No. 11-1448

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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, INC; MELISSA MOSS

Plaintiffs-Appellants

v.

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

Defendant-Appellee

On Appeal from the United States District Court for the District of South Carolina, Spartanburg Division

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PETITION FOR REHEARING *EN BANC*

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PETITION FOR REHEARING *EN BANC*

Plaintiffs sought a declaratory judgment that defendant ("district") violated the Establishment Clause by its implementation of its Released Time For Religious Instruction Policy. The district court entered summary judgment for the district. The panel affirmed. Plaintiffs seek *en banc* review for the following reasons.

(1). The district delegated to a religious institution its governmental power to give an academic grade, in violation of *Larkin v. Grendel's Den,* 459 U.S. 116 (1982), a case almost in point. The panel opinion conflicts with (and did not mention) this controlling Supreme Court authority. Consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

Further, this case involves other questions of exceptional importance, to wit:

(2). Whether the panel opinion wrongly characterized material facts and omitted material facts, which if considered would have raised genuine issues of advancement of religion;

(3). Whether the district delegated to a religious school the implementation of its Policy requirement that "[t]he district will evaluate the classes on the basis of purely secular criteria," and thereby allowed academic credit for religious courses that it could not itself have constitutionally taught; and

(4). Whether the district discriminated on the basis of religious doctrine by implementing an unwritten requirement that only grades from accredited private schools would be accepted.

1. The district delegated to a religious institution its governmental power to give an academic grade, in violation of *Larkin v. Grendel's Den,* 459 U.S. 116 (1982).

Larkin v. Grendel's Den, 459 U.S. 116 (1982), is controlling authority in this Establishment Clause case. It supplies rules that govern the "effect" and the "entanglement" prongs of *Lemon v. Kurtzman,* 401U.S. 603 (1971).

Larkin held that allowing a religious institution to exercise the discretionary governmental power to grant or deny a liquor license offended the "entanglement" prong of *Lemon* because -

> Under our system, the choice has been made that government is to be entirely excluded from the area of religious instruction and *churches excluded from the affairs of government.*

Larkin, 459 U.S. at 126 (emphasis by *Larkin* court) (*quoting Lemon,* 403 U.S. at 625). Donating discretionary governmental power to a religious institution is prohibited because it -

> substitute[s] 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.[1] The school district has unqualifiedly given its discretionary governmental power to award an academic grade to the Bible School. It accepts its grades and enters them on public school student transcripts without any inquiry. App. 237:20-239:13; 245:17-246:7 (30(b)(6) dep.). This donates a discretionary governmental power to a religious institution.

Larkin further held that the donation of a discretionary governmental power to a religious institution violated the "effect" prong of *Lemon*, for two reasons.

First, the power granted to the churches was "standardless" and thus "could be employed for explicitly religious goals." 459 U.S. at 125. A church could, if it chose, prevent the issuance of a license for supposed apostasy of the applicant. The same is true in the present case. By accepting grades from the Bible School without question, Defendant has delegated to the Bible School a standardless power to determine a student's grade on a religious basis or conduct a course consisting entirely of prayer on bended knee. The teacher may fail a student for blasphemy. The school district enters that grade on its records to the legal detriment of the student. She may thereby fail to graduate or lose out in

[1] Justice Kennedy has characterized the facts in *Larkin* as "further[ing] the interests of religion through the coercive power of government. . . [by] delegating government power to religious groups." *Allegheny County v. ACLU,* 492 U.S. 573, 660 (1989) (JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA, concurring in the judgment in part and dissenting in part.)

competition for a scholarship because she failed to learn, to the satisfaction of a religious organization, how she "ought to live as a result" of learning "the basic tenets of the Christian worldview." Op. 8.

Second, *Larkin* held that when religious organizations control liquor licenses, the principal effect is to advance religion because Church and State are symbolically joined in exercising governmental power. This power "could be exercised for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith." 459 U.S. at 125. Equally here a religious organization can fail students for insufficient religious faith.

2. The panel opinion wrongly characterized material facts and omitted material facts, which if considered would have raised genuine issues of advancement of religion.

a. The district retained control over major discipline infractions that occurred at the Bible School during released time. A policy was adopted to allow public school Principals to determine punishment for those infractions. Bible School teachers were invited to attend a district teacher discipline training program.

b. The district gave the Bible School a protected list of student and parent addresses and approved its use to solicit students for the Bible School course.

c. The district regularly allowed the Bible School to visit public school homerooms to promote its program.

d. The district Superintendent counseled the Bible School Director on how to promote its program and suggested that oral communications would be better than putting anything in writing.

In detail, the record shows:

(a). Discipline: The panel entirely omitted to mention evidence showing that the district retained control over major discipline infractions that occurred off-campus during released time. On one occasion a student was removed from a Bible School class for "typical teenage stuff, students cutting up, not listening . . . not being obedient." App. 353:10-12 (Bible School Director dep.). The Assistant Principal had a counseling session with the student. App. 260:10-18 (30(b)(6) dep.). Shortly thereafter the Bible School Director met with five ranking administrators. They agreed that the district would handle "major discipline problems" and that "[i]f it is necessary to write them up then the grade level principal will make the decision as to how severe the punishment is, based on the school's discipline policy." App. 639 ¶ 11. The district also said that it "would like for [the Bible School] to attend the seminar [which the district] offer[s] on classroom management." App. 630 at 631 ¶ 2. This seminar is for new public school teachers and involves "going over the discipline code [and] effective ways to manage a classroom." App. 588:6-20 (Dir. Sec. Educ. dep.). There would have been no charge to the Bible School for its teachers to attend. *Id.*

(b). Addresses: The panel recited that the district gave the Bible School a list of names and addresses of parents and students[2] to whom the Bible School then sent a letter of solicitation, and that the school district "did not review or approve the letter before it was sent." Op. 8. The panel omitted to mention that the district approved the *sending* of the letter. The Superintendent testified that the district "wanted to make parents aware and students aware that the course would be offered" and "talked about . . . how [the Bible School] would contact and how we would contact parents about it . . . ". App. 496:5-6, 20-22 (Supt. Tobin dep.).

(c). Classroom visits: The panel recited that "[a] single [Bible School] homeroom visit did occur . . . but the record suggests that the incident was not repeated." Op. 20-21. The record shows that several visits occurred and when the most recent visit was brought to the district's attention it took no action to prevent a recurrence. In April 2009 the Bible School Director met with ranking district administrators and –

> raised the issue of student recruitment to see what they thought could or should be done by the school to make students aware of the class. . . . The basic consensus was that we should continue doing what we're

[2] Giving the list of names and addresses was an apparent violation of 20 U.S.C. 1232g. Student names and addresses are "directory information." 20 U.S.C. 1232g(a)(5)(A). Before directory information may be disclosed the school must give public notice that allows parents to refuse to allow disclosure. 20 U.S.C. 1232g(a)(5)(B). Defendant did not comply with this requirement. App. 805, 815 (Answer to Interrogatory 17).

> doing, *including going into homerooms*, as long as no one questions it. They didn't seem to think there was anything wrong with principals or guidance counselors making students aware of the class . . . (emphasis added). App. 356:6-15, 358:25-362:16 (Director dep.); App. 630 at 631 ¶ 3.

The sense that the Director got from the discussion was that "no one had complained about it, keep it as it is." App. 362:1-16. The Bible School visited a classroom at the beginning of the next school year. App. 265:10-267:2 (30(b)(6) dep.). As of May 2010, nine months later, no remedial action had been taken. App. 266:14-21. Another visit occurred early in the 2008-2009 school year. App. 809 (Answer to Int. 5)

(d). Administrative favoritism: The panel failed to mention extensive evidence of administrative favoritism. Superintendent White formed a close working relationship with the Bible School Director and often aided him in handling the district's administrative processes. In June 2008 the Superintendent wrote the Bible School Director:

> . . . Maybe we can have coffee one morning this summer and catch up. You can tell me about the successes of the Released Time program *and how we might can make it better*. No need to reapply (emphasis added). (App. 627 (dep. ex. 72, p. 2)).

They had coffee later that month. Later that day the Director wrote the Superintendent and reminded him to schedule a meeting with the high school Principal and the Guidance Director to discuss the registration process for the Bible School course. *Id.,* p. 1. The Superintendent promptly arranged the meeting.

The next day the Director asked the Superintendent whether administrators who would attend the meeting might think that he was "going above their heads" by dealing directly with the Superintendent. *Id.* He asked the Superintendent to explain to them how the meeting had come about. The Superintendent replied:

> You got it. *I called the meeting with you and I asked all the questions because I am interested in growing this program.* (emphasis added). *Id.*

In November the Director wrote again and suggested that he send the Superintendent a letter with copies to the other proposed participants. *Id.* The Superintendent replied:

> . . . *Regarding the letter, I wouldn't do it*. Generally speaking (which is dangerous), anytime you can handle something with a conversation rather than a letter (especially a letter with other folks copied) you should do so. (That applies to emails and text messages as well) (emphasis added). (App. 624 (dep. ex. 71, p. 1).

The Superintendent actively mentored the Bible School Director in the ways and means of promoting its program with the district administration.

The released time program is rife with entanglement in ways the panel did not acknowledge. The panel failed to take the facts in the light most favorable to plaintiffs in ruling on a motion for summary judgment.

3. The district delegated to a religious school the implementation of the Policy requirement that "[t]he district will evaluate the classes on the basis of purely secular criteria" and thereby allowed academic credit for religious courses that it could not itself have constitutionally taught.

The South Carolina Released Time Credit Act, S.C. Code sec. 59-39-112 ("RTCA"), allows academic credit to be given for classes in religious instruction but requires that they be evaluated on the basis of "purely secular criteria," for example "whether the course was taught by a certified teacher" and "review of the course syllabus which reflects the course requirements and materials used." *Id*., at B(4). This review assures that sufficient secular learning will occur in the course such that the public school will not be accepting a course that is religious instruction or exercise. The district's Policy provides that it "will evaluate the classes on the basis of purely secular criteria prior to accepting credit," Op. 6. In fact, however, the district makes no secular evaluation. "That evaluation would come through Oakbrook." App. 253:2-10 (30(b)(6) dep.).

Government may not evaluate religious doctrine or practice but it may evaluate whether private schools meet secular educational requirements. *Bd. of Educ. v. Allen,* 392 U.S. 236, 245 (1968). A public school may not teach a course of religious instruction or practice. *McCollum v. Bd. Educ.,* 333 U.S. 203 (1948); *Doe v. Porter,* 370 F. 3d 558 (6th Cir. 2004). By failing to conduct any secular evaluation of the Bible School course the district allows elective credit for a course that it may not itself teach.

The panel relied on *Lanner v. Wimmer,* 662 F. 2d 1349, 1360-61 (10th Cir. 1981), for the proposition that public schools may not examine released time courses for religious content. Op. 19. This is a well-established proposition. *See, Lanner v. Wimmer,* 662 F. 2d at 1361, *citing Lemon v. Kurtzman,* 403 U.S. 602 (1971). The panel then continued: "By contrast, the School District's policy in this case is not vulnerable to such concerns because it leaves the monitoring function to private schools." Op. 19. The panel's reasoning is that since district review of religion is prohibited, the district may also leave secular review to religious schools. Leaving religious content review to religious schools is what the Constitution requires; but the Constitution does not allow delegation of secular evaluation of religious courses to a religious organization. *See, Bd. of Educ. v. Allen,* 392 U.S. 236, 245-46 (1968). Delegation of secular evaluation to a religious school is delegation of an important governmental function to a religious institution and violates *Larkin.*

The panel further relied on *Lanner* for the proposition that it "generally allow[s] school districts to grant academic credit to . . . public school released time students for their religious instruction." *Lanner* neither so held nor opined. It *held* that the school district's review for doctrinal criteria was unconstitutional. 662 F. 3d at 1349. The basis of its holding was that a public school may not monitor released time courses for religious content. It does not "generally" or otherwise

hold or opine that public schools may delegate secular criteria review to religious schools.

Oakbrook did not review for secular criteria. It reviewed for "the knowledge to be gained in terms of faith." App. 392:5-7. (Seay dep). Oakbrook is "an interdenominational Christian school," App. 402:5-6 (Seay dep.), and "wanted it to be clear that [the Bible School course also] was an interdenominational religious studies course." App. 410:15-17 (Smith dep.). Oakbrook reviewed the Bible School course for conformity with its preferred religious doctrine.[3]

The district's unwritten and unsupervised[4] delegation of course review to Oakbrook leaves Oakbrook at large to pass along a grade for any course of religious instruction or exercise that it wishes to aid. Here credit is being given for a class designed "to produce a Christian mind" in its students. App. 636. If the Bible School course consisted of five hours a week of praying on bended knee and Oakbrook approved it, academic credit would ensue as a matter of course. An

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[3] Oakbrook did review for teacher "qualifications," Op. 7, but as applied that was not a secular criteria. The RTCA speaks of "certification," not "qualifications." Teacher "certification" is a secular governmental requirement. S.C. Code sec. 43-51. It was not required by Oakbrook.

On occasion the Bible School teacher submitted a grade of 103. Oakbrook sent it to the district as a grade of 100. App. 412:11-15, 24-25 (Smith dep.). The South Carolina Department of Education Uniform Grading Policy does not allow grades over 100, App. 890, as a certified teacher would likely have known.

[4] Oakbrook did not inform its accreditation agency of its relationship with the Bible School. App. 401:13-402:2 (Seay dep.); 419:13-16 (Smith dep.).

accredited Hebrew School could pass along a grade for a private Bar Mitzvah training class.

4. The district discriminated on the basis of religious doctrine by implementing a requirement, not stated in the Policy, that only grades from accredited private schools would be accepted.

The Policy makes no mention of whether released time grades may come from accredited or unaccredited schools. Op. 6. But, the district "accepts credit only from accredited private schools." Defendant's Brief, at 60. The RTCA, which requires evaluation by secular criteria, makes no distinction between accredited and unaccredited schools. The South Carolina School Board Association has interpreted the RTCA to require that credits be accepted from accredited and unaccredited schools alike. App. 909 para. 5. Why then did the district accept credits only from accredited schools? The panel accepted the explanation that this was done "to disentangle the [district] from reviewing the religious content of released time courses." Op. 9. The record shows that the unannounced requirement that grades come through accredited schools discriminates in favor of Christianity.

In Spartanburg County there are only six private high schools. Five are Christian (including Oakbrook) and one is secular. App. 946 at 951. It does not appear how many of these schools other than Oakbrook are accredited. The effect of defendant's unwritten accreditation requirement is that Jewish and Muslim

organizations which wish to provide released time must first find out about the unwritten requirement, then find an accredited school that will pass their grades along, and then convince the district (which has no written policy about the matter) that the accredited partner is acceptable. Quakers might not find an accredited school closer than Philadelphia. Oakbrook would not have undertaken any pass-through for a Wiccan religious organization. "We were attempting to do something to support the Christian community." App. 417:4-11 (Smith dep.).

The district has created a requirement that is neutral on its face but as applied in this case discriminates in favor of Christianity. *See, United States v. Hernandez*, 490 U.S. 680, 695 (1989) (evidence of religious discrimination not appearing facially is to be judged by *Lemon*); *cf. Larson v. Valente*, 456 U.S. 228 (1982) (facial discrimination).

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Entrusting secular review to Oakbrook, and receiving grades only from accredited schools, are a *deus ex machina* that allows the district to give credit for Christian courses it could not itself teach.

Respectfully submitted, July 12, 2012.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing document on opposing counsel through the Court's Electronic Case Filing system.

s/ George Daly