No. _____

In The
Supreme Court of the United States

ROBERT MOSS, individually and as general guardian of his minor child; ELLEN TILLETT, individually and as general guardian of her minor child; FREEDOM FROM RELIGION FOUNDATION, INCORPORATED; MELISSA MOSS,

Petitioners,

vs.

SPARTANBURG COUNTY SCHOOL DISTRICT SEVEN, a South Carolina body politic and corporate,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

AARON KOZLOSKI
P.O. Box 1996
Lexington, SC 29071
(803) 748-1320
Aaron@capitolcounsel.us

GEORGE DALY
Counsel of Record
139 Altondale Avenue
Charlotte, NC 28207
(704) 333-5196
gdaly1@gmail.com

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Public school students attend an off-campus "released time" religious instruction course conducted by a private religious organization. The public school's Policy allows it to grant academic credit for this course, after reviewing it for "secular criteria." The public school unconditionally delegates this required secular review to a private accredited religious school, which reviews the released time course for both secular and religious criteria. The public school then grants academic credit for the course.

Is this delegation of governmental power to a religious school an excessive entanglement of church and State prohibited by *Larkin v. Grendel's Den,* 459 U.S. 116 (1982)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Freedom From Religion Foundation, Incorporated states that it is a privately held corporation, has no parent corporation, and none of its shares is held by a publicly traded company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION

STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Robert Moss, Melissa Moss, Ellen Tillett and the Freedom From Religion Foundation, Inc., respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 683 F.3d 589 (4th Cir. 2012), and reproduced in the Appendix ("App.") at 3. The opinion of the District Court for the District of South Carolina is reported at 775 F. Supp. 2d 858 (D.S.C. 2011), and reproduced at App. 30.

JURISDICTION

The judgment of the Fourth Circuit was entered on June 28, 2012. App. 1. Petitioners' timely petition for rehearing *en banc* was denied on July 31, 2012. App. 77. This petition is filed within ninety days thereafter. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND POLICY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion. . . ."

Respondent's "Released Time For Religious Instruction Policy" (2007) provides:

> The board [respondent] will release students in grades seven through twelve from school, at the written request of their parent/legal guardian, for the purpose of religious instruction for a portion of the day. The school will consider this part of the school day.
>
> The Board will not allow the student to miss required instructional time for the purpose of religious instruction. Any absences for this purpose must be during a student's non-instructional or elective periods of the school day.
>
> When approving the release of students for religious instruction, the board assumes no responsibility for the program or liability for the students involved. Its attitude will be one of cooperation with the various sponsoring groups of the school district.
>
> The sponsoring group or the student's parent/legal guardian is completely responsible for transportation to and from the place of instruction. The district assumes no responsibility or liability for such transportation.

Religious instruction must take place away from school property and at a regularly designated location.

District officials will insure that no public funds will be expended to support a released time program and that district staff and faculty will not promote or discourage participation by district students in a released time program.

Elective credit

The district will accept no more than two elective Carnegie unit credits for religious instruction taken during the school day in accordance with this policy. The district will evaluate the classes on the basis of purely secular criteria prior to accepting credit. The district will accept off campus transfer of credit for release time classes with prior approval.

———♦———

STATEMENT OF THE CASE

Petitioner Robert Moss is the father of petitioner Melissa Moss, who was a student at Respondent's ("the district") high school. Petitioner Ellen Tillett's child was a student at the high school. Tillett is a member of petitioner Freedom From Religion Foundation, Inc. ("FFRF"). Petitioners brought suit in the United States District Court for the District of South Carolina pursuant to 42 U.S.C. § 1983. The district court had subject matter jurisdiction pursuant to

28 U.S.C. § 1343(a)(3). Petitioners sought a declaratory judgment that the district's Released Time for Religious Instruction Policy ("Policy") was unconstitutional as applied, and nominal damages.

The district allows a private religious organization (the "Bible School") to conduct released time religious instruction for district students. The district's Policy, *ante,* p. 2, requires that it accept academic credit for these classes, after reviewing them for "secular criteria." The district unconditionally delegated this power of secular review to an accredited religious school, Oakbrook Preparatory School ("Oakbrook"), which reviews the released time course for both religious and secular criteria, without any involvement of its accrediting agency. The district then grants academic credit for these courses on the basis of Oakbrook's approval.

The district court granted summary judgment to the district. It held that each individual petitioner had standing. App. 38-40, 42-49. It did not decide whether petitioner FFRF had standing. App. 48 n.7. On the merits the district court held that there was no excessive entanglement. It rejected the applicability of *Larkin v. Grendel's Den,* 459 U.S. 116 (1982), on the ground that public schools are obliged to accept academic credits from accredited religious schools regardless of the content of the course, App. 70-72, even when the accredited school did not itself teach the course.

The Court of Appeals affirmed. It agreed that the Mosses had standing but held that petitioners Tillett and FFRF lacked standing. App. 13-20. The Mosses, who are Jewish, found the district's approval and treatment of the Bible School distressing. To them it exemplified the district's favoritism of Evangelical Christianity and disfavor of the Jewish tradition to which they belong. App. 19. On the merits the Circuit Court held that the Establishment Clause allowed the district to "trust[ ] the private school accreditation process" to perform the secular criteria review. App. 26. It did not mention that Oakbrook never informed its accreditation agency of its relationship with the Bible School. The Circuit Court did not cite *Larkin*.

The Bible School provides religious instruction one hour each school day at a church next door to the district's high school. At the end of each semester it sends its grades to Oakbrook, a Christian interdenominational school located some ten miles away. Oakbrook reviews the Bible School course to determine the knowledge to be gained in terms of faith, whether it is a Christian interdenominational course, and whether it is a course that Oakbrook would offer. Oakbrook approves the grades and sends them to respondent, which accepts them for academic credit without question. The district's Policy requires that it "evaluate the [Bible School] classes on the basis of

purely secular criteria[1] prior to accepting credit." *Ante*, pp. 2, 3. Without repealing this requirement and without public notice, respondent has unconditionally delegated to Oakbrook the power to evaluate the classes. No standards attend this delegation. The district does not monitor or control Oakbrook's evaluation. Oakbrook is at liberty to evaluate for such secular or religious criteria as it chooses. It has chosen to evaluate for both.

There is no record of communication between respondent and Oakbrook or legal relationship between them. The arrangement by which Oakbrook undertakes the Policy requirement of secular review started with the Bible School approaching respondent's Board Chair soon after the South Carolina Released Time Credit Act, App. 79, was enacted. The Chair indicated that he would prefer to have the released time credit come through accredited Oakbrook rather than directly from the unaccredited Bible School. The Bible School then contracted with

---

[1] The Policy does not define "secular criteria." The term appears to derive from the South Carolina Released Time Credit Act, App. 79, S.C. Code § 59-39-112(B) (2006) – the constitutionality of which is not at issue in this case. That statute allows public school districts to award academic credit for off-campus religious instruction classes after evaluation for "secular criteria" which may include "(1) number of hours of classroom instruction time; (2) review of the course syllabus which reflects the course requirements and materials used; (3) methods of assessment used in the course; and (4) whether the course was taught by a certified teacher." It does not allow this determination to be delegated.

Oakbrook to review the released time course. Respondent is not a party to the contract and has no legal relationship with Oakbrook.

Oakbrook's accreditation agency was not informed of the Bible School course and conducted no review of it. The course is not listed in the Oakbrook catalogue. No Oakbrook students attend it; only district students attend it.

Respondent has granted to a religious institution the governmental power to decide whether a course of religious instruction qualifies for public school academic credit, without any assurance that the religious institution will decide the matter on secular grounds only. The district testified that if Oakbrook grants academic credit for a course entitled Laboratory For Intercessory Prayer, it would accept the credit. Bar Mitzvah training and Mass qualify for academic credit, if Oakbrook says so.

REASONS FOR GRANTING THE WRIT

The unconditional delegation to a religious school of the governmental power to determine whether students have received an appropriate secular education, and the acceptance of academic credit for a course judged religiously appropriate by the religious school, is an excessive entanglement of church and State prohibited by *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

The Circuit Court has decided an important constitutional question in a way that conflicts with *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). *Larkin* held that delegating an important discretionary governmental power to a religious institution was excessive entanglement because it –

> substitute[d] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards . . .

Id., at 127. Delegating governmental power to a religious group "further[s] the interests of religion through the coercive power of government . . . " *Allegheny County v. ACLU*, 492 U.S. 573, 660 (1989) (JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA join, concurring in the judgment in part and dissenting in part).

The district has the governmental power to assure that its students receive a secular education. *Bd. Educ. v. Allen,* 392 U.S. 236, 245-47 (1968). Without amending the Policy requirement that the district itself exercise this power, and without giving public notice, the district has donated this power to Oakbrook. The "reasoned decisionmaking of a public legislative body acting on evidence and guided by standards . . . ", *Larkin v. Grendel's Den*, 459 U.S. at 127 (1982), has been displaced by the unsupervised power of a religious school. No governmental process attends Oakbrook's exercise of the power of review.

Its review is "standardless, calling for no reasons, findings or reasoned conclusions," and may "therefore be . . . employed for explicitly religious goals." *Id.,* 459 U.S. at 125. It has in fact thus used this power, by reviewing for the knowledge to be gained in terms of faith and for whether the Bible School course is Christian interdenominational and thus doctrinally satisfactory to Oakbrook. It is as if a court were to accept the verdict of an uninstructed jury. The jury may have followed the law but there is no assurance that it did so.

The crux of the Circuit Court's opinion is that the district may delegate the power of secular review to Oakbrook because it is "trusting the private school accreditation process to ensure adequate academic standards." App. 26. Oakbrook's accreditation agency, however, was not informed of the Bible School course and conducted no review of it. The Bible School course is not an Oakbrook course. No "accreditation process" was applied to the Bible School course. The process that respondent trusted was the unsupervised process of a private religious school that did not inform its accreditation agency of what it was doing. Whatever might be the case for review by a neutral, non-religious accreditation agency acting on published standards, in this case a private religious school has been secretly empowered to grant public school academic credit on a doctrinal basis.

CONCLUSION

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

Respectfully submitted,

AARON KOZLOSKI
P.O. Box 1996
Lexington, SC 29071
(803) 748-1320
Aaron@capitolcounsel.us

GEORGE DALY
Counsel of Record
139 Altondale Avenue
Charlotte, NC 28207
(704) 333-5196
gdaly1@gmail.com

Counsel for Petitioners