No. 22-238

IN THE

Supreme Court of the United States

CHARTER DAY SCHOOL, INC., ET AL.,

Petitioners,

v.

BONNIE PELTIER, ET AL.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF CATHOLIC CHARITIES OF THE DIOCESE OF ARLINGTON, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Catholic Charities of the Diocese of Arlington, Inc., is the charitable arm of the Catholic Diocese of Arlington, Virginia, and serves all those in need who live within the Diocese regardless of their faith. Catholic Charities' faith recognizes the God-given dignity of all, which inspires its response to the poor and vulnerable, and informs the organization's mission, vision, and strategies. As such, Catholic Charities of the Diocese of Arlington serves the poor, protects the vulnerable, and welcomes the newcomer through 21 programs within 21 counties and seven cities, fulfilling its mission through family counseling, adoption services, immigration services, jobs ministry, prison ministry, food pantries, and family transitional housing.

Amicus is concerned that the decision below takes an overbroad view of the state-action doctrine, potentially encompassing religious social service providers—like *Amicus*—as state actors, and thereby threatening them with the full range of lawsuits and liabilities meant only for government defendants. *Amicus* urges the Court to grant review of the decision below and, on the merits, to reject any approach to the state-action doctrine that could invite that outcome.

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission. All parties received timely notice and have consented to the filing of this brief. *Amicus* addresses only the state-action question presented in the petition; this brief should not be construed as defending the stated rationale for Petitioner Charter Day School's underlying dress code policy.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Circuit's overbroad approach to the state-action doctrine threatens far more than charter schools. It also threatens religious social service providers. The decision below held that an organization may be a state actor if it receives public funds, carries a public label for some purpose, or plays a role in fulfilling a legal obligation or traditional function undertaken by the state. Religious social service providers often satisfy one or more of those criteria. That means they could be deemed state actors. And as state actors, they could be subject to a battery of new liabilities. A Jewish adoption service could be named the defendant in a Fourteenth Amendment action. A Christian relief ministry could face a Title VII suit without the shield of the statute's religious exemption. Or a Muslim vocational program could meet with an Establishment Clause challenge. Such new liabilities would burden, if not bar, religious social service providers' free exercise of religion.

And that, in turn, would burden the many Americans—of all faiths or of no faith—who depend on religious social service providers. Since before the founding, these organizations have taken in the sojourners, cared for the orphans, and seen to the widows. And over the years, their work only has grown. Today, religious social service providers help kids who need a stable home, come alongside addicts working to break the cycle of drug dependence, offer hot meals to the homeless, facilitate job programs for former inmates, work to eradicate human trafficking, ensure that the elderly and homebound are not forgotten—and much more. So by threatening

religious social service providers, the Fourth Circuit's decision threatens these many Americans too.

Amicus thus asks the Court to grant the petition and reverse the Fourth Circuit's decision. In doing so, the Court will ensure that religious social service providers can continue to exercise their religion, free from the threat of unwarranted liability, and for the good of the many Americans they serve.

ARGUMENT

I. THE DECISION BELOW THREATENS RELIGIOUS SOCIAL SERVICE PROVIDERS.

The state-action doctrine marks the line between the government and the governed. Respecting that line benefits those on both sides. It ensures that the government need not take "responsibility" for "conduct it could not control." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). And it "preserve[s]" for the governed "an area of individual freedom" not encumbered by the higher constraints placed upon the state. *Id.*

Still, the governed sometimes may be deemed part of the government. For example, a "private entity" may become a "state actor" when it "performs a traditional, exclusive public function," when "the government compels the private entity to take a particular action," or when "the government acts jointly with the private entity." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). As these examples make clear, however, the "circumstances" where a private entity may become a public actor are appropriately "few" and "limited." *Id.*

Rather than stick to those circumstances, the Fourth Circuit below took a different approach. It designated Charter Day School a state actor after "weigh[ing]" several "factor[s]." Pet. App. 16a. First, the court noted that Charter Day School receives "substantial public funding." *Id.* at 15a. Second, the court highlighted that state law treats Charter Day School as a "public institution[]" for certain purposes, including for budgeting and employee benefits. *Id.* at 14a–15a. Third, the court explained that Charter Day School helps fulfill the state's legal "obligation" to provide free elementary and primary education, a "function" the state had long or traditionally undertaken. *Id.* at 16a, 18a. After slotting those factors into its "totality-of-the-circumstances inquiry," the Fourth Circuit held that Charter Day School was a state actor, and thus subject to the full panoply of restrictions on government action. *Id.* at 22a, 25a. As the dissenters below rightly explained, that holding "threatens" the "independence" of Charter Day School and, indeed, all charter schools. Pet. App. 90a (Wilkinson, J., dissenting). That, no doubt, is true.

But the holding also threatens religious social service providers like *Amicus*. For they potentially could be deemed state actors under the Fourth Circuit's unconstrained multifactor test. And if state actors, they, like Charter Day School, also could be subject to new and destructive liabilities. Indeed, the shadow cast by those novel liabilities would dissuade many religious ministries from continuing at all—particularly those ministries without means to defend themselves against private lawsuits like this one. That troubling result warrants this Court's attention.

A. The Lower Court's Overbroad Approach to State Action Will Chill the Ministries of Religious Social Service Providers.

The Fourth Circuit's novel approach to the state-action doctrine potentially could reach numerous religious social service providers.

Consider just three examples. The Religious Coalition for a Nonviolent Durham (RCND) is an "interfaith" organization based in Durham, North Carolina that, for thirty years, has come alongside those most-affected by violence "through vigil ministry among surviving loved ones of homicide victims, support circles for citizens returning from incarceration, and restorative justice practices that "repair the harm caused by wrongdoing." https://nonviolentdurham.org. Another example is HIAS, originally founded as the Hebrew Immigrant Aid Society, which began in 1881 to assist "Jews fleeing pogroms in Russia and Eastern Europe"; it roots its mission in the Deuteronomic injunction to "love the stranger for you were strangers," and now works to "resettle the most vulnerable refugees of all faiths and ethnicities from all over the world." https://www.hias.org/who/history. Finally, consider *Amicus*, Catholic Charities of the Diocese of Arlington (CCDA). Motivated by "the Gospel of Jesus Christ and the official teachings of the Roman Catholic faith," CCDA "seeks to implement the Church's mission of social justice" by serving "the most vulnerable of God's people." https://www.ccda.net/about-us/who-we-are/our-mission-and-vision/ CCDA does so by aiding immigrants, assisting with adoptions, and providing food, housing, and clothing to the poor.

Each of these organizations could satisfy one or more of the factors that the Fourth Circuit held may transform a private entity into a state actor. Start with public funding. *See* Pet. App. 15a. Each of RCND, HIAS, and CCDA receive public funds. *See* https://nonviolentdurham.org/who/ (thanking the City of Durham and Durham County for financial support); https://www.hias.org/publications/20212022-impact-report (showing receipt of federal funds); https://www.ccda.net/communications/annual-report/2020-annual-report.pdf (reflecting that 20% of 2020 revenue derived from government grants). And these public funding sources—reaching the millions or tens of millions annually—could easily be deemed "substantial." *See* Pet. App. 15. A court therefore could potentially hold that each of the three religious social service providers satisfies the Fourth Circuit's first factor suggesting state action.

So too could a court conceivably find that each of these organizations satisfies the second factor. That is because relevant law may treat each organization as a "public institution[]" for at least some purposes. *See* Pet. App. 14a–15a. For its part, RCND has contracted with Durham County to provide gang prevention and intervention services. *See* Edmund F. McGarrell, et al., *An Assessment of the Comprehensive Anti-Gang Initiative: Final Project Report* 157 (Jul. 20, 2012). HIAS has worked with the State Department to offer refugee relocation assistance. *See* https://www.hias.org/who/history. CCDA has likewise contracted with the Commonwealth of Virginia to provide services to refugees. *E.g.*, https://www.dss.virginia.gov/files/division/cvs/ona/refugee_services/resettlement_contracts/catholic_chariti

es_diocese_of_arlington_btb/12-089/CVS_12-089-01_renewal_III_RSS_%26_TAP_10-1-15_thru_09-30-16.pdf. In each instance, whether for budgeting, task management, or some other purpose, applicable statutes or regulations may treat the religious social service provider as a public institution.

Finally, a court potentially could hold that each of these religious social service providers satisfies the Fourth Circuit's third factor insofar as each helps fulfill a legal "obligation" or perform a "function" the government has long or traditionally undertaken. *See* Pet. App. 16a, 18a. Indeed, in step with the Fourth Circuit, a court could hold that RCND helps the County and City of Durham fulfill their long-established obligation to protect citizens from crime, and to reintegrate former criminals into society. *See, e.g.*, *Snider v. City of High Point*, 85 S.E. 15, 16 (N.C. 1915) (noting that city charter "charged" the city "with the duty" to "to preserve and enforce good government, order, and security of the city, and to protect the lives, health and property of all its inhabitants"). A court likewise could hold that HIAS and CCDA help the federal and state governments make good on the American commitment to welcome the destitute seeking the protection of our soil. *See, e.g.*, Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (accession to the Refugee Protocol by the United States). In each case, the religious social service provider partakes in or assists with an obligation or function traditionally associated with the government. On that basis, a court plausibly could find the Fourth Circuit's third factor met too.

RCND, HIAS, and CCDA are just examples. What they illustrate is that many religious social service providers could meet one or more of the factors framing the Fourth Circuit's "totality-of-the-circumstances" test for state action, Pet. App. 22a, and thus could potentially be deemed state actors.

B. If Religious Social Service Providers Were Deemed State Actors, They Would Be Threatened With New, Destructive Liabilities.

State-actor status is not just a conceptual category. It comes with real-world consequences. If religious social service providers were deemed state actors, they would face the threat of an onslaught of lawsuits hitherto reserved for the government.

This is not just a theoretical possibility. These lawsuits already occur; they just regularly fail under the state-action doctrine. *See, e.g.*, *Rockwell v. Roman Cath. Archdiocese of Bos.*, No. 02-239, 2002 WL 31432673, at *2 (D.N.H. Oct. 30, 2002) (constitutional claims against Roman Catholic diocese dismissed under state-action doctrine); *Uhuru v. Moskowitz*, No. 07-07109, 2009 WL 2020758, at *6–9 (C.D. Cal. July 6, 2009) (constitutional claims against Jewish prison chaplain dismissed under state-action doctrine). Without the state-action doctrine, the suits might not fail—or at least not fail so easily. And at minimum, the looming threat the suits pose could chill religious social service providers' activities. That is because, once freed from any serious state-action requirement, activist plaintiffs potentially could subject religious social service providers to a barrage of new challenges and expose them to a host of new liabilities.

1. Fourteenth Amendment Liability.

The Fourteenth Amendment provides that the state may not "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. This Court has interpreted the Due Process Clause to restrict government from unduly interfering with decisions like whom to marry, whether to use contraceptives, and how to raise children. *See Obergefell v. Hodges*, 576 U.S. 644, 666–76 (2015); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 533–35 (1925). Yet many religions maintain deeply held beliefs in each of those areas.

For example, certain interpretations of Islamic law instruct that Muslims may not marry non-Muslims. *See* Imen Gallala-Arndt, *The Impact of Religion in Interreligious Custody Disputes: Middle Eastern and Southeast Asian Approaches*, 63 Am. J. Comp. L. 829, 831 (2015). Many Christian denominations oppose the use of certain forms of contraception. *E.g.*, *Zubik v. Burwell*, 578 U.S. 403 (2016). And nearly all religions hold strong views about how to raise the next generation in the faith. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 209–13 (1972) (describing Amish educational practices); *Sklar v. Comm'r*, 549 F.3d 1252, 1254 (9th Cir. 2008) (noting that plaintiffs had a "deeply held religious belief that as Jews they have a religious obligation to provide their children with an Orthodox Jewish education"). Because religious social service providers are, at bottom, religious organizations, freely exercising their religious faith, they often share these beliefs and operate their services in a manner consistent with them. *See, e.g.*, *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1874–75

(2021) (discussing how Catholic social service agency that assisted City of Philadelphia with foster care placements adhered to Roman Catholic view of marriage). If those organizations were deemed state actors, however, they could not act in accordance with such beliefs without the risk of incurring crippling liability under the Due Process Clause.

Much the same goes for the Equal Protection Clause. The Fourteenth Amendment directs that the government may not "deny to any person" the "equal protection of the laws." U.S. Const. amend. XIV. This Court has interpreted that provision to mean that, in some contexts, the government may not distinguish between men and women. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 534 (1996). Yet some religions hold different views. *E.g.*, Codex Iuris Canonici (1983) c.1024 (Code of Canon Law) (Roman Catholic priesthood reserved to men). And again, because religious social service providers are ultimately religious organizations, their structure and practice often reflect those views. *E.g.*, https://www.yadyehuda.org/partner-shuls.html (list of male Rabbis who serve as liaisons for Jewish food-insecurity charity in Maryland). Likewise, the Equal Protection Clause forbids ethnic discrimination. *See Hernandez v. New York*, 500 U.S. 352, 360 (1991). Yet some religious groups are rooted in ethnic distinctions. *See, e.g.*, https://www.uocofusa.org/history (noting that Ukrainian Orthodox Church of the USA began because the founders believed that Ukrainian Americans, as a "distinctive ethnic identity should have [their] own" church).

A bevy of new Equal Protection Clause liabilities no doubt would force religious organizations, if deemed state actors, to reconsider those structures and practices at the cost of their faith.

2. Establishment Clause Liability.

Religious social service providers, once deemed state actors, potentially could face new liability under the Establishment Clause too. Indeed, designating such organizations as state actors would immediately raise Establishment Clause questions. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2429 (2022); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019). That is so for several reasons.

To start, religious social service providers often maintain a particular religious affiliation. Consider the example of World Vision, one of the nation's largest relief organizations. In the "About Us" part of its website, World Vision says "[w]e are Christian. We acknowledge one God: Father, Son, and Holy Spirit." https://www.worldvision.org/about-us/mission-statement#1468005319180-514a38f2-ffda. Religious social service providers also sometimes require employees to share their religious affiliation or beliefs. Take another organization, International Justice Mission, which works to eliminate human trafficking. On the "Careers" section of its website, International Justice Mission says we "truly believe that the work we are doing is God's work, not our own, and … [t]hat's why we … require … all employees practice a mature orthodox Christian faith." https://www.ijm.org/careers. Finally, religious social service providers often understand their religious faith to guide their work. Typical is the example from

Islamic Relief US, which provides resources to marginalized persons around the world. In the "Mission, Vision, and Values" section of its website, Islamic Relief US proclaims that "we remain guided by the timeless values and teachings provided by the revelations contained within the Qur'an and prophetic example." https://irusa.org/mission-vision-values/.

These are just three examples, but their religious affiliations and approaches are typical of thousands of private religious nonprofits across the country. Any government that adopted such religious affiliations, employee belief requirements, or express vocational guides quickly would face debilitating Establishment Clause suits. So too would religious social service providers—if they were designated as state actors.

3. Statutory Liability.

If designated state actors, religious social service providers also could face new *statutory* liabilities. For example, Title VII prohibits many employers from engaging in religious discrimination. *See* 42 U.S.C. § 2000e-2. And Title IX prohibits educational institutions from engaging in sex discrimination. *See* 20 U.S.C. § 1681. At the same time, both statutes exempt private religious organizations that draw those otherwise impermissible lines, when the lines flow from faith. *See* 42 U.S.C. § 2000e-1(a); 20 U.S.C. § 1681(a)(3). Of course, the statutory exemptions reflect the First Amendment, which separately and ultimately "protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

But the statutory exemptions protect only religious organizations. 42 U.S.C. § 2000e-1(a); 20 U.S.C. § 1681(a)(3); *see also Our Lady of Guadalupe*, 140 S. Ct. at 2055 (ministerial exception reaches "religious institutions"). If a religious organization were deemed an arm of the state, that could create confusion about the status of the exemptions and thus engender new theories of statutory liability. A former employee might sue a religious organization under Title VII for its decision to employ only those who practice the faith. *See, e.g.*, *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 945–947 (7th Cir. 2022) (Easterbrook, J., concurring) (discussing scope of Title VII's religious organization exemption). Or a former student might sue a religious organization under Title IX for its decision to adhere to religious doctrine drawing distinctions based in sex. *See e.g.*, *Maxon v. Fuller Theological Seminary*, 549 F. Supp. 3d 1116, 1119, 1128 (C.D. Cal. 2020), *aff'd*, 2021 WL 5882035 (9th Cir. Dec. 13, 2021). As yet, neither sort of suit can succeed because of the statutory exemptions. The decision below, however, with its untethered view of state action, threatens the clarity those exemptions provide, both to the religious organizations and to those with whom they interact.

* * *

The Fourth Circuit's overbroad approach to the state-action doctrine threatens not only Petitioner, or even only other charter schools. It also threatens religious social service providers, their free exercise of religion, and their ability to continue their ministries. The Court therefore should grant the petition and reverse the Fourth Circuit's decision.

Were there any doubt about whether that is the right outcome, the Court need only consider its recent free exercise decisions. They involved organizations that, like Petitioner, may have obtained public funds, received some public label, or played some role in fulfilling a state obligation or function. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2018 (2017) (funding for tire scrap program); *Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2251–52 (2020) (tuition assistance program); *Fulton*, 141 S. Ct. at 1875 (foster care contract); *Carson v. Makin*, 142 S. Ct. 1987, 1993–95 (2022) (tuition assistance program). Yet in none of those decisions did the Court understand the organizations to be state actors. Indeed, any such understanding would have made nonsense of the Court's decisions holding that the Establishment Clause permitted, and the Free Exercise Clause required, equal participation in those government programs by religious groups. Instead, the organizations were taken for what they were: The governed acting alongside—not as—the government. That more constrained approach to the state-action doctrine is the right one. The Court should adopt it here.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision below.

October 14, 2022

Respectfully submitted,

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