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.,
Defendants-Appellants, Cross-Appellees,

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, Case No. 7:16-cv-00030-H-KS

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AND NORTH CAROLINA ASSOCIATION OF EDUCATORS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

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STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

Amici state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than Amici or their members—contributed money that was intended to fund preparing or submitting the brief.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1001 Caption: Bonnie Peltier, as Guardian of A.P., a minor child; Erika Booth, as Guardian of I.B., a minor child; and Keely Burks v. Charter Day School, Inc. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Education Association
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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: Eric G. Harrington Date: July 13, 2020

Counsel for: National Education Association

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Pursuant to FRAP 26.1 and Local Rule 26.1,

North Carolina Association of Educators
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: Eric G. Harrington Date: July 13, 2020

Counsel for: NCAE

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amici file this brief with the consent of all the parties. *See* Fed. R. App. P. 29(a)(2).

This brief is submitted on behalf of the National Education Association ("NEA") and the North Carolina Association of Educators ("NCAE"). NEA is the nation's largest professional association representing approximately three million members, who serve as teachers, educators, counselors, and education support professionals in our nation's public schools, including public charter schools.

NEA is a member organization of, by, and for educators, and educators are champions for their students. NEA seeks to ensure that every student receives a high-quality public education regardless of background or zip code. Pursuant to that, NEA recognizes the perniciousness of sex discrimination in education and has long advocated—in legislatures, courts, and in the classroom—to end such discrimination. NEA supports school dress codes that are inclusive and promote equality but opposes dress codes motivated by gender stereotypes that discriminate on the basis of sex, race, gender identity, and more.

NCAE is the North Carolina state affiliate of NEA and represents public-school educators in all of North Carolina's 100 counties. NCAE is committed to equal access to a quality public education for all children and recognizes that a high-quality education depends on all North Carolina public schools, including public

charter schools, treating students with mutual respect, dignity, and equality. This Court's ruling will determine the legal duties of educational institutions, and public charter schools in particular, to prevent sex discrimination, and thus, will affect NEA and NCAE's efforts.

Here a North Carolina public charter school has created a gender-based dress code (the Skirts Requirement) motivated by sex stereotypes that is harmful to the Plaintiffs specifically and girls generally. Amici submit this brief to make two points.

First, Charter Day School, Inc. ("CDS") and Roger Bacon Academy ("RBA") are state actors subject to the Fourteenth Amendment's restrictions on sex discrimination against students. CDS carries out North Carolina's traditional and exclusive state function of providing free, universal, and compulsory education to North Carolina children, and RBA is a joint actor in carrying out that function. Consistent with that, North Carolina law considers CDS to be a "public school," and CDS's charter specifically contemplates that it is subject to constitutional constraints. CDS is further entangled with the State in that it is almost entirely publicly funded and subjected to a web of regulations dictating its responsibilities in providing free and universal education.

Second, CDS's Skirts Requirement violates Title IX of the Education Amendments of 1972 and the Equal Protection Clause of the United States

Constitution because it is motivated by gender stereotypes and harms Plaintiffs on the basis of their sex.

Thus, NEA urges this Court to reverse the district court on the Title IX claim, affirm the district court on the Equal Protection claim against CDS, reverse the district court on the Equal Protection claim against RBA, and grant summary judgment to the Plaintiffs on all counts.

ARGUMENT

I. CDS and RBA acted as state actors when they created, implemented, and enforced the Skirts Requirement.

CDS and RBA are state actors because they exercise powers traditionally and exclusively held by the State of North Carolina, and because they satisfy additional factors considered by this Court in assessing whether a private entity is a state actor: North Carolina considers CDS to be a public school and funds and extensively regulates CDS and RBA, and charter schools like CDS and the State are intertwined in the delivery of free and universal educational to North Carolina students.

1. CDS is a state actor because, in enforcing the Skirts Requirement, it exercised powers that have been traditional and exclusive prerogatives of the State of North Carolina—the power to use state funds to provide free, universal, and compulsory education to North Carolina's students. In short, "the state of [North Carolina] was the exclusive provider of [free, universal, and compulsory

education] services until it effectively delegated [some of] that function to state-funded private actors," such as CDS and RBA. *See Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 345, 348 (4th Cir. 2000) (concluding that a volunteer fire department was a state actor because it carried out the previously exclusive state function of firefighting services). As such, CDS and RBA are state actors in their interaction with students receiving a free education.

Although private parties are not generally state actors under § 1983, this Court and the Supreme Court have identified several circumstances where a private party is a state actor. "One of the paradigmatic means by which a private party becomes subject to section 1983 is through the government's conferral upon that party of what is, at core, sovereign power." *Id.* at 342 (quotations and citations omitted). "In other words, a private actor is responsible as a state actor if the function performed is traditionally the exclusive prerogative of the State." *Id.* (cleaned up). "[A] number of state and municipal functions . . . have been administered with a greater degree of exclusivity by States and municipalities[,] [such as] *education*, fire and police collection, and tax collection." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 163 (1978) (emphasis added).

From the American Revolution to Reconstruction, North Carolina provided some financial support to education academies, but those schools were only "useful in preparing a relatively small number of individuals for civic leadership,

[and] the absence of State funding meant that education . . . was available only to the affluent." Bob Etheridge, State Superintendent, N.C. Dep't of Public Instruction, *The History of Education in North Carolina* 6 (1993), https://files.eric.ed.gov/fulltext/ED369713.pdf. In 1839, the School Law "established for the first time a statewide local option system of 'common' schools, 'free' in the sense that tuition and capital costs were paid out of state and local funds." *Sneed v. Greensboro City Bd. of Ed.*, 264 S.E.2d 106, 111 (N.C. 1980) (citing 1839 N.C. Sess. Laws, c. 8). But these schools were not available to all. *Id.*; *see also* Etheridge, *supra*, at 8–9.

Even then, the pre-Reconstruction state education system eventually collapsed. Before the Civil War, "[e]ducation . . . was at a very low ebb, and the future looked bleak indeed," Etheridge, *supra*, at 10, and no private entities provided free and universal education to the children of North Carolina.

In 1868, North Carolina adopted a new State Constitution, which declared, for the first time in state history, that education was a state-provided right for all: "The 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, sec. 27 (1868), https://www.carolana.com/NC/Documents/NC_Constitution_1868.pdf. To that end, the 1868 Constitution required that the "General Assembly at its first session under the Constitution, shall provide by taxation and otherwise for a general and

uniform system of Public Schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years." N.C. Const. Art. IX, sec. 2 (1868). "[T]he intent of the [1868] framers was that every child have a fundamental right to a sound basic education which would prepare the child to participate fully in society as it existed in his or her lifetime." *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) (citing *City of Greensboro v. Hodgin*, 11 S.E. 586, 589 (N.C. 1890); *Lane v. Stanly*, 65 N.C. 153, 158 (1871)).

In 1913, the first Compulsory Attendance Act required all children between 8 and 12 to attend school, later expanding to 14, then 16. *See* Etheridge, *supra*, at 12, 15. Today, parents who violate the truancy law could face a misdemeanor. N.C. Gen. Stat. § 115C-380.

In 1971, North Carolina revised its constitution, retaining the now-traditional and exclusive state function of providing a free, universal, and compulsory education to all children in the State.[1] *Sneed*, 264 S.E.2d at 112 (recognizing that the 1971 Constitution carried forward "the state's long standing policy of providing its citizens with a basic tuition free education"). The 1971 Constitution reaffirmed the constitutional function to provide a "general and uniform system of

[1] The amendments were made in 1970, but became effective in 1971. Sometimes the revised constitution is called the 1970 Constitution, *see Sneed*, 264 S.E.2d at 112; other times, the 1971 Constitution, *see, e.g.*, *N.C. State Bd. of Educ. v. State*, 814 S.E.2d 67, 72 (N.C. 2018). This brief calls it the 1971 Constitution.

free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." N.C. Const. Art. IX, sec. 2(1). These revisions also constitutionalized compulsory attendance. *Id.*, sec. 3.

Pursuant to these constitutional mandates, North Carolina statute establishes that public schools are "free of charge to all children of the State, and to every person of the State less than 21 years old, who has not completed a standard high school course of study." N.C. Gen. Stat. § 115C-1. In North Carolina, providing a free and universal education to children is a "core constitutional function of the highest order." *State v. Kinston Charter Acad.*, 836 S.E.2d 330, 336 (N.C. Ct. App. 2019).

In 1996, North Carolina delegated some of that "core constitutional function" to public charter schools and expanded that delegation over time. *See* N.C. Gen. Stat. § 115C-218 *et seq.*; *Sugar Creek Charter Sch., Inc. v. State*, 712 S.E.2d 730, 742 (N.C. Ct. App. 2011). But the State retains control. The State Board of Education authorizes charter schools, determines which may open, which are renewed, and which are closed based on recommendations from the Charter School Advisory Board. *See* N.C. Gen. Stat. § 115C-218–218.15, § 115C-218.95. North Carolina charter schools must be open to all and free, § 115C-218.45(a) ("Any child who is qualified under the laws of this State for admission to a public school is qualified

for admission to a charter school."); § 115C-218.50(b) ("[C]harter school shall not charge tuition[.]"). The enabling statutes also establish that charter schools are "public schools," accountable to the State Board of Education. N.C. Gen. Stat. § 115C-218.15(a).

The Charter Agreement here affirms that North Carolina grants the charter, and considers CDS and RBA to be state actors: calling them the "Public Charter School" and requiring them to "compl[y] with the Federal and State Constitutions and all applicable federal laws and regulations, including . . . civil rights[.]" JA0214. CDS and RBA also "agree[] to assume full responsibility for the education of the children enrolled as students in the Charter School." JA0197.

Because RBA jointly participates with CDS in carrying out the state function of providing free and universal education, RBA is a state actor too. *See, e.g.*, *ACLU of Minnesota v. Tarek Ibn Ziyad Acad.*, No. 09-138DWFJJG, 2009 WL 2215072, at *9 (D. Minn. July 21, 2009) (holding charter school is a state actor because it "provide[s] free, public education [and] is a public school [that is] part of the state's system of public education" and its "sponsor," which oversees the school, also is a state actor because it is intertwined with the charter school).

In particular, RBA was a joint actor with CDS in developing and enforcing the Skirts Requirement. *See, e.g.*, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) ("[W]e have consistently held that a private party's joint participation with

state [actors] is sufficient to characterize that party as a 'state actor'[.]"). Here, Baker Mitchell Jr., CDS's founder and RBA's president, was the "vision[ary]" behind the Skirts Requirement. JA0322-24, 0329-33, 0361–62. And RBA authored, along with the Board, CDS's Parent and Student Handbook, which contains the Skirts Requirement. JA0363.

Finally, Defendants' notion that CDS and RBA are not state actors because private schools have existed for a long time misses the mark. *See* CDS Br. 22. Amicus Civitas's related notion that modern charter schools are not state actors because North Carolina provided some public funding to private schools and the University of North Carolina from the Revolutionary period through Reconstruction likewise misses the mark. *See* Civitas Br. 5–7.

These arguments fail to acknowledge the true traditional and exclusive function: free and universal public education. *None* of the imagined private schools or pre-Reconstruction arrangements provided free and universal education to all North Carolinians. Instead, they served only the elite and were accessible only to the "affluent." Etheridge, *supra*, at 6. No other entity in North Carolina—and certainly no private entity—provided free and universal education until the State deemed it an essential state function in the 1868 constitution. And it is that core constitutional function that North Carolina has consciously delegated to certain charter schools only in recent times.

This Court's analysis in *Goldstein*, 218 F.3d 337, is instructive. There, this Court concluded that a private volunteer fire department in Maryland was a state actor because it "(1) carr[ied] out functions, exercis[ed] powers, and benefit[ted] from protections traditionally and exclusively reserved to the state; (2) receiv[ed] substantial state assistance; (3)[was] subject[ed] to extensive state regulation; and (4) considered to be a state actor by the state itself." *Id.* at 339–40. The facts established that the State of Maryland, like here, was the exclusive provider of free firefighting services since 1881 (and partial service before that) "until it effectively delegated that function to state-funded private actors." *Id.* at 345.

Of course, private actors put out fires long before the State of Maryland provided such services, *id.* at 344 ("[W]e need not determine here whether firefighting, in the abstract, is a traditionally exclusive function[.]"), but that fact hardly rendered firefighting a private function that was not the exclusive and traditional prerogative of the State given Maryland's history, *id.*

2. The conclusion that CDS and RBA are state actors is bolstered by additional factors this Court uses to determine whether a private entity is a state actor. These include:

- "[H]ow the state itself views the entity, *i.e.*, whether the state itself regards the actor as a state actor," *Mentavlos v. Anderson*, 249 F.3d 301, 313 (4th Cir. 2001);

- "[T]he extent and nature of public assistance and public benefits accorded the private entity," *Goldstein*, 218 F.3d at 343;
- "[W]hen the state has exercised coercive power or has provided such significant encouragement that the action must in law be deemed to be that of the state," *Mentavlos*, 249 F.3d at 313 (cleaned up); and
- "[T]he extent and nature of governmental regulation over the institution," *Goldstein*, 218 F.3d at 343.

North Carolina law characterizes charter schools as "public schools" and makes them accountable to the State Education Board, and CDS's charter deems it a "Public Charter School," and requires it to "compl[y] with the Federal and State Constitutions." N.C. Gen. Stat. § 115C-218.15(a); *see also Yarbrough v. E. Wake First Charter Sch.*, 108 F. Supp. 3d 331, 337 (E.D.N.C. 2015) (noting that North Carolina charter schools are "statutorily defined public schools"); *State v. Kinston Charter Acad.*, 836 S.E.2d 330, 336 (N.C. Ct. App. 2019) ("[A]s public schools in the State of North Carolina, [charter schools] exercise the power of the State and are an extension of the State itself."); *Sugar Creek*, 712 S.E.2d at 734 ("[C]harter schools are undoubtedly public schools."); *Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ.*, 563 S.E.2d 92, 97 (N.C. Ct. App. 2002) ("The Legislature clearly intended for charter schools to be treated as public schools[.]"); JA0214.

Indeed, a state appellate court declared this very charter school a public school—at its request—when it sought additional public funding. *Charter Day Sch., Inc. v. New Hanover Cty. Bd. of Educ.*, 754 S.E.2d 229, 231 (N.C. Ct. App. 2014) ("As a public school, . . .Charter Day is entitled to state and local funding." (citations omitted)). *See generally* Preston C. Green III et. al., *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 Emory L.J. 303, 304 (2013).

That CDS's funding is determined by state law and comes almost exclusively from the public fisc also weighs in favor of finding state action. *Charter Day Sch.,* 754 S.E.2d at 232 ("[C]harter school funding is governed by statute."); *see also* N.C. Gen. Stat. § 115C-218.105. CDS derives 95 percent of its funding from public sources, JA2595–97; RBA in turn derives 90 percent of its budget from CDS, JA1676, 2605.

As for the specific conduct challenged in this case, North Carolina provides significant encouragement, mandating that charter schools develop policies governing student conduct, *see* N.C. Gen. Stat. §§ 115C-390.2, 115C-260, and CDS and RBA used that mandate to adopt the Skirts Requirement.

Plus, charter schools are subject to a web of state regulation, much of which speaks directly to how charter schools deliver free and universal education to North Carolina children. North Carolina law compels students to attend and

penalizes parents who do not comply, N.C. Gen. Stat. § 115C-378, § 115C-379, determines charter school funding, *id.* § 115C-218.105, requires conflict-of-interest and anti-nepotism rules, *id.* § 115C-218.15(b), establishes state residency rules for charter boards, *id.* § 115C-218.15(e), waives sovereign immunity and requires liability insurance, *id.* § 115C-218.20(a), mandates the charter and board to comply with public records act and open meetings law, *id.* § 115C-218.25, subjects charters to State Board of Education audits, *id.* § 115C-218.30, determines where a charter school can be located, *id.* § 115C-218.35(a), delineates transportation duties to students, *id.* § 115C-218.40, forbids the charter school from discriminating against any student on the basis of ethnicity, national origin, gender, or disability, *id.* § 115C-218.55, limits student discipline and expulsion and requires due process for student removals, *id.* §§ 115C-218.60, 115C-390.2, requires public reporting on charter school performance, *id.* § 115C-218.65, mandates the same health and safety standards as traditional public schools, *id.* § 115C-218.75(a), requires that charter schools share public health information with students' families, and stock certain medical supplies, *id.* § 115C-218.75(a), promotes planning and coordinating with law enforcement to respond to school violence and adopting of anti-bullying student policies, *id.* § 115C-218.75(b)–(e), requires an anonymous tip line, *id.* § 115C-218.75(e1), encourages access to charter facilities for outside youth groups, *id.* § 115C-218.75(f), requires creation

of child sex abuse and sex trafficking plans, as well as student mental health plans, *id.* § 115C-218.75(g), (h), requires the display of the North Carolina and United States flags, and recitation of the Pledge of Allegiance, *id.* § 115C-218.80, dictates the minimum instructional days, hours, and months, *id.* § 115C-218.85(a)(1), requires student performance standards and use of state-based student tests, *id.* § 115C-218.85(a)(2)–(3), requires compliance with state and federal protections for students with disabilities, *id.* § 115C-218.85(a)(4), requires financial literacy in the curriculum, *id.* § 115C-218.85(a)(5), provides state-mandated reading proficiency standards and dictates when students can be promoted to the next grade, *id.* § 115C-218.85(b), establishes processes for dissolution of a charter school, *id.* § 115C-218.100, and more.

North Carolina's relationship with its public charter schools can hardly be characterized as "hands off," or a "light regulatory touch," as Defendants assert. CDS Br. 32–33.

Indeed, the state and charter school entanglement is so pronounced that CDS and RBA also satisfy the Supreme Court's entanglement test, which considers a private entity to be a state actor when, as here, the private entity is significantly controlled by the state or an agency, has been delegated a public function by the state, is entwined with governmental policies, and the government is entwined in the entity's management or control. *See Brentwood Academy v. Tennessee*

Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001).

3. Courts considering charter school arrangements like North Carolina's have concluded that the charter school is a state actor when it provides educational services to students. For instance, in *Riester v. Riverside Community School*, an Ohio charter school was deemed a state actor because state law considered it a "public school," and because the charter school "provide[d] free, public education to Ohio students" and "free, public education, whether provided by public or private actors, is an historical, exclusive, and traditional state function." *See* 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002).

The *Riester* defendants argued that the Supreme Court's finding that a publicly-funded private school was not a state actor in *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982), meant that the Ohio charter school also was not a state actor. But the court disagreed, reasoning that unlike the school in *Rendell-Baker*, the Ohio charter school was created "only with the help of the state," and "is subject to various rules and regulations to which private schools are not." *See* 257 F. Supp. 2d at 972–73; *see also Daughtery v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 907–17 (W.D. Mich. 2000) (treating both public charter school and private corporation operating the school as state actors); *Jones v. SABIS Educ. Sys.*, 52 F. Supp. 2d 868, 876 (N.D. Ill. 1999) (deeming charter school to be a "governmental body" because Illinois law considers charter schools to be "public"); *Tarek Ibn*

Ziyad Acad., 2009 WL 2215072, at *9 (finding charter school a state actor because it's a "public school" that provides free education); *Scaggs v. N.Y. Dep't of Educ.*, No. 06-CV-0799, 2007 WL 1456221, at *13 (E.D.N.Y. May 16, 2007) (finding a public charter a state actor vis-à-vis free public education and distinguishing *Rendell–Baker* as an employment action with little state involvement); *Irene B. v. Phila. Acad. Charter Sch.*, No. CIV.A. 02-1716, 2003 WL 24052009, at *11 (E.D. Pa. Jan. 29, 2003) (finding charter school a state actor where the charter school "is part of the public school system" and the state authorizes the charter schools to carry out the state's duties under education law); *cf. Greater Heights Acad. v. Zelman*, 522 F.3d 678, 680 (6th Cir. 2008) (concluding that Ohio charter schools are subdivisions of the state because, among other things, state law declares them "public schools," makes them open to all, publicly funds them, and regulates them).

4. On the other hand, the cases relied on by CDS and RBA to argue that they are not state actors are inapposite in that they either involve suits brought by non-students, involve vastly different histories of state provided functions, involve arrangements that are more distant from the state, or all three.

Rendell–Baker v. Kohn, the Defendants' showcase authority, did not involve students, nor did the school in that case provide free and universal education, nor was it entangled with the state to the degree North Carolina charter schools are.

That case involved the discharge of employees by a school for troubled children that was funded by the state but only nominally overseen by state agencies. 457 U.S. 830, 832–34 (1982). The specific function in *Rendell-Baker*—"provid[ing] education for students who could not be served by traditional public schools"—had only "recently [been undertaken by] the State." *Id.* at 842.

Even then, the First Circuit decision in *Rendell-Baker*—which was affirmed by the Supreme Court—specifically opined that students "would have a stronger argument than do plaintiffs [vocational counselor and teachers] that the school's action toward them is taken 'under the color of' state law, since the school derives its authority over [students] from the state." *Rendell-Baker v. Kohn*, 641 F.2d 14, 26 (1st Cir. 1981), *aff'd*, 457 U.S. 830 (1982).

Caviness v. Horizon Learning Center, Inc., likewise involved a suit by a teacher, and not students. *See* 590 F.3d 806, 813–14 (9th Cir. 2010) (reasoning that the charter school's public character was not dispositive in "the employment context," noting that "a private actor may be designated a state actor for some purposes but still function as a private actor in other respects"). And Arizona charter schools are structured outside the public school system, unlike North Carolina's. *See Nampa Classical Acad. v. Goesling*, 714 F. Supp. 2d 1079, 1088 (D. Idaho 2010), *aff'd*, 447 F. App'x 776 (9th Cir. 2011) (distinguishing *Caviness* and Arizona's charter school structure from Idaho's, noting that in Idaho, "charter

schools . . . are not private entities but are instead [like North Carolina's] created by statute as part of the public education system").

And in *Logiodice v. Trustees of Maine Central Institute*, the First Circuit concluded that a private school that contracted with a public school district to provide a high school education for district students was not a state actor, but the Maine school was considered a *private*, not public, school and the history of public education in Maine showed that free public education "was not provided exclusively by government in Maine." 296 F.3d 22, 27 (1st Cir. 2002). Unlike North Carolina, "the first statewide high school law [in Maine] providing" free public high schools was passed in 1873 and included "the current provision allowing school districts to provide education through contracts with private high schools." *Id.* That is, Maine has a long history of funding private schools to provide free education to Maine youth; North Carolina does not. *See also Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 166 (3d Cir. 2001) (concluding that a state-funded private school that provided education to sex offenders was not a state actor because the "undisputed evidence showed that the only schools that offered [such] services . . . were private schools" and no "public schools" "specialize[d] in educating and treating sex offenders").

Publicly funded private schools (and even some charter schools) may not be state actors in other states, especially when the challenged decisions do not directly

involve students. But in North Carolina, charter schools are state actors when it comes to student interactions because they carry out North Carolina's exclusive and traditional function, are considered "public schools" subject to constitutional constraints by state statute, caselaw, and the charter agreement itself, and are heavily funded and regulated by public entities.

II. The Skirts Requirement discriminates on the basis of sex, is designed to perpetuate gender stereotypes, and harms the individual Plaintiffs, and thus violates Title IX and the Equal Protection Clause

1. The Skirts Requirement explicitly treats boy and girls differently on the basis of their sex: the policy requires girls to wear skirts, skorts, or jumpers as bottoms, whereas boys are required to wear pants or shorts. JA0068.

2. CDS adopted this policy to perpetuate gender stereotypes about the role of boys and girls in our society. "The Trustees, parents, and other community supporters were determined to preserve chivalry." JA0070. As Mitchell explained, the Skirts Requirement was designed to convey the message, starting in Kindergarten, that boys and girls are different, and to instill "chivalry," which he defined as "a code of conduct where women are . . . regarded as a fragile vessel that men are supposed to take care of and honor." JA0332, 413.

A draft email from Mitchell puts it starkly:

> Both the Trustees, the parents, and the other community supporters were determined to respect the traditional gender roles in this school of choice. . . .

> Thus, the uniform policy seeks to make clear the mutual respect and values that traditionally prevailed for ladies and gentlemen before the statistics on rape, unwed motherhood, spousal abuse, STDs, and abortions began to skyrocket.
>
> That gentlemen wear pants and ladies wear dresses is not just a policy of the school that has prevailed for 15 years, it has been a norm of civilization for many thousands of years. The school is chartered to preserve this norm along with many others.

JA1086.

Other school officials—including members of CDS's governing board, school-based administration, and RBA officials—echoed Mitchell's stereotypes of girls as weaker as justifying the policy. JA0802 (girls are "distinct" and should be treated "more gently"); JA1722 (policy "preserves chivalry"); JA0333 (noting that it's a "touchy subject" but "loved" that the rationale for the Requirement "distinguish[ed] between boys/girls"); JA0333 (policy "models the difference [between the genders]").

3. Plaintiffs did not feel protected by the requirement; they felt harmed. Both I.B. and Keely Burks noted that boys repeatedly teased and harassed them by looking up their skirts, causing them to limit their activities out of fear of leering boys. JA0498–99, 0505.

I.B. testified that the policy told her "that girls should be less active than boys and that they are more delicate than boys. This translates into boys being put in a position of power over girls." JA0499. Keely similarly testified:

> [O]n most days they would make us girls dress in a way that restricted our movement and they would tell us how to sit so boys couldn't see up our skirts. It seemed silly and sexist, and it made me angry to be treated like a person whose comfort and convenience was less important to them than the boys'.

JA0504–06. To Keely, CDS was saying "that we simply weren't worth as much as boys. They seemed to be telling me every day that girls are not in fact equal to boys, and that would make me feel inferior and angry at the same time." JA0507.

The Skirts Requirement not only exposed the Plaintiffs to harassment and made them feel unsafe, but it also specifically hindered their ability to participate in school. When forced to wear skirts, they avoided recess activities like climbing, playing on swings, doing cartwheels or flips, and playing soccer. JA0498, 0503. They were also unable to participate in gym and instead would ruefully watch other children play and enjoy sports. JA0506. But when not compelled to wear skirts, they were "free to do flips and cartwheels and . . . could sit in class unselfconsciously and focus on [] classwork rather than worrying about whether [their] legs were in the proper position for a girl." JA0498–99, 0504. At recess, girls avoided the monkey bars and certain games altogether because they did not want their underwear exposed. JA0498. Boys would look up girls' skirts and tease them if their skirts should "fly up." JA0498, 0505. Keely, for one, eventually gave up playing on skirts days altogether "because it was simply too embarrassing." JA0505–06. And if a student mistakenly thought it was a non-skirt day, the student

could be sent to the school office, missing out entirely on that day's education. JA0503.

CDS sexualized the mere act of sitting, telling them to "sit like a princess" or "sit in a feminine, modest manner" during class and "and [to] keep [their] knees together." JA0497, 0503–04. This prevented them from sitting comfortably, made them self-conscious, and distracted them from their studies. JA0497, 0503–04.

4. Plaintiffs' experts established that this stereotyping discrimination is harmful, even beyond the harm to which Plaintiffs themselves specifically testified. Pls.' Br. 16-18. The Plaintiffs' experts testified that dress codes like CDS's make girls focus on their appearance; deprive them of accessing their athletic physicality; perpetuate gender stereotypes that lead to negative academic, social, and psychological consequences for boys and girls; diminish girls' confidence, interest, and motivation for science and math; and reinforce the "stereotyping threat" that impairs female performance in stereotypical male fields. *Id*. NEA agrees with all that.

The professional experience of Amici's members confirms that sexually discriminatory dress codes perpetuate gender stereotypes, sexualize girls, and deprive them of full and equal access to educational experiences. *See, e.g.*, Kira Barret, *When School Dress Codes Discriminate*, NEAToday, July 24, 2018, http://neatoday.org/2018/07/24/when-school-dress-codes-discriminate (describing

dress codes that sexualize girls, devalues them compared to boys, and distracts them from education); Brenda Álvarez, *Girls Fight Back Against Gender Bias in School Dress Codes*, NEAToday, Jan. 6, 2016, http://neatoday.org/2016/01/06/school-dress-codes-gender-bias (same). These gender-based harms are frequently worse for Black students and transgender and non-binary students. *See* Barret, *supra*; NEA Office of General Counsel, *Legal Guidance on Transgender Students' Rights*, at 9 (June 2016), https://www.nea.org/assets/docs/20184_Transgender%20Guide_v4.pdf.

To be sure, Amici does not oppose all dress codes. Indeed, NEA specifically promotes inclusive dress codes like those adopted in Seattle, Washington, and Portland, Oregon. *See* NEA EdJustice Resources, https://neaedjustice.org/resources. An inclusive dress code can, as Seattle explained, demonstrate a commitment to "eliminating opportunity gaps" and promote a school's core values, including that students have a right to be treated equitably. Seattle Public Schools, *Inclusive Dress Policy for Students* (Oct. 7, 2019), https://www.seattleschools.org/district/calendars/news/what_s_new/inclusive_dress_policy.

But NEA opposes dress codes, like the Skirts Requirement, that create opportunity gaps and discriminate. *See* Tim Walker, *8 Education Trends and Ideas*

Worth Leaving Behind in 2019, NEAToday, Dec. 16, 2019, https://neatoday.org/2019/12/16/8-education-trends-worth-leaving-behind-in-2019/. NEA advises schools to protect transgender students from discriminatory applications of dress codes, promotes awareness about how policing certain natural hairstyles discriminates against Black students, and examines how dress codes can further structural racism. *See NEA Legal Guidance*, *supra*, at 28; Brenda Álvarez, *When Natural Hair Wins, Discrimination in School Loses*, NEAToday Sept. 17, 2019, http://neatoday.org/2019/09/17/banning-black-hair-discrimination; NEA, Reports: 2019 Representative Assembly, ¶ 143 (July 2020), https://ra.nea.org/wp-content/uploads/2020/05/Final-report.pdf; NEA, *5 Things Educators Can Do to Address Bias in Their School*, NEA EdJustice, Oct. 11, 2019: https://neaedjustice.org/2019/10/11/5-things-educators-can-do-to-address-bias-in-their-school/.

5. The Skirts Requirement is not a model inclusive dress code. Instead, it is motivated by gender stereotypes that specifically harmed the plaintiff-students on the basis of their sex, and thus violates Title IX of the Education Amendments of 1972.

Title IX provides, in relevant part, that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial

assistance." 20 U.S.C. § 1681(a). Plaintiffs have plainly established that they have been excluded from participation, denied benefits of, and subjected to discrimination. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174–75 (2005) ("[Title IX] covers a wide range of intentional unequal treatment"); *Mercer v. Duke Univ.*, 401 F.3d 199, 207 (4th Cir. 2005) (Title IX applies to "all programmatic aspects of educational institutions.").

Indeed, school-based discrimination based upon traditional stereotypes about girls is precisely what Title IX intended to root out. *See, e.g.*, *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996) ("Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities."); *see also* 118 Cong. Rec. 5804–05 (1972) (statement Sen. Bayh).

The district court recognized that the Skirts Requirement was harmful sex discrimination yet granted summary judgment in favor of CDS on the Title IX claim. The court reasoned that the Department of Education's rescission of a prior regulation, which expressly prohibited sex discrimination in dress and appearance codes, coupled with the rescission's preamble statement that appearance codes were a "matter that should be left to local discretion" meant that the Skirts Requirement did not violate Title IX. 47 Fed. Reg. 32526–02, revoking 34 C.F.R. § 106.31(b)(5), *see also id.* at 32527.

Yet the rescission does not declare that harmful dress codes based on gender stereotypes do not violate Title IX, nor could it. To take this reading seriously, one would have to accept that a school could require girls to wear sexualized clothing like lingerie or bikinis, and Title IX would be silent. That simply cannot be. In short, the rescission does not interpret Title IX as the district court contends, and if it did, it would be so inconsistent with Congress' clear direction that it would not be entitled to deference any under administrative law deference standard. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Finally, Defendants—relying on *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110–11 (9th Cir. 2006) (en banc) (holding that female bartenders failed to establish that a gender-specific dress code violated Title VII because the dress codes generally did not disproportionately burden women) and its progeny—assert that Title IX was not violated because the Plaintiffs failed to show that the Skirts Requirement "disproportionately burdens one sex." CDS Br. 42. This too is wrong.

Jespersen has never been adopted by this Court, was wrongly decided, and is contrary to *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020). *Bostock* makes clear that discrimination is not waived off merely because both genders are

burdened by a discriminatory policy. There, the Defendants and their amici specifically argued that sexual orientation discrimination was not sex discrimination because both men and women were burdened by prohibitions on same-sex relationships in that neither men nor women could have same sex partners. *Id.* at 1742.

But the Supreme Court flatly rejected that theory of sex discrimination, reasoning that the issue instead is whether "sex plays an essential but-for role" of the harm the victim experiences, not whether genders as a group are disproportionately burdened. *Id.*at 1748; *see also id.* ("Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups."); *id.* at 1753 ("[Title VII] focus[es] on discrimination against individuals and not merely between groups."). Here the girls' sex was the but-for cause of the experienced harm, regardless of whether boys were also burdened.

In any event, the evidence establishes that girls were uniquely burdened by the dress code, and even *Jespersen* recognized that "a grooming standard imposed on either sex [that] amounts to impermissible stereotyping," as is evident here, would constitute actionable sex discrimination. 444 F.3d at 1112; *see also id.* ("[There was] no evidence in th[e] record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear.").

6. The Skirts Requirement also violates the Equal Protection Clause. Retrograde assumptions about the capacity of girls constitute intentional gender discrimination subject to heightened scrutiny. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding that an institution's refusal to admit women based on "overbroad generalizations about the different talents, capacities, or preferences of males and females" violates Equal Protection). Such discrimination survives an Equal Protection challenge only with an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 533. And the justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"; yet it does here. *Id.*; *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014).

We join the Plaintiffs' brief pointing out how the Defendants' additional justifications also fail heightened scrutiny, Pls.' Br. 35–42, but the fairest reading of this record is that those asserted reasons are pretextual and the real justification of the Skirts Requirement is to perpetuate gender stereotypes.

CONCLUSION

CDS and RBA are state actors when they carry out the function of providing free and universal education, and they used that authority to discriminate against students on the basis of their sex. The Skirts Requirement should not stand. Amici urge this Court to reverse the district court on the Title IX claim, affirm on the

Equal Protection Clause claim against CDS, reverse on the Equal Protection Clause claim against RBA, and grant summary judgment to the Plaintiffs on all claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,477 words from the Statement of Interest through the Conclusion, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word with Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Eric A. Harrington

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