Section 1983." Maj. Op. 14 (citing *Brentwood*, 531 U.S. at 295). But *Brentwood* did not say that. Instead, it explained a point no one denies—"no one fact can function as a necessary condition across the board for finding state action." *Brentwood*, 531 U.S. at 295. And after making that point, *Brentwood* emphasized the importance of "pervasive entwinement" of the state in the challenged conduct. *Id.* at 296. As the majority acknowledges, there was no "pervasive entwinement" by the state of the challenged conduct here.

[12] For the same reasons, RBA is not a state actor either. RBA is even further removed from state action because its contractual relationship is with CDS, not the state.

regulate private conduct, plaintiffs' equal protection claim should be dismissed.[13]

And to be clear, concluding that CDS is not a state actor in promulgating its dress code for purposes of a §1983 claim does not give it, or any other charter school operator, a license to discriminate. The majority's assertion that, absent a finding that private operators of charter schools are state actors, victims of discrimination will have "no recourse other than seeking to have the school's charter enforced or revoked" is incorrect. Maj. Op. 28. True, North Carolina can ensure accountability through enforcement or revocation of its charter. CDS's charter, for example, requires compliance with civil rights laws, including applicable state and federal constitutional provisions. But several other mechanisms remain in place to prevent discrimination and to empower victims of discrimination to seek recourse. In fact, as already noted, plaintiffs here brought a third-party beneficiary claim based on that charter provision alleging equal protection violations, the resolution of which remains with the district court. In addition, federal civil rights statutes, like Title VI and Title IX, likely apply to most charter schools as recipients of federal funds. And states and localities may have their own civil rights laws applicable to charter schools. Between accountability measures at the local and the state level as well as robust civil rights laws, the lack of a federal Equal Protection Clause remedy under § 1983 does not enable a charter school to discriminate without consequence. So, in addition to being foreclosed legally, stretching to recognize a § 1983 claim under this scenario is unnecessary.

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[13] Because I conclude that CDS and RBA are not state actors, I do not address the merits of plaintiffs' equal protection claim.

But besides being legally flawed and unnecessary, extending § 1983 relief to private operators of charter schools is ill-advised. Make no mistake about it, the majority's equal protection decision is no narrow ruling. To repeat, the majority concludes "the state has delegated to *charter school operators like CDS* part of the state's constitutional duty to provide free, universal elementary and secondary education." Maj. Op. 19 (emphasis added).

Under that reasoning, all North Carolina charter schools are state actors. And since many state constitutions require public education and many charter schools receive public funding despite their private operation, the majority's decision will likely reach beyond North Carolina. Thus, this decision will have ramifications far beyond any dress code requirement. Indeed, North Carolina's charter school program includes schools whose admissions policies favor economically disadvantaged students. It includes single-gender schools. While eliminating a skirts requirement may feel satisfying, a conclusion that also means those and all other charter schools fall within the majority's expansive view of state actor will have real consequences on states' efforts to improve education by offering innovative educational choices for parents.

Finally, how are litigants and district courts supposed to view the Supreme Court's guidance that for private conduct to constitute state action, the state must compel or at least coerce it? Does that still apply in the Fourth Circuit? Can courts now turn a blind eye to that issue when it gets in the way? And if we can ignore that factor, what about others? I do not see the limiting principles of the majority's decision.

III.

In conclusion, on plaintiffs' equal protection claim, I would reverse the district court's grant of summary judgment to plaintiffs against CDS and affirm the district court's grant of summary judgment to RBA.

WILKINSON, Circuit Judge, with whom Judges NIEMEYER and AGEE join, dissenting:

I respectfully dissent. The majority seeks to expand the concept of state action and the reach of Title IX to a point that will drape a pall of orthodoxy over charter schools and shift educational choice and diversity into reverse.

Because I agree with all the points made by Judge Quattlebaum on the state action question, I am pleased to join the dissenting portion of his excellent opinion. For myself, however, I would go further, and have the case remanded with directions to dismiss it. Here's why.

I.

Since their introduction thirty years ago, charter schools have quickly spread to forty-five states and the District of Columbia. *See* Nat'l Ctr. for Educ. Stat., *Public Charter School Enrollment* (May 2021); Educ. Comm'n of the States, *50-State Comparison: Charter School Policies* (Jan. 28, 2020). The whole purpose of charter schools is to encourage innovation and competition within state school systems.

North Carolina, our focus here, provides by law that charter schools should "operate independently of existing schools" in order to "improve student learning," "encourage the use of different and innovative teaching methods," and "provide parents and students with expanded choices." N.C. Gen. Stat. § 115C-218(a)(1), (3), (5). North Carolina first committed to that course more than two decades ago with the Charter School Act. *See id.* § 115C-218, *et seq.* That law authorizes North Carolina to contract with private nonprofit corporations to independently run charter schools, *id.* § 115C-218.15(b)–(c), and to provide the schools with funding per pupil to use

how they wish, *id.* § 115C-218.105. The charters themselves reflect this variety. *See*, *e.g.*, J.A. 221 (noting that "the granting of a Charter in no way represents or implies endorsement by the [State] of any method of instruction, philosophy, practices, curriculum, or pedagogy used by the School"). The charter school's board of directors governs in "matters related to the operation of the school, including budgeting, curriculum, and operating procedures." *Id.* § 115C-218.15(d). North Carolina has 200 such charter schools, including Charter Day School (CDS), providing a rich array of choices for North Carolina parents and children. *See* N.C. State Bd. of Educ., 2020 Annual Charter Schools Report 3 (June 29, 2021). The entire emphasis of the above legal edifice is on educational choice, diversity, and independence.

The majority misses the whole purpose of the development of charter schools. It has little clue about the problems that led to the formation of the charter school experiment or the function that it serves. Its opinion is all about conformity. It is essentially dismissive of what charter schools might have to contribute, prejudging them as miscreants that must be brought to heel. *See*, *e.g.*, Majority Op. at 20 (worrying about the possibility of "blatant, unconstitutional discrimination committed by [charter] schools").

Public education with its learning standards and social homogenization has assisted the goal of universal literacy and the unifying creed of being an American. *See*, *e.g.*, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) ("America's public schools are the nurseries of democracy."). Yet today something seems different, as though calcification has set in. The very idea of a different model of schooling has drawn the ire of the public education establishment. As this case shows, any

challenge to prevailing educational convention is met by circling the wagons. Well, okay—but plaintiffs are not entitled to expand the whole notion of state action to aid and abet their insularity. Nor are they to assume that their perspective is definitive for purposes of Title IX.

Student dress codes in particular are unsettling to those who believe, as plaintiffs do here, that they connote feminine inferiority. *See* Majority Op. at 28. The codes are founded upon ideals of "chivalry," a word which to the majority suggests male condescension toward women and the need of women for male protection, which in turn robs women of their dignity and independence. *Id.* at 28–29. As Justice Brennan said some years ago, such "romantic paternalism" can "put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality). No doubt my concurring friend espouses that perspective and frowns upon this dress code. *See* Concurring Op. at 54–56 (Keenan, J.). Fair enough. I understand and respect this view.

But the view is not universal. And the "cage" is one of imprisonment in our own perspective, a reluctance to recognize that across the great span of America, there are views that differ from the judge's own. To a great many people, dress codes represent an ideal of chivalry that is not patronizing to women, but appreciative and respectful of them. Far from being a pejorative term, chivalry is symbolic of the tone that CDS wishes to set. "Chivalry" harkens to the age of knighthood, defined as "[t]he brave, honourable, and courteous character attributed to the ideal knight." *Chivalry*, Oxford English Dictionary (2d ed. 1989). What the knights bestowed upon their ladies fair at the end of a tournament has become the bouquet of roses extended on stage at the close of an opera.

The majority seeks to portray the age of chivalry as a brutal time. *See* Majority Op. at 28. But that is hardly the point. CDS uses chivalry in an aspirational sense, not to recreate an earlier time in all of its particulars, but to capture the contemporary connotations of a chivalric order as one in which women are due from the very inception of schooling the greatest measure of respect.

Whether a more chivalric order would in some way enhance mutual respect between the sexes, I hardly know. But one need only look to sexual assaults of women on campus, sexual harassment and belittlement of women in the workplace, sexual degradation of women on the internet, sexual trafficking of young women here and abroad, and spousal abuse of women in the home to know that all is not well. Views legitimately differ on the remedies for this condition. But CDS's chivalric approach should neither be legally banished from the educational system, nor should it be legally imposed.

For CDS, the dress code is an adjunct to an altogether lawful and legitimate view of education that relies upon a "classical curriculum espousing traditional western civilization values." J.A. 80. But CDS's traditional perspective has not been respected by those who disagree with it. Instead, those who promulgated a dress code aimed at cultivating "mutual respect" among men and women, J.A. 70, have been greeted with a boundless determination to litigate their views out of the charter school setting.

That is a shame. It is altogether good that opportunities now exist for women that did not exist in earlier generations. Women today serve as lawyers, doctors, executives, professors and professional athletes, among countless other worthy and admirable professions. *See*, *e.g.*, U.S. Dep't of Labor, *Percentage of Women*

Workers in Science, Technology, Engineering, and Math (STEM), https://www.dol.gov/agencies/wb/data/occupations-stem (2019) (showing an increase in women in STEM occupations); U.S. Dep't of Labor, *100 Years of Working Women*, https://www.dol.gov/agencies/wb/data/occupations-decades-100 (2019) (showing substantially greater workforce participation and occupational diversity for women). As Vice President, House Speaker, and Supreme Court Justices, women hold positions at the highest level of all three branches of our government. These opportunities, though still not all they should be, are to be celebrated. The nation is stronger when it draws upon all its human resources and does not confine the genders to preconceived occupations and professions, as in times past.

But the new need not banish the old. The present need not invariably rush to discredit the past, lest the future hold our own intolerance to poor account. The advent of new possibilities need not extinguish more traditional gender roles which lend stability to home and family and ultimately to society itself. Indeed, many women embrace and balance both modern and traditional elements in their lives, to the benefit of the worlds of both work and family life. *See* U.S. Dep't of Labor, *Mothers and Families: Labor Force Participation*, https://www.dol.gov/agencies/wb/data/mothers-and-families (2020) (showing that nearly three-quarters of mothers with children under eighteen participate in the labor force). So what if certain charter schools or private schools reside at the more traditional side of the spectrum? I'm okay; you're okay. There is room for all in an educational system worth its salt.

II.

The crucial question is one of student and parental choice. North Carolina has designed a system that allows parents and students to choose among varied options, and charter schools seek to preserve precisely that choice. N.C. Gen. Stat. § 115C-218(a)(5). While some of these options espouse value systems with which the majority may disagree, that is no reason for it to stretch the Fourteenth Amendment to stamp out the right of others to hold different values and to make different choices.

A.

Of course, the risk of the new stamping out the old is all too familiar. Justice Thomas, who has championed the concept of student choice in higher education, has cautioned against this same phenomenon playing out as it pertains to race. It is beyond question that desegregated colleges and universities are an altogether good thing. But that must not extinguish the place of historically black colleges and universities (HBCUs) in the educational system. *See United States v. Fordice*, 505 U.S. 717, 745, 748–49 (1992) (Thomas, J., concurring) (agreeing that states must eliminate "policies traceable to the *de jure* system [of segregation that] are still in force and have discriminatory effects," but emphasizing that this must not "portend . . . the destruction of historically black colleges"). The HBCUs were first developed to educate and nurture many of the brightest students in a state who, without the efforts of historically black institutions, would have been left with nowhere to go. It would be beyond cruel if institutions so crucial to African-American progress in the pre-*Brown* era were to find themselves collateral damage in the post-*Brown* order. HBCUs in fact are every bit as relevant in the present as in the past, as students of all races and ethnicities continue to see them

as best suited both for developing their talents and for nurturing the self-confidence that every college student needs for success in the larger world.

The most beneficial progress gives us no license to "throw the baby out with the bath water" by undermining our most valued traditional elements. Clarence Thomas, Address at the National Historically Black Colleges and Universities Week Conference (Sept. 9, 2008). Instead, the state can and should "operate a diverse assortment of institutions." *Fordice*, 505 U.S. at 749 (Thomas, J., concurring). Of course, the HBCUs were in no way discriminatory. They illustrate, however, the importance of preserving student choice in education, even as they remain vulnerable to falling victim to contemporary political or judicial notions of exactly what a unitary school system should entail.

Again, the reconciliation of cultural tradition and modernity requires respecting student choice. The importance of choice need not be confined to higher education. It should, as it has, play a role in elementary and secondary education as well. State and local programs expanding private choices for elementary and secondary education have been widely implemented and consistently upheld. The Supreme Court has emphasized that school voucher programs are a legitimate way to provide "true private choice" among a slew of public and private schools. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002). Those voucher programs are just one of many "publicly funded private school choice" programs designed to "raise the quality of education"; charter schools are another. *Id.* at 683, 683 n.9 (Thomas, J., concurring).

I am aware, of course, that nominally denominated "freedom of choice" plans were utilized by school boards in the 1960s to steer black and white students into

segregated schools. *See Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 442 (1968). But the record contains no suggestion of any malign coercive practices here. I am also aware that such choice as exists at the secondary and elementary level is likely to be the parents' choice, whereas in higher education both parents and children come to a choice at the end of what might sometimes be termed a negotiated truce.

Yet whether the choice is a parental one or a student one does not negate its value. Indeed, the Supreme Court has vindicated the right of parents "to direct the upbringing and education of children under their control." *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534–35 (1925); *see also Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). It has explained that the "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Pierce*, 258 U.S. at 535. For "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*

The choice in *Pierce* was between public and private or parochial schools, but that choice is not so very different from the same parental decision-making exercised as to charter schools. Both *Pierce* and this case stand for the baseline proposition that parents have some right "to choose how and in what manner to educate their children." *Zelman*, 536 U.S. at 680 n.5 (Thomas, J., concurring). And this court has no power to "standardize" children by limiting that parental choice. *Pierce*, 258 U.S. at 535. Subsumed within the right to choose a charter school is not simply a right to enter a bricks-and-mortar structure,

but a choice as to the cultural and curricular components of education advanced within school walls.

B.

While the parental right of choice is not unlimited, neither is this court's ability to restrict the options otherwise available to parents, either directly or by an expansive definition of state action. To say otherwise—to expand state action doctrine so that charter school choice is dramatically restricted—would create a tension within the Fourteenth Amendment as it relates to education. On the one hand, the Amendment's due process guarantee has been interpreted to provide a right of parental choice. *Pierce*, 268 U.S. at 534. But on the other hand, the majority would interpret that same Amendment's state action prong in such an expansive way as to limit the educational choices a state can make available. Courts cannot allow the Fourteenth Amendment to become a self-contradiction by reading it to "constrain a State's neutral efforts to provide greater educational opportunity" and school choices. *See Zelman*, 536 U.S. at 680 (Thomas, J., concurring).

In short, state action doctrine must not be warped to extinguish the vibrancy provided by school choice. For CDS's dress code here was certainly not state action. Charter schools are by their very nature freed from state control in their pedagogical and cultural choices; surely their dress codes cannot then be said to be "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Nor are dress codes or pedagogical policies—or even education more broadly, for that matter—public functions that have been "traditionally the exclusive prerogative of the State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)).

To avoid this commonsense conclusion, the majority gerrymanders a category of free, public education that it calls a traditional state function. *See* Majority Op. at 19, 22 ("[I]n operating a school that is part of the North Carolina public school system, CDS performs a function traditionally and exclusively reserved to the state."). This is nothing but a circular characterization assuming the answer to the very question asked.

As Judge Quattlebaum has noted, the fact that North Carolina funds CDS is of no moment. *See Rendell-Baker*, 457 U.S. at 840 (concluding that near-total state funding did not render school a state actor). States should be able to fund diverse educational options without incurring massive litigation costs. Nor is a charter school, by the mere presence of its charter, transformed into a state actor any more than the Virginia Company became one when it received a charter from King James in 1606. Chief Justice Marshall recognized this basic point in 1819, and it is no less true today. *See Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 638 (1819) ("From the fact, then, that a charter of incorporation has been granted, nothing can be inferred, which changes the character of the institution, or transfers to the government any new power over it.").

Were that not sufficient, here there are even further "countervailing reason[s] against" finding state action. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001); *see also Polk Cnty. v. Dodson*, 454 U.S. 312, 318–19 (1981) (finding that a public defender employed by the state was not a state actor). Charter schools are expressly designed to be freer from state control, and to bring them progressively under such control is to deny their very reason for being. A state action finding here threatens these schools' independence

and sends education in a monolithic direction, stifling the competition that inevitably spurs production of better options for consumers. Judicial restraint in turn requires that we stay hands-off. States and localities and schools and parents and students will do just fine without our help and achieve educational progress on their own.

C.

It is said that dress codes are themselves coercive and antithetical to student choice. That misses the point. Preserving variety is the very reason to have a menu. You need not eat, or even like, everything on offer, and others' tastes may well differ from your own. Castigating the chef for including salmon as an option (or a fellow customer for ordering it) makes little sense when you can order steak for yourself. So too here. No one is forced to go to a charter school, and certainly not to CDS. *See* N.C. Gen. Stat. § 115C-218.45(b) ("No local board of education shall require any student . . . to attend a charter school."). North Carolina offers a wide-ranging menu of educational options. While CDS may not suit the tastes of some, there should be no problem with letting others make that choice.

This is no bizarre notion or partisan judicial push. Different presidents have recognized the important role charter schools play in providing valuable, innovative options for families. *See*, *e.g.*, Barack Obama, *Presidential Proclamation – National Charter Schools Week, 2016* (Apr. 29, 2016); George W. Bush, *Presidential Proclamation – National Charter Schools Week, 2007* (Apr. 27, 2007). The "valuable educational alternative" provided by charter schools, Bush, *supra*, plays an important role both in the lives of those who choose to attend them and in our society as a whole. Granted, a school like CDS is not for everybody. But it is there for those who want it, and their choice is due respect. The

majority fails to offer even that much. Does it not see the irony of mandating uniformity by striking down CDS's uniform mandate?

And what is next? Will litigants seek to eradicate North Carolina's single-sex charter schools? *See*, *e.g.*, School of the Arts for Boys Academy, http://www.sabacademy.org (all-boys charter school in Chatham County, North Carolina); Girls Leadership Academy of Wilmington, http://www.glowacademy.net (all-girls charter school in Wilmington, North Carolina). Will some charter schools' recruiting and admissions decisions, undertaken in pursuit of serving underserved and dispossessed populations, be challenged on Equal Protection grounds? What about charter schools offering a progressive culture and curriculum? A state action finding here leaves charter schools of all stripes more vulnerable to attack. Regardless of the constitutional merits of such challenges, the costs of litigation may well accomplish opponents' lamentable goal of rendering such innovative and diverse programs an experiment that died aborning. Parents and students will feel a loss of participation in those very aspects of their lives that mean the most.

III.

Plaintiffs have another arrow in their quiver: in their view, Title IX bars the dress code too. But this argument is just another way to impose a single rigid perspective on the most minute of schools' operational choices, and it fares no better. We should not read Title IX to intrude into local school decision-making where Congress's intention to do so, and state relinquishment of such control, was so highly uncertain.

A.

It is far from clear that Title IX has anything to say about dress codes—in fact, there is good reason to think it does not. Four decades ago the Department of Education, following a notice-and-comment process, withdrew a regulation which prohibited discrimination "in the application of codes of personal appearance," finding "no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes." 47 Fed. Reg. 32,526, 32,526–27 (July 28, 1982). While it retained other prohibitions under Title IX, the Department concluded that the "[d]evelopment and enforcement of appearance codes is an issue for local determination." *Id.* at 32,526.

At this point, we need not decide whether to afford this interpretation *Chevron* deference. The key is that both North Carolina and CDS agreed to accept federal funds under that clear and straightforward guidance: Title IX did not reach dress codes like this one. Recipients were told such decisions would instead be left to local decision-making.

Title IX "invokes Congress's power under the Spending Clause"; thus, it is "much in the nature of a contract: in return for federal funds, the recipients agree to comply with federally imposed conditions." *Barnes v. Gorman*, 536 U.S. 181, 185–86 (2002) (brackets and emphasis omitted) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); *see also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). Our "central concern" is therefore "with ensuring that the receiving entity of federal funds has notice" of the conditions to which it will be held. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (internal quotation marks and brackets omitted)); *see also Davis*,

526 U.S. at 640. Indeed, the very "legitimacy of Congress' power to legislate" in this realm "rests on whether the recipient voluntarily and knowingly accepts the terms of the 'contract.'" *Barnes*, 536 U.S. at 186 (brackets omitted) (quoting *Pennhurst*, 451 U.S. at 17). So "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 583 (2012) (plurality) (quoting *Pennhurst*, 451 U.S. at 17).

Surely CDS did not unambiguously give up its right to adopt a traditional sex-specific dress code merely by accepting a dollar of federal funds. It simply "strains credulity" to believe that funding recipients such as CDS "should have known" that Title IX prohibits sex-specific dress codes when the Department of Education—the very agency charged by Congress with implementing and enforcing Title IX regulations in this sphere—did not have that understanding. *See Pennhurst*, 451 U.S. at 25. The Department's published position, both in 1999 when CDS was incorporated and in 2015 when CDS signed its current charter, was that dress codes were not implicated by Title IX. And "liability is determined by[] the legal requirements in place when the grants were made" and "should be informed by the statutory provisions, regulations, and other guidelines provided by the [agency] at that time." *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 670 (1985).

Despite this seemingly straightforward agency position, the majority says that the text of Title IX nonetheless unambiguously reaches dress codes. I struggle to see how this can be so. While no one disputes that we "must accord [Title IX] a sweep as broad as its language," *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (citation omitted), broad language is not a blank

check. Nor is breadth the same as clarity, which is at issue here.

Nobody has been clearly "excluded" from or "denied" anything, 20 U.S.C. § 1681(a); CDS offers the same educational programs to both sexes. And not all distinctions are discriminatory. "[T]he term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals," *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006), and "treat[] that individual worse than others who are similarly situated," *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020). Though all agree that this dress code treats girls differently, eminently reasonable minds can and do disagree as to whether it treats them worse. For every parent that seeks to disparage a dress code like this one as harmful or discriminatory, there is another who would seek it out as beneficial. It is not our place to resolve this dispute right now, for whether or not a dress code that draws some sex-based distinctions *is* discriminatory, exclusionary, or benefit-denying, this very difference of opinion shows that it is certainly not *unambiguously* so.

The majority overlooks this entire point. In its view, every difference is by definition discriminatory. This sweeping notion leads it to show pitifully little respect for the value that charter schools might contribute to education. For the majority, this case is all about stomping out any variance at odds with modern sensibilities. So much so that the majority summons up fears of rank discrimination that are not at issue and that appear nowhere in this case. *See* Majority Op. at 28. It matters not that Congress and the Department of Education stopped well short of spelling out conditions that would sweep off the board innumerable classroom approaches and methodologies and countless attempts to

harmonize instruction within the classroom with life outside.

Though "Congress need not spell out every condition with flawless precision for a provision to be enforceable," *W. Va. Dep't of Health & Hum. Res. v. Sebelius*, 649 F.3d 217, 223–24 (4th Cir. 2011) (citing *Bennett*, 470 U.S. at 666–69), here the agency itself has explicitly backed away from saying that this condition on federal funds exists. And it has persisted in sowing that uncertainty up to the present day. In the forty years since the Department rescinded its regulation, the agency has not even attempted to pass a regulation covering appearance codes. *See Davis*, 526 U.S. at 643–44 (looking to "the regulatory scheme surrounding Title IX" to determine if funding recipients had notice of a certain condition); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997) (noting that "[f]ederal regulations similarly fail to indicate any expectation that school[s] will be [held] liable under Title IX").

Indeed, the agency has expressly refused to "take any position regarding the adoption of appearance codes by [schools] since this is a matter that should be left to local discretion." 47 Fed. Reg. at 32,527. At least twenty other agencies have opted to follow the Department of Education's lead in that regard. *See* 65 Fed. Reg. 52,859 (Aug. 30, 2000). Over those years, the caselaw has been mixed on this issue, but numerous cases have also suggested that sex-specific appearance codes do not violate Title IX. *See*, *e.g.*, *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577–78 (7th Cir. 2014) (collecting cases). Even commentators who would banish such dress codes from schools acknowledge that the Department's actions make it unlikely that Title IX reaches dress-code claims. *See* Jennifer L. Greenblatt,

*Using the Equal Protection Clause Post-*VMI *to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. Davis J. Juv. L. & Pol'y 281, 286 (2009); Carolyn Ellis Staton, *Sex Discrimination in Public Education*, 58 Miss. L.J. 323, 334 (1989). Talk about ambiguity.

To ask whether the majority's interpretation or another is better simply misses the boat. The question is instead whether Congress has, "*in unmistakably clear terms*," placed this condition on federal funding. *Com. of Va., Dep't of Educ. v. Riley*, 106 F.3d 559, 566 (4th Cir. 1997) (en banc) (emphasis in original). "At the very least," all this evidence "show[s] that the statutory scheme is profoundly ambiguous" as to dress codes "and that Congress has not spoken with the clarity that *Pennhurst* requires[.]" *Mowbray v. Kozlowski*, 914 F.2d 593, 600 (4th Cir. 1990).

B.

All this focus on ambiguity cannot be divorced from the federalist structure that clarity protects. Clarity is of the utmost importance here, for the very independence of local school systems—and of our federalist structure—depends upon it. As discussed, CDS is not a state actor. Yet North Carolina certainly has the right to create educational options which operate outside of its direct control. Exercising this right is in no sense a waiver of the state's sovereign status. The federal government ought not be allowed to craftily work around that right, bringing North Carolina's independent schools under its own dominion by using its virtually unlimited power to collect and spend.

This case provides a perfect example of using federal powers to wrench our Constitution from its founding shape by hammering the constituent sovereignties in our

system into one conforming federal mold. As the Department of Education rightly recognized, a single dress policy in an individual school is an issue for local determination, not federal control. Providing education for our nation's youth is central to states' sovereignty. *See United States v. Lopez*, 514 U.S. 549, 564 (1995); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–30 (1973); *Riley*, 106 F.3d at 566. It is critical that states be given flexibility to fulfill this role. *See Sebelius*, 567 U.S. at 536 ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.") (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

North Carolina has exercised its sovereignty by choosing to make a diverse assortment of school options available to its students, including independent charter schools. And it should be able to do so without undue federal interference, so that states "may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). In turn, those charter schools have every right to make reasonable decisions about the ordinary day-to-day operation of their schools, again without undue federal interference. Such dispersion of educational decision-making to an even more local level—all the way down to individual schools and parents—is in keeping with the "choice, competition, and innovation" so fundamental to federalism. *See* Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & Educ. 1, 24–25 (2010) (quoting Robert A. Schapiro, *Toward A Theory of Interactive Federalism*, 91 Iowa L. Rev. 243, 267 (2005)). To say that the federal government may prescribe student dress

codes for the untold thousands of schools in the fifty states is to say that little lies beyond its competence, even where its directives themselves come clothed in ambiguity.

To hold otherwise is to allow the inevitable momentum toward federal hegemony to surge onward. Almost unawares, we find ourselves in a world where the enumerated federal powers are incrementally transformed into a general federal police power—and where the federal government's sheer financial leverage allows it to shunt differing perspectives to the sidelines. *See Sebelius*, 567 U.S. at 536 (Spending Clause "must be read carefully to avoid creating a general federal authority akin to the police power."). Much of the growth of federal power is an altogether necessary response to international and interstate challenges and moral imperatives the Framers never envisioned or addressed. But not all of it is. The quotidian operations of state and local schools are not intuitively federal subjects, and where law so firmly aligns with intuition, the outcome should be clear.

IV.

Charter schools are proving quite popular, so much so that they are becoming difficult to restrict through legislative means. So the effort seems to be to control them through regulation and litigation, as this case makes plainly manifest.

No doubt the fight against the CDS dress code has only begun. No doubt this dress code will be attacked as retrograde, a threat to progress of all sorts. No doubt there will be sincere differences of opinion as to this. But our nation has prospered when all its citizens could freely exercise their diverse faiths. Perhaps a greater freedom of choice will likewise lessen the tensions that arise when educational establishments seek to bend school systems to their singular ends. I do not know how the political debate

over school choice will evolve. I do know, however, that this court should not subject this charter school to the slow strangulation of litigation. I would return this case to the district court with directions that it be dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 20-1001

BONNIE PELTIER, ET AL.,

Plaintiffs – Appellees,

v.

CHARTER DAY SCHOOL, INC., ET AL.,

Defendants – Appellants,

THE ROGER BACON ACADEMY, INC.,

Defendant.

No. 20-1023

BONNIE PELTIER, ET AL.,

Plaintiffs – Appellants,

v.

CHARTER DAY SCHOOL, INC., ET AL.

Defendants – Appellees,

THE ROGER BACON ACADEMY, INC.,

Defendant.

(August 9, 2021)

Appeals from the United States District Court for the Eastern District of North Carolina, at Wilmington. Malcolm J. Howard, Senior District Judge. (7:16-cv-00030-H-KS)

Argued: March 11, 2021

Before KEENAN, QUATTLEBAUM, and RUSHING, Circuit Judges.

Reversed and remanded by published opinion. Judge Quattlebaum wrote the opinion, in which Judge Rushing joined. Judge Keenan wrote an opinion, concurring in part and dissenting in part.

ARGUED: Aaron Michael Streett, BAKER BOTTS L.L.P., Houston, Texas, for Appellants/Cross-Appellees. Galen Leigh Sherwin, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellees/Cross-Appellants.

ON BRIEF: J. Mark Little, Travis L. Gray, BAKER BOTTS L.L.P., Houston, Texas, for Appellants/Cross-Appellees. Ria Tabacco Mar, Jennesa Calvo-Friedman, Louise Melling, Amy Lynn Katz, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Irena Como, ACLU OF NORTH CAROLINA LEGAL FOUNDATION, Raleigh, North Carolina; Jonathan D. Sasser, ELLIS & WINTERS LLP, Raleigh, North Carolina, for Appellees/Cross-Appellants. Jeanette K. Doran, NORTH CAROLINA INSTITUTE FOR CONSTITUTIONAL LAW, Raleigh, North Carolina, for Amicus North Carolina Institute for Constitutional Law. Paul B. Stam, Jr., R. Daniel Gibson, STAM LAW FIRM, PLLC, Apex, North Carolina, for Amici The Civitas Institute, Inc. and Paul B. Stam, Jr. Brian R. Matsui,

Aaron D. Rauh, MORRISON & FOERSTER LLP, Washington, D.C., for Amici Society for Research in Child Development, Society for the Psychological Study of Social Issues, Cognitive Development Society, and Society for Research on Adolescence. Alice O'Brien, Eric A. Harrington, Rebecca Yates, NATIONAL EDUCATION ASSOCIATION, Washington, D.C.; Verlyn Chesson-Porte, NORTH CAROLINA ASSOCIATION OF EDUCATORS, Raleigh, North Carolina, for Amici The National Education Association and North Carolina Association of Educators. Emily Martin, Neena Chaudhry, Sunu Chandy, Adaku Onyeka-Crawford, NATIONAL WOMEN'S LAW CENTER, Washington, D.C.; Courtney M. Dankworth, DEBEVOISE & PLIMPTON LLP, New York, New York, for Amici National Women's Law Center and Coalition of Civil Rights and Public Interest Organizations. Jayme Jonat, Nina Kanovitch Schiffer, HOLWELL SHUSTER & GOLDBERG LLP, New York, New York, for Amicus Professor Ruthann Robson.

QUATTLEBAUM, Circuit Judge:

This case involves a charter school's dress code. The dress code includes certain requirements for both boys and girls, certain requirements for boys only and certain requirements for girls only. Three female students sued the school and the company that manages it challenging one of the requirements applicable only to girls—that they wear either skirts, jumpers or skorts, instead of pants or shorts. While the suit involves a host of legal theories, the only ones before us today ask whether a charter school's dress code may give rise to a claim under either the Equal Protection Clause or Title IX, 20 U.S.C. § 1681.

After discovery, all parties moved for summary judgment. The district court granted summary judgment to Plaintiffs on the equal protection claim, but to Defendants on the Title IX claim, holding that Title IX did not reach school dress codes. For the reasons set forth below, we conclude that the charter school here was not a state actor when promulgating the dress code and, thus, is not subject to an equal protection claim. At the same time, however, we determine that claims of sex discrimination related to a dress code are not categorically excluded from the scope of Title IX. Accordingly, we reverse on both claims and remand for further proceedings consistent with this opinion.

I.

A.

In the mid-1990s, the North Carolina General Assembly passed the Charter School Act. *See* N.C. Gen. Stat. § 115C-218, *et seq*. The law "authorize[d] a system of charter schools to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently of existing

schools." *Id.* § 115C-218(a). Charter schools were designed to "[i]mprove student learning" and "[e]ncourage the use of different and innovative teaching methods." *Id.* § 115C-218(a)(1), (3). The goal was to "[p]rovide parents and students with expanded choices in the types of educational opportunities that are available within the public school system." *Id.* § 115C-218(a)(5). Any child eligible to attend a public school may choose to attend a charter school, but no one is required to attend one. *Id.* § 115C-218.45(a)–(b).

Although charter schools are nominally public schools under North Carolina law, they are operated by private nonprofit corporations rather than the local public school board. *Id.* § 115C-218.15. The nonprofit's board of directors has authority to decide matters related to the school's operation. *Id.* § 115C-218.15(d). Charter schools have wide latitude to experiment with pedagogical methods and are exempt from statutes applicable to local boards of education. *Id.* § 115C-218.10. Instead, they are governed by their charter, or contract, between the nonprofit corporation and the state. *Id.* § 218.15(c). The charter provides the primary means of state accountability over charter schools. If the corporation violates any charter provision, the state can revoke the charter or bring a breach-of-contract action. *Id.* § 115C-218.95. Likewise, the state can revoke the charter or decline to renew it if the school underperforms. *Id.* Although charter schools must adopt policies governing student conduct and discipline, the state does not supervise the content of those policies. *Id.* § 115C-390.2(a). Relevant here, there is no state law or charter provision requiring the imposition of a dress code.

B.

Charter Day School, Inc. ("CDS") is a nonprofit corporation that holds a charter from North Carolina. Baker Mitchell incorporated CDS in 1999, intending to open a charter school in rural Brunswick County. That school, Charter Day, initially served just over fifty students. It has grown substantially and currently educates over 900 elementary and middle school students. CDS's volunteer Board of Directors sets the school's policies. Mitchell was initially Chair of the Board, but he is now Board Secretary, a non-voting position.

CDS entered into an "educational management contract" with The Roger Bacon Academy, Inc. ("RBA") to manage day-to-day operations at Charter Day. RBA is a for-profit corporation, which Mitchell also founded and wholly owns. CDS's charter application was filed in conjunction with RBA, with Mitchell as the signatory. The charter incorporated the management agreement between CDS and RBA, which delegates to RBA management of all day-to-day operations of the school, including enforcement of "the rules, regulations and procedures adopted by CDS." J.A. 360.

Charter Day operates as a school promoting traditional values. It advances a "traditional curriculum, traditional manners and traditional respect." J.A. 1719. Students must use polite forms of address, such as "Ma'am" and "Sir." It also embodies a classical curriculum, which focuses on literature, history and Latin. As part of this traditional approach, the school adopted a uniform policy.

The dress code, according to Defendants, helps "instill discipline and keep order." J.A. 2079. All students must wear white or navy-blue tops and khaki or blue bottoms. Shirts must be tucked in and only closed-toed shoes are allowed. In addition, there are some requirements that

apply only to boys or girls. Boys may not wear jewelry and must keep hair "neatly trimmed and off the collar . . . and not below the top of the ears or eyebrows." J.A. 101. Boys must also wear a belt. But while boys may wear pants or shorts, girls must wear skirts, jumpers or skorts, which can be paired with leggings for warmth. On days with physical education class, however, students have different uniforms. On those days, girls may wear gym shorts or sweatpants. The skirt requirement is also waived on some special occasions, like field trips.[1]

If a student violates the dress code, the school typically notifies the parents, which is intended to be informative rather than punitive. A student may also be pulled from class to obtain compliant attire. And while students, in theory, may face expulsion for violating the disciplinary code, which includes the dress code, according to CDS no student has been expelled for a uniform policy violation.

One of the plaintiffs, Bonnie Peltier, a parent of a kindergartener at Charter Day, inquired about the reasons for the skirt requirement at an orientation. School officials directed her to contact Mitchell. Mitchell responded to her email, explaining that Charter Day was "determined to preserve chivalry and respect among young women and men," and there was a need to "restore . . . traditional regard for peers." J.A. 70. Believing the skirt requirement to be discriminatory, Peltier, through counsel, requested the school change it. CDS denied that request, responding that the uniform policy was adopted "to establish an environment in which our young men and

[1] Because the parties refer to the requirement that girls wear skirts, jumpers or skorts as the "skirt requirement," we will as well for simplicity. By doing so, however, we do not intend to suggest that the options other than skirts are irrelevant.

women treat one another with mutual respect." J.A. 427 (citing Mitchell's email to Peltier).

C.

Subsequently, three female students, a kindergartener, fourth and eighth grader, through their parents, sued to challenge the skirt requirement as unlawful under Title IX, the Equal Protection Clause and North Carolina law. The suit named CDS, its Board members in their representative capacities and RBA as defendants. After the district court denied Defendants' motion to dismiss, the case proceeded to discovery.

During depositions, Plaintiffs claimed the skirt requirement created practical problems. The girls testified that they could not move as freely and comfortably in their skirts, which led them to avoid activities during recess. It also required them to cross their legs or keep their knees together while sitting. This focus on how they must sit "distracted [them] from [their] academic work." J.A. 504. They also testified that wearing leggings with a skirt did not keep them as warm in the winter as pants would have.

In addition to these practical concerns, Plaintiffs also expressed concerns about the psychological effects of the requirement. One plaintiff testified that the requirement conveyed the message that "girls should be less active than boys and that they are more delicate than boys. This translates into boys being put in a position of power over girls." J.A. 499. Plaintiffs' expert, a developmental psychologist, testified that research shows requiring girls to wear skirts reinforces "gender roles in which girls are viewed as passive and focused on their appearance instead of agency." J.A. 2467.

CDS officials attempted to explain the reasons for the requirement. Expounding on his claim that it furthered chivalry, Mitchell testified that "chivalry" meant "a code of conduct where women are . . . regarded as a fragile vessel that men are supposed to take care of and honor." J.A. 414. He also remarked that it was important to distinguish boys from girls because boys should treat girls more "courteously and more gently than boys." J.A. 413. CDS Board members largely endorsed Mitchell's reasoning. And the Assistant Headmaster of the elementary school similarly explained that wearing skirts "models the difference" between boys and girls and promotes "the proper treatment of young ladies." J.A. 1090.

D.

After discovery, the parties filed cross-motions for summary judgment, and the district court delivered a mixed ruling. The district court granted summary judgment in favor of Plaintiffs on the § 1983 claim against CDS, but not RBA. It granted summary judgment in favor of Defendants, however, on the Title IX claim.

On the equal protection claim, the district court began by analyzing whether CDS and RBA acted under color of state law for purposes of § 1983. It first noted that the North Carolina legislature's designation of charter schools as public schools was not outcome determinative but merely one factor to consider. Then, it reasoned that CDS was performing a "historical, exclusive and traditional state function" by providing "free, public education," even though education more broadly was not an exclusive state function. Finally, the district court explained that by incorporating the dress code into its disciplinary handbook, CDS brought the policy under the extensive regulation of the state, which has a statute expressing a

policy disfavoring serious disciplinary actions for minor violations, such as dress code violations. *See* N.C. Gen. Stat. § 115C-390.2. It therefore concluded that CDS was acting under color of state law when it promulgated the uniform policy. It also concluded, however, that RBA was not a state actor because it did not have the authority to approve or change the uniform policy, and it thus granted summary judgment to RBA on the equal protection claim. The district court then concluded that CDS could not prevail on the merits of the equal protection analysis because the requirement did not further any of the purposes Defendants offered. It therefore granted Plaintiffs summary judgment against CDS on the equal protection claim.

As to the Title IX claim, the district court determined that Title IX did not apply to sex-specific school dress codes. It noted that the United States Department of Education previously regulated this matter by prohibiting discrimination "against any person in the application of any rules of appearance," but it later withdrew that regulation altogether. 40 Fed. Reg. 24,141 (June 4, 1975); *see* 47 Fed. Reg. 32,526–57 (July 28, 1982). In the withdrawal, the Department stated that "[t]here is no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes." 47 Fed. Reg. at 32,527. The district court gave *Chevron*[2] deference to this withdrawal, determining that the text of Title IX did not speak to this precise issue and the agency's interpretation was reasonable.

At the same time, the district court denied summary judgment without prejudice on the state law claims—

[2] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

allowing the possibility of further litigation on these claims if necessary. These include a North Carolina Equal Protection Clause claim and a third-party beneficiary breach of contract claim based on CDS's charter which, among other things, requires compliance with civil rights laws, including the applicable state and federal constitutional provisions.

Defendants sought to appeal the district court's ruling. The district court determined there was no just reason for delay and entered partial final judgment on its equal protection and Title IX rulings. *See* Fed. R. Civ. P. 54(b).[3] In doing so, it permanently enjoined CDS from enforcing the skirt requirement. CDS timely appealed the grant of summary of judgment to Plaintiffs on the equal protection claim, and Plaintiffs cross-appealed the grant of summary judgment to Defendants on the Title IX claim and to RBA on the equal protection claim. We have jurisdiction over this partial final judgment on the equal protection and Title IX claims pursuant to 28 U.S.C. § 1291.

II.

We begin with Plaintiffs' equal protection claim.[4] Before proceeding to the merits of that claim, however, we must first decide whether CDS and RBA are state actors against which a § 1983 claim may be maintained.

A.

A plaintiff can only succeed on a § 1983 claim if a defendant acts "under color of [state law]." 42 U.S.C. §

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[3] We conducted a sua sponte review of the district court's entry of final judgment under Rule 54(b) as required by our precedent. *Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1336 (4th Cir. 1993). We find no error with the district court's analysis that partial final judgment was warranted in these circumstances.

[4] We review a district court's grant or denial of summary judgment de novo. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

1983. Therefore, § 1983 does not regulate private conduct. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). In some circumstances, however, a private actor's conduct may be considered state action, rather than private action. To determine whether a private actor is engaging in state action for the purposes of § 1983, we ask, "is the alleged infringement of federal rights fairly attributable to the State?" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (internal quotation marks omitted).[5]

That general question has informed a hodgepodge of cases that lack a neat analytical structure. In some cases, the Supreme Court has reasoned an activity may only be state action when it results from the state's "coercive power" or when the state provides "significant encouragement" of the action. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (holding that Medicaid recipients failed to establish state action in a nursing home's decision to discharge Medicaid patients to lower levels of care because those decisions were made independently by private staff, not the state). Other times, the Court has asked whether a state delegates a constitutional obligation to a private party. *West v. Atkins*, 487 U.S. 42, 54–55 (1988) (holding that a state-contracted physician's treatment of an inmate was state action because the state had a constitutional obligation under the Eighth Amendment to provide medical care to inmates). Similarly, the Court has also inquired whether a state delegates a public function traditionally reserved exclusively to the state. *Rendell-Baker*, 457 U.S. at 842.

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[5] Whether a private actor's conduct is "under color of [state law]" "has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States v. Price*, 383 U.S. 787, 794 n.7 (1966). Therefore, we are guided by cases dealing with both provisions.

And finally, the Court has sometimes reasoned that activity "entwined with governmental policies" or actors is state action. *Evans v. Newton*, 382 U.S. 296, 299 (1966); *see also Brentwood Acad. v. Tenn. Secondary Schs. Athletic Assoc.*, 531 U.S. 288, 298 (2001) (holding a school athletic association was a state actor because it was pervasively entwined with public officials).

As evidenced by those different inquiries, "[t]here is no precise formula to determine whether otherwise private conduct constitutes 'state action.'" *Arlosoroff v. Nat'l Collegiate Athletic Assoc.*, 746 F.2d 1019, 1021 (4th Cir. 1984). "Facts that address any of these criteria are significant, but no one criterion must necessarily be applied." *Brentwood Acad.*, 531 U.S. at 303. And "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." *Id.* at 295–96. At bottom, however, the key question remains whether there is a "close nexus between the State and the challenged action" such that private conduct "may be fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974).

We are not left in the dark, however, in analyzing whether a privately operated school can be a state actor. Both the Supreme Court and other circuits have addressed this question in similar contexts. These cases provide a guide on how to proceed here.

In *Rendell-Baker*, the Supreme Court analyzed whether a nominally private school that functioned almost exclusively as a government contractor was a state actor. 457 U.S. at 837. The private school was operated by a board of directors with no public affiliation. *Id.* at 832. It specialized in teaching students with drug or behavioral

problems, or other special needs. *Id.* Nearly all of the students were referred by the public school system or drug courts, and the local public school committees paid the tuition of students they referred, which, when combined with other state and federal funding, resulted in somewhere between 90–99% of the school's operating budget each year. *Id.* The school also issued diplomas certified by the local public school board. *Id.* In order to receive state funding, the school had to comply with a variety of "detailed regulations concerning matters ranging from recordkeeping to student-teacher ratios," as well as certain "personnel standards and procedures." *Id.* at 833. And as a "contractor" with the state and local public school committee, the school had to provide certain individualized services for students. *Id.* at 833.

Even though the school in *Rendell-Baker* derived virtually all its funding from, and was regulated by, the state, the Court held it was not a state actor when it fired certain employees. *Id.* at 837. The Court began its analysis by comparing the school to the nursing home in *Blum*, which instructed that near-total public funding does not turn private action into state action. *Id.* at 840. Then, the Court reasoned that although the state extensively regulated the school, "the decisions to discharge the [employees] were not compelled or even influenced by any state regulation." *Id.* at 841. Finally, in considering whether the school was performing a traditionally exclusive public function, the Court noted that although "the education of maladjusted high school students is a public function," it was not "the exclusive province of the State." *Id.* at 842. Instead, it was a "legislative policy choice" to provide that public function. *Id.*

Other circuits have followed the reasoning in *Rendell-Baker* when analyzing whether private schools or charter schools can be state actors. The First Circuit rejected a claim that a privately operated school, which contracted with the state to be the exclusive provider of public education in a district, was a state actor when disciplining a student because it did not perform an exclusive public function. *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002). It noted that "even publicly funded education of last resort was not provided exclusively by government in Maine." *Id.* The Third Circuit similarly concluded a publicly funded school that educated juvenile sex offenders was not a state actor because, "[a]s was true of the [school] in *Rendell-Baker*," the school did not perform a function traditionally within the exclusive province of the state. *Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 166 (3d. Cir. 2001) (Alito, J.). The Ninth Circuit followed a similar analysis regarding a charter school operator with no material differences from CDS. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010). In that case, the Ninth Circuit held that a private non-profit corporation that operated a public charter school was not a state actor when it took employment actions against a teacher. *Id.* at 808. It began its analysis noting that the state's statutory designation of the charter school as a public school was insufficient on its own to make the school a state actor for all purposes because that designation does not "resolve the question whether the state was sufficiently involved in causing the harm to plaintiff." *Id.* at 814. It then determined that *Rendell-Baker* "foreclosed" the argument that "public educational services" are traditionally an exclusive state function. *Id.* at 814–15. And because no regulation compelled the employment decision at issue, the Court determined that the charter

school was not a state actor. *Id.* at 816–17. With that legal landscape in mind, we turn to the facts here.

B.

"A determination of whether a private party's allegedly unconstitutional conduct is fairly attributable to the State requires us to begin by identifying the specific conduct of which the plaintiff complains." *Mentavlos v. Anderson*, 249 F.3d 301, 311 (4th Cir. 2001) (alterations adopted and internal citations omitted). Plaintiffs here challenge CDS's uniform requirement that girls wear skirts, jumpers or skorts, rather than pants or shorts like boys. Thus, our decision today does not address whether a charter school can ever be a state actor. We only decide today that CDS's skirt requirement is not "fairly attributable" to the state for § 1983 purposes. *Rendell-Baker*, 457 U.S. at 838.

1.

Our analysis begins with *Rendell-Baker*. Charter Day has few differences from the school in *Rendell-Baker* and several meaningful similarities. Both schools are run entirely by private actors that contract with the state. *Rendell-Baker*, 457 U.S. at 832. Both schools receive nearly all their funding from the state. *Id.* Students at both schools could attend a general public school instead; thus, they effectively, if not explicitly, opt in to attending the school. *Id.* at 832 n.1. And Charter Day is arguably under even less state regulation than the school in *Rendell-Baker*—indeed, the purpose of the charter school system in North Carolina is to promote experimentation and school choice through deregulation. N.C. Gen. Stat. § 115C-218(a)(1), (3), (5)–(6).

On the other hand, there are two main differences. First, Charter Day is by law a "public school," whereas the

school in *Rendell-Baker* was nominally private. *Id.* § 218.15(a); *Rendell-Baker*, 457 U.S. at 832. Second, and relatedly, CDS does not charge any tuition, whereas the state reimbursed the school in *Rendell-Baker* for tuition it technically charged students. N.C. Gen. Stat. § 115C-218.50(b); *Rendell-Baker*, 457 U.S. at 832.

These two distinctions do not meaningfully change *Rendell-Baker*'s analysis. Both distinctions are formal, rather than functional. State action case law places more weight on function than nominal characterizations. *See Brentwood Acad.*, 531 U.S. at 298 ("The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings . . . ."); *see also Caviness*, 590 F.3d at 815–16 ("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."). As the Ninth Circuit recognized in *Caviness*, the statutory designation of a school as public cannot change the fact that it is run by a private corporation comprised entirely of private actors. 590 F.3d at 814. The Supreme Court has already instructed that statutory designations are insufficient alone to make a private actor's conduct state action. *Jackson*, 419 U.S. at 350 n.7. Although this designation may create some perceived entwinement between the state and Charter Day, reality belies any perception. Functionally, North Carolina's charter school statutory scheme disentangles the state from the day-to-day operations of CDS, and in particular CDS's promulgation of a dress code. The statutory scheme clearly reflects a "legislative policy choice" to contract with privately operated schools to

provide a hands-off approach by the state, enabling pedagogical experimentation and school choice. *Rendell-Baker*, 457 U.S. at 842. Likewise, the fact that CDS is directly publicly funded, rather than reimbursed for tuition it charges by the state, is a formal distinction. The school in *Rendell-Baker* covered up to 99% of its operating budget from public funds, and like CDS, it had to comply with provisions in its contract with the state. *Id.* at 832. That charter schools cannot charge tuition in North Carolina merely reflects the legislative designation of the schools as public, and thus open equally, in theory, to all. It does not functionally change the relationship between CDS and the state.

Therefore, while the dissent relies heavily on these formal distinctions, that reliance is at odds with the guidance from the Supreme Court and with the decisions of our sister circuits, which would recognize Charter Day as a privately operated school. In sum, it does not seem that Charter Day has meaningful differences from the school in *Rendell-Baker*.

Rendell-Baker does not itself foreclose the inquiry, however, because we are assessing different conduct. That case asked whether the school was a state actor when it fired employees. *Id.* at 831. Here, we are tasked with determining whether CDS was a state actor when it promulgated the skirt requirement. Those actions are different. But for the reasons explained below, this difference is not outcome determinative. CDS's skirt requirement, however different than its firing of an employee, is still not "fairly attributable" to the state. *Id.* at 840.

2.

A tour through *Rendell-Baker*'s analysis and the various state action inquiries confirms that CDS was not a

state actor in promulgating the skirt requirement. While the relevance of these inquiries may depend on the circumstances of a case, here they all point toward one answer. CDS's promulgation of the skirt requirement is not "fairly attributable" to North Carolina. *Id.* at 838.

Our first stop on that tour involves whether CDS performs a traditionally exclusive state function. The parties quarrel over what level of granularity we must analyze CDS's function. CDS argues that we must consider education in general, whereas Plaintiffs argue we should endorse the district court's analysis of whether providing "free, public education" is traditionally an exclusive state function. J.A. 2732. *Rendell-Baker* instructs the answer lies in the middle of these extremes. The Court asked whether "the education of maladjusted high school students" was "the exclusive province of the State." *Rendell-Baker*, 457 U.S. at 842. That was the function the school provided, and the Court determined it to be outside the State's exclusive province. Thus, we cannot look at education in general. But at the same time, we cannot narrow the scope by using answer-assuming adjectives to circumvent the functional inquiry. Asking whether "free, public education" is traditionally an exclusive state function is circular because it "ignores the threshold state-action question." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (explaining that asking whether "the operation of a public forum for speech" was a traditional, exclusive government function improperly avoided the state action inquiry). We agree with the First Circuit that "there is no indication that the Supreme Court had this kind of tailoring by adjectives in mind when it spoke of functions 'exclusively' provided by government." *Logiodice*, 296 F.3d at 27. Instead, we focus solely on what function the actor

provides. *See Mentavlos*, 249 F.3d at 314–15 (describing a public military college's function as "to educate civilian students and produce community leaders" after looking to the school's stated mission).

In North Carolina, charter schools operate "independently of existing schools" to improve learning and educational options by offering "different and innovative teaching methods." N.C. Gen. Stat. § 115C-218(a). Charter Day fulfills this role by educating K-8 students using a classical curriculum—thus, its function is to provide an alternative method of primary education. As the North Carolina statutory scheme makes plain, charter schools are designed to provide alternative methods of education outside the traditional state school system. And so schools like Charter Day cannot be considered "traditionally the *exclusive* prerogative of the state." *Jackson*, 419 U.S. at 353 (emphasis added).

Private actors have a long history, both nationwide and in North Carolina, of carrying out primary education, especially alternative methods of primary education. From its colonial beginnings, North Carolina provided some public funds to private schools. *See, e.g.*, 1808 N.C. Sess. Law LXXII (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); 1805 N.C. Sess. Law XL (An Act Respecting the Warrenton Academy); 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). Over time, even with the proliferation of public schooling, private schools continued to provide alternative primary education opportunities. Last year, over 100,000 children in North Carolina attended a private school, including over 75,000

K–8 students. *2020 North Carolina Private School Statistics*, STATE OF NORTH CAROLINA, DEPARTMENT OF ADMINISTRATION, DIVISION OF NON-PUBLIC EDUCATION 2 (2020), *available at* https://files.nc.gov/ncdoa/Annual-Conventional-Schools-Stats-Report-2019-2020_1.pdf. Private schools, including both religious and independent schools, by their very nature provide a spectrum of alternative curriculums and methods. Students that attend private schools in North Carolina, moreover, may still receive state funding. *See* N.C. Gen. Stat. § 115C-562.1, *et seq*. Some may even attend private schools for free with the benefit of state funds. STATE EDUCATION ASSISTANCE AUTHORITY, *Household Income Eligibility Guidelines* (2021), *available at* https://www.ncseaa.edu/wp-content/uploads/sites/1171/2020/10/HHIncomeEligibilityGuidelines.pdf. In addition to private schools, homeschooling has always played a substantial role in our society as an alternative primary education method. "While many functions have been traditionally performed by governments, very few have been exclusively reserved to the State." *Flagg Brothers Inc. v. Lefkowitz*, 436 U.S. 149, 159 (1978). Providing an alternative method of primary education, even freely, is not one of them. Considering all of this, we conclude that CDS does not perform a traditionally exclusive state function.

Our next stop considers whether any state law or regulation compels CDS's skirt requirement. The district court reasoned that CDS "has brought the uniform policy under extensive regulation of the State by making violations of the uniform policy a disciplinary violation" because North Carolina law discourages long-term suspension or expulsion for minor disciplinary violations, such as non-compliance with a dress code. J.A. 2735; *see* N.C. Gen. Stat. § 115C-390.2. But that expressed policy is

not an "extensive regulation" of school uniform policies. *Rendell-Baker*, 457 U.S. at 841. In fact, there is no state policy at all that requires, prohibits or regulates uniform policies. Thus, no state law or regulation "compelled" the specific action challenged here—the skirt requirement. *Id.* Therefore, it does not result from the state's "coercive power" or extensive regulation such that it warrants attribution to the state itself. *Blum*, 457 U.S. at 1004. In short, neither state law nor state regulation compels CDS's skirt requirement.

Continuing our tour, we next examine whether CDS is "pervasive[ly] entwined" with the state. *Brentwood Acad.*, 531 U.S. at 291. Charter schools in North Carolina operate independently of local school boards. N.C. Gen. Stat. § 115C-218.15. CDS's Board of Directors, which the government has no role in selecting, "decide[s] matters related to the operation of the school, including budgeting, curriculum, and operating procedures." *Id.* § 115C-218.15(d). CDS "is exempt from statutes and rules applicable to a local board of education." *Id.* § 218.10. And while charter schools must "adopt policies to govern the conduct of students and establish procedures to be followed by school officials in disciplining students," the state does not approve or supervise the content of those policies. *Id.* § 390.2(a). Put simply, 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. The state is so hands-off, in fact, that it disclaims liability "for any acts or omissions of the charter school."[6] *Id.* § 115C-218.20(b). This reality is a far cry

[6] The state statute is silent as to whether charter schools are entitled to sovereign immunity. *Id.* § 115C-218.20(a) ("Any sovereign immunity of the charter school . . . is waived to the extent of indemnification by insurance."). Governmental immunity and state

from the "public entwinement in the management and control" necessary for state action. *Brentwood Acad.*, 531 U.S. at 297 (noting the "bottom up" and "top down" entwinement between the nominally private actor and the state).

Our final tour stop involves the question of whether North Carolina has delegated its constitutional obligation to provide public schooling, thus making CDS's conduct state action under *West v. Atkins*, 487 U.S. 42 (1988). *See* N.C. Const. art. IX § 2 (setting forth the state's obligation to provide for a "uniform system of free public schools"). In *West*, the Court held that a physician who contracted with the state to provide medical services to prison inmates was a state actor when treating patients. 487 U.S. at 54. The Court pointed to the constitutional obligation under the Eighth Amendment to provide medical care to inmates, and it concluded the state abdicated this obligation by deferring solely to the contracted-physician's professional judgment. The physician was therefore "authorized and obliged to treat prison inmates" and "clothed with the authority of state law." *Id.* at 55 (quoting *United States v. Classic*, 313 U.S. at 326).

There are important differences between *West* and the circumstances here. First, unlike in *West*, the state here has not abdicated its constitutional obligation through a private contract. In *West*, the state provided the inmate his needed medical care entirely through a contracted private physician. *Id.* at 44, 55. In other words, the state

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action are two sides of the same coin. But while the doctrines are related and contain similar analyses, they are distinct. See *Cunningham v. Gen. Dynamics Info. Tech.*, 888 F.3d 640, 646–47 (4th Cir. 2018) (explaining that a government contractor receives immunity if the state acted within its constitutional power to authorize an action).

fulfilled one-hundred percent of its constitutional obligation through a contract with a private actor. That is not the case here. North Carolina never stepped away from its role in providing a public school system free to all. It still operates public schools that can, and do, accommodate each child who wishes to attend. By providing an alternative option of charter schools, 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. North Carolina law is clear that charter schools "operate independently of existing schools," N.C. Gen. Stat. § 115C-218(a), to offer "different and innovative teaching methods," *id.* § 115C-218(a)(3), and to provide "expanded choices in the types of educational opportunities" available to students. *Id.* § 115C-218(a)(5). These schools are thus an additional option beyond the "traditional public schools that have been established in order to comply with [N.C. Const. art. IX]." *Sugar Creek Charter Sch., Inc. v. State*, 712 S.E.2d 730, 741 (N.C. App. 2011) ("N.C. Const. art. IX, § 2(1) does not implicitly prohibit the establishment of public schools in addition to the traditional public schools that have been established in order to comply with this basic constitutional mandate.").

Second, and further illustrating this point, students at Charter Day had a choice that the inmate in *West* never had. The inmate in *West* had no choice but to submit to the services of the contracted physician the state provided. Emphasizing this point, the Court noted that "[i]t is only those physicians authorized by the State to whom the inmate may turn." *Id.* at 55. It thus concluded that if the physician was deliberately indifferent in providing treatment, that harm "was 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." *Id.* In other words, the inmate had no choice but to submit to the state's medical services, and the state chose to fulfill its obligation through a private actor. By contrast, Charter Day students have a choice. They were never "den[ied] . . . a venue independent of the State," nor were they "den[ied] . . . a venue" that North Carolina had a constitutional obligation to provide. *Id.* Any student in North Carolina may still attend a traditional public school—which the state still completely operates. Because no student must attend Charter Day, and every student may still attend a traditional public school, North Carolina has not delegated its constitutional obligation to CDS. Thus, *West* does not lead to the conclusion that CDS is a state actor.

In sum, CDS's skirt requirement is not "fairly attributable" to the state. *Rendell-Baker*, 457 U.S. at 838.[7] The Constitution only reaches government conduct. Under *Rendell-Baker* and in consideration of the state action doctrine, the skirt requirement is CDS's conduct, not North Carolina's. Because § 1983 does not regulate private conduct, Plaintiffs cannot prevail on their equal protection claim. Therefore, we reverse the district court's grant of summary judgment to Plaintiffs against CDS and affirm the district court's grant of summary judgment to RBA on this claim.

C.

Last, we appreciate the passion of our good colleague's dissent to this portion of our opinion. We join her in

[7] For the same reasons, RBA is not a state actor either. RBA is a further step removed from state action because its contractual relationship is with CDS, not the state.

acknowledging and celebrating the accomplishments of women she identifies and innumerable others. Nothing in our opinion should be construed otherwise. To that point, our opinion neither endorses nor rejects the dress code and the reasons offered by CDS for its implementation. Rather, it is an evaluation of Plaintiffs' Equal Protection claim under current law. Under our precedent, CDS is not a state actor in promulgating its dress code, which means that, even if it causes the harms Judge Keenan describes, CDS is not subject to an Equal Protection claim. Whether we like that law or not, we are bound to follow it.

And to be clear, our decision that CDS is not a state actor in promulgating its dress code for purposes of a § 1983 claim does not give it, or any other charter school operator, a license to discriminate. While none are currently before us, several other mechanisms remain in place to prevent discrimination and to empower victims of discrimination to seek recourse. North Carolina can ensure accountability through enforcement of its charter. CDS's charter, for example, requires compliance with civil rights laws, including applicable state and federal constitutional provisions. Plaintiffs here have a third-party beneficiary claim based upon that charter provision pending before the district court. In addition, federal civil rights statutes, like Title VI and Title IX, likely apply to most charter schools as recipients of federal funds. And states and localities may very well have their own civil rights laws applicable to charter schools. Between accountability measures at the local level and robust civil rights laws, the lack of a federal Equal Protection Clause remedy does not enable a charter school to discriminate without consequence. Plaintiffs can pursue their other claims and, if the facts support them, obtain the appropriate relief. But since the district court has not

addressed those issues and we have remanded the case to it as set forth below, we elect not to comment on the evidence.

III.

We now turn to Plaintiffs' Title IX claim. Plaintiffs argue the district court erred in granting summary judgment to Defendants on the grounds that Title IX does not apply to sex-based dress codes. We agree. In considering that argument, we first address whether Title IX applies to RBA, before determining whether Title IX applies to dress codes like the one at CDS and, if it does, what the proper standard is for such a claim.

A.

At the outset, we must resolve which Defendants are recipients of federal funds for Title IX purposes. The district court did not reach this issue. The parties agree that Title IX regulates CDS, as a direct recipient of federal funds. They dispute, however, whether the same is true for RBA. According to RBA, Title IX does not reach it because it does not receive public funding directly but instead only through its contract with CDS. It points to *National Collegiate Athletic Association v. Smith*, 525 U.S. 459, 468 (1999), as holding that benefiting from federal funding is not enough to be considered a recipient for Title IX purposes.

Title IX's regulations, however, clarify that RBA is a recipient of federal funds such that it is subject to Title IX liability. The Department of Education has defined "recipient" to mean anyone "to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance." 34 C.F.R. § 106.2(i). CDS directly receives federal funds. RBA

receives federal funds "through another recipient," here, CDS, and RBA "operates" the charter school. *Id.* These facts therefore make RBA a "recipient" under the regulation's definition.

In addition, RBA's argument stretches *NCAA* too far. The Supreme Court held in that case that the NCAA, which received dues from its federally funded member colleges, was not subject to Title IX. *NCAA*, 525 U.S. at 468. That the NCAA may have "indirectly benefit[ed] from the federal assistance afforded its members" was not enough to make the NCAA itself, a membership organization, a recipient of federal funds under Title IX. *Id.* But the Court still reiterated in *NCAA* that receiving federal assistance "through an intermediary" amounts to being a "recipient[] within the meaning of Title IX." *Id.* RBA receives fees derived almost entirely from federal funds, not dues, from CDS to operate a school. Because RBA receives these federal funds earmarked for education, it is a recipient under Title IX. 34 C.F.R. § 106.2(i). *NCAA* does not alter the plain application of that regulation.

B.

Having determined that both CDS and RBA are subject to the requirements of Title IX, we next consider whether Title IX's prohibitions apply to school dress codes. We start with Title IX's text. Pursuant to 20 U.S.C. § 1681(a): "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." The statute's text suggests that it applies to any instances, not specific circumstances, where students are "excluded from participation in," "denied the benefits of" or "subjected to discrimination"

on account of sex. 20 U.S.C. § 1681(a). Following that broad language, Congress listed several detailed exceptions, which clarified the institutions and activities that fell under Title IX's purview. *See* 20 U.S.C. § 1681(a)(1)–(9). For instance, certain religious and military institutions are exempt from Title IX's prohibitions. *Id.* § 1681(a)(3)–(4). As are boy or girl conferences, such as Boys State and Girls State. *Id.* § 1681(a)(7). And the membership practices of certain social organizations, like fraternities and sororities, are excepted. *Id.* § 1681(a)(6). Importantly, Congress did not make an exception for the implementation of dress codes.

Defendants claim that the text is ambiguous as it does not specify whether Title IX applies to dress codes. And in response to that alleged ambiguity, they argue we should follow the district court's lead and defer to the agency's decision to rescind its Title IX regulation dealing with appearance codes. Initially, the Education Department's regulations prohibited discrimination "against any person in the application of any rules of appearance." 40 Fed. Reg. 24,141 (June 4, 1975). Seven years later, following a notice-and-comment period, the Department revoked that regulation. 47 Fed. Reg. 32,526–27 (July 28, 1982). The agency noted that "[d]evelopment and enforcement of appearance codes is an issue for local determination." *Id.* at 32,526. It based this determination on the fact that "[t]here is no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes." *Id.* at 32,527. It also justified the revocation by noting that it "permits the Department to concentrate its resources on cases involving more serious allegations of sex discrimination." *Id.* at 32,526.

We give *Chevron* deference to an agency's reasonable statutory interpretation of vague terms or ambiguous interpretive questions. *Amaya v. Rosen*, 986 F.3d 424, 429 (4th Cir. 2021). It is "a tool of statutory construction whereby" we defer to "agencies charged by Congress to fill any gap left . . . in the statutes they administer." *Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 504 (4th Cir. 2011) (quoting *Am. Online, Inc. v. AT&T Corp.*, 243 F.3d 812, 817 (4th Cir. 2001)). The analytical framework is familiar. First, we ask "[i]f the intent of Congress is clear." *Chevron*, 467 U.S. at 842. If it is, that ends the inquiry. *Id.* But if the statute is unclear as to the precise interpretive question, and the ordinary tools of statutory construction do not lend an answer, then we ask if the agency's interpretation is a permissible one. *Id.* at 843.

But before we engage with that familiar *Chevron* framework, the parties raise an antecedent question. Plaintiffs argue the rescission is not the typical agency decision for which *Chevron* deference is considered. They argue that the rescission created a blank slate rather than a new rule. In other words, there is no agency interpretation to which we can defer. It is true that *Chevron* deference only applies to agency "rules carrying the force of law," *Mead Corp.*, 533 U.S. at 227, that interpret "the meaning or reach of a statute." *Chevron*, 467 U.S. at 844 (quoting *U.S. v. Shimer*, 367 U.S. 374, 382 (1961)). The rescission does seem different than that. Although the rescission went through the notice-and-comment process, that only reflects the process required to revoke a regulation promulgated pursuant to those procedures. *See* 5 U.S.C. §§ 551(5), 553. And currently, there are no Department of Education regulations on the issue of appearance codes. Neither party cited, nor have

we found, any decisions addressing whether *Chevron* deference should be applied in these circumstances.

Nor is it clear that when the Department revoked the regulation it was interpreting "the meaning or reach of a statute." *Chevron*, 467 U.S. at 844. To be sure, the rescission suggested that a regulation on appearance codes was not intended by Congress. But that does not mean it is a substantive interpretation of the statute's reach. Instead, the agency described the rescission, at least in part, as an administrative prioritization, rather than as a substantive interpretation of Title IX's meaning. Moreover, the Department of Education has, in fact, investigated complaints regarding sex-based appearance codes in schools since the rescission. *See* Brief of Amici Curiae National Women's Law Center et al. at 13–14. It has done so even in the last few years, citing to 34 C.F.R. § 106.31 (the regulatory section which no longer contains anything specific to dress codes) as its authority for investigating the complaint. *See Archway Classical Acad.—Trivium E.*, OCR Case No. 08-16-1095 (Dep't of Educ. Sept. 28, 2017).

We decline, however, to answer the difficult question of whether the rescission was a "rule[] carrying the force of law" about Title IX's meaning. *Mead Corp.*, 533 U.S. at 227. Even assuming it was, we cannot give the agency deference. The statute plainly answers the interpretive question—Title IX encompasses sex-based dress codes.

"[T]he judiciary is the final authority on issues of statutory construction . . . ." *Chevron*, 467 U.S. at 843 n.9. That authority grounds step one of the *Chevron* analysis. *See Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018). In asking whether Congress's intent was clear at step one, we must apply the "traditional tools of statutory construction" before we can declare an interpretive

question ambiguous. *Chevron*, 467 U.S. at 843 n.9; *see also Nat'l Elec. Mfrs. Ass'n*, 654 F.3d at 504. It is our constitutional obligation to say what the law is, and the Supreme Court has reminded courts not to abdicate that duty at step one of the *Chevron* analysis. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) ("[T]he Court need not resort to *Chevron* deference, as some lower courts have done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand."); *id.* at 2120 (Kennedy, J., concurring) (admonishing lower courts for rushing to give "reflexive deference" instead of using the tools of statutory construction to discern if Congress's intent was clear at step one).

Not only is it our duty to say what the law is; our failure to do so risks damaging the rule of law. If we defer to agencies' reasonable interpretations of unambiguous statutes, we unconstitutionally delegate our duty to interpret the law. Practically, such delegation could result in constant flip-flopping over what the law is, depending on who is in the power. Elections rightly have consequences. But the meaning of the law should not be one of them.

Here, the text of Title IX is clear, which ends the analysis at step one of *Chevron*. As explained above, the statute broadly prohibits sex-based discrimination in schools that receive federal funding. That sweeping prohibition is followed by a handful of exceptions. *See* 20 U.S.C. § 1681(a)(1)–(9). Dress codes are not listed among those exceptions. Here, a consideration of Title IX's entire text, including the list of specific exceptions, which does not include dress codes, leaves no ambiguity. To the contrary, it indicates Congress contemplated exceptions to its broad prohibition against discrimination on the basis

of sex and identified areas outside the scope of Title IX. Had Congress intended to exclude dress codes, it obviously knew how to do so. It could have included dress codes in the list of specified exceptions. Or it could have provided that the list was illustrative or non-exhaustive. But it did neither.

Defendants argue that the lack of a specific mention of dress codes in the text creates an ambiguity. But "[s]ilence . . . does not necessarily connote ambiguity, nor does it automatically mean that a court can proceed to *Chevron* step two." *Arangure*, 911 F.3d at 338. Defendants are right that the statute does not say the words "dress code." But it also does not say the word "retaliation," yet the Supreme Court has held Title IX prohibits retaliation based on a complaint of sex discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) ("The Court of Appeals' conclusion that Title IX does not prohibit retaliation because the 'statute makes no mention of retaliation' ignores the import of our repeated holdings construing 'discrimination' under Title IX broadly." (internal citation omitted)). Nor does Title IX say the words "sexual harassment," and yet the Supreme Court has also held that Title IX encompasses it. *Id.* ("Though the statute does not mention sexual harassment, we have held that sexual harassment is intentional discrimination encompassed by Title IX's private right of action.") (citing *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 74–75 (1992)). Those holdings are no surprise, because "Congress did not list *any* specific discriminatory practices when it wrote Title IX." *Id.* at 175. Instead, "Congress gave the statute a broad reach" by writing a "general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." *Id.*

Dress codes should be considered just like than any other activity under Title IX's purview; they cannot be categorically excepted. That much Congress made clear. Therefore, we cannot defer to the Department on this point. Dress codes are not excluded from Title IX.

C.

Having settled that Title IX is applicable here, we must determine how to apply it. The parties disagree on the standard we should use to evaluate the merits of the Title IX claim. Defendants argue we must evaluate the uniform policy as a whole and compare the burden it places on each sex. *See Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006) (en banc) (reviewing employee policy that required women but not men to wear facial makeup). Plaintiffs, by contrast, would apply the facts to determine whether the requirement subjects girls to discrimination, excludes them from participating in educational activities, or deprives them of equal educational opportunity.

We have little precedent to guide us. Defendants' argument that we must compare the uniform policy's burdens on boys and girls as a whole is grounded in a lone out-of-circuit Title VII decision arising in the employment context. *See id.* at 1108–11. There, the Ninth Circuit rejected a Title VII claim by a casino waitress who asserted that makeup requirements applicable to women were discriminatory. But, given the appearance requirements for men that were part of the same policy, *Jespersen* held the makeup requirements did not impose an "unequal burden" on women. *Id.* Normally, "[w]e look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX." *Jennings v. Univ. of North Carolina*, 482 F.3d 686, 695 (4th Cir. 2007). But *Jespersen* has not garnered

support from other courts. And we have never addressed sex-specific dress codes in either the Title VII or Title IX context before.

Plaintiffs, on the other hand, rely on recent decisions from this Court and the Supreme Court that call for a more individualized inquiry. In *Grimm v. Gloucester County School Board*, 972 F.3d 586, 618 (4th Cir. 2020), which involved a transgender student's allegation that bathroom accommodations at a public high school violated Title IX, we asked, in addressing the "subjected to discrimination" prong, whether the individual was treated "worse than others who are similarly situated." *Id.* at 618 (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020)). And in the context of a Title VII claim that an employer terminated an employee based on sexual orientation, the Supreme Court held that the "focus should be on individuals, not groups." *Bostock*, 140 S. Ct. at 1740. That is because Title VII declares that an employer cannot "discriminate against any *individual* . . . ." 42 U.S.C. § 2000e-2(a)(1) (emphasis added); *see Bostock*, 140 S. Ct. at 1740–41 (focusing on the repeated use of "individual" in Title VII's text as indicative that the analysis must focus on individuals rather than groups). Title IX's language closely resembles Title VII's. *See* 20 U.S.C. § 1681(a) ("No *person* . . . shall, on the basis of sex, . . . be subjected to discrimination . . . .") (emphasis added).

Neither *Grimm* nor *Bostock* completely square with our case here. Both of those cases involved different allegations. *Grimm* involved Title IX but had nothing to do with a dress code. *Bostock* involved Title VII, not Title IX, and involved allegations of individualized employment discrimination.

But despite these differences, their reasoning that we conduct an individualized analysis is consistent with the

broadly applicable text of Title IX. To repeat, Title IX forbids a federally funded school from "exclud[ing] from participation," "den[ying] the benefits of" an education program or "subject[ing] to discrimination" any student "on the basis of sex." 20 U.S.C. § 1681(a). Title IX's text expresses concern for individual harm, not group inequality. *See* 20 U.S.C. § 1681(a) ("No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination . . . ."). And *Bostock* tells us that if a burden is sufficient to meet the standard for individualized harm we describe today, it is not canceled out by other parts of the policy that impose individualized harm to others. As we learned as children, "two wrongs don't make a right." Therefore, following *Grimm* and *Bostock*, the question here is whether CDS's skirt requirement excluded Plaintiffs from participation, denied them education benefits, or "treated [them] worse than similarly situated students." *Grimm*, 972 F.3d at 618.

Because the district court held that Title IX categorically did not apply to dress codes, it did not assess the parties' evidence to determine if there was a genuine issue of material fact as to this claim. Rather than our doing so now, we remand for the district court to address the parties' motions for summary judgment under the standard we set forth today. Plaintiffs allege all three theories of liability under Title IX. Thus, on remand, the district court should evaluate whether there are genuine issues of material fact as to each of these three theories.

The application of the first two theories—whether Plaintiffs were "excluded from participation" or were "denied the benefits of" an educational program in their education at Charter Day—is self-evident from Title IX's text. Plaintiffs' third theory—that they were "subjected

to discrimination" on the basis of sex—is less self-evident. Therefore, we take this opportunity to provide the district court with guidance on application of that theory on remand.

Asking whether Plaintiffs are treated worse than their peers presents a different question than the Equal Protection Clause does. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256–57 (2009) (noting that the Title IX and Equal Protection Clause standards "may not be wholly congruent"). Title IX does not ask, like the Equal Protection Clause, whether there is any good reason for treating sexes differently. Rather, the "subjected to discrimination" prong of Title IX asks whether an individual is treated worse than a similarly situated peer because of sex. Not all distinctions without good reason harm an individual. Mitchell's attempt to justify the skirt requirement illustrates this point. His comments regarding his view of women in our society provide insufficient justification for the skirt requirement to satisfy the heightened scrutiny required under the Equal Protection Clause. But that is not the Title IX inquiry, which asks whether Plaintiffs are treated worse than similarly situated peers. Mitchell's comments may be relevant, but they would not be dispositive of the Title IX analysis. So while these analyses may have some overlap and may sometimes reach the same result, they are distinct inquiries. *See Wilcox v. Lyons*, 970 F.3d 452, 463–64 (4th Cir. 2020).

We also emphasize two other considerations. First, the harm must be objective. *Grimm* and *Bostock* both involved objective, individualized harm. In *Grimm*, for example, the plaintiff produced evidence of medical conditions from avoiding the use of separate restroom facilities far away from class, as well as evidence of suicidal

thoughts resulting from the stress of the situation. 972 F.3d at 617. And in *Bostock*, the plaintiff's employment was terminated. 140 S. Ct. at 1737. Following *Bostock* and *Grimm*, it is not enough that a plaintiff subjectively claims to be worse off. There must be evidence supporting objective harm.

Second, if Plaintiffs demonstrate they are objectively worse off than similarly situated peers, they must show that their sex is a but-for cause of that harm. Title IX prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a). "That language—'on the basis of sex'—is significant." *See Sheppard v. Visitors of Virginia State Univ.*, 993 F.3d 230, 236 (4th Cir. 2021). It "requires 'but-for' causation in Title IX claims . . . ." *Id.* at 237; *see also Grimm*, 972 F.3d at 616 (noting that "sex remains a but-for cause" in transgender discrimination). Therefore, in demonstrating that they have been "subjected to discrimination" "on the basis of sex," Plaintiffs must show that their sex is a but-for cause of being worse off than similarly situated peers. 20 U.S.C. § 1681(a).

IV.

This case raises several weighty issues. While we cannot, in this appeal, comprehensively answer the extent to which a charter school can be a government actor, we decide here that CDS and RBA were not state actors in promulgating and enforcing Charter Day's uniform policy. Therefore, Defendants are entitled to summary judgment on the § 1983 claim. At the same time, however, we conclude that, as recipients of federal education funds, CDS and RBA are subject to Title IX, which covers dress codes. Therefore, we remand to the district court to determine whether there is a genuine issue of material fact as to whether the skirt requirement excluded Plaintiffs

from participation, denied them education benefits or subjected them to discrimination under Title IX.

REVERSED AND REMANDED

BARBARA MILANO KEENAN, Circuit Judge, concurring in part and dissenting in part:

No, this is not 1821 or 1921. It's 2021. Women serve in combat units of our armed forces. Women walk in space and contribute their talents at the International Space Station. Women serve on our country's Supreme Court, in Congress, and, today, a woman is Vice President of the United States. Yet, girls in certain *public* schools in North Carolina are required to wear skirts to comply with the outmoded and illogical viewpoint that courteous behavior on the part of both sexes cannot be achieved unless girls wear clothing that reinforces sex stereotypes and signals that girls are not as capable and resilient as boys. I therefore part company with my friends in the majority and would hold that the actions of Charter Day School (CDS), a *public* school created under North Carolina law and funded almost entirely by governmental sources, are actions of the state for purposes of Section 1983. Moreover, I would hold that CDS' enforcement of the skirts requirement, with its many attendant harms to girls, denies these girls at this *public* school their constitutional guarantee of Equal Protection under the law.[1] Accordingly, I would affirm this part of the district court's judgment.

Additionally, I am pleased to agree with my colleagues' conclusions in Part III of the majority opinion remanding the plaintiffs' Title IX claim. I also agree that RBA is not a state actor for purposes of the Equal Protection Clause. Therefore, I will not address those issues separately.

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[1] Although the welfare of the boys who attend CDS is not directly at issue here, I observe that they, too, are affected adversely by CDS' skirts policy in being required to carry umbrellas in this charade of chivalry financed by state and local government.

I.

In my view, the majority's "state action" analysis jumps off the rails by relying heavily on *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), a case dealing with a private, rather than a public, school. The majority's circumvention of the statutory text is puzzling because North Carolina law unambiguously defines its charter schools as public schools established under the state's authority and responsibility to provide its citizens a free public education. N.C. Gen. Stat. §§ 115C-218(a)(5), 115C-218.15(a).

To prevail on their Equal Protection claim under Section 1983, the plaintiffs were required to show that: (1) the defendants deprived them of a constitutional right, and (2) the defendants did so "under color of [State] statute, ordinance, regulation, custom, or usage" (the state action requirement). *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001) (alteration in original) (citation omitted). The "under-color-of-state-law" requirement of Section 1983 "excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Id.* (citation and internal quotation marks omitted). In determining whether a defendant acted under color of state law, our "ultimate inquiry" is whether "there [is] a sufficiently close nexus between the challenged actions" of the defendant and the state so that the defendant's action "may be fairly treated as that of the State itself." *Id.* at 314 (citation and internal quotation marks omitted).

The majority sets out the many factors that this Court and the Supreme Court have considered in evaluating a private actor's nexus to the state. Maj. Op. 14-15. No single factor "in isolation[] establishes state action." *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 343 (4th Cir. 2000). Instead, we look at the totality of

the circumstances of the relationship between the private actor and the state to determine whether the action in question fairly is attributable to the state. *Id.*

The state action analysis required in this case is not complicated. The North Carolina Constitution mandates that the state "provide by taxation and otherwise for a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students." N.C. Const. art. IX, § 2, cl. 1. To fulfill this duty, in addition to establishing traditional public schools, the North Carolina legislature has authorized the creation of public charter schools that are overseen by a state advisory board. N.C. Gen. Stat. § 115C-218. Charter schools may only operate under the authority granted to them by their charters with the state. *See id.* §§ 115C-218.15(c), 115C-218.5. The state may revoke a school's charter, among other reasons, for non-compliance with the terms of the charter, poor student performance, or poor fiscal management. *See id.* § 115C-218.95. In defining the nature of charter schools, North Carolina law expressly provides:

> A charter school that is approved by the State ***shall be a public school*** within the local school administrative unit in which it is located. All charter schools shall be accountable to the State Board for ensuring compliance with applicable laws and the provisions of their charters.

Id. § 115C-218.15(a)[2] (emphasis added); *see also Sugar Creek Charter Sch., Inc. v. North Carolina*, 712 S.E.2d 730, 742 (N.C. Ct. App. 2011) (observing that charter

[2] Citing this statutory provision and the North Carolina Constitution, CDS' charter reiterates that charter schools are public schools under state law.

schools are "indisputably public schools"). And "for purposes of providing certain State-funded employee benefits," the North Carolina legislature has specified that "charter schools are public schools and that the employees of charter schools are public school employees." N.C. Gen. Stat. § 115C-218.90(a)(4). Thus, under the plain language of these statutes, charter schools, as a matter of state law, are public institutions.

Consistent with this "public" designation, charter schools in North Carolina receive a per-pupil funding allotment from the state board of education based on the amount provided for students attending traditional public schools. N.C. Gen. Stat. § 115C-218.105(a). The local school administrative unit where each student resides similarly transfers the student's share of local funding to the charter school that the student attends. *Id.* § 115C-218.105(c). As a result of these and other public funding mechanisms, CDS receives 95% of its funding from public sources.[3]

This structure of the North Carolina charter school system compels the conclusion that the state has delegated a portion of its duty to provide free primary schooling to charter school operators like CDS. *See Goldstein*, 218 F.3d at 342 ("[I]f the state delegates its obligations to a private actor, the acts conducted in pursuit of those delegated obligations are under color of law."); *see also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 n.1 (2019) ("[A] private entity may, under certain circumstances, be deemed a state actor when the government has outsourced one of its constitutional obligations to a private entity."). The fact that students

[3] CDS also receives funding from the federal government pursuant to certain federal laws, including the Individuals with Disabilities Education Act.

have the option of attending a traditional public school is irrelevant to the question whether a charter school is a state actor. We look to the structure of the charter school to determine whether it is a state entity, not to North Carolina students' ability to select a different school with non-discriminatory policies. North Carolina cannot escape the consequences of discriminatory treatment of any portion of the state's student body by outsourcing the state's educational responsibilities to state-created and state-funded entities. *See West v. Atkins*, 487 U.S. 42, 56-57, 56 n.14 (1988) (holding that a doctor under contract with a state prison was a state actor, because a contrary rule would allow the state "to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of [their] rights." (citation omitted)).

Accordingly, given the plain statement by the North Carolina legislature designating charter schools as "public," and the near-total governmental funding flowing to CDS, the school clearly "exercised power possessed by virtue of state law and made possible only because the [school] is clothed with the authority of state law." *Id.* at 49 (citation and internal quotation marks omitted). For these reasons, I would conclude that CDS' implementation of the skirts requirement at this North Carolina public school is "fairly attributable" to the state of North Carolina. *See Mentavlos*, 249 F.3d at 311.

This conclusion is not altered by the majority's reliance on *Rendell-Baker*, 457 U.S. at 833-35, in which former employees at a private school that contracted with state and local governments challenged their discharges under the First, Fifth, and Fourteenth Amendments. In concluding that the employees' terminations were not

attributable to the state for purposes of Section 1983, the Court reasoned that the private school was

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

Id. at 840-41. The Court also noted that, although the school generally was subject to "extensive regulation," the state had little involvement in personnel matters, including the type of action challenged by the plaintiffs. *Id.* at 841-42.

Although *Rendell-Baker*, like the present case, involved a school, the similarity between the two cases ends there. The institution in *Rendell-Baker* indisputably was a private school, *id.* at 831-32, not a school created by operation of state law or designated as a "public" school by the state legislature. By contract, employees of the private school in *Rendell-Baker* were not considered government employees, *id.* at 833, while, as noted above, the North Carolina code designates employees of charter schools as public employees entitled to receive certain state benefits, including state-employee health and retirement plans, *see* N.C. Gen. Stat. § 115C-218.90. And, instead of receiving statutorily mandated public funding, the school in *Rendell-Baker* was reimbursed by the state and local governments for student tuition under contracts that the private school executed with those governmental units. *Id.* at 832-33.

In evaluating whether an entity's conduct amounts to state action, we must "identify[] the specific conduct of which the plaintiff complains" to determine whether that

conduct is "fairly attributable to the State." *Mentavlos*, 249 F.3d at 311 (citation and internal quotation marks omitted). The challenged action in *Rendell-Baker* involved a personnel decision at a private institution, a matter that clearly was outside the purview of the state's regulation. 457 U.S. at 841-42. In contrast, here, although North Carolina does not regulate charter schools' implementation of dress codes, CDS characterized its dress code, including the skirts requirement, as central to the school's *educational* philosophy, pedagogical priorities, and mission of providing a "traditional school with a traditional curriculum, traditional manners[,] and traditional respect." The skirts requirement thus is a component of the school's core educational function, which North Carolina has delegated to CDS. As discussed further below, the skirts requirement directly impacts the educational experience of female students at CDS, including the plaintiffs' ability to participate in school activities and safety drills, and the long-term psychological consequences for students subjected to pernicious sex-based stereotypes.

Under the circumstances presented, I would reject CDS' attempt to characterize itself as a government contractor, akin to a private entity that builds bridges and dams. CDS would not exist but for North Carolina's creation of the public charter school system and the state's decision to grant CDS a charter. The state legislature unambiguously created charter schools as public entities, and the legislature has established a funding structure that results in CDS receiving almost all its funding directly from governmental sources. And, as openly acknowledged by CDS, the challenged discriminatory action is central to the school's core educational function. Accordingly, for purposes of our Equal Protection Clause

analysis, I would affirm the district court's determination that CDS' implementation of the skirts requirement was carried out under color of state law.

II.

Turning to the merits of the plaintiffs' constitutional claim, I also would affirm the district court's holding that the skirts requirement plainly violates the Equal Protection Clause. In its attempts to justify the sex-based classification, CDS has offered nothing more than harmful stereotypes about how girls should look, behave, and be treated by boys, based on the archaic, unsupported concept that girls are "fragile" and must be handled "gently." We should be long past the days of condoning such differential treatment under the guise of "chivalry," a justification that the Constitution does not tolerate. Moreover, the skirts requirement does not bear any logical relationship to the attainment of any important governmental objective.

Courts are required to apply intermediate scrutiny to sex-based classifications like the skirts requirement. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020). This heightened scrutiny imposes a "demanding" burden on the defendant, which must provide an "exceedingly persuasive" justification for the sex-based classification. *Virginia*, 518 U.S. at 533. Accordingly, to satisfy intermediate scrutiny, the defendant "must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* (alterations, citations, and internal quotation marks omitted).

Most relevant here,

> justifications for gender-based distinctions that are rooted in overbroad generalizations about the different talents, capacities, or preferences of males and females will not suffice. Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection.

Knussman v. Maryland, 272 F.3d 625, 635-36 (4th Cir. 2001) (citations and internal quotation marks omitted). In other words, we will reject sex-based classifications that "appear to rest on nothing more than conventional notions about the proper station in society for males and females." *Id.* at 636; *see also Virginia*, 518 U.S. at 550 (rejecting defendant's reliance on "generalizations about the way women are" to justify differential treatment); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (when the government's "objective is to exclude or 'protect' members of one gender in reliance on fixed notions concerning that gender's roles and abilities, the objective itself is illegitimate" (citation, quotation marks, and alterations omitted)).

I would reject CDS' attempt to divert our attention from the constitutional infirmity of the skirts requirement by arguing that the dress code as a whole is intended to "help to instill discipline and keep order," and "to establish an environment in which [the school's] young men and women treat one another with mutual respect." CDS' purported reason for implementing a dress code does not impact our analysis, nor is it relevant whether other portions of the dress code are discriminatory toward male students. Rather, the question before us is whether the *sex-based classification* of the skirts requirement is

directly supported by an important governmental objective.

Applying the proper lens, I would conclude that the skirts requirement fails intermediate scrutiny. CDS does not attempt to disguise the true, and improper, rationale behind its differential treatment of girls. In his initial response to a parent's objection to the requirement, Baker Mitchell, the founder of CDS, explained that the skirts requirement embodies "traditional values." According to Mitchell, the requirement for girls to wear skirts was part of CDS' effort "to preserve chivalry and respect among young women and men," which also included requiring boys "to hold the door open for the young ladies and to carry an umbrella" to keep rain from falling on the girls. Mitchell later elaborated that chivalry is "a code of conduct where women are treated, they're regarded as a fragile vessel that men are supposed to take care of and honor." Mitchell explained that, through the skirts requirement, CDS sought to "treat [girls] courteously and more gently than boys." CDS board members agreed with these assessments, including CDS' goal of fostering "traditional roles" for boys and girls.

It is difficult to imagine a clearer example of a rationale based on gender stereotypes. On their face, the justifications proffered by CDS "rest on nothing more than conventional notions about the proper station in society for males and females." *Knussman*, 272 F.3d at 636; *see also Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (a sex-based classification reflecting "archaic and stereotypic notions . . . is illegitimate"); *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994) (rejecting "the very stereotype the law condemns" as a justification for a state's sex-based policy (citation omitted)). Under long-standing precedent of the Supreme Court and the Fourth

Circuit, CDS' reasoning does not satisfy the rigors of intermediate scrutiny.[4]

The record is replete with evidence of the harm caused by the stereotypes underlying the skirts requirement. A developmental psychologist explained that the skirts requirement "contradict[s] modern educational practices that foster independence, agency, and self-confidence," by "teach[ing] both boys and girls that girls should value appearance over agency, and attractiveness over autonomy," a stereotype that has proven damaging to girls. And, contrary to the rationale proffered by CDS, gender stereotypes negatively affect the social relationships between boys and girls. For example, the evidence showed that children who believe in gender stereotypes are less likely to play with children of another gender, and boys who hold such beliefs are more likely to be the perpetrators of sexual harassment. There also was evidence that gender stereotypes can have dire psychological consequences for girls, including increased incidences of eating disorders, depression, anxiety, low self-esteem, and risky sexual behaviors. And, academically, gender stereotypes perpetuate the so-called "achievement gap" between boys and girls in the areas of science, mathematics, and engineering, as well as girls' decision to "opt out" of careers in these fields.

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[4] Because CDS' proffered justifications for the skirts requirement are so plainly invalid, I will not linger on the question whether CDS could satisfy the tailoring requirement for intermediate scrutiny. I note, however, the illogical nature of CDS' position that the skirts requirement results in boys paying more respect toward female students. In addition to the skewed notion that children will respect each other if they wear gender-specific clothing, the record is clear that the plaintiffs were subject to ridicule and reprimand when their undergarments were visible and were worried that boys would look up their skirts.

Consistent with this expert evidence, the plaintiffs recounted the negative psychological consequences that they experienced due to the skirts requirement. One plaintiff explained that the skirts requirement conveyed the school's view that girls "simply weren't worth as much as boys," and that "girls are not in fact equal to boys." Another plaintiff stated that the skirts requirement "sends the message that girls should be less active than boys and that they are more delicate than boys," resulting in boys "feel[ing] empowered" and "in a position of power over girls." And, when a teacher instructed a kindergarten-aged plaintiff to "sit like a princess" by folding her legs to avoid exposing her underwear, she learned that the comfort of boys, not girls, was more valued. Indeed, these were the very messages that CDS sought to convey.

In addition to these intangible harms, the plaintiffs described in detail their inability to engage fully in school activities as a result of the skirts requirement. On one occasion, when a first-grade student wore shorts to school due to a misunderstanding of the dress code, she was removed from class and required to spend the day in the school office. The evidence also showed that the plaintiffs avoided numerous physical activities, including climbing, using the swings, and playing soccer, except for days on which they were permitted to wear their unisex physical education uniforms. One plaintiff recounted an incident in which she was reprimanded by a teacher when the shorts portion of her skort was exposed during a cartwheel, causing the plaintiff to refrain from such play in the future. The plaintiffs also could not participate comfortably in school emergency drills that required students to crawl and kneel on the floor, fearing that boys would tease them or look up their skirts. And, notably, CDS effectively has

acknowledged the physical inequities and burdens caused by the skirts requirement by mandating unisex uniforms with shorts or pants for physical education class.

Ultimately, the evidence showed that the skirts requirement has restricted the extent to which the plaintiffs can obtain the academic, social, and physical benefits of their education at CDS, and has exposed them to ongoing psychological harm and discriminatory treatment solely on the basis of their gender.[5] The record thus conclusively supports the district court's determination that the plaintiffs have been denied their constitutional guarantee of Equal Protection, in violation of the Supreme Court's decades-old decision to root out differential and harmful treatment based on gender stereotypes. *See Virginia*, 518 U.S. at 550; *Miss. Univ. for Women*, 458 U.S. at 724-25; *see also Morales-Santana*, 137 S. Ct. at 1689-90 (collecting cases).

To be clear, the Equal Protection Clause does not prevent public schools from teaching universal values of respect and kindness. Here, however, the skirts requirement blatantly serves to perpetuate harmful gender stereotypes as part of the public education provided to our country's young citizens. CDS has imposed the skirts requirement with the express purpose of telegraphing to young children that girls are "fragile," require protection by boys, and warrant different treatment than male students, stereotypes with potentially devastating consequences for young girls. Such a rationale falls woefully short of the "exceedingly

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[5] The acquiescence of certain parents to this discrimination is irrelevant to the Equal Protection analysis. The only pertinent question is whether the plaintiffs have been subjected to an unjustified sex-based classification. And, for the reasons discussed above, the answer is a resounding yes.

persuasive justification" required for the skirts requirement to survive constitutional scrutiny. *Virginia*, 518 U.S. at 531. Therefore, I would hold that if CDS wishes to continue instilling these harmful beliefs in its students, CDS must do so as a private school without the sanction of the state.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

NO. 7:16-CV-30-H

BONNIE PELTIER, ET AL.,
Plaintiffs

v.

CHARTER DAY SCHOOL, INC., ET AL.
Defendants.

ORDER

This matter is before the court on the parties' cross motions for summary judgment [DE #149 and #158]. Appropriate responses and replies have been filed, and the time for further filing has expired. The following additional motions are also ripe for review:

(1) Motion to Strike Answer to Amended Complaint [DE #200];

(2) Motion to Stay Motion to Strike [DE #203];

(3) Motion for Extension of Time to File Response to Motion to Strike [DE #203]; and

(4) Motion for an Advisory Jury [DE #208].

PROCEDURAL HISTORY

Plaintiffs 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; by and through counsel filed the complaint in this matter on February 29, 2016 and an amended complaint on March 11, 2016. Defendants filed a motion to dismiss, which was denied by this court. The parties were ordered to attend a court-hosted settlement conference as to all claims in this matter. The parties did not reach a settlement. Also, during the discovery period, plaintiffs filed a motion for appropriate relief, which was granted on September 29, 2017 [DE #136]. In that order, United States Magistrate Judge Kimberly A. Swank found misconduct by defendants' counsel[1] and ordered that portions of the January 13, 2017, Psychological Report authored by defendants' experts Wells Hively, Ph.D., and Ann Duncan-Hively, Ph.D., J.D., be stricken from the records, specifically, any and all portions which reference or rely

[1] Defendants' former counsel withdrew and defendants now have different counsel than those found to have committed misconduct.

upon classroom observations of the minor plaintiffs or other students of Charter Day School or teacher interviews conducted by defendants' experts. The defendants were ordered to submit a revised expert report. Further, defendants are barred from offering, eliciting, presenting or otherwise relying upon any testimony, statements or opinions of their experts concerning their classroom observations of the minor plaintiffs or the teacher interviews. The order allowed further briefing on the amount of sanctions; however, the parties agreed upon an amount of sanctions prior to entry of any order by the court.

Now before the court are the above-listed motions. These motions are ripe for review.

STATEMENT OF THE FACTS

Plaintiffs are current or former students of Charter Day School, a co-educational, K-8 public charter school in Brunswick County, North Carolina. They brought this action challenging the school's uniform policy, which requires female students to wear "skirts, skorts, or jumpers" ("the skirts requirement") and male students to wear shorts or pants. Plaintiffs do not contest defendants' authority to impose a school uniform policy in general, but only the skirts requirement. They argue the skirts requirement forces them to wear clothing that is less warm and comfortable than the pants their male classmates are permitted to wear and, more importantly, restricts plaintiffs' physical activity, distracts from their learning, and limits their educational opportunities.

Plaintiffs claim the uniform policy violates federal and state law. Specifically, plaintiffs assert the following causes of action: (1) sex-based discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, brought

via 42 U.S.C. § 1983; (2) sex-based discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. and implementing regulations; (3) sex-based discrimination in violation of the Equal Protection Clause in Article I, Section 19 of the North Carolina Constitution; (4) breach of the Charter Agreement between the State Board of Education and Charter Day School, Inc.; and (5) breach of the management agreement between Charter Day School, Inc., and The Roger Bacon Academy, Inc. ("RBA").

The North Carolina General Assembly passed the Charter Schools Act in the mid-1990s. The Act states its purpose as follows:

> The purpose of this Article is to authorize a system of charter schools to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently of existing schools, as a method to accomplish all of the following:
>
> (1) Improve student learning;
>
> (2) Increase learning opportunities for all students, with special emphasis on expanded learning experiences for students who are identified as at risk of academic failure or academically gifted;
>
> (3) Encourage the use of different and innovative teaching methods;
>
> (4) Create new professional opportunities for teachers, including the opportunities to be responsible for the learning program at the school site;
>
> (5) Provide parents and students with expanded choices in the types of educational

opportunities that are available within the public school system; and

(6) Hold the schools established under this Article accountable for meeting measurable student achievement results, and provide the schools with a method to change from rule-based to performance-based accountability systems.

N.C. Gen. Stat. § 115C-218.

Charter Schools are operated by private, nonprofit corporations. N.C. Gen. Stat. § 115C-15(b). The board of directors of the school decides "matters related to the operation of the school, including budgeting, curriculum, and operating procedures." N.C. Gen. Stat. § 115C-15(d).

In this case, the nonprofit corporation which holds the charter for the School is defendant Charter Day School, Inc. ("CDS, Inc.").[2] CDS, Inc. also holds charters for three other charter schools, South Brunswick Charter School, Douglass Academy, and Columbus Charter School. [DE #160 ¶10]. CDS, Inc. was incorporated by Baker Mitchell in 1999. [DE #160 ¶2]. Mr. Mitchell served on the original CDS, Inc. Board of Trustees and currently serves as Board Secretary, a non-voting position. [DE #160 ¶22]. After the formation of CDS, Inc., it applied to open a charter school, which was approved for an initial five-year term. The School began operations for the 2000-2001 academic year. The State renewed the charter of CDS, Inc. to operate the School for ten years in 2005, with another ten-year renewal in 2015. When the School first opened, it had 53 students; it

[2] Charter Day School, Inc. (referred to herein as "CDS, Inc.") is the nonprofit corporation holding the charter, while Charter Day School (referred to herein as "the School") is the school plaintiffs attend.

has since grown to over 900 students in elementary and middle school campuses.

The individual defendants, Robert Spencer, Chad Adams, Suzanne West, Colleen Combs, Ted Bodenschatz, and Melissa Gott (collectively "the Board" or "the Board members") comprise the Board of Trustees of CDS, Inc. and adopt the disciplinary rules, regulations, policies and procedures for the School. [DE #160 ¶¶11, 13].

The original charter application filed by CDS, Inc. notified the State that it intended to enter into an "educational management contract" with defendant RBA. [DE #160 ¶19]. RBA is a for-profit corporation and a legal entity separate from CDS, Inc. [DE #160 ¶20]. Mr. Mitchell is the founder, president, and sole shareholder of RBA. [DE #160 ¶21]. RBA's Chief Financial Officer, Mark Dudeck, serves at the treasurer of CDS, Inc., but is not part of the Board. [DE #160 ¶23]. The charter agreement between CDS, Inc. and the State bars RBA employees from serving on the Board. RBA manages the day-to-day operations of the four charter schools chartered under CDS, Inc., undertaking various functions including leasing land and school buildings to the School, acquiring materials, etc. [See DE #160 ¶¶25-26].

The School is a "traditional values" charter school. [DE #160 ¶54, 55]. The four sections of the School's pledge are "to keep myself healthy in body, mind and spirit," "to be truthful in all my works," "to be virtuous in all my deeds," and "to be obedient and loyal to those in authority." *Id.* The School uses the direct instruction method and a classical curriculum to fulfill the School's mission. [DE #160 ¶¶54, 59].

Since the School's original charter, it has required students to adhere to a uniform policy for the following purpose: "to instill discipline and keep order" so that

"student learning is not impeded." Use of uniforms also "helps promote a sense of pride and of team spirit, as every student is a member of the academic team." [DE #160 ¶¶68, 119-121.] Plaintiffs do not dispute the authority of CDS, Inc. and the School to establish and enforce a uniform policy in general.

All students must wear white or navy blue tops, tucked into khaki or blue bottoms. Boys may wear pants or knee-length shorts with a belt, while girls may wear knee-length or longer jumpers, skirts or skorts but may not wear pants or knee-length shorts. Girls may wear, but are not required to wear, socks, stockings or leggings. Boys must wear socks. All students must wear closed-toe/closed-heel shoes; flip flops, Crocs and sandals are prohibited. [DE #13-2]. In addition to the required uniform, the school also has grooming standards in place which regulate jewelry, hair length and color, as well as makeup and facial hair.[3] [DE #13-4 at 29-30]. Plaintiffs are challenging the skirts requirement only.

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[3] Girls:

- May wear single stud and small earrings that are no longer than ½ inch (no more than 2 per ear)
- Small, non-eccentric necklaces and bracelets may be worn. Not more than one necklace and one bracelet.
- Watches may be worn.
- Excessive or radical haircuts and colors are not allowed.
- Makeup is not allowed for elementary students; middle school girls may wear conservative make-up.

Boys:

- No jewelry is allowed.
- Watches may be worn.
- Hair must be neatly trimmed and off the collar, above the eyebrows, and not below the top of the ears or eyebrows.
- Excessive or radical haircuts and colors are not allowed.
- No mustache or beards. Boys must be clean shaven.

In addition to the uniform policy, students at the School are permitted to wear a separate physical education ("PE") uniform on days they are scheduled to have PE class, which consists of a School approved t-shirt or sweatshirt and sweatpants or shorts. [DE #151 ¶¶50-51]. Because students in different classes are scheduled to have PE on different days, some percentage of the School's students wear the PE uniform on any given school day. [DE #151 ¶¶49-51]. Additionally, the uniform policy is suspended for various reasons on specific days, including certain field trip days, special events such as health, archery or girls' sports; when students achieve certain academic benchmarks; when students make donations to non-school-related charity organizations; or for celebrations or special events at the school. [DE #151 ¶¶52-59].

Violation of the uniform policy may result in disciplinary action. The uniform policy is primarily enforced by the School's teachers. [DE #160 ¶175]. When a student is out of compliance, a standardized, written notification is sent home to the student's parents. [DE #160 ¶76]. Repeated noncompliance results in a phone call to the parents. [DE #160 ¶79]. Sometimes items are loaned to students who cannot afford or do not have a particular item. [DE #160 ¶81]. A student who is out of compliance may be removed from class and sent to the School office or his or her parents may be called and asked to pick up the child. Additionally, the student could be excluded from class for the day and could be expelled; however, no child has ever been expelled for a uniform policy violation. [Answer, DE #94 ¶49].

Plaintiffs and their parents/guardians ad litem have testified that plaintiffs find skirts less comfortable on a daily basis and less warm in the wintertime than pants.

[DE #151 ¶¶123-126, 154-64, and 179-257.] The skirts requirement forces them to pay constant attention to the positioning of their legs during class, distracting them from learning, and has led them to avoid certain activities altogether, such as climbing or playing sports during recess, all for fear of exposing their undergarments and being reprimanded by teachers or teased by boys. [*Id.* ¶¶123-153, 179-257.] They claim the skirts requirement sends a message that their comfort and freedom to engage in physical activity are less important than those of their male classmates. [*Id.* ¶¶165-258.]

The Board has the authority to establish and alter the uniform policy's specific requirements. The Board believes the uniform policy's current requirements inextricably support the School's broader, traditional-values educational model. One Board member stated that the requirements of the uniform policy, including its sex-differentiated requirements, "work seamlessly together in a coordinated fashion in a disciplined environment that has mutual respect between boys and girls and between each other as students." [Adams Dep. 134:1-15, DE #161-1]. The Board members focus on the uniform policy as a whole and not on the specific gender-based requirements, noting it is part of the overall design of the School to instill discipline, order, and mutual respect. However, the Board members in their depositions all seemed to be unable to answer whether it would disrupt discipline if girls were allowed to wear pants (leaving in place the rest of the uniform policy). Furthermore, they often relied on the School's high enrollment and the parents' apparently satisfaction with the policy. They note that the uniform policy is part of the School's traditional values education, and that changing any of the specific requirements risks

inadvertently changing the broader goal. [DE #160 ¶¶118-121, 124-128].

Defendants make much of the test scores and achievements of their students, comparing both the success of the students at the School versus students in traditional public schools within the county, as well as the girls in the School versus the boys in the school. There is no dispute among the parties that the test scores of the School are high compared to traditional public schools in the areas. Nor is there any dispute that plaintiffs chose to send their children to the School, in part, because of the high test scores. Defendants attempt to tie this success to the uniform policy; however, they do not bring forth any facts showing specifically how the skirts requirement furthers this success.

COURT'S DISCUSSION

I. Standard of Review

Summary judgment is appropriate pursuant to Rule 56 of the Federal Rules of Civil Procedure when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Once the moving party has met its burden, the non-moving party may not rest on the allegations or denials in its pleading, *Anderson*, 477 U.S. at 248, but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Summary judgment is not a vehicle for the court to resolve disputed factual issues.

Faircloth v. United States, 837 F. Supp. 123, 125 (E.D.N.C. 1993). Instead, a trial court reviewing a claim at the summary judgment stage should determine whether a genuine issue exists for trial. *Anderson*, 477 U.S. at 249.

In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 247-48. The evidence must also be such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. Accordingly, the court must examine "both the materiality and the genuineness of the alleged fact issues" in ruling on this motion. *Faircloth*, 837 F. Supp. at 125.

II. Title IX Claims[4]

Title IX provides: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). An implied private right of action exists for enforcement of Title IX. *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir.1994) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979)). "Title IX has no administrative exhaustion requirement and no notice provisions. Under its implied private right of action, plaintiffs can file directly in court[.]" *Fitzgerald v. Barnstable Sch. Comm.*,

[4] Plaintiffs do not bring a Title IX claim against the board members. School officials and individuals are not proper Title IX defendants. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009).

555 U.S. 246, 255 (2009). The court notes that not all distinctions on the basis of sex are impermissible under Title IX. *See*, *e.g.*, 20 U.S.C. § 1686 (allowing separate living facilities for different sexes). In this circuit, courts have looked to Title VII cases as guidance for Title IX cases. See *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007).

Defendants argue they are entitled to summary judgment on plaintiffs' Title IX claims for the following reasons: (1) RBA receives no federal financial assistance and it has no authority to alter the uniform policy, which is set by the Board of CDS, Inc; and (2) as to both defendants, the federal agencies tasked with enforcing Title IX interpret it not to apply to school personal-appearance codes at all.

In 1982, the United States Department of Education ("ED") promulgated amendments to its Title IX regulations to revoke the provision that had "prohibit[ed] discrimination in the application of codes of personal appearance." Nondiscrimination on the Basis of Sex, 47 Fed. Reg. 32,526 (July 28, 1982) (hereinafter, "Withdrawal of Appearance-Code Regulation"). ED found "no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes." *Id.* at 32,527. The agency determined that "issues involving codes of personal appearance [should] be resolved at the local level" and that ED should concentrate its resources "on areas . . . more central to the statute's prohibition of discrimination on the basis of sex in education programs which receive Federal financial assistance." *Id.*

Further, ED and many other federal agencies adopted the Title IX Common Rule[5] pursuant to Executive Order 12,250. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858, 52,859 (Aug. 30 2000) (codified at 22 different locations) ("The promulgation of these Title IX regulations will provide guidance to recipients of Federal financial assistance who administer education programs or activities.")

Defendants urge this court to give proper deference to the agency interpretation under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under Chevron's two-step analysis,

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the

[5] In a prior order, this court noted that it did not appear the USDA was one of the agencies which adopted the Common Rule. However, the USDA has since adopted the Common Rule. Education Program or Activities Receiving or Benefitting From Federal Financial Assistance, 82 Fed Reg. 46,655 (Oct 6, 2017) (codified at 7 C.F.R. §§ 15a.100-15a.605).

> court is whether the agency's answer is based on a permissible construction of the statute.
>
> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S. Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron, 467 U.S. at 842-44.

Title IX does not directly speak to the "precise question" of school uniform policies or appearance codes, suggesting that Congress left this matter to the agency's discretion. *See id.* at 842. Additionally, in thirty-five years, Congress has never overridden ED's interpretation of the statute. ED has provided an answer, interpreting Title IX to "permit[] issues involving codes of personal appearance to be resolved at the local level." Withdrawal of Appearance-Code Regulation, 47 Fed Reg. at 32,527. At least twenty other federal agencies have joined in this interpretation. The court finds this long-standing interpretation of Title IX is not "arbitrary, capricious, or manifestly contrary to the statute."

Chevron, 467 U.S. at 844. Therefore, Title IX does not regulate the uniform policy at issue here, and defendants are entitled to summary judgment on the Title IX claims.

III. Equal Protection Claims

a. State Action

Defendants first argue that plaintiffs' Equal Protection Claim ("EPC") claims brought pursuant to § 1983 fail because none of the defendants act "under color of [State] statute, ordinance, regulation, custom or usage." 42 U.S.C. § 1983. Plaintiffs contend that as owners and operators of a charter school specifically designated as a public school under North Carolina law, defendants are state actors subject to the Constitution's equal protection mandate.

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

In order to establish a claim under § 1983, plaintiffs must show (1) that defendants deprived them of a right secured by the Constitution and laws of the United States and (2) that they deprived them of this right under color of state law. *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001). Both the state-action requirement of the Fourteenth Amendment and the under-color-of-state-law requirement of § 1983 "exclude[] from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" *Mentavlos*, 249 F.3d at 310 (quoting

American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999)). Thus, courts treat the under-color-of-law requirement and the state-action requirement as equivalents for analytical purposes. *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-38 (1982). "The state action requirement 'reflects judicial recognition of the fact that "most rights secured by the Constitution are protected only against infringement by governments."'" *Mentavlos*, 249 F.3d at 310 (quoting *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 658 (4th Cir. 1998)). This is so, in part, to "'preserve[] an area of individual freedom by limiting the reach of federal law' and 'avoid[] impos[ition] [up]on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.'" *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)).

However, there are times when the actions of private individuals and organizations may be deemed state action. "[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

As the defendants in this matter are not public officials, but rather private individuals or organizations, plaintiffs have to show that the "allegedly unconstitutional conduct is fairly attributable to the State." *Sullivan*, 526 U.S. at 50.

Caselaw dictates that the court must first, through a factual inquiry, determine the specific conduct of which plaintiffs complain. *Mentavlos*, 249 F.3d at 311. Once the

court has identified the specific conduct at issue, the court must then use factors from case law to determine whether state action exists. While there is no precise formula for this determination, several factors exist. A private entity may be considered a "state actor"

> "(1) when a sufficiently close nexus exists between a regulated entity and a state such that the actions of the former are fairly treated as those of the state; (2) when the state 'has exercised coercive power or has provided such significant encouragement that the action must in law be deemed to be that of the state'; and (3) 'when the private entity has exercised powers that are traditionally the exclusive prerogative of the state.'"

Mentavlos, 249 F.3d at 313 (quoting *Haavistola v. Cmty. Fire Co. of Rising Sun*, 6 F.3d 211, 215 (4th Cir. 1993)); *see also Brentwood Acad.*, 531 U.S. at 295-96. In assessing whether these circumstances exist, the court may be guided by such factors as

> "(1) 'whether the injury caused is aggravated in a unique way by the incidents of governmental authority'; (2) 'the extent and nature of public assistance and public benefits accorded the private entity'; (3) 'the extent and nature of governmental regulation over the institution'; and (4) 'how the state itself views the entity, *i.e.*, whether the state itself regards the actor as a state actor.'"

Mentavlos, 249 F.3d. at 313 (quoting *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 343 (4th Cir. 2000)).

Here, plaintiffs complain of the issuance and application of a school uniform policy by a private

corporation and its Board members. The uniform policy consists of the specific uniform requirements and the grooming standards. These requirements and standards are incorporated into the Discipline section of the Student Handbook, which lists several items that "students will" and "students will not" do. Under "students "will not," item number 20 is "violate the dress code." Therefore, not wearing the appropriate uniform is considered a disciplinary violation. Here, then, the precise question before the court is "Whether a non-profit board and its members who are all private individuals (not state officials or employees) but operate a public charter school in North Carolina act under color of state law when they promulgate and enforce a uniform policy/dress code which is incorporated into the discipline policy of the charter school?"

i. <u>"Public School"—How the State Views the Entity</u>

Under this analytical framework, plaintiffs first argue that defendants are state actors simply because North Carolina statutory law designates charter schools as public schools. *See* N.C. Gen. Stat. § 115C-218.15(a) ("A charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located. All charter schools shall be accountable to the State Board for ensuring compliance with applicable laws and the provisions of their charters.") This court noted that charter schools are public schools under state statute in a prior order. [DE #91 at 12 (citing *Yarbrough v. East Wake First Charter Sch.*, 108 F.Supp. 3d 331, 337 (E.D.N.C. 2015))]. Plaintiffs believe the inquiry begins and ends here. However, as noted *supra*, defendants are two private corporations and six individuals, none of whom are public officials. The court

finds that the fact that charter schools are deemed public schools in North Carolina is simply one factor to consider. It does not end the inquiry and does not automatically mean the defendants are "state actor[s] for all purposes . . . as a matter of law." *Caviness v. Horizon Cmty. Learning Ctr, Inc.*, 590 F.3d 806, 813 (9th Cir. 2010). "Rather, a private entity may be designated a state actor for some purposes but still function as a private actor in other respects." *Id.*

ii. "Historical, Exclusive and Traditional State Function"

In *Rendell-Baker*, the court noted the question is not "simply whether a private group is serving a 'public function'" but rather "whether the function performed has been 'traditionally the exclusive prerogative of the State.'" *Rendell-Baker*, 457 U.S. at 842 (quoting *Jackson*, at 353). While education is a public function in North Carolina, the mere fact that a private entity performs a function serving the public does not make it state action. Many students are educated in private and home school settings. Therefore, while education is an important public function; education is not the "'exclusive prerogative of the State.'" *Rendell-Baker*, 457 U.S.at 842 (quoting *Jackson*, 419 U.S. at 353). However, here defendants are providing free, public education, and "free, public education, whether provided by public or private actors, is an historical, exclusive, and traditional state function." *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002).

In North Carolina, free, public education has long been historically governmental. Article IX of The North Carolina Constitution provides for a uniform system of free public schools:

> The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

N.C. Const. art. IX, § 2(1).

Therefore, CDS, Inc. is performing an historical, exclusive and traditional state function.

iii. "State Regulation"

Charter schools, in North Carolina, are creatures of a statutory scheme whose express purpose is to "authorize a system of charter schools to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently." N.C. Gen. Stat. § 115C-218(a). It is undisputed that the School is a charter school funded with public funds. Further, "[e]xcept as provided in [Article 14a of the North Carolina General Statutes] and pursuant to the provisions of its charter, a charter school is exempt from statutes and rules applicable to a local board of education or local school administrative unit." N.C. Gen. Stat. § 115C-218.10.

In furtherance of fostering the statutory goal of independence, the charter school's board, not the State, decides "matters related to the operation of the school, including budgeting, curriculum, and operating procedures." N.C.Gen. Stat. § 115C-218.15(d). However, despite the stated goal and some freedoms, the State extensively regulates portions of charter school operations. For example, the State sets the formula for funding allocation, establishes criteria for student admission and prohibits charter schools for charging tuition. N.C. Gen. Stat. § 115C-218.45, § 115C-218.50(b).

It also requires charter schools to comply with instructional standards adopted by the State Board of Education, N.C. Gen. Stat. § 115C-218.85, and prohibits charter schools from sectarianism or discrimination, N.C. Gen. Stat. §§ 115C-218.50(a), 115C-218.55 ("A charter school shall not discriminate against any student on the basis of ethnicity, national origin, gender, or disability.").

State law also requires public schools, including charter schools, to establish a student code of conduct and discipline. N.C. Gen. Stat. § 115C-390.2; N.C. Gen. Stat. § 115C-218.60.[6]

By subjecting charter schools to Article 27, the general statutes provide that charter schools "shall adopt policies to govern the conduct of students and establish procedures to be followed by school officials in disciplining students. These policies must be consistent with the provisions of this Article and the constitutions, statutes, and regulations of the United States and the State of North Carolina." N.C. Gen. Stat. § 115C-390.2(a). Among the many regulatory restrictions on disciplinary codes within this section, is a statutory restriction on the use of long-term suspensions and expulsions for non-serious violations of the discipline codes, including dress code violations:

> Board policies shall minimize the use of long-term suspension and expulsion by restricting the availability of long-term suspension or expulsion to

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[6] N.C. Gen. Stat. § 115C-218.60 provides:

> The [charter] school is subject to and shall comply with Article 27 of Chapter 115C of the General Statutes, except that a charter school may also exclude a student from the charter school and return that student to another school in the local school administrative unit in accordance with the terms of its charter after due process.

> those violations deemed to be serious violations of the board's Code of Student Conduct that either threaten the safety of students, staff, or school visitors or threaten to substantially disrupt the educational environment. Examples of conduct that would not be deemed to be a serious violation include the use of inappropriate or disrespectful language, noncompliance with a staff directive, **dress code violations,** and minor physical altercations that do not involve weapons or injury. The principal may, however, in his or her discretion, determine that aggravating circumstances justify treating a minor violation as a serious violation.

N.C. Gen. Stat. § 115C-390.2 (emphasis added).

In the matter before the court, the Board of CDS, Inc. incorporated the uniform policy into the Discipline Code of the Student Handbook. Further, defendants admit that violations may result in disciplinary action. [DE #94 ¶49]. The court need not decide whether every dress code or uniform policy of a charter school is extensively regulated by the State because, in this matter, CDS, Inc. has brought the uniform policy under extensive regulation of the State by making violations of the uniform policy a disciplinary violation.

This case presents a multi-faceted analysis regarding whether the actions of defendants constitute state action. However, this is the analysis the court must conduct based on the statutory scheme established by the North Carolina General Assembly—a scheme which attempts to contract out and fully fund an historical, traditional and exclusively state function, namely free public education, to private corporations and individuals. Answering the precise question before the court, the court finds that

under the facts and circumstances presented here, CDS, Inc. and its board members acted under color of state law when they incorporated into the disciplinary code of the School a uniform policy the violation of which could subject students to discipline. The undersigned notes this finding does not equate to a finding that North Carolina charter schools and their board members are state actors for all purposes, only that the action complained of here occurred under color of state law.

b. Defendant RBA

Defendants argue the lack of state action is even clearer with respect to RBA. RBA holds no direct contract with the State and receives no direct public funding but rather contracts with CDS, Inc. to provide "necessary educational facilities and management services." Perhaps even more important, RBA has no direct authority to change the uniform policy. The uniform policy is set by the Board, and RBA's officers are not members of the Board of CDS, Inc. Plaintiffs argue that RBA was equally subject to the delegation of authority by the State for the education of students at the School, and has played a principal role in the creation, governance, and operation of the School from its inception. Plaintiff notes that the Charter Application was filed by CDS, Inc., "in conjunction with" RBA; the logo on the application is that of RBA, and the header on each page lists both CDS, Inc. and RBA. Mr. Mitchell is listed as the primary contact. The Application detailed the operation and management of the school by RBA.

The facts show that RBA and CDS, Inc. are significantly intertwined, yet legally distinct entities. RBA provides the facilities, maintenance, staff and administration. However, despite these close connections, CDS, Inc. is the non-profit entity which holds

the charter with the State and the Board of CDS, Inc. is the entity with final authority over the uniform policy at issue in this matter. Therefore, the court finds the state action doctrine does not extend so far as to cover RBA in this particular instance. While the court notes that RBA and its principals appear to exercise much indirect influence over the Board of CDS, Inc., CDS, Inc. remains the legal entity charged with approving the uniform policy and discipline code at issue. Therefore, RBA's motion for summary judgment as to the constitutional claims is GRANTED.

c. EPC Claims Analysis

Having found state action on the part of CDS, Inc., the court turns to the issue of whether the uniform policy, as currently written and enforced, violates the equal protection clause. "The equal protection clause of the Fourteenth Amendment protects individuals against intentional, arbitrary discrimination by government officials." *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577 (7th Cir. 2014) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). "Whether and when the adoption of differential grooming standards for males and females amounts to sex discrimination is the subject of a discrete subset of judicial and scholarly analysis." *Hayden*, 743 F.3d at 577 (citing numerous cases involving allegations of sex discrimination regarding dress codes).

Courts traditionally have and should refrain from regulating the day-to-day issues presented in local schools, leaving such matters to local authorities. *See Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities."). Further, generally, "children do not possess the same rights as

adults." *Schleifer ex rel Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998). While public schools have more expansive power to regulate the conduct of schoolchildren, *see Vernonia School Dist. 47J v. Acton*, 515 US 646, 656-57 (1995), it is well established that children do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Comny Sch Dist.*, 393 U.S. 503, 506 (1969).

Here, plaintiffs have shown that CDS, Inc. has promulgated and is enforcing a uniform policy at the School that requires girls to wear skirts, and, on its face, treats girls differently than boys by not allowing them to wear pants. Further, plaintiffs argue this policy and its enforcement cause girls to suffer a burden that the boys do not suffer and that the policy is based on impermissible sex stereotypes. Plaintiffs argue this policy and its enforcement constitute unconstitutional sex discrimination.

Under the constitutional framework and controlling precedent, sex is not a proscribed classification like race or national origin. *United States v. Virginia*, 518 U.S. 515, 533 (1996). "Physical differences between men and women [] are enduring." *Id.* "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration." *Id.* Plaintiffs urge this court to adopt the intermediate scrutiny used in *Virginia* to this gender based uniform policy. *See id.* Defendants argue that the intermediate scrutiny in *Virginia* does not apply and that courts have upheld dress codes with gender distinctions that require students to dress in conformity with accepted standards of the community. "Sex-differentiated standards consistent with community norms may be permissible to the extent they are part of a comprehensive, evenly-enforced grooming code that

imposes comparable burdens on both males and females alike." *Hayden*, 743 F.3d at 581.

The caselaw in this specific area is not well developed, at least not in recent jurisprudence. Most recent uniform and dress code cases are claims based on the First Amendment, not the Equal Protection Clause. Arguably, the most analogous cases are the hair length cases of the Vietnam era, cases decided long before *United States v. Virginia* and not based explicitly on an Equal Protection analysis. Since the 1960s and 70s, there have been limited cases concerning requirements that girls wear skirts. This is likely a function, at least partly, of changing community standards that have led to the near eradication of prohibitions on girls wearing pants.

However, the court need not decide the exact breadth of application of *Virginia's* intermediate scrutiny or whether *Hayden's* "comparable burdens" standard is part of intermediate scrutiny, because even under a "comparable burden" analysis, the court finds the skirts requirement does not pass muster. While this court recognizes that certain sex-differentiated standards consistent with community norms may be permissible, the skirts requirement in this case is not consistent with community norms. Women (and girls) have, for at least several decades, routinely worn both pants and skirts in various settings, including professional settings and school settings. Females have been allowed to wear trousers or pants in all but the most formal or conservative settings since the 1970s.[7] According to

[7] According to the expert's report, female cadets at West Point have been permitted to wear trousered uniforms since the first coed class entered in 1976 and females began wearing pant suits on the Senate floor for the first time over twenty-five years ago, in 1993. [DE #152-20].

plaintiffs' expert, most public school dress codes across the country allowed girls to wear pants or shorts by the mid-1980s. "[I]t is worth noting that the community standards which may account for the differences in standards applied to men and women, girls and boys, do not remain fixed in perpetuity." *Hayden*, 743 F.3d at 581-82.

While defendants argue the skirts requirement is based on the traditional values approach of the school as a whole and is in place to instill discipline and keep order, defendants have shown no connection between these stated goals and the requirement that girls wear skirts. Defendants argue that the sex-differentiated requirements cannot be viewed in isolation but instead "work seamlessly together in a coordinated fashion in a disciplined environment that has mutual respect between boys and girls and between each other as students" and that the uniform policy, and specifically the skirts requirement, helps the students to "act more appropriately" toward the opposite sex. They argue that taking away the "visual cues" of the skirts requirement would hinder respect between the two sexes. However, even assuming these are legitimate goals, defendants have not shown how the skirts requirement actually furthers these stated goals. The evidence shows that on any given day, a portion of the female student population is not subject to the skirts requirement. The undisputed facts show that there are a number of days (P.E. days at least once per week, as well as special event, and field trips days) where girls are not required to wear skirts. There has been no evidence presented that the boys treat the girls differently or vice versa on those days. When questioned about the skirts requirement, none of the Board members deposed could explain how requiring

girls to wear skirts specifically furthered the policy's stated goals. Further, there is no evidence that requiring girls to wear skirts on a daily basis is consistent with community standards of dress in Brunswick County or in North Carolina generally.

It is not the holding of this court that dress, grooming and uniform policies cannot have differences for boys and girls. However, even under the *Hayden* theory of an "evenly-enforced grooming code" with "comparable burdens," defendants cannot show that the uniform policy imposes comparable burdens. Yes, the boys at the School must conform to a uniform policy as well. But plaintiffs in this case have shown that the girls are subject to a specific clothing requirement that renders them unable to play as freely during recess, requires them to sit in an uncomfortable manner in the classroom, causes them to be overly focused on how they are sitting, distracts them from learning, and subjects them to cold temperatures on their legs and/or uncomfortable layers of leggings under their knee-length skirts in order to stay warm, especially moving outside between classrooms at the School. Defendants have offered no evidence of any comparable burden on boys. While defendants emphasize that the uniform policy is most frequently enforced against boys for failure to wear a belt, there is no evidence that wearing a belt inhibits the boys' ability to fully participate in the programs or activities of the School. Therefore, the skirts requirement causes the girls to suffer a burden the boys do not, simply because they are female.

Under the facts of this specific case, the court finds that the skirts requirement of the uniform policy of the School promulgated by CDS, Inc., as written and enforced, violates the Equal Protection Clause. Plaintiffs are

entitled to summary judgment on this issue. Defendants' motion for summary judgment on this issue is DENIED.

IV. North Carolina Constitutional Claims

The North Carolina Constitution provides a direct cause of action only in the absence of an adequate state remedy. "An adequate state remedy exists if, assuming the plaintiffs claim is successful, the remedy would compensate the plaintiff for the same injury alleged in the direct constitutional claim." *J.W. v. Johnston Cty. Bd. of Educ.*, No. 5:11-CV-707-D, 2012 WL 4425439, at *17 (E.D.N.C. Sept. 24, 2012) (quoting *Estate of Fennell ex rel. Fennell v. Stephenson*, 137 N.C. App. 430, 437, 528 S.E.2d 911, 915-16 (2000)).

Neither plaintiffs nor defendants have adequately addressed this issue in a manner in which the court can provide proper analysis. Therefore, the motions for summary judgment as to the North Carolina constitutional claims are DENIED WITHOUT PREJUDICE to be refiled, if appropriate, with proper support.

V. Breach of Contract Claims

Plaintiffs contend they are third-party beneficiaries to the contract between the State of North Carolina and CDS, Inc. as well as the management agreement between CDS, Inc. and RBA. While plaintiffs contend their status as third-party beneficiaries is clear, the court finds, similar to the state constitutional claim, that neither defendants nor plaintiffs have adequately addressed this legal issue in a manner in which the court can provide proper analysis. Therefore, the cross motions for summary judgment are DENIED WITHOUT PREJUDICE as to the breach of contract claims to be refiled, if appropriate, with proper support.

VI. Procedural Motions

As to the Motion to Strike Answer to Amended Complaint [DE #200], Motion to Stay Motion to Strike [DE #203], and Motion for Extension of Time to File Response to Motion to Strike [DE # 203], all of these are procedural motions which only need be addressed if summary judgment is ultimately denied. While the court is denying without prejudice the motions for summary judgment as to the state law claims, the denial is solely for the purposes of seeking additional filings from the parties. Therefore, judicial efficiency would not be served by addressing the procedural motions at this time. Therefore, these motions are DENIED WITHOUT PREJUDICE to be refiled if necessary. If refiled, the court will consider them as if filed on their original filing date so as to avoid prejudicing the parties as to timeliness arguments.

Also before the court is defendants' motion for this court to allow trial before an advisory jury [DE #208]. The court, in its discretion, denies this request.

CONCLUSION

For the foregoing reasons, the court hereby orders as follows: the cross motions for summary judgment [DE #149 and #158] are GRANTED IN PART, DENIED IN PART, AND DENIED WITHOUT PREJUDICE IN PART. Specifically, as to the Title IX claims, defendants' motion for summary judgment is GRANTED and plaintiffs' motion DENIED. As to the EPC claim, defendants' motion is GRANTED as to defendant RBA and DENIED as to all other defendants. Plaintiffs' motion for summary judgment is GRANTED as to CDS, Inc. and the individual board members insofar as the court finds the skirts requirement violates the equal protection clause. As to the North Carolina

Constitutional and breach of contract claims, the cross motions are DENIED WITHOUT PREJUDICE. The motion to strike, motion to stay and motion for extension of time [DE #200, #203] are DENIED WITHOUT PREJUDICE to be refiled if necessary, and the motion for an advisory jury [DE #208] is DENIED.

The clerk is directed to refer this matter to the magistrate judge for further case management.

This 28th day of March 2019.

/s/
Malcom J. Howard
Senior United States District Judge

At Greenville, NC
#26

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

NO.: 7:16-CV-30-H

BONNIE PELTIER, ET AL.;

Plaintiffs

v.

CHARTER DAY SCHOOL, INC., ET AL.,

Defendants.

(November 26, 2019)

ORDER

This matter is before the court on defendants' motion to certify Order for Appeal under 28 U.S.C. § 1292(b) or in the alternative entry of partial final judgment under Rule 54(b) as well as plaintiffs' motion for entry of judgment under Rule 54(b) and motion for declaratory judgment and permanent injunction. Appropriate responses and replies have been filed, and these matters are ripe for adjudication. Additionally, defendants moved for leave to file a surreply [DE #236]. The motion is granted, and the court has considered the surreply herein. The clerk is directed to file the surreply, attached as Exhibit A to DE #236 as a separate filing.

Plaintiffs are current or former students of Charter Day School, a co-educational, K-8 public charter school in Brunswick County, North Carolina. They brought this action challenging the school's uniform policy, which requires female students to wear "skirts, skorts, or jumpers" ("the skirts requirement") and male students to wear shorts or pants. Plaintiffs do not contest defendants' authority to impose a school uniform policy in general, but only the skirts requirement.

Plaintiffs' amended complaint claims the uniform policy violates federal and state law. Specifically, plaintiffs asserted the following causes of action: (1) sex-based discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, brought via 42 U.S.C. § 1983; (2) sex-based discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* and implementing regulations; (3) sex-based discrimination in violation of the Equal Protection Clause in Article I, Section 19 of the North Carolina Constitution; (4) breach of the Charter Agreement between the State Board of Education and Charter Day School, Inc.; and (5) breach of the management agreement between Charter Day School, Inc., and The Roger Bacon Academy, Inc. ("RBA").

This court granted plaintiffs' motion for summary judgment on their Equal Protection Clause claim and granted defendants' motion for summary judgment on plaintiffs' Title IX claim. The court denied without prejudice the parties' cross-motions for summary judgment on the state constitutional and breach of contract claims, holding that they could be refiled, if appropriate, with additional briefing in support.

Defendants now move this court to certify an interlocutory appeal solely as to the Equal Protection claim. In the alternative, defendants ask the court to enter partial final judgment on that claim only under Rule 54(b) of the Federal Rules of Civil Procedure. Plaintiffs respond, in their own motion, agreeing that partial final judgment could be entered under Rule 54(b) but asking that the court also enter final judgment as to the Title IX claim in addition to the Equal Protection claim.

Defendants also ask this court to stay the remaining state-law claims pending the outcome of any appeal. Plaintiffs contend a stay is unnecessary. Finally, plaintiffs ask the court to enter both a permanent injunction and a declaratory judgment as to the Equal Protection claim. Defendants dispute the necessity of an injunction or declaratory judgment, noting they are voluntarily complying with the court's order.

Title 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district

> court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292 (West).

Rule 54(b) of the Federal Rules of Civil Procedure authorizes the court to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b).

> Otherwise, any order or other decision . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Id.

To determine whether entry of partial final judgment under Rule 54(b) is appropriate, the court must determine whether judgment is final and then whether there is no just reason for delay. To be final, the decision "must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is an 'ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Curtiss-Wright Corp. v. Gen. Elec. Co.,* 446 U.S. 1, 7 (1980) (quoting *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 436 (1956)).

Whether there is no just reason to delay is a fact-specific inquiry and may require the court to consider the following factors, if applicable:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by

> future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a setoff against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.
>
> *Allis-Chalmers Corp. v. Philadelphia Electric Co.,* 521 F.2d at 364 (footnotes omitted); *see also Curtiss-Wright,* 446 U.S. at 8, 100 S.Ct. at 1465 ("whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals") (footnote omitted).

Braswell Shipyards, Inc. v. Beazer E., Inc., 2 F.3d 1331, 1335-36 (4th Cir. 1993).

"Where the district court is persuaded that Rule 54(b) certification is appropriate, the district court should state those findings on the record or in its order." *Braswell Shipyards, Inc.*, 2 F.3d at 1336 (4th Cir. 1993).

In this matter, this court's March 28 order on the parties' cross motions for summary judgment reached final decisions on both the Equal Protection Clause and Title IX claims. Furthermore, resolution of the state law claims necessitates the court make findings independent of the federal claims including (1) whether plaintiffs are third-party beneficiaries of the contracts in question; (2) whether a cause of action lies for violations of the state

constitution under these circumstances; (3) what standard applies to violations of the right to Equal Protection of the law in the context of the North Carolina Constitution; and (4) whether the Skirts requirement violates that constitutional standard.

The court has considered all the factors applicable here and finds no just reason to delay entering judgment on the Equal Protection Claim and the Title IX claim. Therefore, the court finds entry of partial final judgment is appropriate here and certification of interlocutory appeal is not appropriate. *Sass v. D.C.*, 316 F.2d 366, 368 (D.C. Cir. 1963) (noting better practice is to use Rule 54(b) instead of 28 U.S.C. § 1292 certification).

Therefore, the clerk is directed to enter partial final judgment in accordance with the summary judgment order entered on March 28, 2019, which granted plaintiffs' motion for summary judgment on their Equal Protection Clause claim and granted defendants' motion for summary judgment on plaintiffs' Title IX claim. Furthermore, the court hereby declares that the specific requirement of the uniform policy of the School promulgated by CDS, Inc., as written and enforced, requiring girls to wear skirts, jumpers, or skorts and prohibiting them from wearing pants or shorts, violates plaintiffs' rights under the Fourteenth Amendment of the United States Constitution. The court therefore permanently enjoins defendants from establishing or enforcing a provision in the Uniform Policy of Charter Day School requiring that girls wear skirts and prohibiting them from wearing pants or shorts.

CONCLUSION

For the foregoing reasons, the court GRANTS plaintiffs' motion for entry of judgment under Rule 54 (b) and GRANTS IN PART AND DENIES IN PART

defendants' motion for an interlocutory appeal under 28 U.S.C. § 1292(b) or in the alternative for entry of partial final judgment. The clerk is directed to enter a partial final judgment, declaratory judgment and permanent injunction in this matter, as detailed above. Further, the clerk is directed to refer this matter to the magistrate judge for continued pretrial management of the remaining claims.

This **26th** day of November 2019.

/s/
Malcolm J. Howard
Senior United State District Judge

At Greenville, NC
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APPENDIX E

States That Designate Charter Schools As "Public"[1]

State	Statute
Alabama	Ala. Code § 16-6F-4
Alaska	Alaska Stat. § 14.03.255
Arizona	Ariz. Rev. Stat. § 15-101
Arkansas	Ark. Code § 6-23-103
California	Cal. Educ. Code § 47601
Colorado	Colo. Rev. Stat. § 22-30.5-104
Connecticut	Conn. Gen. Stat. § 10-66aa
Delaware	Del. Code tit. 14, § 503
Florida	Fla. Stat. § 1002.33
Georgia	Ga. Code § 20-2-2062
Hawaii	Haw. Rev. Stat. § 302D-1
Idaho	Idaho Stat. § 33-5202A
Illinois	105 Ill. Comp. Stat. § 5/27A-5
Indiana	Ind. Code § 20-24-1-4
Iowa	Iowa Code § 256E.1
Kansas	Kan. Stat. § 72-4206

[1] The five omitted states—Montana, Nebraska, North Dakota, South Dakota, and Vermont—do not authorize charter schools.

Kentucky	Ky. Rev. Stat. § 160.1590
Louisiana	La. Stat. § 17:3973
Maine	Me. Rev. Stat. tit. 20-A, § 2401
Maryland	Md. Code Educ. § 9-102
Massachusetts	Mass. Gen. Laws ch. 71, § 89
Michigan	Mich. Comp. Laws § 380.501
Minnesota	Minn. Stat. § 124E.03
Mississippi	Miss. Code § 37-28-5
Missouri	Mo. Stat. § 160.400
Nevada	Nev. Rev. Stat. § 388A.150
New Hampshire	N.H. Rev. Stat. § 194-B:1
New Jersey	N.J. Stat. § 18A:36A-3
New Mexico	N.M. Stat. § 22-8B-2
New York	N.Y. Educ. Law § 2853
North Carolina	N.C. Gen. Stat. § 115C-218.15
Ohio	Ohio Rev. Code § 3314.01
Oklahoma	Okla. Stat. § 70-3-132
Oregon	Ore. Rev. Stat. § 338.005
Pennsylvania	24 Pa. Stat. § 17-1703-A
Rhode Island	16 R.I. Gen. Laws § 16-77-2.1

South Carolina	S.C. Code § 59-40-40
Tennessee	Tenn. Code § 49-13-104
Texas	Tex. Educ. Code § 12.105
Utah	Utah Code § 53G-5-401
Virginia	Va. Code § 22.1-212.5
Washington	Wash. Rev. Code § 28A.710.010
West Virginia	W. Va. Code § 18-5G-1
Wisconsin	Wis. Stat. Ann. § 118.40
Wyoming	Wyo. Stat. § 21-3-304