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, KATHLEEN CHAPMAN,
JEFF SILVER, PAUL MASON AND TERRY JACKSON,

Appellees.

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

BRIEF AMICUS CURIAE OF NATIONAL COUNCIL OF JEWISH WOMEN, INC., NATIONAL COUNCIL OF JEWISH WOMEN, INC., ATLANTA SECTION, THE INTERFAITH ALLIANCE, AND THE GEORGIA INTERFAITH ALLIANCE IN SUPPORT OF APPELLEES AND SUPPORTING AFFIRMANCE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COBB COUNTY SCHOOL DISTRICT, et al. Appellants, v.	))))))	CASE NO. 05-10341-I CASE NO. 05-11725-II
JEFFREY MICHAEL SELMAN, et al. Appellees.	))))	

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I. Corporate Disclosure Statement

The National Council of Jewish Women, Inc. ("NCJW") is a nonprofit corporation. It has no parent corporation, has not issued stock, and no publicly-held corporation owns 10% or more of its stock.

The National Council of Jewish Women, Inc., Atlanta Section ("NCJW, Atlanta Section") is a nonprofit corporation. It has no parent corporation, has not issued stock, and no publicly-held corporation owns 10% or more of its stock.

The Interfaith Alliance is a nonprofit corporation. It has no parent corporation, has not issued stock, and no publicly-held corporation owns 10% or more of its stock.

The Georgia Interfaith Alliance has no parent corporation, has not issued stock, and no publicly-held corporation owns 10% or more of its stock.

II. Certificate of Interested Persons

Counsel for NCJW, NCJW, Atlanta Section, The Interfaith Alliance, and the Georgia Interfaith Alliance certifies that the following parties, firms, partnerships, counsel, and judges have an interest in the outcome of this case:

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STATEMENT OF THE ISSUES

Whether the Appellants violated Article I, Section II, Paragraph II of the Georgia Constitution by communicating at the public expense a message from the School District on science textbooks; singling out evolution as a theory deserving a heightened degree of skepticism at the public expense.[1/]

1/ This brief does not address the second issue on appeal: whether Appellants' actions also violated the Establishment Clause of the United States Constitution.

SUMMARY OF ARGUMENT

The appeal in this matter challenges the ruling of the United States District Court for the Northern District of Georgia that a Sticker placed on certain Cobb County (Georgia) School District ("School District") science textbooks violated the Establishment Clause of the First Amendment of the Constitution and Article I, Section II, Paragraph VII of the Georgia Constitution. This ruling should be upheld on the independent state grounds that the actions of the School District violated the Georgia Constitution.

Article I, Section II, Paragraph VII of the Georgia Constitution prohibits the use of state funds to promote religion. The District Court made factual findings that the Sticker policy constitutes a promotion of religion. Specifically, the District Court found that the Sticker policy was adopted in reaction to the pressure of citizens motivated by religious concerns, and promotes those citizens' agenda regarding the teaching of the origin of life in public schools.

Because these factual findings are not clearly erroneous and Government funds were used to purchase and apply the Stickers, this Court should affirm the District Court's ruling that the Sticker policy violates Article I, Section II, Paragraph VII of the Georgia Constitution.

ARGUMENT

I. Factual Background

In Fall 2001, the School District began the process of selecting a new science textbook. Selman v. Cobb County Sch. Dist., No. Civ. A. 1:02-CV-2325-C, 2005 WL 83829, at *2 (N.D. Ga. Jan. 13, 2005). At that time, the School District followed a policy which was understood to prohibit the discussion of human evolution in classes required for graduation. Id. During the textbook evaluation process, the School District administration decided to recommend that evolution instruction be strengthened to comply with Georgia curriculum requirements. Id.

Members of certain religious denominations have opposed any teaching of evolution in public schools. Id. at *20-21; see also McLean v. Arkansas Bd. of Ed., 529 F. Supp. 1255, 1259-60 (E.D. Ark. 1982). Proponents of religious theories of origin have engaged in a lengthy debate with advocates of evolution regarding whether evolution if taught should be presented in schools as fact or be described as a theory. Selman, 2005 WL 83829 at *20.

Individuals who oppose the teaching of evolution in public schools on religious grounds have encouraged the teaching of evolution as a theory to weaken the teaching of evolution and weaken the hold of evolution

generally. Id. The description of evolution as a mere theory mischaracterizes the status of evolution in the scientific community, as, according to the District Court, "[t]o the contrary, evolution is the dominant scientific theory of origin accepted by the majority of scientists." Id. at *22.

When it became known that the Cobb County School Board ("School Board") was in the process of strengthening instruction on evolution and adopting new science textbooks, a number of Cobb County citizens expressed opposition to teaching of evolution in public schools, for religious reasons; and "put pressure on the School Board to implement certain measures that would nevertheless dilute the teaching of evolution. . . . " Selman, 2005 WL 83829, at *20.

On March 28, 2002, the School Board adopted new science textbooks, including one written by Kenneth Miller and Joseph Levine, which contained material on evolution. Id. at *5. The School Board adopted the textbooks with the condition that District insert into the books a Sticker with the following language:

> 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.

Id. at *4-5. The Sticker contained no explanation about why students were being instructed to single out only evolution to consider critically, among all

scientific theories. Id. at *22. The School Board did not adopt alternative language proposed by the school administration for the Sticker. That proposed language would have clarified that a scientific theory is not speculation but rather explanation; that evolution is a theory accepted by most scientists; and that all scientific theories, not just evolution, should be studied critically.[2/] Id. at *7-8, 24.

The School Board had the Sticker produced with monies from the county's general fund between Summer and Fall 2002. Id. at *8. Cobb County School personnel, acting on school time, physically affixed the Stickers into all of the science textbooks that contained material regarding the origin of life. Id.

The District Court held that the Sticker Policy violated both the Establishment Clause of the United States Constitution and Article I, Section II, Paragraph VII of the Georgia Constitution.

2/ The proposed alternative Sticker contained the following language:

> 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.

Id. at *7.

II. Standard of Review

The District Court's legal conclusions are subject to de novo review. Glassroth v. Moore, 335 F.3d 1282, 1297 (11th Cir.), cert. denied, 540 U.S. 1000 (2003). This Court, however, should uphold the District Court's factual conclusions, unless it finds clear error. Fed. R. Civ. Proc. 52(a); American Civil Liberties Union of Ga. v. Rabun Cty. Chamber of Commerce, Inc., 698 F.2d 1098, 1110 (11th Cir. 1983).

III. State Constitutional Provisions Regarding Government Aid to Religion Can Be More Restrictive Than the United States Constitution

A state can prohibit aid to religion that is otherwise permissible under the United States Constitution. Locke v. Davey, 540 U.S. 712, 722-25 (2004). Locke concerned a Washington state scholarship program that provides scholarships to high achieving students for post-secondary school expenses. A student asserted that the program violated the Free Exercise Clause of the First Amendment of the United States Constitution because students who pursue a degree in theology were ineligible for the program. Id. at 715-16. This restriction in the scholarship program was required by

the Washington Constitution, which prohibits direct or indirect funding of religious instruction preparing students for the ministry.[3/] Id. at 719.

The Locke Court recognized that the Washington scholarship program would not have violated the Establishment Clause to the United States Constitution if students were permitted to use state scholarship funds to pursue a degree in theology. Id. at 719 ("Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent private choice of recipients."). Thus, "the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution." Id. at 722.

Nevertheless, the state's prohibition on the use of the scholarship funds to pursue a degree in theology did not violate the Free Exercise Clause of the United States Constitution. The State of Washington's interest in prohibiting use of Government funds to promote religion was "scarcely novel" and "since the Founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." Id. at 722. The Court further observed that Georgia, among other states, prohibited use of tax

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3/ Washington Constitution, Art. I, § 11 provides that "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

funds to support the ministry in its constitution at the time of the founding of the state. Id. at 723 (quoting Ga. Const., Art. IV, §5 (1789), which provided that "'All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own.'").

IV. Cobb County's Sticker Requirement Violates the Georgia Constitution

The Georgia Constitution in force today prohibits any use of Government funds to promote religion.[4/] Article I, Section II, Paragraph VII of Georgia's Constitution states that "no money shall ever be taken from the

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4/ This provision can be traced back to the Constitutions of 1777, which disestablished the Anglican church, and asserted religious freedom. Ga. Const. Art. LVI (1777). At the Convention of 1789, the delegates inserted a clause into the constitution that "'exempted the people from paying a tax to the state for support of any church and declared all persons to be free from contributing to 'any religious profession but their own.'" Robert G. Gardner, A History of the Georgia Baptist Association 1784-1984 at 46 (2d ed. 1996).

At the 1877 Convention, the delegates adopted a provision that stated: "No money shall ever be taken from the public treasury, directly or indirectly in aid of any church, sect, or denomination of religionists, or of any sectarian institution." Ga. Const. Art. I, Sec. I, Par. XIV; Walter McElreath, A Treatise on the Constitution of Georgia, at 451 (1912). During the 1981 convention, which drafted the constitution ratified in 1983, the delegates made one small change to the provision: they simply extended the prohibition to the funding of "cults." Ga. Const., Sec. II, Par. VII.

public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or any sectarian institution" ("Financing Provision").

In general, the Georgia Constitution grants Georgia citizens rights and protections in addition to those provided by the United States Constitution. Fleming v. Zant, 386 S.E.2d 339, 342 (Ga. 1989) ("Federal constitutional standards represent the minimum, not the maximum, protection that this state must afford its citizens."); Creamer v. Georgia, 192 S.E.2d 350, 353 (Ga. 1972) ("Georgia has long granted more protection to its citizens than has the United States and that while the States cannot grant less protection it can grant more.").

The Financing Provision in particular "is intended to have a stronger application than the first amendment to the United States Constitution." Birdine v. Moreland, 579 F. Supp. 412, 417 (N.D. Ga. 1983) (citing 1960-61 Op. Att'y Gen. Ga. p. 349). The Financing Provision is more restrictive than the Establishment Clause of the United States Constitution because, the Georgia Constitution, like the Washington Constitution, contains an explicit prohibition of Government financial aid to religion. See 1999 Op. Att'y Gen. Ga. No. 1999-16 ("Because the Georgia Constitution explicitly prohibits any aid to religion, a prohibition that is only implicit in the First Amendment, it has been interpreted to be more restrictive.").

The Financing Provision of the Georgia Constitution protects "the citizens of [Georgia] against having money wrung from them by taxation taken or appropriated in aid" of any church, sect, or denomination of religionists or sectarian institution. Bennett v. City of La Grange, 112 S.E. 482, 484 (Ga. 1922).[5/]

Bennett held that a city could not contract with the Salvation Army – a sectarian institution – to take care of poor persons in the city because such action violated the Georgia Constitutional provision barring the use of the public treasury to aid sectarian institutions.[6/] Id. at 486. Bennett rejected

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5/ The equivalent provision of the Constitution of Georgia in 1922 was worded as follows: "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists or of any sectarian institutions." Ga. Const. Art. 1, § 1 ¶ 14 (1877).

The Bennett court found this provision was applicable to county and municipal treasuries, not just the Georgia state treasury. 112 S.E. at 485.

6/ The Bennett court noted that an institution is sectarian if its members "hold sentiments or doctrines different from those of other sects of people," . . . . "have a common sense of faith," and its members attempt to disseminate this common sense of faith. Id. at 486.

Specifically, the Bennett court found the Salvation Army is sectarian because "it preaches the gospel of Christ, and undertakes to disseminate Christian truth, in all probability the doctrines and tenets of some branch of Protestantism, in preference to Catholicism, the doctrines of the Jewish religion, Mohammedanism, and the various other religions of the world." Id.

arguments that the contract was permissible because the city was only paying the Salvation Army the actual amounts spent by the organization to care for the poor. Id. at 485. Instead, Bennett held that the contract gave "great advantage" and "substantial aid" to the Salvation Army because ministering to the poor is a "powerful instrumentality in the successful prosecution of the work of a sectarian institution." Id. at 486-87.

Three years later, in City of Savannah v. Richter, 127 S.E. 148, 149 (1925), the Georgia Supreme Court ruled that the Financing Provision prevented the City of Savannah from paying paving assessments levied against churches and sectarian institutions.

The Georgia Attorney General's office has issued numerous advisory opinions relying on these cases. A 2000 Attorney General opinion advised that the Financing Provision prohibits the Georgia State School Board from providing a grant or entering into a contract "for after-school care with a sectarian organization." 2000 Op. Att'y Gen. Ga. No. 2005-05 (Mar. 18, 2000); see also 1988 Op. Att'y Gen. Ga. 94 (county school system could not contract with a sectarian organization to provide after-school programs for students, even if the program was run in a non-sectarian manner, if the sectarian organization was paid with public funds). An organization nevertheless can be affiliated with a religious organization without being

considered sectarian for purposes of the Financing Provision, so long as it does not attempt to promote a religious viewpoint. See, e.g., 2000 Op. Att'y Gen. Ga. No. 2005-05 (Mar. 18, 2000) (Not "every organization that may have some affiliation with a religious group is included in the definition of 'sectarian.'").

The Georgia Attorney General has also recognized that the Financing Provision prohibits the Government from using public funds to express a religious message or to aid religion. For instance, a 1990 Attorney General Opinion stated that a planned holiday display in the Georgia Capital Rotunda, which would include a live nativity scene to be presented by the Georgia Building Authority, an organization that receives funds from state agencies, would violate the Financing Provision because the state would "directly or indirectly subsidize the sectarian aspects of the display." 1990 Op. Atty. Gen. Ga. 74 (Nov. 30, 1990).

In this case, the School District used public funds to aid the dissemination of an opinion of members of the community who oppose the teaching of evolution for religious reasons. Such aid violates the Financing Provision.

The District Court found that citizens largely motivated by religion pressured the School Board to dilute the teaching of evolution once it

became known that the School District was considering the adoption of new science textbooks and the strengthening of instruction on evolution. Selman, 2005 WL 83829, at *20. In reaction to partisan religious pressure, the School Board required the placement of Stickers on all textbooks that discuss evolution, stating that evolution is a theory that must be approached with an open mind, studied carefully, and critically considered. Id.

The District Court found as a fact that religious opponents of public school instruction on evolution have urged as a fallback position that evolution be described as a theory, as means of weakening instruction on this topic. Id. at *21. The District Court found that the language chosen for the Stickers singled out evolution, among all scientific theories, for critical consideration; and that the Stickers' reference to evolution as a theory, in its context as a Sticker on science texts, understates the status of evolution as the dominant scientific explanation in the scientific community for the origin of life. Id. at *22. The District Court's factual conclusions demonstrate that the Stickers aided religious opponents by disseminating their message intended to cast doubt on the validity of evolution as an explanation for the origin of life.

The School District used money from its general fund to purchase the Stickers. School District personnel paid with Government funds placed the

Stickers on the textbooks. Id. at *8. Such use of use of public funds to aid the promotion of religious ideas is a violation of the Georgia Constitution.

CONCLUSION

The District Court's ruling should be affirmed on the independent state ground that the Cobb County School District's policy requiring the Stickers on all textbooks which discuss evolution violates Article I, Section II, Paragraph VII of the Georgia Constitution.

Respectfully Submitted,

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Dated: June 9, 2005

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the type-volume limitations set forth in FRAP 32(a)(5) and FRAP 32(a)(6).

This Brief uses the type-font size of Times-New Roman 14 point-face containing not more than 10 ½ characters per inch.). The Brief contains 2,300 words.

David Alfred Webster

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing

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