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

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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STATEMENT OF JURISDICTION

This is an action pursuant to 42 U.S.C. 1983. Plaintiffs seek a declaration of unconstitutionality and nominal damages for the defendant school district's policy of granting academic credit (course credit toward graduation, and a grade) for "released time" religious instruction conducted off-campus by a religious organization. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. 1343(3),(4).

Judgment was entered on April 5, 2011, and appeal was taken on May 3, 2011, within the 30 days allowed by 28 U.S.C. 2107(a). This Court has subject matter jurisdiction pursuant to 28 U.S.C. 1291. This is an appeal from a final judgment that disposed of all claims.

ISSUES PRESENTED

1. Whether the plaintiffs have standing.
2. Whether defendant's policy of granting academic credit for released time religious education violates the Establishment Clause by having the effect of advancing or endorsing religion.
3. Whether defendant's policy of granting academic credit for released time religious education violates the Establishment Clause by excessively entangling church and State.

STATEMENT OF THE CASE

This action was commenced by the filing of a summons and complaint on June 16, 2009. Plaintiffs Robert Moss and Ellen Tillett each sued individually, and each also sued as a parent of a minor child who attended defendant's Spartanburg High School. Plaintiff Moss's daughter Melissa became a plaintiff in June 2010, shortly after reaching her majority. Plaintiff The Freedom From Religion Foundation, Inc. ("FFRF") sued in its capacity as an association on behalf of one of its members. All parties moved for summary judgment as to the Third Amended Complaint. The Court denied plaintiffs' motion, granted defendant's motion, and dismissed the action. This appeal followed.

STATEMENT OF FACTS

In addition to the three individual plaintiffs Robert Moss, Melissa Moss and Ellen Tillett, these are the witnesses whose testimony is mentioned in this Statement of Facts.

-Grayson **Hartgrove**, Executive Director of Spartanburg County Bible Education in School Time ("SCBEST") until June 30, 2007.

-Andrew "Drew" **Martin**, Incoming Executive Director of SCBEST from 2006 until June 30, 2007, thereafter Executive Director.

-Conrad "Chip" **Hurst**, Chair of defendant's Board of Trustees.

-Dr. Walter **Tobin**, defendant's Superintendent during the academic year 2006-2007.

-Dr. Thomas **White**, Jr., defendant's Superintendent following Dr. Tobin, and defendant's 30(b)(6) witness.

-Nan **McDaniel**, defendant's Director of Secondary Education until June 30, 2007.

-Rodney **Graves**, Principal of Spartanburg High School until June 30, 2007, and thereafter Director of Secondary Education.

-John **Wolfe**, defendant's Guidance Director.

Standing

In March 2007 plaintiffs Robert Moss and his daughter Melissa Moss received at their home a letter from SCBEST. It announced that SCBEST had been approved by defendant to provide released time religious instruction for Spartanburg High School; that elective credit would be awarded for its course; and that the course would teach students how they "ought to live as a result of" the Bible and "the basic doctrines of the Christian faith." App. 48:24-49:4 (Robert Moss dep.); App. 681 (dep. ex. 157). Plaintiff Robert Moss attended defendant's next meeting, at which defendant's Released Time for Religious Instruction Policy (Addendum I) ("Policy") was enacted. App. 710 at 712 ¶ 3(d) (Robert Moss Affid.). He told defendant that he had been "outraged to receive a letter at home from SCBEST, stating that now our Spartanburg High School children could get credit for classes given at a neighboring church." App. 702 (dep. ex. 188). He told defendant that "[t]here is absolutely no question that giving credit for such a course, elective or not, is an endorsement of religion."

App. 702 (dep. ex. 188). He met later with defendant's Chair and Superintendent to discuss the matter, but this meeting left him again feeling stigmatized as an outsider because of his opposition. App. 68:10-69:6; 108:8-15 (Robert Moss dep.); App. 710 at 713 (Robert Moss Affid.). Prior to the enactment of the Policy he and his wife had volunteered at Spartanburg High School, but afterwards they felt less comfortable doing so. Officials of defendant have been less friendly to the Mosses and the Mosses have avoided contact with them and the school premises because of the new released time policy. App. 110:2-114:3.[1]

Plaintiff Tillett was emotionally distressed upon learning of the SCBEST letter. App. 718 at 719 ¶ 5 (Tillett Affid.). She finds released time for religious instruction to be unwelcome and emotionally distressing. App. 718, 719 ¶ 3. For her, defendant's support of religious instruction shows "lack of respect and lack of understanding for individuals of different faiths." *Id.* The granting of academic credit is offensive to her. App. 718, 719 ¶ 4. Her child is subject to receiving a lower class rank because grades for released time religious instruction are factored into the GPA's of SCBEST students. *Id.* She objects to the fact that defendant is donating a governmental power to a religious organization: "I don't believe the school district can hand over to someone else

[1] *See also id.,* 50:2-51:14; 52:3-12; 62:25-64:21; 72:13-22; 75:14-77:11; 88:19-89:9; 90:23-93:17 (Robert Moss dep.); App. 681,702, 703 (dep. exs. 157, 188 and 189).

that power, that authority." App. 166: 5-9 (Tillett dep.). She felt less welcome at defendant's administration building after the Policy was enacted. App. 196:13-16 (Tillett dep.).[2]

Plaintiff Melissa Moss, a non-Christian, felt like an outsider at defendant's high school because of her receipt of the SCBEST letter and because SCBEST students are awarded an academic grade. App. 715 at 716-17 ¶¶ 3, 5, 6, 7 (Melissa Moss Affid.). Receiving the SCBEST letter made her feel "uncomfortable," App. 120:19-25 (Melissa Moss dep.), and "made [her] feel like because the school was endorsing this kind of thing that certain people who wouldn't take this course were kind of like outsiders." App. 121:1-6 (Melissa Moss dep.). Defendant's Policy "makes the non-Christians feel like outsiders more, and it's not a good atmosphere to go to a high school in." App. 123:23-124:9 (Melissa Moss dep.); *see also* App. 137:14-138:10 (Melissa Moss dep.) "[T]he fact that the school district accepted an academic grade for [SCBEST's class] contributed to my feeling of being an outsider at the school." App. 715 at 716 ¶ 3 (Melissa Moss Affid.).

[2] *See also,* App. 163:7-15; 165:22-166:3; 174:12-33:5; 196:17-197:22; 198:22-200:8; 201:14-205:6; 206:12-207:1; 208:3-15; 209:2-210:11 (Tillett dep.).

The Merits

SCBEST provided off-campus Christian released time religious instruction for Spartanburg High students from 1997 until it discontinued its program at some time before 2006, for lack of interest. App. 304:13-23 (Martin dep.). No academic credit was awarded for this program during this time. App. 305:5-13 (Martin Dep.).

In June 2006 South Carolina enacted the Released Time Credit Act ("RTCA"), South Carolina Code Sec. 59-39-112 (2006) (Addendum II), which permits upon certain conditions (but does not require) the awarding of two elective credits for released time religious instruction. That same month SCBEST met with defendant's Chairman Hurst about resuming released time religious instruction at Spartanburg High. The Chair agreed with SCBEST that he would prefer to have the credit for the course transferred to defendant through Oakbrook Preparatory School, a local Christian interdenominational accredited private school.[3] App. 365:2-366:23 (Martin dep.); App. 402:3-6 (Seay dep.). SCBEST is not an accredited school. App. 821 (Admission No. 7). Later in 2006 SCBEST entered into a contract with Oakbrook. App. 394:19-21 (Seay dep.); App. 602 (dep. ex. 7). Defendant was not a party to this contract but the contract nevertheless recited that

[3] Oakbrook is accredited by the South Carolina Independent Schools Association ("SCISA"), whose accreditation standards appear at App. 606-11 (dep. ex. 12). App. 399:17-400:13 (Seay Dep.).

defendant "will provide that students can transfer elective course credit" from Oakbrook to defendant. *Id.* This provision accorded with Chairman Hurst's preference. Since then Oakbrook has transferred the SCBEST grades to defendant, denominating them as grades for "Christian Education/SCBEST." App. 390:12-19; 391:10-13 (Seay dep.); App. 605 (dep. ex. 11). Defendant knows that these grades come from SCBEST without alteration by Oakbrook. App. 446:8-447:2; 462:11-463:23 (Wolfe Dep.); App. 485:2-14 (McDaniel dep.). Defendant accepts these grades without further inquiry and enters them on student transcripts and factors them into student GPA. App. 237:20-239:13; 245:17-246:7 (White Dep.). The SCBEST course is not listed in the Oakbrook catalogue. App. 416:16-18 (Smith Dep. p. 21). Defendant knows that the course is not taught at Oakbrook, which is ten or more miles distant from Spartanburg High, App. 406:14-20 (Smith Dep.), but is taught by SCBEST every day of the semester at an Episcopal Church next door to Spartanburg High. App. 272:5-13 (White dep.); App. 681 (dep. ex. 157).

In early January 2007 Drew Martin, Interim Executive Director of SCBEST, met with defendant's Instructional Services Committee to discuss SCBEST's released time course. In attendance with Martin were Chairman Hurst, the Committee Chair (a member of defendant's Board), defendant's Superintendent Dr. Tobin, and defendant's Assistant Superintendent Dr. Dupre.

App. 307:15-18; 309:21-24 (Martin dep.). Martin described the SCBEST course to them and gave out his "Basic Commitments" document. App. 310:15-21; 311:5-13; 329:4-8 (Martin dep.); App. 633 (dep. ex. 93). This document explains at length that SCBEST is a religious organization whose "curriculum is deliberately structured to help the student develop a Christian world view." App. 633 at 636 (dep. ex. 93). The SCBEST arrangement with Oakbrook and the need for the Board to develop a policy were discussed. App. 504:16-505:7 (Tobin dep.); App. 328:22-329:8 (Martin dep.). Defendant knows that SCBEST is teaching and that it is giving credit for a course of religious instruction that seeks to strengthen the students in the Christian faith, and not for a course about Bible history such as is permitted to be taught by South Carolina Code Sec. 59-29-230. (Addendum III).[4]

Defendant accepts any and all grades from any accredited school without question, including grades for religious instruction or practice. App. 273:13-274:17 (White dep.).

At defendant's January 2007 meeting it was moved and passed that defendant "allow the high school to offer its students elective credit for off-campus religious education," and that the "classes will be provided . . . through SCBEST."

[4] The Third Amended Complaint asks for relief as to "defendant's practice of granting public school academic credit for proselytizing, evangelical and sectarian religious released time education courses." App. 18 at 31. It is not in dispute that SCBEST is teaching that sort of course, App. 302:8-303:19 (Martin dep.), and plaintiffs now refer to such a course as "religious instruction," the term used in defendant's Policy (Addendum I), or "religious practice," an equivalent term.

App. 663 at 664. Defendant and SCBEST then worked "in concert," as Superintendent Tobin put it, to develop such a Policy. App. 492:21-495:21 (Tobin dep.). SCBEST "dialogued with the school board and Dr. Tobin about granting the transfer credit for our program." App. 621 (dep. ex. 67); App. 343:6-17 (Martin dep.). A comprehensive scenario prepared by SCBEST was a part of defendant's development of the policy. App. 514:22-515:6 (Tobin dep.); App. 686 (dep. ex. 173).

In February 2007 SCBEST prepared a letter to the parents of all rising tenth, eleventh and twelfth grade students at Spartanburg High about its upcoming released time course offering. App. 307:23-25; 308:8-309:6 (Martin dep.); App. 681 (dep. ex. 157). Dr. Tobin testified that "we [defendant] talked about how we would contact – how they [SCBEST] would contact and how we would contact parents about it." App. 496:7-497:10 (Tobin dep.). SCBEST requested the names and addresses of the parents from defendant. Defendant supplied them. App. 315:12-316:7 (Martin dep.). SCBEST mailed the letter to them in late February 2007. App. 309:3-6 (Martin dep.); App. 497:15-21; 508:15-509:25; 512:11-513:12 (Tobin dep.); App. 225:5-226:18 (White dep.). Superintendent Tobin

"wanted to make parents aware and students aware that the course would be offered." App. 495:24-496:6 (Tobin dep.) [5]

The released time policy that defendant and SCBEST developed had its first reading in February 2007. App. 668 at 671 (dep. ex. 152). It provided that defendant "may award . . . no more than two elective Carnegie unit credits" for released time religious instruction. App. 480:17-481:13 (McDaniel dep.); App. 680 (dep. ex. 155). This tracked the language of the RTCA (Addendum II).

On March 6, 2007, defendant enacted its Released Time for Religious Instruction Policy (Addendum I). Per an amendment proposed by Superintendent Tobin at the meeting, it changed the permissive "may award" language of the February version to provide that defendant mandatorily "will accept" credits[6] for released time religious instruction. *Id.* One effect of this change - although the Policy does not so state nor imply– was to require that the credit come only from an accredited school. App. 487:9-18 (McDaniel Dep.).

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[5] SCBEST made copies of the addresses and later used them to send another promotional letter to parents in July 2007. App. 623 (dep. ex. 69); App. 332:12-22, 346:16-20 (Martin Dep.). This letter also solicited funds for SCBEST. SCBEST continued to request lists of parents' names and addresses from defendant until at least January 2009. App. 569:24-570:1, 582:3-583:13 (Graves Dep.); App. 685 (dep. ex. 162).

[6] The South Carolina Uniform Grading Policy requires that a credit have a grade associated with it. App. 890, 894.

Defendant objected to the statement in the February letter that SCBEST would be offering the course, App. 516:4-519:5 (Tobin dep.), despite that this statement accords with the January decision of the Board ("these classes will be provided through . . . SCBEST," App. 663 at 664). Defendant then started drafting a letter aimed at correcting what it saw as the error in the SCBEST letter. App. 571:24-572:11 (Graves dep.); App. 510:13-22 (Tobin dep.); App. 682 (dep. ex. 158); App. 683 (dep. ex. 159). SCBEST participated in this process. A draft version of the corrective letter was faxed from Superintendent Tobin's office. App. 234:18-235:20 (White dep.); App. 618 (dep. ex. 62). It does not appear to whom it was faxed, but within three days SCBEST requested of Dr. Tobin that he not send the letter and Dr. Tobin agreed not to send it. App. 333:17-21 (Martin Dep.); App. 612 (dep. ex. 25); App. 510:13-511:2 (Tobin Dep.). The draft correction letter said that the SCBEST letter was "not accurate." App. 683 (dep. ex. 159). In SCBEST's view, had the defendant sent this letter out to parents it "wouldn't have been a positive thing" for SCBEST. App. 335:7-336:3 (Martin dep.). The correction letter was never sent. App. 510:13-511:2 (Tobin dep.); App. 710 at 713 ¶ "e" (Moss Affid. ¶ "e").

During the days after defendant's March meeting, when defendant and SCBEST were at odds about the SCBEST letter, they were working together about another letter. After learning of the Moss remarks at the March meeting SCBEST

drafted a letter defending the constitutionality of the Policy, for Superintendent Tobin to sign and send to the Mosses. The draft reached Dr. Tobin, who forwarded it to Chairman Hurst "for your information as you formulate your letter" to the Mosses. App. 515:20-517:15 (Tobin Dep.); App. 701 (dep. ex. 187A).[7]

Before the 2007-2008 school year started defendant approved SCBEST to offer released time religious instruction and approved that the grades that it gave could come to defendant through Oakbrook and be entered on student transcripts and factored into student GPAs. App. 446:8-447:2; 452:17-455:14; 456:18-457:3; 462:11-463:23 (Wolfe Dep.); App. 519:6-520:4 (Tobin Dep.); App. 237:20-239:13 (White Dep.). The Guidance Director did not recall, in his 36 years at Spartanburg High, another instance of a grade from an unaccredited school coming to defendant through an accredited school. 440:8-14; 448:18-449:19 (Wolfe Dep.).

After the Policy was passed and the SCBEST classes commenced, defendant and SCBEST continued to interact about a variety of subjects. SCBEST made promotional visits to defendant's homerooms and solicited students at registration. Forms for requesting assignment to SCBEST were kept in defendant's Guidance Office. Defendant enforced discipline for student misbehavior at SCBEST.

[7] Exhibit 187A is a more legible copy of the deposition exhibit 187 referred to in the deposition.

Superintendent White became personally invested in the success of SCBEST and sought to advance its cause within defendant's administration.

SCBEST has visited homerooms. In September 2009 at defendant's Whitlock Junior High the SCBEST teacher "made the students aware of the course." App. 358:25-359:7 (Martin Dep.); App. 805 at 809 ¶ 5 (Answer to Interrogatory no. 5). Since learning of this incident defendant has taken no action to prevent a recurrence. App. 265:10-267:2 (White Dep.). Earlier, at a meeting in April 2009 of Drew Martin with defendant's Assistant Superintendent, Director of Secondary Education, and three Junior High Principals, Martin –

> 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. Both [the Principals] felt that most of the students are already aware of the class. The basic consensus was that we should continue doing what we're doing, *including going into homerooms*, as long as no one questions it. (emphasis added).

App. 356:6-15, 358:25 - 362:16 (Martin Dep.); App. 630 at 631 ¶ 3 (dep. ex. 75). The sense that Martin got from the discussion was that "no one had complained about it, keep it as it is." App. 362:1-16 (Martin Dep.).

Each August Spartanburg High has a registration at which students' schedules become available and parents are invited to visit. SCBEST has had a table at this event every year. App. 324:23-327:8 (Martin Dep.); App. 560:3-561:25 (Graves Dep.); App. 442:5-13 (Wolfe Dep.). At one registration Martin set up a display board on the designated SCBEST table and "had my students from

last semester come" and "as [other] students were walking by just kind of told them briefly what it was, and if they were interested they gave them a flier." App. 325:12-327:1 (Martin Dep.). On January 7, 2009 the Superintendent, Assistant Superintendent, Director of Secondary Education, Spartanburg High Principal, and Guidance Director met and decided that SCBEST could continue coming to the registration. App. 580:9-581:3 (Graves Dep.); App. 685 (dep. ex. 162).

Forms for requesting assignment to SCBEST are kept in defendant's Guidance Office. App. 441:6-14 (Wolfe Dep.).

As to discipline, on one occasion a student was removed from an SCBEST junior high school class for "typical teenage stuff, students cutting up, not listening . . ." App. 352:24-354:10 (Martin Dep.). Martin did not consider this a major discipline problem. App. 319:24-320:19 (Martin Dep.). SCBEST returned the student to school before the end of the class period. The Assistant Principal had a counseling session with the student and the administration learned that this had happened. App. 259:21-260:23 (White Dep.). Previously Martin had had the understanding that there was a precedent in place that defendant would "accept[ ] our discipline referrals just as if they came from one of your teachers." App. 628 at 629 ¶ 1 (dep. ex. 73); App. 352:24-353:4 (Martin dep.). Martin spoke with the Principal on this occasion about discipline and came away with the understanding that defendant "left it up to the specific grade level principals as somewhat of a

judgment call." App, 320:5-19 (Martin dep.). As of November 2008 Martin was unclear whether the rule was that defendant would accept discipline referrals in all cases or only in "egregious" cases. App. 354:11-355:9 (Martin Dep.).[8] The "typical teenage stuff" incident led to Martin's April 8, 2009 letter to Superintendent White, requesting clarification of the discipline policy and advocating that defendant accept SCBEST discipline referrals as if they came from defendant's teachers. App. 352:22 -354:9 (Martin Dep.); App. 628 (dep. ex. 73); App. 275:2-6 (White dep.).

Two weeks after Martin's letter three representatives of SCBEST met with the Assistant Superintendent, the Director of Secondary Education, and three Principals. It was agreed that defendant 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. 356:6-15 (Martin Dep.); App. 630 ¶ 11(dep. ex. 75). Defendant's Director of Secondary Education testified that the discipline policy as to SCBEST was that the defendant would handle "a major ordeal." App. 586:1-8 (Graves dep.).

[8] Martin also related that two students had gotten into a fight on the SCBEST bus. He thought that defendant had disciplined them for that behavior. App. 321:14-18 (Martin Dep.).

Martin's earlier letter to Superintendent White had said that "[i]f you think it would be helpful for our teachers to receive some training in the discipline policies of the District, I would be happy to look into that possibility." App. 628 at 629 ¶ 1 (dep. ex. 73). At the meeting two weeks later SCBEST was invited "to attend the seminar [defendant] offer[s] on classroom management." App. 630 at 631 ¶ 2. This seminar is for new teachers and involves "going over the discipline code, effective ways to manage a classroom," and like matters. App. 588:6-20 (Graves Dep.). There would have been no charge for SCBEST to attend. *Id.*

Superintendent White formed a close working relationship with Drew Martin and often aided him in dealing with defendant's administrative processes. In June 2008 Martin wrote White and inquired whether SCBEST had to reapply for the coming school year. White replied:

> Drew, Good to hear from you. Hope you are doing well. 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*. (emphasis added)
>
> No need to reapply. I checked the policy and there is no mention of it.
>
> Thanks for all you do.
>
> Thomas White (App. 627 (dep. ex. 72 p. 2)).

They had coffee later that month. App. 626 (dep. ex. 72). That same day Martin wrote White and reminded him to schedule a meeting with the high school

Principal and the Guidance Director to discuss the registration process for the SCBEST course. *Id.* White promptly arranged the meeting.

The next day Martin wrote again and raised the issue of whether the Principal and Guidance Director who were to attend the meeting might think he was "going above their heads" by dealing directly with White, the Superintendent. *Id.* He asked White to explain to them how their meeting had come about. White 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).
>
> Thanks, Thomas (*Id.*).

In late September 2008 Martin again suggested to White that he arrange a meeting for him, this one with the Principal (Stevens) and the Guidance Director (Wolfe) about scheduling SCBEST classes. App. 624 at 625 (dep. ex. 71). In November Martin again wrote White and suggested that he send White a letter with copies to the other proposed participants (now including Assistant Superintendent Pruitt). *Id.* White replied:

> Drew, Good to hear from you. Looking forward to our meeting. *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 supplied).
>
> Have a great weekend.
>
> Thomas White (App. 624 (dep. ex. 71).

See, App. 229:19-232:15 (White Dep.); App. 347:14-352:11 (Martin Dep.).

The SCBEST grade is factored into the student's GPA. GPA is an important consideration in college admissions. App. 397:16-17 (Seay Dep.). The giving of a grade and a diploma are both "very important" functions for defendant. App. 250:24-251:1 (White Dep.). Numerous scholarships require that the applicant have a certain GPA or higher. 556:20-557:4 (Graves Dep.). *See, e.g.,* S.C. Code Sec. 59-149-50(A) (LIFE scholarship depends on GPA). GPA is a qualifier for defendant's Honor Roll (which is featured at graduation), Beta Club, Valedictorian, and Salutatorian. App. 238:19-239:13; 245:10-16; 250:16-20 (White Dep.); App. 556:3-558:9 (Graves Dep.). An SCBEST student who makes a high grade could qualify for Valedictorian in lieu of a student who took no religious instruction courses.

In Spartanburg County there are 5 Christian and 1 nonsectarian private schools offering tenth, eleventh and twelfth grades. App. 946 at 951.[9]

[9] Nat'l Center for Educ. Statistics, U.S. Department of Education, Private School Universe Survey 2008-09. http:::nces.ed.gov:surveys:pss, last visited 11-3-2010.)

SUMMARY OF ARGUMENT

Standing

The individual parent plaintiffs have standing. *Zorach v. Clauson,* 343 U.S. 306, 309 n. 4 (1952). The individual student plaintiff has standing. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n. 9 (1963).

Alternatively, the individual plaintiffs have standing because they have an interest in receiving a public education that comports with the Establishment Clause. *Id.* This interest has been infringed because the Policy has caused direct and immediate injury to them. They have suffered emotionally on account of the enactment and the implementation of the Policy. *Suhre v. Haywood County,* 131 F. 2d 1083 (4th Cir. 1997).

Religious Effect

1.

Zorach v. Clauson, supra, permitted a public school to allow students to be released from school for religious instruction. No academic credit was granted. Granting academic credit for released time religious instruction rewards, not just permits, the meeting of religious needs. No restrictions are placed on the power of the religious teacher to award a grade. Allowing academic credit for released time can result that a student becomes the valedictorian when she otherwise would not have qualified, by receiving a high grade for religious reasons.

Larkin v. Grendel's Den, 459 U.S. 116 (1982), held unconstitutional the donation to a religious institution of the power to control the award of liquor licenses because it allowed the exercise of a governmental power for religious reasons. Donating the power to confer academic credit to a religious organization likewise allows the exercise of a governmental power for religious reasons.

Smith v. Smith, 523 F. 2d 121 (4th Cir.), *cert. denied,* 423 U.S. 1073 (1976), analyzed the critical difference between *Zorach* and *McCollum v. Board of Education*, 333 U.S. 203 (1948), as being that the religious teacher in *McCollum* was put into the position of authority held by the secular teacher, which was not the fact in *Zorach*. That analysis brings the present case within the ambit of *McCollum* rather than *Zorach,* because here the religious teacher has the secular power to give a public school grade.

2.

Defendant has closely cooperated with the released time religious organization in both the formulation and the implementation of the Policy, by such matters as giving it names and addresses of students so that they could be solicited for released time, allowing it to make presentations in homerooms, allowing it to have a table at registration, keeping forms for requesting assignment to released time in the Guidance Office, enforcing discipline for it, and inviting it to in-house discipline training.

3.

The district court erred in applying *Monell v. Department of Social Svcs.,* 436 U.S. 658 (1978), so as to exclude some evidence of the cooperation between defendant and the released time religious organization. *Monell* applies to proof of liability of municipal corporations for alleged unconstitutional actions, not to proof that implementation of a policy shows endorsement and advancement. *See Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290 (2000). Alternatively, the rejected evidence meets the *Monell* test of admissibility.

Entanglement

Larkin holds that discretionary governmental powers may not be delegated to a religious institution. Defendant has donated the discretionary power to award academic credit to a religious organization. The district court relied on a dictum in *Lanner v. Wimmer,* 662 F. 2d 1349 (10th Cir. 1981), a pre-*Larkin* case, to conclude that governmental power may be donated to a religious institution if it is "neutrally stated and administered." That conclusion is based on a misreading of *Board of Educ. v. Allen,* 392 U.S. 236 (1968). That case dealt with governmental regulation of *secular* instruction at private religious schools, not with the *religious* instruction at private religious schools for which academic credit is given here.

ARGUMENT

Standard of Review

Review of a decision that a party has standing is *de novo*. *Scottsdale Ins. Co. v. Knox Park Constr., Inc.* 488 F. 3d 680, 683 (5th Cir. 2007).

Review of a decision granting summary judgment is *de novo*. *Love-Lane v. Martin,* 355 F. 3d 766, 775 (4th Cir. 2004), *cert. denied,* 543 U.S. 813 (2004).

Discussion of Issues

1.

Whether the individual plaintiffs have standing.

In *Zorach v. Clauson,* 343 U.S. 306, 309 n. 4 (1952), a case involving the constitutionality of released time, the Court held: "No problem of this Court's jurisdiction [*i.e.,* standing] is posed in this case since . . . appellants here are parents of children currently attending schools subject to the released time program." The individual plaintiffs Robert Moss and Ellen Tillett are identically situated. Nothing further need be shown to give them standing. *Zorach* is a case on all fours as to them. Melissa Moss has standing pursuant to *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n. 9 (1963) because she is a student subjected to a released time religious program.

Alternatively, the individual plaintiffs have shown cognizable injury to their interests due to defendant's granting of academic credit.

The individual plaintiffs have an interest at risk in this case. As the District Court held, "parents and their children have a cognizable interest in receiving a public education that comports with the Establishment Clause. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n. 9 (1963)." App. 1037.

Plaintiffs have shown an infringement of this interest, in being subjected to unwelcome personal contact with a State-sponsored practice of granting academic credit.

Robert Moss felt stigmatized as an outsider by the enactment of the Policy and its granting of academic credit and by his treatment by defendant's Chair. This caused him to feel less comfortable about volunteering at Spartanburg High and to avoid going to defendant's premises.

Plaintiff Tillett was emotionally injured by released time because its academic credit impacts her son's class rank and because it shows lack of respect for individuals of different faiths. She also was offended by the donation of a governmental power to a religious institution and felt less welcome at defendant's premises after the Policy was enacted.

Plaintiff Melissa Moss felt like an outsider and felt marginalized and ostracized on account of the Policy and its acceptance of academic credit. Released time adversely affected her relationships at school.

The conduct of which plaintiffs complain has caused direct and immediate

injury-in-fact to their personal interests. Their interests are "directly affected by the laws and practices against which their complaints [were] directed," *Suhre v. Haywood County,* 131 F. 3d 1083, 1086 (4th Cir. 1997), *quoting id.,* a circumstance that was sufficient to establish standing to pursue Establishment Clause violations in *Schempp*. They accordingly have "a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause." *Id., quoting Assoc. of Data Processing Serv. Orgs. v. Camp.,* 397 U.S. 150, 154 (1970) (interpreting *Schempp*).

The injuries to plaintiffs' interest are not abstract or remote, they are personal and particular. Like Mr. Suhre, the individual plaintiffs are required to continue to operate in close proximity to unwelcome conduct as a price of continuing to have access to school or court. The case at bar involves the application of a policy instead of a physical display as in *Suhre*, but that makes no difference to the standing analysis. A policy as well as a display may cause cognizable harm to a protected interest. *Santa Fe Indep. Sch. Dist v. Doe,* 530 U.S. 290 (2000). Melissa Moss's emotional discomfort at attending a school that authorizes released time is every bit as real and immediate as was Mr. Suhre's discomfort at having the Ten Commandments displayed in his local court house. These injuries are in the parties' own bailiwick, not in Omaha, Nebraska. *See, Suhre*, 131 F. 3d at 1086. The individual plaintiffs' interests are harmed in

personal and particular ways by matters immediately at hand. *See, H.S. v. Huntington County Com. Sch. Corp.,* 616 F. Supp. 2d 863, 863-873 (N.D. Ind. 2009) (collecting cases). They have, as the District Court put it, a "personal and direct stake in the pending controversy." App. 1037.

The standing of the individual plaintiffs having been established, the Court should pretermit the issue of plaintiff FFRF's standing. *Watt v. Energy Action Educ. Found.,* 454 U.S. 151, 160 (1981) ("Because we find California had standing, we do not consider the standing of the other plaintiffs.").

2.

Whether defendant's policy of granting academic credit for released time religious education violates the Establishment Clause by having the effect of advancing or endorsing religion.

a.

Accepting academic credit in and of itself endorses religion.

Defendant is releasing students from school for a religious exercise. This practice is allowed by *Zorach v. Clauson,* 343 U.S. 306 (1952). Defendant is additionally granting academic credit for released time religious instruction at which students are taught how they ought to live as Christians. This giving of academic credit is the centerpiece of this case.

In traditional released time the school "cooperates in a religious program to the extent of making it possible for students to participate in it." *Zorach,* 343 U.S.

at 313. Awarding academic credit advances religious more than does traditional released time. It alters the legal relationship between public school and student for religious reasons by giving a grade. It rewards the student for religious participation. It tells the world that the school approves of the student's mastery of the religious precepts that have been taught. None of these results are true for traditional released time and none were approved by *Zorach*. Academic credit can allow a student to qualify for a scholarship or make the Honor Roll. It does far more than is needed to accommodate the purpose of traditional released time, which is only that schools "do no more than accommodate their schedules to a program of outside religious instruction." *Zorach*, 343 U.S. at 315. SCBEST students are not just getting an excused absence to pursue religious instruction; their religious life is being promoted and approved.

The released time instructor has complete power over what grade is given. She may fail a student for saying what she considers to be a blasphemy or for what she perceives to be insufficient spiritual development. Defendant will accept that failing grade and enter on its records that legal detriment to the student's relationship to the public school; and the student may fail to graduate or lose out in competition for a scholarship because he failed to learn, to the satisfaction of a religious organization, how he ought to live as a Christian. This would reasonably appear to an outside observer to be an instance of a public school creating a

significant detriment to a student's career for religious reasons. This goes far beyond the release of students to attend religious ceremonies which was approved in *Zorach.*

Adding academic credit to traditional released time is gratuitous to the traditional objective of allowing students to attend programs of outside religious instruction. Academic credit in and of itself endorses religion.

This case is controlled by *Larkin v. Grendel's Den,* 459 U.S. 116 (1982). There a Massachusetts statute gave churches the power to control the grant of liquor licenses for premises within 500 feet of a church. The Court held that this donation of power had the principal and primary effect of advancing religion in violation of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), for two reasons.

First, the power granted to the churches was "standardless" and thus "could be employed for explicitly religious goals." *Larkin,* 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. Defendant has delegated to SCBEST a standardless power to determine a student's grade on a religious basis. There is nothing to stop it from passing a student for religious piety or failing her for blasphemy.

Second, *Larkin* held that the power that was granted to churches advanced religion because "the mere appearance of a joint exercise of legislative authority by

Church and State provides a significant symbolic benefit in the minds of some by reason of the power conferred." 459 U.S. at 125-26. When churches control academic credits or control liquor licenses, Church and State are symbolically joined in exercising governmental power. The Massachusetts statute at issue in *Larkin* "gives churches the right to determine whether a particular applicant will be granted a liquor license, or even which one of several competing applicants will receive a license." 459 U.S. at 125. This is also the situation in the present case. A religious organization can determine whether a student gets academic credit.

The district court rejected the application of *Larkin* and *Lemon* to this case for three invalid reasons.

First, the district court distinguished the power to issue an academic credit from the power to refuse a liquor license on the ground that issuing an academic credit is "not a quintessential governmental function." App. 1057. Whatever a "quintessential" governmental function may be, it is not the standard expressed by the Supreme Court. *Larkin* characterized the power at issue as a "discretionary governmental power[ ]," 459 U.S. at 123; simply as "a governmental power," *id;* and as a "delegated power," 459 U.S. at 125. The statute that granted this power was said to vest "significant governmental authority" and "substantial governmental powers" in religious organizations. 459 U.S. at 126. In later cases the court characterized *Larkin* as involving the delegation of simply "a

governmental power," *Allegheny County v. ACLU,* 492 U.S. 573, 590-91 (1989); and as involving the delegation of "state power," *Hernandez v.* Commissioner, 490 U.S. 680, 697 (1989). The Supreme Court has never described the *Larkin* power as being quintessential.

Defendant has delegated an important discretionary power to a religious organization. The power to assess academic performance and then grade it accordingly requires the exercise of discretion, which is the hallmark of a discretionary power. *See, Owen v. City of Independence,* 445 U.S. 622, 644 (1980).

Second, the district court stated that "public schools in South Carolina are obliged to accept the credit for transfer students regardless of the content of the course." App. 1057.[10] This conclusion is not supported by the record. There is no information in the record as to what public schools (other than defendant) in fact do about granting academic credit for transfer students. The only citation given by the district court is to Superintendent White's testimony. *Id.* His testimony speaks only to *defendant's* practice, not to the practices of other South Carolina public schools. App. 273:13-274:17.

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[10] If the use of the word "obliged" indicates that the district court concluded that public schools were legally required to accept all transfer credits, even for a religious training course such as Priestly Practices 101, no case supports this proposition. Defendant could not offer such a course itself. *Abington Twp. v. Schempp, supra,* 374 U.S. 203 (1963).

The practice as to transfer students is not relevant because the SCBEST students are not transfer students, they are Spartanburg High students released for an hour a day to walk across the parking lot and then return. They are full-time students at a public school. Their released time class is "a part of the school day." Policy, Addendum I.

Third, the district court opined that the power at issue was not controlled by *Larkin* because it is "significantly more curtailed than the power churches exercised in *Larkin*." App. 1057. As indicators of how the power to grant academic credit had been curtailed the district court mentioned (1) that "[t]he only students who are directly impacted by the released time policy are students who voluntarily desire to receive the religious education," and (2) that these students did not receive advance placement for the course. *Id.* Neither circumstance curtails the power.

The first point is not relevant. This case challenges the grade-awarding power as unconstitutional, whomever receives the grade. It also not correct as a matter of fact. The students not attending the released time class are subject to disqualification based on class rank whenever an SCBEST student receives a higher class rank for religious reasons. That directly impacts them.

As to the second point, not all courses get advance placement credit. SCBEST did not qualify for advance placement status for the neutral reason that it

was not a third or fourth level of an elective. App. 243:7-13; 244:7-21 (White dep.).

Precedent in this court puts a heavy burden on any who seek to extend *Zorach* beyond its facts. *Zorach* was decided two decades before the *Lemon* test was formulated. Shortly after *Lemon* the District Court for Western District of Virginia was presented with a case substantially indistinguishable on its facts from *Zorach*. The Court held that *Zorach* was not good law after *Lemon* and that traditional released time violated the second *Lemon* test. *Smith v. Smith*, 391 F. Supp. 443, 450 (W.D.Va. 1975). On appeal this court agreed, in the abstract. "If we were to decide this case solely by direct application of the tripartite test . . . we would be inclined to agree with the district court's overall conclusion that the release-time program is invalid" under the second *Lemon* test. *Smith v. Smith,* 523 F. 2d 121, 124 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). But, after the district court's decision and before decision in this court, the Supreme Court had decided *Meek v. Pittenger*, 421 U.S. 349 (1975), in which it characterized *Zorach* as creating only an allowable "indirect or incidental benefit" to religion. *Id.,* 421 U.S. at 359, *quoted in Smith v. Smith,* 523 F. 2d at 125. Finding the case before it indistinguishable from *Zorach* and because of *Meek* finding *Zorach* to be controlling law, this court reversed.

Zorach was preceded by *McCollum v. Board of Education*, 333 U.S. 203 (1948), in which the Supreme Court declared unconstitutional the conducting of religious classes on school premises by outside instructors. This court in *Smith v. Smith* marked the essential distinction between *McCollum* and *Zorach* as being that in *McCollum* the authority of the public school was used to promote instruction because the religious teacher had been put into the position of authority held by the teacher of secular subjects. *Smith v. Smith,* 523 F. 2d at 123 n. 6. This court is now presented with a case in which the authority of the public school teacher has been vested in a religious instructor. SCBEST could be conducting prayer services each day and giving grades based on Drew Martin's perception of the student's sincerity. Defendant has done far more than accommodate the scheduling of religious instruction, which was all that *Zorach* allowed. *Smith* marks *Zorach* as lying near the boundary line between accommodation and advancement. Defendant has crossed the line by giving an affirmative benefit to religion.

In *Doe v. Shenandoah County School Board,* 737 F. Supp. 913 (W.D. Va. 1990), released time religious instructors were allowed to enter public schools classrooms to solicit students, the public school passed out and collected released time registration cards, and classes were held just outside the public school's property line. All those facts are also presented by the case at bar. SCBEST has been allowed to make classroom presentations; enrollment forms are kept in the

Guidance Office; and classes are conducted at a next-door church. Even without academic credit being granted the *Doe* court held these practices unconstitutional.

An objective observer would reasonably conclude that the SCBEST course is functionally one of defendant's electives.

b.

Defendant has directly aided SCBEST in its religious mission.

Just as defendant's granting of academic credit has done more than is necessary to accommodate released time, so has defendant's close cooperation with SCBEST in the implementation of released time gone beyond what is necessary to accommodate it. In multiple ways defendant has violated the rule that a public school must adopt the least entangling administrative alternative in dealing with a released time program. *Lanner v. Wimmer,* 662 F. 2d 1349, 1358 (10th Cir. 1981).

In *McCollum v. Board of Education, supra*, religious instruction was conducted weekly for up to 45 minutes in public school classrooms. The court held this practice unconstitutional because the classes were conducted on public school property and involved "close cooperation" with the religious group. 333 U.S. at 209.

Defendant has closely cooperated with SCBEST in the development and implementation of the Policy.

Superintendent Tobin characterized the process of formulating the Policy as having been done "in concert" with SCBEST and the facts bear out this characterization. Defendant's involved administrators received and considered a scenario prepared by SCBEST. Defendant could have elected to develop the Policy without involvement of SCBEST, which was of course free to send defendant such suggestions as it wished but could not have participated in the formulation of the Policy without the permission of defendant. Superintendent Tobin discussed with SCBEST how defendant, and how SCBEST, would contact parents about released time. Defendant then gave SCBEST the names and addresses of parents and children, in February 2007, when the Policy was in a late stage of development. Not surprisingly SCBEST used this information to contact parents and children. This action accorded with the position of Superintendent Tobin that defendant "wanted to make parents aware and students aware that the course would be offered."

At the last minute defendant changed the Policy text from "may award" (the language of the Released Time Credit Act) to "will accept." This change does not speak to the source of academic credits, whether from accredited schools or unaccredited schools, but defendant asserts that meaning for it. App. 478:1-10 (McDaniel dep.). This interpretation allows acceptance of academic credit from unaccredited SCBEST through Oakbrook, but requires that other unaccredited

religious organizations find an accredited school which will report its grades to defendant – once the applicant finds out that the Policy has this unannounced requirement. There are only 6 private high schools in Spartanburg County.

The "may award" provision tracked the RTCA provision. The RTCA has been interpreted by the South Carolina School Board Association to require that released time credit be accepted from accredited and unaccredited schools alike. App. 909 ¶ 5. This tends to indicate that defendant's Policy was not "designed to disentangle the School District from reviewing the religious content of released time instruction," as the district court concluded, App. 1059, but instead to disfavor unaccredited schools which are not acceptable to an accredited school.

The SCBEST February letter did not reflect the last-minute change in the Policy. Defendant drafted a correction letter which contradicted the SCBEST letter, but SCBEST requested that this letter not be sent because it would have reflected unfavorably on SCBEST and defendant did not send it. Defendant allowed what it saw as erroneous statements in the letter to go uncorrected. Defendant and SCBEST were thus closely involved in the formulation of the Policy.

This close involvement continued after the Policy was enacted. SCBEST learned of the Mosses' displeasure with the Policy and their meeting with the Chair and Superintendent and drafted a letter for the Superintendent to send to the

Mosses. For aught that appears this was SCBEST's unilateral act which it had every right to take, but which defendant could have chosen to ignore. Instead the Superintendent forwarded the letter to the Chair for use in formulating a letter to the Mosses. Here again, as in choosing to utilize the SCBEST scenario, in meeting numerous times with SCBEST to discuss the Policy during its development, and in giving names and addresses that expectably were used to contact students and parents, defendant chose to involve itself with SCBEST in ways not shown to be necessary to the formulation of a released time policy. This is "close cooperation" and it continued to occur after the Policy was enacted.

Defendant allowed SCBEST to make presentations in homerooms and did nothing to prevent a recurrence. Defendant allowed SCBEST to have a table at registration. Forms for requesting assignment to SCBEST are kept in the Guidance Office. Defendant has enforced discipline for SCBEST, formulated a policy that it would handle SCBEST's major discipline problems, and invited SCBEST to participate in its in-house teacher training about discipline. Superintendent White has undertaken to aid Drew Martin by scheduling meetings with top administrators and advising Martin about how to communicate with them.

The released time students are released in the geographic sense, but as to discipline they are not fully released. As to discipline they are no more released

than are students on a History field trip. Defendant remains the empowered disciplinarian as to major discipline issues.

SCBEST has an easy and productive access to the levers of power in defendant's administration. An objective observer would reasonably conclude that the SCBEST course is functionally one of defendant's electives. As Drew Martin testified, "it's an elective now." App. 331:1-4. Defendant has adopted the SCBEST course as its own.

c.

Monell v. Department of Social Services, 436 U.S. 658 (1978), does not prevent the admission of testimony that defendant aided SCBEST.

The District Court held that certain items of testimony proffered by plaintiffs were not admissible to show liability under 42 U.S.C. 1983 because they did not meet the requirements of *Monell v. Department of Social Services,* 436 U.S. 658 (1978). App. 1039.

In *Monell* the Court held:

> Local governing bodies, therefore can be sued directly under § 1983 for . . . declaratory . . . relief where . . . the action that is alleged to be unconstitutional implements or executes a policy . . . officially adopted and promulgated by that body's officers . . . [T]he touchstone of the § 1983 action against a government body is . . . that official policy is responsible for a deprivation of rights protected by the Constitution . . .

430 U.S. at 690 (footnotes omitted).

These requirements are plainly met as to the academic credit policy itself. Defendant officially enacted the Policy. It provides for the granting of academic

credit. Defendant executes it by granting credit. That causes the deprivation of rights. This satisfies the requirements that ". . . the action that is alleged to be unconstitutional implements or executes a policy . . . officially adopted and promulgated by that body's officers . . . ," *id.* The District Court agreed with this analysis. App. 1040.

The district court then went on to hold that plaintiffs had to satisfy *Monell* as to every proffered item of proof of execution of the Policy. It allowed consideration of the retention of forms in the Guidance Office, the presentations in homerooms, and the appearance of SCBEST at registration, but held inadmissible defendant's administration of discipline for SCBEST, defendant's providing SCBEST with the names and addresses of its incoming students, and defendant not sending out a correction of SCBEST's erroneous letter. App. 1042.[11] In so doing it erroneously treated each item of proof as if it were a claim of liability, rather than evidence of unconstitutional endorsement caused by the implementation of the policy. These excluded items of evidence are not "the action that is alleged to be unconstitutional," *Monell, supra.* Plaintiffs are not seeking a declaratory judgment of unconstitutionality as to these items, but instead a declaratory judgment that the

[11] The District Court held additionally that plaintiffs could not show defendant to be liable for accepting draft released time policies from SCBEST, that a SCBEST Director wrote to defendant's Chair, or for remarks made by a member of defendant's Board at the January 2007 Board meeting, App. 1040. Plaintiffs have elected not to challenge these rulings on this appeal.

academic credit policy has been unconstitutionally applied. These items are relevant evidence because they tend to make it more probable that an objective observer would conclude that the effect of the implementation of the academic credit policy is to endorse religion. *See, F. R. Evid.* 401.

Plaintiffs' view of what is admissible in an Establishment Clause case is supported by *Santa Fe Indep. Sch. Dist v. Doe,* 530 U.S. 290 (2000), where the Court was, as here, concerned with the effect of the implementation of a school board policy. In the course of deciding whether the Prayer At Football Games policy was unconstitutional the Court considered, without even a nod to *Monell,* wide-ranging evidence of how the policy was implemented, including the prayer that was delivered pursuant to the policy, that it was broadcast over the school's public address system, and that presumably there were cheerleaders and uniformed band members present. 530 U.S. at 307-08. The Court observed that "[t]he actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy." 530 U.S. at 307. The prayer policy did not cause the cheerleaders and band members to be present, but they were part of a "setting" in which the policy was executed, 530 U.S. at 308, which was relevant to the endorsement question. *Cf., Allegheny County v. American Civil Liberties,* 492 U.S. 573 (1989), in which the Court considered wide-ranging evidence about the origins of Christmas and Chanukah in deciding the constitutionality of a religious

display. Judging endorsement requires consideration of the context in which a policy is implemented.

Alternatively, each of the items of evidence which the District Court disallowed meets the requirements of *Monell* for being a basis for imposing municipal liability. The district court held that *Monell* did not prevent consideration of several of plaintiffs' items of evidence, on several rationales. The keeping of released time permission forms on school premises was held to create potential liability because it "derive[d] directly from the execution" of the released time policy. App. 1041. Visits to classrooms were admissible to show liability because "School District officials were apprised of and did not object." App. 1042. SCBEST's presence at registration created potential liability because "school officials approved" the request. *Id.*

These rationales also establish liability for the excluded items.

The agreement that defendant would handle major discipline issues was made by five ranking officials.[12] They also extended the invitation to attend the discipline workshop. All this "derive[d] directly from the execution" of the released time policy, App. 1041, which was sufficient for the permission slips to be considered. The two instances of administration of discipline by Principals were

[12] It is not clear whether the district court held that evidence of disciplinary matters beyond the two instances of student misbehavior were to be excluded. Only the two instances are specifically mentioned as being excluded. App. 1042.

reported to Superintendent White by Martin and led to the "major discipline" policy. "School District officials were apprised of and did not object," App. 1042, which was sufficient for the classroom visits. Defendant's Code of Conduct for students provides that "[p]rincipals will determine the appropriate disciplinary action for students who violate these guidelines." App. 936.

The addresses were furnished to SCBEST by Superintendent Tobin. This is school official's approval, which the district court found to be sufficient to consider the SCBEST presence at registration.

The failure to correct the February letter was similarly due to the inaction of Superintendent Tobin.

See, Holloman v. Harland, 370 F. 3d 1252 (11th Cir. 2004), which held that a school district could be held liable under *Monell* for the consequences of a policy "mandating, authorizing, *or permitting*" the actions in question. 370 F. 3d at 1292 (emphasis added). The Policy permitted all the actions which were excluded by the district court.

3.

Whether defendant's policy of granting academic credit for released time religious education violates the Establishment Clause by excessively entangling church and State.

In addition to the religious effect of what defendant has done, the Establishment Clause is also offended by what it has allowed SCBEST to do.

Defendant's donation of its governmental power to give public school academic credit to a religious institution has excessively entangled it with a religious institution.

In *Larkin v. Grendel's Den*, *supra*, 459 U.S. 116 (1982), the Court held that the donation of governmental power to a religious organization also offended the third prong of the *Lemon* test. In reaching this conclusion the Court first quoted from *Lemon, supra,* 403 U.S. at 625:

> 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.*

459 U.S. at 126 (emphasis by *Larkin* court). The Court then stated the "core rationale" of the Establishment Clause, going back a century and a half to South Carolina law:

> The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. *Watson v. Jones*, 13 Wall. 679, 730, 20 L. Ed. 666 (1872), *quoting Harmon v. Dreher,* 1 Speers Eq. 87, 120 (S.C. App. 1843).

459 U.S. at 126. This meant that "[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to . . . religious institutions." 459 U.S. at 127. Applying this core rationale to implementation of the Massachusetts statute, its delegation of power was held unconstitutional 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, on issues with significant economic and political implications.
>
> *Id.*

The principle that governmental power may not be donated to a religious institution is an aspect of the broader principle that unchecked governmental power may not be donated to a private institution or person. Our guiding aphorism is that we have a government of laws, not men. When governmental power is given to private hands there is no legal process that can review its abuse and we have a government of men. Donating governmental power to religious institutions is not accommodation of religion; it is abdication of civic responsibility.

This brings us full circle to *Smith v. Smith, supra*, where this court so accurately foresaw the principle of *Larkin* when it observed that it was the donation of governmental power to a religious institution that explained the difference in result between *McCollum* and *Zorach.*

The district court held that *Larkin* was inapplicable because it involved a discretionary governmental power, whereas the power involved in the case at bar was said not to be discretionary because defendant did not review the released-time classes for content. App. 1059. The delegated power is nevertheless discretionary. Determining a grade is discretionary. It involves the exercise of judgment. That defendant does not control the substance of the religious

instruction does not alter the discretionary character of the separate power to determine a grade.

The district court cited a dictum from *Lanner v. Wimmer,* 662 F. 2d 1349 (10th Cir. 1981),[13] to support its conclusion that defendant's decision not to review the released time course for content meant that it was not donating a discretionary power. App. 1059. According to this dictum, "[i]f school officials desire to recognize released-time classes generally as satisfying some elective hours, they are at liberty to do so if their policy is neutrally stated and administered." This dictum is not well taken and should be rejected by this court.

In *Lanner* the Court affirmed an injunction that prohibited the granting of elective credit. 662 F. 2d at 1361-62. In a lengthy dictum not related to the affirmance of the injunction it described the circumstances under which academic credit could be granted for released time religious instruction. This was its course of reasoning.

1. Government can require religious schools to meet secular criteria in order for attendance at religious schools to satisfy compulsory school attendance laws. 662 F. 2d at 1361, *citing Board of Education v. Allen,* 392 U.S. 236, 245-46 (1968).

[13] An earlier portion of this opinion is relied on above, *supra* at p. 33.

2. This standard can be used to determine the granting of elective credit for released time religious instruction.
3. "If the school officials desire to recognize released-time classes generally as satisfying some elective hours, they are at liberty to do so if their policy is neutrally stated and administered" 662 F. 2d at 1361.
4. Granting elective credit advances religion no more than granting attendance credit if the government does no more than insure "that certain courses are taught for the requisite hours and that teachers meet minimum qualification standards." *Id.*

This analysis erroneously conflates governmental regulation of *secular* education at private religious schools with governmental granting of public school credit for *religious* instruction given at private religious schools. The State has an interest in seeing that school children receive a secular education and to that end may regulate secular instruction at private religious schools as to hours of attendance, teacher qualifications, and subjects required to be covered, *Board of Educ. v. Allen, supra*; but it has no cognizable interest in how religious instruction is carried out at religious schools. "Under our system the choice had been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government." *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

Board of Education v. Allen, *supra,* 392 U.S. at 245-46, expressed the extent of governmental regulation of religious schools as follows:

> In the leading case of *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the Court held that although it would not question Oregon's power to compel school attendance or require that that the attendance be at an institution meeting State-imposed requirements as to quality and nature of curriculum, Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view that the State's interest in education would be sufficiently served by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since *Pierce,* a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v. Society of Sisters:* if the State must satisfy its interest in *secular* education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their *secular* educational function. (footnotes omitted, emphases added.)

In the view of the *Lanner* court there is no difference between requiring that the calculus teacher at a religious school be State-certified, and giving graduation credit for Intercessory Prayer 101. *Allen* gives no support for that proposition. *Allen* determines the allowable extent of governmental control of secular teaching at religious institutions. It does not speak to governmental acceptance of religious instruction. *Lemon v. Kurtzman,* does, and prohibits it.

CONCLUSION

The court should reverse and remand for entry of judgment in favor of plaintiffs for the relief demanded in the Third Amended Complaint.

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument because of the importance of the issues presented.

Respectfully submitted, July 5, 2011.

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ADDENDUM I

RELEASED TIME FOR RELIGIOUS INSTRUCTION. *Code* JHCB

Issued 3/07.

Purpose: To establish the basic structure for released time for students for religious instruction.

The board 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.

Adopted 3/07

ADDENDUM II

South Carolina Code Sec. 59-39-112[14]

[Preamble] Whereas, the South Carolina General Assembly finds that:

(1) The free exercise of religion is an inherent, fundamental, and inalienable right secured by the First Amendment to the United States Constitution.

(2) The free exercise of religion is important to the intellectual, moral, ethical and civic development of students in South Carolina, and that any such exercise must be conducted in a constitutionally appropriate manner.

(3) The United States Supreme Court, in its decision, *Zorach v. Clausen*, 343 U.S. 306 (1952), upheld the constitutionality of released time programs for religious instruction during the school day if the programs take place away from school grounds, school officials do not promote attendance at religious classes, and solicitation of students to attend is not done at the expense of public schools.

(4) The federal Constitution and state law allow the state's school districts to offer religious released time education for the benefit of the state's public school students.

(5) The purpose of this act is to incorporate a constitutionally acceptable method of allowing school districts to award the state's public high school students elective Carnegie unit credits for classes in religious instruction taken during the school day in released time programs, because the absence of an ability to award such credits has essentially eliminated the school districts' ability to accommodate parents' and students' desires to participate in released time programs.

Now, therefore, Be it enacted by the General Assembly of the State of South Carolina:

[14] The Preamble and the severability of this statute clause are not codified.

SECTION 1. This Act may be cited as the "South Carolina Released Time Credit Act".

SECTION 2. [End of preamble]

SECTION 59-39-112. Elective credit for released time classes in religious instruction.

(A) A school district board of trustees may award high school students no more than two elective Carnegie units for the completion of released time classes in religious instruction as specified in Section 59-1-460 if:

(1) for the purpose of awarding elective Carnegie units, the released time classes in religious instruction are evaluated on the basis of purely secular criteria that are substantially the same criteria used to evaluate similar classes at established private high schools for the purpose of determining whether a student transferring to a public high school from a private high school will be awarded elective Carnegie units for such classes. However, any criteria that released time classes must be taken at an accredited private school is not applicable for the purpose of awarding Carnegie unit credits for released time classes; and

(2) the decision to award elective Carnegie units is neutral as to, and does not involve any test for, religious content or denominational affiliation.

(B) For the purpose of subsection (A)(1), secular criteria may include, but are not limited to, the following:

(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.

Severability clause

SECTION 3. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality of validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more other, subsections, paragraphs, subparagraphs, sentences, clauses, phrases or words thereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

ADDENDUM III

South Carolina Code Section 59-29-230. Old and New Testament era courses.

(A)(1) A school district board of trustees may authorize, to be taught in the district's high schools, an elective course concerning the history and literature of the Old Testament era and an elective course concerning the history and literature of the New Testament era.

(2) Each course offered must be taught in an objective manner with no attempt to influence the students as to either the truth or falsity of the materials presented.

(3) Students must be awarded the same number of Carnegie units that are awarded to other classes of similar duration.

(4) A particular version of the Old or New Testament to be used in either course may be recommended by the board of trustees; provided, that the teacher of the course and students enrolled in the course may use any version of the Old and New Testaments.

(B) The board of trustees of a district that offers a course pursuant to this section must:

(1) maintain supervision and control of the course;

(2) hire any new teachers that it determines are required to teach the course in the same manner all other teachers are hired;

(3) assure that all teachers teaching the course are certified by the State; and

(4) make no inquiry into the religious beliefs, or the lack of religious beliefs, held by a teacher when determining which teacher shall teach the class.

(C) The State Board of Education shall develop and adopt academic standards and appropriate instructional materials that must be used by high schools offering a course pursuant to this section. These academic standards and instructional materials must ensure that the courses do not disparage or encourage a commitment to a set of religious beliefs.

(D) The academic standards and appropriate instructional materials developed and adopted by the board must:

(1) be designed to help students gain a greater appreciation of the Old Testament and the New Testament as great works of literature, art, and music; assist students in gaining greater insight into the many historical events recorded in the Old Testament and the New Testament; and provide students with a greater awareness of the many social customs that the Old Testament and the New Testament have significantly influenced; and

(2) provide that the Old Testament is the primary text for the course exploring the history and literature of the Old Testament era and that the New Testament is the primary text for the course exploring the history and literature of the New Testament era.

(E) The academic standards developed and adopted may provide that students may be assigned period-appropriate secular historical and literary works to supplement the primary text.

CERTIFICATE OF COMPLIANCE

This brief has been prepared using Microsoft Word Times New Roman 14 point type. This is a proportionally spaced serif typeface.

Exclusive of the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, Addenda and certificate of service this brief contains, according to the word count function of Microsoft Word, 10,512 words.

I understand that a material misrepresentation can result in the Court's striking this brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or copy of the word or line printout.

s/ George Daly

No. 11-1448

Robert Moss, Ellen Tillett, The Freedom from Religion Foundation, Inc., and Melissa Moss, Plaintiffs-Appellants -vs- Spartanburg County School District Seven

CERTIFICATE OF SERVICE

I certify that on July 5, 2011, I made service of the foregoing Opening Brief of Plaintiffs-Appellants by serving one copy on opposing counsel:

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s/ George Daly