

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.,

Respondents.

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

**BRIEF OF *AMICI CURIAE* TIMOTHY K.
MOORE, SPEAKER OF THE NORTH
CAROLINA HOUSE OF REPRESENTATIVES,
AND PHILIP E. BERGER, PRESIDENT PRO
TEMPORE OF THE NORTH CAROLINA
SENATE IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Whether a private entity that contracts with the State to operate a charter school engages in state action when it formulates a policy without coercion or encouragement by the government.

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INTEREST OF *AMICI CURIAE*¹

Timothy K. Moore is Speaker of the North Carolina House of Representatives. Speaker Moore was first elected to the General Assembly in 2002 and is currently serving his fourth term as the presiding officer of the North Carolina House of Representatives. He is the longest serving Republican House Speaker in North Carolina history. Under his leadership, the House of Representatives has substantially increased teacher pay and overall K-12 educational spending, worked to reduce class sizes, and supported efforts to increase K-12 technological instruction in, for example, computer coding and robotics.

Philip E. Berger is President Pro Tempore of the North Carolina Senate. Senator Berger was first elected to the State Senate in 2000. He was elected minority leader in 2004 and then President Pro Tempore in 2010. Senator Berger has supported education-focused legislation, including legislation to lift the cap on the number of public charter schools, to raise teacher salaries, and to provide opportunity scholarships and scholarships for disabled students and those in failing schools.

As leaders of North Carolina's General Assembly, Speaker Moore and President Pro Tempore Berger

¹ Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties were timely notified pursuant to Rule 37.2(a) of *amici curiae*'s intent to file this brief, and all parties have provided written consent to its filing.

have an interest in North Carolina's laws and specifically in those laws concerning education. They submit this amicus brief to underscore the importance of charter schools to education in North Carolina and how the opinion of the United States Court of Appeals for the Fourth Circuit threatens North Carolina's charter school program.

INTRODUCTION AND SUMMARY OF ARGUMENT

North Carolina aims to promote innovative and flexible learning methods through its charter schools. These schools function as laboratories, where novel teaching methods compete to provide parents and students with expanded choice. Parents and students then have the freedom to choose which educational experience suits them best, whether at one of these charter schools, in the traditional public school system, in selective private schools, or through home schooling. North Carolina has carefully crafted this educational structure to provide students and parents choices, diversity, and independence.

North Carolina has chosen to foster its goals of diversity and experimentation by ensuring that charter schools operate autonomously from the State. This is evident from the face of the Charter School Act, N.C. Gen. Stat. § 115C-218 *et seq.* That statute expressly provides that charter schools are to operate "independently" of the State, that the "private nonprofit corporation[s]" responsible for the schools "shall decide matters related to the operation of the school," and that the private entities and individuals operating these schools can neither bind the State nor incur

liability on its behalf. Charter schools' actions are the actions of these "private nonprofit" entities, they are not made "under color" of state law and so cannot give rise to a claim under 42 U.S.C. § 1983.

The Fourth Circuit's decision to the contrary threatens to stifle innovation and profoundly harm North Carolina's charter school program. The decision may directly jeopardize some existing charter schools—for example, those that offer single-gender education. It may dissuade additional experimentation in education by other schools that could serve the public interest. And by enabling a new category of constitutional litigation against charter school programs, policies, and personnel decisions, the decision threatens crippling litigation and fees against all charter schools.

This Court should grant the petition for a writ of certiorari, reverse the Fourth Circuit, and preserve the educational choice that the North Carolina's General Assembly established in the Charter School Act.

ARGUMENT

I. North Carolina's Charter Schools Provide Innovative Learning Methods and Enhanced Educational Choice.

In North Carolina, as in many other States, "education is not and never has been a function reserved to the state." *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002). "From its early beginnings, the North Carolina legislature provided some public funds to private schools." Pet. App. 67a-68a (Quattlebaum, J., concurring in part, dissenting in

part) (citing 1805 N.C. Sess. Laws 27 (An Act Respecting the Warrenton Academy) (granting a surplus of £250 in local tax revenue to Warrenton Academy)).² Today, North Carolina has a diverse set of educational opportunities—including traditional public schools, charter schools, selective private schools, and home schooling—that allow families to select the learning environments that best suit their students. The North Carolina General Assembly supports each of these options.³ But charter schools play an important role within this broader framework by providing innovative and unique education opportunities to all students.

A. The North Carolina legislature recognized this benefit when it passed the Charter School Act in 1996. That law “authorize[d] a system of charter schools to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently of existing schools.” N.C. Gen. Stat. § 115C-218(a). The Act has led to the proliferation of charter schools throughout the State that are excelling academically and providing North

² See also 1809 N.C. Sess. Laws LXXII (An Act to Amend an Act, Entitled “An Act to Establish an Academy in the City of Raleigh,” Passed in the Year One Thousand Eight Hundred and One); 1796 N.C. Sess. Laws LXI (An Act to Authorize the Trustees of the Lumberton Academy to Lay off and Sell a Part of the Town Common; to Raise a Fund for the Purpose of Building Said Academy).

³ For example, in 2013, the North Carolina legislature established the Opportunity Scholarship Program, which is an income-based scholarship program that allows students to attend selective private schools they would not otherwise be able to afford. See N.C. Gen. Stat. § 115C-562.2.

Carolínians with “different,” “innovative” educational choices. *Id.* § 115C-218(a)(1), (3).

The Act permits any “nonprofit corporation” to apply “to establish a charter school.” N.C. Gen. Stat. § 115C-218.1(a). The application must contain information concerning the charter school’s distinctive mission and how the school will fulfill the Charter School Act’s goals. *Id.* §§ 115C-218.1(b), 115C-218.15(c). After review by the State Board of Education and the North Carolina Charter Schools Advisory Board (an entity created by the Charter School Act), *id.* §§ 115C-218(b)(2), (b)(10)(b), 115C-218.5(a), the State Board may accept the application if it finds the applicant would run the school “in an educationally and economically sound manner” and would achieve the purposes of the Charter School Act, including to “[e]ncourage the use of different and innovative teaching methods” and to “[i]ncrease learning opportunities for all students.” *Id.* §§ 115C-218.5(a), 115C-218(a)(2)-(3).

If an application is granted, the State Board and the applicant enter into a “charter,” or contract, for the applicant to operate the school. N.C. Gen. Stat. § 115C-218.15(c). The board of directors of the private entity that established the school then operates the school, having authority for “budgeting, curriculum, and operating procedures.” *Id.* § 115C-218.15(b), (d). The board is required to comply with certain “[g]eneral operating requirements,” like “Health and Safety Standards,” *id.* § 115C-218.75(a), and to ensure the school meets baseline “student performance standards adopted by the State Board of Education.” *Id.* § 115C-218.85(a)(2). But the charter school otherwise has significant flexibility and is encouraged to “use * * *

different and innovative teaching methods” to educate its students. *Id.* § 115C-218(a)(3).⁴

B. Since its creation in 1996, the North Carolina charter school program has been a massive success. Ninety-one charter schools opened in the first five years after the Act was passed.⁵ And since 2011, when the legislature lifted the 100-charter-school cap from the original Act, the number of charter schools has more than doubled. Today, there exist over 200 charter schools serving over 130,000 students—approximately eight percent of North Carolina’s students.⁶ Demand for these innovative schools is even higher; 73% of charter schools have students on waitlists, and over 60,000 students are on charter school waitlists.⁷

North Carolina charter schools take full advantage of the flexibility and autonomy the law allows to uniquely meet students’ and families’ needs. For example, the Sterling Montessori Academy offers “a diverse educational community, grounded in the Montessori philosophy and teaching practices,” which is

⁴ The State Board and local school administrative units provide funding to charter schools in an amount roughly equivalent, on a per-pupil basis, to the allocation in the traditional public school system, with more funds provided for students who have disabilities or limited English proficiency. N.C. Gen. Stat. § 115C-218.105(a), (d).

⁵ N.C. State Bd. of Educ., 2021 Annual Charter Schools Report 30 (June 15, 2022), available at <https://webservices.ncleg.gov/ViewDocSiteFile/70190>.

⁶ 2021 Annual Charter Schools Report 3, 30.

⁷ 2021 Annual Charter Schools Report 3.

not otherwise offered by North Carolina’s traditional public schools.⁸ FernLeaf Community Charter School offers “[e]xperiential” and “Project Based Learning” that provides students with “1.5+ hours of outdoor time each school day.”⁹ And petitioner Charter Day School prides itself on offering “a classical curriculum espousing the values of traditional western civilization.”¹⁰

Other charter schools have innovated by targeting a specific population or subject matter. The Girls Leadership Academy of Wilmington, for example, is a “unique single-gender public charter school environment” for girls,¹¹ while the School of the Arts for Boys Academy—which will open in the 2023-24 school year—will provide “culturally and linguistically diverse boys a high-quality education.”¹² Elsewhere, the North Carolina Leadership Academy “seeks to develop student potential through [each student’s] empowerment in a participative leadership role” and

⁸ Mission, Philosophy and Strategic Plan, Sterling Montessori, <https://sterlingmontessori.org/index.php/page-types/welcomemissionschool-profile> (last accessed Oct. 13, 2022).

⁹ FernLeaf Community Charter School, <https://www.fernleafccs.org/> (last accessed Oct. 13, 2022); *see* Outdoor & Environmental, FernLeaf Community Charter School, <https://www.fernleafccs.org/outdoor-environmental> (last accessed Oct. 13, 2022).

¹⁰ Our Curriculum, Classical Charter Schools, <http://charterdayschool.net/philosophy/our-curriculum/> (last accessed Oct. 13, 2022).

¹¹ Girls Leadership Academy of Wilmington, <http://www.glowacademy.net> (last accessed Oct. 13, 2022).

¹² School of the Arts for Boys Academy, <http://www.sabacademy.org> (last accessed Oct. 13, 2022).

specifically targets students from the Civil Air Patrol for participation in its leadership-focused curriculum.¹³ Several other charter schools offer curricula focused on “Science, Technology, Engineering, the Arts, and Math,”¹⁴ or with other subject matter emphases (*e.g.*, agriculture).¹⁵

The numbers demonstrate that these schools are succeeding in educating North Carolinians. During the 2020-21 school year, 96% of “charter schools met or exceeded all financial and operational goals.”¹⁶ The students benefitting from these schools, moreover, come from a diverse set of backgrounds. In the 2021-22 school year, 50.3% of charter school students were students of color; 22.5% were economically disadvantaged; and 10.3% had disabilities.¹⁷

In short, the North Carolina General Assembly designed charter schools to function as pedagogical laboratories, where novel “teaching methods” compete to “provide parents and students with expanded choices in the types of educational opportunities that

¹³ School Profile, The North Carolina Leadership Academy, <https://thencla.org/profile.html> (last accessed Oct. 13, 2022).

¹⁴ TMSA Triangle, <https://www.tmsacademy.org/> (last accessed Oct. 13, 2022); *see* About Our Charter School, Southwest Charlotte STEM Academy, <https://scstemacademy.org/about-our-charter-school/> (last accessed Oct. 13, 2022).

¹⁵ Pocosin Innovative Charter provides “agriculture courses” and opportunities to work with “agriculture staff.” Student Life, Pocosin Innovative Charter, <https://www.pocosininnovativecharter.org/student-life> (last accessed Oct. 13, 2022).

¹⁶ 2021 Annual Charter Schools Report 24.

¹⁷ *Id.* at 36, 44, 46.

are available within the public school system.” N.C. Gen. Stat. § 115C-218(a)(1), (3), (5). Thankfully, this vision has been borne out by the many parents, students, board members, teachers, and employees who help North Carolina’s charter schools succeed.

II. The Charter School Act Ensures Innovation and Flexibility by Granting Charter Schools Independence from the State.

The principal trait of charter schools that supports the innovation and flexibility they provide is the North Carolina legislature’s decision to permit them to “operate independently” of traditional public schools. N.C. Gen. Stat. § 115C-218(a). Several aspects of the statutory scheme underscore charter schools’ independence from that traditional public school system and, ultimately, the State. The Fourth Circuit erred in concluding otherwise.

First, the Charter School Act provides that charter schools are “operated by * * * private nonprofit corporation[s],” not the State. N.C. Gen. Stat. § 115C-218.15(b). Charter schools cannot bind the State, *id.* § 115C-218.105(b), and while the private, nonprofit operators of charter schools can “sue and be sued,” *id.* § 115C-218.20(a), “no civil liability * * * attach[es]” to the State “for any acts or omissions of the charter school,” *id.* § 115C-218.20(b). This design reflects the legislative calculus that the private marketplace of ideas can be better at generating innovative ideas for improving developmental and educational outcomes than the State. This insight is core to the overall success of charter schools. *See* Pet. App. 89a (“Charter

schools are by their very nature freed from state control in their pedagogical and cultural choices * * * .”).

Second, North Carolina charter schools are afforded “wide latitude to experiment with pedagogical methods.” Pet. App. 56a. North Carolina’s charter schools are generally “exempt from statutes and rules applicable to a local board of education or local school administrative unit.” N.C. Gen. Stat. § 115C-218.10. And the State Board of Education’s authority over charter schools is “limited to control, administration, and disbursement of state and federal moneys.” *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 355-56 (2009). After entering into a charter with the State, “[n]o other terms may be imposed on the charter school as a condition for receipt of local funds.” N.C. Gen. Stat. § 115C-218.15(c). Instead, the “private nonprofit” board of directors determines the charter school’s “budgeting, curriculum, and operating procedures.” *Id.* § 115C-218.15(b), (d).

This autonomy allows charter schools to counter the sometimes-homogenizing effects of traditional public schooling and to “[e]ncourage the use of different and innovative teaching methods” for North Carolina children. *Id.* § 115C-218(a)(1), (3).

Third, the Act also provides choice and autonomy to North Carolina families looking for educational opportunities that best align with their personal needs and values. In particular, the statute provides that “[a]ny child who is qualified under the laws of this State for admission to a public school is qualified for admission to a charter school.” N.C. Gen. Stat. § 115C-

218.45(a). Unlike traditional public schools that guarantee admission only in a family's neighborhood school, parents are free to apply to whatever sort of charter school they prefer (whether that be a Montessori school, an all-girls school, or a Civil Air Patrol leadership academy) without regard to geography. *See id.* § 115C-218.45(d) ("Admission to a charter school shall not be determined according to the local school administrative unit in which a student resides."). This distinction makes it possible for charter schools to cater to larger communities and thus focus on narrower interests. *See id.* § 115C-218.45(e) (noting charter schools may make admission decisions based on "the mission of the school as set out in the charter"). At the same time, it provides parents with the sort of choice that previously was only available to those that could pay for selective private schools.

Fourth, and finally, while the legislature made these additional educational options available to everyone, they are mandatory for no one. The Act specifically provides: "No local board of education shall require any student * * * to attend a charter school." N.C. Gen. Stat. § 115C-218.45(b). While the Charter School Act thus demonstrates that the North Carolina legislature intended for all students *to have the option* to benefit from charter schools, the legislature did not require any families to take this path (and, indeed, the legislature strengthened other educational paths through the Opportunity Scholarship Program and by increasing K-12 funding in traditional public schools).

Despite these significant distinctions and autonomy, the Fourth Circuit concluded that charter schools are state actors for purposes of 42 U.S.C. § 1983 based

in large part on a provision of the Charter School Act that states: “A charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located.” N.C. Gen. Stat. § 115C-218.15(a); *see* Pet. App. 14a. The court explained that, in doing so, it was attempting to honor North Carolina’s “sovereign prerogative” to treat charter schools as state actors. Pet. App. 22a.

With due respect, the Fourth Circuit misinterpreted North Carolina’s sovereign actions. As a general matter, a State’s designation of an entity as “public” does not always make the entity at issue a state actor. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (holding “public access channel[]” not state actor); *Polk County v. Dodson*, 454 U.S. 312, 324 (1981) (holding “public defender” not state actor); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 n.7, 351-53 (1974) (holding “public utility” not state actor); *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 814 (9th Cir. 2010) (holding “public” “charter school” not state actor). And here, the court of appeals erred in interpreting the reference to “public school” in the Charter School Act as demonstrating the General Assembly’s intent that charter schools be treated as state actors.

The Charter School Act as a whole demonstrates that the North Carolina General Assembly specifically crafted charter schools to be “operated by [the] private nonprofit corporation[s],” N.C. Gen. Stat. § 115C-218.15(b), “independently of existing schools,” *id.* § 115C-218(a). The statute refers to charter schools as “public school[s],” in the sense that they are schools open to the public. *Id.* § 115C-218.15(a). But it is

charter schools' independence and autonomy from the State that is their *raison d'être*. And it is the driving force behind their success.

III. The Fourth Circuit's Decision Threatens To Stifle Innovation and Profoundly Harm North Carolina's Charter Schools.

The Fourth Circuit's contrary conclusion that charter schools are state actors threatens profound harm to North Carolina's charter school program by undercutting the very independence and choice that the General Assembly sought to incubate and by opening up new avenues for costly litigation and liability.

By attributing the "private nonprofit" entities' actions to the State, N.C. Gen. Stat. § 115C-218.15(b), the Fourth Circuit directly jeopardizes the flexibility that is at the heart of the Charter School Act. Imposing on charter schools a new set of constitutional restrictions designed to limit state, not private, action will inevitably limit the flexibility of those schools to innovate and to offer educational opportunities beyond traditional public schools.

Consider, for example, single-sex charter schools. In the Charter School Act, the North Carolina General Assembly expressly preserved the ability of private nonprofit entities to operate single-sex charter schools. *See* N.C. Gen. Stat. § 115C-218.45(e) ("A charter school whose mission is single-sex education may limit admission on the basis of sex."). And, as noted above, enterprising private actors are opening both female and male single-sex charter schools in North Carolina. *See, e.g.*, Girls Leadership Academy of Wilmington, <http://www.glowacademy.net> (all-girls charter school

in Wilmington, North Carolina); School of the Arts for Boys Academy, <http://www.sabacademy.org> (all-boys charter school in Chatham County, North Carolina opening for 2023-2024 school year). The Fourth Circuit’s decision now raises the question of whether these charter schools are constitutional, at least if there is not an “equal opportunity” for students of the other sex in the area. *United States v. Virginia*, 518 U.S. 515, 534 (1996). If the Fourth Circuit’s decision is left to stand, parents who want to send their children to these schools—and schools like them—may lose the ability to do so.

And the questions will assuredly not stop there. As Judge Wilkinson asked, “Will some charter schools’ recruiting and admissions decisions, undertaken in pursuit of serving underserved and dispossessed populations, be challenged on Equal Protection grounds? What about charter schools offering a progressive culture and curriculum?” Pet. App. 92a (Wilkinson, J. dissenting). If charter schools are state actors, what are the First Amendment implications for admission- or personnel-decisions based on the mission of charter schools? How about the implications for restrictions or disciplinary approach to student speech? *Cf. Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021). Will the Due Process Clause suddenly inhibit a charter school’s ability to hire and fire the appropriate staff to serve their unique needs? *Cf. Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Perry v. Sindermann*, 408 U.S. 593 (1972).

Even if charter schools could, in theory, maintain sufficient flexibility in light of whatever new restrictions are imposed, the litigation itself and the

specter of liability may make it impractical to even try. Charter schools are run by private entities and private individuals, like those that respondents named in their lawsuit here. When those entities and individuals are sued under Section 1983 for their purported state actions, they—not the State and the taxpayer—bear the cost of that litigation. As noted above, “no civil liability * * * attach[es]” to the State “for any acts or omissions of the charter school.” N.C. Gen. Stat. § 115C-218.20(a), (b). Nor does the State nor any other government entity indemnify charter schools. And if the charter school ultimately loses a suit, these private defendants may have to pay not only damages and their own defense costs, but could be liable for the attorney’s fees of the plaintiffs as well. *See* 42 U.S.C. § 1988.

At a minimum, the risk of such debilitating personal liability will cause charter schools to steer clear of any policies, programs, or educational approaches that may subject them and their supporters to constitutional litigation. Most likely, given the difficulty in avoiding such litigation altogether, at least for some private nonprofits, the costs will dissuade them from opening or operating a charter school at all.

The result is that the 60,000 North Carolina students, and their families, waiting for the chance to enjoy the unique opportunities charter schools can provide will continue to wait. The situation cries out for this Court’s intervention.

CONCLUSION

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

Respectfully submitted,

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