United States District Court
for the District of South Carolina
Spartanburg Division

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| Robert Moss, individually and as general guardian of his minor child, and<br><br>Ellen Tillett, individually and as general guardian of her minor child, and<br>The Freedom From Religion Foundation, Inc.,<br>*Plaintiffs,*<br>~ *vs.* ~<br><br>Spartanburg County School Districy No. 7, a body politic and Corporation,<br>*Defendant.* | CA No. 7:09-CV-1568-HMH<br><br>**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S TO MOTION DISMISS** |

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

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## STATEMENT OF THE CASE

The Complaint was filed on June 16, 2009. Dkt. 1. It pleaded that defendant had violated the Establishment Clause of the United States Constitution by granting academic grades for released time religious education. On August 31, 2009, defendant moved to dismiss pursuant to *Fed. R. Civ. P.* 12(b)(1) for lack of standing and pursuant to *Fed. R. Civ. P.* 12(b)(6) for failure to state a claim. Dkt. 19. On September 17 plaintiffs filed a First Amended Complaint as of right under *Fed. R. Civ. P.* 15(a). Dkt. 24. On September 21 plaintiffs moved for leave to file and serve a Second Amended Complaint. Dkt. 25. This motion was allowed by the Court on September 24. Dkt. 26. The Second Amended Complaint was filed on September 30. Dkt. 27. The First and Second Amended Complaints brought forward the Establishment Clause claim and added an Equal Protection claim.

On October 1 the Court ordered that the case would be dismissed for failure to prosecute unless plaintiffs responded within ten days to the motion to dismiss the Complaint. Dkt. 29. On October 10 plaintiffs responded with their Memorandum in Opposition, dkt. 30, addressing the Establishment Clause claim as presented in the Complaint and in the two amended Complaints, but not addressing the Equal Protection Claim because there had been no motion to dismiss it. Defendant filed its Reply Memorandum, dkt. 32, on the same basis,

addressing the allegations of all the Complaints as they applied to the Establishment Clause claim but not addressing the Equal Protection Claim. Defendant then moved to dismiss the Equal Protection Claim pursuant to *Fed. R. Civ. P.* 12(b)(6) and filed its Memorandum in Support ("Mem. Supp."). Dkt. 33. [1] Plaintiffs now respectfully file this Memorandum in Opposition.

## STATEMENT OF FACTS

The pertinent facts are alleged in the Second Amended Complaint, which is incorporated by reference. Pertinent portions will be quoted in the Argument.

## ARGUMENT

Released time religious instruction as such is constitutional, *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952). Plaintiffs claim that additionally giving academic credit for it violates the Establishment Clause.

Within the set of facts that shows defendant's violation of the Establishment Clause are two actions of defendant which independently violate the Equal Protection Clause. These actions are (1) defendant's "allowing SCBEST to discriminate among students for religious reasons by adjusting their

[1] Defendant has not formally moved to dismiss the Establishment Clause claim of the Second Amended Complaint. But, defendant's Reply Memorandum, dkt. 32, briefs its opposition to the Establishment Clause claim as stated in the Second Amended Complaint and is in effect a motion to dismiss it.

academic grade based on SCBEST's perception of the student's religious status or progress or lack thereof," and (2) defendant's "not allowing unaccredited schools other than SCBEST to have their grades transferred as coming from an accredited private school." Second Amended Complaint ¶ 43.

The Equal Protection Clause provides: "…nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., Amndt. XIV, cl. 1. The constitutional text is "essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed. 2d 313 (1985). The standard for judging whether like treatment has been given varies with the classification. Those classifications which impinge on fundamental rights or suspect classes may be justified only by a compelling governmental interest. *San Antonio Indep. Sch. Dist. v. Rodriguez* , 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973). Other classifications need only be shown to be rationally related to permissible governmental objectives. *Cleburne v. Cleburne Living Ctr.*, *supra,* 473 U.S. at 440.

Defendant argues that plaintiffs have failed to state an Equal Protection claim because they have not adequately shown (1) that there has been State action,[2] (2)(a) that (a) SCBEST has awarded academic grades on the basis of

[2] Defendant's Argument I.B.2., Mem. Supp. at 6.

religion, or (2)(b) that other unaccredited schools have not been exempted from the requirements of the Transfer Regulations,[3] (3) that plaintiffs are similarly situated with respect to the alleged discriminations,[4] (4) that the classifications at issue do not impinge on a fundamental right,[5] and (5) that these classifications do not have a rational basis.[6] None of these positions is well taken.

**1 The discriminations at issue are State action.**

This is an action pursuant to 42 U.S.C. 1983. Plaintiffs need only show State action under color of law.

2 <u>The awarding of grades on a religious basis</u>

Plaintiffs' first Equal Protection claim is that defendant allows SCBEST to discriminate in academic grades on the basis of religion by delegating its academic grading authority to SCBEST, Second Amended

[3] Defendant's Argument I.A., Mem. Supp. at 2.

[4] Defendant's Argument I.B.1., Mem. Supp. at 5.

[5] Defendant's Argument I.C., Mem. Supp. at 6.

[6] Defendant's Argument I.D., Mem. Supp. at 8.

Complaint, ¶ 27,[7] and then accepting this grade without question, *id.* ¶ 36(a).[8] Defendant, a school district, is a State actor. *School Dist. of Abington Twp. v. Schempp,* 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed. 2d 844 (1963). A delegation of authority and the acceptance of a grade by a State actor are State action.

Two other theories of State action are also well pleaded.

First, the actions of SCBEST are State action because defendant has delegated a public function to SCBEST. Granting a public school academic grade is a public function. When a public function is granted to a private entity, exercise of the public function by the private entity is State action. *Marsh v. Alabama,* 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946).

Second, the arrangement between defendant and SCBEST is so symbiotic and mutually interdependent that they are in effect joint venturers in the enterprise of administering public school grades. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed. 2d 45 (1961). The

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7 "27. Defendant has delegated to SCBEST the power to perform the governmental function of granting public school grades."

8 "36. . . .(a) the grades submitted by Oakbrook to defendant are treated by defendant as coming from Oakbrook and not from SCBEST and without further inquiry they are entered upon the student's official transcript and credited as satisfying an elective requirement and used to compute grade point averages. . ."

Second Amended Complaint alleges that defendant aided SCBEST in sending its solicitation letter, ¶ 9(a);[9] that defendant and SCBEST and Oakbrook Preparatory School agreed to report SCBEST grades as Oakbrook grades and defendant accepts them as such without question, ¶ 36(a);[10] and that defendant has substantially aided SCBEST in the fulfillment of its religious mission, ¶ 38.[11] This alleges a joint venture in which SCBEST controls the award of certain public school grades.

3 Allowing SCBEST to evade the Transfer Regulations

Plaintiffs' second Equal Protection claim is that defendant has, by exempting SCBEST from controlling law, allowed it but not other unaccredited

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9 "9 . . .(a) Prior to the enactment of the Policy each parent plaintiff received through the mails and shared with his or her minor child a letter . . . from Spartanburg County Bible Education in School Time (SCBEST), a private religious organization which had been selected by defendant and whose selection was later ratified by defendant and which now offers the sectarian, evangelical and proselytizing religious released time religious education course implemented by Defendant. Upon information and belief Defendant supplied SCBEST with the names and addresses of all rising tenth, eleventh and twelfth grade students at Spartanburg High School so that this letter could be sent. Upon information and belief defendant knew of and approved the contents of this letter before it was sent. . ."

10 "36. . . .(a) the grades submitted by Oakbrook to defendant are treated by defendant as coming from Oakbrook and not from SCBEST and without further inquiry they are entered upon the student's official transcript and credited as satisfying an elective requirement and used to compute grade point averages. . ."

11 "38. By its implementation of the Policy defendant has substantially aided SCBEST in the fulfillment of its religious mission."

schools to have their grades transferred as if coming from an accredited private school. Second Amended Complaint ¶¶ 29-36. This is State action. Defendant itself, a governmental actor, has created and applied the exemption. *School Dist. of Abington Twp. v. Schempp, supra,* 374 U.S. at 225.

**4 Plaintiffs have sufficiently alleged that (a) SCBEST has in fact awarded grades on the basis of religion, and (b) other unaccredited schools have not been exempted from the requirements of the Transfer Regulations.**

In *Ashcroft v. Iqbal*, ___ U.S. ____, 129 S.Ct. 1939, 173 L.Ed. 2d 868 (2009), the Court held that on a motion to dismiss for failure to state a claim (a) the Court looks at facts, not conclusions; (b) the pleaded facts must state a plausible claim; and (c) a claim is not plausible if it alleges facts equally or more consistent with lawful conduct. Defendant argues that *Iqbal* requires dismissal in this case.

5 The awarding of grades on a religious basis

The only factual omission that defendant alleges in support of its *Iqbal* argument as to this claim is that plaintiffs have failed to allege that SCBEST has in fact awarded grades on the basis of religion. Mem. Supp. at 3.

Plaintiffs dispute that this fact is required to be shown to state a claim.

Their claim is that defendant has violated the Equal Protection clause, not that SCBEST has done so. It is not required that SCBEST actually discriminate for a claim to be stated against defendant. The allegation that defendant has delegated the power to discriminate to a private entity sufficiently alleges a lack of equal protection. The discrimination need not come to fruition. In *Larkin v. Grendel's Den,* 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed. 2d 297 (1982), the government's donation of a governmental power to a private organization was sufficient for the Court to proceed to decision, without any allegation that the donated power had been exercised. Threatened injury is sufficient for standing. *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 72, 98 S.Ct. 2620, 57 L.Ed. 2d 595 (1978). Plaintiff state a claim that defendant has violated the Equal Protection clause by alleging that defendant has donated a governmental power to a private entity, whether or not the power is exercised.

If though it is required that plaintiffs allege that SCBEST has in fact exercised its power to award grades on the basis of religion, that has been alleged. SCBEST has in fact taught a course that included such objectives as "to teach students to …bear[ ] faithful witness to the Christian Gospel." Second Amended Complaint ¶ 24(g). The grade in a course that has as its objective the teaching of how to bear faithful religious witness will necessarily reflect how well the teacher perceives that the student has in fact borne such

witness. This will be a grade given on a religious basis. The grade for a course that has among its objectives "to give the students the opportunity to accept Jesus as their Lord and Saviour," Second Amended Complaint ¶ 24(c), will be a religiously-based grade. SCBEST is not teaching an abstract or historical course about Christian doctrine. It is teaching an evangelical, proselytizing and sectarian course. Students are released from high school for "religious instruction," ¶ 23. They are released for instruction *in* religion, not merely instruction *about* religion. Grades given in "religious instruction" courses are religiously-based grades.

The Court is to construe the facts in the light most favorable to plaintiffs. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974). Applying this standard, plaintiffs have alleged that SCBEST has in fact graded on a religious basis.

In the event that the Court considers that plaintiff's allegation on this matter is insufficient, then plaintiff prays leave to amend to allege that "Defendant expected that SCBEST would grade based on its perception of a student's religious status or progress or lack thereof, it has done so, and defendant knows that it has done so."

b. Allowing SCBEST to evade the Transfer Regulations

Defendant's second argument under *Iqbal* is that the second Equal

Protection claim needs "further factual enhancement," *Iqbal,* 129 S.Ct. at 1949, in order not to be merely a "naked assertion," *id.* Mem. Supp. at 4.

The Second Amended Complaint pleads that "other unaccredited schools subject to application of Paragraph 3 of the Transfer Regulations are not allowed by defendant to have their grades transferred as coming from an accredited private school," ¶ 36(c); pleads that the transferring students must either take proficiency tests or undergo a probationary assignment to demonstrate their proficiency in the subject, ¶ 29;[12] pleads that the Transfer Regulations are controlling South Carolina law as to whether grades from unaccredited schools may qualify for academic credit on transfer to a public high school, ¶¶ 30-32[13]; and states that defendant has allowed SCBEST to evade them but not allowed other unaccredited schools to evade them, ¶¶

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[12] "29 . . .3. If a student transfers from a school, which is not accredited, he or she shall be given tests to evaluate prior academic work and/or be given a tentative assignment in classes for a probationary period."

[13] "30. Defendant is required by South Carolina law to apply the Transfer Regulations when deciding whether to grant academic credit for released time religious education.

31. SCBEST is not an accredited high school within the meaning of the Transfer Regulations.

32. Paragraph 3 of the Transfer Regulations controls the granting of academic credit for public high school grades for the SCBEST course and all other courses taught by unaccredited schools."

36(c), 43.[14] These are statement of fact showing that defendant has waived the Transfer Regulations for the benefit of SCBEST but not for other unaccredited schools. *Iqbal* does not require more. These are plausible statements of fact. Defendant does not make any argument that its action is more consistent with legitimate than unlawful action.

**3(a). Defendant has discriminated with respect to academic grades in favor of SCBEST students, who are equally situated with the minor plaintiffs with respect to academic grades.**

Defendant argues that plaintiffs are not similarly situated with respect to SCBEST students and therefore have not stated a claim as to academic grade discrimination. Mem. Supp. at 5-6.

Persons subject to the legitimate application of a law or governmental action are similarly situated with respect to all others who are subject to the same law or governmental action. *Purdy & Fitzpatrick v. State*, 79 Cal. Rptr. 77, 85, 456 P. 2d 645, 653 (Cal. Sup. Ct. 1969) (since aliens are "persons"

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14 "36 . . .(c) other unaccredited schools subject to application of Paragraph 3 of the Transfer Regulations are not allowed by defendant to have their grades transferred as coming from an accredited private school.

43. Defendant has arbitrarily discriminated between persons similarly situated by allowing SCBEST to discriminate among students for religious reasons by adjusting their academic grade based on SCBEST's perception of the student's religious status or progress or lack thereof, and by not allowing unaccredited schools other than SCBEST to have their grades transferred as coming from an accredited private school."

within the meaning of the Equal Protection Clause, a law which prohibits the employment of aliens on public works affects persons similarly situated; both citizens and aliens had an equal right to seek to be hired).[15]

Plaintiffs and the SCBEST students have exactly the same relationship to defendant's legitimate grading of students. Each is the recipient of public school grades. Therefore they are similarly situated and may bring an Equal Protection challenge to defendant's implementation of its power to grade.

**3(b). SCBEST is equally situated with other entities subject to the legitimate application of the Transfer Regulation, and Plaintiffs have standing to pursue this Equal Protection claim.**

The Transfer Regulations, Second Amended Complaint ¶ 29, are the South Carolina law that governs the transfer of academic grades from accredited and unaccredited private schools to public high schools. SCBEST is not an accredited school within the meaning of the Transfer Regulations. *Id.* ¶ 31.[16] Therefore it is subject to the application of ¶ 3 of the Transfer

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[15] In accordance with Local Civil Rule 7.05(a)(4) a copy of this opinion is separately furnished.

[16] "31. SCBEST is not an accredited high school within the meaning of the Transfer Regulations."

Regulations. *Id.* ¶ 32.[17] Application of the proficiency test or probationary assignment provisions of the Transfer Regulations, *id.* ¶¶ 33, 34,[18] would violate the Constitution because the government may neither evaluate the religious content of courses nor offer religious instruction. *School Dist. of Abington Twp. v. Schempp*, *supra*, 374 U.S. at 225; *Epperson v. Arkansas*, 393 U.S. 97, 103-07, 89 S.Ct. 266, 21 L.Ed. 2d 228 (1968). Defendant avoids this constitutional violation only by an evasive fiction that SCBEST grades come from an accredited school. *Id.* ¶ 35.[19] Defendant is purposely allowing

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17 "32. Paragraph 3 of the Transfer Regulations controls the granting of academic credit for public high school grades for the SCBEST course and all other courses taught by unaccredited schools."

18 "33. Application of the requirement of Paragraph 3 of the Transfer Regulations that a student "shall be given tests to evaluate prior academic work" would require defendant to assess the religious content of a released time religious instruction course for which academic transfer credit was sought, in violation of the Establishment Clause of the First Amendment to the United States Constitution.

34. The requirement of Paragraph 3 of the Transfer Regulations that the student "be given a tentative assignment in classes for a probationary period" cannot be implemented as to the SCBEST course because no such course may be taught in a public high school."

19 "35. Defendant and SCBEST and Oakbrook Preparatory School (Oakbrook), a private religious school located in Spartanburg, South Carolina, which is accredited within the meaning of the Transfer Regulations, have arranged for the grade assigned to released time students by SCBEST to be reported to defendant by Oakbrook as if it were an Oakbrook grade. Upon information and belief there is little or no formal or substantive educational connection between Oakbrook Preparatory School and SCBEST."

SCBEST to evade the Transfer Regulations. *Id.* ¶ 37.[20] Other unaccredited schools subject to application of Paragraph 3 of the Transfer Regulations are not allowed to have their grades transferred as coming from an accredited private school. *Id.* ¶ 36(c).[21] These facts show that SCBEST and the other unaccredited schools are similarly situated to each other. Each is equally affected by the legitimate application of the Transfer Regulations.

The Transfer Regulations have not been directly applied to plaintiffs, but plaintiffs have standing to challenge their unequal application between others. A party with standing[22] may challenge discrimination which implements the harm of which he complains, even though he is not the direct object of the discrimination. It is enough that his interests which the suit seeks

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20 "37. Upon information and belief the arrangement to have the SCBEST grade reported as if it were an Oakbrook grade was made and has been implemented with a purpose to evade, for the purpose of favoring sectarian, evangelical and proselytizing religious release time educational courses, the matters set forth in Paragraphs 29 through 36, above."

21 "36…(c)other unaccredited schools subject to application of Paragraph 3 of the Transfer Regulations are not allowed by defendant to have their grades transferred as coming from an accredited private school."

22 Defendant appears to have conceded that plaintiffs have standing to make each of the Equal Protection claims. Defendant's first Motion to Dismiss, dkt. 19, specifically invoked *Fed. R. Civ. P.* 12(b)(1). Its accompanying Memorandum argued standing at length. In contrast, the present Motion to Dismiss, dkt. 33, does not invoke Rule 12(b)(1)and defendant's supporting Memorandum does not discuss standing except as to plaintiff FFRF. Mem. Supp. at n. 2.

to protect are affected by the discrimination. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed. 2d 66 (1979). There it was alleged that realtors had "steered" prospective Negro home buyers away from predominately white areas of the Village in violation of 42 U.S.C 3612. The Village did not claim to be a direct object of the steering, but only that the steering had had the effect of wrongfully manipulating its housing market. The *Gladstone* Court first construed the statute to permit standing as broadly as Article III allowed. 441 U.S. at 108-09. The Court then held that the Village had standing because the sales practices of the realtors had begun to rob it of its racial balance and stability. Plaintiffs have alleged the substantial equivalent: that the exemption of SCBEST from the Transfer Regulations is a part of a plan that allows the granting of academic credit for released time religious education. It is an action of defendant that affects plaintiffs' interests.

**4. Defendants' actions are to be subjected to strict scrutiny and defendant offers no compelling justification for them.**

Governmental actions that classify on the basis of constitutional rights or a suspect classification or "impinge on" constitutional rights are to be subjected to strict scrutiny and will be sustained only if "suitably tailored to serve a compelling state interest." *Cleburne v. Cleburne Living Ctr., supra,* 473 U.S.

at 440.

6 The awarding of grades on a religious basis

Plaintiffs have alleged that defendant has "allow[ed] SCBEST to discriminate among students for religious reasons by adjusting their academic grade based on SCBEST's perception of the student's religious status or progress or lack thereof." Second Amended Complaint ¶ 43. This clearly alleges governmental action that classifies on the basis of or impinges on a constitutional right.

Defendant argues that "the Policy" does not involve a constitutional violation. Plaintiffs do not attack the Policy,[23] but only two of its applications. Defendant then argues that its application of the Transfer Regulations does not involve a suspect classification. Mem. Supp. 7. Again at Mem. Supp. 8-9 defendant attacks "the Policy" but never mentions plaintiffs' claim that it has awarded grades on a religious basis. Defendant thus does not appear to dispute that plaintiffs have alleged that defendant's accepting religion-based grades from SCBEST classifies on the basis of and impinges on a constitutional right.

Defendant does not articulate any allegedly compelling interest for its

[23] The "Policy" is defined in the Second Amended Complaint ¶ 23 as the written Policy enacted by defendant,

acceptance of religion-based grades.[24]

7 Allowing SCBEST to evade the Transfer Regulations

Plaintiffs have alleged that allowing SCBEST to evade the Transfer Regulations creates a religious classification and impinges on constitutional rights. ¶¶ 33 and 34 of the Second Amended Complaint allege that neither of the two alternatives of ¶ 3 of the Transfer Regulations may be constitutionally applied to the religiously-based grades awarded by SCBEST. The government may neither evaluate the religious content of courses nor offer religious instruction. *School Dist. of Abington Twp. v. Schempp, supra,* 374 U.S. at 225; *Epperson v. Arkansas, supra,* 393 U.S. at 103-07. To avoid this constitutional problem defendant has exempted SCBEST from the application of the Transfer Regulations by setting up a straw man relationship with SCBEST and Oakbrook Preparatory School. This is governmental action that classifies on the basis of and impinges on a constitutional right.

The Transfer Regulations apply to both religious and secular unaccredited schools. The exemption of SCBEST, an unaccredited religious school, is thus a discrimination on the basis of religion.

Defendant has not attempted to state any compelling interest supporting

[24] The State interest that it does articulate is discussed in Section 5, *infra.* It is nowhere argued to be "compelling." Its legitimacy is discussed in Argument 5.

this favoritism to a a religious school.

**5. Defendant's asserted interest is overbroad. Appropriately narrowed, it is not a legitimate interest.**

Defendant has asserted one broad interest: "accommodating the religious exercise of students and parents." Mem. Supp. 8.

Governmental action will be sustained on rational basis review if "the classification [at issue] is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Ctr.*, *supra*, 473 U.S. at 440. Defendant's articulated interest is so broadly stated that many of its applications would be clearly unconstitutional. It would, for example, justify a law requiring students to pray aloud on bended knee before leaving class. That would be within the scope of its interest as defendant has cast it. That would "accommodate the religious exercise of students." Defendant's articulated interest is not legitimate in its overbroad applications.

As authority for the validity of its asserted interest defendant cites *Smith v. Smith*, 523 F.2d 121, 124 (4th Cir. 1975) and *Zorach v. Clauson*, *supra,* 343 U.S. 306 (1952). Both of these cases dealt with released time for religious education, but without any academic grade being awarded. Their statements of what constituted a legitimate governmental interest are to be read in the light of the facts presented. They do not hold that there is a valid governmental interest

in the award of an academic grade for released time religious education. Plaintiffs agree that defendant has a legitimate interest in accommodating the religious exercise of students and parents *in Zorach-style released time religious education.* That interest, however, does not fit the governmental action in this case.

At the end of its argument defendant applies an interest of properly limited scope to justify its action in this case. Defendant states: "The award of credit for the program . . . 'lift[s] a regulation that burdens the exercise of religion' by eliminating the course-credit hurdle . . . *[Corporation of Presiding Bishop v.] Amos* [483 U.S. 327] at 338 [107 S.Ct. 2682, 97 L.Ed. 2d 273 (1987)]." Governmental action for the purpose of lifting a regulation that *burdens the exercise of religion* is legitimate governmental action. But, the absence of an academic grade is no burden on the exercise of religion. Obtaining an academic grade is not a religious exercise. The free exercise of religion includes the right to enjoy released time religious education, *Zorach*, but it does not include the right to get a public school academic grade for doing so.

It *fosters* religion to give a grade for it. Giving a grade does not accommodate religion because it does not remove any burden on religion. SCBEST had previously conducted a *Zorach*-type program before academic

grades were authorized, but discontinued it because "elective [academic] credit was not available at that time." Second Amended Complaint, Ex. A. Apparently students and parents lost interest. It was then the addition of an academic grade, and not the removal of any burden on religious exercise, that made the course attractive again. Leaping the course-credit hurdle did not accommodate religion; instead it gave it a competitive advantage. There was no newly permitted religious exercise on the other side of the hurdle, but only an academic grade.

Respectfully submitted, November 16, 2009.

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