No. 22-238

In the Supreme Court of the United States

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

v.

BONNIE PELTIER, AS GUARDIAN OF A. P., A MINOR CHILD, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The North Carolina Constitution requires the State to provide "a general and uniform system of free public schools." N.C. Const. Art. IX, § 2, Cl. 1. North Carolina fulfills that obligation by offering several types of free public schools, including charter schools. Although the State authorizes private nonprofit entities to operate charter schools, North Carolina law establishes those schools as "public school[s]" that are open to the same students as the State's traditional public schools. N.C. Gen. Stat. § 115C-218.15(a) (Supp. 2022). The question presented is:

Whether the operator of a North Carolina public charter school is a state actor when it adopts and enforces a student dress code in the course of fulfilling the State's constitutional obligation to offer free public education to its residents.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Equal Protection Clause generally "applies to acts of the [S]tates, not to acts of private persons or entities." *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 837 (1982). Similarly, 42 U.S.C. 1983 authorizes suits only against persons acting "under color of" state law. See *Rendell-Baker*, 457 U.S. at 838. In some circumstances, the actions of a private individual or entity are deemed "fairly attributable to the State" and subject to constitutional requirements enforceable through suits under

Section 1983. *Ibid.* (citation omitted). That determination depends on whether "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State.'" *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (citation omitted).

The criteria for identifying state action "lack rigid simplicity." *Brentwood Acad.*, 531 U.S. at 295. But this Court has identified certain circumstances where a private entity typically qualifies as a state actor. See *id.* at 296; *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928-1929 (2019). One such circumstance is where "the government has outsourced one of its constitutional obligations to a private entity." *Manhattan Cmty.*, 139 S. Ct. at 1929 n.1 (citing *West* v. *Atkins*, 487 U.S. 42 (1988)). Another is where the entity exercises "powers traditionally exclusively reserved to the State." *Id.* at 1928 (citation omitted).

2. The North Carolina Constitution vests state residents with "a right to the privilege of education" and imposes a "duty of the State to guard and maintain that right." N.C. Const. Art. I, § 15. That duty includes the provision of "a general and uniform system of free public schools * * * wherein equal opportunities shall be provided for all students." N.C. Const. Art. IX, § 2, Cl. 1.

Charter schools are one of six types of "[p]ublic school unit[s]" in North Carolina's public-school system. N.C. Gen. Stat. § 115C-5(7a);[1] see Br. in Opp. 4-5. A nonprofit entity may apply to the State for a charter that authorizes it to operate a public school. N.C. Gen. Stat. § 115C-218.1(a). If granted, the state-conferred

[1] All citations to the General Statutes of North Carolina are to the 2021 version unless otherwise stated.

charter "establish[es] [the] charter school." *Ibid.*; see *id.* § 115C-218.15(c) (Supp. 2022). Although charter schools "operate independently of existing schools," *id.* § 115C-218(a), they are designated as "public school[s] within the local school administrative unit," or school district, in which they are located, *id.* § 115C-218.15(a). Charter schools are exempt from many "statutes and rules applicable to a local board of education," *id.* § 115C-218.10, but they are accountable to the State Board of Education for "ensuring compliance with applicable laws and the provisions of their charters," *id.* § 115C-218.15(a), and for meeting "expected academic, financial, and governance standards," *id.* § 115C-218.6(a).

In addition, charter schools must generally comply with the same state laws governing student discipline that apply to other public schools. N.C. Gen. Stat. § 115C-218.60. Among other things, those laws provide that schools' codes of conduct and disciplinary procedures "must be consistent with" the "constitutions" of "the United States and the State." *Id.* § 115C-390.2(a).

3. In 1999, Charter Day School, Inc. (CDS) applied for a charter to establish a public school that would "emphasize[] traditional values and direct instructional methods." C.A. App. 108.[2] The State approved CDS's application and has twice renewed CDS's charter. Pet. App. 158a. Like other public schools, CDS must be open to all children eligible to attend school in North Carolina and may not charge tuition. *Id.* at 5a, 173a. Consistent with the State's standard charter agreement, CDS's charter requires it to "compl[y] with the Federal and State Constitutions." C.A. App. 214; see Br. in Opp. 8.

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[2] Like the opinion below, this brief generally refers to both the corporation and the school itself as "CDS." Pet. App. 4a n.1.

CDS has had a dress code since the school's founding. Pet. App. 159a-160a. The code requires female students to wear skirts, jumpers, or skorts and prohibits female students from wearing shorts or pants, subject to exceptions for certain occasions (like physical education class). *Id.* at 6a. The school incorporates the dress code "into the Discipline section of [its] Student Handbook," *id.* at 171a, and noncompliance may result in removal from class or expulsion, *id.* at 6a.

Respondent Bonnie Peltier is the parent of a female student at CDS. Pet. App. 6a. When Peltier objected to the skirt requirement, Baker Mitchell, CDS's founder and a member of its Board of Trustees, told her that the rule "preserve[s] chivalry and respect." *Id.* at 6a-7a, 58a. Mitchell later explained that "chivalry" is "'a code of conduct where women are * * * regarded as a fragile vessel that men are supposed to take care of and honor.'" *Id.* at 7a. "CDS Board members largely endorsed Mitchell's reasoning" for the skirt requirement. *Id.* at 109a (panel opinion).

4. The other respondents are also parents or guardians of female students at CDS. C.A. App. 35. Together with Peltier, they sued CDS and members of its Board of Trustees, arguing that the skirt requirement is sex discrimination that violates the Equal Protection Clause and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* C.A. App. 55-58. Respondents also brought a third-party breach-of-contract claim alleging that CDS violated its charter by adopting an unconstitutional dress code. *Id.* at 60-61.

On cross-motions for summary judgment, the district court ruled for respondents on their constitutional claim, holding that CDS's enforcement of the dress code is state action that violates the Equal Protection Clause

because it impedes female students' activities and learning. Pet. App. 168a-181a. The court ruled for petitioner CDS on the Title IX claim, deeming the statute inapplicable to dress codes. *Id.* at 164a-168a. And the court declined to rule on the breach-of-contract claim, finding it insufficiently briefed. *Id.* at 182a. The court entered partial final judgments on the equal-protection and Title IX claims and enjoined CDS from enforcing the skirt requirement. *Id.* at 190a-191a.

5. A partially divided panel of the court of appeals reversed. Pet. App. 101a-153a. The panel majority held that CDS's enforcement of the dress code is not state action, foreclosing respondents' equal-protection claim. *Id.* at 116a-125a. The panel held, however, that Title IX applies to school dress codes. *Id.* at 131a. Judge Keenan dissented from the state-action holding but concurred in the Title IX holding. *Id.* at 140a-153a.

6. The en banc court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-100a.

a. The en banc court affirmed the district court's holding that CDS is a state actor when it enforces its dress code. Pet. App. 12a-25a. Relying on this Court's decision in *West*, *supra*, the en banc court reasoned that state action may be found where a State "outsource[s] or otherwise delegate[s] certain of its duties to a private entity." *Id.* at 11a. The court observed that the North Carolina Constitution obligates the State to provide free public education, and that the State has chosen to "fulfill[] this duty in part by creating and funding the public charter school system." *Id.* at 21a-23a. Thus, the court concluded, when educating and disciplining students in a public school, CDS is fulfilling a "delegate[d]" constitutional responsibility of the State. *Id.* at 23a; see *id.* at 16a.

The en banc court additionally held that CDS, as a public charter school, "perform[s] the traditionally exclusive government function" of providing "free, universal elementary and secondary schooling to the state's residents." Pet. App. 23a; see *id.* at 19a. In analyzing this issue, the court declined petitioners' invitation to frame the relevant function as "providing 'educational services' generally." *Id.* at 18a. The "proper inquiry," the court explained, considers "the 'function within the state system' that CDS serves." *Ibid.* (quoting *West*, 487 U.S. at 55-56). And the court observed that CDS operates a "public" school—a "unit" in the State's public-school system—in fulfillment of "the [S]tate's constitutional obligation to provide free, universal elementary and secondary education." *Id.* at 19a. That function, the court found, has been "traditionally and exclusively reserved to the [S]tate" in North Carolina. *Ibid.*

On the merits of respondents' equal-protection claim, the en banc court held that CDS's skirt requirement does not satisfy intermediate scrutiny. Pet. App. 30a. The court concluded that, rather than serving any "important governmental interest," the requirement was motivated by the "impermissible gender stereotypes" that "girls are 'fragile'" and "require protection by boys." *Id.* at 30a-32a.

As to respondents' Title IX claim, the en banc court concluded that the statute applies to dress codes. Pet. App. 37a. It remanded to the district court to consider whether CDS's skirt requirement violates Title IX by discriminating against female students. *Id.* at 39a-41a.

b. The en banc court's opinion was accompanied by four separate opinions. Judge Wynn, joined by four judges, and Judge Keenan, joined by one judge, con-

curred. Pet. App. 42a-50a, 51a-53a. Judge Quattlebaum, joined by two judges in full and three judges in part, dissented from the majority's state-action holding but concurred in the Title IX analysis. *Id.* at 54a-80a & n.1. Judge Wilkinson, joined by two judges, dissented on both issues. *Id.* at 81a-100a.

DISCUSSION

The court of appeals correctly held that CDS is a state actor when it enforces its student dress code. Public charter schools in North Carolina are units in the public-school system that the State created to fulfill its constitutional duty to offer a free, public education to its residents. In adopting and enforcing a student code of conduct, CDS is carrying out the State's constitutional obligation and exercising authority conferred by the State to operate a state-chartered public entity. CDS is a state actor when it acts in that capacity.

The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. The state-action inquiry is notoriously fact-specific, and the purportedly conflicting decisions on which petitioners rely are distinguishable because they involved different types of entities, different state-law regimes, and different challenged actions. And even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle for considering it: The resolution of the question presented will not affect CDS's obligation to comply with the U.S. Constitution, and may not affect the ultimate disposition of this case. The petition for a writ of certiorari should be denied.

A. The Court Of Appeals Correctly Held That CDS's Enforcement Of Its Student Dress Code Is State Action

1. The North Carolina Constitution enshrines a "fundamental right to receive an education in [the State's] public schools." *Britt* v. *North Carolina State Bd. of Educ.*, 357 S.E.2d 432, 436 (N.C. Ct. App. 1987). It is "the duty of the State to guard and maintain that right." N.C. Const. Art. I, § 15. And the State must do so by providing "a general and uniform system of free public schools." N.C. Const. Art. IX, § 2, Cl. 1. The state constitution "le[aves] up to the legislature," however, the "means of achieving this mandate." *Kiddie Korner Day Sch., Inc.* v. *Charlotte-Mecklenburg Bd. of Educ.*, 285 S.E.2d 110, 114 (N.C. Ct. App. 1981).

The North Carolina General Assembly has created a public-school system consisting of six types of "[p]ublic school unit[s]," including charter schools. N.C. Gen. Stat. § 115C-5(7a). North Carolina law specifically provides that an approved charter school "shall be a public school." *Id.* § 115C-218.15(a) (Supp. 2022). Accordingly, charter schools are open to the same students as other public schools, tuition-free, and subject to the State Board of Education's "supervision." *Id.* § 115C-12 (Supp. 2022); *id.* §§ 115C-218.6(a), 115C-218.45(a), 115C-218.50(b). They receive funding from the State Board and local school districts. *Id.* § 115C-218.105 (Supp. 2022). And they must use instructional programs that "meet the student performance standards adopted by the State Board" and "conduct the student assessments" that the Board requires. *Id.* § 115C-218.85(a)(2) and (3). In short, charter schools are public entities established by state-granted charters and funded by the State to fulfill the State's constitutional obligations.

CDS's enforcement of its student dress code falls squarely within the school's exercise of that delegated government function. As petitioners explained below, the dress code is a "key part" of CDS's "traditional approach" and "overall pedagogical strategy." Pet. C.A. Br. 10. And, with one exception not relevant here, North Carolina law specifically requires charter schools to comply with the same state laws that govern student codes of conduct and discipline in other public schools. N.C. Gen. Stat. § 115C-218.60. Those laws address the development, content, and review of school disciplinary policies, and specifically require all public schools—including charter schools—to ensure that their "policies to govern the conduct of students" comply with the federal and state constitutions. *Id.* § 115C-390.2(a).

As with traditional public schools, moreover, state law defines and limits charter schools' authority to enforce their codes of conduct through disciplinary action. N.C. Gen. Stat. §§ 115C-390.2, 115C-390.5 to 115C-390.8. A female student at CDS who refused to wear a skirt could thus be disciplined only in a manner consistent with those state laws, and would be entitled to appeal certain final decisions to the local board of education, and then to state superior court. See *id.* §§ 115C-45(c), 115C-392.

2. Under this Court's precedents, CDS's adoption and enforcement of its dress code is state action.

a. As the Court recently reaffirmed, "a private entity may, under certain circumstances, be deemed a state actor when the government has outsourced one of its constitutional obligations to a private entity." *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1929 n.1 (2019). In that situation, the entity exercises "power delegated to it by the State" to fulfill the State's

own legal "obligation." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974).

That was the case in *West* v. *Atkins*, 487 U.S. 42 (1988), which arose in the context of North Carolina's "constitutional obligation, under the Eighth Amendment, to provide adequate medical care to those whom it has incarcerated." *Id.* at 54. The State had contracted with a private physician to provide medical services in its prisons. *Id.* at 43-44, 55. The Court held that the physician was a state actor. *Id.* at 54-55. It reasoned that "[t]he State bore an affirmative obligation to provide adequate medical care" but "delegated that function to" the physician, who "assumed that obligation by contract." *Id.* at 56. Having been "vested with state authority to fulfill essential aspects of the duty, placed on the State by the Eighth Amendment and state law, to provide essential medical care to those the State had incarcerated," the Court held that the physician "must be considered to be a state actor." *Id.* at 57. Although *West* itself concerned an obligation imposed by the federal Constitution, this Court has assumed that state constitutional obligations qualify as well. See *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 55-56 (1999).

b. The court of appeals correctly held that the same factors that established state action in *West* are present here. The North Carolina Constitution obligates the State "to provide free, universal elementary and secondary schooling to the [S]tate's residents." Pet. App. 23a. And the State "fulfill[s] this duty in part" by authorizing nonprofit entities to operate charter schools, which are part of the State's public-school system and would not exist absent the charters granted by the State. *Ibid.* Thus, like the medical treatment provided

by the physician in *West*, CDS's implementation of the dress code in furtherance of the "educational mission" with which it has been tasked, and its enforcement of the dress code through disciplinary action, relies on "'power [CDS] possesse[s] by virtue of state law.'" *Ibid.* (quoting *West*, 487 U.S. at 49).

The court of appeals also correctly held that, in operating a public school, CDS performs "a function traditionally and exclusively reserved to the [S]tate." Pet. App. 19a; see *Jackson*, 419 U.S. at 352. North Carolina's first "statewide local option system of 'common' schools" arose out of North Carolina's School Law of 1839. *Sneed* v. *Greensboro City Bd. of Educ.*, 264 S.E.2d 106, 111 (N.C. 1980) (quoting 1839 N.C. Sess. Laws 8). Since then, "North Carolina has maintained its system of 'free' public schools * * * with the exception of the few years immediately after the Civil War." *Id.* at 111-112.

A holding that CDS is not a state actor would allow States to evade constitutional constraints by delegating core governmental functions to private entities. *West* specifically addressed this concern, noting that a State cannot relieve itself "of its constitutional duty to provide adequate medical treatment to those in its custody" by "[c]ontracting out prison medical care." 487 U.S. at 56. As the court of appeals noted below, that concern applies equally here, because a finding of no state action would mean that "North Carolina could outsource its educational obligation to charter school operators, and later ignore blatant, unconstitutional discrimination committed by those schools." Pet. App. 17a.

3. Petitioners' criticisms of the court of appeals' decision lack merit.

a. Petitioners assert (Pet. 29-30) that the inmate in *West* had no choice but to rely on state-provided medical care, whereas charter-school students could choose to attend a traditional public school instead. But the *West* Court noted the inmate's inability to seek treatment elsewhere because that was the source of the State's constitutional obligation to provide medical care in the first instance, 487 U.S. at 54-55; the Court did not suggest that this fact is always necessary to a finding of state action.

Similarly, petitioners observe (Pet. 29) that North Carolina has no obligation to operate charter schools in particular, and they assert that "*West* is not triggered" by the State's decision to contract out a particular form of schooling it had no duty to provide in the first place. But again, the State undisputedly has a constitutional duty to provide a public education, and it created a system of public charter schools to partially fulfill that duty. See pp. 2-3, 8, *supra*. And *West* itself refutes petitioners' logic: Just as the State here has no obligation to rely on charter schools to fulfill its duty to provide public education, the State there had no obligation to rely on contractors rather than state employees to fulfill its duty to provide medical treatment. See 487 U.S. at 44-45, 55-56.

b. Petitioners also assert (Pet. 22-25) that the decision below contradicts this Court's decision in *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982), which held that a private school was not a state actor. But *Rendell-Baker* involved a very different type of school: a specialized private school for students who had "difficulty complet-

ing public high schools," which accepted students on referral from state and local entities that paid the students' tuition. *Id.* at 832. The Court held that the school's termination of teachers for criticizing employment decisions was not state action giving rise to First Amendment and due-process violations. *Id.* at 834-835, 841-843.

That decision is entirely consistent with the conclusion that CDS is a state actor. Even if a State contracts with, funds, or regulates a private school like the one in *Rendell-Baker*, the school is not established by a state-granted charter, is not designated or treated as a public entity by state law, is not required to comply with the state and federal constitutions, and is not required to be tuition-free and open to all. Cf. *Rendell-Baker*, 457 U.S. at 831-834. Conversely, North Carolina charter schools like CDS have all of those attributes because they are public entities created by the State to fulfill its constitutional obligation. In addition, unlike the *Rendell-Baker* school's "personnel decisions"—which were not meaningfully supervised by the State and bore little connection to the State's payment of tuition for some of the school's students—this case involves CDS's fulfillment of the "core educational function" that it performs on the State's behalf. Pet. App. 20a; see *Rendell-Baker*, 457 U.S. at 839 n.6, 841-842.

Petitioners also assert (Pet. 22-23) that *Rendell-Baker* undercuts the court of appeals' conclusion that CDS performs a traditionally exclusive state function. In fact, *Rendell-Baker* confirms that the court of appeals correctly rejected petitioners' "high level of generality" in framing the relevant function as "providing 'educational services' generally." Pet. App. 18a. In *Rendell-Baker*, the Court asked whether "the education

of maladjusted high school students" was a traditional and exclusive public function, and it emphasized that Massachusetts had not "until recently" undertaken the function of "provid[ing] education for students who could not be served by traditional public schools." 457 U.S. at 842; see *Manhattan Cmty.*, 139 S. Ct. at 1929 (describing *Rendell-Baker* as holding that "special education" is not a traditionally exclusive state function). This case involves a different function—the provision of a "free, universal elementary and secondary education to [state] residents"—that had long been exclusively performed by North Carolina. Pet. App. 19a; see p. 11, *supra*.

c. Finally, petitioners assert that the decision below conflicts with this Court's decisions holding that "public utility" operators, "public access" cable operators, and "public defender[s]" are not state actors. Pet. 26 (citations omitted). Petitioners maintain that the court of appeals ignored the reasoning of those decisions by relying on a "'public' moniker" that conveys nothing more than performance of "a public service." Pet. 25-27.

That argument mischaracterizes the decision below, which makes clear that North Carolina's designation of charter schools as "public" is far more than a "label," Pet. 26, or a colloquial reference to the provision of a public service. Rather, it reflects North Carolina's decision to create a system of public charter schools established by state-granted charters, integrated into the State's public-school system, supervised by the State Board of Education, and treated as public institutions for a variety of state-law purposes—including, as particularly relevant here, student codes of conduct and disciplinary procedures. N.C. Gen. Stat. § 115C-218.60.

B. The Decision Below Does Not Warrant Review

The court of appeals' decision neither conflicts with any decision of another court of appeals nor otherwise warrants further review. In arguing otherwise, petitioners overread the decisions on which they rely, overstate the significance of the Fourth Circuit's narrow, state-specific holding, and posit a false choice between educational innovation and public-school students' constitutional rights.

1. As this Court has emphasized, the state-action question is a "necessarily fact-bound inquiry." *Brentwood Acad.*, 531 U.S. at 298 (citation omitted). That is especially true in this context: Charter schools are different from private schools, and charter schools themselves have different characteristics in different states. The decisions from the First, Third, and Ninth Circuits on which petitioners rely considered dissimilar institutions, state legal regimes, and constitutional claims. None of those decisions establishes that those courts would disagree with the decision below on the facts presented here.

a. The Third Circuit's decision in *Robert S.* v. *Stetson School, Inc.*, 256 F.3d 159 (2001) (Alito, J.), concerned not a public charter school, but a private school—specifically, a "private, residential institution"—that provided specialized education and treatment for "juvenile sex offenders," including students whose costs were paid by the city of Philadelphia. *Id.* at 162-163. Addressing the plaintiff's traditional-public-function theory of state action—and emphasizing that the plaintiff had "forsw[orn] reliance" on other theories—the Third Circuit held that the school did not perform such a function because, historically, only private schools had offered similar services. *Id.* at 165-166. Here, by contrast,

the court of appeals found that a different function—the provision of a free public education to all comers—traditionally and exclusively fell to North Carolina. Pet. App. 13a-19a; see *id.* at 22a n.11.

b. For similar reasons, the court of appeals' decision does not conflict with the First Circuit's decision in *Logiodice* v. *Trustees of Maine Central Institute*, 296 F.3d 22 (2002), cert. denied, 537 U.S. 1107 (2003). Like *Robert S.*, *Logiodice* concerned a private school. *Id.* at 24. Although a Maine public school district had contracted with that school to provide a free education to district residents, *id.* at 24-25, the school retained its separate status as a private institution, rather than a unit within the Maine school system. Cf. *Carson* v. *Makin*, 142 S. Ct. 1987, 1993 (2022) (explaining Maine's practice of relying on private schools to educate residents in sparsely populated areas). And in stark contrast with North Carolina's charter-school scheme, the *Logiodice* private school's contract with the district specified that the school would have the "sole right to promulgate, administer, and enforce all rules and regulations pertaining to student behavior [and] discipline." 296 F.3d at 28; compare pp. 3, 9, *supra*.

Petitioner notes (Pet. 20) the *Logiodice* court's rejection of the plaintiff's argument that the private school performed the traditional public function of "providing a publicly funded education available to all students generally." 296 F.3d at 27. But as the First Circuit explained, in Maine, public education had *not* historically been the exclusive province of state-run schools, given Maine's longstanding reliance on private institutions.

Ibid. North Carolina does not share that idiosyncratic history. See p. 11, *supra*.[3]

c. Of the circuit decisions on which petitioners rely, only the Ninth Circuit's decision in *Caviness* v. *Horizon Community Learning Center, Inc.*, 590 F.3d 806 (2010), considered whether a *public* charter school should be deemed a state actor for purposes of a Section 1983 claim. But in *Caviness*, the Ninth Circuit rejected a distinct and broader theory of state action arising from a very different set of facts. The plaintiff, a former teacher, sued after school employees allegedly disparaged him while he was searching for new work. *Id.* at 810-811. The plaintiff asserted that "under Arizona's statutory scheme, all charter schools are, as a matter of law, state actors" for "all purposes," including "employment purposes." *Id.* at 813.

The Ninth Circuit dismissed the plaintiff's reliance on Arizona's "statutory characterization of charter schools as 'public schools,'" finding it not dispositive "in the employment context." *Caviness*, 590 F.3d at 814; see *id.* at 810. But the court's analysis was focused on the school's role as an employer, see *id.* at 812-814, and its reasoning did not foreclose the possibility that an Arizona charter school could be a state actor with respect to other conduct more closely tied to its educational mission. See *id.* at 812 (emphasizing the need to focus on "the specific conduct of which the plaintiff complains"

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[3] The First Circuit also suggested that the plaintiff had "tailor[ed]" the relevant function too narrowly. *Logiodice*, 296 F.3d at 27. But any tension between that statement and the reasoning of the decision below would not justify this Court's review: The proper framing of the relevant function in *Logiodice* was a secondary aspect of the court's analysis that did not affect the case's outcome.

because "an entity may be a State actor for some purposes but not for others" (citations omitted)); see also *id.* at 814.

The Ninth Circuit also rejected the plaintiff's argument that the school's provision of "public educational services" was a traditional and exclusive state function. *Caviness*, 590 F.3d at 815 (citation and emphasis omitted). But the court did not consider whether Arizona's constitution, like North Carolina's, imposes a duty to provide free public education, and if so, whether Arizona established charter schools to fulfill that duty. See *id.* at 814-816; cf. Ariz. Rev. Stat. Ann. § 15-181(A) (2021) (excluding charter schools from state constitutional provision applicable to public schools).

d. Finally, petitioners contend that the First, Third, and Ninth Circuits held that an educational contractor can be a state actor only where "the State encouraged or coerced the challenged conduct." Pet. 2-3. But the decisions cannot fairly bear that reading. The Third and Ninth Circuits merely rejected the proposition that general state regulation or oversight is itself sufficient for state-actor status, see *Robert S.*, 256 F.3d at 165, 168; *Caviness*, 590 F.3d at 816-818, while the First Circuit discussed the possibility of state action based on "governmental coercion or encouragement" only in passing, *Logiodice*, 296 F.3d at 26. Moreover, as noted, the *Caviness* court cabined its holding to the employment context, 590 F.3d at 812-814, and the *Logiodice* court similarly emphasized that state-action determinations "are sensitive to fact situations," 296 F.3d at 26.

2. Petitioners miss the mark in asserting (Pet. 3) that the decision below will have consequences for "charter-school operators throughout the country." The court of appeals "narrowly" resolved the specific

state-action question here based on North Carolina's "statutory framework and language" and the type of action challenged. Pet. App. 25a n.12. The court's decision would leave it free to reach a different conclusion about the status of charter-school operators in a State with a different history, different constitutional requirements, or a different statutory regime. And by expressly limiting its holding about North Carolina charter schools to conduct that "affect[s] the [S]tate's core educational function," *ibid.*, the court also left open the possibility that a different conclusion might obtain in cases challenging other types of actions by charter schools in the State.

Petitioners' assertion that the decision below "poses an existential threat" to charter schools (Pet. 30) is likewise unfounded. There is little reason to believe that requiring public-charter-school operators to abide by constitutional limitations like the equal-protection guarantee will "drape a pall of orthodoxy" over them. Pet. 32 (citation omitted). Notably, charter schools in North Carolina—including CDS—are already required by their charters and state law to comply with the federal and state constitutions, as well as other antidiscrimination provisions. C.A. App. 214; N.C. Gen. Stat. §§ 115C-218.55, 115C-390.2(a).

Petitioners' prediction that the decision below will expose charter-school operators to "the slow strangulation of litigation," Pet. 32 (citation omitted), is similarly unsupported. Over the past two decades, numerous federal and state courts have found charter schools and their operators to be state actors for various purposes, including in circuits petitioners claim on their side of the purported split. See *United States* v. *Minnesota Transitions Charter Sch.*, 50 F. Supp. 3d 1106, 1120 (D.

Minn. 2014) (noting that "most other courts to address the issue have concluded that charter schools are state actors").[4] And three courts of appeals, including the Third Circuit in a recent unpublished opinion, have analyzed Section 1983 claims brought against charter schools without questioning whether they were state actors. See *Family C.L. Union* v. *Department of Child. & Fam.*, 837 Fed. Appx. 864, 869 & n.22 (3d Cir. 2020); *Brammer-Hoelter* v. *Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010); *Fister* v. *Minnesota New Country Sch.*, 149 F.3d 1187 (8th Cir. 1998) (Tbl.) (per curiam).

Finally, there is no incompatibility between encouraging educational innovation and respecting students' constitutional rights. Cf. Pet. 30-32. As the case comes to the Court, petitioners do not dispute that CDS's skirt requirement would violate female students' equal-protection rights if implemented by a government-run public school. Instead, the "premise" of petitioners' policy argument is that state-chartered public schools

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[4] See, *e.g.*, *Lengele* v. *Willamette Leadership Acad.*, No. 22-cv-1077, 2022 WL 17057894, at *3-*4 (D. Or. Nov. 17, 2022); *Patrick* v. *Success Acad. Charter Sch., Inc.*, 354 F. Supp. 3d 185, 209 n.24 (E.D.N.Y. 2018); *Meadows* v. *Lesh*, No. 10-cv-223, 2011 WL 4744914, at *1-*2 (W.D.N.Y. Oct. 6, 2011); *Jordan* v. *Northern Kane Educ. Corp.*, No. 08-4477, 2009 WL 509744, at *2-*3 (N.D. Ill. Mar. 2, 2009); *ACLU* v. *Tarek Ibn Ziyad Acad.*, No. 09-138, 2009 WL 2215072, at *9-*10 (D. Minn. July 21, 2009); *Scaggs* v. *New York Dep't of Educ.*, No. 06-cv-799, 2007 WL 1456221, at *13 (E.D.N.Y. May 16, 2007); *Matwijko* v. *Board of Trs. of Global Concepts Charter Sch.*, No. 04-663A, 2006 WL 2466868, at *3-*5 (W.D.N.Y. Aug. 24, 2006); *Irene B.* v. *Philadelphia Acad. Charter Sch.*, No. 02-1716, 2003 WL 24052009, at *11 (E.D. Pa. Jan. 29, 2003); *Riester* v. *Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 971-973 (S.D. Ohio 2002); *McNaughton* v. *Charleston Charter Sch. for Math & Sci., Inc.*, 768 S.E.2d 389, 399 (S.C. 2015).

"must be allowed to experiment with unconstitutional discrimination" to cultivate educational innovation. Pet. App. 47a (emphasis omitted). As Judge Wynn explained, that premise is "plainly wrong." *Ibid.* "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (citation omitted). Eliminating unconstitutional discrimination—whether based on sex, race, religion, or other grounds—ensures that all students have the opportunity to benefit from the "diverse pedagogical approaches" (Pet. 30) charter schools can offer.

C. This Case Would Be A Poor Vehicle For Considering The Question Presented

Even if the question presented otherwise warranted review, this interlocutory petition would be an unsuitable vehicle in which to consider it because resolution of that question will not alter CDS's legal obligations and may have no practical effect on the disposition of this case.

1. This is an unusual state-action dispute. Ordinarily, "the state-action doctrine protects a robust sphere of individual liberty" because private entities that are not engaged in state action are free to ignore the constitutional limits that bind government actors. *Manhattan Cmty.*, 139 S. Ct. at 1934. Here, however, it is undisputed that CDS is obligated by North Carolina statute and the express terms of its charter to conform its code of conduct and disciplinary actions to the U.S. Constitution, including the Equal Protection Clause. See pp. 3, 9, 19, *supra*.

A decision reversing the court of appeals' state-action holding would thus have no effect on the legal obligations of CDS or any other North Carolina charter

school. If this Court were inclined to take up the state-action doctrine's application to charter schools, it should await a case from a State that has not already chosen, as a matter of state law, to subject its charter schools to federal constitutional requirements.

2. This interlocutory petition would also be an unsuitable vehicle because it is by no means clear that the state-action issue will affect the ultimate resolution of the case. That is true for two independent reasons.

First, even if this Court held that CDS is not a state actor for purposes of respondents' Section 1983 claim, respondents may still obtain the non-declaratory relief they seek—which is limited to injunctive relief and nominal damages, C.A. App. 62-63—under Title IX. The court of appeals remanded the Title IX claim for the district court to consider whether the skirt requirement "operates to exclude [respondents' children] from participation in their education, to deny them its benefits, or otherwise to discriminate against them based on their sex," in violation of Title IX. Pet. App. 39a-40a. And petitioners conceded below that respondents may "pursue identical relief on remand via their Title IX claim." Pet. C.A. Resp. to Reh'g Pet. 17.[5]

Second, respondents have also brought a third-party breach-of-contract claim alleging that CDS violated the provision in its charter requiring the school to comply

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[5] Petitioners now maintain (Cert. Reply Br. 9) that because CDS's board members are named as defendants in the Section 1983 claim, but not in the Title IX claim, a favorable state-action decision would relieve those individuals "of all potential liability." But CDS's bylaws require it to indemnify board members against court judgments and attorneys' fees. C.A. App. 704-705. Resolving the question presented thus could have limited practical significance even for those parties.

with the federal Constitution. C.A. App. 60-61. The district court denied summary judgment to both sides on that claim, allowing for "the possibility of further litigation." Pet. App. 61a. That separate claim could likewise provide respondents with the same relief they secured on their Section 1983 claim: a declaration that the skirt requirement violates the Equal Protection Clause and an order requiring a change to the policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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