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 INDEPENDENT WOMEN'S LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Charter schools have a long history of providing innovative educational options to parents seeking alternatives to the one-size-fits-all nature of local public schools. One of these options, single-sex education, has proven an effective means of improving academic and social outcomes for both males and females. The decision below—which is the first time a court of appeals has held a charter school to be a state actor, see Pet. App. 54a (Quattlebaum, J., dissenting)—poses an existential threat not only to single-sex schools but also to any charter school that embraces classical methods of education, such as dress codes or certain single-sex activities and spaces. These schools can hardly be expected to remain operational, much less continue to innovate, while the court of appeals has given parents carte blanche to make a federal case out of every action the institutions take.

This threat to educational alternatives is of great concern to *amicus* Independent Women's Law Center (IWLC), which is a project of Independent Women's Forum (IWF), a nonprofit, non-partisan 501(c)(3) or-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have consented in writing to the filing of this brief; all parties were notified by *amicus curiae* of its intent to file this brief more than 10 days prior to its due date.

ganization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes access to free markets and the marketplace of ideas and supports policies that expand liberty, encourage personal responsibility, and limit the reach of government. IWLC supports this mission by advocating for equal opportunity, individual liberty, and the rights of women and girls. As organizations comprised primarily of women, many of whom are mothers, IWF and IWLC value the different learning styles of all children and believe that parents should enjoy a full range of options when deciding which schools their children should attend.

For the reasons stated by petitioners (hereinafter "Charter Day School"), IWLC agrees that the court of appeals erred in concluding that Charter Day School is a state actor. IWLC writes further to explain the practical dangers of that holding and the harm it will inflict on families who are simply seeking the best education available for their children. If charter schools can be deemed state actors, then thousands of educational institutions across the nation will suddenly be subject to lawsuits that make a constitutional issue of everything from the sex of their students to their extracurricular clubs. Such litigation will hamper the schools' ability to function and severely limit the educational choice that has been critical for so many families. This Court should grant certiorari and reverse the decision below.

REASONS FOR GRANTING THE PETITION

Although publicly funded, charter schools are independent schools that are explicitly exempt from many of the regulations that control government-run public schools. Charter schools are granted such autonomy so they can experiment in ways that government-run public schools cannot. Charter schools thus play a crucial role in America's educational system, offering innovative curricula and learning environments not offered elsewhere. The court of appeals' decision threatens that innovation by declaring these independent institutions to be state actors subject to constitutional litigation.

One group of schools that will be particularly vulnerable to suit under the court of appeals' rule is single-sex charter schools. Research confirms that single-sex education provides students with many benefits. Although there are good reasons to conclude that many single-sex primary and secondary schools are constitutional, the decision below holding that charter schools are state actors will subject those schools to a cascade of lawsuits challenging that premise and, indeed, their very existence.

Other schools that have adopted classical modes of education or dress codes that are not in fashion today will likewise face litigation under the majority's opinion. Formerly free to make pedagogical decisions without meddling from the state, charter schools will now be subject to constitutional litigation over every decision regarding hiring and firing, extracurricular activities, restroom assignments, and the composition of athletic teams.

As shown below, such an uncertain legal environment undermines the very purpose of charter schools: allowing educational leaders to make bold and creative decisions without the constant threat of government intervention or federal lawsuit. This Court should grant certiorari and hold that publicly funded charter schools are not state actors for purposes of constitutional litigation.

I. The Court of Appeals' Decision Threatens the Existence of Single-Sex Charter Schools

One of the most troubling consequences of the court of appeals' decision is the threat it poses to institutions that provide single-sex education. As the dissent below recognized, see Pet. App. 92a (Wilkinson, J., dissenting), the majority's decision to hold that charter schools are state actors will open up a floodgate of constitutional litigation. And, despite the benefits of single-sex charters for both sexes, these schools will be particularly vulnerable to constitutional attack under the Fourth Circuit's rule.

A. Single-Sex Schools Benefit Both Sexes

Although single-sex education is less prevalent in American schools today than it was in the past, single-sex schools predominated from roughly the time of the founding until the 1920s.[2] Coeducational schools eventually became the norm, but researchers continued to explore whether single-sex instruction offered students a valuable educational experience.

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[2] See *Debating Single-Sex Education: Separate and Equal?* at v-vi (Frances R. Spielhagen ed., 2d ed. 2013).

1. That research confirmed that single-sex education offers distinctive benefits to students of both sexes. For example, students in single-sex schools are less likely to categorize subjects as "masculine" or "feminine," and more likely to engage with subjects historically associated with the opposite sex.[3]

Studies have additionally shown students in single-sex institutions to be more "academically minded" and less likely to focus on other characteristics such as athletic skill or physical attractiveness.[4] Indeed, one study of U.S. charter schools found that "more than half of single-sex charters had substantially higher proficiency rates than their neighbors."[5] In other words, single-sex schools allow students to explore their passions free from sex stereotypes, cultural expectations, and group norms.

Single-sex schools also provide many social and emotional benefits for students. Researchers con-

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[3] See Hofman, Note, *"Exceedingly [Un]Persuasive" and Unjustified: The Intermediate Scrutiny Standard and Single-Sex Education After* United States v. Virginia, 2015 Mich. St. L. Rev. 2047, 2055 (2016); P. Haag, *Single-Sex Education in Grades K-12: What Does the Research Tell Us?*, *in Separated by Sex* 13, 19 (Susan Morse ed., Am. Ass'n of Univ. Women Educ. Found. 1998) (discussing study in which younger "girls from single-sex schools showed much stronger preferences than their coed peers for such stereotypically 'masculine' subjects as mathematics and science. Young boys from single-sex schools similarly showed stronger preferences for such stereotypically 'feminine' subjects as music and art.").

[4] Hofman, 2015 Mich. St. L. Rev. at 2055.

[5] N. Malkus & J. Hatfield, Am. Enter. Inst., *Differences by Design? Student Composition in Charter Schools With Different Academic Models* 16 (2017).

ducting a study for the United States Department of Education observed "more positive student interactions" and "more positive academic and behavioral interactions between teachers and students in the single-sex schools than in the comparison coed schools."[6]

The benefits provided by single-sex institutions extend beyond the students' time in school. Researchers in Great Britain determined that women who attended all-girl secondary schools earned "up to 10 per cent more than those" who attended mixed-sex institutions and were "more likely to study 'boys' subjects' such as maths and physics, helping them break into male-dominated careers."[7] Here in the United States, researchers found that boys who attended single-sex schools were more likely to consider applying to graduate schools and, when taking postsecondary tests, demonstrated a "significant" advantage in "mathematics ability."[8]

2. It is unsurprising, therefore, that the United States federal and state governments have recognized and embraced the benefits of single-sex primary and secondary schools. Regulations promulgated

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[6] Off. of Plan., Evaluation & Pol'y Dev., U.S. Dep't of Educ., *Executive Summary* to Early Implementation of Public Single-Sex Schools: Perceptions and Characteristics, at x (2008) (prepared by RMC Rsch. Corp.).

[7] Clark, *More career women come from single-sex schools*, Daily Mail (Sept. 22, 2006), https://tinyurl.com/54emsjjm.

[8] Off. of Plan., Evaluation & Pol'y Dev., U.S. Dep't of Educ., Doc # 2005-01, *Single-Sex Versus Coeducational Schooling: A Systematic Review* 34 tbl. 8, 55 tbl. 16 (2005) (prepared by Am. Insts. for Resch./RMC Rsch. Corp.), available at https://files.eric.ed.gov/fulltext/ED486476.pdf.

by the United States Department of Education, for example, expressly permit single-sex charter schools. See 34 C.F.R. § 106.34(c)(2).

Over one third of the 50 States similarly permit some form of single-sex charter schools by law or regulation.[9] In Connecticut, the State Board of Education is even required to "give preference to applicants for charter schools * * * whose primary purpose is the establishment of education programs designed to serve," among other student populations, "students of a single gender." Conn. Gen. Stat. § 10-66bb(c)(3)(A)(vi). Given the many benefits single-sex charter schools offer, it makes sense that lawmakers would authorize and prioritize their operation.

B. Single-Sex Charters Face the Threat of Extinction Under the Court of Appeals' Decision

Although single-sex charter schools are authorized by law and are recognized for their distinctive benefits, such schools will be particularly susceptible

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[9] See Ariz. Rev. Stat. Ann. § 15-184(H); Conn. Gen. Stat. § 10-66bb; Fla. Stat. § 1002.311; Haw. Rev. Stat. § 302D-34; Ind. Code § 20-24-5-4; Ky. Rev. Stat. Ann. § 160.1592(19); Miss. Code Ann. § 37-28-23(8)(e); Mo. Rev. Stat. § 160.410.3; N.J. Admin. Code 6A:11-2.1(b)(6); N.Y. Educ. Law § 2854; N.C. Gen. Stat. § 115C-218.45(e); Ohio Rev. Code Ann. § 3314.06(D)(1)(a); S.C. Code Ann. § 59-40-50(B)(7); Utah Code Ann. § 53G-5-301(2); see also Mich. Comp. Laws Ann. § 380.1146(2) (permitting single-sex charters so long as there is a corresponding school for students of opposite sex); Wis. Stat. § 118.40(3)(h) (same); Del. Code Ann., Tit. 14, § 506 (permitting one same-sex school for each sex to operate at once); Nev. Rev. Stat. Ann. § 388A.453(8)(b) (permitting single-sex school for students who pose severe disciplinary problems).

to constitutional challenge under the majority's opinion below.

1. Lower courts have divided over whether single-sex primary and secondary public schools are constitutional under the Fourteenth Amendment. At least two courts have concluded that certain same-sex public secondary schools were (or were likely) unconstitutional under the Equal Protection Clause. See *Garrett* v. *Board of Educ. of Sch. Dist. of Detroit*, 775 F. Supp. 1004, 1008 (E.D. Mich. 1991) (granting injunction prohibiting Detroit from operating six all-male academies after concluding plaintiffs challenging school were likely to succeed on constitutional claim); *Newberg* v. *Board of Pub. Educ.*, 26 Pa. D. & C.3d 682, 706–707 (Pa. C.P. 1983) (concluding Philadelphia's operation of specific boys' and girls' high schools violated the Equal Protection Clause). These courts largely relied on this Court's decision in *Mississippi University for Women* v. *Hogan*, which held that a state's operation of a single-sex nursing college violated the Equal Protection Clause, in part because the policy of excluding men "tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job." 458 U.S. 718, 729 (1982); see *United States* v. *Virginia*, 518 U.S. 515 (1996) (holding operation of the all-male Virginia Military Institute violated the Equal Protection Clause).

Other courts have held to the contrary. See, *e.g.*, *A.N.A. ex rel. S.F.A.* v. *Breckinridge Cnty. Bd. of Educ.*, 833 F. Supp. 2d 673, 675, 678–679 (W.D. Ky. 2011) (rejecting challenge to program that offered the option of single-sex classes and concluding there was no constitutionally cognizable injury in separating

classes based on sex); *Vorchheimer* v. *School Dist. of Philadelphia,* 532 F.2d 880, 887–888 (3d Cir. 1976) (rejecting challenge to all-boys high school where record "contain[ed] sufficient evidence to establish that a legitimate educational policy may be served by utilizing single-sex high schools"), *aff'd by an equally divided court*, 430 U.S. 703 (1977) (mem.); *Williams* v. *McNair*, 316 F. Supp. 134, 138 (D.S.C. 1970) (three-judge district court) (rejecting equal protection challenge to all-girls college where "[t]here [wa]s no suggestion that there is any special feature connected with [the college] that will make it more advantageous educationally to [male plaintiffs] than any number of other State-supported institutions"), *summarily aff'd*, 401 U.S. 951 (1971) (mem.); see also *Doe* v. *Wood Cnty. Bd. of Educ.*, 888 F. Supp. 2d 771, 778–779 (S.D.W. Va. 2012) (holding under Title IX that school district could not require parents to opt out of single-sex education but rejecting argument "that no single-sex classes would ever withstand scrutiny under the Constitution").

2. As those decisions suggest, there are sound reasons to conclude that, depending on their origins and purposes, many single-sex primary and secondary schools are constitutional. This Court in *Virginia* held only that the Commonwealth could not constitutionally reserve a "unique" and "premier" educational opportunity for one sex. 518 U.S. at 533 n.7. The Court specifically "d[id] not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities" generally. *Ibid.* (internal quotation marks and citation omitted). In fact, the Court recognized "the mission of some single-sex

schools to dissipate, rather than perpetuate, traditional gender classifications." *Ibid.* (internal quotation marks and citation omitted). And the Court acknowledged the "reality" that "[s]ingle-sex education affords pedagogical benefits to at least some students." 518 U.S. at 535.

Strong constitutional arguments in favor of single-sex charter schools will not, however, stop the lawsuits against these institutions once they are declared state actors. In fact, despite the clear benefits of single-sex education, a number of organizations are vocally opposed to allowing parents to choose this option for their children.[10] Under the court of appeals' decision, therefore, single-sex charter schools will be likely subjects of attack.[11] The rule adopted below threatens the very existence of this important educational option.

II. The Court of Appeals' Decision Endangers Institutions Adopting Classical Modes of Education

In addition to threatening the existence of single-sex charters, the decision below imperils charter schools that have adopted a classical educational

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[10] See generally Benham et al., *Single-Sex Education*, 20 Geo. J. Gender & L. 509, 521 (2019) (noting that "[s]everal groups, including NOW, the ACLU, and the Feminist Majority Foundation" objected to proposed rules that would allow public single-sex schools).

[11] See Hofman, 2015 Mich. St. L. Rev. at 2050–2051 ("Without a clear standard for analyzing sex-class isolations, the constitutionality of single-sex education will remain in limbo. Schools attempting to implement single-sex educational programs will continue to be faced with the threat of lawsuits.").

model and that recognize distinctions between males and females.

There is no question that the last century has witnessed increased "judicial oversight of the day-to-day affairs of public schools." *Morse* v. *Frederick*, 551 U.S. 393, 420 (2007) (THOMAS, J., concurring). As a result of the decision below, charter schools can expect similar constitutional litigation over myriad operational issues. And, regardless whether those lawsuits have any merit—charter schools, like many public schools, may well ultimately prevail on the claims against them—the schools will be forced to spend on that litigation time and resources that could be better spent innovating and educating students.

One likely focus of litigation will be charter schools' disciplinary policies. Many parents are drawn to charter schools precisely because of their distinctive behavior codes, including "clear consequences for misbehavior, positive reinforcements for desired behaviors, use of a 'zero tolerance' policy for potentially dangerous behaviors * * * and consistent schoolwide enforcement of the behavioral standards and policies in place."[12] Under the court of appeals' rule, however, charter schools will likely find such policies subject to challenge under the First, Fourth, and Fourteenth Amendments. See, *e.g.*, *Morse*, 551 U.S. 393 (lawsuit by student alleging that school vio-

[12] R. Lake, et al., Ctr. on Reinventing Pub. Educ. & McCullough et al., Mathematica Pol'y Rsch., *Executive Summary* to Learning from Charter School Management Organizations: Strategies for Student Behavior and Teacher Coaching 4 (2012).

lated his First Amendment rights by confiscating a pro-drug banner and suspending him); *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 666 (1995) (Fourth Amendment challenge to school drug testing policy); *Wynar* v. *Douglas Cnty. Sch. Dist.,* 728 F.3d 1062, 1064–1065 (9th Cir. 2013) (student suit raising First Amendment and due process claims against school for temporarily expelling him after he sent "increasingly violent and threatening instant messages.").

The decision below also turns charter schools' hiring and firing decisions into constitutional fodder. See, *e.g.*, *Pickering* v. *Board of Educ. of Twp. High Sch. Dist. 205,* 391 U.S. 563, 567–69 (1968) (suit by public high school teacher challenging his dismissal under the First Amendment); *Riley's Am. Heritage Farms* v. *Elsasser*, 32 F.4th 707, 716 (9th Cir. 2022) (suit by vendor raising First Amendment challenge to school's severing of business relationship), *motion to file petition for certiorari out of time denied,* No. 22M16 (U.S. Oct. 11, 2022). Decisions regarding what extracurricular clubs to sponsor will likewise be subject to judicial oversight. See, *e.g.*, *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (suit alleging school violated First Amendment when it would not permit club to meet on campus after hours).

Additional questions will likely arise: If the school allows others to gather on its property, are there circumstances in which it can be deemed a public forum? See generally, *e.g.*, *Shurtleff* v. *City of Boston*, 142 S. Ct. 1583, 1588 (2022) (because Boston "makes City Hall Plaza available to the public for events," Boston "acknowledge[d] that this means the

plaza is a 'public forum.'"). Even the process by which charter schools *make* their decisions will be subject to debate. See *Blau* v. *Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 396 (6th Cir. 2005) (due process claim objecting that parent and student "did not have notice or an opportunity to respond" to a proposed dress code).

Charter schools can also expect constitutional suits based on the bathrooms to which they assign students. See, *e.g.*, *Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (lawsuit alleging, among other claims, that rule requiring student to use restroom that corresponds with his biological sex, rather than gender identity, violated Equal Protection Clause), *abrogated on other grounds by Illinois Republican Party* v. *Pritzker*, 973 F.3d 760 (7th Cir. 2020), *cert. denied,* 141 S. Ct. 1754 (2021). And they may be subject to litigation if they separate their sports teams on the basis of biological sex. See, *e.g.*, *A.M. by E.M.* v. *Indianapolis Pub. Schs.*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430, at *14 (S.D. Ind. July 26, 2022) (alleging, among other things, that law prohibiting any male-bodied athletes from playing on girls' or women's team violated Equal Protection Clause), *appeal docketed*, No. 22-2332 (7th Cir. July 27, 2022).

Moreover, a school's dress code need not mandate skirts to prompt litigation; one family sued a school district claiming that its "dress code's prohibition on blue jeans violate[d] [students'] substantive due process rights." *Blau*, 401 F.3d at 393. In short, under the court of appeals' rule, no decision a charter school makes is safe from a constitutional challenge.

III. Charter Schools Will Not Be Able to Innovate Under This Increased Threat of Litigation

The threat of extensive litigation posed by the decision below raises other, collateral threats. Charter schools exist in order to give parents some degree of choice within the public education system. But these choices would not be possible if charter schools were subject to the same state mandates, bureaucratic dictates, and private lawsuits as traditional public schools. Charter institutions cannot be expected to operate, much less innovate, under the pall of litigation cast by their new state-actor status.

The legal framework created by the court of appeals is, therefore, untenable for these schools. Indeed, the court of appeals did not explain how these previously independent institutions will be able to function when every choice they make can potentially trigger a host of constitutional lawsuits. Administrators and educators who choose to work for charters in order to avoid the litigation that hampers public schools may well leave the field entirely. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982) (recognizing "the general costs of subjecting officials to the risks of trial," including "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service").

Operational costs apart from litigation will also likely rise, as schools are forced to change their policies to respond to the threat of suit. And single-sex charters may well have to close completely as a result

of the court of appeals' decision, despite dozens of laws and regulations that explicitly authorize their existence.

All of this will be a great loss for American families. Charter institutions were designed to provide innovative options for parents seeking alternatives to their local public schools. Like so many other educational institutions—including most private universities—charter schools receive public funding. But that does not transform them into state actors any more than the Massachusetts Institute of Technology's acceptance of federal money makes it a state school. See Pet. 25 (citing *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840–841 (1982)). By holding that charter schools are state actors, however, the court of appeals' decision will force these institutions to act like public schools and to eliminate the choices they currently provide. This Court should grant certiorari and hold that charter schools are not state actors.

CONCLUSION

For the foregoing reasons, as well as those stated by Charter Day School, the petition for certiorari should be granted.

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