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.; AND 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
No. 7:09-cv-01586-HMH – Hon. Henry M. Herlong, Jr.

APPELLEE'S RESPONSE BRIEF

Eric C. Rassbach
Luke W. Goodrich
Lori H. Windham
Eric N. Kniffin
THE BECKET FUND
FOR RELIGIOUS LIBERTY
3000 K St., NW, Suite 220
Washington, DC 20007
T (202) 955-0095
F (202) 955-0090

Counsel for Spartanburg County School District Seven

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1, Appellee Spartanburg County School District Seven makes the following disclosure:

1. The School District is not a publicly held corporation or other publicly held entity;

2. The School District does not have any parent corporations;

3. No publicly held corporations owns 10% or more of the stock of the School District;

4. There is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation;

5. The School District is not a trade association;

6. This case does not arise out of a bankruptcy proceeding.

August 4, 2011

s/ Eric N. Kniffin

Eric N. Kniffin
Counsel for Spartanburg County School District Seven

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Regulations **Page(s)**

INTRODUCTION

This lawsuit is much ado about nothing. The School District adopted an unremarkable released time policy as an accommodation of some students' interest in receiving private religious instruction off campus. The District scrupulously designed the policy to be neutral among religions and used safeguards to avoid entanglement with religion. As even Plaintiffs now concede—despite earlier allegations to the contrary—the District had an entirely secular purpose in accommodating its students.

Plaintiffs press on, however, because of what they call the "centerpiece" of their case: their claim that public schools violate the Establishment Clause *whenever* they accept transfer credits for religious instruction. This argument has far-reaching consequences that Plaintiffs fail to acknowledge. Public schools across the nation can and routinely do accept such credits without promoting or becoming entangled with religion. The mere conjunction of this common practice with the longstanding—and perfectly constitutional—practice of released time education does not make either one unconstitutional. Two rights do not make a wrong.

Plaintiffs' claims fail for two simple reasons. First, Plaintiffs lack standing to complain about the policy because it has caused them no injury. It has not harmed their academic standing, nor has it disrupted their school day. At most they can claim to be offended by the existence of a government policy they dislike. But just disagreeing with the government is not enough to meet Article III's injury requirement. Without an injury, Plaintiffs are not entitled to hale the District into court.

Second, the District's policy easily qualifies as a bona fide religious accommodation under both *Zorach* and *Lemon*. The District did not promote the released time program, nor did it coerce anyone to join. Both the release of students and the acceptance of elective credit are neutral accommodations that simply make it possible for students to receive religious instruction. Nor does the arms'-length, accreditation-based recognition of transfer credits create any entanglement. Indeed, Plaintiffs' proposed remedy of public school review of religious school courses poses the far greater danger of entanglement.

Plaintiffs' lawsuit is ultimately driven by their admittedly negative feelings towards the religious beliefs of some of their fellow students, which they find offensive. Plaintiffs are entitled to their opinion and

their feelings, but they aren't entitled to have the government adopt them. Government should be neutral in matters of religion, which is just what the District has done here. The Court should affirm the district court.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs have standing to challenge the School District's released time policy.

2. Whether the School District's accommodation of parents' and students' interest in released time education violates the Establishment Clause.

3. Whether the School District's practice of accepting transfer credits for private school courses in religious instruction violates the Establishment Clause.

STATEMENT OF FACTS

A. Released time accommodations in South Carolina

In 1952, the Supreme Court established that public schools may allow students to leave campus for a portion of the school day to attend religious instruction, so long as public schools neither funded nor promoted that instruction. *Zorach* v. *Clauson,* 343 U.S. 306 (1952); *see also Smith* v. *Smith*, 523 F.2d 121 (4th Cir. 1975). As the Supreme Court explained, "When the state encourages religious instruction . . . , it follows the best of our traditions." *Zorach,* 343 U.S. at 314. Such actions "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups." *Id.* at 314.

Since then, many school districts around the country have created accommodations for released time instruction. Joint Appendix ("J.A.") 882 (more than 250,000 public school students in 32 states). South Carolina has permitted public school students to attend released time classes since 1992. Opinion ("Op.") at 2; J.A. 884.

In 1997, the South Carolina Legislature increased the number of course credits required for high school graduation by twenty percent.

S.C. Code. Ann. § 59-39-100(d); S.C. Code Ann. Regs. 43-234. The credit increase had an unintended side effect: it made it very difficult for South Carolina to accommodate parents' and students' interest in released time education. Op. 2. As a Columbia citizen complained, "if you can't get credit for it, then you can't afford to take the time to take the class." J.A. 688.

The law's effects were felt in Spartanburg County School District Seven ("District") too: the only released time provider in the District "lost its high school participants after the state started increased graduation requirements in 1997." J.A. 688; *see* Op. 3.

In 2006, the South Carolina Legislature remedied the problem. Having determined that "the absence of an ability to award [elective credit] has essentially eliminated the school districts' ability to accommodate parents' and students' desires to participate in released time programs," 2006 S.C. Acts 322 (Addendum A), the Legislature enacted the Released Time Credit Act ("Act"), S.C. Code Ann. § 59-39-112 (Addendum A).

The Act allows students to earn up to two units of elective credit for "released time classes in religious instruction." *Id*. School districts are to determine whether to award credits for released time using "substan-

tially the same criteria" used to evaluate transfer credits for "similar classes at established private high schools." *Id.* The statute also specifies that "classes in religious instruction are evaluated on the basis of purely secular criteria" and that evaluation should "not involve any test for[] religious content or denominational affiliation." *Id.* Under state regulations, all for-credit courses must be assigned a numerical grade. J.A. 897.

The Act added released time to the hundreds of elective and off-campus credit opportunities available to South Carolina public high school students. For example, students may choose to enroll in dual-credit courses with local universities, such as the advanced German course Plaintiff Melissa Moss took at Wofford College, which is affiliated with the United Methodist Church. J.A. 149, 709. These courses enable students to earn both high school and college credit. J.A. 894-95. Similarly, students may take International Baccalaureate (IB) or Advanced Placement (AP) classes, either in school or "online and in other nontraditional settings." J.A. 895. Students may receive elective credit for a "community internship," essentially working an off-campus job under the supervision of a community mentor. J.A. 920. Some remedial

credits may be offered via software-driven courses. J.A. 902. All of these options are in addition to traditional on-campus electives. J.A. 919-22 (course catalog listing over 200 options).

B. SCBEST forms Agreement with Oakbrook.

After the Act became law, a local released time provider, SCBEST,[1] decided to develop a high school course that would satisfy parents' and students' interest in released time education. Because SCBEST wanted students to be able to receive elective credit, it asked a local accredited private school, Oakbrook Preparatory School ("Oakbrook"), to oversee its course. Op. 3; J.A. 317. A similar arrangement had already been successful in Georgia, where students have long been receiving credit for released time. J.A. 284, 317-18.

Under the agreement between SCBEST and Oakbrook, Oakbrook "agreed to review and approve" SCBEST's "curriculum, qualified teacher[s], educational objectives, and testing," and "provide the necessary oversight" for the released time course, and would "acknowledge the participation and grade of each SCBEST student . . . and [would] trans-

[1] SCBEST, pronounced "S.C. Best," stands for Spartanburg County Bible Education in School Time.

fer elective credit." J.A. 602-03 ("Agreement"); *see also* Op. 3. The District had no involvement in developing or approving the relationship between Oakbrook and SCBEST. Op. 3 & n.3; J.A. 479, 552.

C. The District considers and adopts the Policy.

Once the Oakbrook-SCBEST agreement was in place, SCBEST contacted the District to suggest the adoption of a new released time policy that would allow students to earn academic credit, as permitted by state law. Op. 3; J.A. 616, 694, 698-99. A District committee met and discussed whether to recommend a new released time policy. Op. 3, J.A. 258. The committee ultimately proposed that the Board develop and adopt a new released time policy modeled on the Released Time Credit Act, Op. 3-4; J.A. 664, and the Board unanimously adopted the motion. Op. 4, J.A. 664.

Although SCBEST put forward its own draft policy, the District chose not to adopt it. Op. 4; J.A. 506. Instead, the District based its policy on the Released Time Credit Act and a model policy drafted by the South Carolina School Board Association. Op. 4; J.A. 909-13. The District edited the model policy, changing the word "award" to "accept" to clarify that the District "was merely accepting transfer credits rather

than actively 'making judgments about the quality of the course.'" Op. 4-5 (quoting J.A. 478); *see also* Op. 26; *compare* J.A. 913 (model policy) *with* J.A. 915 (Addendum B) (District's policy). At its next meeting, the Board of Trustees voted unanimously to adopt the revised released time policy ("Policy"). Op. 4-5; Addendum B; J.A. 673.

The Policy sets forth the criteria under which the District will permit released time classes. Addendum B. In accordance with the Released Time Credit Act, the Policy states that the District will "accept no more than two elective [] unit credits of religious instruction." *Id.*; *see also* Addendum A. The Policy pledges that the District's "attitude will be one of cooperation with the various sponsoring groups of the school district," and that "district staff and faculty will not promote or discourage participation by district students." *Id.*

D. The District implements the Policy.

Spartanburg High School students began taking the SCBEST course for elective credit in August 2007. Op. 6, J.A. 364. Out of a Spartanburg High School student population of about 1,500, on average fewer than four students (0.3%) have participated in SCBEST's program each semester. Op. 7 n.4; J.A. 918; J.A. 881 (20 students over 6 semesters).

The Policy makes only minimal claims on the District's administrative staff. J.A. 727. The District does not advertise the SCBEST course. Op. 6; J.A. 269-270. Guidance counselors are trained not to suggest the course to students, but if a student expresses interest in the course and shows parental permission, the Spartanburg High School guidance department works with the student to try to fit the course into her schedule. Op. 6, 29; J.A. 460-61, 277-78.

The District also treats released time courses no differently from off-campus electives, such as the dual-credit German course that Plaintiff Melissa Moss took at Wofford College, or from any other transfer course from an accredited private school. Op. 6; J.A. 691. As District personnel explained, "the District will allow credit for the class based solely on Oakbrook's approval of the class," and "this is the normative practice on any transfer credit from private schools." J.A. 452; *see also* Op. 26. The SCBEST course does not appear in the Spartanburg High School catalog and, while state regulations require the grades to be factored into students' grade point averages, they are not reported on Spartanburg High School report cards. Op. 29; J.A. 812-13; J.A. 451 ("That would be the same way if a student went to Wofford College and took a course

there.").

At the end of the semester, SCBEST "relays the students' grades to Oakbrook, and Oakbrook sends the grades on an official transcript to Spartanburg High School." Op. 6; J.A. 605; J.A. 446. The District transfers the grades to the students' Spartanburg High School transcripts, with the course listed simply as "transfer elective"—the same designation used for Plaintiff Melissa Moss's off-campus dual-credit course. *Compare* J.A. 881 (summary of SCBEST student transcripts) *with* J.A. 709 (Melissa Moss transcript).

While participating in off-campus electives and released time classes, the students are outside the District's custodial control and the District does not monitor students' attendance. J.A. 271. The District neither monitors nor enforces the discipline of off-campus instructors. J.A. 219-20, 595-96. However, under its Code of Conduct, which is "applicable to student conduct on and off school premises," it retains the ability to respond to any report of student misconduct with either counseling or "behavior consequences." J.A. 934-36 (Code of Conduct); 260-61 (school official may counsel student regarding off-campus behavior); 595-96 (Code of Conduct applies to off-campus conduct).

The District granted some requests for accommodation for students involved in SCBEST, but rejected others. Unlike students in off-campus electives, SCBEST students initially had to choose between released time and study hall. J.A. 565-67. When SCBEST brought this discrepancy to the District's attention, the District adjusted its policies to treat students taking released time the same as students taking off-campus courses for credit. *Id.* But when SCBEST wanted the District to be "more assertive in getting information to students" about released time, the District refused. J.A. 237. The District denied SCBEST's request to list its released time course on high school registration forms. J.A. 219.

The District also rejected SCBEST's request that the District award honors or AP credit to students taking the class because it determined that the course does not qualify for such weight. J.A. 549. When factoring GPAs on South Carolina's 5-point scale, honors courses receive a half-point bonus over normal courses and AP and dual-credit courses receive a full-point bonus. J.A. 893-95. This means that students interested in maximizing their GPA and class rank must select one of these electives, rather than SCBEST. J.A. 145-46 (Plaintiff Melissa Moss

takes honors and AP courses because it looks good to colleges and helps her GPA). SCBEST's grading has been stringent; so far, it has awarded two Fs, two Ds, four Cs, eight Bs, and seven As. J.A. 780 ¶ 4.

The District has also taken care to avoid any apparent encouragement to attend SCBEST, and refused to allow SCBEST special access to students. "Any aid the School District provided . . . is identical to the aid it afforded other outside organizations." Op. 32. Under the Policy, the District has refused SCBEST's requests to make any announcements at Spartanburg High School. J.A. 327-28. On one occasion, a Spartanburg High School student made flyers to advertise the SCBEST course and posted them in the hallways before school without the District's knowledge. J.A. 693. When school officials saw the posters, they took them down immediately, before the school day started. J.A. 443-44, 813.

On another occasion, a new principal mistakenly permitted an SCBEST representative to make an announcement in a middle school homeroom, unbeknownst to the District administration. J.A. 735-36. When the District administration learned of the incident during discovery for this litigation, it reminded all principals of its policy prohibiting such visits. J.A. 736. No visit has recurred. J.A. 736.

E. Oakbrook oversees the SCBEST course.

The released time classes provided by SCBEST are supervised by Oakbrook, which is in turn supervised by its accrediting agency. As required under the Agreement, Oakbrook reviewed SCBEST's syllabus and tests. J.A. 421-22, 393. It remained "fully in charge of the course content." J.A. 410. Oakbrook followed up on grade reports to verify that SCBEST's grading methods conformed with Oakbrook's standards. J.A. 411-12. Oakbrook was "more than pleased with the rigor of the [SCBEST] course." J.A. 411; *see also* J.A. 420, 423-35.

Oakbrook also reviewed the qualifications of Drew Martin, who taught the SCBEST class for Spartanburg High School students. Martin graduated from Duke University, has three Master's degrees, and is a certified teacher in the State of South Carolina. J.A. 300, 314. Oakbrook spoke with Martin about his lesson plans, methodology, and grading. J.A. 411. Oakbrook's headmaster found that Drew was "a consummate professional" who "takes his role as teacher seriously." J.A. 426. He "was the kind of teacher I would love to have had at Oakbrook." J.A. 417.

Oakbrook's oversight also made a difference. SCBEST modified its

curriculum in response to Oakbrook's recommendations. J.A. 421-22. As SCBEST's Executive Director told its Board, "We are being held accountable by Oakbrook Preparatory School, and have a responsibility to the school districts, the schools, and to the state to offer an academically legitimate class. . . . The best way to think of our class is a private school class being offered to public school students." J.A. 613-14.

Additionally, Oakbrook's accrediting agency, the South Carolina Independent School Association, held Oakbrook accountable. J.A. 427. Oakbrook made sure the SCBEST class met its accreditor's standards before it entered into the Agreement because overseeing a substandard course would have put Oakbrook's accreditation at risk. J.A. 425-26.

F. The Moss family protests the District's new Policy.

Robert Moss first found out about the District's new released time Policy through a letter from SCBEST in February 2007. Op. 7; J.A. 47. SCBEST's letter (incorrectly) stated that the District had already adopted the Policy and approved SCBEST to teach a course for elective credit. Op. 7 (letter was "erroneous[]"); J.A. 632 (SCBEST admits "we were wrong"). The SCBEST letter also directed parents and students to its website and provided a registration card for interested families. Op.

7-8; J.A. 681.

The Mosses were particularly upset because they presumed that this letter had the District's approval. J.A. 53-54; J.A. 20 ¶ 9(a). However, the District did not see the letter until the Mosses showed it to them. J.A. 222. It had merely produced an address list in response to an SCBEST "freedom of information" request. J.A. 368, 291 (such a request was SCBEST's consultant's standard practice), 225.

At the close of the School Board's March 7 meeting, after the Board had unanimously passed the new released time Policy, Robert Moss's wife, Heidi, spoke in opposition to the Policy. J.A. 703-04; J.A. 679. The day after the Board meeting, the Mosses wrote to the principal of Spartanburg High School, again threatening to sue. J.A. 916.

Although the District had not received any other complaints about the Policy, it reached out to the Mosses and invited them to a meeting with the superintendent and board chairman. J.A. 729, 833. At that meeting, Robert Moss "conveyed his concerns." and the District responded. Op. 8; J.A. 532, 861. In response to the Mosses' claim that the Policy was endorsing Christianity, the District told the Mosses that it would welcome a Jewish group teaching a released time course. J.A.

861. Additionally, shortly before Plaintiffs filed suit, the District told Plaintiffs' attorney that it would accept credit from a released time class taught by a Muslim group. J.A. 837 (typescript of J.A. 705-07). The District also assured the Mosses that SCBEST has no special or preferential status with the District. J.A. 861-62, 537-38.

G. Plaintiffs file suit.

Plaintiffs filed this lawsuit in June 2009, seeking a declaratory judgment that the District violated the First Amendment in implementing the Policy. Op. 8; J.A. 19 ¶ 4. The Court granted the District's motion to dismiss Plaintiffs' equal protection claim, but not Plaintiffs' Establishment Clause claim. Dkt. 39. At the close of discovery, the parties filed cross-motions for summary judgment. Dkts. 71, 72. The District also filed motions challenging Plaintiffs' evidence. Dkts. 81, 82, 83.

On April 5, 2011, the district court issued a 37-page opinion on the parties' summary judgment motions. The district court found that Plaintiffs' "intangible, spiritual injuries" were sufficient to give them standing, even though they were not "directly impacted" by the District's released time Policy. Op. 14, 34. On the merits, the district court found that "[n]one of [Plaintiffs'] allegations, considered alone or aggre-

gated, remove the challenged policy from the ambit of *Zorach*." Op. 36. The district court also found that the Policy passed all three prongs of the *Lemon* test, characterizing the Policy as "a passive measure on behalf of public school officials to accommodate the desire of its students to receive religious instruction." Op. 36. The court granted the District's motion for summary judgment and denied its evidentiary motions as moot. Op. 37. Plaintiffs subsequently appealed to this Court. J.A. 1062.

STANDARD OF REVIEW

Summary judgment is appropriate "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Teamsters Joint Council No. 83* v. *Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991). "The building of one inference upon another will not create a genuine issue of material fact. Mere unsupported speculation . . . is not enough to defeat a summary judgment motion." *Ennis* v. *Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995)) (citation omitted). On appeal, this Court reviews grants of summary judgment de novo. *EEOC* v. *Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

SUMMARY OF THE ARGUMENT

I. Plaintiffs have not borne their burden of proving standing under

any of the five theories of standing they have offered, because they have suffered no injury in fact.

First, Plaintiffs' "class rank" standing argument has been disproven—the Plaintiff students have, if anything, benefited from the existence of the released time Policy, and their class rank is higher than that of every student participating in the released time program.

Second, Plaintiffs' similarity-to-*Zorach* standing argument ignores the injury at issue in that case: the disruption to the plaintiffs' school day. Plaintiffs have neither alleged nor proven such an injury.

Third, Plaintiffs' argument for "offended observer" standing fails because that form of standing applies only to displays a plaintiff sees, not policies a plaintiff knows about. Mere knowledge of a government policy one does not agree with is not sufficient to create Article III standing.

Fourth, Plaintiffs have waived their taxpayer standing argument.

Fifth, Plaintiff Freedom From Religion Foundation does not have organizational standing because none of its members had standing when the lawsuit was filed.

II. Even if the Court reaches the merits, Plaintiffs' challenge fails under both the directly applicable *Zorach*/*Smith* test and the broader

Lemon standard.

Under *Zorach* and *Smith*, the released time Policy at issue here is an unremarkable accommodation of religion. As a neutral, arms'-length accommodation, the Policy does nothing to violate *Zorach* or repeat the mistakes made in *McCollum*.

With respect to *Lemon*, Plaintiffs have conceded that the District had a secular purpose in promulgating its released time Policy, leaving only *Lemon*'s "effects" and "entanglement" prongs.

The Policy does not have the effect of advancing religion because it is merely an accommodation of students' private interest in participating in religious instruction. Plaintiffs' argument about the "centerpiece" of its case—accepting credit for released time education—is wrong. Accepting credit merely places released time courses on a level playing field with off-campus elective options. Similarly, Plaintiffs' claim of too much cooperation with the released time provider ignores both the nature of *Monell* liability and the District's entirely neutral approach towards outside organizations of all sorts.

The Policy does not create excessive entanglement with religion. The District designed the Policy to avoid entangling oversight of the

content of the released time instruction. Ironically, Plaintiffs' proposed remedy—public school officials reviewing the content of courses at private schools to see if they are "too religious"—would cause more entanglement, not less.

ARGUMENT

I. Plaintiffs lack standing to challenge the District's released time Policy.

Plaintiffs have not met their burden of proving injury, traceability, and redressability with the "manner and degree of evidence required at the successive stages of the litigation." *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992).

At various times over the course of litigation, Plaintiffs have claimed five types of standing: (1) "class rank" injury standing, based upon the at first speculative and now disproven negative impact the Policy had upon Plaintiff students' class rank; (2) "*Zorach*" standing based on the fact that *Zorach* found standing in a released time case; (3) "offended observer" standing under *Suhre* and *Schempp*, based upon Plaintiffs' awareness of a government policy with which they disagreed; (4) taxpayer standing; and (5) organizational standing for Plaintiff Freedom From Religion Foundation (FFRF). None of Plaintiffs' theories of stand-

ing help them meet their burden; this case should therefore be dismissed for lack of standing.

A. Plaintiffs can show no "class rank" injury.

The closest Plaintiffs have come to alleging an actual injury in this case has been their speculation that they might be "subject to receiving a lower class rank because grades for released time religious instruction are factored into the GPA's of SCBEST students." Plaintiffs' Opening Brief ("Br.") at 4; *see also* Br. 23; J.A. 21 ¶ 11 ("Each student attending defendant's released time course is subject to academic advantage . . . ."). But to show that the District's Policy has harmed them, Plaintiffs must demonstrate some sort of *concrete* injury *to them* which is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan,* 504 U.S. at 560 (citation omitted); *see also Rosenfeld* v. *Montgomery Cnty. Pub. Sch.*, 25 Fed. Appx. 123, 129-30 (4th Cir. 2001) (student did not have standing to challenge allegedly discriminatory internship selection policies because he was not otherwise eligible for the internships).

Showing injury-in-fact is particularly important at this late stage of litigation, after Plaintiffs have had the burden of producing evidence at summary judgment. *See Lujan*, 504 U.S. at 561 (plaintiff must prove

standing with the "manner and degree of evidence required at the successive stages of the litigation"); *United States* v. *Jones*, 136 F.3d 342, 348 (4th Cir. 1998) (plaintiff lost standing late in litigation when facts demonstrated she was no longer injured by discriminatory admissions policy).

Plaintiffs have never offered anything more than speculation—much less proof—that their class rank was harmed by the Policy. After alleging a merely speculative injury in the complaint (student's released time participation "***may affect*** his or her grade point average based on SCBEST's perception of the student's religious status"), J.A. 21 ¶ 11, Plaintiffs later conceded that neither Plaintiff child suffered any academic disadvantage because of the Policy.[2] To the contrary, the summary judgment record conclusively demonstrates that they were not harmed at all: the Plaintiff students have excellent grades, *see* J.A. 708-09, and SCBEST was far from an "easy A" that might give participating students a higher class rank. So far, SCBEST has awarded two Fs, two

[2] J.A. 191-92 (Tillett has "no specific evidence" of any academic disadvantage for her child); J.A. 141 (Melissa Moss dep.: Q: "Do you believe that you were academically disadvantaged because you didn't take the SCBEST class while other students did?" A: "I don't believe that I was specifically, but I think that somebody could have been.").

Ds, four Cs, eight Bs, and seven As. J.A. 780 ¶ 4. SCBEST is also a "regular" course rather than an honors course, which adds extra points to students' GPAs. J.A. 779 ¶ 3. Indeed, the summary judgment evidence demonstrates that students in the released time program are at a singular *disadvantage* with respect to class rank because they are taking a non-honors course during a period where they have the option of boosting their GPAs by taking an honors elective course. J.A. 781 ¶ 9. Not surprisingly, no SCBEST student has a class ranking higher than either Melissa Moss or Tillett's child. J.A. 781 ¶¶ 10-11. Plaintiffs' claims about academic disadvantage are thus entirely conjectural and hypothetical. They have failed to allege or prove any actual injury based upon class rank.[3]

B. Plaintiffs cannot show injury-in-fact based on mere similarity to *Zorach*.

Having no direct injury, Plaintiffs instead try to turn the Supreme

---

[3] Even if Plaintiffs did prove some injury to their class rank, it would not be redressable, as the Plaintiff students cannot possibly demonstrate—without engaging in speculation—that their class rank would *increase* if the released time program ends. Indeed, students currently attending released time classes might decide to take the *honors* "easy A" electives that Plaintiffs' students took. J.A. 780 ¶¶ 5, 7 (almost all students, including Plaintiff Melissa Moss and Plaintiff Tillett's child, received top grades in honors courses).

Court's seminal released time case, *Zorach* v. *Clauson,* into an *ipse dixit*. Br. 22 ("Nothing further need be shown to give them standing."). But *Zorach* does not help them.

In *Zorach,* the plaintiffs complained of *direct* injuries, namely that "the classroom activities come to a halt while the students who are released for religious instruction are on leave." *Zorach,* 343 U.S. at 309. The released time policy directly injured the plaintiffs' interest in their own classroom experiences by adversely impacting the quality of those experiences. Having to kill time on campus while others attended an off-campus religious class was the injury-in-fact in *Zorach*, not mere attendance at the same school where a released time program existed.

Plaintiffs, by contrast, have neither alleged nor proven disruption to their own classes caused by the existence of the released time classes. Indeed, as only twenty students have taken the class over six semesters, J.A. 881, it is difficult to imagine how it would have any impact on the school as a whole. The summary judgment evidence bears this out: Melissa Moss never saw students walking to or from the SCBEST class, and Tillett's minor child did not even know about the Policy until Tillett told her child about it shortly before joining the lawsuit. J.A.

153-54 at 93:25-94:4; J.A. 169 at 23:6-18.

Moreover, Plaintiffs' reading of *Zorach* would prove far too much: anyone who attends a school with a released time policy may sue. Without a direct injury to tether standing to something that actually happened to plaintiffs, there would be no logical stopping point. Would-be released time plaintiffs could argue that the mere presence in the same school, the same school district, or even the same state, would be similar enough to *Zorach* to create standing. Standing jurisprudence would pose no meaningful restraints in the public school context.

Plaintiffs cannot merely invoke *Zorach* and obtain standing; they must allege and prove an injury like the injuries present in *Zorach*. They have failed to do so.[4]

---

[4] It is also questionable whether *Zorach* is even precedential on the standing point, since it was decided well before the development of modern standing jurisprudence. The whole of *Zorach*'s standing analysis is footnote 4: "No problem of this Court's jurisdiction is posed in this case since, unlike the appellants in *Doremus* v. *Board of Education*, 342 U.S. 429, appellants here are parents of children currently attending schools subject to the released time program." 343 U.S. at 310 n.4 (internal citation omitted). Since "drive-by jurisdictional rulings . . . have no precedential effect," the question is an open one. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

C. Plaintiffs lack "offended observer" standing.

At different points in the litigation, Plaintiffs have relied on another argument: that they have standing because they are offended by the Policy's existence. Br. 22-25 ("unwelcome personal contact"; "stigmatized as an outsider"; "feel less comfortable"; "offended"; "felt less welcome"); J.A. 19 ¶ 9 (Complaint stating Plaintiffs are "offended [] and emotionally affected and distressed" by Policy). The district court accepted this rationale below. Op. 13-15. But the doctrine of so-called "offended observer" standing is directed at government-sponsored religious *displays* and *rituals*, not government *policies*. Plaintiffs are attempting to expand offended observer standing well beyond its existing boundaries.

1. "Offended observer" standing is based on seeing displays or experiencing rituals, not knowing about policies.

The biggest problem with Plaintiffs' "offended observer" theory is that is that it is designed for religious displays and rituals, not policies like the one at issue here. The irreducible minimum injury in offended observer cases is "unwelcome direct contact" with the government display that offends the plaintiff. *Suhre* v. *Haywood Cnty.*, 131 F.3d 1083, 1086 (4th Cir. 1997) (Ten Commandments plaque). Without this direct

contact, plaintiffs lack a concrete and particularized injury, meaning they are in the same position as any other citizen who disagrees with a government action. As this Court explained, a "psychological consequence presumably produced by observation of conduct with which one disagrees," simply "is not an injury sufficient to confer standing under Art. III." *Id.* (quoting *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982)). The distinction between mere psychological consequence and direct contact is a fine one, depending upon a plaintiff's physical act of seeing the challenged government display, or observing the challenged ritual. *See id.* at 1089-90 ("direct contact" exemplified by "visible" displays and "visual impact"; injury created when plaintiff "enter[ed]" room where display was visible). For this reason, offended observer standing makes no sense outside the context of government displays that people can see or hear.

As this Court noted in *Suhre*, display cases are a "particularized subclass of Establishment Clause standing jurisprudence." *Id.* at 1086. Courts have therefore refused to extend this doctrine to cases involving other sorts of government action, reasoning that the extension would

"eviscerate well-settled standing limitations. Under Plaintiffs' theory, every government ***action*** that allegedly violates the Establishment Clause could be re-characterized as a governmental ***message*** promoting religion. And therefore everyone who becomes aware of the 'message' would have standing to sue." *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008) (emphasis in original). Indeed, it makes little sense to speak of "offensive contact" with a written government policy, as opposed to, say, a Ten Commandments monument.

The same principle holds true in the other offended observer case on which Plaintiffs rely, *Sch. Dist. of Abington* v. *Schempp*, 374 U.S. 203 (1963). In *Schempp*, the plaintiffs complained of being "exposed" to a "religious ceremony" of daily morning Scripture readings and prayers. *Id.* at 206-08. That the religious ceremonies were not a static display like the plaque at issue in *Suhre* does not make them any less displays offered to public view. But seeing a religious ceremony—just like seeing a religious display—is markedly different from knowing about the mere existence of a released time policy that applies to others.

Plaintiffs cryptically cite *Doe* v. *Santa Fe Independent School District*, 530 U.S 290 (2000), for the proposition that "offended observer"

standing extends to merely knowing about policies. Br. 24. But in *Santa Fe*, just as in *Schempp,* the harm was being forced to see and hear "offensive religious rituals." 530 U.S. at 312. Nor were the plaintiffs in *Santa Fe* complaining that they were harmed by the mere adoption of a policy—they were harmed because they had to choose between witnessing "offensive religious rituals" and going to the football game. Plaintiffs here have not been forced to make any such choice.

Both this Court and the Supreme Court have carefully cabined "offended observer" standing to cases where plaintiffs have actually been subjected to religious messages, either by seeing religious displays or hearing religious rituals. They are a poor fit where, as here, plaintiffs merely seek to challenge a government policy applied to others.

2. Plaintiffs lack the necessary "direct contact" with the released time Policy.

Even if *Suhre* and similar display cases could be stretched to fit cases involving government policies, they still would not give Plaintiffs standing. Plaintiffs lack the necessary "direct contact" with the Policy. In *Suhre,* the plaintiff had no choice but to view the offending Ten Commandments plaque when he appeared in court, including his involuntary appearance as a defendant in a criminal trial. 131 F.3d at 1090. By

contrast, Plaintiffs here have not been involuntarily subjected to grades from an SCBEST class, much less the class itself, or even a presentation about the SCBEST program. *See* Br. 23 (discussing Plaintiffs' contacts with the program). Indeed, as the district court acknowledged, "[t]he ***only students*** who are directly impacted by the released time policy are students who voluntarily desire to receive the religious education." Op. 34 (emphasis added).

Plaintiffs are merely aware that the Policy exists. That awareness, and any negative feelings associated with it, is nothing more than the "psychological consequence" this Court refused to rely on in *Suhre*:

- Plaintiff Robert Moss saw a letter from a private organization announcing the Policy. Br. 3.
- He feels "stigmatized as an outsider because of his opposition" to the Policy. Br. 4.
- Melissa Moss also saw the letter, and once looked at the syllabus of a friend who attended the SCBEST class. J.A. 127-29, 134; Br. 5.
- She felt "uncomfortable" and like "an outsider at the school." Br. 5.
- Plaintiff Tillett heard about the Policy from Robert Moss "late in the process," and her minor child did not even know of the Policy until Tillett told her child about it shortly before filing the lawsuit. J.A. 169, 160.
- Tillett now claims that "released time for religious instruction [is] unwelcome and emotionally distressing." Br. 4.

Plaintiffs have established that they know about the Policy, and that they have strong feelings about it. They have even established that they discussed it with others, which they claim compounded the problem. But nowhere do Plaintiffs show any sort of direct contact with the Policy. They are no different than someone who reads about the Policy in the newspaper elsewhere in South Carolina, or even in Omaha. Br. 24. Psychological consequence, without more, cannot constitute an injury in fact.

Instead, Plaintiffs are akin to the plaintiffs in *Doe* v. *Tangipahoa Parish School Board*, 494 F.3d 494 (5th Cir. 2007) (en banc), where plaintiffs sued over the content of invocations given at school board meetings, but neglected to prove they had actually been present when the offending invocations were given. The court held that the plaintiffs lacked standing to bring an Establishment Clause challenge, because standing in similar cases "has not previously been based solely on injury arising from mere abstract knowledge that invocations were said. The question is whether there is proof in the record that Doe or his sons were exposed to, and may thus claim to have been injured by, invocations given . . . ." *Id.* at 497. Plaintiffs here possess abstract knowledge about the Policy,

but no actual contact with it.

D. Plaintiffs lack taxpayer standing.

Plaintiffs abandoned their taxpayer standing claim below and do not raise it again here. *See* J.A. 866-67; Br. 22-25. It is undisputed that the District expends no funds on the released time Policy. *See* Addendum B.

E. FFRF lacks organizational standing.

Plaintiffs urge the Court not to review their organizational standing claim. Br. 25. This is because Plaintiffs failed to prove that any FFRF member had standing at the time the complaint was filed. They admitted below that none of the Plaintiffs were FFRF members at the time of filing. J.A. 797-98.

Because Plaintiffs have failed, after extensive discovery, to meet their burden of establishing basic facts essential to their standing, their claims must be dismissed for lack of standing.

II. The released time Policy does not violate the Establishment Clause.

Even assuming Plaintiffs have standing, their Establishment Clause claim fails on the merits. The released time Policy is constitutional under both the controlling released time decisions in *Zorach* and *Smith* and under the *Lemon* test.

A. The Policy is constitutional under *Zorach* and *Smith*.

This case is ultimately controlled by *Zorach* and *Smith*. Both cases held that released time programs are not only constitutional but laudatory. As *Zorach* explained: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." 343 U.S. at 313-14. And as this Court explained in *Smith*, released time is an "administratively wise response to a plenitude of parental assertions of the right to 'direct the upbringing and education of children under their control.'" *Smith*, 523 F.2d at 125 (citation omitted).

Under *Zorach* and *Smith,* a released time program can violate the Establishment Clause in one of two ways. First, a program is unconstitutional when "the force of the public school [is] used to promote [religious] instruction." *Zorach*, 343 U.S. at 315. That was the problem in *McCollum* v. *Board of Education*, where the released time classes were held in public school classrooms, were thus supported by public funds, and where the released time teachers "were subject to the approval and supervision of the superintendent of schools." 333 U.S. 203, 208-09 (1948). These problems were cured in *Zorach*. There, the Court upheld

the released time program because the classes were held offsite and no school district funds were expended on the released time program. *See* 343 U.S. at 308-09.

Second, a released time program is unconstitutional if there is "specific coercion or pressure brought to bear on non-participants by school officials." *Pierce* v. *Sullivan W. Cent. Sch. Dist.*, 379 F.3d 56, 60 (2d Cir. 2004). An example of such coercion would be if "teachers were using their office to persuade or force students to take the religious instruction." *Zorach*, 343 U.S. at 311.

Two post-*Zorach* cases shed further light on these standards. In *Lanner* v. *Wimmer*, 662 F.2d 1349, 1355 (10th Cir. 1981), the public school not only shared its intercom and bell system with a Mormon seminary next door, it also allowed released time students to earn elective credits. The Tenth Circuit found that such accommodations did not advance religion: the intercom and bell sharing were "nothing more than an administrative effort to accommodate the released-time program with as little inconvenience to students as possible." *Id.* at 1359. And as for credit, the Court held that there was no difference between accept-

ing credit for released time classes and accepting credit "when a private religious school student transfers to a public school." *Id.* at 1361.

In *Pierce*, the Second Circuit upheld a released time program with allegations arguably far more troubling than those at issue here. 379 F.3d 56 (2d Cir. 2004). There, the plaintiffs alleged that the public school "left non-participants in the program with nothing to do" during released time, failed to "protect non-participants from the taunts of program participants," and violated a state regulation by agreeing to schedule released time before lunch. *Id.* at 58. Furthermore, "a significant majority" of students took released time classes, and non-participating students were subjected to "abusive religious invective" by their peers. *Id.* at 60, 58. Nevertheless, the Second Circuit upheld the program, concluding that it was "purely voluntary and there is no specific coercion or pressure brought to bear on non-participants by school officials." *Id.* at 60. Thus, the case fell "plainly within the ambit of *Zorach* rather than *McCollum*." *Id.*

The released time Policy at issue in this case is likewise entirely faithful to *Zorach* and *Smith*. As in *Zorach*, the religious instruction takes place off campus, no public funds are used, and the District exer-

cises no control over the released time instructors. Op. 29; Addendum B. Although Plaintiffs complain about "close cooperation" between the District and SCBEST, Br. 33, such cooperation is precisely what this Court ***encouraged*** in *Smith*: "[P]ublic school cooperation with the religious authorities in *Zorach* and the instant case is . . . administratively wise . . . ." 523 F.2d at 125.

In *Smith*, it was irrelevant that the school shared address lists with released time providers. *See* 523 F.2d at 122. This has not stopped Plaintiffs from complaining about the same action here. *See* Br. 9, 20, 34, 36, 41. Similarly, the District's actions were perfectly consistent with *Lanner* and *Pierce* when it changed the schedule to treat released time classes the same as off-campus electives. As the *Lanner* court said, "The primary effect of these aspects of the program is simply to make the school's administration of the released-time system convenient and to avoid unnecessary conflicts with school classes and activities." 662 F.2d at 1359; *see also Pierce*, 379 F.3d at 58 (switching schedule to accommodate released time classes).

As for coercion, Plaintiffs do not even allege it. Nor could they. Far from any coercion or inducement, the undisputed facts show that an av-

erage of only 4 out of 1500 students participated in the program (0.3%) in any given semester, and, if anything, the program tended to have a detrimental impact on participants' grade point average. *See supra* at 10, 13-14. This stands in stark contrast to *Pierce*, where "a significant majority" of students took released time classes, non-participating students were given "nothing to do," and non-participating students were subjected to "abusive religious invective" by their peers—and the Second Circuit still upheld the program. 379 F.3d at 60, 58.

Lastly, Plaintiffs complain that released time classes may be taken for elective credit. But this is a distinction without a difference. When South Carolina increased the required credits for graduation by twenty percent, it became impracticable for students to leave campus for released time and still complete all the required credits for graduation. *See supra* at 5-6. Thus, accepting credit, like allowing students to leave school grounds during the day, simply makes it possible to accommodate parents' and students' wish for released time education. Indeed, this is precisely the accommodation the Tenth Circuit approved in *Lanner*. 662 F.2d at 1361. Accepting credit is not an extension of *Zorach* or

Smith, but merely their modern manifestation.[5]

B. The Policy is constitutional under the *Lemon* test.

Plaintiffs fare no better under the *Lemon* test. Under that test, Plaintiffs must demonstrate that the released time Policy (1) lacks "a secular purpose"; (2) has the "principal or primary effect" of "advanc[ing] . . . religion"; or (3) "foster[s] excessive government entanglement with religion." *Glassman* v. *Arlington Cnty.*, 628 F.3d 140, 146 (4th Cir. 2010). Plaintiffs have failed to prove any of these elements.[6]

---

[5] Plaintiffs (at 32-33) rely on *Doe* v. *Shenandoah County School Board*, 737 F. Supp. 913 (W.D. Va. 1990), as their only modern example of a released time program that was struck down. But there, religious instruction often took place on school property; public school teachers took "an active part in the recruitment effort both by physical participation . . . and by verbal encouragement of the students"; and the plaintiff's teacher subjected him to "substantial pressure" to participate. *Id.* at 918, 915, & n.5. All of those facts are in plain violation of *Zorach* and are not present here.

[6] As this Court has repeatedly noted, the *Lemon* test has been "frequently criticized," including by "members of the Supreme Court." *Ehlers-Renzi* v. *Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 288 & n.* (4th Cir. 2000); *see also Mellen* v. *Bunting*, 327 F.3d 355, 367 n.7 (4th Cir. 2003). The Supreme Court has not applied *Lemon* in its recent Establishment Clause decisions. *See, e.g.*, *Van Orden* v. *Perry*, 545 U.S. 677 (2005) (declining to apply *Lemon*'s endorsement test); *Salazar* v. *Buono*, 130 S.Ct. 1803 (2010) (same). And several circuits, including this one, have declined to apply *Lemon* in certain Establishment Clause cases, including at least one released time case. *See, e.g.*, *Myers* v. *Loudoun Cnty. Pub. Sch.*, 418 F.3d 395, 402 (4th Cir. 2005) (upholding reci-

1. Plaintiffs concede that the Policy has a secular purpose.

Plaintiffs do not dispute the district court's finding that the purpose of the District's released time Policy is "to accommodate parents' and students' desire to receive religious instruction." Op. 24; *see* Br. 1 (no argument on this point).

This is no small concession. In the last decade, no Supreme Court case has struck down a law under the Establishment Clause without first finding that the law lacked a secular purpose. *Compare McCreary Cnty.* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (striking down a Ten Commandments display that lacked a secular purpose), *with Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436 (2011) (finding a secular purpose and upholding government action); *Van Orden*, 545 U.S. 677 (same); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (same).

---

tation of the Pledge of Allegiance in public schools without applying the *Lemon* test; stating that "[t]here is 'no single mechanical formula that can accurately draw the constitutional line in every case'"); *Pierce*, 379 F.3d at 58 (2d Cir.) (upholding a released time program without applying *Lemon* test). As in *Myers*, this case can be resolved in light of *Zorach* and *Smith* without resort to *Lemon*.

2. The Policy does not have the principal or primary effect of advancing religion.

Plaintiffs have also failed to demonstrate that the Policy has the primary effect of advancing religion. As the district court correctly concluded: "Viewed from the perspective of an objective observer, the School District's policy does no more than merely *accommodate students' desire to partake in religious instruction*." Op. 34 (emphasis added). Plaintiffs offer two arguments in response. First, they claim that "[a]ccepting academic credit in and of itself endorses religion." Br. 25. Second, they claim that the allegedly "close cooperation" between the District and SCBEST has impermissibly advanced religion. Br. 33. Neither argument has merit.

a. Accommodating private religious exercise does not impermissibly advance religion.

Plaintiffs concede, as they must, that the government is allowed to accommodate students' desire for released time instruction. Br. 25; Op. 25. But underlying both of their arguments is hostility to *any* government policy that makes it easier for students to participate in the program. According to Plaintiffs, anything beyond merely permitting "the scheduling of religious instruction" is an impermissible "benefit to religion" and must be struck down. Br. 32.

But this argument fundamentally confuses the distinction between ***government advancement*** of religion and government accommodation of ***private religious exercise***. As the Supreme Court explained in *Amos*: "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects,' the ***Government itself*** must have advanced religion ***through its own activities and influence***." *Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327, 328 (1987) (second emphasis added).

Thus, the Supreme Court has repeatedly upheld government policies that make it easier for private parties to exercise their religion. These policies include Title VII's religious exemption, which protects the right of religious organizations to hire and fire employees on the basis of religion, *id.*; the Religious Land Use and Institutionalized Persons Act, which gives special protection to the religious exercise of prisoners, *Cutter* v. *Wilkinson*, 544 U.S. 709, 724-25 (2005); property tax exemptions, which benefit houses of worship, *Walz* v. *Tax Comm.*, 397 U.S. 664, 680 (1970); school voucher programs, which make it easier for children to attend religious schools, *Zelman*, 536 U.S. at 658; and, of course, released time programs, which make it easier for students to receive reli-

gious instruction, *Zorach*, 343 U.S. at 306.

This Court has done the same. It has upheld, among other things, a county zoning ordinance that made it easier to construct religious schools, *Ehlers-Renzi*, 224 F.3d at 287; a joint economic venture that resulted in significant financial benefits to a church, *Glassman*, 628 F.3d 140; and a released time program indistinguishable from the Policy at issue here, *Smith*, 523 F.2d 121. As this Court has explained, the key question is whether "the ***government itself*** has advanced religion through its own activities and influence"—such as by "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Madison* v. *Riter*, 355 F.3d 310, 318 (4th Cir. 2003) (citations and internal quotation marks omitted).

Plaintiffs do not even attempt to allege "sponsorship, financial support, [or] active involvement of the sovereign in religious activity" here. Rather, the only actions that advance religion have been taken by SCBEST and participating students. The only challenged government actions—namely, accepting credit and cooperating with SCBEST—merely make it possible to have a functioning released time Policy, thus falling squarely within the category of accommodating private religious

exercise.

b. Accepting credit for released time classes does not impermissibly advance religion.

According to Plaintiffs, "th[e] giving of academic credit is the centerpiece of this case." Br. 25. An award of credit, they claim, "rewards the student for religious participation," "tells the world that the school approves of the student's mastery of the religious precepts that have been taught," and "does far more than is needed to accommodate the purpose of traditional released time." Br. 26. Thus, "[a]ccepting academic credit [for religious instruction] in and of itself endorses religion." Br. 25.

This argument fails for three reasons. *First*, as noted above, when South Carolina increased the credits required for graduation by twenty percent, it became impossible for many students to participate in a released time program and still graduate on time. *See supra* at 5-6. Unlike *Zorach* or *McCollum*, classroom activities in South Carolina do *not* "come to a halt while the students who are released for religious instruction are on leave," 343 U.S. at 309; rather, nonparticipating students continue taking other classes that award credit towards graduation. Thus, in the absence of credit, students who opt for released time are placed at a severe disadvantage. As the South Carolina Legislature

found (and Plaintiffs have not disputed): "[T]he absence of an ability to award [elective] credits has essentially eliminated the school districts' ability to accommodate parents' and students' desires to participate in released time programs." Addendum A.

Thus, accepting credit does not, as Plaintiffs claim, "reward[] the student for religious participation," or do "far more than is needed to accommodate the purpose of traditional released time." Br. 26. Rather, it places students who desire released time instruction on a level playing field with those who don't. As such, it is a straightforward "accommodation" under *Zorach* and *Smith*.

Second, Plaintiffs' attack on credit is directly contrary to the only other court that has addressed the issue. As noted above, the Tenth Circuit in *Lanner* expressly approved the granting of credit. Granting credit for released time classes, the court said, is no different from granting credit "when a private religious school student transfers to a public school." 662 F.2d at 1361. As long as the school grants credit on the basis of "secular criteria," then "nothing in either the establishment or free exercise clauses would prohibit recognizing *all released-time classes* . . . in satisfaction of graduation requirements." *Id.* (emphasis added).

Contrary to Plaintiffs' assertion (Br. 44), this analysis was not "dictum," but was fundamental to its holding. Indeed, the Court actually *enjoined* the award of credit when it did not satisfy this standard—that is, when credit was awarded based on "a judgment as to whether the courses were 'mainly denominational' in content." *Id.* at 1362. Of course, that is not the case here.

Third, Plaintiffs' attack on credit calls into question the widespread practices of multiple states—all of which accept credit for religious instruction when students transfer from an accredited religious school. The district court noted that the practice is "unremarkable" because "accredited private schools routinely confer academic credit for instruction its students receive, and public schools in South Carolina are obliged to accept the credit for transfer students regardless of the content of the course." Op. 34, *see also* Op. 26 (citing S.C. Code Ann. Regs. 43-273, the South Carolina transfer regulation).

In response, Plaintiffs say the district court's conclusion "is not supported by the record." Br. 29. But they cite nothing to the contrary. Nor can they. Not only South Carolina schools, but public schools across the country routinely accept transfer credits awarded by private religious

schools. In the Fourth Circuit, examples include:

- **Maryland**: "Credit and grades for students transferring from an accredited school outside the county will be based upon the grading policy of the sending school." J.A. 262.

- **North Carolina**: "Students transferring from a non-public school accredited by Southern Association of Colleges and Schools (SACS) into the WCPSS will receive . . . [c]redit for ***all courses approved*** by the sending school." J.A. 978 (emphasis added).

- **Virginia**: "A secondary school ***shall*** accept credits toward graduation received from Virginia nonpublic schools accredited by one of the approved accrediting constituent members of the Virginia Council for Private Education (VCPE)." 8 Va. Admin. Code § 20-131-60(D) (emphasis added).

In other states, examples include:

- **Florida**: "The purpose of this rule is to establish uniform procedures relating to the acceptance of transfer work and credit for students entering Florida's public schools. . . . Credits and grades earned and offered for acceptance ***shall*** be based on official transcripts and ***shall*** be accepted at face value subject to validation if required by the receiving school's accreditation." Fla. Admin. Code Ann. r. 6A-1.09941 (emphasis added).

- **Georgia**: "Local boards of education ***shall*** accept student course credit earned in an accredited school." J.A. 979 (emphasis added).

- **New Mexico**: "All credits awarded by an accredited school will be accepted as transfer credits, ***including those for courses in religious education***." J.A. 981 (emphasis added).

- **Texas**: "Student credits earned in nonpublic schools accredited by [the Texas Private School Accreditation Commission] ***can be transferred*** to Texas public schools." J.A. 984 (emphasis added).

- **Utah**: "Utah public schools ***shall*** accept transfer credits from accredited secondary schools consistent with R277-705-3." Utah Admin. Code r. 277-410-4 (emphasis added).

Under all of these policies, students receive credit for religious instruction when they transfer from an accredited religious school to a public school. And as the Tenth Circuit held in *Lanner*: "Recognizing attendance at church-sponsored released-time courses as satisfying graduation requirements advances religion no more than recognizing attendance at . . . full-time church-sponsored schools." 662 F.2d at 1361.

Therefore crediting Plaintiffs' "centerpiece" argument would have wide-ranging implications. It would invalidate not only the District's Policy, but also South Carolina's transfer regulations and Released Time Credit Act. It would create a circuit split with *Lanner*. And it would call into question the transfer policies of public schools in at least eight other states.

Plaintiffs claim that this widespread practice is "not relevant," because accepting credits from a full-time religious school is somehow dif-

ferent from accepting credits from a single released time course. Br. 30. But they offer no reason why. *Id.* Amici at least try: they claim that the reason that public schools accept transfer credits from religious private schools "is to promote the attendance of *secular* private schools." Amici Br. 10 n.7 (emphasis in original). In other words, it is fine to accept transfer credits if it is done to lure students away from religious schools so they can be properly secularized in public schools, but it is not acceptable to accept credits if the purpose is to accommodate religious exercise. Amici's proposed distinction is not only offensive, it is also contrary to the longstanding principle that accommodating religious exercise is a salutary secular purpose. *See supra* Section II.A.

In sum, accepting credit for released time classes, like accepting credits from private religious schools, is a good and constitutional practice. It is a "passive" accommodation that is "administratively wise." *Smith*, 523 F.2d at 125. When public schools accept transfer credits for religious instruction, they are not communicating "approv[al] of the student's mastery of the religious precepts" or "endorsement" of religion. Br. 26-27. They are communicating respect for the right of parents to educate their children. *See Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 534–

35 (1925). And they are communicating that the government wants to avoid the entanglement that would result from trying to separate courses that are "too religious," "sectarian," or "denominational" from all the rest. That is precisely what the District has done here.

c. Cooperating with SCBEST to ensure smooth operation of the Policy does not impermissibly advance religion.

Next, Plaintiffs claim that the "close cooperation with SCBEST in the implementation of released time" impermissibly advances religion. Br. 33. They offer a laundry list of allegations supposedly showing that the District gave SCBEST special treatment or "adopted the SCBEST course as its own." Br. 33-37. But this argument fares no better than Plaintiffs' attack on credit.

As an initial matter, many of Plaintiffs' allegations are legally irrelevant under *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978), because they concern private conduct or isolated actions that are not attributable to District policy. Under § 1983, plaintiffs may challenge actions only if they "implement[] or execute[] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [a government] body's officers." *Berkley* v. *Common Council*, 63 F.3d 295,

296 (4th Cir. 1995) (citation omitted); *see also Nurre* v. *Whitehead*, 580 F.3d 1087, 1092 n.3 (9th Cir. 2009) (applying *Monell* to an Establishment Clause challenge against a school district). Thus, as the district court correctly concluded, Plaintiffs cannot challenge conduct that is "unattributable to school officials or cannot be reasonably connected to an official School District policy or custom."[7] Op. 17. That includes the conduct of private parties, stray remarks by individual officials, and policy violations that were later corrected.

More importantly, even treating all of Plaintiffs' allegations as relevant, those allegations do not even begin to show impermissible advancement of religion. Rather, they merely show that the District and SCBEST engaged in precisely the sort of "public school cooperation with the religious authorities" that this Court commended as "administratively wise." *Smith*, 523 F.2d at 125.

For example, Plaintiffs complain that the District developed its released time Policy "in concert" with SCBEST. Br. 34. But the undis-

[7] Plaintiffs claim that the district court, under its reading of *Monell*, failed to consider some of their evidence of "close cooperation." Br. 37. This is incorrect. The court stated that "none of Plaintiffs' allegations, even those that Plaintiffs have failed to connect to an official policy or custom, infringe the Establishment Clause." Op. 20 n.8.

puted facts show that the District *rejected* the draft policy offered by SCBEST and instead based its Policy on state law and a model policy drafted by the South Carolina School Board Association. Op. 4; J.A. 909-13. The fact that SCBEST participated in the policymaking discussion is both unremarkable and prudent, as SCBEST was the only group that had shown interest in offering released time classes. Indeed, it would have been foolish "to develop the Policy without involvement" of those who would be affected by it. Br. 34.

Next, Plaintiffs complain that the District changed the wording of the draft policy from "may award" to "will accept." Br. 34. Again, this is unremarkable. District administrators testified, without contradiction, that the purpose of this change was to clarify that the District "was merely accepting transfer credits rather than actively 'making judgments about the quality of the course.'" Op. 4-5 (quoting J.A. 478). Thus, Plaintiffs are essentially trying to penalize the District for adopting a *less* entangling approach. Nor does this wording, as Plaintiffs suggest, Br. 18, 35, prevent other religious groups from offering released time courses. Neither the Policy nor common sense precludes a released time provider from partnering with an accredited private school outside the

county.

Plaintiffs also complain that the District allowed "erroneous statements in [an SCBEST] letter to go uncorrected." Br. 35. Specifically, SCBEST's letter asserted that the District had already adopted a released time policy (when it had not yet done so), and that SCBEST was already able to offer released time classes for credit (when it was not yet able to do so). J.A. 681. But by the time the District became aware of SCBEST's letter, it had already finalized its Policy, and within a week, it had decided it would accept credit for SCBEST's classes just like it accepted transfer credits from accredited private schools. J.A. 222, 691. Thus, the alleged "errors" were quickly overcome by events and no longer needed correction.

Next, Plaintiffs complain that the District "remains the empowered disciplinarian as to major discipline issues" in SCBEST classes. Br. 36-37. This overstates a general policy applied to a wide variety of off-campus activities. The District has an obvious interest in ensuring that students are not engaging in major misconduct in off-campus electives and other activities. *See* J.A. 262, 276. Thus, it maintains a written policy allowing it to respond to "student conduct on and off school premis-

es." J.A. 934. The District retains the authority to address major disciplinary problems arising off campus, including at released time classes. *See* J.A. 595-96 (Principal Stevens dep.). Plaintiffs have not shown that the District has acted in a manner inconsistent with its Code of Conduct, nor that it has handled discipline for SCBEST differently than it does for any off-campus elective or other activity.

Lastly, Plaintiffs complain about SCBEST's "table at registration," "[f]orms . . . in the Guidance Office," and participation in "in-house teacher training." Br. 36. But again, in these respects, SCBEST was treated just like any other educational organization. The District allows *any* community organization to have a table at the open house, including military recruiters, college representatives, Boys & Girls Clubs, insurance representatives, AYSO soccer, community non-profits, and fund-raising organizations. Op. 32; J.A. 268, 560, 597. The guidance office includes materials from *numerous* educational organizations. J.A. 782. And there is no evidence that SCBEST was given preferential access to "in-house teacher training"; indeed, SCBEST's teacher did not even attend the training. J.A. 357-58.

Perhaps most importantly, Plaintiffs' myopic focus on the interac-

tions between the District and SCBEST misses the big picture of just how neutral the released time Policy is. As the district court said, "The policy is cast in neutral terms and allows its students to petition for released time religious instruction regardless of the specific religion or denomination." Op. 36. The District has repeatedly affirmed its willingness to accommodate different faiths through the Policy. J.A. 861 (would welcome Jewish released time program); J.A. 837 (would welcome Muslim released time program). The Policy itself pledges that the District will cooperate "with the ***various sponsoring groups*** of the school district," clearly anticipating that more than one religious organization will offer courses. Addendum B.[8]

Nor does the Policy privilege religion over non-religion. Released

---

[8] Plaintiffs may claim that because SCBEST is currently the only released time provider, the Policy "clearly advance[d] one faith" under *Joyner* v. *Forsyth Cnty.*, --- F.3d ----, 2011 WL 3211354, at *8 (4th Cir. Jul. 29, 2011). But this argument is contrary to numerous released time precedents. In *Smith*, only one released time provider was operating, and had done so for forty years. 523 F.2d at 122. Similarly, in *Lanner* and *Pierce*, the students had only limited released time options. *See Pierce*, 379 F.3d at 58 (one Catholic and one Protestant program); *Lanner*, 662 F.2d at 1354 ("overwhelming use" by Mormon Church). *Joyner* is distinct because it is not about religious accommodation taking place on private property, but about the limits of permissible religious expression at a government event.

time is simply one of a long list of off-campus credit options, such as the dual-credit German course that Plaintiff Melissa Moss took at a Methodist college, International Baccalaureate or Advanced Placement courses that can be taken online, software-driven courses, and "community internships." *See supra* at 7-8. If anything, there is a *disincentive* to take released time classes, as the grades given in SCBEST's classes are *significantly lower* than the grades in classes Plaintiffs' children have taken. *See supra* at 13-14. That is confirmed by the low enrollment in released time classes. *See supra* at 10.

In short, as the district court rightly concluded, "the record shows that the School District treated SCBEST merely the same as other outside organizations." Op. 32. The contact between the District and SCBEST is precisely the sort of "administratively wise" cooperation commended in *Smith*. 523 F.2d at 125. Far from impermissibly advancing religion, "[t]he primary effect [of this cooperation] is simply to make the school's administration of the released-time system convenient and to avoid unnecessary conflicts with school classes and activities." *Lanner*, 662 F.2d at 1359.

3. The Policy does not entangle the government with religion.

Finally, Plaintiffs have failed to demonstrate that the Policy fosters excessive entanglement with religion. To the contrary, they have come nowhere close. In the words of the district court, "[b]y limiting the acceptance of academic credit from accredited schools, the School District's released time policy was ***designed to disentangle*** the School District from reviewing the religious content of released time instruction. . . . Plaintiffs have failed to show how the School District's ***passive acceptance*** of academic credit for religious instruction constitutes excessive entanglement with religion." Op. 36 (emphasis added).

This conclusion is correct under the standards demarked by both this Court and the Supreme Court. The District has not "manage[d] or incorporate[d] the religious arena itself." *Ehlers-Renzi*, 224 F.3d at 292. And there is no evidence of "comprehensive, discriminating, and continuing state surveillance" of religious exercise. *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971); *see also Mueller* v. *Allen*, 463 U.S. 388, 403 (1983) (explaining that such comprehensive surveillance is "necessary [for a challenged action] to run afoul of" *Lemon's* third prong).

Plaintiffs do not even attempt to argue that the District is "entan-

gled" under any of these standards. Instead, Plaintiffs focus on *Larkin* v. *Grendel's Den*, in which the Court struck down a Massachusetts law that granted churches unfettered authority to "veto" applications for liquor licenses. 459 U.S. 116, 120 (1982). According to Plaintiffs, by accepting transfer credit for religious instruction, the District has unconstitutionally "donated" to a religious organization "its governmental power to give public school academic credit." Br. 42, 43, 27-28.

This argument fails for three reasons. *First*, as the district court pointed out, "the power to issue an academic grade is not a power reserved exclusively to governmental bodies." Op. 36. The law in *Larkin* was problematic because the power to regulate alcohol is exclusively reserved to the states under the Twenty-First Amendment, and "the zoning function is traditionally a governmental task." *Larkin*, 459 U.S. at 121, 122. By contrast, the power to award credit toward state graduation requirements is not a traditional governmental task at all; private schools do it all the time. Indeed, the Supreme Court has specifically denied the notion that education is the exclusive province of government. *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925).

Were the law otherwise, public schools would violate *Larkin* ***any***

time they accepted transfer credits from religious instruction at a private school. But as shown above, states across the country routinely do just that.

Second, Plaintiffs' argument turns on the erroneous notion that SCBEST has "standardless power to determine a student's grade on a religious basis," and that "[t]here is nothing to stop it from passing a student for religious piety or failing her for blasphemy." Br. 27. Not so. The District accepts credit only from accredited private schools, and the undisputed facts show that the accreditation process imposes significant limits.

Even a brief look at the relationship between Oakbrook and SCBEST shows that the oversight provided by that relationship is real and rigorous. *See supra* at 15-16. Oakbrook remained "fully in charge of the course content." J.A. 410. It had "several conversations" with SCBEST's instructor and reviewed SCBEST's curriculum, tests, and grade reports. J.A. 411, 391. Oakbrook did not simply approve SCBEST, it made recommendations to make the course better, and asked questions to make sure its expectations were met. J.A. 411-12, 421-22.

Oakbrook's oversight confirmed SCBEST was meeting its goal of

providing a rigorous course. J.A. 411, 391, 617. Even Plaintiff Tillett concedes this is true: "I believe it's academically rigorous." J.A. 190.

Further, Oakbrook is itself accountable to its accrediting agency. By assuming responsibility for the rigor of SCBEST courses, Oakbrook not only risked its own reputation, but also its accreditation. *See supra* at 16. And while Oakbrook is a Christian school, the South Carolina Independent School Association evaluates all of Oakbrook's classes—including its religious instruction classes—under "objective secular criteria."

Thus, Plaintiffs are wrong to suggest that the District's Policy and South Carolina law have created a free-for-all where grades may be based on "religious piety" or "blasphemy." Br. 26-27. The time-honored accreditation system ensures that private school courses are held to high academic standards while avoiding any entanglement between public schools and religious instruction.

Finally, Plaintiffs' desired arrangement would produce *far more* entanglement than the District's Policy. According to Plaintiffs, it is fine for public schools to accept transfer credit for "*secular* education at private religious schools," but not for "*religious* instruction given at private

religious schools." Br. 45. Indeed, Plaintiffs suggest that it would be fine for the District to give released time credit "for a course about Bible history such as is permitted to be taught by South Carolina [law]," but not "for a course of religious instruction that seeks to strengthen the students in the Christian faith." Br. 8. But Plaintiffs offer no guidance on how the District is supposed to draw the line between released time courses that offer "*religious* instruction" and released time classes that offer "*secular* education."

Nor can it. That is precisely the type of entangling inquiry that the Establishment Clause forbids. It is also precisely the arrangement that the Tenth Circuit condemned in *Lanner*. There, the released time policy generally permitted an award of credit, but excluded credit for "courses devoted mainly to denominational instruction." 662 F.2d at 1360. This, the court said, produced excessive entanglement because "it requires the public school officials to . . . examin[e] and monitor[] the content of courses offered there to insure that they are not 'mainly denominational.'" *Id.* at 1361. Ironically, that is precisely what Plaintiffs are arguing for here. The District should not be penalized for adopting the far less entangling approach of simply accepting all credits, on the basis of

purely secular criteria, from all accredited private schools.

As the district court concluded: "Plaintiffs have failed to show how the School District's ***passive acceptance*** of academic credit for religious instruction constitutes excessive entanglement with religion." Op. 36 (emphasis added). Nothing about the Policy, either on its face or in its implementation, creates excessive entanglement with religion. To the contrary, the undisputed facts show that the District went out of its way to ensure that no such entanglement occurred.

CONCLUSION

The decision of the district court should be affirmed.

STATEMENT ON ORAL ARGUMENT

Defendant does not object to Plaintiffs' request for oral argument.

Respectfully submitted,

s/ Eric C. Rassbach

Eric C. Rassbach
Luke W. Goodrich
Lori H. Windham
Eric N. Kniffin
THE BECKET FUND
FOR RELIGIOUS LIBERTY
3000 K St., NW, Suite 220
Washington, DC 20007
T (202) 955-0095
F (202) 955-0090

Counsel for Spartanburg County School District Seven

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,262 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point typeface.

August 4, 2011

s/ Eric N. Kniffin

Eric N. Kniffin
Counsel for Spartanburg County School District Seven

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on August 4, 2011.

I certify that Appellants' counsel, George Daly, is a registered CM/ECF user and that service will be accomplished by the appellate CM/ECF system.

August 4, 2011

s/ Eric C. Rassbach

Eric C. Rassbach
Counsel for Spartanburg County School District Seven

ADDENDUM A

South Carolina Released Time Credit Act

2006 S.C. Acts 322 (preamble); S.C. Code § 59-39-112

[START 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, civic, and ethical 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. *Clauson*, 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:

[END PREAMBLE]

S.C. Code § 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.

ADDENDUM B

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 ensure 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

Legal references:

A. S.C. Code of Laws, 1976, as amended:

1. Section 59-1-460 – South Carolina Released Time for Religious Education Act.
2. Section 59-39-112 – South Carolina Released Time Credit Act.

Spartanburg County School District No. 7