IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 05-10341-I
&
NO. 05-11725-II

COBB COUNTY SCHOOL DISTRICT, COBB COUNTY BOARD OF EDUCATION, JOSEPH REDDEN, SUPERINTENDENT,

APPELLANTS,

v.

JEFFREY MICHAEL SELMAN, DEBRA ANN POWER, KATHLEEN CHAPMAN, JEFF SILVER, PAUL MASON, and TERRY JACKSON,

APPELLEES.

Appeal from the United States District Court
For the Northern District of Georgia, Atlanta Division

BRIEF OF *AMICUS CURIAE* AMERICAN JEWISH CONGRESS IN SUPPORT OF APPELLEES

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APPELLANTS,	:	
v.	:	**COURT OF APPEALS CASE NOS. 05-10341-I & 05-11725-II**
JEFFREY MICHAEL SELMAN, DEBRA ANN POWER, KATHLEEN CHAPMAN, JEFF SILVER, PAUL MASON, and TERRY JACKSON,	:	
APPELLEES.	:	

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for proposed *amicus curiae* American Jewish Congress certify, pursuant to Rule 26.1 of the Federal Rules of Civil Procedure and Rule 26.1-1 of the Local Appellate Rules for the United States Court of Appeals for the Eleventh Circuit, that the following attorneys, persons, associations, firms, partnerships and corporations have an interest in the outcome of this case:

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

Interests of the Amicus 1

Statement of the Issue 1

Summary of the Argument 1

Argument 5

A. "Primary Effect" and the "Reasonable Observer": Context and History Matter 5

B. The Sticker and the Textbook it Qualifies 7

C. Historical Context: Common Themes in the Anti-Evolution Campaign 11

D. Local Context: Evolution's (Mis)Treatment in Cobb County 15

CONCLUSION 19

TABLE OF AUTHORITIES

CASES **Pages**

Capitol Square Review & Advisory Bd. v. Pinette,
515 U.S. 753 (1995) 5, 15

Daniel v. Waters,
515 F.2d 485 (6th Cir. 1975) 13

Edwards v. Aguillard,
482 U.S. 578 (1987) 2, 6, 12, 13, 15

Elk Grove Unified Sch. Dist. v. Newdow,
124 S. Ct. 2301 (2004) 11, 12

Epperson v. Arkansas,
393 U.S. 97 (1968) 2

Freiler v. Tangipahoa Parish Bd. of Educ.,
975 F. Supp. 819 (E.D. La. 1998), *aff'd*,
185 F.3d 337 (5th Cir. 1999) 14 n.5

Glassroth v. Moore,
335 F.3d 1282 (11th Cir. 2003) 5

King v. Richmond County,
331 F.3d 1271 (11th Cir. 2003) 5, 7 n.2

Lemon v. Kurtzman,
403 U.S. 602 (1971) 5 n.1

Mozert v. Hawkins County Bd. of Educ.,
827 F.2d 1058 (6th Cir. 1987) 13 n.4

Scopes v. Tennessee,
154 Tenn. 105, 289 S.W. 363 (1927) 12

Smith v. Board. of Sch. Com'rs of Mobile County,
827 F.2d 684 (11th Cir. 1987) 6

OTHER AUTHORITIES

Kenneth R. Miller & Joseph S. Levine, *Biology*, 369 (Prentice Hall 2002) 8, 9

Interests of the Amicus

The American Jewish Congress is a membership organization founded in 1918 to protect the civil, political, economic and religious rights of American Jews. In the decades since its founding this organization has collaborated with other minority groups in shared strivings to realize fully the constitutional guaranties of protection for conscience and liberty. Because the separation of church and state, particularly in the public schools, is an essential safeguard of the religious rights of Jews and other minorities, the American Jewish Congress has sought consistently to support the constitutional principles guaranteeing that separation. The Congress seeks this Court's permission to participate in this case based on a judgment that the policy in question embodies a direct, albeit disguised, attack on those principles. While there are Jews who accept the Book of Genesis as literal truth, the American Jewish Congress opposes the promotion or advancement of any such doctrine, directly or indirectly, through the public school curriculum.

Statement of the Issue

Would the "informed reasonable observer" conclude that the Cobb County School Board endorsed religion by mandating – in response to religious objections – the inclusion of a warning sticker conspicuously affixed to the inside cover of high school science textbooks that pejoratively characterizes evolution as "a theory, not a fact" and singles evolution out for special scrutiny?

Summary of the Argument

The District Court correctly held that, regardless of the School Board's *purpose* in adopting the sticker, the sticker has the impermissible *effect* of sending a message that the School

Board has taken the side of religious objectors in the debate over the teaching of evolution. Stretching back over nearly 100 years of this nation's history, the religious struggle to control what young and impressionable public school students will be told and taught about the origin of species has involved varying strategies and approaches, growing more subtle over time. But the end goal has been constant: to preserve and protect biblical, religion-based accounts of creation from what are perceived to be the contradictory teachings of science.

Mindful of this history, and the unbroken line of legal defeats that these strategies have met in the courts, when the Cobb County School Board recently and belatedly determined to bring the district's science curriculum into compliance with state mandates requiring the teaching of evolutionary theory, it did not direct that creationist views be given equal (or any) air time and also was careful to avoid mention of any particular religion, religion per se, or the Bible. Nonetheless, like the state action condemned in *Epperson v. Arkansas*, 393 U.S. 97 (1968), *Edwards v. Aguillard*, 482 U.S. 578 (1987), and other similar precedents, the School Board's approach amounts to an attempt to "tailor" the curriculum by undermining evolution – here, diminishing it as a mere "theory" that is not a "fact" and that requires special scrutiny – creating the unmistakable impression that the Board has sided with religious objectors in a setting where the audience consists of captive and impressionable students.

Whether the sticker has the unconstitutional effect of endorsing religion depends on how it would be perceived by the hypothetical "informed reasonable observer." Drawing on the apposite precedents from this Court and the United States Supreme Court, the District Court correctly explained that the "informed, reasonable observer" is deemed to have knowledge of "the historical opposition to evolution by Christian fundamentalists and creationists in Cobb County and throughout the Nation." R4-98-37. Viewing the sticker through this nationwide

historical lens, the reasonable observer would naturally understand it as an endorsement of the latest link in the creationist-based anti-evolution chain that has included outright bans on evolution instruction, so-called "balanced treatment" statutes and other targeted disclaimers and warnings. Although arguably different in degree, the sticker is no different in kind.

Viewing the sticker through the local lens of recent developments in Cobb County leads to the same result. The reasonable observer would be aware of the School District's longstanding hostility to the teaching of evolution (including the practice of physically ripping evolution instruction pages out of textbooks destined for the public schools) and of the undisputed fact that the sticker resulted from lobbying by biblical creationist parents and the School Board's decision – however well-intentioned it may have been – to appease them. It was, as Appellants concede, a "gesture to religious citizens" (Appellants' Br. at 15) and it would be perceived as such by the "informed reasonable observer."

This understanding of the sticker's evolution-challenging message is reinforced by comparison to the substance of the textbook to which it is affixed. That textbook independently (and repeatedly) describes evolution as a "scientific theory," explains both the strengths and the limitations of all such theories, and clearly states that evolutionary theory does not and can not definitively answer the controversial question of how life began. Armed with this knowledge, the "reasonable observer" would be hard pressed to understand any actual *need* for the sticker, or what "offense" it might be aimed at reducing, and thus could only conclude – with the benefit of historical context – that the Board was taking sides and putting qualifications on the state-mandated teaching of evolution to protect and fortify those whose religious teachings suggest an alternative explanation for the origin of species.

To be clear, we do not contend that there is *no way* for a school district to accommodate and respect the views of those members of the community who believe and teach their children the biblical version of creation. This would be a much different case if the School Board had formulated a sticker or instructed its teachers to inform students that: (a) the School Board recognizes that there may be religious objections to the teaching of certain science topics, including evolutionary theory; (b) the science curriculum, including instruction on evolutionary theory, is not intended to and does not in fact address questions of theology or religion; and (c) to the extent the students have religiously based questions or concerns about any subject matter taught in school, they should consult with their parents and/or their clergyman.

Nearly a century after the Scopes trial, the teaching of evolution has remained a divisive issue in many parts of the country. It has become common knowledge that its opponents are those who believe in the biblical account of creation. Denigrating evolution as "theory" rather than "fact" may seem to some less blatant than excluding it from the curriculum altogether (which the School Board had done until only a few years ago) or requiring the simultaneous teaching of creationism. But when done at the behest of religiously-motivated objectors and given the School Board's imprimatur, it nonetheless sends the same impermissible message of endorsement. The reasonable observer, aware of this history, cannot help but conclude that the School Board, by agreeing to adopt this sticker, weighed in on the religious side of the debate. For these reasons and those we set out in detail below, the District Court's determination that the sticker has the unconstitutional effect of endorsing and thus directly advancing religion should be affirmed.[1]

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[1] The American Jewish Congress also supports reversal of the District Court to the extent it held that the School Board's conduct does not violate the *purpose* prong of the three-part test first set

Argument

A. "Primary Effect" and the "Reasonable Observer": Context and History Matter

The District Court, following this Court's most recent Establishment Clause opinions, properly analyzed whether the School Board's decision had the "primary effect of advancing or endorsing religion" by asking "'whether, irrespective of government's actual purposes, the practice under review in fact would convey a message of endorsement or disapproval to an informed, reasonable observer." *King v. Richmond County*, 331 F.3d 1271, 1279 (11th Cir. 2003) (citing Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984)). *Accord Glassroth v. Moore,* 335 F.3d 1282, 1297 (11th Cir. 2003).

Appellants argue that the sticker is permissible primarily because it is "devoid of religious endorsement, or direct benefit to religion," and that it is "only by searching for implicit meaning that a viewer could assume any connection to religion." (Appellants' Br. at 24). But this stands the "endorsement test" – which Appellants themselves acknowledge as an appropriate constitutional yardstick in this case (Appellants' Br. at 19-20) – on its head. As Justice O'Connor explained, "the knowledge attributed to the reasonable observer" cannot "be limited to the information gleaned simply from viewing the challenged display." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (concurring opinion). The relevant question for purposes of the effect analysis is not what the sticker does (or does not) say, but *whether the School Board's decision to mandate the warning sticker* would be perceived as an endorsement of religion. That depends not on a myopic reading of the language of the sticker alone, but instead – and more significantly – on an assessment of the overall context from which it arose

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out in *Lemon v. Kurtzman,* 403 U.S. 602, 657-58 (1971). To avoid burdening the Court with duplicative briefing, however, we join in and adopt the arguments of Appellees and other *amici curiae* on that point and limit our analysis to the *effect* prong.

and in which it is being used. As Appellants themselves concede, "'the test does not evaluate a practice in isolation from its origins and context.'" (Appellants' Br. at 20-21 (quoting *Elk Grove Unified Sch. Dist. v.* Newdow, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring)).

In this case, the "informed reasonable observer" must – at a minimum – be deemed familiar with (i) the presentation of evolution in the textbook itself; (ii) the nationwide historical religiously-based resistance to the teaching of evolution in public schools, including the specific such history in Cobb County; and, (iii) the events in Cobb County that led to the adoption of the textbook and the mandatory inclusion of the sticker. In combination, as we argue below, these three pieces of information demonstrate that the District Court correctly concluded that the School Board's decision to adopt this sticker had the impermissible effect of endorsing religion because "the informed, reasonable [observer] would perceive the School Board to be aligning itself with proponents of religious theories of origin." R4-98-35.

Before turning to the specifics of the endorsement test and its application here, we pause to emphasize a crucial overarching point of law: in applying the *Lemon* test and assessing "direct advancement" and "endorsement," this Court must "do so mindful of the particular concerns that arise in the context of public elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. at 585. The Supreme Court has described its own monitoring of compliance with the Establishment Clause in the setting of public schools as "particularly vigilant." *Id.* at 583-84. Similarly, this Court has observed that "the pervasive influence exercised by the public schools over the children who attend them . . . makes *scrupulous compliance* with the establishment clause in the public schools particularly vital." *Smith v. Board. of Sch. Comm'rs of Mobile County*, 827 F.2d 684, 689-90 (11th Cir. 1987) (citing *Edwards*) (emphasis added). These precedents demand nothing less than a heightened and most exacting scrutiny of the

School Board's decision here to inject an evolution warning sticker into the community's public school classrooms.

B. The Sticker and the Textbook it Qualifies

While Appellants correctly argue that the sticker cannot be understood apart from the substance of the textbook to which it is affixed, they err in arguing that a reasonable observer would conclude that the sticker is essentially meaningless and therefore constitutionally harmless in the face of the text's "comprehensive instruction on evolutionary theory." (Appellant's Br. at 27-28.) In fact, a reasonable observer acquainted with the textbook would appreciate that the sticker is literally redundant and suggestively inconsistent compared to the book's content, and also would know that the book does not even purport to answer – and expressly acknowledges that the "leap from nonlife to life is the greatest gap in scientific theories of Earth's early history." In the face of these facts, a reasonable observer cannot help but wonder whether the sticker's dramatic presence – bearing italicized and bold type stating "Approved By Cobb County Board of Education" – signals the School Board's support, approval or endorsement of the religiously-based viewpoint that evolution should be singled out among scientific theories for special qualifications and warnings.[2]

Turning first to the sticker's characterization of evolution as "a theory, not a fact, regarding the origin of living things," the reasonable observer is in one sense left with a question as to what the sticker really adds on this point, as the textbook itself makes perfectly clear that evolution is a scientific "theory." Thus, the introduction to the chapter on evolution states:

[2] Following this Court's admonition that size and placement matter, *King*, 331 F. 3d at 1284-85, we attach at the end of our brief a photocopy of the sticker in its actual size and form. *See* Exhibit A, following the Conclusion, *infra.*

> What scientific explanation can account for the diversity of life? The answer is a collection of scientific facts, observations, and hypotheses known as evolutionary theory. **Evolution**, or change over time, is the process by which modern organisms have descended from ancient organisms. A **theory** is a well-supported testable explanation of phenomena that have occurred in the natural world.

Defs.' Ex. 4, Kenneth R. Miller & Joseph S. Levine, BIOLOGY, 369 (Prentice Hall 2002) (emphasis in original) [hereinafter "Miller & Levine"].

But in another and more important respect, the sticker's "theory" not "fact" distinction misleadingly insinuates that evolution is a mere guess, lacking in analytical or empirical support, and thus buttresses the proposition that other (perhaps even more valid) explanations of the origin of species may exist. This plain implication of the sticker – through a pejorative and colloquial use of the term "theory" – stands awkwardly opposed to the accepted scientific meaning of a "theory," as clearly stated in the very first chapter of the textbook:

> You may have heard the word *theory* used in everyday conversations as people discuss ideas. Someone might say, 'Oh, that's just a theory,' to criticize an idea that is not supported by evidence. In science, the word *theory* applies to a well-tested explanation that unifies a broad range of observations. A theory enables scientists to make accurate predictions about new situations.

Miller & Levine, at 14 (emphasis in original).

The sticker's calculated phrasing, setting up "theory" in opposition to and as distinct from "fact," ensures that no reasonable observer would conclude that it was intended to remind Cobb County students of the actual meaning of "scientific theory" – i.e., "a well-tested explanation that unifies a broad range of observations." (*Id.*) To the contrary, both common sense and the only evidence on this point in the record confirm that the "theory" not "fact"

language is intended to be – and is in fact – understood as casting doubt on evolution's validity. As the District Court found:

> Some students have pointed to the language on the Sticker to support arguments that evolution does not exist.... In addition, Dr. McCoy testified that the Board's misuse of the word "theory" causes "confusion" in his science class and consequently requires him to spend significantly more time trying to distinguish "fact" and "theory" for his students.... Dr. McCoy stated that some of his students translate the Sticker to state that evolution is "just" a theory, which he believes has the effect of diminishing the status of evolution among all other theories....

R4-98-16.

The sticker's next (and third) sentence, directing that the material on evolution in particular "be approached with an open mind, studied carefully, and critically considered," reinforces the direct challenge of the prior sentence to evolution's validity as a scientific theory. Much like the statement that precedes it, at the most literal level this third sentence does little more than repeat what the textbook already makes plain – that students should approach all scientific theories with an open and critical mind. In its introductory chapter, for example, the textbook states: "In keeping with [the scientific] approach to pursuing knowledge, *certain qualities are desirable in a scientist: curiosity, honesty, open-mindedness, skepticism, and the recognition that science has limits*. An open-minded person is ready to give up familiar ideas if the evidence demands it. A skeptical person continues to ask questions and looks for alternative explanations." Miller & Levine, at 6 (emphasis added). The book proceeds to explain that "no theory is considered absolute truth." *Id.* at 15. What is different about the sticker's exhortation to open-mindedness and critical thinking, of course, is that unlike the textbook, it singles evolution out for these special "warnings."

The "reasonable observer" also would be familiar with the textbook's sensitive and balanced treatment of evolution and would know that its authors do not purport to offer definitive statements about the question of how life began. The textbook expressly states that "the leap from nonlife to life is the *greatest gap in scientific theories of Earth's early history*" (*id.* at 425). The authors present Darwinian theory as a collection of "hypotheses" that are "based on a relatively small amount of evidence." (*Id.* at 423). And the textbook notes uncertainty surrounding the origin of the human species: "The history and interrelationship of [earlier species in the *homo* genus], and the path by which they led to modern humans, are fascinating and still not completely understood." (*Id.* at 839). *See also id.* ("The existence of these fossils is well established, but the diagram shows that paleontologists are debating just how they are related to one another and to modern humans.").

In short, the reasonable observer would know that the book qualifies evolution as a theory, notes that science has not provided satisfactory or complete answers to all questions that might reasonably be asked on the topic, and makes clear that good scientists must *always* engage in critical thought. Armed with this knowledge, the reasonable observer would be hard pressed to understand any actual need for the sticker. But the very redundancy of the sticker with what is in the book shapes how a reasonable observer would perceive it. It is unlikely that the sticker would be understood as a means through which to reduce offense to religious beliefs if the textbook does not logically create such an offense to begin with. The clear message is that evolution and evolution alone is somehow more suspect, or less valid, than other scientific theories, worthy of a special warning or disclaimer. And as we now explain, when this clear message is placed in the broader context of historical religious-based resistance to the teaching of

evolution in Cobb County and beyond, the "reasonable observer" could only conclude that the School Board had endorsed the demands of religious objectors for a state-sponsored warning that effectively undermines or at least diminishes evolution's scientific validity in the eyes of impressionable young students. [3]

C. Historical Context: Common Themes in the Anti-Evolution Campaign

In applying the endorsement test, the District Court quite properly considered and attributed to the reasonable observer knowledge of the basic contours of the century-long campaign in this country against the teaching of evolution by those who seek to promote – or to protect against perceived science-based challenges to – religious accounts of the origin of species. While Appellants would have this Court write this crucial context off as "a distant history" (Appellants' Br. at 32), "the reasonable observer must be deemed aware" not only of "the history of the conduct in question," but also, and equally importantly, of "*its place in our Nation's cultural landscape.*" *Elk Grove*, 124 S. Ct. at 2322 (O'Connor, J., concurring) (emphasis added). Stated differently, the "history and ubiquity" of a practice "is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Id.* at 2323 (quoting *County of Allegheny v. ACLU of Pittsburgh*, 492 U.S. 573, 630-31 (1989)).

We do not contend that this divisive and lengthy history with respect to the teaching of evolution renders unconstitutional any attempt to acknowledge, respect or accommodate arguably competing or inconsistent religious views. But it is plainly relevant to

[3]This would be a different case if the textbook's authors had openly asserted or argued that evolution disproves the existence of god. In fact, the textbook makes no mention of god or of any divine being.

how a "reasonable observer" would understand the disclaimer sticker adopted in Cobb County. If under the endorsement test it is important to consider 40 or 50 years of historical experience showing that certain practices have *not* engendered religious divisiveness or prompted any significant number of legal challenges, *Elk Grove.,* 124 S. Ct. at 2324 (O'Connor, J., concurring) (concluding that the phrase "under God" in the Pledge of Allegiance is not an "endorsement" of religion), so too here it is relevant – indeed, we submit it is essential – to consider the century-long divisive battle over the teaching of evolution in the public schools in determining how a reasonable observer would understand and perceive the School Board's decision to place this particular disclaimer sticker in its science textbooks.

In *Edwards v. Aguillard*, the Supreme Court most recently catalogued the well-known "historic and contemporaneous link" and "antagonisms" "between the teachings of certain religious denominations and the teaching of evolution." 482 U.S. at 590-91 & n.9 (citing, among other sources, *McLean v. Arkansas Bd. Of Educ.*, 529 F. Supp. 1255, 1258-64 (E.D. Ark. 1982)). Some of the earliest efforts were to exclude evolutionary theory from the public school curriculum altogether, the most (in)famous example being the *Scopes* "monkey trial" case in 1925, centered around a Tennessee statute criminalizing the teaching of evolutionary theory. *See Scopes v. Tennessee*, 154 Tenn. 105, 289 S.W. 363 (1927). After a similar attempt to prevent instruction in evolutionary theory in Arkansas, the Supreme Court in *Epperson* held that the Establishment Clause "does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." 393 U.S. at 106.

Having failed to lock evolution out of the public school classroom, religious anti-evolution activists then looked to balance evolution theory with creationist doctrine, using tactics in part indistinguishable from the sticker adopted by the School Board here. Thus, over thirty

years ago another court of appeals had little difficulty striking down a Tennessee statute requiring public school teachers to give equal treatment to creationism and evolution and also prohibiting "the selection of any textbook which teaches evolution unless it also contains *a disclaimer stating that such doctrine is 'a theory as to the origin and creation of man and his world and is not represented to be scientific fact.'*" *Daniel v. Waters*, 515 F.2d 485, 489 (6th Cir. 1975) (emphasis added) (finding the statute "obviously in violation of the First Amendment").[4]

Twelve years later, in *Edwards v. Aguillard*, the Supreme Court addressed a Louisiana statute that similarly "forbid[] the teaching of the theory of evolution in public schools unless accompanied by instruction in creation science." 482 U.S. 578, 581. Affirming the decision of the Fifth Circuit, the Court agreed that "'the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting evolution by counterbalancing its teaching at every turn with the teaching of creationism.'" *Id.* at 589. The statute's obvious and constitutionally improper purpose, the Court wrote, "was to restructure the science curriculum to conform with a particular religious viewpoint." To that end, "[o]ut of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects." *Id.* at 593.

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[4] Some years later, religious objectors to the teaching of evolution complained – unsuccessfully – that qualifying evolution as "theory not fact" did not go far enough in protecting what they perceived to be their own contrary religious views. *See Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1062 (6th Cir. 1987) (born again Christian plaintiffs claimed that texts contained material that conflicted with their religious views – including material on evolution – and that it was a violation of the Free Exercise Clause to require their children to be exposed to these texts; although "the textbooks contained a disclaimer that evolution is a theory, not a proven scientific fact," plaintiffs nonetheless complained that "the references to evolution were so pervasive *and presented in such a factual manner* as to render the disclaimer meaningless") (emphasis added).

Constitutionally barred from "restructuring" the curriculum to exclude evolution (under *Epperson*) or "discrediting" evolution by requiring that it be "counterbalanced" with instruction on creationism (under *Edwards*), religious opponents refocused their efforts on how evolution itself would be described and presented to students. The new (and continuing) strategy is to discredit the teaching of evolution by the less overt but no less unconstitutional tactic of singling it out with a warning or disclaimer stating that it is not factual and should be approached critically and with skepticism.

As the District Court observed, "the teaching of evolution as a theory rather than as fact is one of the latest strategies to dilute evolution instruction employed by anti-evolutionists with religious motivations," and the fact versus theory distinction is one "that religiously-motivated individuals have specifically asked school boards to make in the most recent anti-evolution movement." R4-98-35, 39. As a result, the fact/theory debate is "a loaded issue with religious undertones." (*Id.* at 34). Indeed, as recently as *Freiler v. Tangipahoa Parish Bd. of Educ.*, 975 F. Supp. 819, 824 (E.D. La. 1998), *aff'd*, 185 F.3d 337 (5th Cir. 1999), it was the "strong belief by certain [school] Board members that schoolchildren should not be taught evolution as fact" because it conflicted with their belief in the "Biblical theory of creation" that culminated in the much more complicated "disclaimer" that was eventually struck down in that case.[5]

[5] Interestingly, while the "disclaimer" struck down in *Freiler* made explicit reference to a single religious alternative with respect to the origin of life – stating that the "theory" of evolution "should be presented to inform students of the scientific concept and [is] not intended to influence or dissuade the Biblical version of Creation or any other concept" – in another respect it was actually more balanced than the sticker here, exhorting students to "exercise critical thinking and gather all information possible and closely examine" *not just evolution*, but "*each alternative*" explanation of the origin of species. 185 F.3d at 341 (emphasis added).

From this history, the "reasonable observer" would understand the many different ways in which those opposed on religious grounds to the inclusion of evolutionary theory in the public school curriculum have attempted to achieve the constitutionally forbidden "tailoring" (*Epperson*) or "restructuring" (*Edwards*) or "discrediting by counterbalancing" (*id.*), including the "fact" vs. "theory" distinction. This same observer also would appreciate that regardless of the particular means deployed, the end goal has remained constant: to ensure that what public school students are taught is better aligned with, or at least is not irreconcilably opposed to, religious teachings about the origin of species.

D. Local Context: Evolution's (Mis)Treatment in Cobb County

Moving from the general and national history to the specific story of evolution instruction in Cobb County's public schools, we do not repeat here the detailed history of resistance against such instruction that is amply set out in the District Court's opinion and the appellate briefs of the parties. We focus instead on what we submit are the most salient of those critical contextual facts, facts that are properly attributed to the reasonable observer attempting to understand the message of the sticker. *See Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring) (the "reasonable observer" "must be deemed aware of the history and context of the community and forum" in which the challenged practice occurred).

First, for decades prior to the events that gave rise to this litigation, the School District's policy and regulations provided that no student could be compelled or required to study the subject of the "origin of human species," and indeed prohibited teaching this topic to elementary and middle school students, "in respect for the family teachings of a significant number of Cobb County Citizens." R4-98-4. As Appellants acknowledge, "[i]n practice, evolution instruction had been curtailed" – in apparent violation of state curriculum requirements

– "at least partially because teachers were afraid it might conflict with students' religious beliefs." (Appellants' Br. at 5).

Second, it was "common practice in some science classes for textbook pages containing material on evolution to be removed from the students' textbooks." *Id.* As one school board member and parent testified, she remembered "being quite taken aback and quite horrified . . . because when [her sons'] science textbooks came home . . . the pages on evolution had been removed from the books," and when she inquired of the principal, she was told "it was just the policy of the board of education." R6-113-208-210.

Third, in 2001, when it became public knowledge that the School Board was considering re-introducing evolution into the curriculum – to finally bring the district into compliance with state mandates – the School Board received numerous complaints from parents. One complaint voiced by a number of parents was that the textbook "did not offer any information regarding alternate theories or criticisms of evolution," specifically including "the theories of creationism and intelligent design." R4-98-7.

Fourth, this resistance culminated in a petition filed by a vocal six-day biblical creationist and signed by about 2,300 other Cobb County residents. *Id.* The Petitioners requested that the School Board "place a statement prominently at the beginning of the text that warned students that the material on evolution was not factual but rather was a theory." *Id.*

Fifth, in response to "the outcry from these parents," the School Board "consulted legal counsel to determine if there was any language that would help to address parent concerns within the confines of the law." R4-98-8. During this process, a Cobb County science teacher

proposed two alternative versions of the sticker, including one – apparently favored by the administration – that stated:

> This textbook contains material on evolution, a scientific theory, or explanation, for the nature and diversity of living things. Evolution is accepted by the majority of scientists, but questioned by some. All scientific theories should be approached with an open mind, studied carefully and critically considered.

R4-98-13. The School Board rejected this more balanced – albeit less critical – alternative introduction to evolution.

This history shows that, contrary to what Appellants suggest, it is no mere coincidence that "the language of the Sticker may coincide with the religious views of some citizens." (Appellants' Br. at 16). It was those citizens who lobbied for the sticker, they did so because the material on evolution conflicted with their "religious views" and because they viewed the sticker's phrasing and message as a way to protect and preserve those views, and the School Board came up with this language specifically to address their concern and for no other reason. It is this chain of events, rather than the language of the sticker standing alone, that informs how a reasonable observer would interpret the School Board's decision.

It is true, as Appellants point out, that the sticker was adopted "while the School District was making affirmative efforts to . . . improve evolution instruction." (Appellant's Br. at 28). But this does not, as Appellants mistakenly suggest, immunize the School Board's action from an Establishment Clause challenge under the *effect* prong of the *Lemon* test. (*See* Appellants' Br. at 28-29). As the District Court explained, "the informed, reasonable observer would be aware that citizens and parents largely motivated by religion put pressure on the School Board to implement certain measures that would nevertheless dilute the teaching of evolution"

and "would be aware that the language of the Sticker essentially mirrors the viewpoint of these religiously-motivated citizens." R4-98-33. He or she also would know that the School Board rejected a more balanced alternative, reinforcing the message that the point of the sticker is not simply to "reduce offense," but rather to protect religion-based views on the origin of species by diminishing the force of the scientific theory of evolution. As the District Court aptly summarized:

> . . . this Sticker misleads students regarding the significance and value of evolution in the scientific community for the benefit of the religious alternatives. By denigrating evolution, the School Board appears to be endorsing the well-known prevailing alternative theory, creationism or variations thereof, even though the Sticker does not specifically reference any alternative theories.

R4-98-36.

CONCLUSION

When the sticker is considered in its full and complete context – including the context of the textbook it purports to introduce, the context of the historical struggle throughout this country concerning the teaching of evolution in the public schools, and the context of Cobb County's particular antagonism toward this subject matter – the "reasonable observer" can come to only one conclusion: that the School Board, however well-intentioned, ultimately took sides and endorsed the religiously-based position that evolution ought to be singled out for unique warnings and disclaimers as to its validity, with the natural and intended effect of preserving and advancing alternative religious explanations. The Establishment Clause forbids this result, particularly and especially in the scrupulously protected context of the public schools. For these reasons, the decision of the District Court finding unconstitutional advancement and endorsement of religion should be affirmed.

Dated: New York, New York
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This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.

Approved by
Cobb County Board of Education
Thursday, March 28, 2002

CERTIFICATE OF COMPLIANCE

I certify that this Brief of Amicus Curiae complies with the type-volume limitations set forth in FRAP 32(a)(7)(B). This Brief contains 5605 words.

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