

No. 22-238

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**In the Supreme Court of the United States**

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CHARTER DAY SCHOOL, INC. ET AL., PETITIONERS

*v.*

BONNIE PELTIER ET AL., RESPONDENTS.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

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**BRIEF FOR THE STATES OF TEXAS, ALABAMA,  
ALASKA, ARKANSAS, KANSAS, MISSISSIPPI, NEBRASKA,  
SOUTH CAROLINA, TENNESSEE, AND VIRGINIA AS  
AMICI CURIAE IN SUPPORT OF PETITIONER**

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### INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Alaska, Arkansas, Kansas, Mississippi, Nebraska, South Carolina, Tennessee, and Virginia.<sup>1</sup> The amici States issue charters to independently operated, but publicly funded schools. Many of the amici States do so in furtherance of constitutional mandates to provide for public education. *See, e.g.*, ALASKA CONST. art. VII, § 1; ARK. CONST. art. XIV, § 1; KAN. CONST. art. VI, § 1; S.C. CONST. art. XI, § 3; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1. Even where public education is not constitutionally mandated, traditional public schools serve an essential public need. The necessary uniformity of a government-run school, however, ill-serves students with unique needs. To provide such students another option to thrive, amici States have created charter school frameworks. They impose different or fewer regulations on charter schools than they do on traditional public schools. But the amici States fund their charter schools with state monies and, to varying degrees, treat them as “public” schools. In short, the amici States’ charter schools share many characteristics with the North Carolina charter school at issue in this case.

The en banc Fourth Circuit’s decision to treat North Carolina’s charter schools as state actors subject to liability under 42 U.S.C. § 1983 threatens the amici States’ interest in the independence of their own charter

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<sup>1</sup> No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On October 4, 2022, counsel of record for all parties received notice of amici’s intention to file this brief.

schools. The amici States therefore urge this Court to grant the petition for review.

#### SUMMARY OF ARGUMENT

I. Charter schools are designed to encourage innovation and diversity. For those parents and students who are not well served by traditional public schools or who seek alternative educational models, publicly funded charter schools provide a welcome opportunity for academic success. In Texas, for example, over 6% of public-school students attend a charter school, and thousands more are on a waitlist for a seat in a charter-school classroom. Examples of successful charter schools in the amici States illustrate the possibilities for innovation, from flexible class sizes driven by student performance levels to teacher home visits and parent collaboration. Such innovation would not be possible in a traditional public school district subject to strict regulation of everything from the prescribed curriculum to the student–teacher ratio and minutes of instruction.

II. The question presented in this case—whether a charter school is a state actor subject to the requirements of the Fourteenth Amendment—warrants this Court’s attention because it may dictate whether such schools can continue to exist. Until now, every court of appeals to confront similar questions has applied *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and concluded that a publicly funded, privately operated school is *not* a state actor. The en banc Fourth Circuit disagreed. Although *Rendell-Baker* rejected the theory that public funding and the existence of some state regulation makes a school into a state actor, the Fourth Circuit held that those factors subject charter schools like petitioners to liability. Although *Rendell-Baker* explained that what matters is the challenged policy’s

relationship *to the State*, the Fourth Circuit imposed liability because the challenged policy is central to the *charter school's* chosen educational model.

The Fourth Circuit's decision threatens charter schools' independence in other States as well. The aspects of North Carolina law that led the Fourth Circuit to impose liability on petitioners are hardly unique to that State. Like North Carolina's, many state constitutions contain a mandate that the State provide for a system of public schools. And state law frequently denominates charter schools as "public" or "governmental" schools and provides charter-school teachers with employment benefits available to teachers at traditional public schools. These are not distinctions that limit the decision's impact to North Carolina.

The Fourth Circuit's decision is also troubling because *Rendell-Baker* and the long-established state-action doctrine look to the challenged action's relationship to the *State*. If the State cannot control an action, it cannot be responsible for that action, so the Fourteenth Amendment does not treat that action as the State's. Applying that principle to a school funded almost entirely through the State, *Rendell-Baker* held that because the challenged school-policy decision was neither mandated nor controlled by the State, that policy decision was not state action under section 1983. But the Fourth Circuit turned that analysis on its head by looking at the importance of the challenged policy—here, a school dress code—to *the private entity*. Such discretionary policies are precisely what the States have structured their charter-school systems to leave in independent hands. Using such a policy to attribute a charter school's action to the State threatens to fundamentally undermine that independence.

**ARGUMENT****I. Minimally Regulated Charter Schools Are a Central Component of States' Educational Systems.**

For over forty years, this Court's state-actor doctrine has held that publicly funded, privately operated schools are not subject to liability under 42 U.S.C. § 1983 because education is not "traditionally the *exclusive* prerogative of the State." *Rendell-Baker*, 457 U.S. at 842 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)). Intending to foster innovative pedagogical methods and educational diversity, States have relied upon that rule to fund innovative, independent schools that operate outside the State's government-run public-school systems. The Fourth Circuit's decision below jeopardizes this system. This Court should grant the petition for writ of certiorari to ensure the continued independence of charter schools not only in North Carolina, but also in Texas and other States.

**A. Charter schools are designed to allow educators to develop innovative pedagogical methods.**

The charter school concept was first proposed by Albert Shanker, President of the American Federation of Teachers, in a 1988 speech to the National Press Club.<sup>2</sup> Shanker's proposal was motivated by his concern that public school reforms of the 1980s were too "top down."<sup>3</sup>

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<sup>2</sup> See Richard D. Kahlenberg, *The Charter School Idea Turns 20*, EDUCATION WEEK (March 25, 2008), <https://www.edweek.org/policy-politics/opinion-the-charter-school-idea-turns-20/2008/03>.

<sup>3</sup> Albert Shanker, *Proposals for Restructuring American Schools*, C-SPAN (Mar. 31, 1988), at 12:30-18:50 <https://www.c-span.org/video/?1996-1/proposals-restructuring-american-schools>.

In Shanker’s view, governmental reforms could go only so far because States could set only minimal requirements—for example, the length of school days or the components of a curriculum. *See id.* These mandates were effective in educating students with some learning styles but were “bypassing about 80 percent of the students in this country.” *Id.*

Schenker proposed a solution to this problem: allow both parents and teachers to “opt for” an alternative type of school. *Id.* at 23:35-26:50. This model would empower educators to form “totally autonomous school[s]” for the sole purpose of implementing innovative teaching techniques. *Id.*

**B. Charter schools have become an important and successful part of state educational systems.**

The proposal caught on. Minnesota adopted the first charter-school statute in the early 1990s, and by 2008 forty states and the District of Columbia had followed suit. *See Kahlenberg, supra n.2.* For example, Texas was among the early adopters, and its experience helps demonstrate the importance of allowing schools to choose innovative education models subject to minimal government control. The Texas Legislature first authorized charter schools in 1995. *See Act of May 27, 1995, 74th Leg., R.S., ch. 260 (S.B. 1), 1995 Tex. Gen. Laws 2207; see also LTTS Charter Sch., Inc. v. C2 Constr., Inc., 342 S.W.3d 73, 74 (Tex. 2011) (discussing the passage of the Texas Charter School Act).* Now, some of its charter schools are listed among the best schools in the country—notwithstanding that they serve populations of students that are all too often left behind in more traditional school environments.

1. Texas policymakers—like those of other amici States—believed charter schools would “allow educators to be more innovative and creative and give parents and community leaders more input in public education on the local level.” House Research Organization, Bill Analysis, Tex. S.B. 1, 74th Leg., R.S., 13 (May 4, 1995). By eliminating some curriculum and pedagogical regulations, the Texas Charter School Act was designed to “give teachers and parents who want to try new ideas the maximum flexibility they need [without] having to request a waiver from the education commissioner.” *Id.* at 14; *see also*, *e.g.*, LA. REV. STAT. § 17:3972(A) (“It is the intention of the legislature . . . to authorize experimentation by city and parish school boards by authorizing the creation of innovative kinds of independent public schools for students.”).

Today, across the nation there are thousands of charter schools. Many are highly specialized; these include charter schools focused on “STEM . . . , college prep, classical education, and Montessori,” along with a significant number of “dropout recovery schools.” House Research Organization, Bill Analysis, Tex. S.B. 2, 83rd Leg., R.S., 7 (May 16, 2013) [hereinafter S.B. 2 Bill Analysis]; *see also*, *e.g.*, KAN. STAT. § 72-4206(b) (“A charter school also may be organized around a special emphasis, theme or concept or utilize innovative educational methods or practices.”).<sup>4</sup>

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<sup>4</sup> *See Fast Facts: Charter Schools*, NATIONAL CENTER FOR EDUCATION STATISTICS, [www.nces.ed.gov/fastfacts/display.asp?id=30](http://www.nces.ed.gov/fastfacts/display.asp?id=30) (discussing the rapid growth of charter schools throughout the States); NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS, INSTRUCTIONAL DELIVERY AND FOCUS OF PUBLIC CHARTER SCHOOLS: RESULTS FROM THE NAPCS NATIONAL CHARTER SCHOOL SURVEY, SCHOOL YEAR 2011-2012 (2012) (discussing the wide range of specialized charter school in the States).

A 2013 report from the Texas Sunset Advisory Commission found that charter schools achieved notable success, including being more likely to have “exemplary” performance scores compared to traditional districts. SUNSET ADVISORY COMMISSION, FINAL REPORT WITH LEGISLATIVE ACTION: TEXAS EDUCATION AGENCY 70-71 (2013). Because other charter schools were among the lowest scores, proposals were made to allow the Texas Education Agency more power to strip the charters of failing schools, while increasing the statewide cap on the number of charter operators to allow more options to the public. *See id.* Texas’s Legislature agreed, passing landmark legislation that reformed and restructured the charter school system. *See* Act of May 26, 2013, 83rd Leg., R.S., ch. 1140 (S.B. 2), 2013 Tex. Gen. Laws 2160; *see also Honors Acad., Inc. v. Texas Educ. Agency*, 555 S.W.3d 54, 58 (Tex. 2018) (discussing the 2013 amendments to Texas’s statutory scheme).

Today, the Texas Charter School Act explicitly calls for charter schools to be “innovative” and free from governmental oversight that “unduly regulates the instructional methods or pedagogical innovations of charter schools.” TEX. EDUC. CODE § 12.001(a)(5), (b); *see also*, *e.g.*, FLA. STAT. § 1002.33(b) (“Charter schools shall . . . [e]ncourage the use of innovative learning methods.”).

Fulfilling the goal of the Texas Legislature, charter schools in the State are a popular alternative to traditional public schools. The overwhelming majority of Texas Charter schools are “open-enrollment charters,” organized under Texas Education Code section 12.101. *See* Amie Rapaport, et al., *Annual Evaluation Open-Enrollment Charter Schools 2012-13 School Year*, TEXAS EDU. AGENCY 12 (Sept. 2014). Such charter schools are

“public” in that they are offered at no expense to students and must be open to all. The State of Texas reimburses charter schools for each student, and charters may not charge students tuition. TEX. EDUC. CODE §§ 12.106(a), .108. Further, Texas law requires charter schools to “prohibit discrimination in admission policy on the basis of sex, national origin, ethnicity, religion, disability, academic, artistic, or athletic ability, or the district the child would otherwise attend.” *Id.* § 12.111(a)(5).

The demand for seats in a charter school classroom far exceeds the supply. In the 2019–2020 school year, 336,107 Texas students were enrolled at 178 open-enrollment charters, spread across 771 campuses. 2020 TEX. EDUC. AGENCY COMPREHENSIVE BIENNIAL REP. ON TEX. PUB. SCH., at 301 [hereinafter BIENNIAL REPORT]. That is 6.2% of all public-school students in Texas. *Id.* Each year, charter schools with more registered students than available seats hold a lottery. *See* TEX. EDUC. CODE § 12.117(a)(2)(A). Students who do not receive a seat are placed on a waitlist maintained by the school. *See id.* § 12.1173(d). In 2021, 70% of Texas charter schools maintained a waitlist. 2021 TEX. EDUC. AGENCY, CHARTER SCH. WAITLIST REP. [hereinafter TEX. WAITLIST REPORT]. In all, 58,588 individual students were on waitlists for seats in Texas charter schools. *Id.* Other States have had similar experiences. *See* Susan Pendergrass & Nora Kern, *Waiting for Their Chance: A Closer Look at Wait Lists in Urban Public Charter Schools*, NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS 12 (May 2015) (reporting that 24,500 students were on waitlists to attend charter schools in Miami-Dade County, Florida).

2. The popularity of charter schools in the amici States shows that innovation by private educators

creates successful alternatives for many students. For example, many Texas charter schools specialize in educating students at high risk of dropout. BIENNIAL REPORT, *supra*, at 301. Three examples of successful charter schools and charter-school systems in Texas and other States illustrate the importance of eliminating government oversight to empower innovative education methods.

**IDEA Public Schools.** IDEA was founded by two Teach For America teachers; it began as an extra-curricular program to help students prepare for college, but eventually became a school in its own right.<sup>5</sup> The IDEA charter system now has 96 campuses in Texas and Louisiana, with plans to expand to Florida and Ohio. *See* Seale, *supra* n.5. Starting with its first graduating class in 2007, IDEA has maintained 100% college acceptance, *id.*—notwithstanding that 86% of its students are economically disadvantaged and almost 40% have limited English proficiency.<sup>6</sup> Unsurprisingly, the system struggles to keep up with demand—IDEA had the largest waitlist among Texas charter schools in 2021, with 14,952 students. TEX. WAITLIST REPORT, *supra*.

The cofounders believe that IDEA’s successes spring from the fact that “IDEA is a school of choice.” Seale, *supra* n.5. In this sense, IDEA focuses on buy-in from parents and teachers: “It’s a total marriage and everyone—student, teacher, parent, school leader—have to be all in to get through the ups and downs.” *Id.* IDEA gets

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<sup>5</sup> Colin Seale, *An “IDEA” That Works: Why And How A School System Achieved 14 Years Of 100% College Acceptance*, FORBES, Mar. 7, 2020, <https://www.forbes.com/sites/colinseale/2020/03/07/an-idea-that-works-why-and-how-a-school-system-achieved-14-years-of-100-college-acceptance/?sh=7e9a8ca75f91>.

<sup>6</sup> The Texas Tribune, *Idea Public Schools*, <https://schools.texastribune.org/districts/idea-public-schools/>.

this buy-in by specializing in serving students at a high risk of dropping out. The cofounders identify their “secret sauce” as “working with kids at the last resort. Kids who have been through several other interventions and we may be the last thing they try to get on a better path.” *Id.*

Specialization with high-dropout-risk students is not the only thing that makes IDEA different from a traditional public school. The school is one of the first organizations to implement Siegfried Engelmann’s concept of “direct instruction” on a wide scale. *See* Shepard Barbash, *An IDEA Whose Time Has Come*, CITY JOURNAL (Winter 2019). A direct-instruction program consists of two parts. *First*, teachers are given carefully crafted, concise scripts, which “specify a precise sequence of examples, exercises, and wording that teach a subject quickly and clearly.” *Id.* *Second*, students answer through “choral” response. *Id.* Trained teachers can hear students who are slow to answer, and teachers administer mastery tests every five to ten lessons to ensure all students are keeping pace. *Id.* Older high school students are required to take at least eleven advanced-placement courses, as part of IDEA’s “AP for All” program. *Id.* IDEA also offers “summer college” to high school juniors, giving them the opportunity to prepare for life on a college campus. *Id.*

IDEA also implements cultural and student-health goals through innovative concepts. To increase aerobic activity, students are given wristband heart-rate monitors and engage in sixty-second burst exercises throughout the day. *Id.* IDEA also emphasizes culture. All students must wear uniforms and are taught manners and other virtues through fifty-five school rules. *Id.*

Many of these innovations come from the fact that IDEA chooses to operate like a corporation that responds to market demands. While cofounder Tom Tor-kelson is a trained educator, several senior executives come from the private sector. *Id.* Such experience often is not available to those running public schools across a State—particularly in a large, highly populous State.

**KIPP Public Schools.** KIPP is another multi-State network of charter schools serving low-income students. In Texas, KIPP educates over 31,000 students, over 90% of whom are economically disadvantaged.<sup>7</sup> Four Texas KIPP schools were ranked in the 2022 Jay Mathews Challenge Index High School Rankings—a recognition for the top one percent of American high schools.<sup>8</sup> Similarly, U.S. News and World Report ranked six Texas KIPP high schools on its 2022 list of best schools.<sup>9</sup> There are currently 6,456 students on the waitlist to attend Texas KIPP schools. *See* TEX. WAITLIST REPORT, *supra*.

Many of the techniques KIPP uses to achieve these results are unconventional. For example, KIPP SHINE Preparatory School—a PreK through fourth grade KIPP school in Houston—uses performance data to structure class size. *See* TEX. EDUC. AGENCY, 2015–16 REWARD SCHOOLS CASE STUDY REPORT: KIPP SHINE PREPARATORY SCHOOL 2-3 (Nov. 2016) [hereinafter KIPP SHINE REPORT]. As one member of the

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<sup>7</sup> The Texas Tribune, *KIPP Texas Public Schools*, <https://schools.texastribune.org/districts/kipp-texas-public-schools/>.

<sup>8</sup> *See KIPP Texas High Schools Ranked Among Top in the Nation*, KIPP TEXAS (Apr. 22, 2022), <https://kipptexas.org/kipp-texas-high-schools-ranked-among-top-in-the-nation/>.

<sup>9</sup> *See Six KIPP Texas High Schools Ranked Among Best in The Nation by U.S. News & World Report*, KIPP TEXAS (Apr. 26, 2022), <https://kipptexas.org/six-kipp-texas-high-schools-ranked-among-best-in-the-nation-by-u-s-news-world-report/>.

leadership team explained: “Instead of teaching in self-contained classrooms,” instructors “differentiated their math and reading classes in order to . . . strategically have smaller classes” for its “struggling students.” *Id.*

Relationships between adults and students also play a key role in the school’s culture. Each student is assigned an “excellence mentor.” *Id.* at 7. Students meet with their mentors twice a week, giving students “the opportunity to talk with someone that they’re comfortable with” about concerns at home or at school. *Id.* Students are also expected to abide by the schoolwide behavior plan, referred to as the “LiveSchool program.” Through the LiveSchool program, students earn reward dollars that are distributed as a “paycheck” every Friday. *Id.* at 6. Students may spend their paychecks at the school store on a range of items such as snacks, school supplies, and small toys. *Id.* Teachers have observed that they see significant improvements in student behavior “because of” the program. *Id.*

KIPP SHINE’s organization as a charter school also allows it to have a unique student-intake process that involves a staff visit to every student’s home. *See id.* at 4. Such visits, as well as subsequent academic events, give school leadership the opportunity to engage with families about the school’s expectations. *Id.* The school also departs from traditional school hours, with an extended school day that begins at 7:25 a.m. and ends at 4:15 p.m. *See* TEX. EDUC. AGENCY, 2015–16 REWARD SCHOOLS CASE STUDIES REPORT: STATEWIDE REPORT 17 (2016). And excelling campuses have autonomy from the broader KIPP organization. KIPP SHINE REPORT, *supra*, at 8. One member of the KIPP organization explained: “Autonomy lies with those [KIPP schools] that are achieving results. The [schools] that are not

achieving results have more guardrails and more scrutiny.” *Id.* One teacher explained that this autonomy is vital to student success because “if something is not working” for a campus, it can be changed “even if it is something that is being pushed by” the larger KIPP organization. *Id.* Such autonomy is impossible in a traditional public school, which must be managed with all other schools across the State.

**YES Prep Public Schools.** YES Prep Public Schools is a charter school district local to Houston, Texas.<sup>10</sup> Almost 92% of YES Prep students are economically disadvantaged. *Id.* YES Prep has been recognized in the Top 100 High Schools in the Nation by U.S. News and World Report every year since 2007.<sup>11</sup> At one of its campuses, YES Prep West, three factors contribute to this success. *See* TEX. EDUC. AGENCY, REWARD SCHOOLS CASE STUDY PROJECT: YES PREP WEST YES PREP PUBLIC SCHOOLS (2015).

*First*, the school relies on detailed data on each student, and provides teachers a real-time dashboard to track student progress. *Id.* at 3. Data is collected from course performance and standardized testing. *Id.* YES Prep West uses data to structure classes and curriculum: “Data is used in all conversations from curriculum, to operations, to culture, to planning, as well as in evaluations of teachers and students.” *Id.* at 2-3. These data-driven conversations allow teachers to revise instruction or add teaching material to the curriculum—often on a weekly basis. *Id.* at 3.

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<sup>10</sup> *See* The Texas Tribune, *YES Prep Public Schools Inc.*, <https://schools.texastribune.org/districts/yes-prep-public-schools-inc>.

<sup>11</sup> *See* Results, YES PREP PUBLIC SCHOOLS, <https://www.yesprep.org/about/results>.

*Second*, the school emphasizes family and community engagement. *Id.* YES Prep West requires teachers to make initial home visits with each student’s family. *Id.* at 4. Teachers regularly call students’ homes and provide families updates via email and report cards. *Id.* YES Prep West also emphasizes community engagement. Teachers formulate a community engagement plan every year and share it with school families. *Id.* at 3-4. Those plans involve community service days; staff and families have “help[ed] with cleanup following natural disasters (e.g., flooding, hurricanes), serv[ed] meals at a local homeless shelter, [and] distribut[ed] food and clothing to local homeless residents.” *Id.* at 4.

*Finally*, YES Prep West emphasizes teacher quality and professional development and intra-school communication. *Id.* at 5. Teachers often communicate with campus leadership, instructional coaches, and content-area leads. *Id.* Teachers are also given the flexibility to try new methods and improve their skills as educators. *Id.* The school encourages teachers to “employ [instructional methods] that they may have little experience with, to expand their ‘tool kit,’ and to improve their ability to instruct and support students with different learning styles or challenges.” *Id.*

These are just three examples among hundreds, but they each demonstrate that limiting state-imposed pedagogical requirements can allow educators to experiment and find new teaching methods. These innovations may include—as appropriate to a given campus—longer class days, closer parent–teacher relationships, and community service. Charter schools work, in part, because they are an alternative option that requires additional effort and buy-in on the part of families. Successful reform starts with educators and parents—not the State.

3. Charter schools shine when comparing results among schools serving minority and economically disadvantaged students. In Texas, “passing rates for Hispanic students and students identified as economically disadvantaged were higher in standard charters than in traditional districts on all tests, except mathematics,” where scores were the same. BIENNIAL REPORT, *supra*, at 302. “Passing rates for African American students were higher in standard charters on the reading, writing, and mathematics tests,” the same on science tests, with traditional districts performing better on social studies tests alone. *Id.* Further, “[t]he annual dropout rate for students overall was lower in standard charters (0.5%) than traditional districts (1.3%).” *Id.* at 305.

The results in Texas are consistent with numbers nationwide. Studies show that charter schools in predominantly minority and economically disadvantaged areas often produce better results than traditional schools in similar areas. *See, e.g.*, David Griffith, *Still Rising: Charter School Enrollment and Student Achievement at the Metropolitan Level*, THOMAS B. FORDHAM INSTITUTE 23 (Jan. 2022) (“[T]his analysis suggests that many Hispanic students benefit from enrolling in charter schools, especially in the biggest metropolitan areas.”); Feng Chen & Douglas N. Harris, *The Combined Effects of Charter Schools on Student Outcomes: A National Analysis of School Districts*, RESEARCH ON EDUCATION ACCESS AND CHOICE 34 (Dec. 2021) (“[O]ur analysis suggests that charter schools improve . . . two important outcomes: test scores and high school graduation.”); Edward Cremata, et al., *National Charter School Study*, CENTER FOR RESEARCH OF EDUCATION OUTCOMES 3 (2013) (“The analysis of the pooled 27 states shows that charter schools now advance the learning gains of their students’ more than traditional public schools in

reading.”). As a result, decisions that affect charter schools and their continued vitality—whether from the judicial system or elsewhere—are issues of significant national concern.

## **II. The Question Presented Warrants this Court’s Attention as it Involves the Fundamental Relationship Between the States and Charter Schools.**

The Fourth Circuit’s decision has significant national impact because it forces the State back into the driver’s seat at schools whose vitality depend on their pedagogical independence. If the government is responsible for charter schools’ every pedagogical choice, it cannot avoid regulating those choices. Such constraints would stifle innovation and threaten the successes achieved by many charter schools due to their independence. Until this case, the lower courts have uniformly applied this Court’s well-established state-actor doctrine and held that such schools are not state actors subject to liability under section 1983. This Court should grant the petition to correct the Fourth Circuit’s erroneous conclusion that a charter school’s choice of pedagogical method transforms it into a state actor.

### **A. Until now, every court of appeals to consider the issue has concluded publicly funded, but privately operated schools are not state actors.**

In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), this Court applied its state-actor jurisprudence to examine whether a privately operated, publicly funded school that specialized in educating high-risk students was a state actor under section 1983. The Court concluded that it was not in three logical steps. *First*, it unequivocally held

that “the fact that virtually all of the school’s income was derived from government funding” was not dispositive. 457 U.S. at 840. *Second*, it stated that government “regulation of the school” is not relevant when the challenged conduct is not itself “compelled or even influenced by any state regulation.” *Id.* at 841. *Third*, it determined mere “public function” is not enough: “the question is whether the function performed has been ‘traditionally the *exclusive* prerogative of the State.’” *Id.* at 842 (quoting *Jackson*, 419 U.S. at 353). Accordingly, the Court held that the private school did not become a state actor by virtue of its public funding.

Applying these principles, every prior Court of Appeals has held that publicly funded, privately operated schools—including charter schools—are not state actors. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 816 (9th Cir. 2010) (holding that a charter school was not a state actor); *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002) (holding that a public school operated by a private contractor was not a state actor); *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 165 (3d Cir. 2001) (holding that a school for juvenile offenders was not a state actor). Charter schools are funded by the States rather than through private tuition, *see, e.g.*, IND. CODE § 20-24-7-2; TEX. EDUC. CODE §§ 12.106(a), .108, but, as the Third Circuit has explained, “it is clear that [a school’s] receipt of government funds d[oes] not make it a state actor.” *Robert S.*, 256 F.3d at 165.

It is also not enough to show that the school is subject to *some* regulation. For example, Arizona regulates personnel matters at charter schools, giving charter-school teachers the right to participate in State retirement fund and the same hiring priorities as teachers at traditional

public schools. ARIZ. REV. STAT. § 15-187. The Ninth Circuit nevertheless held that Arizona charter schools are not state actors because “[e]ven extensive government regulation of a private business is insufficient to make that business a state actor if the challenged conduct was ‘not compelled or even influenced by any state regulation.’” *Caviness*, 590 F.3d at 816 (quoting *Rendell-Baker*, 457 U.S. at 841-42); *see also Robert S.*, 256 F.3d at 165 (“Similarly, although Robert relies on the detailed requirements set out in [the government’s] contracts with [the school], those requirements are also insufficient because they did not ‘compel or even influence’ the conduct on the part of the [school] staff that Robert challenged.”).

Finally, and most critically, other courts of appeals have recognized that “education is not and never has been a function reserved to the state.” *Logiodice*, 296 F.3d at 26 (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)). Indeed, public schools did not exist for much of the nation’s history. As the dissenters below explain, the concept of school choice—from private schools to home schooling—has a long history. *See Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 144 (4th Cir. 2022) (en banc) (Quattlebaum, J., dissenting in part and concurring in part). Today’s charter schools build on that history by providing a funding mechanism by which families can afford to send their children to alternative schools. The mere fact that States have “chose[n] to provide alternative learning environments at public expense” does not transform independent charter schools into state actors. *Caviness*, 590 F.3d at 815; *cf. Robert S.*, 256 F.3d at 166 (considering historical evidence that only private schools provided the type of education at issue).

States have relied on this robust consensus of persuasive and binding authority to foster a network of charter

schools that include some of the best educational opportunities in the Nation. Yet the Fourth Circuit below disregarded this framework in favor of a new test which penalizes charter schools for making innovative educational choices.

**B. The Fourth Circuit’s decision threatens government intrusion on the pedagogical independent central to charter schools.**

Despite the Fourth Circuit’s attempt to cast its decision as “narrowly focus[ed] on the statutory framework and language chosen by North Carolina’s legislature,” *Peltier*, 37 F.4th at 123 n.12 (majority opinion), the opinion disregard’s this Court’s test and threatens the independence of charter schools in many States.

1. Instead of applying *Rendell-Baker*, the Fourth Circuit reached a result that is contrary to all its sister circuits by considering a grab-bag of factors: the North Carolina Constitution’s mandate that the State provide free education, *id.* at 117, the fact that charter schools are open to all and designated as “public,” *id.*, the fact that teachers received compensation from the State’s retirement fund, *id.* at 117, and the fact 95% of school funding is from the State. *Id.* at 118.

The factors the Fourth Circuit chose to highlight hardly distinguish North Carolina charter schools from charter schools operating in other States. To the contrary, North Carolina’s is far from the only state constitution to mandate that the State provide a system of free public education. *See, e.g.*, ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; FLA. CONST. art. IX, § 1; IND. CONST. art. 8, § 1; KAN. CONST. art. VI, § 1; LA. CONST. art. VIII, § 1; S.C. CONST. art. XI, § 3; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1. And the other factors highlighted by the Fourth Circuit

exist in other States, too. In Texas, for example, charter schools are designated as “public” or “governmental” for many purposes. *See, e.g.*, TEX. EDUC. CODE §§ 12.1051-1058. Many States authorize charter-school teachers to receive state benefits and charter schools are publicly funded. *Id.* §§ 12.1057, .106; *see also, e.g.*, KAN. STAT. § 72-4211(b). Finally, charter schools are free and generally statutorily denominated as “public.” *See, e.g.*, TEX. EDUC. CODE §§ 12.108, .111(a)(5); IND. CODE § 20-24-1-4. Thus, the Fourth Circuit’s admonition that its decision is limited to North Carolina law rings hollow.

2. Even more troubling is the Fourth Circuit’s attempt to distinguish *Rendell-Baker*. According to the court below, *Rendell-Baker* concerned mere “personnel decisions,” whereas the dress code at issue in this case is “a central component of the public school’s *educational* philosophy, pedagogical priorities, and mission.” *Peltier*, 37 F.4th at 120. That distinction is flimsy on its own terms—it is often said that personnel *is* policy. *Cf. Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (holding that religious schools could invoke the ministerial exception when making employment decisions because “the selection and supervision of the [schools’] teachers . . . lie at the core of [the schools’] mission[s].”). And in any event, this Court has not suggested that mere “personnel decisions” are materially distinct from other school policies. *See Rendell-Baker*, 457 U.S. at 841; *see also Logiodice*, 296 F.3d at 27 (rejecting the argument that section 1983 claims against schools were more meritorious when brought by students, rather than teachers, because “the Supreme Court’s decision in *Rendell-Baker* did not encourage such a distinction.”). Nor has it made state-actor status turn on how “central” to

the challenged policies are to the private entity’s “core mission.”

More than that, the Fourth Circuit majority’s reasoning subverts *Rendall-Baker*’s logic. *Rendall-Baker* did not look at the nature of the challenged policy; it looked at that policy’s relationship to the State. *See Rendell-Baker*, 457 U.S. at 841. Only when the policy at issue is mandated or controlled by the State can that policy “be fairly attributed to the State,” *id.* at 839-40—even if the state funds the school or regulates it in other ways. The state-action inquiry, after all, is aimed at determining whether an ostensibly private actor is nevertheless functioning as the State. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). If the State lacks control over the private actor’s actions, the State cannot be responsible for those actions, *see id.*—and that makes section 1983 liability inappropriate.

Setting pedagogical priority at charter schools is the very decision that the States reserved to local parents and educators when they authorized charter schools. As discussed at length above, *supra*, Part I, Texas and other amici carefully designed their charter school systems to ensure that charter schools have considerable freedom when selecting and implementing a pedagogical approach. *See, e.g.*, TEX. EDUC. CODE § 12.001(a)(5), (b). Indeed, the Texas Legislature specifically contemplated that the Charter School Act would allow parents to choose to enroll their children in schools with the same classical education model as the charter school at issue in this case. *See S.B. 2 Bill Analysis, supra*, at 7 (discussing charter school options in Texas). And charter schools are, by design, optional; a student or parent who disagrees with a particular charter school’s priorities or policies need not enroll.

Instead of recognizing the virtue of pedagogical choice, the Fourth Circuit held that a charter school's choice of learning method is the defining feature that opens the school to liability under section 1983—and its accompanying threat of attorney's fees. *See* 42 U.S.C. § 1988. Such a rule threatens to stifle innovation by nudging charter schools into choosing methods that have been previously blessed by the federal courts. This case serves as a cautionary example. Here, petitioners sought to create a school “more like schools were 50 years ago” to teach “traditional manners and traditional respect.” *Peltier*, 37 F.4th at 113. As part of that pedagogical vision, petitioners instituted a dress code that has now embroiled over six years of litigation. *See id.*

The decision below potentially subjects all charter schools to constitutional scrutiny. Such a holding defeats the purpose of charter schools.

This Court should grant the petition for a writ of certiorari to review this issue and ensure charter schools can continue to enjoy the independence provided under the *Rendell-Baker* framework.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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