

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, AS GUARDIAN OF A. P., A MINOR CHILD, *et al.*,  
*Respondents.*

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

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**BRIEF IN OPPOSITION**

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## QUESTION PRESENTED

The North Carolina Constitution mandates that the General Assembly “shall provide . . . for a general and uniform system of free public schools,” to be “supervise[d] and administer[ed]” by the State Board of Education. N.C. Const. art. IX, §§ 2, 5. To fulfill this obligation, the state legislature has chosen to create six types of free public schools, including public charter schools. North Carolina’s express purpose in creating charter schools was to “expand[] choices in the types of educational opportunities that are available within the public school system.”

In authorizing Charter Day School, Inc. (“CDS”) to operate a “public charter school” in North Carolina, the State Board of Education required it to “compl[y] with the Federal and State Constitutions.”

North Carolina directs all charter holders, including CDS, to adopt a code of student conduct. Petitioners’ code of conduct requires girls to wear skirts in order “to preserve chivalry,” based on the belief that every girl is “a fragile vessel.”

The question presented is:

Where the North Carolina legislature has chosen to meet its constitutional duty to provide free public education by creating public charter schools “within the public school system” and expressly governed by the federal and state Constitutions, does a public charter school act under color of state law when it implements a code of student conduct?

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## INTRODUCTION

North Carolina authorized “public charter schools” to offer educational choice “within the public school system” and expressly requires them to obey the federal Constitution. The Fourth Circuit rightly concluded that, given the State’s unique constitutional and statutory scheme, one such school acted under color of state law when it required girls to wear skirts to receive a state-guaranteed and state-provided education. That decision, which faithfully applied this Court’s state-action doctrine and is specific to North Carolina, does not warrant this Court’s review.

First, there is no split among the circuits. Only one other court of appeals has even addressed whether a charter school was a state actor, and it applied the same legal standard as the court below and reached a different result only because of materially different facts, not any disagreement about the law.

Second, this case is a poor vehicle to address the question presented. The Fourth Circuit remanded for an evidentiary hearing on plaintiffs’ Title IX claim, and if they prevail on that claim, the state-action question will not alter the school’s obligations. Moreover, CDS’s equal-protection obligations are fixed regardless of the state-action question because CDS is expressly bound by the terms of its charter to comply with the federal Constitution.

Contrary to Petitioners’ assertion that the decision below “would cover charter-school operators throughout the country,” Pet. 3, the Fourth Circuit’s reasoning is specific to North Carolina and turns on the unique character of that State’s law. No other state shares all the features that underscore the

charter schools' status in North Carolina as state actors, and only one other state requires its charter schools to obey the federal Constitution in all respects. Thus, even if the Court were inclined to address the status of charter schools generally, this case is an inappropriate vehicle for doing so.

And while Petitioners and their amici proclaim that respecting students' constitutional freedoms would somehow undermine schools' ability to innovate, the Constitution affords ample room for pedagogical variation, leaving to state and local governments broad discretion in devising public school curricula and rules. For that reason, the major charter school associations, the National Alliance for Public Charter Schools and the National Association of Charter School Authorizers, voiced strong support for the decision below. And, as noted above, Petitioners themselves agreed to comply with the federal Constitution in their state charter, so holding them to their bargain will not diminish their ability to innovate or spell the school's demise.

Finally, the decision below is correct. The Fourth Circuit decided that a public charter school, authorized by the State to provide constitutionally-mandated public schools to all comers, and explicitly required by the State to obey the federal Constitution—both generally and specifically with respect to its code of conduct—was a state actor when it enforced its student code of conduct, including the rule that girls must wear skirts. It did so for four mutually reinforcing reasons: (1) North Carolina intended its charter schools to be state institutions, situated them firmly “within the public school system” that it is constitutionally compelled to provide, and required them to obey the federal Constitution; (2) the

State delegated to public charter schools part of its duty under the North Carolina Constitution to provide a “general and uniform system of free public schools”; (3) the function of providing “free public education” is one traditionally and exclusively reserved to the State in North Carolina; and (4) the skirts requirement is, by Petitioners’ own admission, central to carrying out that function. That decision, resting on the unique legal scheme North Carolina itself created, does not warrant review.

## STATEMENT OF THE CASE

### A. State law background

#### 1. *North Carolina’s constitutional right to education*

The North Carolina Constitution has expressly enshrined a specific right to “free public schools” since 1868. The State is not merely required to support education as a general matter, but is specifically mandated to provide “a general and uniform system of free public schools.” N.C. Const 1868, art. IX, § 2. The provision of public schools “was considered a matter of such paramount importance, supervision is reserved to the State itself” by the Constitution, which requires public schools to be governed by the State Board of Education. *Lane v. Stanly*, 65 N.C. 153, 157 (1871); *see also* N.C. Const. 1868, art. IX, § 9 (“The Board of Education . . . shall have full power to legislate and make all needful rules and regulations in relation to Free Public Schools . . .”). This requirement of “Free Public Schools” means that “the State must take charge of the education of its citizens.” *Lane*, 65 N.C. at 158. The Constitution “guarantee[s] every child of this state an opportunity to receive a sound basic education in [its] public schools.” *Leandro v. State*, 488

S.E.2d. 249, 255 (N.C. 1997). “[I]t is the duty of the State to guard and maintain that right.” *Hoke Cnty. Bd. of Educ. v. State*, 879 S.E.2d. 193, 248 (N.C. 2022) (internal quotation marks omitted).

Public education “is a governmental function so fundamental in [North Carolina] that [its] constitution contains a separate article entitled ‘Education.’” *Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 418 S.E.2d 648, 655 (N.C. 1992) (quoting N.C. Const. art. IX). The “Education” article contains ten sections specifying how the state must fulfill its obligation to establish, supervise, and fund “a general and uniform system of free public schools.” N.C. Const. art. IX, § 2. It directs that the “State Board of Education shall supervise and administer the free public school system.” *Id.* § 5. And it requires that certain types of revenue be spent only on “public schools,” prohibiting the expenditure of these funds on non-public schools. *Id.* §§ 5, 6, 7.

## 2. North Carolina’s “public school units”

To fulfill its constitutional obligation to establish a “system of free public schools,” *id.* § 2, the State has created six types of “[p]ublic school unit[s],” N.C. Gen. Stat. § 115C-5(7a). They are:

- *Local school administrative units*, also known as district schools. *Id.* §§ 115C-5(6), 115C-69;
- *Charter schools*, such as the school at issue here. *Id.* § 115C-218.15;
- *Regional schools*, which may be created by two or more school districts in partnership with institutions of higher education and private businesses or organizations. *Id.* § 115C-238.60;
- *Innovative School District schools*, which the State Board of Education has identified as its

lowest performing schools and has contracted with a for-profit or non-profit School Operator to operate on its behalf.<sup>1</sup> *Id.* § 115C-75.6;

- *Schools for students with special needs*, *Id.* §§ 115C-150.11-15; and
- *University of North Carolina laboratory schools*, operated by university units that offer educator preparation programs. *Id.* §§ 116-239.5(a), 116-239.7(c).

As units within the “system of free public schools,” all of these schools are governed by the State Board of Education and must be free and open to all.

### 3. *North Carolina’s charter school scheme*

The North Carolina legislature authorized public charter schools in order 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) (emphasis added). “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.* § 115C-218.15(a). As detailed below, North Carolina treats charter schools as an integral part of the “public school system.”

#### **State Board of Education approval.**

Consistent with the North Carolina constitutional requirement that the State Board of Education supervise all public schools, no charter school may operate unless the State Board approves it. *Id.* § 115C-218.5. The State Board is obligated “to grant,

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<sup>1</sup> *What Is the NC Innovative School District*, NC Innovative Sch. Dist., <http://innovativeschooldistrict.org/about/what-is-innovative-school-district> (last visited Dec. 5, 2022).

supervise, and revoke charters, and demands full accountability from charter schools for school finances and student performance.” *Id.* § 115C-218.90(a)(4).

The State Board of Education consists of the “Lieutenant Governor, the State Treasurer, and 11 members appointed by the Governor.” *Id.* § 115C-10. The State Board “sets policy and general procedures for *public* school systems across the state,” exercising its “constitutional authority to guard and maintain the right of a sound, basic education for every child in North Carolina *Public* Schools.”<sup>2</sup> The State Board’s Policy Manual explains that the State Board sets policy for charter schools because it is “obligat[ed] under the NC Constitution to supervise and maintain the system of free public schools.” N.C. State Bd. of Educ., Policy Manual, CHTR-019: Charter Schools Policy Process (adopted Jan. 7, 2016). The State Board must ensure that charter schools meet applicable “academic, financial, and governance standards.” N.C. Gen. Stat. § 115C-218.6(a). The State Board can terminate a charter for student performance, fiscal management, or other good cause. *Id.* § 115C-218.95.

**State Board of Education oversight.** North Carolina law requires public charter schools to establish a nonprofit corporation board of directors, which “decide[s] matters related to the operation of the school, including budgeting, curriculum, and operating procedures,” subject to the supervision of the State Board. N.C. Gen. Stat. § 115C-218.15(b)-(d). The charter school’s nonprofit board has a similar role to a district school’s local board of education, *State ex*

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<sup>2</sup> *State Board of Education*, N.C. Dep’t of Pub. Instruction, <https://www.dpi.nc.gov/about-dpi/state-board-education> (last visited Dec. 5, 2022) (emphasis added).

*rel. Stein v. Kinston Charter Acad.*, 866 S.E.2d 647, 660 (N.C. 2021), and has the duty to make policy decisions “including employment decisions, budget development, and other administrative actions,” N.C. Gen. Stat. § 115C-47.<sup>3</sup>

The State Board of Education “approves the original members of the boards of directors of the charter schools.” *Id.* § 115C-218.90(a)(4). Before the State Board approves a charter, the charter board must show that, upon completion of a yearlong planning process with the State Office of Charter Schools, it successfully created appropriate financial management and governance policies. N.C. State Bd. of Educ., Policy Manual, CHTR-013.<sup>4</sup> And charter schools and their boards are subject to transparency rules imposed only on public, governmental bodies, including state open meetings and public records requirements. N.C. Gen. Stat. § 115C-218.25.

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<sup>3</sup> See also Pet. App. 15a n.6 (citing *Kinston* for the proposition that North Carolina charter schools are “local rather than statewide in character,” and accordingly may assert governmental immunity akin to local school boards and not sovereign immunity reserved for the State and its agencies).

<sup>4</sup> These include having a conflict of interest and anti-nepotism policy, N.C. Gen. Stat. § 115C-218.15(b), meeting no less than 8 times per year, and having a majority of board members and officers whose primary residence is in North Carolina. See *Ready-to-Open Framework for North Carolina Charter Schools*, Off. of Charter Schs., N.C. Dep’t of Pub. Instruction, <https://www.dpi.nc.gov/media/12217/open> (last visited Dec. 5, 2022); *Performance Framework*, N.C. Dep’t of Pub. Instruction, <https://www.dpi.nc.gov/students-families/alternative-choices/charter-schools/performance/performance-framework> (last visited Dec. 5, 2022).

**Obligation to comply with the federal Constitution.** The State Board of Education’s Model Charter Agreement obligates every charter holder to ensure “the Public Charter School complies with the Federal and State Constitutions.” N.C. Dep’t of Pub. Instruction, Standard Charter Agreement, § 5.1 (“N.C. Charter Agreement”).<sup>5</sup>

**Admissions.** Charter schools, like all other public schools, must be open to all children who are between ages five and twenty-one and have not completed high school. N.C. Gen. Stat. §§ 115C-1, 115C-218.45(a), 115C-364. A public charter school must accept every timely applicant unless the number of applications exceeds the capacity of a program, *id.* § 115C-218.45(h), without regard to “intellectual ability, measures of achievement or aptitude, athletic ability, or disability,” except where in compliance with the mission of the school as set out in the charter, *id.* § 115C-218.45(e).

**Student codes of conduct.** All public schools, including charter schools, must adopt student codes of conduct “consistent with . . . the constitutions, statutes, and regulations of the United States and the State of North Carolina.” *Id.* § 115C-390.2(a); *see id.* § 115C-218.60. Charter schools must maintain “a discipline policy that is compliant with state and federal law and . . . is consistent with the approved

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<sup>5</sup> <https://www.dpi.nc.gov/media/15251/open>; *see also Charter Agreements*, N.C. Dep’t of Pub. Instruction, <https://www.dpi.nc.gov/students-families/alternative-choices/charter-schools/additional-resources/charter-agreements> (last visited Dec. 5, 2022).

charter application and approved charter application amendments.”<sup>6</sup>

**Curriculum.** North Carolina law requires public charter schools to adopt programs that “meet the student performance standards adopted by the State Board of Education and the student performance standards contained in the charter.” *Id.* § 115C-218.85(a)(2). North Carolina’s Standard Course of Study, which the General Assembly directed the State Board to adopt, *id.* § 115C-81.5(a), is the basis of the statewide tests, administered at every public school, including charter schools.<sup>7</sup> North Carolina law also requires charter schools to provide instruction on certain specified topics.<sup>8</sup> Any changes a charter school wants to make to its curriculum, class size, school day length, or academic year schedule, require approval by the State. N.C. Charter Agreement § 27.2.

**Funding.** Like all other public schools, charter schools may not charge tuition. *Id.* § 115C-218.50(b).

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<sup>6</sup> *Performance Framework*, N.C. Dep’t of Pub. Instruction, <https://www.dpi.nc.gov/students-families/alternative-choices/charter-schools/performance/performance-framework> (last visited Dec. 5, 2022) (Charter School Performance Framework measurement for annual review).

<sup>7</sup> N.C. Dep’t of Pub. Instruction, *2022–23 North Carolina Annual Testing Program* (2022), <https://www.dpi.nc.gov/media/15052/open>.

<sup>8</sup> N.C. Gen. Stat. § 115C-218.85(a)(5) (requiring “financial literacy instruction as required by the State Board of Education”); *id.* § 115C-218.85(b)(1)-(3) (requiring charter schools to provide reading interventions for third-grade students who are not reading at or above a third-grade level, notify parents and guardians whose children are not reading at grade level, and retain students who do not meet that standard except for good-cause shown).

They receive a per-pupil funding allotment from the State Board of Education and the local school administrative unit. *Id.* § 115C-218.105(a), (c). Under the North Carolina Constitution, these funds may be spent only on “public schools.” N.C. Const. art. IX, §§ 6, 7.<sup>9</sup>

**Performance standards.** The State Board of Education is responsible for monitoring student progress at all public schools, including charter schools. Like all other public schools, charter schools must “conduct the student assessments required by the State Board of Education.” N.C. Gen. Stat. § 115C-218.85(a)(3).<sup>10</sup> “Each school year, every public school, including charters, administers the End-of-Grade and End-of-Course tests as part of the Accountability Program.”<sup>11</sup> The State Board issues each public charter school a “report card.” *Id.* § 115C-218.65.

**Designation as Local Educational Agencies.** North Carolina has also designated every public charter school a “[l]ocal educational agency” under the federal Individuals with Disabilities Education Act. N.C. Gen. Stat. § 115C-106.3(11)(b). Federal law defines the term “local educational

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<sup>9</sup> In 2019-20, CDS received \$6,013,218 from the State Public School Fund and \$2,285,700 from the Local Fund. *Charter Day School: 2019-20 Summary Statistics*, N.C. Sch. Finances, <https://ncreports.ondemand.sas.com/srcfinance/school?school=10A000&year=2020&lang=undefined> (last visited Dec. 5, 2022).

<sup>10</sup> See also N.C. State Bd. of Educ., Policy Manual, CHTR-001: Charter School Accountability Requirements (adopted Oct. 3, 2013) (“All charter schools shall comply with North Carolina’s Accountability Model . . .”).

<sup>11</sup> N.C. Dep’t of Pub. Instruction, *Charter School Application Resource Manual* (2022), <https://www.dpi.nc.gov/media/13852/download?attachment>.

agency” as a “a public board of education or other public authority” or “any other public institution or agency” having administrative control and direction of a public elementary school or secondary school. 20 U.S.C. § 1401(19). Accordingly, each public charter school must provide to every enrolled student with a disability a “free appropriate public education’ . . . at public expense, under public supervision and direction, and without charge” that “meet[s] the standards of the” State Board of Education. *Id.* § 1401(9).

**Teachers.** At least fifty percent of teachers in a charter school must hold teacher licenses. N.C. Gen. Stat. § 115C-218.90(a)(1). All teachers in mathematics, science, social studies, and language arts must be college graduates. *Id.* And all public school teachers, including those at charter schools, must pass criminal history checks. *Id.* § 115C-218.90(b).

**Employee benefits.** Based on “the determination of the General Assembly that charter schools are public schools and that the employees of charter schools are public school employees,” charter school employees are eligible for state-funded employee benefits, including membership in the state retirement system and health plan. *Id.* § 115C-218.90(a)(4). Charter school teachers are eligible for other benefits restricted by statute to those who teach in “public school[s],” *id.* § 116-209.60(5), including loan forgiveness, *id.* § 116-209.63(b)(1), (2), and funding for advanced training and certification programs, *id.* § 115C-296.2(b)(1).

**Other obligations.** Finally, charter schools, like other public schools, must comply with “any court-

ordered desegregation plan in effect for the local school administrative unit.” *Id.* § 115C-218.45(e). Charter schools must be nonsectarian. N.C. Gen. Stat. § 115C-218.50(a). And they must “develop a transportation plan so that transportation is not a barrier to any student who resides in the local school administrative unit in which the school is located.” *Id.* § 115C-218.40.

#### 4. *Private schools in North Carolina*

Private schools in North Carolina are subject to none of the above requirements. Most fundamentally, private schools are not “public school units” “within the public school system,” which must be governed by the State Board of Education. N.C. Const. art. IX, § 5. They do not need any state approval or accreditation, and their ownership and governance are unregulated. *See* N.C. Gen. Stat. §§ 115C-552, 115C-554, 115C-555, 115C-562.<sup>12</sup>

North Carolina imposes just seven requirements, largely ministerial, on private schools. They must: (1) report their name, address, and chief administrator and owner to the State, *id.* §§ 115C-552, 115C-560; (2) meet fire safety, sanitation, and asbestos standards, *id.* §§ 115C-554, 115C-562; (3) operate at least nine months of the year, *id.* §§ 115C-548, 115C-556; (4) keep attendance and disease immunization student records, *id.*; (5) administer a nationally standardized achievement test or equivalent in grades three, six, nine, and eleven, and

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<sup>12</sup> *See also Private School FAQs, “School Accreditation,”* N.C. Dep’t Public Admin., <https://ncadmin.nc.gov/public/private-school-information/private-school-faqs#school-accreditation> (last visited Dec. 5, 2022).

establish a minimum score on the eleventh grade test for graduation, *id.* §§ 115C-549, 115C-550, 115C-556, 115C-557; (6) issue driving eligibility certificates, *id.* § 115C-566; and (7) provide free eye protective devices for shop or laboratory classes, *id.* § 115C-166.<sup>13</sup>

Private schools, unlike public charter schools, need not be open to all, and may be selective in admissions. They may be sectarian,<sup>14</sup> charge tuition, and “utilize whatever curriculum they wish.”<sup>15</sup> They are exempted from North Carolina student testing requirements.<sup>16</sup> Their student codes of conduct are not approved, reviewed, or regulated by the State, and

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<sup>13</sup> See generally *Notice of Intent to Establish a Private School*, N.C. Dep’t of Admin., <https://www.dnpsys.nc.gov/NPEPublic/private/NOIPrivateSchool.aspx> (last visited Dec. 5, 2022); *Private Grade K-12 School Requirements*, N.C. Dep’t of Admin., <https://ncadmin.nc.gov/public/private-school-information/private-grade-k-12-school-requirements> (last visited Dec. 5, 2022).

<sup>14</sup> Indeed, the statute applies to “Private Church Schools and Schools of Religious Charter,” N.C. Gen. Stat. Ch. 115C, Subch. X, art. 39, Pt. 1, and in the 2021-22 School Term, 64% of North Carolina’s private schools were religious schools. Chená T. Flood, N.C. Dep’t of Admin., *2022 North Carolina Private School Statistics* (2022), <https://ncadmin.nc.gov/media/14080/download?attachment>.

<sup>15</sup> *Private School FAQs: “Curriculum,”* N.C. Dep’t Public Admin., <https://ncadmin.nc.gov/public/private-school-information/private-school-faq#curriculum> (last visited Dec. 5, 2022).

<sup>16</sup> *Private School FAQs: “Testing, National Standardized,”* N.C. Dep’t of Admin., <https://ncadmin.nc.gov/public/private-school-information/private-school-faq#testing-national-standardized> (last visited Dec. 5, 2022). A private school that accepts students receiving state scholarships must administer to those students an annual nationally-recognized standardized test that it selects report the results. N.C. Gen. Stat. § 115C-562.5(4).

their teachers need not be licensed.<sup>17</sup> And most importantly, unlike public charter schools, private schools need not agree to comply with the federal or state Constitutions.

### **B. Factual background of this dispute**

The State Board of Education granted CDS a charter to operate the school at issue in 2000. J.A. 0360.<sup>18</sup> As noted above, the charter expressly requires that “the Public Charter School compl[y] with the Federal and State Constitutions.” J.A. 0214.

CDS’s code of conduct includes a uniform policy that requires girls to wear skirts, jumpers, or skorts. J.A. 0068. Boys may wear pants or shorts. J.A. 0068. As Petitioners themselves acknowledged below, the “State Board of Education with full knowledge and information approved the Uniform policy . . . on multiple occasions.” J.A. 0311 (Defs.’ Answer to Pls.’ Am. Compl.).

Plaintiffs (Respondents here), students at CDS and their parents, requested a change in the uniform policy that would allow girls to wear pants or shorts, as boys at the school do. They explained that the skirts requirement restricted girls’ movement and that wearing pants or shorts would allow them to be more active during recess, avoid exposing their underwear when they crawled during tornado and fire drills, and

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<sup>17</sup> *Private School FAQs: “Teachers,”* N.C. Dep’t of Admin., <https://ncadmin.nc.gov/public/private-school-information/private-school-faqs#teachers> (last visited Dec. 5, 2022).

<sup>18</sup> “J.A.” refers to the Joint Appendix filed in the court of appeals. Joint Appendix, *Peltier v. Charter Day School, Inc.*, No. 20-1001(L) (4th Cir. May 4, 2020), ECF No. 23. “CDS” refers to both CDS, Inc., as well as the school.

keep them warmer in winter. J.A. 0347-57, 0496-99, 0502-09. One student explained 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.” Pet. App. 8a. Another testified that the skirts requirement conveys the school’s view that girls “simply weren’t worth as much as boys” and that “girls are not in fact equal to boys.” Pet. App. 7a-8a.

CDS rejected the request. In an email to plaintiff Bonnie Peltier, a CDS parent, CDS founder Baker Mitchell explained that girls and boys should be required to dress differently to emphasize “chivalry,” “a code of conduct where women are . . . regarded as a fragile vessel that men are supposed to take care of and honor,” and “females are to be treated courteously and more gently than boys.” J.A. 0413-14; *see also* Pet. App. 7a.

### **C. Procedural history**

Plaintiffs sued for violations of the Equal Protection Clause, Title IX, and the charter agreement requirement that CDS comply with the federal and state Constitutions. J.A. 0062-63. The district court granted plaintiffs summary judgment on their Equal Protection Clause claim. The court concluded that CDS was a state actor with respect to the student code of conduct and that the skirts requirement violated the Equal Protection Clause. It therefore enjoined CDS from prohibiting girls from wearing pants or shorts to school. The court dismissed plaintiffs’ Title IX claim and stayed pending appeal the breach of contract claim based on the charter agreement.

A divided panel of the Fourth Circuit affirmed in part and reversed in part. The panel reasoned that the skirts requirement would likely violate equal protection, but it reversed on the threshold question of whether CDS was a state actor. But the panel unanimously reversed the district court’s dismissal of plaintiffs’ Title IX claim and remanded that claim for an evidentiary hearing.

The Fourth Circuit granted rehearing en banc and affirmed the district court’s decision that CDS violated the Equal Protection Clause in enforcing the skirts requirement. Conducting the “highly fact-specific” inquiry that this Court’s state-action decisions require, Pet. App. 12a, the en banc court concluded 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,” Pet. App. 16a. When “CDS[] implemented the skirts requirement as part of the school’s educational mission,” the court found, it was “exercising the ‘power possessed by virtue of state law and made possible only because the [school] is clothed with the authority of state law.’” Pet. App. 23a (quoting *West v. Atkins*, 487 U.S. 42, 49 (1988)).

Under North Carolina’s unique constitutional and statutory scheme, the court determined, charter schools “function[] as a component unit in furtherance of the state’s constitutional obligation to provide free, universal elementary and secondary education to its residents.” Pet. App. 19a. As “part of the North Carolina public school system, CDS performs a function traditionally and exclusively reserved to the state”—provision of the constitutionally mandated

free public education. *Id.* Six judges dissented from the equal protection ruling.

The en banc court also agreed that plaintiffs' Title IX claim was cognizable and remanded for an evidentiary hearing on that claim. Three judges dissented from the conclusion that a remand was warranted on plaintiffs' Title IX claim.

The district court's injunction has been in place continuously since 2019, and CDS's current student handbook now reflects that girls may wear pants or shorts as an alternative to skirts. CDS's curriculum has not been affected; it continues to teach "coursework in Latin, Cursive, and Grammar," to "place[] high importance on reading," and to "outperform averages" in testing.<sup>19</sup> CDS plans to expand to meet heightened enrollment demands for its "classical curriculum and emphasis on civic virtue."<sup>20</sup>

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<sup>19</sup> *NC School Report Card*, Classical Charter Schs., <http://charterdayschool.net/school/welcome-letter> (last visited Dec. 5, 2022).

<sup>20</sup> *Wilmington-Area Charter Schools Network Has New Name; Eyes Further Growth and Expansion*, Classical Charter Schs. (June 21, 2021), <http://charterdayschool.net/newsandupdates/uncategorized/6221/wilmington-area-charter-schools-network-has-new-name-eyes-further-growth-and-expansion/>.

## REASONS FOR DENYING CERTIORARI

### I. THERE IS NO SPLIT IN THE COURTS OF APPEALS.

The court of appeals concluded that a North Carolina charter school established, governed, and operated as a “public” school “within the public school system” to meet North Carolina’s constitutional duty to provide “free public schools” to all, and expressly required by the State’s charter to comply with the federal Constitution, is a state actor with respect to its student code of conduct. That decision, which rests on the unique legal status of North Carolina’s charter schools under state law, conflicts with no decision of any other court of appeals.

This Court has long emphasized that determining whether an entity has engaged in state action is a “necessarily fact-bound inquiry.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). The court below followed that directive, maintaining a “narrow[] focus” on “the statutory framework and language chosen by North Carolina’s legislature in establishing North Carolina’s charter schools,” as well as on the specific “conduct at issue,” regulation of student conduct. Pet. App. 25a n.12. No other court has declined to find state action under similar circumstances.

Cases cited by Petitioners are consistent with the Fourth Circuit in applying this Court’s required fact-bound inquiry to determine whether a school operates as a state actor. The differences in outcomes reflect critical differences in the facts, but no disagreement as to the applicable law.

Petitioners cite only three cases as purportedly demonstrating a split. Two involve undisputable

*private* schools that merely received government funding. Pet. 14-16 (discussing *Logiodice v. Trs. of Maine Cent. Inst.*, 296 F.3d 22 (1st Cir. 2002) and *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159 (3d Cir. 2001)). This Court has long held that private contractors are not state actors simply because they receive government funding. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982); *see also Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974). The courts in *Logiodice* and *Robert S.* did no more than apply that principle.

*Logiodice* involved Maine’s unique system of relying on private schools to satisfy the state’s compulsory attendance requirement in sparsely populated areas lacking a public school. 296 F.3d at 27; *see also* Me. Stat. tit. 20-A, § 2901. Plaintiffs argued that the private school should be treated as a state actor because education is an exclusive government function. The First Circuit rejected that argument, examining Maine’s specific history and statutes and noting that high school education had never been the exclusive province of the government in Maine. 296 F.3d at 27.

*Robert S. v. Stetson School, Inc.*, similarly involved a “private” institution that provided specialized treatment, including through contracts with the government, for juvenile sex offenders. The Third Circuit found no state action, noting that the “undisputed evidence” showed that such service was provided in Pennsylvania exclusively by private schools, not public ones. 256 F.3d at 166.

Neither case involved a public school, established by the State to meet its constitutional obligation to establish and maintain “a general and

uniform system of free public schools.” N.C. Const. art. IX, § 2.

The only case Petitioners cite that even involved a charter school of any kind concerned a very different statutory scheme and very different conduct. In *Caviness v. Horizon Community Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010), the Ninth Circuit held that a charter school in Arizona was not a state actor for purposes of its treatment of a former employee, even though Arizona law labeled the school “public” for some other limited purposes. That decision was rooted in the fact-specific examination of Arizona’s state law scheme and wholly consistent with the analysis engaged in by the Fourth Circuit.

First, the Ninth Circuit did not even consider whether the Arizona Constitution creates a duty to provide free public education and, if so, whether Arizona has delegated such duty to charter schools. Even if it had delegated some duties to charter schools, Arizona charter schools are expressly *exempt* from many rules governing the treatment of employees, the specific subject in dispute in *Caviness*. 590 F.3d at 817 (quoting Ariz. Rev. Stat. Ann. § 15-183(E)(5)). And Arizona’s charter agreement, unlike North Carolina’s, does not expressly require its charter schools to follow the federal or state Constitutions,<sup>21</sup> least of all with respect to how they treat terminated staff.<sup>22</sup> By contrast, the Fourth

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<sup>21</sup> Ariz. State Bd. for Charter Schs., Sample Charter Contract (modified May 21, 2014), [asbcs.az.gov/sites/default/files/New%20Charter%20Contract-%20Modified%2005-21-2014\\_0.pdf](http://asbcs.az.gov/sites/default/files/New%20Charter%20Contract-%20Modified%2005-21-2014_0.pdf).

<sup>22</sup> In fact, Arizona expressly exempts its charter schools from its constitutional provision requiring the “establishment and

Circuit carefully surveyed North Carolina’s Constitution and charter school scheme and concluded that North Carolina treats public charter schools as an integral part of the “system of free public schools” it is constitutionally required to maintain and expressly requires them to comply with the federal Constitution.

Second, the Ninth Circuit’s analysis was cabined to the “specific conduct of which the plaintiff complains”—namely, the school’s alleged disparagement of a former employee in its “role as an employer.” *Id.* at 812-13 (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999)). The court expressly distinguished that question from whether the school might be a state actor for purposes of regulating students. *Id.* The charter school there admitted that whether its students had constitutional rights vis-à-vis the school was not at issue.<sup>23</sup> Here, by contrast, CDS argued, and the Fourth Circuit emphasized, that the subject matter of dispute—the skirts requirement—was an integral aspect of CDS’s provision of free public education to all. Appellants’ Opening Br. at 10, *Peltier v. Charter Day School, Inc.*, No. 20-1001(L) (4th Cir. May 5, 2020), ECF No. 22. (CDS conceived of the uniform policy as “a key part” of the “overall pedagogical strategy”); Pet. App. 23a (“CDS[] implemented the skirts requirement as part of the school’s educational mission”). And North Carolina law expressly requires the school’s code of conduct to be “consistent with . . . the constitutions,

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maintenance of a general and uniform public school system,” Ariz. Const. art. XI, § 1; Ariz. Rev. Stat. Ann. § 15-181(A).

<sup>23</sup> Tr. of Oral Arg. at 5, *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806 (2010) (No. 08-15245), 2009 WL 1764742.

statutes, and regulations of the United States and the State of North Carolina.” N.C. Gen. Stat. § 115C-390.2(a); *see id.* § 115C-218.60.

Thus, there is no split in authority. Only two courts of appeals have ever addressed whether a charter school is a state actor for any purpose, and they reached different results by applying the same legal standard to very different state law regimes. Petitioners’ argument reduces to a contention that the court below “misappl[ied] . . . a properly stated rule of law,” but that is “rarely” the basis for granting certiorari. Sup. Ct. R. 10.

## **II. THIS CASE IS A POOR VEHICLE FOR DECIDING THE STATE ACTION QUESTION.**

This case is also a poor vehicle to decide the question presented for three reasons.

First, the decision below is not final and has been remanded for further proceedings that might make resolution of the state action question irrelevant. Thirteen of the sixteen judges on the en banc court determined that plaintiffs’ Title IX claim, which requires no state action, should be remanded for an evidentiary hearing. *See* Pet. App. 37a-38a n.20, 40a n.23, 55a n.1. As Petitioners’ counsel conceded at oral argument before the Fourth Circuit, if plaintiffs obtain relief under Title IX, the outcome of the equal protection claim will make no difference to CDS’s obligations. *See* Supp. App. 1a (“[T]o prevail, [Petitioners] need to win on both the state actor question and the Title IX question.”). Plaintiffs seek only injunctive relief and nominal damages, J.A. 0062-63, and whether that relief is awarded pursuant to Title IX or Section 1983 makes no difference. This

Court should not review a question that in the end may not alter the outcome. *See* Stephen M. Shapiro et al., *Supreme Court Practice* (11th ed. 2019) (citing *S. Dakota v. Kan. City S. Indus., Inc.*, 493 U.S. 1023 (1990) (denying certiorari where there was alternative basis for affirmance)); *cf.* *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (“Courts should think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case.” (internal quotation marks omitted)).

Second, because CDS is contractually bound to comply with the federal and state Constitutions, resolution of the equal protection claim will not alter its obligations. Indeed, when asked about a hypothetical violation of students’ free-speech rights, counsel for CDS conceded below that such conduct “would violate” CDS’s “charter that it has with the State of North Carolina.” Supp. App. 2a. As a result, CDS is legally bound to respect its students’ constitutional rights whether it is deemed a state actor or not. CDS has not sought certiorari on the Fourth Circuit’s holding on the merits of plaintiffs’ equal protection claim that “the skirts requirement fails intermediate scrutiny and facially violates the Equal Protection Clause.” Pet. App. 31a. Thus, a decision concluding that it is not a state actor would not alter its obligations to plaintiffs here.

Third, because North Carolina is one of only two states to impose on their charter schools an express requirement to comply with the federal Constitution across the board, this case does not provide an appropriate vehicle to decide any question regarding the status of charter schools more

generally.<sup>24</sup> That requirement, which addresses the precise question posed here, and underscores the State's affirmative decision to establish charter schools as state actors subject to the Constitution, makes this case an especially poor vehicle.

**III. BECAUSE THIS CASE CONCERNS ONLY ONE STATE'S UNIQUE CHARTER SCHOOL SYSTEM, IT DOES NOT PRESENT AN IMPORTANT QUESTION REQUIRING THIS COURT'S REVIEW.**

Petitioners and their amici suggest that this case presents an important question because, if North Carolina's public charter schools must abide by the federal Constitution, that will limit their ability to innovate. But there is no basis for that contention. Indeed, CDS is *already required* to abide by the federal Constitution pursuant to the terms of its charter agreement, both as a general matter and as to its code of student conduct in particular, so the question of how a charter school might operate without constitutional constraints is not even presented here. Moreover, that requirement has not interfered with pedagogical innovation, either in

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<sup>24</sup> Ga. Dep't of Educ., Charter School Contract Template (2021), <https://www.gadoe.org/External-Affairs-and-Policy/Charter-Schools/Documents/01%20-%20Charter%20School%20Contract%20Template%202021.11.23.docx?csf=1&e=3zWIW>. Some other states' agreements require compliance with particular provisions of the federal or state Constitutions, such as nondiscrimination or due process provisions. But only North Carolina and Georgia require charter schools to be bound across the board by the federal Constitution. And North Carolina expressly requires student codes of conduct to comply with the federal Constitution as well.

North Carolina’s charter schools or in public schools generally.

The fact that a public school must innovate consistent with the Constitution is no obstacle to educational experimentation or success. As the National Alliance for Public Charter Schools explained in its amicus brief before the Fourth Circuit: “Charter schools aim to foster innovation in the public school system. But that innovative spirit does not include a license to violate charter school students’ constitutional rights.” Br. for Nat’l Alliance for Public Charter Schools as Amici Curiae at 1, *Peltier v. Charter Day School, Inc.*, No. 20-1001(L) (4th Cir. Aug. 30, 2021), ECF No. 90-1.<sup>25</sup>

Indeed, public charter schools in North Carolina have enjoyed explosive growth, increasing by over 100% in the last ten years to 204 schools, nearly tripling the percentage of public school funding directed to charter schools, and increasing enrollment to 130,000 students.<sup>26</sup> Yet every charter school in North Carolina is required by its charter to respect students’ federal and state constitutional freedoms.<sup>27</sup>

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<sup>25</sup> See also Nat’l Ass’n of Charter Sch. Authorizers, *NACSA Statement on 4th U.S. Circuit Court Ruling in Peltier v. Charter Day School* (June 15, 2022), <https://www.qualitycharters.org/2022/06/nacsa-statement-on-4th-u-s-circuit-court-ruling-in-peltier-v-charter-day-school-2/> (praising en banc ruling).

<sup>26</sup> N.C. Dep’t of Public Instruction, State Bd. of Educ., *Report to the North Carolina General Assembly: 2021 Annual Charter Schools Report*, 36, 53-54 (2022), <https://npr.brightspotcdn.com/31/d2/525dbb99457aa7b8e3a613c2ce42/charter-school-annual-report-2021.pdf>.

<sup>27</sup> *Id.* at 30, 54.

Petitioners fail to identify any “innovative” educational methods that would run afoul of the Constitution—other than the requirement that girls wear skirts. And, since the district court enjoined the skirts requirement in 2019, CDS has continued to flourish, touting its lengthy wait list and plans to expand—all while girls may elect to wear pants or shorts to school.

Moreover, the decision below concerns a single state with a unique constitutional, statutory, and charter regime. In particular, as noted above, only one other state, Georgia, expressly requires its charter schools to abide by the federal and state Constitutions.<sup>28</sup> More broadly, charter school regimes vary widely across states.<sup>29</sup>

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<sup>28</sup> Ga. Dep’t of Educ., Charter School Contract Template (2021), <https://www.gadoe.org/External-Affairs-and-Policy/Charter-Schools/Documents/01%20-%20Charter%20School%20Contract%20Template%202021.11.23.docx?csf=1&e=3zWIW>.

<sup>29</sup> States vary substantially in how they govern charter schools. For example, in North Carolina, the State Board of Education is the only entity empowered to authorize a charter school to open and remain open. N.C. Gen. Stat. § 115C-218.5(a). Other states assign authorizing and termination authority to institutions of higher education, *e.g.*, Nev. Rev. Stat. § 388A.220(3), independent commissions, *e.g.*, Idaho Code Ann. § 33-5202A(1)(b), non-profit or charitable organizations, *e.g.*, Minn. Stat. § 124E.05(c), (h), Native American tribes, *e.g.*, Okla. Stat. tit. 70, § 3-132(A)(6), or some combination. In North Carolina, charter schools are directly accountable to the State Board for student academic performance in the same manner as all other types of public schools. N.C. Gen. Stat. § 115C-218.85(a). In other states, charter schools are accountable to their authorizers or a local educational authority, under the terms of their individual charter contract or an evaluation policy that applies only to charter schools. *E.g.*, Tex. Educ. Code § 12.0531. Some charter schools are established as part of the “public school system”;

The decision here concerns only North Carolina.

CDS's founder could have established a private school instead of a public charter school. He did not. He chose instead to operate a public charter school "within the public school system" and subject to the "Federal and State Constitutions." The decision below merely respects North Carolina's choices about how to structure its free public education system and holds CDS to its bargain.

#### **IV. THE DECISION BELOW IS CORRECT.**

##### **A. The court below correctly determined that CDS is a state actor for purposes of the skirts requirement.**

The court of appeals correctly decided that CDS was a state actor when it enforced its rule that girls must wear skirts to receive an education. It did so based on a careful review of the full range of relevant circumstances, but principally for four mutually reinforcing reasons. First, North Carolina's Constitution and statutes make clear that the State intended its charter schools to be state institutions subject to the federal Constitution. Pet. App. 15a. Second, the State delegated to public charter schools part of its constitutional duty to provide "free, universal elementary and secondary education" through a "general and uniform system of free public schools." Pet. App. 16a & n.8. Third, CDS's "operat[ion of] a school that is part of the North Carolina public

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others are not. These are but a few of the ways charter schemes may differ from state to state, but suffice to make clear that whether a charter school is a state actor in one state will not determine whether a charter school is a state actor in another state.

school system” is a function traditionally and exclusively reserved to the State in North Carolina. Pet. App. 19a. And fourth, the skirts requirement is, by CDS’s admission, part of the educational function it performs for the State. Pet. App. 20a.

Turning to the first reason, the Fourth Circuit surveyed North Carolina’s Constitution and statutes and concluded that “North Carolina has exercised its sovereign prerogative to treat these state-created and state-funded schools as public institutions.” Pet. App. 23a. North Carolina established its public charter schools, like its five other “public school units,” N.C. Gen. Stat. § 115C-5(7a), “within the public school system,” *id.* § 115C-218(a)(5). They are expressly part of the “general and uniform system of free public schools” that the State is constitutionally required to maintain. N.C. Const. art. IX, § 2. As public schools, charter schools must be open to any student eligible to attend on a first-come, first-served basis, N.C. Gen. Stat. § 115C-218.45(a); comply with due process before excluding a student, *id.* § 115C-218.60; be tuition free, *id.* § 115C-218.50(b); be nonsectarian, *id.* § 115C-218.50(a); and comply with “the Federal and State Constitutions,” N.C. Charter Agreement § 5.1, including specifically with respect to their codes of conduct. N.C. Gen. Stat. § 115C-390.2(a); *see id.* § 115C-218.60. None of these requirements apply to private schools.

Like all other North Carolina public schools, charter schools receive per-pupil funding and must use the State’s public school budget format. N.C. Gen. Stat. § 115C-218.105(a), (c); *see also Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ.*, 563 S.E.2d 92, 97-98 (N.C. App. 2002). They receive funding that is constitutionally restricted to

“public schools.” N.C. Const. art. IX, §§ 6, 7. And employees of charter schools are eligible for benefits available only to public school employees. *See supra* Statement at 11. As the court of appeals concluded, “[t]he 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.” Pet. App. 20a-21a.

Public charter schools owe their existence to the State Board of Education. The State Board determines whether to approve a charter,<sup>30</sup> requires charter schools to operate pursuant to the authority granted by their charters, and can revoke schools’ charters for noncompliance. *See* N.C. Gen. Stat. §§ 115C-218.15(c), 115C-218.5, 115C-218.95(a)(1)-(6); *see also id.* § 115C-218.15 (“All charter schools shall be accountable to the State Board for ensuring compliance with applicable laws and the provisions of their charters.”).

The State Board of Education also supervises a charter school’s educational functions, as it does for all other types of “public school units.” *Id.* § 115C-218; *see also* N.C. Const. art. IX, § 5 (“The State Board of Education shall supervise and administer the free public school system.”). Public charter schools must “conduct the student assessments required by the [State Board],”<sup>31</sup> satisfy State Board requirements

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<sup>30</sup> *2020 Charter Application Timeline*, N.C. Dep’t of Pub. Instruction, <https://www.dpi.nc.gov/media/8198/download> (last visited Dec. 5, 2022).

<sup>31</sup> *See also* Memorandum from Michael Maher, Deputy Superintendent, N.C. Dep’t of Pub. Instruction on 2022-23 Annual Testing Program and Accountability Requirements to

regarding student performance standards, and provide state-specified instruction. N.C. Gen. Stat. § 115C-218.85(a). The State Board issues public charter schools an annual “report card” like all other public schools.<sup>32</sup>

Perhaps most significantly, North Carolina made plain that its charter schools are state actors in its model charter agreement. The charter, to which every charter holder must agree, expressly provides that charter schools are bound by the “Federal and State Constitutions.” N.C. Charter Agreement § 5.1. And North Carolina law specifically requires charter schools’ codes of conduct to comply with the federal Constitution as well. That requirement makes sense only if the schools are state actors.

Second, the court below correctly concluded 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.” Pet. App. 16a, 21a-22a; *see Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 n.1 (2019) (citing *West*, 487 U.S. at 56). In *West*, this Court held that a private doctor who provided medical services at a state prison was a state actor when he did so because the state had delegated to him its “constitutional obligation, under the Eighth Amendment, to provide adequate medical care” to its prisoners. 487 U.S. at 54. The private physician’s

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LEA Superintendents & Charter School Directors (July 18, 2022), <https://drive.google.com/file/d/14JVrK0GMSXwqFAX8MvnhZvHt9BM4K6aB/view>.

<sup>32</sup> Robert P. Spencer, *NC School Report Card: Welcome Letter*, Classical Charter Schools, <http://charterdayschool.net/school/welcome-letter/> (last visited Dec. 5, 2022).

“function within the state system” was to fulfill the state’s “affirmative obligation to provide adequate medical care” to prisoners, and therefore the treatment he provided was state action. *Id.* at 55-56.

The court of appeals properly found that CDS, like the doctor in *West*, has been delegated an affirmative constitutional obligation of the State, and is therefore a state actor for purposes of carrying out that delegated function. In North Carolina, “it is the duty of the *State* to guard and maintain [the] right” to free public schools. *Hoke Cnty. Bd. of Educ.*, 879 S.E.2d. at 248 (quoting N.C. Const. art. I, § 15). And significantly, the North Carolina Constitution requires that the State meet this responsibility not by supporting education generally, but specifically by providing “a general and uniform system of *free public schools*.” N.C. Const. art. IX, § 2 (emphasis added). More than 25 years ago, the State chose to fulfill this obligation in part by authorizing public charter schools. “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.” Pet. App. 16a.

Third, the court of appeals correctly concluded that CDS’s provision of “free public school[]” is a function traditionally and exclusively reserved to the State by North Carolina’s Constitution. Pet. App. 19a n.8; see *Jackson*, 419 U.S. at 353; see also, e.g., *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 345 (4th Cir. 2000) (firefighting in Maryland is traditionally and exclusively reserved to the State). “In one form or another, North Carolina has maintained its system of ‘free’ public schools ever

since 1840, with the exception of the few years immediately after the Civil War.” *Sneed v. Greensboro City Bd. of Educ.*, 264 S.E.2d 106, 111-12 (N.C. 1980). In 1868, North Carolina codified the right to education in the State’s constitutionally mandated “general and uniform system of Public Schools, wherein they shall be free of charge to all the children.” See N.C. Const. 1868, art. I, § 27; art. IX, §§ 2, 9. While the State is of course free to, and does, support private education as well, its charter schools are expressly established as part of the “public school system” to provide *free public education*. Private schools do not provide “free public education” in North Carolina.<sup>33</sup>

Finally, the court of appeals noted that “[b]y CDS’ own admission,” the particular function at issue in this case “directly impacts the constitutional responsibility that North Carolina has delegated to CDS.” Pet. App. 20a. The fact that the student code of conduct is an integral part of the school’s provision of “free public education,” and part of a code of conduct that North Carolina law requires must comply with the federal Constitution, further reinforces the conclusion that CDS is a state actor at least for these purposes.

All of these factors point in precisely the same direction. The court of appeals therefore correctly

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<sup>33</sup> To be sure, North Carolina does not treat all “public school units” in precisely the same way. That would defeat the purpose of creating six different types of public schools in the first place. But the differences between the state’s various public schools are differences of degree, not kind, and they certainly do not transform public schools into private schools. The state’s relationship to private schools, by comparison, is wholly different in nature. See *supra* Statement at 12-14.

found that CDS is a state actor for purposes of its student code of conduct.

**B. Petitioners’ arguments lack merit.**

Petitioners’ arguments against state action fail. Petitioners maintain that CDS’s skirts requirement is not state action because North Carolina did not “coerce” CDS to adopt it. Pet. i, 12, 13, 24. But no such “coercion” or compulsion is required. As this Court recently reiterated, there are several ways state action may be established, only one of which involves direct coercion of a specific act. *See Halleck*, 139 S. Ct. at 1928 (providing non-exhaustive list of ways “a private entity can qualify as a state actor,” only one of which is “when the government compels the private entity to take a particular action”); *Lugar*, 457 U.S. at 939 (identifying multiple state action tests, the “state compulsion” test among them).

Petitioners’ heavy reliance on *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), is similarly misplaced. *Rendell-Baker* and this case both involve schools, but the similarities end there. In that case, this Court declined to deem a wholly “private institution” a state actor merely because it had a state contract and was subject to some regulatory oversight, where the function it provided was not traditionally reserved to Massachusetts. *Id.* at 832. The function at issue was “the education of maladjusted high school students.” *Id.* at 842. The Court found that “until recently the State had *not* undertaken to provide education for” such students at all, but had left their education entirely to the private sector. *Id.* (emphasis added).

Here, by contrast, the function CDS serves is “operating a school that is part of the North Carolina

public school system.” In North Carolina, that is “a function traditionally and exclusively reserved to the state.” Pet. App. 12a, 19a. Petitioners seek to avoid this conclusion by attempting to redefine the relevant function as “primary education,” and then asking whether *that* more general function is traditionally reserved to the state. But the *Rendell-Baker* Court did not ask whether “secondary education,” in general, is a government function; rather, it asked whether the function Massachusetts had *actually contracted with the school to provide*—educating a particular subset of high school students—was an exclusive government function. 457 U.S. at 832 & n.1 (quoting Mass. Gen. Laws, ch. 71B, § 4); *see also Halleck*, 139 S. Ct. at 1929 (describing function in *Rendell-Baker* as providing “special education”).

The proper focus, therefore, looks to the function North Carolina has actually authorized CDS to provide. *See* Rehearing En Banc Br. for United States as Amicus Curiae at 20, *Peltier v. Charter Day School, Inc.*, No. 20-1001(L) (4th Cir. Nov. 18, 2021), ECF No. 120 (“assessing state action requires . . . specificity,” and therefore it is improper to “reformulat[e] the question to ask” whether “‘providing educational services’ writ large” is traditionally an exclusive government function); *cf. West*, 487 U.S. at 54-55 (considering party’s “function within the state system” to determine whether its “actions can fairly be attributed to the State”). The court of appeals correctly “look[ed] to the relationship between the charter school and the state,” Pet. App. 17a, to “identify[] the ‘function within the state system’ that CDS serves,” Pet. App. 18a (quoting *West*, 487 U.S. at 55-56), and concluded that “CDS operates a ‘public’ school, 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," "a function traditionally and exclusively reserved to the State," Pet. App. 18a-19a.

Finally, Petitioners argue that the fact that charter schools receive government funding, are regulated by the state, or are labeled "public" for some purposes are not sufficient to establish state action. But as made clear above, the Fourth Circuit's decision rests on much more. Here, every facet of North Carolina law makes clear that charter schools are part of the State's constitutionally mandated "free public school" system and are subject to the federal Constitution. On these facts and under this Court's precedent, the court of appeals was correct.

### **CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 7, 2022

**SUPPLEMENTAL  
APPENDIX**

**Excerpts from transcription of audio file titled  
20-1001-20211210.mp3 from the  
U.S. Court of Appeals for the Fourth Circuit  
En Banc Oral Argument in  
*Peltier v. Charter Day School, Inc.*,  
No. 20-1001(L) (Dec. 10, 2021)**

\* \* \*

**THE COURT:** That's a good question, because your aim is not just state actor. You have a particular remedy you're seeking, and if the panel below unanimously went in a particular way—of course, it is vacated; I think you're correct on that—the ultimate remedy you want is, of course, to have it declared as a state actor, but you certainly don't want the other to be—Title IX to be granted either. So I would think your focus would be on both unless you're here purely for a legal and academic basis to deal with state actor, because you need both in order to prevail; is that correct?

**MR. STREETT:** You're correct, Your Honor, to prevail, we need to win on both the state actor question and the Title IX question, and our position, of course, as we've laid out in our briefs on Title IX, is that a binding Education Department regulation has interpreted reasonably Title IX to not reach dress codes. That was the position that the district court agreed with, and we continue to press that position here today. Of course, if the Court is inclined to stick with the panel opinion on that point, which, as you mentioned, was unanimous, then the Court would need to reach the Title IX—or the state actor question as well.

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**THE COURT:** Can I ask you something about the implications of your position? Is it your view that Charter Day School could adopt a policy of expelling any student who wears a black armband to protest the Vietnam War?

**MR. STREETT:** Your Honor, our position is that that would not be state action but that may very well violate other civil rights protections—

**THE COURT:** What would it violate? It would violate the First Amendment if they're a state actor, but it wouldn't violate Title IX. It wouldn't violate Title VI. It wouldn't violate the ADA or the Rehabilitation Act. What would it violate?

**MR. STREETT:** My only reservation is, I'm not familiar with whether there would be any state protections that that would violate. What I know it would violate is the charter that it has with the State of North Carolina. The state, I suspect, would immediately come in and enforce against the school under that prong.

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**THE COURT:** You keep saying that the state can enforce this, but I just want to be clear, in your view, the only reason the state can enforce this is because the charter requires them to follow the Constitution. If the charter didn't require them to follow the Constitution, in your view, the state couldn't even enforce it, right?

**MR. STREETT:** That is correct, Your Honor.

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**DIGITALLY SIGNED CERTIFICATE**

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

s/ Wendy Campos  
WENDY CAMPOS  
September 30, 2022

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