No. 22-238

IN THE

Supreme Court of the United States

CHARTER DAY SCHOOL, INC, ET AL.,

Petitioners,

v.

BONNIE PELTIER, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* GREAT HEARTS ACADEMIES IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

Great Hearts Academies provides classical education in the United States. Dedicated to serving families in the moral and intellectual formation of their children, Great Hearts operates more than 40 tuition-free, K-12 charter schools throughout Arizona and Texas, serving over 25,000 students. Great Hearts' core mission is to cultivate students' minds and hearts through pursuit of the virtues summarized by its Latin motto—*verum*, *pulchrum*, *bonum* (truth, beauty, and goodness). Great Hearts works to develop the intellectual and moral excellence of its students and employs the Socratic method of teaching.

Great Hearts seeks to form great-hearted men and women, possessed of clear thought and noble character. Across its schools, Great Hearts had 555 graduates in the Class of 2020. The average SAT score of the class was more than 175 points above the national average, and the average ACT score was more than 7 points above the national average. Some 97% of students immediately attended college, and collectively earned more than $44 million in merit-based scholarships.

As a provider of classical education, Great Hearts has a deep interest in ensuring that charter schools across the United States continue to have the freedom and flexibility to offer innovative educational experiences for their students.

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[1] Per Rule 37.2(a), counsel for *amicus* provided notice to all parties at least 10 days prior to the due date, and all parties granted consent. Per Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In America, education has never been a function exclusively entrusted to the government. Private actors have always played an important, if not dominant, role in educating our country's children. During colonial times and in the early republic, nearly all children were educated in independent schools financed by community groups, charities, and, most notably, churches. Government-run schools providing universal education did not take hold until the mid-1800s, and even then, only in some communities. While the percentage of children educated in state-run public schools dramatically increased during the 20th century, private, parochial, and charter schools have continued to serve as robust alternatives to government schools. It is against this historical backdrop—and the Court's decision in *Rendell-Baker*—that the Fourth Circuit's *en banc* decision below must be judged.

In *Rendell-Baker* v. *Kohn*, this Court was asked to determine whether an independent school for students with substance-abuse and behavioral problems constituted a state actor for purposes of 42 U.S.C. § 1983, where that school received 90% to 99% of its funding from the government. 457 U.S. 830 (1982). The Court held that the school was not a state actor, based on three factors: (1) the government did not compel or coerce the conduct at issue; (2) there was not a symbiotic relationship between the school and the government regarding the conduct; and (3) the education of children who cannot be served by traditional public schools is not historically the exclusive function of the state. The Court's decision was not impacted by the fact that the school received nearly all its funding from

the state nor that state law required the state to provide the educational services offered by the school.

Since that decision, three courts of appeal—the First, Third, and Ninth Circuits—have faithfully applied the *Rendell-Baker* factors to hold that independent schools, including a charter school, were not state actors, even though the schools received nearly all their funding from the state. But in the decision below, the Fourth Circuit created a different rule. The court conceded that the state had zero involvement in the school conduct at issue—meaning that the first two *Rendell-Baker* factors were not satisfied—yet still held the school to be a state actor. To do that, the court relied on the clearly erroneous conclusion that the function served by charter schools in North Carolina is a function that has traditionally been reserved to the government—reasoning foreclosed by both *Rendell-Baker* and our nation's history.

Unless this Court corrects the Fourth Circuit's error and provides clear guidance that charter schools are not presumptive state actors, the decision below will wreak havoc on the educational systems in the Fourth Circuits and in other Circuits that have yet to address the issue. Charter schools were created due to a bipartisan belief that government-run public schools could *not* properly serve all their student populations. Whereas wealthier families could find alternatives to government education through private and parochial schools, poorer—and predominantly minority—families could not. Charter schools provide such students that alternative.

By design and definition, charter schools are run by independent entities that provide an alternative to government-run education. That independence frees

charter schools from bureaucratic and governmental constraints and allows them to offer innovative curricula and environments that government-run schools do not. If charter schools are deemed state actors, that innovation will be stifled.

Certiorari is warranted.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION IMPROPERLY DEPARTS FROM THIS COURT'S PRECEDENT AND THE PRECEDENT OF ITS SISTER CIRCUITS.

A. This Court and other Circuit Courts Have Employed a Consistent Framework to Determine Whether a School Engaged in State Action.

A plaintiff may succeed on a § 1983 claim only if a defendant acts "under color of" state law. 42 U.S.C. § 1983.[2] Section 1983's state-action requirement ensures that it does not cover "merely private conduct, […] how[ever] discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 (1999). "Careful adherence" to the requirement "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power," *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982), and promotes federalism by "avoid[ing] the imposition of responsibility on a State for conduct it could not control." *Nat'l Coll. Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179, 191 (1988). For these reasons, among others, a private entity can only "qualify as a state actor in a few limited

[2] This case involves only Section 1983 public-actor liability, not a charter school's status under any other state or federal law or constitutional provision.

circumstances." *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2019).

Here, the question before the Fourth Circuit was simple: Was Charter Day School a state actor where the state had zero involvement in compelling or coercing the challenged conduct? The Court's decision in *Rendell-Baker* requires that the question be answered a resounding 'no.'

In *Rendell-Baker*, the Court explained that, to determine whether a private actor has engaged in state action for the purposes of § 1983, a court must ascertain whether "the alleged infringement of federal rights [is] fairly attributable to the State." 457 U.S. at 838. The Court held that a school for children with drug, alcohol, behavioral problems and other special needs was not a state actor, despite the fact that: (1) the school received between 90% and 99% of its funding from the government; (2) nearly all the students were referred by the public school system or drug courts; (3) the public school systems paid the tuition for the students they referred; (4) the school issued diplomas certified by the public school system; and (5) the school was required to comply with detailed regulations concerning record-keeping, student-teacher ratios, and personnel matters. *Id.* at 831–33.

Although the Court has recognized that making the "fairly attributable" determination requires a fact-specific inquiry, it has generally employed three tests: (1) "the 'public function' test," (2) "the 'state-compulsion' test," and (3) "the 'nexus' test." *Lugar*, 457 U.S. at 939 (collecting cases); see *Lindke* v. *Freed*, 37 F.4th 1199 (6th Cir. 2022) (Thapar, J.) (same); cf. *Howell* v. *Father Maloney's Boys' Haven, Inc.*, 976 F.3d 750, 752 (6th Cir. 2020) (Sutton, J.).

Under the "public function" test, the "question is not simply whether a private group is serving a '"public function."' *Rendell-Baker*, 457 U.S. at 842. Rather, the "question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Id.* (emphasis added, citation omitted). The *Rendell-Baker* Court held that the education provided by the school—the provision of education to those who could not be served by traditional public school—was not such a function.

Under the "state compulsion" test, the question is whether the conduct at issue was compelled or coerced by the state. The *Rendell-Baker* Court held that the school's determination to discharge the plaintiffs was not compelled by the state or influenced by state regulation.

Under the "nexus test," the question is whether the conduct is "entwined with governmental policies" or subject to the government's "management or control," *Lindke*, 37 F.4th at 1203, such that there is a "symbiotic relationship" between the private actor and the state, *Rendell-Baker,* 457 U.S. at 843. The *Rendell-Baker* Court held that the "school's fiscal relationship with the State is not different from that of many contractors performing services for the government." *Id.* at 843.

The *Rendell-Baker* Court's opinion was not changed by the fact that the school was subject to "extensive" regulation *unrelated* to the challenged conduct, nor by the fact that "virtually all of the school's income was derived from government funding." *Id.* at 840.

Since *Rendell-Baker*, three circuit courts have addressed whether a publicly funded school engaged in state action. All three courts analyzed the issue using

the *Rendell-Baker* framework. And all three courts concluded that *Rendell-Baker* compelled the conclusion that the school's conduct could not be fairly attributed to the state. Like in the case below, none of the challenged conduct was compelled by the state. Thus, the core inquiry in each case was whether the schools were state actors under the "public function" test.

In *Caviness* v. *Horizon Community Learning Center, Inc.*, 590 F.3d 806 (9th Cir. 2010), the Ninth Circuit considered whether a private, non-profit charter school in Arizona engaged in state action under Section 1983 when it "took certain employment-related action with respect to a former teacher." *Id.* at 808. Just as here, the relevant statute designated the charter school a "public" school and charged the publicly funded charter schools with providing learning that will "improve pupil achievement." *Id.* at 808 n.1. Nonetheless, the court held the school was not a state actor.

Applying the "public function" test, the court held that education has never been the exclusive province of the state. In so holding, the court—citing *Rendell-Baker*—rejected plaintiff's argument that the function at issue was the provision of "public educational services," rather than simply "educational services." *Id.* at 814–15. The plaintiff reasoned that, though "education in general" can be provided by anyone, "*public* educational services" are traditionally and exclusively the province of the state. *Id.* at 815. But the court explained that this argument was "foreclosed" by *Rendell-Baker*. *Id.* The court reasoned that, just as in *Rendell-Baker*, the "legislative policy choice" to "provide alternative learning environments at public expense" in "no way makes these services the exclusive

province of the State." *Id.* (quoting *Rendell-Baker*, 457 U.S. at 842). The court further held that the state's statutory characterization of charter schools as "public" was not controlling. *Id.* at 815–16.

In *Logiodice* v. *Trustees of Maine Central Institute*, 296 F.3d 22 (1st Cir. 2002), the First Circuit considered whether a private corporation that contracted with a Maine public-school district to operate the *only* high school in the district—which had to "accept and educate all the school district's students"—engaged in state action when it disciplined a student. *Id.* at 24–25. Again, the court held that the school was not a state actor because the function served by the school was not the exclusive province of the state.

The court reasoned that "[o]bviously, education is not and never has been a function reserved to the state. In Maine, as elsewhere, schooling, including high school education, is regularly and widely performed by private entities; this has been so from the outset of this country's history." *Id.* at 26–27 (citation omitted). Like in *Caviness*, the court rejected the plaintiff's arguments that attempt to "narrow and refine" the function that should be the subject of the court's inquiry. *Id.* Specifically, the plaintiff argued that the court should consider only whether it has historically been the exclusive province of the state to provide "publicly funded education available to all students" in a "school of last resort." *Id.* at 27. In rejecting this argument, the court held that "[t]here is no indication that the Supreme Court [in *Rendell*] had this kind of tailoring by adjectives in mind when it spoke of functions 'exclusively' provided by government." *Id.*

Finally, in *Robert S.* v. *Stetson School, Inc.*, 256 F.3d 159 (3d Cir. 2001), the Third Circuit—in an opinion for

the court by then-Judge Alito—held that a publicly-funded school that educated juvenile sex offenders did not engage in state action in its alleged mistreatment of a student. The Third Circuit held that the "public function" test was not satisfied, as the education of juvenile sex offenders has historically been provided only by private entities. *Id.* at 166. The court rejected the plaintiff's argument that a different conclusion should be reached because the services the school provided were required by state law. *Id.* The court held that *Rendell-Baker* foreclosed this argument because the school in that case also provided services that a state statute required the state to provide. *Id.*

B. The Fourth Circuit's Decision Diverges from *Rendell-Baker*.

In the decision below, the Fourth Circuit conceded that neither the "state-compulsion" nor the "nexus" test were satisfied. The Court specifically stated that because "North Carolina was not involved in CDS' decision to implement the [dress code] requirement, there was no 'coercion' or 'pervasive entwinement' by the state with the challenged conduct." *Peltier* v. *Charter Day Sch., Inc.*, 37 F.4th 104, 116 (4th Cir. 2022) (en banc). Nonetheless, the court held that CDS qualified as a state actor based on: (1) an improper reformulation of the "public function" test; and (2) a consideration of additional factors that this Court has rejected.

The Fourth Circuit recognized that the "public function" test is satisfied only where the conduct at issue is "exclusively a state function." *Id.* at 117. But the court then defined the conduct in a manner that was outcome determinative. The court erroneously held that the appropriate question was whether "free," "universal," *and* "public" education has historically

been an exclusive function of the state. *Id.* at 118. Essentially, the court held that operating a state-run public school is the exclusive province of the state. While that may be true, nothing in this Court's precedents or circuit court decisions applying those opinions support such a gerrymander. Cf. *Carson* v. *Makin*, 142 S. Ct. 1987, 1999–2000 ("Maine's formulation does not answer the question in this case; it simply restates it.").

The Court "has stressed that 'very few' functions fall into" the category of exclusive state actions. *Halleck*, 139 S. Ct. at 1929 (quoting *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978)). Those few functions include "running elections and operating a company town." *Id.* (collecting cases); see *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 353 (1974) (noting that the function must be "traditionally associated with sovereignty, such as eminent domain"). That means most functions "do not fall into that category"—including "running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity." *Halleck*, 139 S. Ct. at 1929.

Thus, in the context of schools, *Rendell-Baker* and its progeny require that the court analyze the *function* that the school was fulfilling without normative judgments or outcome-determinative modifiers. In *Rendell-Baker,* the Court held that the function was "education for students who could not be served by traditional public schools." In *Caviness* and *Logiodice*, the courts held that the function was providing education or educational services. In *Robert S.*, the court held that the function was providing education to juvenile sex offenders.

Here, there can be some debate as to whether the proper function to be analyzed is "education" or "education that serves as an alternative to traditional public schools." Either way, it is clear that the function has never been the exclusive province of the state and has not been "traditionally associated with sovereignty." *Jackson*, 419 U.S. at 353.

"School choice predates America's founding. Children in the colonial era and early republic were educated through a variety of independent schools financed by local communities, churches, and charities." Dick M. Carpenter II & Krista Kafer, *A History of Private School Choice*, 87 Peabody J. of Educ., 337 (2012). Indeed, "churches . . . were the administrative centers for the vast majority of educational undertakings during" the Colonial Era all the way to the 1900s. *Id.* "Most schools financed their operation through charity or tuition, which meant all children, no matter their socioeconomic level, could attend school." *Id.*

"Although most Americans take for granted the presence of public schools, from their inception as a part of a national movement, these schools sparked controversy and political division." W. JEYNES, AMERICAN EDUCATIONAL HISTORY: SCHOOL, SOCIETY, AND THE COMMON GOOD 145 (2007). "Common, public schools supported by general taxes for all students would not be established until the middle of the nineteenth century, and then only in scattered communities." DONALD K. SHARPES, ADVANCED EDUCATIONAL FOUNDATIONS FOR TEACHERS: THE HISTORY, PHILOSOPHY, AND CULTURE OF SCHOOLING 253 (2001).

The availability of private and religious school choices for families "began to disappear […] as 'free' public schooling displaced independent schools." Car-

penter II & Kafer, *supra* at 336. Nonetheless, homeschooling and private, parochial, and charter schools have continued to provide a robust alternative to state-run schools. As discussed in Section II, charter schools are just the most recent manifestations of school choice, intended to give poorer students the same choice available to middle-class and wealthy families via private and parochial schools.

This determination—*that education has never been the exclusive province of the state and that there have always been alternatives to government-run schools*—ends the state actor inquiry.

Contrary to the Fourth Circuit's decision, this conclusion is *not* impacted by the fact that:

- CDS is almost exclusively funded by the state. *Peltier*, 37 F.4th at 118. The *Rendell-Baker*, *Caviness*, *Logiodice*, and *Robert S.* courts all held that the schools were not state actors, despite receiving all or nearly all of their funding from the government.
- The North Carolina Constitution requires the state to provide free public schools. *Id.* at 117–18. In *Rendell–Baker* and *Robert S.*, the schools were not state actors, despite state laws requiring the states to offer the educational services provided by the schools. The fact that the states made the "legislative policy choice" to partially fulfill their obligations through private entities did not somehow transform those private entities into state actors. So too here.
- North Carolina law designates charter schools as "public." *Id.* at 117. It is true that charter schools are state partners who subject themselves to a state regulatory regime. But that

> does not make them public actors under Section 1983, as this Court's precedents make clear. For example, in *Jackson*, the Court disregarded a state's statutory designation of a utility as "public" and instead found that the utility was not a state actor based on the fact that supplying a utility was not traditionally the exclusive prerogative of the state. *Jackson*, 419 U.S. at 353. Following such precedent, the *Caviness* court eschewed the statutory labeling of charter schools as public and instead faithfully analyzed the factors set forth in *Rendell–Baker*. The Fourth Circuit should have done the same here.

Finally, the Fourth Circuit's reliance on *West* v. *Atkins*, 487 U.S. 42 (1988), is misplaced. That case involved a prisoner who claimed that a doctor employed by the prison inflicted upon him cruel and unusual punishment. As the *Logiodice* court held, *Atkins*' reasoning is inapplicable here. "The [*Atkins*] decision emphasized both that the plaintiff was literally a prisoner of the state (and therefore a captive to whatever doctor the state provided) and that the state had an affirmative constitutional obligation to provide adequate medical care to its prisoners […]." 296 F.3d at 29. "By contrast," the court continued, "the plaintiff in our case is not required to attend [the school]; and the Supreme Court has rejected any federal constitutional obligation on the state to provide education." *Id.*

II. THE FOURTH CIRCUIT'S REASONING WOULD DESTROY THE INNOVATION THAT CHARTER SCHOOLS ARE INTENDED TO FOSTER.

A. Charter Schools are Key to Education Innovation.

"The concept of private school choice—that is, government-sponsored school choice programs that allow families to choose private schools—is not new. The longest running of such programs originated more than 100 years ago in Maine and Vermont." Carpenter II & Kafer, *supra* at 336. Charter schools, however, are relatively new players in the Nation's education system.

After state-run schools became the primary mode of education in the United States, conservative "economists and liberal academics alike argued for school choice[.]" Zachary Jason, *The Battle Over Charter Schools*, Harv. Ed. Mag. (Summer 2017), https://bit.ly/3M69ExQ. Conservatives framed the argument in favor of allowing market forces, not government bureaucracies, to shape education. *E.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 86–89 (1962). Liberals argued for the need to "decentraliz[e]" public schools, thereby "promot[ing] diversity, pluralism, responsiveness to the needs of the community being served and, […] greater efficiency." Theodore Sizer & Phillip Whitten, *A Proposal for a Poor Children's Bill of Rights*, PSYCH. TODAY 62 (Aug. 1968).

Charter schools were first proposed by Ray Buddee in the 1970s. Ted Kolderie, *Ray Buddee and the origins of the 'Charter Concept'*, Educ.|Evolving (June 2005), https://bit.ly/3fUvQPa. But the movement did not take hold until the 1980s, after "think tanks and the federal

government released a series of damning reports on public schools, most notably the Reagan Administration's A Nation at Risk: The Imperative for Education Reform, [a] 1983 report that warned of a 'rising tide of mediocrity.'" Jason, *supra*.

That report determined that the Nation's education system was in crisis, cataloguing metrics showing that educational results were in a free-fall. For example, the Commission detailed a continuous and dramatic decline in test scores, a widening achievement gap between US students and foreign competitors, and a functional illiteracy rate among minority youth approaching 40%. Nat'l Comm'n on Excellence in Edu., *A Nation at Risk: The Imperative for Educational Reform* (Apr. 1983) https://bit.ly/3rxgMK1.

In 1991, Minnesota passed the first law allowing the formation of public charter schools. Nat'l Ctr. for Educ. Stats., *Public Charter School Enrollment* (2022) https://bit.ly/3yhxLEa. Currently, 45 States and the District of Columbia authorize the formation of public charter schools. *Id.* By the fall of 2019 (*i.e.*, pre-COVID-19), 3.4 million students were enrolled in charter schools. *Id.* Since the Pandemic, charter schools have experienced a 7% enrollment surge. Debbie Veney & Drew Jacobs, *Voting With Their Feet: A State-Level Analysis of Public Charter School and District Public School Trends*, Nat'l All. for Pub. Charter Schs. (Sept. 2021), https://bit.ly/3V8lOdt. Today, an estimated 3.6 million students are enrolled in charter schools. Nat'l All. for Pub. Charter Schs., *Research and Data* https://bit.ly/3C4TPmm (last visited Oct. 12, 2022).

State laws governing charter schools vary widely, but the schools all have one thing in common: though state partners, "[by] their very nature, charter schools

are independent" because they "operate outside the school district." Lyria Boast, et al., *Learning in Real Time: How Charter Schools Served Students During COVID-19 Closures*, Nat'l All. of Pub. Schs. 2 (Aug 2020), https://bit.ly/3T0Vv7p. The schools' charters grant them autonomy to develop curricula, policies, and budgets free from many of the regulations that bind state-run schools. Emily Langhorne, *Five Reasons Why Independent Charters Outperform In-District Autonomous Schools*, Forbes (Aug. 23 2018), https://bit.ly/3T15UzF. Indeed, this is the primary purpose of charter schools: to give students the option to attend schools that are different—and hopefully better—than government schools. *Id.*

One goal of charter schools is to put poorer students on equal footing with their wealthier counterparts. The modern "propulsion toward school choice [...] has always been that way too few kids in America have been able to pick their schools, and way too many have been stuck in bad schools that they have no alternative to." Jason, *supra* (quotation omitted). While wealthy and middle-class families can opt out of traditional public schools, sending their children to private and parochial schools, poorer families cannot. Charter schools—which are free to attend—provide these families an alternative to state-run public schools. See, *e.g.*, James E. Ryan, *A Choice Question: School Choice and Educational Equity*, Edu. Week (Mar. 29, 2016), https://bit.ly/3V59ESH.

Because they are state partners yet remain independent, charter schools are free to craft a tailored learning experience that meets their students' needs. Boast et al., *supra*. For some charter schools, this flexibility means designing a curriculum around a particular subject or skill set—such as college prep, STEM,

or the Arts. *Id.* For others, the school is organized around a teaching method—such as Montessori—or have longer school days and calendars to accommodate working parents. *Id.* Through these innovations, charter schools are "finding better ways to serve students who have traditionally been underserved, and [are] delivering exceptional results." *Id.* at 3.

Because charter schools can cater to students' unique needs, they offer a host of proven educational and social benefits to students. The greatest beneficiaries tend to be low-income and minority students. Jason, *supra*. According to one study, charter school offer low-income Black students 59 more days of math learning and 44 more days of reading education per year compared to government school counterparts. Max Eden, *Issues 2020: Charter Schools Boost Results for Disadvantaged Students and Everyone Else*, Manhattan Inst. (Jan. 28, 2020), https://bit.ly/3rQklvf. Another study found that among a group of charter schools in New York City, admission corresponded with decreased rates of teen pregnancy and likelihood of incarceration. Will Dobbie & Roland G. Fryer, Jr., *The Medium-Term Impacts of High-Achieving Charter Schools*, J. Pol. Econ. 123, no. 5 (Oct. 2015), https://bit.ly/3fMaTWV. A third study found that charter school attendance correlates with a significant decrease in arrests for drug and violent felonies. David J. Deming, *Does School Choice Reduce Crime?* Educ. Next 12, no. 2 (Spring 2012), https://bit.ly/3fMaYKd.

B. The Fourth Circuit's Decision Stifles Innovation.

If left intact, the Fourth Circuit's decision would stifle charter schools' ability to provide innovative educational choices and opportunities, thereby depriving disadvantaged students of the options available to

their more fortunate peers. By deeming charter schools to be state actors for purposes of Section 1983 liability, the schools will be unable to engage in innovative practices that have proven effective in affording students a superior education to that available in state-run schools. A few examples illustrate this point.

1. Single-Sex Charter Schools

Single-sex schools provide enormous benefits to their students. *E.g.*, Teresa A. Hughes, *The Advantages of Single-Sex Education*, 23 Nat'l Forum of Educational Admin. & Supervision J. 2, 13 (2006) https://bit.ly/2swFNGX ("[I]n single-sex settings teachers are able to design the curriculum to tailor to the individual needs of each sex."); Amy Robertson Hayes, et al., *The Efficacy of Single-Sex Education: Testing for Selection and Peer Quality Effects*, in Sex Roles (Nov. 2011) at 10, https://bit.ly/3fJCVCl ("Girls attending a single-sex school outperformed those girls attending coeducational schools"). Accordingly, "since the 1990s, there has been a resurgence of interest in single-sex education in public schools [.]" Melinda D. Anderson, *The Resurgence of Single-Sex Education*, The Atlantic (Dec. 22, 2015) https://bit.ly/3V6n3d4.

There are numerous single-sex charter schools, many of which emphasize STEM education for girls.[3] Although women make up a majority of college applicants and incoming college students, they earn only 36% of STEM degrees. Kim Parker, *What's Behind the Growing Gap Between Men and Women in College Completion?*, Pew Research (Nov. 8, 2021) https://pewrsr.ch/3EhYZ0W; STEM Women, *Women*

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[3] *E.g.*, Girls Leadership Academy of Wilmington (NC); Chattanooga Girls Leadership Academy (TN); Hawthorn Leadership School for Girls (MO); Young Women's Leadership Academy (TX).

in STEM USA Statistics (May 21, 2021), https://bit.ly/3RBPxZh. Because of this pipeline problem, although women make up *nearly half* of the Nation's workforce, they account for *only 27%* of STEM workers. Anthony Martinez & Cheridan Christnacht, *Women Are Nearly Half of U.S. Workforce but Only 27% of STEM Workers,* U.S. Census Bureau, (Jan. 26, 2021) https://bit.ly/3MaJfPj. "By graduation, men outnumber women in nearly every science and engineering field, and in some, such as physics, engineering, and computer science, the difference is dramatic, with women earning only 20 percent of bachelor's degrees." Am. Ass'n of Univ. Women, *Why So Few?* (Feb. 2010) xiv, https://bit.ly/3T14pBR.

Girls-only, STEM-based charter schools aim to fix this problem. And it works. "Graduates of girls' schools are six times more likely to consider majoring in math, science, and technology and three times more likely to consider engineering compared to girls who attend coed schools." Int'l Coal. of Girls Schs., *Why Girls' Schools*, https://bit.ly/3M6SbW3.

If charter schools are state actors under Section 1983, there is a strong likelihood that they would face lawsuits and adverse decisions holding their single-sex policies impermissible. In 1996, this Court held that the categorical exclusion of women from the Virginia Military Institute ("VMI")—then a public all-male college—violated the 14th Amendment's equal protection guarantee. *United States* v. *Virginia*, 518 U.S. 515, 534 (1996). In dissent, Justice Scalia noted that the logic of the holding rendered "single-sex public education . . . unconstitutional." *Id.* at 595 (Scalia, J., dissenting).

Notwithstanding Justice Scalia's warning, the Department of Education has since adopted regulations allowing public single-sex education, provided that a

"substantially equal" school is also operated for the opposite sex. 34 C.F.R. § 106.34(c)(1). It seems only a matter of time before advocates challenge the Department's regulations and ask this Court to hold that its *VMI* decision renders single-sex primary and secondary schools unconstitutional. *See* David S. Cohen & Nancy Levit, *Still Unconstitutional: Our Nation's Experiment With State Sponsored Sex Segregation in Education*, 44 Seton Hall L. Rev. 339 (2014); Elizabeth Weil, *Teaching Boys and Girls Separately*, N.Y. Times Mag. (Mar. 2, 2008) https://nyti.ms/3Mgfgpd (noting that the ACLU opposes all single-sex education); The Leadership Conf. on Civ. & Human Rts., *Single-Sex Proposed Regulations Comments* (Apr. 23, 2004), https://bit.ly/3RFRjIS (opposing single-sex public schools as unconstitutional, citing *VMI*). Based on the reasoning in *VMI*, there is a strong possibility that those challenges would be successful. And, if determined to be state actors, charter schools would be the subject to the courts' decisions. The risk is clear: while wealthy and middle-class students would continue to reap the perceived benefits of single-sex education in private and parochial schools, their disadvantaged peers would not.

2. Charter Schools Emphasizing Stricter Discipline

Charter schools play a particularly important role in inner cities, where they offer a viable alternative to government-run schools. *See* Philip M. Gleason, *What's the Secret Ingredient? Searching for Policies and Practices that Make Charter Schools Successful*, Mathematica Policy Research Working Paper No. 47 at 9–10 (July 2016). Indeed, "[t]he greatest demand for charters comes from parents in urban areas like Newark and D.C. that have struggled with low-performing

traditional public schools." Laura McKenna, *Why Don't Suburbanites Want Charter Schools?*, The Atlantic (Oct. 1, 2015), https://bit.ly/3fMlOQj. In such areas, violence, lawlessness, and apathy often prevent motivated students from receiving the education that they deserve. *E.g.*, Gerald J. Brunetti, *Resilience Under Fire: Perspectives on the Work of Experienced, Inner City High School Teachers in the United States*, 22 Teaching & Teacher Edu. 812, 812 (2006).

In such areas, charter schools offer demanding curricula and safe environments where inner-city students can learn. To operationalize that mission, the schools often employ strict rules and stringent discipline.

This approach has shown great success. The network of Success Academy Charter Schools is one example. Success Academy opened its first campus in Harlem in 2006, but today it operates four dozen New York City campuses that serve more than 10,000 students, most of them from traditionally disadvantaged socioeconomic groups.

Parents flock to the Academy, hoping to provide their children a path to success. With good reason. Among other things, Success Academy students outscore other students in the City by more than two-fold. Rebecca Mead, *Success Academy's Radical Educational Experiment*, The New Yorker (Dec. 4, 2017), https://bit.ly/3CAeXCr ("[N[inety-five per cent of Success Academy students achieved proficiency in math, and eighty-four per cent in English Language Arts; citywide, their respective rates were thirty-six and thirty-eight per cent."). Academy students are "testing dynamo[s]" who outscore even many of their counterparts in wealthy suburbs. Kate Taylor, *At Success Academy, Charter Schools, High Scores and Polarizing*

Tactics, NY Times (Apr. 6, 2015) https://nyti.ms/3M9XCnd.

Part of the Academy's recipe for success is a strict disciplinary policy. For example, in 2015, the schools suspended 11% of their students over the course of the school year, compared to the 4% suspension rate of the City's public schools. Eva Moskowitz, *Turning Schools Into Fight Clubs*, WSJ (Apr. 1, 2015) https://on.wsj.com/3CAfPH9. In some Academy schools, up to 20% of students may be suspended at least once during the school year. Mead, *supra*.

The Academy and the thousands of families who choose to attend deem this discipline necessary to achieve the schools' (undeniably) stellar results. Eva Moskowitz, the founder of Success Academy, explains that "we have found that when rules are clearly established and are fairly and consistently enforced, the learning environment is purposeful and joyful." Moskowitz, *supra*. It also teaches children real-life skills: "In [the real world], when you assault your co-worker or curse out your boss, you don't get a 'restorative circle,' you get fired." *Id.* Accordingly, "[s]uspensions convey the critical message to students and parents that certain behavior is inconsistent with being a member of the school community." *Id.*

Deeming charter schools state actors hinders the implementation of such disciplinary philosophies. This Court and the lower courts have heard numerous Section 1983 cases regarding school suspensions and expulsions, including cases alleging violation of free speech and due process rights. *E.g.*, *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Mahoney Area Sch. Dist.* v. *B.L.* ex rel *Levy*, 141 S. Ct. 2038 (2021); *Tinker* v. *Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). If allowed to

stand, the Fourth Circuit's decision will open the floodgates to Section 1983 claims against charter schools.[4] The result will again be that poor and minority families suffer the greatest loss. Middle-class and wealthy families will have the option to send their children to private schools with stricter codes of conduct if they deem such an environment necessary or beneficial. Poor and minority students will lack such an option.

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It is difficult to reliably predict all the practices that will face challenge if charter schools are subjected to § 1983 claims. But one thing is certain: such suits would threaten the very independence and innovation that charter schools need, that parents demand, and that students deserve.

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[4] In fact, in recent years, Success Academy has been sued for alleged due process violations related to suspensions and expulsions. The district courts have allowed those suits to proceed as a result of district court precedent employing the same flawed logic adopted by the Fourth Circuit. *See Patrick* v. *Success Acad. Charter Sch., Inc.,* 354 F. Supp. 3d 185, 209 (E.D.N.Y. 2018).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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