

**IN UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**DOCKET NO. 05-10341-I**

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**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.**

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**BRIEF OF THE APPELLANTS**

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

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

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

**: DOCKET NO. 05-10341-I**

Counsel for Appellant Cobb County School District and Cobb County Board of Education certify pursuant to F.R.A.P. 26.1 that the following parties, firms, partnerships, counsel, and judges have an interest in the outcome of this case:

Joseph Redden, Superintendent

**COBB COUNTY SCHOOL DISTRICT, ET AL.**

**v.**

**DOCKET NO. 05-10341-I**

**JEFFREY MICHAEL SELMAN, ET AL.**

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**COBB COUNTY SCHOOL DISTRICT, ET AL.**

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Honorable J. Foy Guin, Jr.

**COBB COUNTY SCHOOL DISTRICT, ET AL.**

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**JEFFREY MICHAEL SELMAN, ET AL.**

Kansas Citizens for Science

Michigan Citizens for Science

Nebraska Religious Coalition for Science Education

New Mexico Academy of Science

New Mexico Coalition for Excellence in Science and Math Education

New Mexicans for Science and Reason

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**Trial Judge:**

**Honorable Clarence Cooper**

## STATEMENT REGARDING ORAL ARGUMENT

Appellants believe that oral argument may assist the Court in its analysis of this Establishment Clause challenge, particularly with regard to the issue of the effect of the statement under the Lemon test. While the facts in this case are unique, the Court's decision in this appeal will have a broad significance with regard to local school district control of curriculum matters.

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## **STATEMENT OF JURISDICTION**

Jurisdiction over this appeal is conferred upon this Court by 28 U.S.C. § 1292(a). That statute gives this Court jurisdiction of appeals from orders granting injunctions.

## STATEMENT OF THE ISSUES

1. Whether a statement devoid of religious content which was issued by a school district as part of an improved, exclusively scientific, evolution curriculum violates the Establishment Clause when adopted for secular purposes.
2. Whether the trial court erred in refusing to apply the standards set forth in Adler v. Duval County School Board to a facial challenge under the Establishment Clause of a facially-neutral statement.
3. Whether the statement at issue violates the Georgia Constitution.

## **STATEMENT OF THE CASE**

### **I. COURSE OF PROCEEDINGS IN THE COURT BELOW**

Plaintiff Jeffrey Selman filed this action on August 21, 2002, alleging that a sticker regarding evolution instruction adopted by Cobb County Board of Education as part of its most recent textbook adoption and inserted into science texts violated the Establishment Clause of the First Amendment of the United States and Georgia Constitutions on its face. (R1-1). The Sticker said:

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. (R4-Def. Exh. 4).

Plaintiff later was given leave to amend the Complaint on the same claims by adding as Plaintiffs Debra Anne Power, Kathleen Chapman, Jeff Silver, Paul Mason and Terry Jackson. (R1-9).

After Defendants timely answered the Complaint, two parents of students attending Cobb County Schools, Larry Taylor and Allen Hardage, filed a Motion to Intervene. (R1-7; R1-8). The basis for the Motion to Intervene was that Defendants had not asserted the rights of students to be informed of alternative theories of origin. (Id.). The Court denied the Motion to Intervene, (R2-44), reasoning that the



proposed intervenors sought to assert defenses based on classroom instruction, which was beyond the narrow scope of the litigation. (R2-44-5-6).

After discovery was conducted, Defendants filed a Motion for Summary Judgment on all claims on July 21, 2003. (R1-22). Plaintiffs responded, relying in large part on the affidavits of several scientists asserting that the actions of Cobb County School District were consistent with a strategy of fundamentalist Christians in general to oppose evolution instruction. (R1-24; R2-25). Defendants moved to strike those affidavits. (R2-28).

The Court denied the Motion for Summary Judgment in its entirety, finding that the Sticker at issue potentially violated the effect and entanglement prongs of the Lemon test. (R2-45). The Court also denied the Motion to Strike, while concluding that the affidavits proffered by Plaintiffs should not be considered, since they were not based on admissible evidence. Id. The Court then denied the Defendants' Motion for Reconsideration or Certification under 28 U.S.C. 1292. (R2-53).

Defendants timely filed a Trial Brief focusing on the issue of whether Plaintiffs' claims should be considered a facial challenge analyzed under the standard set forth in United States v. Salerno. (R2-58). The Court entered an Order finding that, while Plaintiffs had only mounted a facial challenge to the Sticker,

evidence regarding classroom instruction might be relevant to the analysis under Lemon. (R3-72).

After a bench trial held November 2004, the Court entered an Order finding that the Sticker on its face, violated the effect and entanglement prongs under Lemon, as well as the Georgia Constitution, and requiring Defendants to immediately remove the Sticker from all textbooks. (R4-98). In part, the Court found the following:

- The Court concluded that the following language violated the Establishment Clause of the U.S. Constitution on its face because it endorsed religion: **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.** (R4-98-8, 42).
- Based upon the “highly credible” testimony of school board members, the Court found that the Sticker had at least two legitimate secular purposes. (R4-98-24, 27). “First, the Sticker fosters critical thinking by encouraging students to learn about evolution and to make their own assessment regarding its merit. Second, by presenting evolution in a manner that is not unnecessarily hostile, the Sticker reduces offense to students and parents whose beliefs may conflict with the teaching of evolution.” (R4-98-30)
- “[T]he School Board adopted a sticker that is not openly religious but served to put students, parents, and teachers on notice that evolution would be taught in a manner that is inclusive rather than exclusive. The school board sought to show consideration for their constituents’

personal beliefs regarding the origin of life while still maintaining a posture of neutrality towards religion.” (R4-98-28).

The Court denied a Motion by Defendants to Stay Enforcement of the Injunction. (R5-112). Defendants filed a Notice of Appeal within 30 days after the Order granting the injunction was entered (R5-118), and filed a Second Notice of Appeal after Judgment was entered.

## **II. STATEMENT OF FACTS**

### **A. TEXTBOOK COMMITTEE QUESTIONS EVOLUTION INSTRUCTION.**

In the process of reviewing textbooks for possible inclusion in the curriculum in the fall of 2001, Cobb County School District’s (“CCSD”) textbook adoption committee (“Committee”) voiced concerns about a selection of texts which included information regarding theories of origin. (R7-255-256).

Specifically, the Committee believed that certain texts under consideration would violate CCSD’s policy regarding evolution instruction. (Id.) CCSD’s official Policy with regard to evolution instruction, which had been in place since 1995, stated that “some scientific accounts of the origin of human species as taught in public schools are inconsistent with the family teaching of a significant number of Cobb County citizens.” (R6-210; R4-Def. Exh. 1). CCSD’s Regulation regarding evolution instruction stated that curriculum should be organized to avoid compelling any student to study the subject of origin of species, prohibited

instruction on origin of species in elementary and middle school, and allowed for elective classes on theories of origins, including creation theory. (R6-211; R4-Def. Exh. 2). In practice, evolution instruction had been curtailed at least partially because teachers were afraid it might conflict with students' religious beliefs. (R6-210). In some instances, textbook pages with evolution instruction were removed from textbooks. (R6-211). Prior to reaching a decision on which texts would be recommended, the administration decided to revise the Policy and Regulation regarding evolution to remove the restrictions on instruction and to strengthen the curriculum. (R6-255-259; R6-213-214).

#### B. TEXTBOOK RECOMMENDATIONS.

While the Policy and Regulation revisions were under consideration, the Committee recommended texts to the Board of Education, including the primary high school biology text written by Kenneth Miller and Joseph Levine (R4-Def. Exh.4; Kenneth Miller & Joseph Levine, Biology (Prentice Hall, 2002)). In the Miller textbook, one unit out of ten (four chapters) is devoted to evolution instruction, including 101 pages on evolutionary theory. (Id.). The Committee reviewed the texts using American Association for Advancement of Science methods; members of the Committee felt it was the best biology textbook for high school students they had seen. (R6-67).

While some texts distinguished between science, or the natural, and the supernatural, this one did not. (R-6-102-103). Dr. Miller, a professor at Brown University, was aware that his college students were sometimes resistant to instruction regarding evolutionary theory due to religious beliefs; while other textbooks acknowledged the potential conflict between evolution instruction and religious belief, he deemed it inappropriate to include any acknowledgment of this potential conflict. (R6-172-173). Portions of the Miller textbook dealing with evolutionary theory were deemed to be "anti-religious" by several school districts around the country, leading Dr. Miller to write letters of explanation to a number of such districts. (R6-161). In the introduction to the unit on evolution, the textbook states:

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.

(R4-Def. Exh. 4, p. 369).

#### C. DEBATE REGARDING CURRICULUM CHANGES.

Once parents of Cobb County students learned that evolution curriculum was being strengthened, parents, scientists, and others around the country began to

express their opinions to school board members about this issue. (R6-188-191, 212-213). Communications to school board members “ran the entire gamut of viewpoints,” generating “thousands of emails, phone calls, media contacts.” (R6-188-189; R4-Def. Exh. 8). As long-time school board member and former teacher Betty Gray testified,

[T]here was an anxiety level about what you ought to teach about evolution, because on the other side of the continuum there were groups of people that had very, very strong religious views of the situation and they certainly didn't want evolution in the classroom to punish their children or to in any way infringe on how their kids felt about things. . . . [Y]ou need some sort of balance that allows any youngster in a classroom to learn about evolution, at the same time, with not so much dynamic dogma that they don't know how to deal with it or they're intimidated with their own views. . . .

(R7-393-394).

1. Sticker Adopted.

Some members of the Board asked legal counsel to draft a statement which would be constitutional addressing some of the parent's concerns. (R6-191-192, 194). Although not all members of the Board embraced the particular language used, all agreed with the need for the Sticker. (R6-215-216; 224; R7-404). The Board adopted the texts recommended by the textbook adoption committee. (R6-196-197, 204). At the same time, they voted to place a sticker on the inside cover of textbooks including evolution instruction stating:

**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.**

(R4-Def. Exh. 4). The Sticker is scientifically accurate. (R8-485). Cobb students are expected to understand the scientific definition of "theory" at the middle school level. (R8-499).

2. Policy and Regulation Finalized.

Textbooks incorporating the Stickers were issued to students in August 2002 (R7-398). In September 2002, the Board approved the revised Policy regarding instruction on theories of origin. (R6-263-264). It stated:

As stated in Policy IA, Philosophy, it is the educational philosophy of the Cobb County School District to provide a broad based curriculum; therefore the Cobb County School District believes that discussion of disputed views of academic subjects is a necessary element of providing a balanced education, including a study of the origin of the species. This subject remains an area of intense interest, research, and discussion among scholars. As a result, the study of this subject shall be handled in accordance with this policy and with objectivity and good judgment on the part of teachers, taking into account the age and maturity level of their students.

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 Cobb County Board of Education that this policy not

be interpreted to restrict the teaching of evolution; to promote or require the teaching of creationism; or to discriminate for or against a particular set of religious beliefs, religion in general or non-religion.

(R4-Def. Exh. 5; R6-216-217).

In January 2003, the Board adopted the revised Regulation regarding theories of origin.<sup>1</sup> (R6-264). The Regulation removed previous restrictions on evolution instruction, explicitly stating that theories of origin shall be taught as required under the state curriculum. (R4-Def. Exh. 6).

1. Theories of origin shall be taught as defined within the Quality Core Curriculum (QCC). Teachers should seek to help students demonstrate proficiency in understanding these aspects of the theory of origins defined in the QCC and the impact of scientific theories on the disciplines studied.

2. Teachers are expected to set limits on discussion of theories of origin in order to respectfully focus discussion on scientific subject matter; at the same time, it is recognized that scientific instruction may create conflict or questions for some students with regard to belief systems. Discussion should be moderated to promote a sense of scientific inquiry and understanding of scientific methods, and to distinguish between scientific and philosophical or religious issues. It may be appropriate to acknowledge that science itself has limits, and is not intended to explain everything, and that scientific theories of origin and religious belief are not necessarily mutually exclusive.

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<sup>1</sup> Whereas the Policy is a general statement of policy or practice by the School District, the Regulation is a more specific outline of how the Policy is to be implemented. (R6-218).



3. Under no circumstances should teachers use instruction in an effort to coerce students to adopt a particular religious belief or set of beliefs or to disavow a particular religious belief or set of beliefs. Instruction should be respectful of personal religious beliefs, and encourage such respect among students. Teachers should not interject their personal faith-based beliefs, or lack thereof, into such instruction, and should maintain a posture of neutrality toward religion.

4. It is recognized that instruction regarding theories of origin is difficult because it is socially controversial and potentially divisive. The administration expects, and will support, every teacher's effort to provide objective and professional instruction.

(Id.)

3. Actual Perceptions of Board Action.

After the Sticker had been adopted, one parent, Marjorie Rogers, presented a petition to the Board on September 26, 2002, containing 2300 signatures asking the school board to allow discussion of scientific alternatives to evolutionary theory.

(R6-38-40; R3-77-45). Ms. Rogers asked the Board to allow discussion of alternative theories, to provide supplementary materials regarding these theories, to allow electives on religion, and to provide further clarification of the textbooks.

(R6-56-60). Ms. Rogers was not satisfied with the language of the Sticker, nor did she approve other curriculum decisions made by the school board. (Id.). As Ms.

Rogers testified:

[The school board was] not listening to me. I think they thought I was kind of a raving lunatic at that point. . . . They didn't do anything I wanted them to do. . . . You

know, I'm glad they did what they did, I don't mean to sound like that. I think, you know, it was marginally effective.

(R6-59). At around the same time, another set of parents presented a petition which supported adoption of texts in their current form. (R4-Def. Exh. 8). The Board's deliberations regarding the changes in evolution curriculum generated worldwide publicity, and provoked public comment by scientists expressing a variety of views at school board meetings. (R6-192-193).

Jeff Selman, the sole Plaintiff during the majority of the time the case was pending in the trial court, had no children issued texts including the Sticker; rather, he learned of the Sticker through an article in *Creative Loafing* magazine. (R7-313, 323). Based on the historic opposition of certain persons of religious belief to evolution, Mr. Selman immediately concluded that the Sticker was religious, without reviewing the Sticker's text. (R7-314-315; 331-332, 345). After the revised Board Policy was passed regarding evolution instruction, however, he wrote a letter to the Board stating that "it seems apparent that the Board is correctly moving to keep faith-based beliefs out of science instruction." (R7-350-351). Mr. Selman testified that the Regulation adopted by the Board governing actual classroom instruction on evolution does not promote religion, in his opinion. (R7-353-355).

#### D. REASONS FOR STICKER.

Board members testified to a variety of reasons for adopting the sticker at issue, although none of them who testified at trial stated that they intended to promote or endorse religion. (R6-215; R7-300-302; R7-381-382; R7-395; R8-450-451). A majority of board members testified that they were either aware that the policy and regulation were being revised to strengthen evolution instruction at the time that they voted for the Sticker, or that the Policy and Regulation are consistent with their purpose in voting for the Sticker. (R6-213-214; R7-303; R8-443, 451-452). The board members intended the Sticker to promote tolerance and respect for religious beliefs. (R6-198, 207; R7-383; R7-394; R8-424). At least two board members felt that the Sticker provided notice that evolution would in fact be taught since the restrictions had been removed. (R6-196-197; R7-395). Board members intended the Sticker to support teachers in teaching evolution. (R8-418; R7-387; R7-395). The Sticker was intended to promote critical thinking. (R7-381-382; R8-423, 425).

#### E. ACTUAL EFFECTS OF STICKER.

More than 103,000 students are enrolled in Cobb County schools. (R6-265). Textbooks including the Sticker have been disseminated each year to approximately 34,000 students across Cobb County. (R4-101-Stickel Affidavit, ¶ 4). In the two and a half school years from the time the Sticker was placed in

textbooks through the trial, there had been no complaints regarding the teaching of religion or alternative theories of origin in science classroom to the superintendent of the School District, to the supervisor of high school science curriculum, or to any board members. (R6-265; R6-219; R7-304; R8-501-503). There have been no reports that Creationism or Intelligent Design were being taught or discussed in any of the hundreds of classes using texts with the Sticker. (R6-100, 111; R6-265; R7-310; R7-355-356). The CCSD superintendent and supervisor of high school science curriculum felt that the changes improved evolution instruction. (R7-252, 257-8; R8-485-486). The Sticker prompted at least one student to engage in additional scientific research regarding mitochondrial DNA. (R8-486).

Two teachers testified regarding the actual impact of the curriculum changes in the classroom. Dr. Wes McCoy, Science Department Chair at North Cobb High School, testified that the Sticker has a detrimental effect because he is required to spend additional class time regarding the distinction between the scientific terms of “fact” and “theory”. (R6-72-73). He testified that this sometimes occurred because students point to the Sticker and insert the word “just” (evolution is “just” a theory). (*Id.*). There has been no increase in religious objections to evolution theory in his classroom since the adoption of the Sticker. (R6-83-84, 89). Dr. McCoy was not aware of any instance of Creationism or Intelligent Design being taught in Cobb County classrooms since the adoption of the Sticker, including

among the fifteen teachers whom he supervised. (R6-111, 74). Dr. McCoy was opposed to the Sticker. (R6-72). However, viewed in context of the textbook, he did not believe it endorsed religion. (R6-94).

Middle school teacher Charmagne Quenan testified that she is better able to effectively teach evolutionary theory under the current policies. (R7-457-459). Rather than avoiding the subject of evolution, under the current policy she can acknowledge the potential conflict between science and religious faith when the issue is raised by students, and effectively steer the discussion back to the desired curriculum. (Id.). Ms. Quenan does not teach Intelligent Design or Creationism in her classes. (R8-457).

#### F. ADDITIONAL EFFORTS TO IMPROVE EVOLUTION INSTRUCTION.

In addition to the revisions to the Policy and Regulation, Cobb County School District has also conducted seminars and workshops for teachers to assist them in instruction regarding evolution. (R6-84-85; R8-485-488). One of authors of the Miller-Levine textbook, Joseph Levine, came to Cobb County at the behest of the science supervisors to discuss the unique challenges to evolution instruction. (R6-160-161). These issues are not unique to Cobb County, but are raised frequently “by teachers all over the country all of the time.” (R6-161). In fact, Dr. Miller testified that he faces this challenge in his position at Brown University,

where students sometimes ask him at the end of the semester about the relationship between his instruction and his own religious faith. (R6-178-180).

### **STATEMENT REGARDING STANDARDS OF REVIEW**

The District Court's findings of fact which support its legal conclusions are subject to the clearly erroneous standard of review. Pullman-Standard v. Swint, 456 U.S. 273, 102 S. Ct. 1781 (1982). Whether the District Court applied the controlling principles of law correctly is a question of law subject to *de novo* review. Id. Smith v. Board of Comm'rs, 827 F. 2d 684, 690 n. 4 (11<sup>th</sup> Cir. 1987).

### **SUMMARY OF THE ARGUMENT**

In late 2001, Cobb County School District began a series of improvements to its evolution curriculum in the course of selecting new science textbooks for adoption. The textbooks included comprehensive, exclusively scientific curriculum regarding evolutionary theory. When parents complained about the improvements in the curriculum, Cobb County School Board adopted a facially-neutral statement to be included in textbooks as a small gesture to those citizens. The Sticker stated, in part, that "evolution is theory" and that the materials regarding evolution "should be approached with an open mind, studied carefully, and critically considered." Subsequent to the adoption of the Sticker, the School Board has repeatedly affirmed its commitment to quality scientific instruction, and to religious neutrality. Although textbooks including the Sticker had been

disseminated to more than 90,000 students at the time of trial, there was no evidence that the Sticker had caused any religious discussion or debate whatsoever.

In determining whether the textbook at issue amounts to an endorsement of religion, the Court's focus should be, first and foremost, on the neutral language of the Sticker itself, together with the extensive evolutionary curriculum to which it is attached. Just as a statute is interpreted according to its plain meaning, an observer of the Sticker at issue would focus on the language itself, rather than reading between the lines. The Sticker is neutral on its face. In interpreting its effect, the issue is not whether the Sticker has educational merit, whether it is well-written, or whether one can imagine persons offended by its meaning. The issue is whether the Sticker endorses religion. Both on its face, and in its specific context, this Sticker does not.

The Court below erred in its application of the Lemon test to the unique facts of this case in two respects. First, the Court relied heavily on the historical effort by religious groups to restrict evolution instruction in finding that the Sticker endorses religion, discounting the immediate events leading to the Sticker. The Court's holding flies in the face of its factual finding that the Sticker was part of a larger effort to strengthen evolution instruction. The mere fact that a part of the language of the Sticker may coincide with the religious views of some citizens does not render it unconstitutional.

Second, although the Court determined that this case involves a facial challenge to a facially-neutral Sticker, it declined to apply the deferential standard applied by this Court in Adler. After concluding that the Sticker had at least two secular purposes, the Court conducted a searching inquiry into hypothetical effects of the Sticker. The decision below neither treated the case as a facial challenge, nor considered the lack of any evidence that the Sticker had a religious effect in the classroom.

### **ARGUMENT AND CITATIONS OF AUTHORITY**

The fundamental principle of First Amendment jurisprudence is the requirement of neutrality toward religion. The Supreme Court has called the neutrality principle the basic purpose of the Establishment and Free Exercise Clauses, “which is to ensure that no religion be sponsored or favored, none commanded, and none inhibited.” Walz v. Tax Commission of New York, 397 U.S. 664, 90 S.Ct. 1409, 1411 (1970). “The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and non-religion, and that it work deterrence of no religious belief.” Abington School District v. Shempp, 374 U.S. 203, 305, 83 S. Ct. 1560 (1963) (Goldberg, concurring). Complete separation of church and state is not constitutionally required, nor constitutionally permissible, since that would often require hostility or



discrimination against religion. As the Court noted in Lynch v. Donnelly, the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the ‘callous indifference’ we have said was never intended by the Establishment Clause.” 465 U.S. 668, 673, 104 S.Ct. 1355, 1359 (1984)(citations omitted).

In order to violate the primary effect prong of the Lemon test through advancement of religion, it is not sufficient that the government action merely accommodates religion. The Constitution ‘affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any.’ Nor is it sufficient that government conduct confers an indirect, remote or incidental benefit on a religion or that its effect merely happens to coincide or harmonize with the tenets of a religion. . . .

Smith v. Board of Comm’rs, 827 F. 2d 684, 691 (11<sup>th</sup> Cir. 1987) (citation omitted).

In the context of public education, this Court has observed that “throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with public schools and their students.” Adler v. Duval County School Board, 250 F.3d 1330, 1336 (11<sup>th</sup> Cir. 2001) (*en banc*). Accommodation of religious belief in public schools is not only a constitutional requirement, it also has important pedagogical implications. The primary role of public education is to instill fundamental values of our society in students which, “must, of course, include tolerance of divergent

political and religious views, even when the views expressed may be unpopular.”

Bethel School District v. Fraser, 478 U.S. 675, 681, 106 S.Ct. 3159 (1986).

Under the Establishment Clause, each challenge calls for line drawing based on a fact-specific, case-by-case analysis. King v. Richmond County, 331 F. 3d 1271, 1275-76 (11<sup>th</sup> Cir. 2003) (citations omitted). In adopting the textbooks with the Sticker at issue in this case, the Cobb County School Board did not write on a blank slate. The Board was in the process of taking substantial actions to correct previous problems with evolution instruction; while taking these actions, the Board was aware of a need to accommodate religious belief, not only as a matter of respect, but also because such an acknowledgement might promote an acceptance of evolution instruction. Even though the Sticker is neutral on its face, the District Court found that it violated the Establishment Clause, primarily because its language purportedly harmonized with religious beliefs, including the religious beliefs of some School Board constituents.

**I. EITHER ON ITS FACE OR VIEWED IN CONTEXT, THE STICKER DOES NOT PROMOTE RELIGION.**

The District Court analyzed the Sticker under the three-part Lemon test, together with the overlapping endorsement test. The Lemon test requires the Court to find a government message unconstitutional if (1) it has a religious purpose; (2) its principal or primary effect advances or inhibits religion; or (3) it creates an

excessive entanglement of the government with religion. Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971). The endorsement test has frequently been used by the Courts in the Establishment Clause context, particularly in analyzing displays of religious symbols. Endorsement “sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” Lynch v. Donnelly, 465 U.S. 668, 688.

Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the Lemon is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. The laws upheld in Walz v. Tax Comm’n, 397 U.S. 664 (1970) (tax exemption for a religious, educational and charitable organizations), in McGowan v. Maryland, 366 U.S. 420 (1961) (mandatory Sunday closing law), and in Zorach v. Clauson, 343 U.S. 306 (1952) (release time from school for off-campus religious instruction), had such effects, but they do not violate the Establishment Clause. What is crucial is that a government practice does not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Lynch, 465 U.S. at 691-2 (O’Connor, concurring). The endorsement test assumes the viewpoint of a reasonable observer, so that “the test does not evaluate a practice in isolation from its origins and context.” Elk Grove Unified School

District v. Newdow, 542 U.S. 1, 56, 124 S.Ct. 2301 (2004) (O'Connor, concurring).

A. SECULAR PURPOSES FOR STICKER.

Courts should defer to a State's articulation of a secular purpose, so long as the statement is sincere and not a sham. Edwards v. Aguillard, 482 U.S. 578, 586-7, 107 S.Ct. 2773 (1987); Wallace v. Jaffree, 472 U.S. 38, 75-6, 105 S.Ct. 2479, 2499-2500 (1985) (O'Connor concurring) (purpose inquiry "should be deferential and limited"). The Courts have instructed that the first prong of the Lemon test is a "fairly low hurdle" and that an impermissible purpose should be found only where there is an obvious overriding religious purpose. Bachman v. West High School, 132 F. 3d 542, 552 (10<sup>th</sup> Cir. 1992); Brown v. Gilmore, 258 F. 3d 265, 276 (4<sup>th</sup> Cir. 2001).

In general, an analysis of a government statement's purpose should consider the language of the statement itself, as well as the legislative history and unique context of the statement. Edwards, 482 U.S. at 594; Bown v. Gwinnett County School District, 112 F. 3d 1464, 1469 (11<sup>th</sup> Cir. 1997). In considering a facial challenge, however, "the primary focus by definition must be the text." Adler, 250 F. 3d 1330, 1339.

Based in part upon the "highly credible" testimony of the board members (R4-98-24, 27), the District Court found that the Sticker had at least two legitimate

secular purposes: fostering critical thinking and reducing possible offense to parents and students whose beliefs might conflict with the teaching of evolution. (R4-98-24-30). These purposes are amply supported in the record.

In this case, the Sticker itself does not include an explicit expression of the purpose behind its implementation. However, there is no dispute in this case that the Sticker came about in the course of a series of dramatic improvements to evolution instruction by the school board, including the removal of restrictions on evolution instruction, and that parents who were concerned about the potential for offense to their religious beliefs made a number of requests to the School Board regarding evolution instruction. In addition, there is clear statement of the purpose behind the overall changes in evolution instruction in the board Policy which was being revised at the same time. The purpose stated in the board 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 insure a posture of neutrality toward religion."

The trial testimony of the members of the Board of Education, while not demonstrating a uniform intent among all board members, did not demonstrate any religious purpose. See Bown, 112 F. 3d at 1471-72. There was no evidence of a religious purpose presented. Board members testified that they did not intend to promote religion by voting for the Sticker. A majority of board members also

testified that they were either aware of the fact that the policy and regulation were being revised to strengthen evolution instruction at the time they voted for the Sticker, or that the policy and regulation are consistent with their purpose in voting for the Sticker. Several board members were aware of problems which had been caused by the previous policy restricting evolution instruction, and intended the new policy to support improved evolution instruction. Some board members wanted to promote tolerance, and to reassure parents that the improvements in evolution instruction did not mean that the instruction would be presented in such a way as to negate the possibility of religious faith. Board members stated that they wanted to promote critical thinking in adopting the Sticker as a part of the improved evolution curriculum.

**B. IN CONTEXT, THE EFFECT OF THE STICKER WAS NOT PROMOTION OF RELIGION.**

The effects prong of the Lemon test focuses on the issue of whether “the practice under review in fact conveys a message of endorsement or disapproval” of religion. Bown, 112 F. 3d 1464, 1472 (citing Wallace v. Jaffree, 472 U.S. 38, 56 n.32, 105 S.Ct. 2479, 2489 (1985)). As demonstrated by the clear precedent of this Court and the Supreme Court, an overriding principle of Establishment Clause jurisprudence is that each case must be judged in its unique circumstances, and that the context of a government statement is a key to determine the constitutionality of

its effect. Lynch v. Donnelly, 465 U.S. 668, 694, 104 S.Ct. 1355 (1984); King v. Richmond County, 331 F.3d 1271, 1283-86 (11<sup>th</sup> Cir. 2003); Adler, 250 F. 3d 1330.

In addition, it is improper to “[f]ocus exclusively on the religious component of any activity,” as doing so “would inevitably lead to its invalidation under the Establishment Clause.” King, 331 F. 3d at 1282 (citing Lynch). The District Court’s analysis turned on the asserted implicitly religious component of part of the Sticker, a single phrase in the 33-word statement. “The critical language in the sticker that supports the conclusion that the sticker runs afoul of the Establishment Clause is the statement that ‘[e]volution is a theory, not a fact, concerning the origin of living things’.” (R4-98-33).

Clearly, the Sticker has no explicit religious message. A viewer may think the Sticker is superfluous, or even confusing. However, on its face, it is devoid of religious endorsement, or direct benefit to religion. It is only by searching for implicit meaning that a viewer could assume any connection to religion.

While the Supreme Court has stated that the endorsement test is partially “a legal question to be answered on the basis of judicial interpretation of social facts”, the key focus in applying the test is the particular government act or display at issue. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 598, 109 S. Ct. 3086 (1989) (“The crèche itself [bearing the words “Glory to God in the

Highest!"] is capable of communicating a religious message.”); Lynch, 492 U.S. at 679 (“The focus of our inquiry must be on the crèche in the context of the Christmas season”); King, 331 F. 3d at 1282. Once the inherent religious content of the display is determined, the particular context of the display is considered to determine whether the context “detracts from the . . . . religious message “or “diminish[es] its religious meaning.” 492 U.S. at 598-599. “It has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may – *even reasonably* – confuse an incidental benefit to religion with state endorsement.” Capital Square Review and Advisory Board v. Pinette, 515 U.S. 753, 768, 115 S. Ct. 2440 (1995).

In contrast to the religious display cases relied upon in the District Court’s Order, the government message in this case is neutral on its face. It can only be imbued with religious content by searching for meaning outside the document. As this Court noted rejecting a similar challenge to implicit content in school textbooks, “If the Establishment Clause is to have any meaning, distinctions must be drawn to recognize not simply ‘religious’ and ‘anti-religious’ but ‘non-religious’ governmental activity as well.” Smith v. Board of School Comm’rs, 827 F. 2d 684, 693 n.9 (11<sup>th</sup> Cir. 1987) (citation omitted).

In King v. Richmond County, 331 F. 3d 1271 (11<sup>th</sup> Cir. 2003), the Court analyzed the context of a Ten Commandments tablet contained within the



Richmond County seal and determined that it did not constitute a violation of the Establishment Clause. The Court's analysis of the particular context of the Ten Commandments tablet, which was found to include both secular and religious components, took into consideration four factors: (1) limited context, (2) use of other symbols in the seal, (3) size and placement of the seal, and (4) the fact that the seal did not contain the Ten Commandments text. 331 F. 3d at 1283-1286.

1. The Sticker Itself is Neutral.

The Sticker in this case does not, on its face, express any religious idea, mention any religious belief, or promote any religious practice. Compare Freiler v. Tangipahoa Parrish Board of Education, 185 F. 3d 337, 341 (5<sup>th</sup> Cir. 1999) (verbal statement supporting "Biblical version of Creation"); Smith, 827 F. 2d at 692. ("[T]he textbooks contain ideas that are consistent with theistic religion. However, . . . mere consistency with religious tenets is insufficient to constitute unconstitutional advancement of religion.") Like the text, the Sticker refers to evolution as a "theory"; it also says evolution is "not a fact".<sup>2</sup>

The Sticker suggests that the attached materials on evolution "should be approached with an open mind, studied carefully, and critically considered". This

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<sup>2</sup> The District Court speculated that the Sticker has "great potential to prompt confusion", questioning whether it provides an educational benefit. (R4-98-38). However, "the wisdom of an educational policy . . . is not germane to the constitutional issue of whether that policy violates the Establishment Clause." Smith, 827 F. 2d at 694.

suggestion that the evolution curriculum should be “studied carefully” clearly supports that curriculum; the suggestion to approach it “with an open mind” could certainly assist some students in learning the material, in spite of potential conflict with their religious beliefs. For those students not perceiving any conflict between evolution instruction and their religious beliefs, the suggestion that the materials be approached with an open mind would presumably have very little effect whatsoever.

2. Textbooks Promote Evolution, Not Religion.

The Sticker itself does not exist independently of books to which it is affixed, containing 101 pages of comprehensive instruction on evolutionary theory. The Stickers consist of 33 words in small type on the inside front cover of the textbooks. Aside from the sheer quantity of evolution text, its thorough and interactive treatment of the topic should reasonably counteract any supposed negative perception due to the Sticker. A court would have to assume that the text itself is utterly devoid of persuasive effect and very poorly written, to conclude that a small neutral Sticker predominates. In addition, if a non-religious statement carries such weight, it is difficult to imagine how the context of a truly religious symbol could ever overcome its effect, as in King, Allegheny, or other cases.

If a reasonable observer was confused or concerned about the information in the Sticker, he or she could easily refer to the entire unit of evolution instruction to

obtain more information. The introduction to the unit on evolution explains that evolutionary theory “consists of facts, hypotheses, and observations. . . .” and the theory is “well-established”.<sup>3</sup> See Edwards v. Aguillard, 482 U.S. 578, 599, 107 S. Ct. 2573 (1987) (defining evolution as a “theory”).

3. Immediate Context Was Improvement in Instruction.

The Sticker itself arose in the context of a public controversy regarding the improvement in evolution instruction by the School Board. Based on the variety of views expressed, as recalled by virtually every witness at trial, as well as the Board’s subsequent actions, it is difficult to imagine any observer fairly concluding that the Board had adopted an anti-evolution stance. Without outside intervention, school officials noted that the adoption of the best science textbooks would require a change in official school district policy and practice regarding evolution instruction, and set about making those changes in order to enable them to adopt the textbook at issue in this case. A well-informed reasonable observer would certainly be aware that the School District was making affirmative efforts to remove restrictions and to improve evolution instruction. In fact, it was these

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<sup>3</sup>The District Court’s Order faults the language of the Sticker because there is no explicit explanation of why the topic of evolution is the only theory mentioned. (R4-98-36-37). However, any observer would be aware of the publicity surrounding the School Board’s curriculum improvements, and the opposition to instruction on evolution in particular.

changes, which were well-known to the public, which resulted in the adoption of the Sticker.<sup>4</sup>

4. Subsequent Actions Confirm Secular Effect.

It is appropriate to consider the School Board's actions after adoption of the Sticker in determining whether the effect of this Sticker, in context, amounted to endorsement. Capital Square Review and Advisory Board v. Pinette, 515 U.S. 753, 778, 115 S.Ct. 2440 (1995) (O'Connor, concurring) (endorsement test "requires courts to examine history and administration of a particular practice"). Within a month of the time that the textbooks containing Stickers went into circulation in the Cobb schools, the School Board adopted its revised official Policy, eliminating provisions in the 1995 Policy requiring "respect for family teachings" and specifically mandating religious neutrality. The Board later adopted a revised Regulation which also removed restrictions on evolution instruction.

Plaintiff Selman was keenly aware that the School District was in the process of revising the Policy and Regulation, and closely watched the School Board's actions subsequent to the adoption of the Sticker to determine whether to

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<sup>4</sup> There is some confusion in the District Court's Order regarding the timing of the Board's actions. While the District Court found that the Sticker was motivated in part by a petition signed by 2300 residents (R4-98-26-27), in fact the petition was presented four months after the Sticker was adopted. (R4-Def. Exh. 4, Pla. Exh. 7).

amend his Complaint. After the Policy and Regulation were adopted, he not only declined to expand the litigation to include the Policy and Regulation, he wrote a letter to the School Board while this litigation was pending expressing approval of the Board Policy on evolution instruction. (R7-351-355). In contrast, Marjorie Rogers, whom the District Court found was motivated by religion, was dissatisfied with the Board: "They didn't do anything I wanted them to do." In spite of this, the District Court concluded, "the sticker sends a message to those who oppose evolution for religious reasons, that they are favored members of the community, while the sticker sends a message to those who believe in evolution that they are political outsiders." (R4-98-31).

5. Minimal Actual Effect Shown in Record.

The record in this case includes very little evidence of the impression the textbooks at issue make on students, or their impact in the classroom.<sup>5</sup> At the time of trial, the Sticker had been included in textbooks provided to more than 90,000 Cobb County students at the middle and high school levels. In that time, there has

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<sup>5</sup> As noted *infra*, the District Court did not limit its analysis on this facial claim to the actual text of the Sticker and the context in which it arose, but also considered evidence of classroom instruction. While the District Court concluded that the Sticker confused students, resulting in a potential benefit to religious belief, there is absolutely no evidence that the Sticker directly promoted religious belief, or that it encouraged discussion of religion. "Speculative fears as to the potential effects of this statute cannot be used to strike down a statute that on its face is neutral . . . ." Brown v. Gilmore, 258 F.3d 265, 278.

not been a single complaint regarding religious discussion in science classrooms, or regarding discussion of arguably religious concepts such as Intelligent Design; none of the Plaintiffs has identified any constitutional injury beyond offense at the language of the Sticker.

Of the two teachers who testified at trial, one, Dr. Wes McCoy, testified the Sticker resulted in confusion among students regarding the definitions of “theory” and “fact”; he admitted, however, that there was no increase in religious objections to evolution compared with the time prior to the Sticker. Another teacher, Charmagne Quenan, testified that the Sticker, along with the revised policy, improved her ability to provide evolution instruction and enabled her to better focus discussion on the scientific subject matter. Dr. George Stickel, Cobb County School District’s Supervisor of High School Science, testified that the Sticker could enhance instruction to students who believed that evolution theory was contrary to their religious beliefs by minimizing that conflict. While the pedagogical benefits of the Sticker might be debatable, the lack of religious impact is not.

In summary, this Court should in no way find that the Sticker incorporated in the science textbooks constitutes an endorsement of religion. The Sticker itself is neutral, and although it arguably may contain a single phrase consistent with

religious beliefs, the attached textbooks include voluminous and extensive materials which could be inconsistent with religious belief.

C. TRIAL COURT'S ANALYSIS FOCUSED ON REMOTE HISTORY, NOT IMMEDIATE CONTEXT.

1. Consideration of History of Non-Parties.

While the District Court opinion in this case acknowledged the unique factual situation in finding a secular purpose, its analysis under the effect prong of the Lemon test focused primarily on two factors, each of which should have a minimal role, if any, in determining endorsement. First, the Court focused heavily on the historic antagonism between some individuals of religious faith and evolution instruction; in fact, the Court began its analysis of the effect prong with the proposition that "members of certain religious denominations historically have opposed the teaching of evolution in public schools". (R4-98-32).<sup>6</sup> Analyzing this case in terms of a distant history which has nothing to do with CCSD's affirmative efforts in this case violates the key principle that "factual specifics and context are nearly everything when it comes to applying the Establishment Clause to religious symbols and displays." Glassroth v. Moore, 335 F. 3d 1282, 1300 (11<sup>th</sup> Cir. 2003).

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<sup>6</sup> Most religious denominations no longer see a conflict between their religious beliefs and evolutionary theory. (R6-105). See the revised Regulation ("Scientific theories of origin and religious beliefs are not necessarily mutually exclusive"). (R4-Def. Exh. 6).

If the Establishment Clause could be analyzed in terms of whether a government action is the “kind of activity” which might be perceived as endorsement, simply because that activity has been used to endorse religion in other historical cases, then the results in Adler, Bown and King are all wrong. The differing results reached by courts in cases involving moments of silence, Ten Commandments displays, and other actions or symbols which either acknowledge or accommodate religion demonstrate that the history of non-parties has no relevance in these cases. CCSD’s actions, including the adoption of comprehensive evolution texts, the removal of respect for family teachings as a consideration in evolution instruction, and the requirement of religious neutrality in its revised Policy, hardly fall within the parameters of the strategy of anti-evolutionists.

The District Court’s analysis not only considered the history of public school efforts to restrict evolution, but also considered that a reasonable observer in this case would know that law review articles suggest that teaching evolution as a theory rather than a fact is a strategy to dilute evolution instruction (R4-98-35), relying upon Justice Brennan’s dissent in Lynch, 465 U.S. at 709-12. Whether the reasonable observer is a high school student or an adult citizen, it seems unlikely that such a reasonable observer would have a basic familiarity with law review articles regarding the Establishment Clause. In clarifying the standards set forth in



Lynch, Justice O'Connor explained that a reasonable observer would be aware of the history of the particular community and forum at issue in the case.

There is also *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. . . . It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears. . . . An informed member of the community will know how the public space in question has been used in the past . . . and it is that fact, not that the space may meet the legal definition of a public forum, which is relevant to the endorsement inquiry.

Capital Square Review and Advisory Board v. Pinette, 515 U.S. 753, 780-81, 115

S.Ct. 2440 (1995); King, 331 F. 3d at 1282. The District Court's analysis not only goes far beyond the quantum of knowledge which courts have attributed to a reasonable observer, but further assumes that the School Board suppresses evolution instruction in the classroom, contrary to the evidence of record.<sup>7</sup>

## 2. Consideration of Religious Belief of Constituents.

Second, the Court below found that a reasonable observer would perceive that the School Board was aligning itself with religiously-motivated citizens by

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<sup>7</sup> In Lynch, Justice Brennan reviewed secondary sources to analyze the balance between secular and religious components of an inherently Christian symbol. "The nativity scene . . . is the chief symbol of the characteristically Christian belief that a Divine Savior was brought into the world. . . ." 465 U.S. at 708. In this case, it is a government statement, not a religious symbol, which is at issue, and secondary sources were used by the Court to append religious meaning to its non-religious language.

adopting the Sticker. (R4-98-33, 35). Based on the evidence, neither the language of the Sticker nor any of the other actions taken by the School Board were satisfactory to those who opposed the adoption of the textbooks. On the other hand, proponents of the textbooks were satisfied with the Board's actions, to the extent that Plaintiff Selman wrote a letter to the Board of Education on October 24, 2002, after the adoption of the revised board policy on evolution instruction, in which he stated that "it seems apparent that the Board is correctly moving to keep faith-based beliefs out of science instruction. . . ." (R4-99-1). While some members of the public objected to the adoption of the Sticker, to the extent that evolutionary theory and religion are seen as contradictory or mutually exclusive, the Board's action can only be seen as promoting evolution instruction.

In addition, not every criticism or question regarding evolution theory is necessarily religiously motivated. 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."). While the District Court based its conclusion of unconstitutional effect partly on the factual finding that "a large number of Cobb County citizens opposed the teaching of evolution in a rigid fashion and . . . many of these citizens were motivated by their religious beliefs" (R4-98-27), Marjorie Rogers, the only parent opposed to the textbook who testified at trial, stated that she wanted scientific critiques of evolutionary theory taught in the classroom, and

not religion. Several witnesses at trial testified that they had some type of religious belief, although only Ms. Rogers' belief is set forth in the Order as a basis for the determination that her actions were motivated by religion, leading to an unconstitutional effect. (R4-98-7). This Court and the Supreme Court have determined that "one's religion ought not to affect one's legal rights or duties or benefits." Midrash Sebhadi, Inc. v. Town of Surfside, 366 F. 3d 1214, 1239 (11<sup>th</sup> Cir. 2004); see Adler, 206 F. 3d at 1086; Mitchell v. Helms, 530 U.S. 793, 828, 120 S. Ct. 2530 (2000).<sup>8</sup> The District Court's Order not only makes assumptions about religious belief, but negates the political voice of purportedly religiously-motivated citizens by striking down a government action based upon the premise that those citizens approve of the action.

D. STICKER DOES NOT CREATE EXCESSIVE ENTANGLEMENT.

The effect and entanglement prongs under Lemon are closely related. However, the Court should not find a violation of either prong in this case. As in Bown v. Gwinnett School District, 112 F. 3d 1464, 1472-73, (11<sup>th</sup> Cir. 1997), if the textbook is used in the classroom as intended, and as the evidence showed, there

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<sup>8</sup> The Court below concluded that, not only was Ms. Rogers motivated by her religious belief, but all 2300 citizens who signed a petition opposing the textbooks were also motivated by religious belief. Even assuming that all 2300 individuals were motivated by religious belief, that represents only about one percent of the parents of students attending Cobb County schools, and an even smaller percentage of the 600,000 residents of Cobb County.

can be no more religious effect or entanglement resulting from the Sticker than result from a moment of silence, although both allow for the possibility of a religious belief. In Bown, the moment of silence resulted in minimal religious entanglement; in this case, based on the evidence at trial, there is none.

## **II. STICKER IS CONSTITUTIONAL WHEN ANALYZED AS FACIAL CHALLENGE.**

While the trial court held that this case represented only a facial challenge, the Court declined to apply the standard for facial challenges as set forth in United States v. Salerno, 481 U.S. 739, 735, 107 S.Ct. 2095 (1987), which has been applied consistently by this Court to facial challenges, including those in the Establishment Clause context. Adler, 206 F. 3d at 1083; Horton v. City of St. Augustine, 272 F. 3d 1318, 1329 (11<sup>th</sup> Cir. 2001); Benning v. State of Georgia, 391 F. 3d 1299, 1304 (11<sup>th</sup> Cir. 2004). The Court decided that the School Board's statement reflected in the Sticker did not have an application as contemplated by Salerno, so that it would not apply the Salerno standard.<sup>9</sup>

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<sup>9</sup> The Court noted, "The challenge in this case is to a government sponsored message, which is not being 'applied' in the traditional sense. Indeed, as both parties have acknowledged, to the extent that the sticker has an 'application,' the application is governed by the Cobb County School District's policy and regulation regarding theories of origins. Albeit relevant to the instant case, the policy and regulation are not the subject of Plaintiffs' challenge. . . . The sticker in dispute may have practical effects and create perceptions in the minds of its observers, but the Sticker does not 'operate' or have an 'application' as contemplated by Salerno. For these reasons, the Court concludes that the Salerno standard should not apply

Although the Supreme Court has not consistently applied the standards set forth in Salerno to facial challenges in every case, both the Supreme Court and this Court have consistently required a higher burden of proof from a Plaintiff attempting to mount a facial challenge to the constitutionality of a government action. Bowen v. Kendrick, 487 U.S. 598, 600-602, 108 S.Ct. 2562 (1988) (Supreme Court has not explicitly delineated the distinction between facial and as-applied challenges in Establishment Clause cases). While the members of this Court disagreed regarding the proper analysis of facial challenge in the Establishment Clause context in Adler, 250 F. 3d 1330, the majority of the Court determined that there is a valid distinction between facial and as-applied challenges in this context. Id. at 1340-41.

In applying the Lemon test, there would be no difference between a facial challenge and as-applied challenge with regard to the purpose prong, because under the Salerno standard, an unconstitutional purpose would render the government action invalid in all circumstances. Id. at 1343 (Kravitch, dissenting) (“If the Duval policy has an unconstitutional purpose, then there is no set of circumstances under which the policy would be valid, notwithstanding that some of the graduation messages delivered pursuant to the policy might be totally devoid

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in this case, the Court will focus its analysis using the standard set forth in Lemon.” (R4-98-20-21; R4-98-38n.8).

of religious content.”). However, in analyzing effect, the majority opinion in Adler implied that a Plaintiff mounting a facial challenge must establish much more than the mere possibility of an unconstitutional application. Based upon the neutral language of a policy itself, the Court found that there was no violation of the Lemon effect prong, even though religious messages were in fact delivered in approximately sixty percent of the instances in which the policy was applied. Id. at 1339. In reaching the conclusion that there was no unconstitutional effect, the Court properly relied, first and foremost, upon the text of the policy itself. “The primary focus by definition must be the text”. Id.

Other courts have similarly concluded that, although evidence regarding applications of the government action may be relevant, the primary emphasis must be upon the face of the policy or statement itself. For example, in upholding Virginia’s moment of silence statute, the Fourth Circuit cautioned that although “we can examine the available data to determine the statute’s ‘inevitable’ effect,” we must not speculate about a statute’s application in considering the second and third prongs of the Lemon test” on a facial challenge. Brown v. Gilmore, 258 F. 3d 265, 275 (4<sup>th</sup> Cir. 2001).

In Freiler v. Tangipahoa Parrish Board of Education, 185 F. 3d 337, the Court employed a similar analysis in holding that a verbal statement required to be read to students as part of any evolution instruction violated the Establishment

Clause.<sup>10</sup> “We limit our analysis to the precise language of the disclaimer and the context in which it was adopted.” Freiler, 185 F. 3d 337, 342. The verbal disclaimer in that case arose in the context of a number of efforts by the School Board to introduce Creationism into the curriculum and otherwise to promote religious expression. The Court’s analysis, rather than focusing on the broader history of anti-evolutionists, focused primarily on the text of the statement itself. The Court found that the primary effect of the disclaimer was to protect a particular religious viewpoint, relying upon “the interplay of three factors: (1) the juxtaposition of the disavowal of endorsement of evolution with the urging that students contemplate alternative theories of the origins of life; (2) the reminder that students have the right to maintain beliefs taught by their parents regarding the origin of life; and (3) the ‘Biblical version of Creation’ is the only alternative theory explicitly referenced in the disclaimer.” Id. at 346.

The District Court’s analysis in this case did not focus primarily upon the text of the Sticker, or even upon the record evidence regarding the lack of any

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<sup>10</sup> The verbal statement provided in part: “It is hereby recognized . . . that the lesson to be presented . . . is known as the Scientific Theory of Evolution and should be presented to inform students of the Scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept. It is further recognized . . . that it is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.” 185 F. 3d at 341.

religious endorsement resulting from the Sticker, but rather relied heavily upon the implicit messages of a small portion of the Sticker, as gleaned from secondary sources.<sup>11</sup>

The Court below recognized that the record in this case was inadequate to allow Plaintiffs to mount a meaningful as-applied challenge (R3-72-8); the Plaintiffs did not demonstrate any unconstitutional application of the Sticker to them, beyond offense at the words “evolution is a theory, not a fact.” *See Some Realism About Facial Invalidation of Statutes*, 30 Hofstra L.Rev. 647, 654 (2002). By failing to limit its analysis either to the text and immediate context of the Sticker, as required in a facial challenge, or to the lack of any evidence of a constitutional violation, as in an as-applied challenge, the Court was forced to speculate as to potential effects of the Sticker, striking down a facially-neutral statement which has never resulted in unconstitutional application.

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<sup>11</sup> In determining that the Sticker had at least two secular purposes, the District Court noted “unlike the disclaimer in the Freiler case, the Sticker in this case does not contain a reference to religion in general, any particular religion, or any religious theory. This weighs heavily in favor of upholding the Sticker as constitutional.” (R4-98-25).



### **III. THERE IS NO VALID GEORGIA CONSTITUTIONAL CLAIM**

The Georgia Constitution has several provisions that address the establishment of freedom of religion and separation of church and state prohibitions. Ga. Const. Art. I, Sect. II, Para. VII; Ga. Const. Art. I, Sect. I, Para. 3 and 4. In this case, the issues involve Ga. Const. Art. I, Sect. I, Para. IV, Jones v. Moultrie, 196 Ga. 526 (1943) and Ga. Const. Art. I Sect. II, Para. VII. Mayor of Savannah v. Richter, 160 Ga. 177 (1925). These provisions under the Georgia Constitution generally parallel the provisions in the First Amendment to the United States Constitution. See, 1999 Op. Att'y. Gen. 99-16; 2000 Op. Att'y. Gen. 00-09; Moeller v. Schrenko, 251 Ga. App. 151 (2001).

### **CONCLUSION**

Appellants respectfully requests that the Order and Judgment of the District Court be reversed. This is a facial challenge to a facially-neutral Sticker. There is no Establishment Clause violation in this case, unless the Court ignores the language of the Sticker, the content of the textbook, substantive improvements in policy and curriculum, and the lack of any practical impact, and instead focuses on strategies and practices of non-parties outside the record. Both as a matter of law and as a matter of policy, the Court should find no constitutional violation when a local school board acts in good faith to improve its curriculum, particularly based upon such a tenuous and speculative connection with religion.

Respectfully submitted this 11 day of April, 2005.

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A handwritten signature in black ink, appearing to read "E. Linwood Gunn, IV", is written over a horizontal line.

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**CERTIFICATE OF COMPLIANCE**

I certify that this **Brief of Appellants** compiles the type-volume limitations set forth in FRAP 32(a)(7)(B). This Brief contains 10,727 words.

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**CERTIFICATE OF SERVICE**


I CERTIFY that I have this day served upon those persons listed below a copy of the within and foregoing **Brief of the Appellants** via hand-delivery to:

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