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; THE 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.

BRIEF OF *AMICI CURIAE* CHRISTIAN LEGAL SOCIETY, NATIONAL COMMITTEE FOR FURTHERANCE OF JEWISH EDUCATION, NATIONAL ASSOCIATION OF EVANGELICALS, AND ADVOCATES FOR FAITH AND FREEDOM IN SUPPORT OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1, *Amici Curiae* Christian Legal Society ("CLS"), National Committee for Furtherance of Jewish Education ("NCFJE"), National Association of Evangelicals ("NAE"), and Advocates for Faith and Freedom ("Advocates") make the following disclosures:

1. Neither CLS, NCFJE, NAE, nor Advocates is a publicly held corporation or other publicly held entity;

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3. No publicly held corporation owns 10% or more of the stock of CLS, NCFJE, NAE, or Advocates;

4. CLS, NCFJE, NAE, and Advocates do not know of any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation;

5. Neither CLS, NCFJE, NAE, nor Advocates is a trade association; and

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

August 18, 2011

s/ Jay T. Thompson
Jay T. Thompson
Counsel for *Amici Curiae*

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INTERESTS OF *AMICI CURIAE*[1]

Christian Legal Society ("CLS") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous law schools. For three decades, CLS's legal advocacy division, the Center for Law & Religious Freedom ("Center"), has worked to protect students' right to be free from discriminatory treatment of their religious expression. The Center's staff assisted in drafting the original version of the Equal Access Act, 20 U.S.C. §§ 4071 *et seq.* (2010), passed by Congress in 1984 to protect the right of students to meet for religious speech on public secondary school campuses. *See* 128 Cong. Rec. 11784-85 (1982). The Center has frequently represented students and community groups engaged in religious expression in public education settings. *See, e.g., Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534 (1986); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.,* 386 F.3d 514 (3d Cir. 2004); *Child Evangelism Fellowship of Md., Inc. v. Montgomery*

[1] The parties consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

County Pub. Schs., 457 F.3d 376 (4th Cir. 2006), *and* 373 F.3d 589 (4th Cir. 2004); *Garnett v. Renton Sch. Dist.,* 987 F.2d 641 (9th Cir. 1993). The Center was a primary drafter, along with American Jewish Congress, of *Religion in the Public Schools: A Joint Statement of Current Law*, which became the basis for the Clinton Administration's Department of Education's guidance letters regarding *Religious Expression in Public Schools,* issued to school administrators in 1995, 1998, and 1999, and the corresponding Bush Administration's DOE letter and guidelines, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, issued in 2003, discussed *infra*.

The National Committee for Furtherance of Jewish Education ("NCFJE"), established in 1941, was the first organization which operated the Released Time Program in New York City, enrolling over 10,000 children in the New York State public school system in its early years. The Jewish Released Time classes in New York are still operated by NCFJE. Under the leadership of Rabbi Jacob J. Hecht, who worked with the legal team defending the constitutionality of Released Time in *Zorach v. Clauson* and directed the NCFJE from 1945–1991, the

organization greatly expanded its scope of activities to include: religious schools for men and women, summer camps for children, educational programs for college students, drug and substance abuse prevention in the inner-city schools, charities for underprivileged families, funds for education, and toys for hospitalized children.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It believes that religious freedom is God-given, and that the government does not create such freedom but is charged to protect it. It is grateful for the American legal tradition of safeguarding religious freedom and believes that this jurisprudential heritage should be carefully maintained.

Advocates for Faith and Freedom ("Advocates") is a California-based non-profit law firm dedicated to protecting traditional family values and religious liberties, including the right of parents to educate their children in accordance with their beliefs. Advocates seeks to ensure that religious liberties so integral to the fabric of our Nation and society are not unduly hindered in contravention of Constitutional principles. Consequently, Advocates has been a part of many cases

involving traditional family values and religious liberty around the Nation. The ability of government organizations to accommodate religion is one of the most valued facets of religious liberty in America, as well as one of the most fundamental. The resolution of this case in favor of Spartanburg County School District No. 7 is of great importance to Advocates due to the impact it will have upon future cases involving released time programs that will undoubtedly arise across the country, including in the Ninth Circuit, where there are currently thirty-nine released time programs and no circuit case law.

SUMMARY OF ARGUMENT

For nearly sixty years, the Supreme Court, this Court, and other federal courts of appeals have repeatedly upheld public school "released time" programs in which religious instruction is conducted off school grounds, as long as the public school's role is a passive accommodation of a student's choice to receive religious instruction and not an endorsement of religion.

The released time program in this case should be analyzed under the Supreme Court's leading precedent in evaluating off-campus released time programs, *Zorach v. Clauson*, 343 U.S. 306 (1952). The *Zorach* holding is still viable case law which is supported and bolstered, not weakened, by subsequent Free Exercise and Establishment Clause cases, such as *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Since the Supreme Court upheld the constitutionality of released time in *Zorach*, numerous courts—including the Supreme Court and the Fourth Circuit—have followed *Zorach* as the guiding precedent for off-campus released time programs. Moreover, those same courts have often cited *Zorach* as the leading authority in cases requiring a delineation of the boundary between proper accommodation of a neutral,

nondiscriminatory program and improper endorsement of religion under the First Amendment. The federal courts, including the only other federal appellate case that has considered released time academic credit, continue to uphold *Zorach*'s principles of allowing government bodies to accommodate citizens' religious beliefs.

Under *Zorach* and its progeny, the released time program in this case does not violate the Establishment Clause because Spartanburg County School District Seven (the "School District") passively accommodates the religious desires of its students without endorsing or entangling itself with religion. In the same way that the School District routinely accepts transfer credit from private schools in secular courses, it accommodates students attending released time programs by accepting credit awarded by an accredited private school. The School District's *de minimis* involvement in the released time program is acceptable under the Establishment Clause and the well-settled analysis of *Zorach* and its progeny.

The fact that students in the School District who choose to receive religious instruction off campus must enroll in academic courses at an accredited private school does not to change the fact that *Zorach*

controls. The School District treats these courses like other accredited private school courses, meaning it accepts a transfer of "elective" academic credit if it is awarded by an accredited private school. At issue here is whether the School District may be enjoined from accepting transfer credit for certain courses based solely on the viewpoint-based assertion that courses with religious subject matter may not be given the same credit as courses without religious subject matter.

Furthermore, barring the School District from accepting transfer credit for courses in the released time program would force a number of unwarranted, even unfair, effects for students choosing to participate in the program. Students wishing to enroll in an off-campus religious elective would be disadvantaged compared to their classmates who take secular electives. Refusing to accept transfer credit only for off-campus religious courses would also deter students from exploring their spiritual interests while rewarding students exploring non-spiritual interests, raising significant concerns under the Free Exercise Clause. Put simply, allowing the School District to accept credit for a released time program does not confer a special benefit to its participants;

instead, it merely gives those students access to the same types of academic freedom available to other students.

ARGUMENT

I. *ZORACH V. CLAUSON* REMAINS THE LEADING AUTHORITY THAT UPHOLDS ACCOMMODATION OF OFF-CAMPUS RELIGIOUS INSTRUCTION AND CONTROLS IN THIS CASE.

The District Court correctly followed *Zorach v. Clauson*, 343 U.S. 306 (1952), in upholding the right of the School District to accommodate students' exercise of religion by accepting academic transfer credit for students who participate in released time programs. The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. *Zorach* expounded upon the Establishment Clause, articulating that while there may be no establishment of a religion by the State, the State is not required to single out religious activities for disparate treatment or take a position that is hostile to religion. 343 U.S. at 312. Instead, the First Amendment, as *Zorach* and other precedent instructs, allows the School District to accommodate the religious beliefs of its students in a neutral, nondiscriminatory manner. As demonstrated by cases that stretch

across six decades, *Zorach*'s holding remains viable in this arena and is woven into the fabric of Establishment Clause jurisprudence for both released time programs specifically and overall governmental accommodation of citizens' religious views generally.

A. Under *Zorach*, a Public School May Accommodate Students Who Choose to Leave Campus During the School Day to Receive Academic Religious Instruction.

The Supreme Court has twice examined the constitutionality of voluntary religious instruction for public school students. In *Zorach*, the Court said that the Constitution supports accommodations in which a public school releases a student from school grounds to receive religious training or instruction from an entity unaffiliated with the school. 343 U.S. at 312-15. *Zorach* involved a program where students choosing to receive off-campus religious instruction during the school day were permitted to leave school grounds to receive such instruction. *Id.* at 308. Students not wishing to receive religious instruction remained in their classrooms and went about their regular course schedule. *Id.* The religious organizations hosting the instruction provided the school with weekly attendance reports. *Id.* The Court held that this program was constitutional because the public schools did

"no more than ***accommodate*** their schedules to a program of outside religious instruction." *Id.* at 315 (emphasis added). Therefore, "[w]hen 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" and does not offend the Establishment Clause. *Id.* at 313-14. The *Zorach* opinion also explained that, while the First Amendment restricts the government from endorsing a particular religion, it also prevents the government from preferring a belief in no religion over a belief in religion generally, which would read into the Constitution a false "requirement that the government show a callous indifference to religious groups." *Id.*; *see also Brown v. Gilmore*, 258 F.3d 265, 274 (4th Cir. 2001) ("[T]he Religion Clauses must not be interpreted with a view that religion be suppressed in the public arenas in favor of secularism."). Therefore, the Court observed that if schools were not permitted to accommodate the religious desires of students and parents, it would produce an unconstitutionally hostile environment toward religion. *Zorach*, 343 U.S. at 314.

Zorach distinguished *McCollum v. Bd. of Education*, 333 U.S. 203

(1948), the only other case in which the Supreme Court has addressed voluntary religious instruction for public school students. *McCollum* examined a very different program of religious instruction from *Zorach*, and it invalidated a public school's religious instruction policy on the basis that the policy used "the state's taxsupported public school buildings" to "disseminat[e] religious doctrines" and employed "the state's compulsory public school machinery" to provide students to sectarian groups for their religious classes. *Id.* at 212. In *McCollum*, instructors hired by private religious organizations were brought into public school classrooms once a week to serve as teachers of religious instruction. *Id.* at 207-08. The school district's superintendent approved the selection and supervised every religious instructor in the program. *Id.* at 208. The religious instruction was administered in regular classrooms as part of the students' regular schedule, and students choosing not to participate had to go to alternate classrooms for other studies. *Id.* at 209. Because of the close, active participation by the school district, the Supreme Court began its opinion by framing the issue as "relat[ing] to the power of a state to utilize its tax-supported public school system in aid of religious instruction." *Id.* at

204-05. The Court held that this practice was impermissible under the Establishment Clause. *Id.* at 209. The key facts the Court identified in support of this holding were: (1) public school buildings had been used "for the dissemination of religious doctrines" and (2) school officials had exercised "close cooperation" with private religious organizations. *Id.* at 209-12.

Importantly, the *McCollum* Court was careful to articulate that its holding did not "manifest a governmental hostility to religion or religious teachings," and that "[a] manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *Id.* at 211-12. Therefore, *McCollum* allowed room for the Court to conclude under a different set of facts, as it later did in *Zorach*, that a released time policy is constitutionally permissible where the weight of public school authority is not used to promote or conduct the religious instruction.

Taken together, *Zorach* and *McCollum* provide a framework to analyze the constitutionality of voluntary religious instruction for public school students. The focal principle to be distilled from *Zorach* and *McCollum* is that a public school may accommodate its students

who engage in voluntary religious instruction as long as it occurs off campus and the weight of public school authority is not used to promote or conduct the religious instruction.

B. Zorach Remains the Leading Authority, and the Supreme Court Continues to Rely Upon It and Its Principle that Accommodation of Religion Constitutes a Secular Purpose for Government Policy.

Zorach is often cited as a leading authority in cases requiring a delineation of the boundary between passive accommodation of religion and active promotion or endorsement of religion. Since the 1952 *Zorach* opinion, the Court has repeatedly cited *Zorach* in numerous contexts to reaffirm the constitutionality of accommodating citizens' private religious needs and concerns. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (state could, as part of federal program for the disabled, provide sign language interpreter for deaf student at Catholic high school); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145-46 (1987) (accommodating employee's religious practice of not working certain scheduled hours because of religious convictions did not violate Establishment Clause); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (exempting religious organizations from Title

VII's prohibition on religious discrimination is constitutional religious accommodation); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970) (state tax exemptions for real property held by religious organizations and used for worship did not violate Establishment Clause).

The Supreme Court has, therefore, repeatedly reiterated the underlying principle in *Zorach* that accommodation of individuals' religious choices creates permissible interaction between government and religion. The Court has deemed such interaction acceptable in numerous contexts, so long as the government does not itself directly promote or endorse a religious mission. For example, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court upheld a state program offering, among other things, tuition aid for students choosing to attend private school. *Id.* at 644-45. The Court emphasized that any incidental endorsement of or benefit to religion was a result of students' and parents' individual choices and could not be reasonably attributed to the government. *Id.* at 652. Where a government program is "neutral with respect to religion" and accommodates "genuine and independent private choice," it is "not readily subject to challenge under the Establishment Clause." *Id.*

Nor has *Zorach*'s status as a leading authority been weakened by subsequent cases such as *Lemon v. Kurtzman* in 1971, which set forth the three-part "*Lemon* test" for determining whether government action violates the Establishment Clause. 403 U.S. 602. In fact, the Court has explained that the principles set forth in *Zorach* also underlie the *Lemon* test, bolstering the continuing vitality of *Zorach*. In *Presiding Bishop v. Amos*, 483 U.S. 327 (1987), for example, the Court reiterated the accommodation principle in an employment discrimination suit under Title VII of the Civil Rights Act. A former employee argued he was wrongfully discharged from his job at a nonprofit facility operated by the Mormon Church because he failed to qualify for a certificate stating that he was a member of the Church and eligible to attend its temples. *Id.* at 329. Citing *Zorach*, the Court held that the *Lemon* test's requirement of a "secular legislative purpose" did not require that every law's purpose be entirely separate from religion. *Id.* at 335 (citing *Zorach*, 343 U.S. at 314). The Court reasoned that requiring a law's purpose to be completely separate from religion would create the "callous indifference" and hostility towards religious groups that the Court warned of in *Zorach*. *Id.* The rationale of the "purpose"

requirement in *Lemon* was not to create such hostility, but rather to prevent the government from endorsing a particular religion or viewpoint over another. *Id.* Therefore, *Amos* confirmed that *Lemon* and *Zorach* are consistent with one another and that the *Lemon* requirements further the same principles set forth in *Zorach*.

Other cases have also confirmed, in various contexts, the continued vitality of *Zorach*'s principle of the constitutionality of state religious accommodation. For example, in *Walz v. Tax Comm'n of N.Y.*, the Supreme Court again relied upon *Zorach* for the proposition that accommodating religion is a legitimate governmental purpose. 397 U.S. 664 (1970).[2] Specifically, the Court found that the legislative purpose of a property tax exemption for religious organizations was "neither the advancement nor the inhibition of religion" and thus constituted a permissible accommodation. *Id.* at 672. The Court noted that houses of worship, like hospitals, libraries, and professional and historical groups, have "beneficial and stabilizing influences in community life," which the state may legitimately encourage. *Id.* at 673.

[2] Although *Walz* was decided one year prior to *Lemon's* articulation of the three-part test, the *Walz* Court explicitly framed its analysis in the same terms as *Lemon*.

In short, the Supreme Court's affirmations of *Zorach*'s core principles are too numerous to count. *See, e.g.*, *Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994) (citing *Zorach* for the proposition that "government may allow public schools to release students during the schoolday to receive off-site religious education"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (Scalia, J., concurring) (citing *Zorach* for the proposition that "indifference to 'religion in general' is not what our cases, both old and recent, demand"); *Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 213 (1963) ("In *Zorach*[,] we gave specific recognition to the proposition that '[w]e are a religious people whose institutions presuppose a Supreme Being.' "); *Engel v. Vitale*, 370 U.S. 421, 442 (1962) (Douglas, J., concurring) (same).

C. The Fourth Circuit Has Consistently Recognized *Zorach*'s Continuing Vitality.

This Court has supported the accommodation principles laid out in *Zorach* for decades. In *Smith v. Smith*, the Court upheld a released time program under *Zorach* that was substantially similar to the released time program in this case. 523 F.2d 121 (4th Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976). The primary issue in *Smith* was whether

Zorach was still controlling in light of *Lemon*'s "tripartite test" as restated in *Meek v. Pittenger*, 421 U.S. 349 (1975).[3] This Court stated:

> In *Meek* the [Supreme] Court expressly cited *Zorach* as viable authority. Although *Zorach* was decided many years before the Court fashioned the [*Lemon*] tripartite test, the *Meek* citation indicates that *Zorach* is not inconsistent with the tripartite test. Indeed, *Zorach* illuminates the test. Therefore, it is our duty to follow *Zorach* and to understand the modern test in the light of *Zorach*'s continuing viability.

523 F.2d at 124 (internal citation omitted). Therefore, this Court held that the Supreme Court reinforced the validity and viability of *Zorach* after *Lemon*. *Id.*

The *Smith* Court also explained the boundary between permissible released time programs under *Zorach* and impermissible public school religious instruction under *McCollum*. In order to analyze

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[3] *Meek* is referenced here only for the proposition, as stated in *Smith*, that the Supreme Court still held *Zorach* to be good law even after the creation of the *Lemon* "tripartite test." *Meek* held that it was permissible to use public funds to provide textbooks to students at private religious schools but not to provide other in-kind aid. 421 U.S. at 372-73. The Supreme Court subsequently held that this distinction was an "anomal[y] in our law" and overruled *Meek* because of this distinction. *Mitchell v. Helms*, 530 U.S. 793, 808, 837 (2000) (plurality opinion & O'Connor, J., concurring). However, this holding does not change the fact that both the Supreme Court and the Fourth Circuit have repeatedly upheld *Zorach* as consistent with the *Lemon* test. *Smith*, 523 F.2d at 124.

a released time program, the Court explained that "[i]n shaping the modern tripartite test, the Court has not rejected its early Religion Clause cases, but instead has purported to distill them. Our task, therefore is to apply the modern [*Lemon*] test in a fashion consistent with the results in *McCollum* and *Zorach*." *Id.* at 123. The Court then explained that the "crucial distinction" between *McCollum* and *Zorach* was that "in *McCollum*, the public school turned its classrooms over to the religious instructors; in *Zorach*, the schools only adjusted 'their schedules to accommodate the religious needs of the people.' " *Id.* at 123-24.

The released time program that was upheld in *Smith* was similar to the program in this case, except that in *Smith*, the school did "not provide formal instruction" for the students who chose not to participate in released time classes. *Id.* at 122. Therefore, compared to the released time program here, the *Smith* policy was closer to *McCollum* than *Zorach* because the school temporarily interrupted its other academic instruction.

The Fourth Circuit also has supported *Zorach*'s accommodation principles multiple times since *Smith*. In *Brown v. Gilmore*, for

example, this Court held that a statute mandating a minute of silence in public schools did not violate the Establishment Clause because it had the secular purpose of accommodating individuals' beliefs. 258 F.3d 265, 281-82 (4th Cir. 2001). The express intent of the minute of silence was that " 'each pupil may, in the exercise of his or her individual choice, *meditate, pray, or engage in any other silent activity* which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.' " *Id.* at 270 (citation omitted) (emphasis supplied). The Court upheld the constitutionality of this statute, emphasizing that the First Amendment should not be misinterpreted to mean that religion must be suppressed in favor of secularism.[4] *Id.* at 274. Relying on *Zorach,* this Court explained the basic proposition that denying the government the ability to accommodate the spiritual needs of its citizens would give preference and favorable treatment to a belief in *no* religion over a belief in *any* religion. *Id.* This Court then further observed that, "[n]ot only is the government permitted to accommodate religion without violating the

[4] Recently, other circuits have followed this reasoning from *Brown*. *See, e.g.*, *Sherman v. Koch*, 623 F.3d 501 (7th Cir. 2010); *Croft v. Gov. of Tex.*, 562 F.3d 735 (5th Cir. 2009).

Establishment Clause, at times it is required to do so." *Id.*

D. Other Federal Courts of Appeals, Including the Only Other Case That Has Considered Academic Credit in a Released Time Context, Continue to Rely Upon *Zorach* and Its Progeny.

The accommodation of religion borne out of *Zorach* remains a well-respected principle in other federal circuits. The Tenth Circuit, for example, relied on *Zorach* as the leading authority on released time in the only other federal court of appeals case to address a released time program from which the public school accepted academic credit. *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981). Like *Smith*, *Lanner* accepted "*Zorach*'s continuing vitality" after the creation of the *Lemon* test. *Id.* at 1357-58.

In *Lanner*, students were allowed to leave campus for one hour each day if enrolled in a class at the local Mormon seminary. The Tenth Circuit analyzed this program under *Zorach* because the released time program occurred off campus, stating "it is clear that released-time programs permitting attendance at religious classes off school premises do not per se offend the establishment and free exercise clauses." *Id.* at 1357. Turning attention to the academic credit provision, the court noted that the released time policy there stated that a public school

could recognize academic credit awarded by a private school but could not give credit for "courses devoted mainly to denominational instruction." *Id.* at 1360. The court overturned the portion of this policy that required public school officials to evaluate released time courses based on a "religious test" "by examining and monitoring the content of courses offered there to insure that they are not 'mainly denominational.' " *Id.* at 1361. The court was careful to explain that there was no constitutional problem with accepting academic credit for religious courses taken off campus at a private school; the problem was limited to the requirement that school officials selectively decided which courses would receive credit based on their religious content. *Id.* at 1361-62. The court stated that "we do not prohibit or require the state to recognize for purposes of 'elective credit' any released-time classes which are available to all students on terms that do not require any test for religious content." *Id.* at 1362. Therefore, as long as school officials did not evaluate the religious content of each course, there was no problem with accepting academic credit for the released time program. *Id.*

Lanner's holding that there is no constitutional problem with

accepting academic credit from a released time program that does not require the public school to impose a religious test is not to be discarded as dicta. (*Cf.* Pl.-App. Br. at 44-45.) *Lanner*'s explanation was necessary in order not to overstate the scope of its holding. The Court sought to be clear that it was only enjoining the practice of accepting academic credit that required the public school to engage in a "religious test."

Further, *Lanner* does not "erroneously conflate[] governmental regulation of secular education at private religious schools with governmental granting of public school credit for religious instruction given at private religious schools." (*Id.* at 45.) As *Smith* stated (citing *Zorach*), accommodation of a citizen's religious interests is itself a valid secular purpose. *Smith*, 523 F.2d at 124.

The Second Circuit also held that *Zorach* controls the constitutionality of an off-campus released time program. *See Pierce v. Sullivan West Central School District*, 379 F.3d 56, 59 (2d Cir. 2004). The court in *Sullivan West* held that accommodation of released time is constitutional when the government does not coerce student participation. *Id.* The released time program in *Sullivan West* was

purely voluntary. *Id.* at 60. Neither the physical proximity of the churches where the released time programs were held nor the percentage of students that chose to participate in the program specifically affected the Second Circuit's ruling. *Id.* Under *Zorach*, the program was a mere accommodation of the students' desires to study religion and was, therefore, a wholly private decision of the students rather than an act attributable to the school. *Id.* at 61.

E. The Department of Education During Both the Clinton and Bush Administrations Vigorously Upheld the Principles Stemming From *Zorach*.

The courts are not the only arenas in which *Zorach*'s principles have been championed. The U.S. Department of Education has issued similar guidelines on religious expression in public schools during both Democratic and Republican presidential administrations. The Clinton Administration issued guidelines ("Clinton DOE Guidelines") in 1995, 1998, and 1999, which were then sent to all school district superintendents nationwide.[5] In 2003, the Bush Administration issued similar guidelines, *Guidance on Constitutionally Protected Prayer in*

[5] *See* http://www2.ed.gov/Speeches/08-1995/religion.html; http://www2.ed.gov/inits/religionandschools/secletter.html (both last visited Aug. 15, 2011).

Public Elementary and Secondary Schools, 68 Fed. Reg. 9645-01 (Feb. 28, 2003) ("Bush DOE Guidelines").

The Clinton DOE Guidelines were, in large part, based on guidelines prepared by a diverse group of organizations representing every side of the debate on religion in public schools. The purpose of that document, entitled *Religion in the Public Schools: A Joint Statement of Current Law*[6] ("Joint Statement"), was to summarize and catalog those issues involving religion in the public schools that had been authoritatively addressed by the courts.

The Joint Statement made clear in 1995 that settled law protected a school district's right to use its "discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on premises during the school day."[7] This exact language on released time programs was subsequently adopted by the Clinton DOE Guidelines. This policy reflects a distinct reliance on *Zorach*'s accommodation principles.

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[6] http://www2.ed.gov/Speeches/04-1995/prayer.html (last visited Aug. 15, 2011).

[7] *Id.* ¶ 18.

Similarly, the Bush DOE Guidelines stated that "schools may excuse students from class to remove a significant burden on their religious exercise, where doing so would not impose material burdens on other students." 68 Fed. Reg. at 9647. These Guidelines further stated that when "school officials have a practice of excusing students from class on the basis of parents' requests for accommodation of nonreligious needs, religiously motivated requests for excusal may not be accorded less favorable treatment." *Id.*

Relying on the principles outlined in *Zorach*, the Department of Education has therefore repeatedly stated that schools have the right to accommodate the religious needs of their students through released time religious instruction.

II. WITHIN THE FRAMEWORK OF *ZORACH*, THE RELEASED TIME POLICY HERE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Consistent with the principles enunciated above, released time policies similar to the School District's policy in this case have been consistently upheld as having a secular purpose and being an appropriate constitutional accommodation.

A. The School District's Accommodation of Religious Instruction, Including the Acceptance of Academic Transfer Credit, is a Constitutional Exercise of Educators' Discretion.

As set forth above, it is well established that released time programs in public schools are constitutional when they accommodate religious instruction without becoming involved in the instruction. Like the program upheld in *Zorach*, this case involves a released time program held off public school grounds and without public school supervision or support. Even through the lens of the Court's more recent ruling in *Lemon*, this program is constitutional. Here, the District Court correctly held that the program (1) has a secular purpose, (2) does not have the primary effect of advancing or inhibiting religion, and (3) does not result in an excessive government entanglement with

religion. *See Moss v. Spartanburg County School Dist. No. 7*, No. 7:09-1586-HMH, --- F. Supp. 2d ----, 2011 WL 1296699 (D.S.C. Apr. 5, 2011).

1. The Program Has A Secular Purpose.

The School District's acceptance of elective academic credit for students participating in the released time program has a secular purpose. The Supreme Court, this Court, and other federal courts of appeals have held that accommodation of religion in this arena serves a secular purpose. *See supra* Part I.A; *Smith*, 523 F.2d at 124 (noting that "[t]he purpose of the Harrisonburg release-time program, like the *Zorach* program, is secular—the schools aim only to accommodate the wishes of the students' parents"); *Lanner*, 662 F.2d at 1349 ("The School Board's desire to accommodate the public in its spiritual needs satisfies the secular legislative purpose prong of the [*Lemon*] test.")

Here, the released time program serves the secular purpose of accommodating religion without extending beyond the permissible boundaries of the First Amendment. As in *Zorach* and *Lanner*, the program merely allows students to participate in and receive credit for off-campus elective courses to accommodate its students' religious preferences.

2. The Program Neither Promotes nor Inhibits Religion.

Additionally, the primary effect of the School District's released time program neither promotes nor inhibits religion. In *Zorach*, the Supreme Court held that the school district neither promoted nor inhibited religion because it did not actively advance any religious instruction, distinguishing it from the program in *McCollum*. 343 U.S. at 315; *see also Smith*, 523 F.2d at 125 (holding that the released time program there neither promoted nor inhibited religion because allowing students to leave school grounds during the school day was a "largely passive and administratively wise response to a plenitude of parental assertions of the right to 'direct the upbringing and education of children under their control.' ") (quoting *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). *Lanner* also explained that accepting academic credit does not offend the Establishment Clause as long as it does not require the public school to engage in a religious test. 662 F.2d at 1357, 1362.

Here, as in *Zorach*, *Smith*, and *Lanner*, the primary effect of the School District's released time program is neither to promote nor inhibit religion. The School District provides no funding, property, or teachers for the released time program, nor does it advertise or promote the

program. Moreover, the academic credits accepted for participating students is not evaluated on religious content; the School District avoids the "religious test" of which the Tenth Circuit warned in *Lanner*. In allowing credit for released time classes, the School District validly accommodates its students without overstepping its constitutional bounds.

It is not an endorsement of religion to accept academic transfer credit for the released time program, just as it is not an endorsement of religion for a public school to accept the academic credits of a student switching from a religious private school to public school. If students and their parents were deprived of the ability to transfer from private to public schools, parents would be faced with an all-or-nothing choice: either enter private school permanently or forgo private school altogether. Such a result cannot stand. *See Society of Sisters*, 268 U.S. at 534-35 (invalidating an Act requiring students to attend public rather than private religious schools because it "unreasonably interfere[d] with the liberty of parents . . . to direct the upbringing and education of children under their control"). Indeed, it is common for parents to enroll their child in a religious school for k-8 grades, and

then enroll him or her in a public high school.

Furthermore, barring the School District from accepting academic credit from the released time program would effectively force it to engage in unconstitutional viewpoint-based discrimination by singling out accredited private school courses with religious subject matter for disparate treatment. The latter course, urge by Plaintiffs-Appellants, would create entanglement in religion. Here, the School District's policy applies neutrally to all accredited transfer credits, regardless of subject matter.

3. The Program Does Not Result in Excessive Entanglement with Religion.

Accepting academic transfer credit for released time courses also does not result in "excessive government entanglement" under *Lemon*. Though Church and State should be distinct, the First Amendment "does not say that in every and all respects there shall be a separation of Church and State." *Zorach*, 306 U.S. at 312.

No excessive entanglement problem arises in this case. The Plaintiffs-Appellants argue that the released time program goes beyond acceptable practices under *Zorach* by allowing academic credit. They misconstrue, however, the government's role in accepting academic

transfer credit. The ability to grant academic credit is not a uniquely governmental power; private schools do so on a regular basis in their normal course of operations. The School District, in deciding whether to allow credit, does no more than accept the affirmation of the state's accrediting agencies that the school granting the credit is properly accredited. This ensures that the School District cannot grant or deny credit for courses in the released time program on the basis of religious content or viewpoint.

Furthermore, Plaintiffs-Appellants' argument would also undermine the power and autonomy of private schools. It has long been established that parents have the right to choose to send their children to an accredited private school, *Society of Sisters*, 268 U.S. at 534-35, or, in some cases, to none at all, *see Wisconsin v. Yoder*, 406 U.S. 205 (1972). If the transfer of credits from a private to public school was prohibited, this right would be severely diminished. Regardless of whether the students are transferring one credit or a whole year's worth of credits from a private school, the School District has the authority to accommodate students in this manner.

Moreover, the School District's policy here makes explicit its

intent to remain separate from religion. For example, the School District deliberately changed the wording of its policy from "awarding" two elective Carnegie unit credits to "accepting" that credit. *Moss*, No. 7:09–1586–HMH, 2011 WL 1296699, at *2. Similarly, by adopting a content-neutral policy of inquiring only whether an elective course is taught at an accredited school, the School District refrains from making religious value judgments about the credits accepted. In doing so, the School District remains neutral while accommodating the needs and desires of students and their parents to exercise their religious beliefs.

B. The School District's Acceptance of Academic Transfer Credit Lifts a Burden From Students Who Otherwise Would Have to Choose Between Educational Obligations and Religious Convictions.

Barring the School District from accepting transfer credit for courses in the released time program would create an unnecessary, burdensome distinction: it would prohibit the School District from accommodating student participation in released time courses with religious content while allowing it to accommodate students participating in non-religious off-campus programs. This distinction is unnecessary because the released time policy here is nondiscriminatory in two respects, allowing for accredited off-campus instruction in any

religion, while also permitting off-campus instruction in secular courses. The distinction is burdensome because it effectively penalizes students for acting on their religious convictions, and it would require the School District to supervise off-campus instruction.

Under the distinction urged by Plaintiffs-Appellants, students wishing to enroll in an off-campus religious elective would be disadvantaged compared to their classmates who take secular electives. Denying academic transfer credit to students who participate in the released time program while allowing others to earn credit by attending non-religious programs draws a constitutionally improper line. The purpose of elective credits is to allow students to choose the areas of study they wish to pursue during the academic day. However, refusing to accept transfer credit only for off-campus religious courses would deter students from exploring their spiritual interests while rewarding students exploring secular interests, raising significant concerns under the Free Exercise Clause.

A distinction between religious and secular transfer credits would likewise be burdensome on the School District. Currently, this released time program relieves the School District from subjectively monitoring

and evaluating religious subject matter. If, however, the School District were barred from accepting academic credits for released time programs, it would be required to continuously evaluate and monitor the contents and viewpoint of all off-campus elective classes, resulting in an excessive entanglement with religion and potentially creating an environment of hostility toward religion.

Here, the policy of neutral accommodation removes the burdens placed on students—who would otherwise have to choose between their faith and academic achievement—and the School District. Allowing released time program participants to receive credit does not grant those students a special benefit; rather, it allows them the same opportunities as other students to pursue their preferred course of elective study without being penalized for their religious beliefs.

III. CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reject Plaintiffs-Appellants' arguments, and affirm the District Court's grant of summary judgment.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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