

CASE No. 20-1001 (L)

In the

United States Court of Appeals

for the Fourth Circuit

**BONNIE PELTIER, AS GUARDIAN OF A.P., A MINOR CHILD; ERIKA
BOOTH, AS GUARDIAN OF I.B., A MINOR CHILD; AND KEELY
BURKS,**

Plaintiffs-Appellees, Cross-Appellants,

v.

**CHARTER DAY SCHOOL, INC.; ROBERT P. SPENCER; CHAD ADAMS;
SUZANNE WEST; COLLEEN COMBS; TED BODENSCHATZ; AND
MELISSA GOTT IN THEIR CAPACITIES AS MEMBERS OF THE
BOARD OF TRUSTEES OF CHARTER DAY SCHOOL, INC.; AND THE
ROGER BACON ACADEMY, INC.,**

Defendants-Appellants,

and,

THE ROGER BACON ACADEMY, INC.,

Defendant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NORTH CAROLINA, SOUTHERN DIVISION

BRIEF OF THE NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

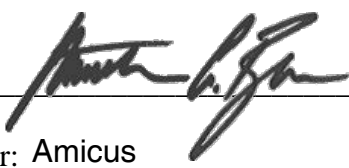
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature:  _____
Counsel for: Amicus _____

Date: 8/30/2021

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INTERESTS OF AMICUS CURIAE¹

The National Alliance for Public Charter Schools (“National Alliance”) is the leading national organization committed to supporting students attending or hoping to attend a public charter school. The National Alliance supports students through federal and state advocacy efforts, research, and elevating national awareness of the charter school movement. These efforts include legal advocacy to safeguard the rights of charter school students, who are always public school students, of which there are 126,000 in North Carolina and 3.3 million nationwide.

The National Alliance disagrees with the recent Fourth Circuit Court of Appeals panel decision holding that North Carolina charter schools are not state actors when exercising the governmental function of providing public education. Charter schools aim to foster innovation in the public school system. But that innovative spirit does not include a license to violate charter school students’ constitutional rights. More to the point, the National Alliance believes that public charter schools cannot discriminate against any student on the basis of sex, gender, race, disability, or religious preference in violation of the Constitution.

¹ The National Alliance has separately sought leave to file this amicus brief pursuant to Rule 29(a)(3). No party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than amicus curiae and its counsel contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

North Carolina charter schools are public schools. They were created by the state as *explicitly* public schools. Their boards and board members are treated as public officials. Over the course of the past quarter century, charters have been subject to many of the same rules as traditional public schools. And North Carolina courts have treated them as public schools that exercise state power, serve as extensions of the state, and reap the benefits as well as abide by the strictures associated with being a state actor.

The panel decision determining Charter Day School (“CDS”) was not acting as a public school takes an easy case and makes it hard. Applying overlapping state action tests should not obscure well-established factual and legal realities. Charter schools in North Carolina were conceived of and have since consistently operated as public schools, and charter school students are entitled to the full measure of constitutional rights afforded their traditional public school peers. En banc review is necessary to affirm the district court ruling that CDS must not transgress its students’ constitutional rights.

ARGUMENT

I. NORTH CAROLINA CHARTER SCHOOLS WERE FOUNDED AND ARE OPERATED AS PUBLIC SCHOOLS.

The North Carolina Constitution protects the right to public education. Since their inception, charter schools have played a role in the state fulfilling this

constitutional obligation to the children of North Carolina. And, in the decades since, the public character of charter schools has been not merely a matter of form but also of function. From their founding document to day-to-day operations to legal benefits and obligations, the public nature of North Carolina’s charter schools is plain.

The North Carolina Constitution provides that “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” N.C. Const. art. I, § 15. To that end, the state constitution mandates that the state “provide by taxation or otherwise for 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. In sum, “the State . . . is solely responsible for guarding and preserving the right of every child in North Carolina to receive a sound basic education[.]” *Silver v. Halifax Cnty. Bd. of Comm’rs*, 821 S.E.2d 755, 756 (N.C. 2018).

Charter schools have been a part of North Carolina’s system of free public education for a quarter century. The North Carolina legislature authorized the creation of charter schools in 1996, with the goal of making “innovative teaching methods” available to students. N.C. Gen. Stat. § 115C-218(a)(3). In so doing, the state was explicit about the kind of school they were creating: “[a] charter school . . . ***shall be a public school*** within the local school administrative unit in which it is

located.” *Id.* § 115C-218.15(a) (emphasis added); *see also id.* § 115C-218(a)(5) (noting statutory purpose of “[p]rovid[ing] parents and students with expanded choices in the types of educational opportunities that are available *within the public school system*”) (emphasis added). Tellingly, while the state Division of *Nonpublic* Education aids private and home schools, *see, e.g., id.* §§ 115C-548, 115C-566(a) (emphasis added), the state Department of *Public* Instruction supervises charter schools. *See, e.g., id.* § 115C-218(c) (emphasis added).

The state not only brought charter schools into existence but also is directly responsible for each charter school beginning and continuing operations. The state must approve the application of each prospective charter school. *Id.* § 115C-218.5. Each charter school then “shall operate under [its] written charter[,]” signed off on by the State Board of Education. *Id.* § 115C-218.15(c). Each charter requires compliance “with the Federal and State Constitutions and all applicable federal laws and regulations[.]” North Carolina Department of Public Instruction, *Charter Agreement* § 5.1 (2018); *see also* JA 0214 (CDS charter including this requirement). An initial charter lasts for no longer than 10 years and then may be extended for 10 additional years by the state, subject in the initial and renewal windows to compliance with state and federal law and periodic reviews by the State Board of Education. *Id.* §§ 115C-218.5-.6. Charter non-compliance, poor

student performance, or poor fiscal management can result in the state revoking a school's charter. *Id.* § 115C-218.95(a).

Consistent with its obligation to provide public school students a sound basic education, North Carolina robustly supports charter schools once operational. As with traditional public schools, charter schools receive a per-pupil funding allotment from the State Board of Education. *Id.* § 115C-218.105(a). This per-pupil funding, which is equal to that provided to traditional public schools, flows from the State Board of Education to “the local school administrative unit in which the child resides” for disbursement to the charter school. *Id.* § 115C-218.105(b)-(c). And state support is essential to charters schools' effective operation. Keenan Op. at 45 (“CDS receives 95% of its funding from public sources.”). All of this makes possible another hallmark of public education: charter school students do not pay tuition. N.C. Gen. Stat. §§ 115C-1, 115C-218.15(a).

In exchange for its largess, North Carolina extensively regulates charter schools. Charter schools must “meet the same health and safety requirements” as local traditional public schools, including everything from implementing individual care plans for students with diabetes, *id.* § 115C-218.75(a), to adopting “a mental health training program and suicide risk referral protocol[.]” *Id.* § 115C-218.75(h). Charter schools must report myriad indicia of student and school performance to the state. *Id.* § 115C-83.15. These reports are the basis for state-issued school

report cards, *id.*, which must be “prominently displayed on the school Web site” for five years. *Id.* § 115C-218.65. Charter schools must “develop and operate an anonymous tip line[.]” *Id.* § 115C-218.75(e1). If the local traditional public school “requires an applicant for employment for employment to be checked for a criminal history[.]” then charters in that community must do the same. *Id.* § 115C-218.90(b)(1). The state even mandates that charters display the flags of the United States and North Carolina in each classroom when available and require a daily recitation of the Pledge of Allegiance, but, like other public schools, prohibits them from “compel[ling] any person to stand, salute the flag, or recite the Pledge of Allegiance.” *Id.* § 115C-218.80; *cf. West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no [state] official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

The operators of charter schools are treated similarly. For instance, charter school boards and members are subject to open meetings and public record laws. *Id.* § 115C-218.25. The state specifies that charter schools as well as “the organization that operates the charter school, or its members, officers, or directors” waive sovereign immunity “to the extent of indemnification by insurance[.]” again underlining the public nature of the enterprise. *Id.* § 115C-218.20(a).

This is but the tip of the regulatory iceberg. “[H]ands-off” the state is not, *but see* Op. at 20 (asserting the contrary); it is more accurate to say North Carolina and charter schools are “pervasive[ly] entwine[ed]” when it comes to educating students. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n.*, 531 U.S. 288, 291 (2001).

II. NORTH CAROLINA CHARTER SCHOOLS HAVE BEEN TREATED BY NORTH CAROLINA COURTS AS PUBLIC SCHOOLS.

Unsurprisingly given their statutory origins, funding, and highly regulated day-to-day operations, North Carolina courts have consistently found charters are public schools. As the above indicates, this is a matter of form *and* function.

“Charter schools are public schools[,]” the North Carolina Court of Appeals stated unequivocally nearly two decades ago. *Francine Delany New School for Children, Inc. v. Asheville City Bd. of Educ.*, 563 S.E.2d 92, 93 (N.C. App. 2002). This was not mere rhetoric; instead, it was at the foundation of the court’s holding that “[t]he Legislature clearly intended for charter schools to be treated as public schools subject to the uniform budget format.” *Id.* at 97. Local charter schools accordingly were entitled to share in supplemental school taxes and penal fines received by the local board for traditional public schools. *Id.* at 98. Along the same lines, the state Court of Appeals held that the Charlotte-Mecklenburg public school district must allocate funds to local charters “on the same basis” as it did traditional

public schools. *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 655 S.E.2d 850, 857 (N.C. App. 2008) (*Sugar Creek I*). The state Court of Appeals subsequently reaffirmed that charters are “indisputably public schools,” *Sugar Creek Charter School, Inc. v. State*, 712 S.E.2d 730, 742 (N.C. App. 2011) (*Sugar Creek II*), with funding sources broadly overlapping with those of traditional public schools. *Id.* at 736.

Perhaps most tellingly, the state Court of Appeals recently parted company with the panel majority’s assessment that the governing statutory regime “is silent as to whether charter schools are entitled to sovereign immunity.” Op. at 25. Indeed, a panel of that court unanimously found no such ambiguity, holding unequivocally that “charter schools are entitled to exercise the State’s sovereign immunity.” *State v. Kinston Charter Academy*, 836 S.E.2d 330, 336 (N.C. App. 2019).

Although distinct from the state action analysis, the court’s immunity reasoning is instructive when assessing whether CDS engages in state action in educating its students. The panel began by noting that “[e]ducation is a governmental function so fundamental in this state that our constitution contains a separate article entitled ‘Education.’” *Id.* at 336 (quoting *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 418 S.E.2d 648, 655 (N.C. 1992)). Consistent with this fundamental role,

[w]hen functioning within this sphere, the units of the public school system do not exercise derived powers such as are given to a municipality for local government, . . . ; they **express the immediate power of the State**, as its agencies for the performance of a special mandatory duty resting upon it under the Constitution, and **under its direct delegation**.

Id. (emphasis added) (quoting *Bridges v. City of Charlotte*, 80 S.E.2d 825, 830 (N.C. 1942)). As laid out above, charter schools now too function in this sphere. *See id.* (“By the plain meaning of the statute, charter schools are public schools.”). Form, in turn, connotes substance: “Charter schools, as public schools in the State of North Carolina, **exercise the power of the State and are an extension of the State itself**.” *Id.* (emphasis added);² *see also West v. Atkins*, 487 U.S. 42, 56-57 (1988) (concluding private physician was state actor where state delegated constitutional duty of providing essential medical care to him); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 342 (4th Cir. 2000) (“[I]f the state delegates its obligations to a private actor, the acts conducted in pursuit of those delegated obligations are under color of law.”).³

² The state Supreme Court granted discretionary review of this decision. *State v. Kinston Charter Acad.*, 847 S.E.2d 412 (N.C. 2020). The dispute on appeal, however, is limited to the question of whether the state waived sovereign immunity for charter schools for the purposes of the North Carolina False Claim Act; their public nature is not in dispute. Brief for Appellant at 2, *State v. Kinston Charter Acad.*, No. 16PA20 (N.C. argued Aug. 31, 2021) (granting that the “law provides that charter schools are public schools”).

³ Courts across the country have recognized charter schools originating from similar statutory regimes as public schools, *see, e.g., Foreman v. Chester-Upland*

It is axiomatic that federal courts afford great deference to state court interpretations of state law. *See, e.g., Goldstein*, 218 F.3d at 347. Here, North Carolina courts have spoken unequivocally since the state authorized charters: schools such as CDS are public. Beyond their actions being “fairly attributable to the State,” *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982), North Carolina charter schools and the corporate entities that hold the charter to operate them are functioning as the state itself in educating students.

CONCLUSION

As Judge Keenan aptly noted in her panel dissent, “[t]he state action analysis required in this case is not complicated.” Keenan Op. at 44. Charter schools are statutory creations. Each charter school in North Carolina only comes into existence with state approval. And charter schools like CDS are robustly supported and regulated by the state during the course of their existence. North Carolina

Sch. Dist., 941 A.2d 108, 115 (Pa. Commw. 2008) (“What a charter grants is not a contract that ‘outsources’ public education, but the establishment of schools to provide students with public education.”), and, therefore, their operators as state actors. *See, e.g., Jordan v. N. Kane Educ. Corp.*, No. 08-C-4477, 2009 WL 509744 at *3 (N.D. Ill. May 2, 2009) (“NKEC, in its capacity as the governing body of the Cambridge Lake Charter School, is a state actor.”); *Scaggs v. N.Y. Dep’t of Educ.*, Civ. No. 06-CV-0799, 2007 WL 1456221 at *13 (E.D.N.Y. May 16, 2007) (holding management company for charter school “may properly be viewed as having engaged in state action”). Similarly, the Trump administration concluded sectarian charter schools would run afoul of the Establishment Clause “[b]ecause a charter school is under ‘public supervision and direction.’” U.S. Dept. of Educ., *Exclusion of Religiously Affiliated Schools from Charter School Grant Programs* at 4 (2020) (quoting 20 U.S.C. § 7221i(2)(B)).

courts have without fail recognized their public nature, affording them the benefits as well as enforcing the strictures imposed by this status. As public schools, charter schools must play by public rules in educating students, including the obligation to respect their students' constitutional rights.

The panel decision contravened clear legislative intent and state court construction recognizing the public character of North Carolina charter schools. The stakes are high not only as to the public status of charter schools in the Carolinas, Virginias, and Maryland but also for the constitutional rights of hundreds of thousands of charter students in these states. This Court should grant en banc review.

Respectfully submitted this the 30th day of August, 2021.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,577 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in fourteen-point Times New Roman font.

Date: August 30, 2021.

/s/ Christopher A. Brook
Christopher A. Brook

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing documents with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on August 30, 2021.

I certify that all participants in the case that require service are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: August 30, 2021.

/s/ Christopher A. Brook _____
Christopher A. Brook