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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LUTHER D. THOMAS, Clerk
By: *J. Pinckney*
Deputy Clerk

JEFFREY MICHAEL SELMAN,
Plaintiff,

v.

COBB COUNTY SCHOOL DISTRICT,
et al.,
Defendants.

CIVIL ACTION FILE NO.:
1:02-CV-2325-CC

AMICUS BRIEF OF PARENTS FOR TRUTH IN EDUCATION
INTEREST OF AMICI CURIAE

Amici are parents of students in the Cobb County School District and throughout Georgia who believe in the academic freedom of teachers, schools and school districts to employ inquiry-based approaches to science education. The textbook sticker ("the Sticker") at issue in this case functions, in part, as a pedagogical tool encouraging critical thinking. *Amici* believe schools should be permitted to employ such tools. Quality science education demands students learn about and critically analyze prevailing scientific theories.

ARGUMENT

**I. ADOPTION OF THE STICKER WAS WITHIN THE AUTHORITY
OF THE ELECTED LOCAL SCHOOL BOARD.**

A. States and local school boards enjoy broad discretion over education policy, particularly in the selection of curriculum.

1. Critical thinking about scientific issues is vital to an education to prepare children to be informed citizens who contribute to society.

The duties of citizenship require citizens to be informed on scientific matters. For example, voters must make informed decisions when the choice of candidates involves policy differences on matters such as the environment, public health, or personal medical decisions. Just as judges function as “gatekeepers” in deciding which scientific theories are admissible under the *Daubert* standard, jury members must be able examine admissible evidence for believability, reliability and persuasiveness in establishing material facts and reaching verdicts.¹ Thus, School should not be hampered in emphasizing critical thinking skills in science.

2. The Supreme Court has repeatedly recognized the importance of local school boards in operating schools.

Recognizing that “[t]he public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society,”² “[s]tates and local school boards are generally afforded considerable discretion in

¹ See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-595, 113 S.Ct. 2786 (1993).

² *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 278, 108 S.Ct. 562 (1988) (Brennan, J., dissenting).

operating public schools.”³ “[T]he education of the nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”⁴ The Supreme Court’s deference to school board decisions comes in recognition that boards are best-suited to make educational policy. “The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members.”⁵ The Court has cautioned intrusion on discretionary school decisions,⁶ noting courts are not equipped to deal with many school issues.⁷ Held an Eleventh Circuit panel: “a court must defer to reasonable educational decisions made by educators.”⁸

School boards have a duty to respect the right of parents to direct their children’s education. Landmark cases hold that parents “have a constitutional

³ *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S. Ct. 2573 (1987).

⁴ *Hazelwood*, 484 U.S. at 273.

⁵ *Wood v. Strickland*, 420 U.S. 308, 326, 95 S.Ct. 992 (1975).

⁶ *Id.*, (“It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.”)

⁷ *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42, 93 S.Ct. 1278 (1973); see also *Hendrick Hudson Dist. Bd. of Ed. V. Rowley*, 458 U.S. 176, 208, 102 S.Ct. 3034 (1982) (citing *Rodriguez*, at 42) (“We previously have cautioned that courts lack the “specialized knowledge and experience” necessary to resolve “persistent and difficult questions of educational policy.”).

⁸ *Searcey v. Harris*, 888 F.2d 1314, 1319 (11th Cir.1989).

liberty interest in directing the upbringing and education of their children.”⁹ Thus:

[p]arents have a vital interest in what their children are taught. Their representatives have in general prescribed a curriculum. There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society.¹⁰

Parents do not dictate particulars of school curriculum. Nonetheless:

“[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposefully be used to advance religious views that may conflict with the private beliefs of the student and his or her family.”¹¹

At the same time, in making curriculum decisions a school board must respect the student’s First Amendment right to receive information.¹²

A school board must also be sensitive to dangers of dogmatic instruction.

The Supreme Court has consistently held that “...the First Amendment...does not tolerate laws that cast a pall of orthodoxy over the classroom.”¹³ When school

⁹ Court Order, Feb. 25, 2004, at 3, (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571 (1925) (holding the state could not ban private or parochial schools and require parents to send their children to government-operated schools); and *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625 (1923) (holding state could not prohibit the teaching of foreign languages in private schools, as statute infringed on the liberty of parents and teachers to make educational decisions)).

¹⁰ *Palmer v. Board of Education*, 603 F.2d 1271, 1274 (7th Cir.1979), *cert. denied*, 444 U.S. 1026, 100 S.Ct. 689 (1980).

¹¹ *Aguillard*, at 584.

¹² Court Order, Feb 25, 2004, at 4 (citing *Pico*, at 867).

¹³ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 87 S.Ct. 675 (1967); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178 (1943): “[i]f there is any fixed star in our constitutional constellation, it is that no

boards discourage curricular dogmatism, courts should be reluctant to interfere.

B. The decision to adopt the Sticker is a pedagogical/curricular matter warranting deference.

Deference to “reasonable educational decisions made by educators”¹⁴ is reflected in the Supreme Court’s acknowledgment of the “weighty and delicate” task in making “particularized and supremely subjective choices among diverse curricula.”¹⁵ The Georgia Court of Appeals held that “[s]chool boards have broad discretion in determining curricula in their schools.”¹⁶ The Board exercised this discretion in adopting the Sticker. Policy considerations justified the adoption.

1. As curricular or pedagogical tools, stickers or disclaimers allow teachers to deal with controversial topics, avoiding censorship.

As Justice Brennan pointed out in *Hazelwood School District v. Kuhlmeier*, where a school chooses not to associate itself with a particular viewpoint, “[d]issociative means short of censorship are available to a school,” such as disclaimers or statements of policy.¹⁷ Simply adopting a sticker or insert while teaching students the necessary information is consistent with “the right to receive

official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

¹⁴ *Searcey*, 888 F.2d at 1319.

¹⁵ *Epperson v. State of Ark.*, 393 U.S. 97, 98, 104, 89 S.Ct. 266 (1968).

¹⁶ *Moeller v. Schrenko*, 251 Ga. App. 151, 154, 554 S.E.2d 198 (2001).

¹⁷ *Hazelwood*, 484 U.S. at 289 (Brennan, J., dissenting).

ideas” that Justice Brennan highlighted in *Board of Education v. Pico*.¹⁸

2. Disclaimers should be available to school boards as a means of insuring students will be fully informed, while assuring parents that schools create no “pall of orthodoxy over the classroom.”¹⁹

Textbook inserts may be a school board’s only practical means of fulfilling curricular objectives while reducing dangers of dogmatic presentations of controversial topics. Boards can rarely influence textbook content; when textbook content or presentation conflicts with legitimate parental expectations, it is not practical to assume a newer or a different textbook will address those concerns.

In addition to Justice Brennan’s suggestions in *Hazelwood*, the Fifth Circuit panel’s opinion in *Freiler v. Board of Education*, concerning a textbook disclaimer about evolution (“the Disclaimer”) is of importance here. There the Court said:

We limit our analysis to the precise language of the disclaimer and the context in which it was adopted. We do not confront the broader issue of whether the reading of any disclaimer before the teaching of evolution would amount to an unconstitutional establishment of religion.”²⁰

¹⁸ *Pico*, 457 U.S. 853, 866, 102 S.Ct. 2799 (1982). This right finds its source in “the role of the First Amendment . . . in affording the public access to discussion, debate and the dissemination of information and ideas” *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 98 S.Ct. 1407 (1978); in the fact that “the State may not consistently with the spirit of the First Amendment, contract the spectrum of available knowledge,” *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678 (1965); and in the recognition that the Court has “held in a variety of contexts that ‘the Constitution protects the right to receive information and ideas’” *Stanley v. Georgia*, 394 U.S. 557, 564 89 S.Ct. 1243 (1969).

¹⁹ *Keyishian*, 385 U.S. at 603.

²⁰ *Freiler*, 185 F.3d 337, 341 (5th Cir. 1999).

This narrow holding was based upon the crucial fact that “[t]he disclaimer, taken as a whole encourages students to read and meditate upon religion in general and the ‘Biblical version of Creation’ in particular.”²¹ While the *Freiler* panel found the religious nature of the Disclaimer dispositive and chose not to address the “broader issue” of textbook inserts concerning evolution, the Supreme Court’s opinion in *Edwards v. Aguillard* is relevant to the broader issue insofar as inserts address “scientific critiques of prevailing scientific theories.”²² If school boards can require the presentation of scientific criticisms of scientific theories, then use of an insert as an educational tool to reach this goal is certainly permissible.

C. The Sticker’s reference to evolution as a theory and not a fact is reasonable in light of case law and current scientific understanding.

1. Case law recognizes evolution as a scientific theory.

In *Edwards*, the Supreme Court refers to evolution as a “theory.” Justice Powell, concurring, cites a dictionary defining “evolution” as “the theory that the various types of animals and plants have their origin in other preexisting types, the distinguishable differences being due to modifications in successive generations.”²³

²¹ *Freiler*, 185 F.3d at 346.

²² See *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573 (1987).

²³ See *Edwards*, 482 U.S. at 599 (Powell and O’Connor, J.J., concurring) (citing Webster’s Third New International Dictionary 532 (unabridged 1981); see also “Evolution,” Webster’s Third New International Dictionary, Unabridged (2002). (Available at <http://unabridged.merriam-webster.com>) (Jul. 7, 2004).

This dictionary defines a “fact” as “physical actuality or practical experience as distinguished from imagination, speculation, or theory.”²⁴ “Theory” is defined as a “working *hypothesis* given probability by experimental evidence or by factual or conceptual analysis but not conclusively established or accepted as a *law*.”²⁵

Additional language in *Edwards* supports referring to evolution as a theory. The Court stated: “We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught.”²⁶ The reference to evolution as a “theory” and the recognition of the importance of scientific critiques of scientific theories contradicts Plaintiff’s insistence that evolution is a fact beyond examination. The Court’s decision in *Epperson v. Arkansas* also refers to evolution as a scientific theory.²⁷ Lower court cases call evolution a theory.²⁸ The

²⁴ “Fact.” *Id.*

²⁵ “Theory.” *Id.*

²⁶ *Edwards*, 482 U.S. at 593.

²⁷ See, e.g., *Epperson*, 393 U.S. 97, 98, 89 S.Ct. 266 (1968) (discussing evolution as “the theory that man evolved from other species of life”; the First Amendment’s prohibition of laws that prohibit “the teaching of a scientific theory or doctrine”; Arkansas’s anti-evolution statute’s prohibition of the teaching of “the theory that man evolved from other species of life”; Arkansas’s anti-evolution statute as preventing teachers from “discussing the theory of evolution”; and the anti-evolution statute in the Scopes trial as seeking to suppress “the teaching of a theory...”); *Id.* at 107, 109.

²⁸ *Peloza v. Capistrano Unified School District*, 37 F.3d 517, 521-522 (9th Cir.1994) (quoting the district court, approvingly):

Evolution is a scientific theory based on the gathering and studying of data, and modification of new data. It is an established scientific theory which is

Sticker's reference to evolution as a "theory" and not a "fact" also keeps with the Georgia Court of Appeals understanding of scientific theories in *Moeller v. Schrenko*.²⁹ There the Court held "[t]he essence of any scientific hypothesis is that the proposed idea is subject to test—that the idea could, in principle at least, be proven false,"³⁰ seeing no Constitutional infirmity in the textbook's "offending passage," which "makes it clear that no definitive answer exists with regard to the origin of life on earth."³¹ The Sticker reflects a reality: theories are subject to falsification. Were the Board to treat evolution as a fact, it would be open to charges that it prevented scientific critiques of a scientific theory, prevented critical thinking, and cast a pall of orthodoxy over the classroom.

2. Other Sources and Scientific Authorities Refer to Evolution as a "Theory" and not as a "Fact."

The *Life Science Dictionary* distinguishes "theory" from fact, stating that "[t]heories are more certain than hypotheses, but *less certain* than laws."³² A widely-used biology textbook asserts that "[g]ood scientists do not allow theories

used as the basis for many areas of science. As scientific methods advance and become more accurate, the scientific community will revise the accepted theory to a more accurate explanation of life's origins.

²⁹ 251 Ga. App. 151, 554 S.E.2d 198 (2001).

³⁰ *Moeller*, 251 Ga. App. at 152.

³¹ *Moeller*, 251 Ga. App. at 153.

³² "Theory," *BioTech's Life Science Dictionary*. Lucy A. Snyder, 2003. (<http://biotech.icmb.utexas.edu/search/dict-search.phtml?title=theory>) (May 12, 2004) (emphasis added).

to become dogma.”³³ Another high-school biology textbook points out that:

A useful theory may become the dominant view among the majority of scientists, but no theory is considered absolute truth. Scientists analyze, review, and critique the strengths and weaknesses of theories. As new evidence is uncovered, a theory may be revised or replaced by a more useful explanation... Science is characterized by both continuity and change.³⁴

While plaintiff accuses the Board of singling out evolution for differential treatment, it is Plaintiff who insists that evolution (unlike other scientific theories) is a “fact,” and that no scientist in the fields of biology or chemistry dispute evolution. The Sticker answers the real question of whether, in the Board’s eyes, evolution is subject to critical analysis and modification. It conveys to parents and the community that students *will* be taught the nature of science, scientific theories, critical thinking, and the theory of evolution, but not in a dogmatic manner.

D. The Sticker’s placement is reasonable in light of the growing scientific controversy over Darwin’s theory.

1. A growing number of scientists now question key aspects of the theories of chemical and biological evolution on scientific grounds.

A number of scientists who accept key aspects of Darwin’s theory of evolution disagree about the mechanism by which it may have occurred. These scientists have raised the possibility that none of the explanations now offered for

³³ Campbell, Neil A., Reece, Jane B., & Mitchell, Lawrence G., *Biology*, 5th ed., Benjamin Cummings (1999), at 426.

³⁴ Kenneth R. Miller & Joseph Levine, *Biology*, Pearson Prentice Hall (2004) at 15.

the mechanism of evolution will prove accurate. The Sticker is a reminder of the need for further research, serving an appropriate educational purpose.

Peer-reviewed science literature discusses many questions and criticisms of aspects of Darwin's theory, including: whether natural selection acting on random mutations and variations sufficiently explains new genetic information, new organs, new complex body plans, and responses to environmental stimuli;³⁵ how the pattern in the fossil record does not conform to neo-Darwinian expectations about life's history;³⁶ and how many homologous structures come from nonhomologous genes while nonhomologous structures come from similar genes.³⁷ The literature also discusses problems with chemical evolutionary scenarios for the origin of life.³⁸

³⁵ See, e.g., Stephen C. Meyer, "The Origin of Biological Information and the Higher Taxonomic Categories," 117 *Proceedings of the Biological Society of Washington* 213 (2004); Scott Gilbert et al., "Resynthesizing Evolutionary and Developmental Biology," 173 *Developmental Biology* 357, 361 (1996); James A. Shapiro, "Genome Organization, Natural Genetic Engineering and Adaptive Mutation," 13 *Trends in Genetics* 98, 98-104 (1997); Richard von Sternberg, "Genome Self-Modification and Cellular Control of Genome Reorganization," 89 *Rivista Di Biologia/Biology Forum* 423, 424-53 (1996).

³⁶ See, e.g., Jeffrey H. Schwartz, "Homeobox Genes, Fossils, and the Origins of Species," 257 *Anatomical Rec. [New Anat.]* 15, 15-31 (1999).

³⁷ See John Gerhart & Marc Kirschner, *Cells, Embryos, and Evolution* 125-46 (1997); John A. Davison, "Semi-Meiosis As an Evolutionary Mechanism," 111 *J. Theoretical Biology* 725, 725-35 (1984).

³⁸ Simon Conway Morris, *Life's Solution: Inevitable Humans in a Lonely Universe* (2003): 22-68; Leslie E. Orgel, "The Origin of Life—A Review of Facts and

Some scientists who support Darwinian evolution have noted that many textbook presentations of evidence for the theory are inadequate or erroneous.

The First Amendment can hardly be understood to preclude a school board from encouraging students to study these issues or learn about the scientific controversy.

Finally, students have a right to be informed that a significant number of scientists have published works calling into question all or several key aspects of Darwinian theory. For instance, more than 300 biologists, biochemists, and other doctoral scientists have signed a statement expressing their skepticism of a central tenet of Darwin's theory of evolution on scientific grounds, which reads: "We are skeptical of claims for the ability of random mutation and natural selection to account for the complexity of life. Careful examination of the evidence for Darwinian theory should be encouraged."³⁹ These dissenting scientists include professors and researchers at academic institutions such as Yale, Princeton, MIT, the Smithsonian, University of California at Berkeley, and the University of Texas. This call for examination of scientific evidence for Darwin's theory (apart from

Speculations," *Trends in Biochemical Science* 23 (1998): 491-495; Robert Shapiro, "Prebiotic Ribose Synthesis: A Critical Analysis," 18 *Origins of Life & Evolution Biosphere* 71, 71-85 (1988).

³⁹ Press Release: "Doubts Over Evolution Mount with Over 300 Scientists Expressing Skepticism with Central Tenet of Darwin's theory," Discovery Institute, Seattle WA (April, 2004). (Available at <http://www.discovery.org/scripts/viewDB/index.php?command=view&id=2114>) (August 31, 2004).

consideration of any alternative scientific theory, such as intelligent design,⁴⁰ or from any religious concept such as creationism), supports the Board's decision.

2. Precedent acknowledges the scientific controversy over evolution.

The Supreme Court held that "[n]o field of education is so thoroughly comprehended by man that new discoveries cannot yet be made,"⁴¹ and prior court rulings have acknowledged the growing scientific controversy surrounding evolution. In *Edwards*, the Court was clear that scientific theories could be subjected to critiques having a scientific basis. While striking down a state statute mandating the teaching of creationism, the Court stated: "We do not imply that a

⁴⁰ The scientific theory of intelligent design holds that certain aspects of the universe and of living things cannot best be explained by purely materialistic processes, such as natural selection acting on random mutations, but only by an intelligent cause. Intelligent design is an emerging scientific theory, and an alternative to part of Darwin's theory of evolution, but not necessarily in conflict with many tenets of evolutionary theory. Although a minority scientific view, it is discussed in science and philosophy of science journals as well as peer-reviewed books published by academic publishers such as Cambridge University Press and Michigan State University Press. See Michael Behe, *Darwin's Black Box: The Biochemical Challenge to Evolution* (1996); William Dembski, *No Free Lunch: Why Specified Complexity Cannot Be Purchased without Intelligence* (2002); John Angus Campbell and Stephen C. Meyer, eds., *Darwinism, Design, and Public Education* (2003); William A. Dembski and Michael Ruse, eds., *Debating Design: From Darwin to DNA* (2004); William Dembski, *The Design Inference: Eliminating Chance through Small Probabilities* (1998); Stephen C. Meyer, "The Origin of Biological Information and the Higher Taxonomic Categories," *passim.*, at 213-219.

Amici maintain the Sticker does *not* require students to contemplate any alternative scientific theory such as intelligent design.

⁴¹ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 77, S.Ct. 1203 (1957).

legislature could never require that scientific critiques of prevailing scientific theories be taught.”⁴² Thus, “...following *Edwards* [a teacher] certainly has the academic freedom to present scientific weaknesses of Darwinism to his students without fear of running afoul of the Establishment Clause.”⁴³ Under *Edwards*’ the Constitution does *not* insulate evolution, nor does it censor scientific critiques.

3. This Court’s previous Order acknowledges that scientists dispute the theory of evolution.

In order for Plaintiffs’ claim to succeed, Plaintiffs must establish either that there is absolutely no controversy over evolution, or that, if there is controversy, it is somehow illegal to allow students to be informed about it. Such a finding would not only be preposterous but also conflict with this Court’s previous order. As this Court noted, “the Sticker simply informs students that evolution is a theory, not a fact, and that it should not be taken at face value,” and that “Plaintiff Selman has acknowledged that even other scientists dispute the theory of evolution.”⁴⁴

E. Darwin’s theory of evolution can be subjected to scientific criticism, apart from any consideration of alternative scientific theories.

⁴² *Edwards*, 482 U.S. at 594.

⁴³ DeWolf, David K., Meyer, Stephen C., and DeForrest, Mark Edward, “Teaching the Origins Controversy: Science, Or Religion, Or Speech?”, 2000 *Utah L. Rev.* 1, 108; reprinted in Meyer, Stephen C. and Campbell, John Angus, eds., *Darwinism, Design and Public Education*, Michigan State University Press: East Lansing, MI (2002), pgs 59-132.

⁴⁴ Court Order, Feb. 25, 2004, at 16.

In *Edwards*, the Supreme Court implicitly recognized that the ability to teach scientific critiques of scientific theories⁴⁵ does not require consideration of alternative theories of origins. The Sticker, on its face, calls for student awareness of scientific critiques of evolution; it does not address alternative theories.

As noted, a critical analysis of evolution can be analogized to a judge's evaluation of whether, under *Daubert*, scientific evidence is admissible.⁴⁶ The test of admissibility is not whether there is a variety of alternative theories with regard to a factual assertion. Instead, the proponent of scientific evidence need only establish a sufficient basis for relying upon the scientific opinion or theory being offered. Likewise, a student taught to critically analyze the scientific evidence supporting the theory can simply inquire as to the sufficiency of the evidence supporting that particular theory, apart from consideration of alternative theories.

G. Evolutionary theory can be subjected to scientific criticism, apart from any constitutionally impermissible consideration of religion.

This Court has recognized that “encouraging consideration of alternatives to evolutionary theory does not necessarily entail promotion of religious beliefs,”⁴⁷

⁴⁵ *Edwards*, 482 U.S. at 593: “[w]e do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught.”

⁴⁶ See *Daubert*, at fn 3, *supra*.

⁴⁷ Court Order, Feb. 25, 2004, at 16.

and that there is a secular purpose in encouraging critical thinking.⁴⁸ As noted above, the Supreme Court likewise recognized in *Edwards* that a school district can require “scientific critiques of prevailing scientific theories be taught,”⁴⁹ so long as the primary purpose is not to advocate a particular religious viewpoint. It follows that if consideration of alternative theories does not entail promotion of religion, the Sticker’s encouragement to students critically to analyze evolution by learning scientific criticisms of the theory is constitutionally permissible.

H. The Sticker’s pedagogical approach to evolution coincides with an important and growing inquiry-based approach to science education.

There is a growing trend towards inquiry-based science education, in which students weigh the scientific evidence for and against all hypotheses and theories, including evolution. The Constitution gives states and school boards discretion to incorporate such approaches as good educational pedagogy.

The Ohio Board of Education adopted a Life Sciences benchmark stating that students should “[d]escribe how scientists continue to investigate and critically analyze aspects of evolutionary theory.”⁵⁰ The Minnesota legislature approved science standards with a benchmark reading: “The student will be able to explain

⁴⁸ *Id.*, at 15.

⁴⁹ *Edwards*, 482 U.S. at 593.

⁵⁰ OH Standards, Life Sciences, Benchmark H. December 10, 2002. (Available: http://www.ode.state.oh.us/academic_content_standards/ScienceContentStd/RTF/e_Science_Benchmarks_by_Standard.rtf) (Aug. 31, 2004).

how scientific and technological innovations as well as new evidence can challenge portions of or entire accepted theories and models including... [the] theory of evolution....”⁵¹ Other states have followed a similar course.⁵²

Also, legislative history of the No Child Left Behind Act of 2001 (NCLB) includes Congress’ endorsement of an inquiry-based approach to controversial scientific topics such as evolution. Congress endorsed an inquiry-based approach in the authoritative conference committee report language accompanying NCLB, stating “where topics are taught that may generate controversy (such as biological evolution), the curriculum should help students to understand the full range of scientific views that exist...”⁵³ This guidance to states seeking compliance with

⁵¹ MN Standards, History and Nature of Science, Grades 9-12, Adopted 2004. (Available: <http://education.state.mn.us/content/072583.pdf>) (Aug. 31, 2004).

⁵² Students will “critically analyze the data and observations supporting the conclusion that the species living on Earth today are related by descent from the ancestral one-celled organisms.” New Mexico Science Standards. (Available: http://164.64.166.11/cilt/downloads/science/science_standards.doc) (Aug. 31, 2004); “Describe how scientists continue to investigate and critically analyze aspects of theories.” Arizona Science Standards, Strand 2: History and Nature of Science, Concept 2: Nature of Scientific Knowledge: “Understand how scientists evaluate and extend scientific knowledge,” High School, PO 4. (Available: <http://www.ade.state.az.us/standards/science/downloads/strand2.doc>)(Nov. 1, 2004).

⁵³ P.L. 107-110, No Child Left Behind Act of 2001 House Conference Report No. 107-334, pg. 703, December 13, 2001.

The pertinent section of the NCLB Conference Committee Report reads in full:

NCLB requirements received broad bipartisan support in the Congress.⁵⁴

II. THE STICKER PASSES MUSTER UNDER THE *LEMON* TEST.

The Sticker is consistent with the three-pronged *Lemon* test followed by the Eleventh Circuit in resolving Establishment Clause questions.⁵⁵ Since this Court held the Sticker has a secular purpose, the focus will be on the second two prongs.

A. The primary effect of the Sticker is to enhance students' understanding of evolution by encouraging critical thinking skills.

The Sticker's primary effect, based upon its plain meaning, is to encourage students to study evolution and learn even more about it by critically analyzing the evidence supporting it, just as many scientists continue critically to analyze it.

1. The Sticker is facially neutral.

The primary effect of encouraging critical thinking skills on a scientifically controversial topic is religiously neutral. The Sticker encourages students to learn

The Conferees recognize that a quality science education should prepare students to distinguish the data and testable theories of science from religious or philosophical claims that are made in the name of science. Where topics are taught that may generate controversy (such as biological evolution), the curriculum should help students to understand the full range of scientific views that exist, why such topics may generate controversy, and how scientific discoveries can profoundly affect society. *Id.*

⁵⁴ See Statement by Sen. Ted Kennedy, 147 Cong. Rec. S6150 (daily ed. June 13, 2001); statement by Sen. Rick Santorum, 147 Cong. Rec. S13365-07, S13378.

⁵⁵ See *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971).

about the theory of evolution presented in their textbooks and to think critically about the evidence supporting the theory, in order to better understand the theory and the surrounding controversy. As this Court's prior order acknowledged,

[t]he Sticker in this case does not, on its face, advance or endorse a religious belief or practice... Plaintiff Selman has acknowledged that even other scientists dispute the theory of evolution. Therefore, encouraging consideration of alternatives to evolutionary theory does not necessarily entail promotion of religious beliefs.⁵⁶

Unlike the Disclaimer in *Freiler*, the Sticker does not discuss a particular religious viewpoint.⁵⁷ Previous orders by this Court point out that students can learn about alternatives to evolution in a constitutional manner. In one Order, this Court made reference to a passage from *Moeller*, where that Georgia Court of Appeals stated:

[t]he only religious references which are made inform the students that creationism is one commonly given explanation for the origin of life. This reference in no way advances or endorses a religious belief or practice and, as such, use of the textbook does not violate the second prong of the *Lemon* test.⁵⁸

According to this Court's previous order, "This decision is persuasive inasmuch as the Sticker here, according to Defendants, serves a similar purpose of informing students that there are alternative theories regarding the origin of life."⁵⁹ This Court also ruled that "encouraging consideration of alternatives to evolutionary

⁵⁶ *Id.* at 16.

⁵⁷ This Court previously acknowledged this distinction. *Id.* at 17.

⁵⁸ *Moeller*, 251 Ga. App. at 154.

⁵⁹ Court Order, Feb. 25, 2004, at 16.

theory does not necessarily entail promotion of religious beliefs.”⁶⁰

2. The Sticker was adopted in a religiously neutral context.

The Board adopted the Sticker in a religiously neutral context. This Court has recognized that the Board’s legal counsel drafted the Sticker with Constitutional precedents clearly in mind.⁶¹ As stated above, this Court held that the Sticker has a valid secular purpose. These two facts alone make the primary effect of the Sticker adopted by the Board different than the Disclaimer adopted in *Freiler*. In that case, the Disclaimer was held to have been adopted for a sham, religious purpose and not a secular one, making it much more likely to have a primary effect of establishing a particular religious viewpoint the Sticker, adopted by a Board that sought to comply with the law with a clear, secular purpose.

The context for the Sticker’s adoption is even more favorable in light of the Board’s revised Policy IDBD, theories of origin. It reads:

The purpose of this policy is to foster critical thinking among students, to allow academic freedom consistent with legal requirements, to promote tolerance and acceptance of diversity of opinion, and to ensure a posture of neutrality toward religion. It is the intent of the...Board...that this policy not be interpreted to restrict the teaching of evolution, to promote or require the teaching of creationism, or to discriminate against, or on behalf of, a

⁶⁰ Court Order, August 9, 2004, at 16.

⁶¹ Court Order, March 31, 2004, at 3.

particular set of religious beliefs, religion in general, or non-religion.⁶²

After adopting the policy, a revised Regulation IDBD was implemented, stating: “teachers are expected to set limits on discretion of theories of origin in order to respectfully focus discussion on scientific subject matter” and that teachers “should maintain a posture of neutrality toward religion.”⁶³ Only a disregard of the policy and regulations would likely have a primary effect of advancing a religious viewpoint. Plaintiffs cannot establish that teachers will disregard such directives.

Whereas the panel in *Freiler* was forced to rely upon the scant legislative history to show that the reference to the Bible was the basic message of the Disclaimer,⁶⁴ here the Board made an authoritative policy pronouncement concerning this issue and supplemented that policy with regulations to insure religious neutrality in pursuit of critical thinking on a controversial scientific topic.

3. Evolution still has a preferred position in the curriculum, as the Sticker does not endorse religion.

The Sticker’s plain meaning and the context in which it is displayed, has the primary effect of encouraging students to think critically about evolution—the only theory taught in the biology textbooks approved by the Board. As such,

⁶² Johnston Dep. at 24:14-25, Ex. 1; Deposition of Teresa Plenge at 17:13-23; 33:9-17; 42:3-12; 43:4-7; Johnson Aff. ¶4; Gray Aff. ¶4; Searcy Aff. ¶4; Order, pg. 3-4, March 31, 2004.

⁶³ Johnson Dep. At 25:7-12, Ex. 2, Court’s Order, March 31, 2004, at 3.

⁶⁴ *Freiler*, 185 F.3d at 346.

evolutionary theory occupies a preferred place in the School District's curriculum. The Sticker was adopted in light of the increased emphasis upon evolution in the curriculum. This Court acknowledged the Sticker's secular purpose and explicit message for students to think critically. The Sticker's religiously neutral language and effect (especially in light of the Board's policy and implementing regulations), communicate to a neutral observer that the government is not endorsing any particular religious viewpoint, nor is it endorsing religion or non-religion.

The Sticker's surrounding context answers any questions of impermissible endorsement. As noted, a scientific controversy surrounds the theory of evolution. Furthermore, the Board policy and regulations concerning evolution confine classroom discussion of evolution to scientific evidence. Plaintiff's rationale, to the contrary, all but requires a finding that there is no controversy over evolution and that teachers will disregard the words of the Sticker, as well as Board policy and regulations, inserting religious matters into science class. However, the teachers, and administrators can be expected to exercise sufficient control over classroom discussion to steer any conversation touching upon religious matters back to science matters. If the Sticker and its context can be construed to endorse a message, it is this: students shall be fully instructed in the theory of evolution and shall learn to think critically about the evidence that supports the theory.

4. Any indirect benefit to religion from the Sticker is inconsequential.

The primary effect of the Sticker (in context) is to strengthen students' education by encouraging critical thinking about evolutionary theory. Any indirect benefit to religion would fall below a threshold of constitutional concern. While it may be theoretically possible for the Sticker to indirectly benefit religions whose teachings disagree with the theory, such is not enough to violate the Constitution. Case law holds that a government act does not violate the Constitution just because

it happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation.⁶⁵

Applied to the this case, the fact that teaching evolution less dogmatically may be consistent with views of certain religious groups does not mean the policy is unconstitutional, if it was adopted by the Board on secular grounds. To hold otherwise would jeopardize the constitutionality countless government actions.

Teaching evolution itself would likely run afoul of the *Lemon* test under this

⁶⁵ *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); see also *Harris v. McRae*, 448 U.S. 297, 319 (1980) ("it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'"); *Edwards*, 482 U.S. at 605: ("A decision respecting the subject matter to be taught in public schools does not violate the Establishment Clause simply because the material to be taught 'happens to coincide or harmonize with the tenets of some or all religions.'") (Powell, J, concurring).

interpretation, since teaching evolution may indirectly benefit groups supporting evolution who use the theory to justify their own religious or metaphysical beliefs.

Many prominent defenders of evolutionary theory use the theory to advance religious or anti-religious claims.⁶⁶ For example, Eugenie Scott, director of the nation's top lobbying group promoting evolution, is a signer of the Humanist Manifesto III, which states that "humans are... the result of unguided evolutionary change," celebrating "the inevitability and finality of death."⁶⁷ Some defenders of evolution use the theory to promote a better understanding of God.⁶⁸ If the Sticker is unconstitutional because it may incidentally benefit those who criticize evolution for religious reasons, teaching evolution is unconstitutional for the same reason: it

⁶⁶ For discussion of the use of evolution to support religious views, see Jeffrey F. Addicott, "Storm Clouds on the Horizon of Darwinism: Teaching the Anthropic Principle and Intelligent Design in the Public Schools," 63 *Ohio State Law Journal* 1507 (2002); Nicholas Miller, "Life, the Universe and Everything Constitutional: Origins in the Public Schools," *Journal of Church and State*, Summer 2001.

⁶⁷ "Humanism and Its Aspirations: Humanist Manifesto III," (Washington, D.C.: American Humanist Association), <http://www.americanhumanist.org/3/HumandItsAspirations.htm>. As another example, Steven Schaeferman, of the pro-evolution group Texas Citizens for Science, argues evolution proves "the universe and life is devoid of immanent meaning and purpose." Steven Schaeferman, "The Challenge of the Fossil Record," [http:// www.freeinquiry.com/challenge.html](http://www.freeinquiry.com/challenge.html).

⁶⁸ A major pro-evolution group's "Faith Network Director" spotlights a curriculum for church use that claims "Darwin's theory of evolution... has, for those open to the possibilities, expanded our notions of God." See Phina Borgeson, "Introduction to the Congregational Study Guide for *Evolution*," http://www.ncseweb.org/resources/articles/8888_csg-int.pdf. (Nov. 1, 2004).

incidentally aids those who use evolution to promote their own religion of atheism, humanism, or otherwise. This would be an untenable result. Just as it is proper for a school board to adopt curriculum involving neutral instruction in the evidence for evolution in spite of any indirect benefit to adherents of certain beliefs, so it is within a board's discretion to encourage neutral instruction, encouraging students to think critically about such evidence. The Sticker leaves religion and non-religion on equal footing by encouraging critical thinking, and the Board's policy and regulations make clear that teachers must do so without reference to religion.

B. The Sticker does *not* create excessive church and state entanglement.

For reasons stated in the above sections on the Sticker's secular purpose and primary effect, the Sticker is devoid of any concerns of excessive entanglement. The School District is not involved in matters of church affairs, nor would any churches be involving themselves in School District affairs.⁶⁹ The bare theoretical possibility of entanglement cannot reasonably be expected to become excessive.

CONCLUSION


For the foregoing reasons, amici curiae urge the Court to find in favor of the Defendants, Cobb County School District.

⁶⁹ See *Lynch v. Donnelly*, 465 U.S. 668, 689, 104 S.Ct. 1355 (1984) (O'Connor, J., concurring) ("The entanglement prong of the *Lemon* test is properly limited to institutional entanglement.")


Respectfully submitted this 5th day of November, 2004.

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This brief has been prepared in Times New Roman (14 pt.) font, which has been approved by the Local Rules of this Court.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

JEFFREY MICHAEL SELMAN,

Plaintiff,

v.

COBB COUNTY SCHOOL DISTRICT,
et al.,

Defendants.

CIVIL ACTION FILE NO.:
1:02-CV-2325-CC


CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon all parties and the following individuals by first class mail:

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