IN UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NOS. 05-10341-I & 05-11725-II

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

APPELLANTS,

v.

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

APPELLEES.

APPELLANTS' REPLY BRIEF

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

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ARGUMENT AND CITATIONS OF AUTHORITY

I. INTRODUCTION

By all accounts, the Cobb County School Board ("School Board") took a quantum leap forward in its evolution instruction in 2001-2002, removing restrictions on evolution instruction and adopting a new curriculum which included, according to Appellees, "one of the best [biology] books on the market." In the face of strong views both opposing and supporting these specific improvements to the curriculum on evolution theory, the Board appended a small Sticker to the extensive scientific evolution information it provided its students which expressed an open-mindedness toward evolution instruction. A reasonable well-informed observer, so we are told, viewing this 33-word Sticker affixed to 101 pages of evolution curriculum, could only conclude that the School Board wanted to endorse religious belief to the exclusion of the science of evolution.

Appellees attempt to overcome the lack of any religious reference in the Sticker itself, the fact that it was part of an overall process of improving evolution instruction, and the fact the Sticker has not actually had any role in promoting a religion in the classroom, by repeatedly asking the Court to focus on the historic conflict between evolution and religion. See, *e.g.* Appellees' Brief , pp. 19, 20, 23,

25 and 26. However, given the admitted historical conflict between evolution and religion, a reasonable observer would be compelled to ask why in the world the School Board was going out of its way in order to strengthen and promote evolution instruction, and why the Sticker had no reference to religion or any alternatives to evolution instruction, unless the School Board was attempting to promote evolution instruction, rather than religion.

A non-religious statement does not become religious simply because of a historic conflict between evolution and religion, nor can this case be compared with cases in which evolution curriculum was restricted or curtailed, since exactly the opposite occurred here. Under the unique facts of this case, no reasonable observer could perceive the Sticker to be an endorsement of any religion.

II. CITIZEN COMMENTS DO NOT MAKE A NON-RELIGIOUS STATEMENT RELIGIOUS

The cornerstone of the District Court's Order and the Appellees' argument is the idea that the language "evolution is a theory" endorses religion because it is consistent with religious belief.[1] The Sticker at issue is facially neutral (even if we

[1] It is significant that Plaintiffs' theory of the case below, as expressed in the original Complaint and the Response to Defendants' Summary Judgment Motion, was that the Sticker was intended to pave the way toward classroom instruction in religious theories of origin, such as Creationism and Intelligent Design. However, there was absolutely no evidence at trial showing that any religious theories of origin had been taught in science classes, or even that the topic of religion as it

ignore the evolution-supporting suggestions to study it carefully and approach it with an open mind). The only nexus offered to tie this Sticker to religious belief is based, not on the intent of the Cobb County School Board, or on the effects it has in the classroom, but on the historical efforts of non-parties to subvert evolution, and the assumed religious beliefs of the School Board's constituents. Neither of these is a viable rationale for a finding of endorsement in this case.

Notwithstanding the fact that the Sticker says nothing about religion or religious belief, Appellees argue "[b]y placing the 'theory, not a fact' language in the Sticker, the Cobb County School District appears to endorse religion because it echoes the sentiments of many religious groups' opposition to evolution." (Brief of Appellees, p. 23) (emphasis supplied). This was the same argument which was made, and readily rejected, by this Court in Adler.

> Appellants highlight the fact that some community members wrote letters imploring . . .the Board to find a way to maintain their graduation prayer tradition. It would be an especially dangerous practice if a court

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relates to the theory of evolution was discussed any more frequently that it was before the Sticker was adopted. (R4-98-16). The district court denied a Motion to Intervene by parents wishing to assert students' rights to be informed of alternative theories of origin, on the basis that classroom instruction was beyond the scope of the litigation, but later found that the Sticker might somehow subvert classroom instruction and thus, support anti-evolutionists. (R4-98-38). (Compare R4-98-20-21 "The challenge in this case is to a government sponsored message, which is not being 'applied' in the traditional sense" with R4-98-38 because of the Sticker, "teachers have less time to teach the substance of evolution.")

> could somehow discern legislative purpose, not from the text of the policy, nor from its explicitly stated purpose, nor even from a decision-making body that has offered no debate from which to find purpose, but, rather, simply from the controversy surrounding the subject and the heartfelt and often conflicting views expressed by many members of the community.

Adler v. Duval County School Board, 206 F. 3d 1070, 1086 (11th Cir. 2000) vacated, 531 U.S. 801 (2000), reinstated, 250 F. 3d 1330.[2]

The District Court's finding that the facially-neutral Sticker in this case had the effect of endorsement turned primarily upon these citizen comments.

> [T]he basis for this Court's conclusion that the Sticker violates the effects prong is not that the School Board should not have called evolution a theory or that the School Board should have called evolution a fact. Rather, the distinction of evolution as a theory rather than a fact is the distinction that religiously-motivated individuals have specifically asked school boards to make in the most recent anti-evolution movement, and that was exactly what parents in Cobb County did in this case.

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[2] It is significant that this Court considered the public controversy evidence only as a part of the purpose prong, and did not even discuss it in terms of the effect. The District Court's Order in this case repeatedly considers the same evidence in analyzing both prongs of the Lemon test, often reaching conflicting results. For example, in analyzing the purpose prong, the Court found that it was sensible for the School Board to single out evolution in the Sticker, because evolution was the focus of all of the curriculum changes at issue (R4-98-26), but in analyzing the effect of the Sticker found that it sent a message of endorsement because it focused solely on evolution. (R4-98-37).

(R4-98-39). See R4-98-27 ("citizens were motivated by their religious beliefs"; "adopted the Sticker to placate their constituents"); R4-98-28 ("School Board sought to show consideration for their constituents' personal beliefs"); R4-98-33 ("A significant number of Cobb County citizens had voiced opposition to the teaching of evolution for religious reasons"; "citizens and parents largely motivated by religion by pressure on the School Board"; "language of the Sticker essentially mirrors the viewpoint of these religiously-motivated citizens"; "Sticker would appear to advance the religious viewpoint of the Christian fundamentalists and Creationists who were vocal during the textbook adoption").

The District Court's decision rises or falls with its conclusion that the effects of the Sticker should be determined, not by its language, not by the curriculum to which it was attached or actual events in the classroom, but by citizen comments over which the Board had no control. "[S]chools do not endorse all speech that they do not censor." Adler v. Duval County Sch. Bd., 250 F. 3d at 1333. Further, the repeated recitation that these individuals were "religiously motivated" is a supposition unsupported in the record.

The record in this case shows that the opinions expressed to the School Board prior to their adoption of the Sticker included a wide range of viewpoints, including input from not only those the Court believed to be "fundamentalist

Christians", but also individuals such as Plaintiff Jeffrey Selman. (R6-212-213; R7-348; R8-449).[3] Critics of the textbook wanted the School District to allow instruction in alternative theories of origin such as Creationism and intelligent design and to provide supplemental material on those theories. (R6-34-35, 47). They wanted the curriculum to include criticism of Darwinism and to provide other clarifications of information presented in the text. (R6-58). Individuals identified by the District Court as fundamentalist Christians did not approve of the Sticker, nor the other curriculum improvements made by the School District. (R6-56, 59-60). Plaintiff Selman, on the other hand, while he disliked the Sticker, felt that the Board's actions regarding actual classroom instruction did not promote religion. (R7-351, 354-5).

Notwithstanding these facts, the District Court found that the Sticker "sends a message to those who oppose evolution for religious reasons that they are favored members of the political community, while the Sticker sends a message to those who believe in evolution that they are political outsiders." (R4-98-31). Marjorie Rogers certainly didn't deem herself a favored member of the political

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[3]Appellees repeatedly argue that the School Board catered to religious belief because they adopted the Sticker in response to a petition presented by Marjorie Rogers. The Sticker was adopted March 28, 2002, while the petition was submitted the following September. (R3-77-43 (petition dated Sept. 26, 2002); R4- Def. Exh. 4; see R4-Def. Exh. 8).

community: "They didn't do anything I wanted them to do." (R6-59). Jeff Selman didn't consider himself an outsider. (R7-351, 359). While the reasonable observer is measured under an objective standard, a reasonable observer could not conclude that a facially-neutral sticker affixed to extensive secular evolution curriculum, adopted in the context of improvements in evolution curriculum, was intended to promote religion at the expense of evolution. King v. Richmond County, 331 F.3d 1271 (11th Cir. 2003).

The broad ramifications of this type of argument are readily apparent. If a law is unconstitutional simply because it is supported by, that is, because it "echoes the sentiments" of citizens the court assumes are motivated by religion, then laws which in any way provide an indirect benefit to religion or religious belief, including all laws restricting abortion in any way, Sunday business closing mandates, any type of law providing financial or other assistance to any religious organization, or any law enacted for purposes of religious accommodation, would necessarily be struck down. See Lynch v. Donnelly, 465 U.S. 668, 671-2 (O'Connor concurring). As this Court has noted, it not a violation of the effect prong of the Lemon test that an governmental action "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 (11th Cir. 1987) (citation omitted).

If every law with which presumably religious persons agree constituted a establishment of religion, then political bodies such the School Board would have an affirmative obligation to ignore the wishes of constituents whom they imagine to hold religious belief. The Establishment Clause does not go that far. "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief, or from making adherence to a religion relevant in any way to a person's standing in the political community." County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 593-94, 109 S.Ct. 3086 (1989); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1239 (11th Cir. 2004). In arguing that the Sticker has an unconstitutional effect, Appellees not only ask the Court to improperly focus on the comments of a small fraction of Cobb County citizens, they also ignore the fact the Plaintiffs were actually pleased with the result of the evolution curriculum improvements, while the supposed "fundamentalist Christians" were not satisfied with either the curriculum changes or the Sticker itself. [4]

[4]Appellees' recitation of the history leading up to the curriculum changes in 2000-2001 assumes that the members of the Board of Education which adopted the Sticker were the same as those who originally adopted the problematic evolution

III. EFFORTS BY NON-PARTIES TO RESTRICT EVOLUTION INSTRUCTION IRRELEVANT TO COBB SCHOOLS' EFFORTS TO IMPROVE EVOLUTION INSTRUCTION

A. STICKER WAS PART OF IMPROVED EVOLUTION CURRICULUM

Both the District Court's Order and the Appellees' Brief rely heavily upon Epperson v. Arkansas, 393 U.S 97, 89 S.Ct. 266 (1968) and Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573 (1987). However, the District Court acknowledged the key distinctions between this case and those two cases: in this case the School District was in the process of strengthening, not curtailing, evolution instruction, in the process of removing, and not implementing, restrictions; in addition, both of those cases turned on a finding of impermissible purpose, whereas the Court properly found two secular purposes in this case (R4-98-37).

In Epperson, the statute prohibiting evolution instruction was deemed unconstitutional because it censored instruction in a particular subject matter, evolution theory. The Supreme Court affirmed the lower court's holding that the statute was unconstitutional because it "tends to hinder the quest for knowledge,

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policy in 1979. In fact, of the five Board members who testified at trial, only one had been on the Board when the evolution Policy and Regulation were most recently revised in 1995. (R6-187, R7-270, R7-372, R7-390, R8-413). A reasonable observer would be aware that this Board went out of its way to take unilateral action to change the long-standing Policy and Regulation regarding theories of origin, in a way which was decidedly pro-evolutionist and anti-religious.

restrict the freedom to learn, and restrain the freedom to teach." 393 U.S. 97, 100; see 393 U.S. at 109 (characterizing the law as "an attempt to blot out a particular theory"). Similarly, in Edwards, "the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint." 482 U.S. 578, 593. It is difficult to understand how a genuine comparison can be made between an attempt to prevent evolution instruction and this case. Here, the Sticker urges open-minded and careful study of the subject of evolution, is attached to an extensive curriculum supporting and explaining evolutionary theory, and is packaged with a revised Policy and Regulation which mandate tolerance and religious neutrality.

Appellees' attempt to compare this case with those in which evolution instruction was restricted ignores the requirement that this case be decided based on its unique facts. King v. Richmond County, 331 F.3d 1271, 1275-6 (11th Cir. 2003). Appellees focus exclusively on the supposed implicit religious content of the Sticker ("evolution is a theory"), and essentially argue that this statement is the kind of thing that fundamentalist Christians have said in the past. If Establishment Clause analysis were that generic, this Court could have looked at the use of the Ten Commandments in King and readily determined that it violated the Establishment Clause because other cases had found that to be a religious symbol.

331 F.3d 1271. Rather than looking at the particular facts in Bown v. Gwinnett County School District, 112 F. 3d 1464 (1997) the court could look at the Supreme Court precedent and find that every moment of silence was merely an attempt to interject prayer in the schools, just as it could have reached a similar result regarding the graduation messages in Adler. The particular facts of this case are more important than generalizations derived from cases in which evolution was restricted.[5]

B. SCHOOL BOARD SINGLED OUT EVOLUTION FOR PREFERENTIAL TREATMENT

Appellees also argue that the Sticker is unconstitutional because it singles out evolution for special treatment. There can be no doubt that evolution is the only scientific theory mentioned in the Sticker - - and with good reason. The Sticker arose as a part of an effort to strengthen evolution instruction in particular, and to remove the restrictions on such instruction. In adopting the best possible evolution instruction the textbook adoption committee noticed a conflict between the purposed curriculum and existing policies, specifically regarding evolution.

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[5]Rather than focusing exclusively on part of the language of the 33-word Sticker, the Court should first determine what government action is being challenged. Chabad-Lubvitch v. Miller, 5 F.3d 1383, 1388 (11th Cir. 1993). Here, the government action is not the adoption of a sticker, but rather the textbook adoption which included 101 pages on evolutionary theory along with a 33-word Sticker. The primary effect of that government action, regardless of how one feels about the language of the Sticker, is an improvement in evolution instruction.

(R7-255-256). The Policy and Regulation at issue deal specifically with theories of origin, and not with other scientific theories. Appellees ask the Court, in effect, to ignore the context of the decision to place the Sticker in biology textbooks by arguing that there was no reason to single out evolution in particular.

Appellees assert that there was no reason to single out evolution because there are other scientific theories which have religious implications, such the theories of gravity, relativity and Galilean heliocentrism, as the District Court found. (R4-98-8). This argument actually proves Appellants' point: if the School District desired to promote religion, it would have been reasonable to expect it to question all theories which might conflict with religion, not just evolution. In the current day it is evolution instruction which causes a particular conflict with certain persons' religious beliefs; there is no evidence of record suggesting that Cobb County citizens were amassing at board meetings to protest the treatment of germ theory or the theory of relativity in school textbooks. As the District Court correctly found,

> Evolution was the only topic in the curriculum, scientific or otherwise, that was creating controversy at the time of the adoption of the textbooks and Sticker. The School Board's singling out of evolution was understandable in this context, and the undisputed fact that there are other scientific theories with religious implications that are not mentioned in this Sticker or in others supports the

> Court's conclusion that the Board was not seeking to endorse or advance religion.

(R4-98-26).

Evolution, in fact, is unique not only in its religious implications, but in the particular challenges evolution instruction poses because of those religious implications. It was because of the unique nature of the subject matter of evolution that the Cobb County School District went above and beyond merely teaching the subject, offering workshops to teachers to offer guidance on handling religious objections to the scientific subject matter in the classroom (these workshops, of course, singled out evolution). (R6-103-104; see R6-160-161). It was the portion of the Miller biology textbook regarding evolution, in particular, and only the evolution portion, which a number of school districts around the country believed to be anti-religious. (R6-166-167). In fact, Dr. Miller dealt with the inextricable relationship between evolution and religion in a book entitled Finding Darwin's God. (R6-167-168, 179-180). Evolution was singled out by the Sticker for the simple reason that evolution was a particular area which the School District was working to strengthen, and because evolution is a particular area which causes religious concerns in some citizens.

IV. ACCURATE REFERENCE TO EVOLUTION AS "THEORY", EVEN IN ISOLATION, DOES NOT CREATE ENDORSEMENT

Rather than looking at the word "theory" according to its plain meaning, Appellees urge that the Sticker uses a colloquial meaning of the word. The colloquial use of the term is not the standard use:

> American Heritage Dictionary, (Houghton Mifflin Co., 4th Ed. 2000): The first definition of "theory" is "a set of statements or principles devised to explain a group of facts or phenomena, especially one that has been repeatedly tested or is widely accepted and can be used to make predictions about the natural phenomena."
>
> Cambridge Advanced Learner's Dictionary, (Cambridge Univ. Press 2004): "A formal statement of the rules on which a subject of study is based or ideas which are suggested to explain a fact or event . . .";
>
> Webster's College Dictionary, (Random House 1996): "A coherent group of general propositions used as principles of explanation for a class of phenomena: *Darwin's Theory of Evolution*".

Appellees' contention that a reasonable observer would understand this word in a colloquial way is supported by the testimony of Wes McCoy, who testified that "maybe twice a year" a student will point to the Sticker and state "just" a theory, contrary to the Sticker's text. (R6-82). He reported no increase in religious objections to evolution. (R6-84). There is no evidence supporting the

idea that the hundreds of other students taught by Dr. McCoy each year viewed "theory" as having a colloquial meaning.

Appellees apparently acknowledge that, as a matter of scientific fact, evolution is a theory, just as the textbook itself acknowledges. Viewed in context, the Sticker is affixed to a text which tells any reasonable observer that "a theory is well-supported testable explanation of phenomena." (R4-Def. Exh. 4-369). Even a reasonable observer at the middle school level is expected to understand the scientific definition of "theory". (R8-499). A reasonable observer must ignore the text to which the Sticker is attached, as well as the preferred dictionary definition, and look to obscure secondary sources in order to find the meaning gleaned by Appellees.

Even assuming that an accurate reference to evolution as a "theory" somehow disparages it, every witness agreed that posing questions about current scientific ideas and questioning current theories is a part of the scientific process: there is nothing inherently religious about questioning any scientific theory, no matter how broad. According Dr. Miller, there is a legitimate scientific disagreement about everything in science. (R6-146; R8-488). "Can we question an element of evolutionary theory without being religiously motivated? Of course." (R6-185) (Testimony of Dr. Miller). Thus, a key premise of the Appellees'

argument, that any possible disparagement of evolution must necessarily result in an endorsement of religion, is completely invalid.[6]

V. STICKER CAUSES NO ENTANGLEMENT, EITHER ON ITS FACE OR AS-APPLIED

Teachers are required to moderate classroom discussion regarding not just evolution, but all other parts of the curriculum, without regard to whether there is any sticker in the textbook at issue. Any religious discussion which might arise in the classroom is due to the nature of the subject matter itself, as pointed out, *supra*, whether that classroom discussion occurs in Cobb County or at Brown University. Cobb County School District teachers who actually implemented evolution instruction testified that the adoption of the Sticker caused no increase whatsoever in religious discussion in the classroom. (R6-82-84; R8-457-459; R8-473-475). Appellees' arguments regarding entanglement are nothing more than speculation contrary to the facts of record. Under either a facial or an as-applied analysis, the

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[6]Actual restrictions on evolution instruction may violate the Establishment Clause, but that is exactly the opposite of what occurred in this case. None of the cases cited by Appellees stand for the proposition either that disparagement of evolution creates a constitutional violation, or that the expression that "evolution is a theory" creates endorsement. See, *e.g.* Edwards, 482 U.S. 578, 593 ("We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught"); Freiler v. Tangipahoa Parish Board of Education, 201 F. 3d 602, 603, (5th Cir. 2000) (on petition for rehearing *en banc*) ("We do not decide that a state mandated statement violates the constitution simply because it disclaims any intent to communicate to students that the theory of evolution is the only accepted explanation of the origin of life. . . .").

Sticker does not create any entanglement. Bown v. Gwinnett County School District, 112 F.3d 1464, 1473-4 (11th Cir. 1997).[7]

Appellees cite the Court's Order on summary judgment finding that there was a potential issue of fact regarding entanglement: "Inasmuch as Defendants are encouraging students to consider alternative theories to evolution, it is reasonable to expect that these alternative theories will come up in classroom discussion." (R2-45-17-18). Based on this reasoning, since there was no evidence at trial that alternative theories were ever discussed in any classroom, it is reasonable to assume that Defendants were not encouraging students to consider these alternatives, and that no entanglement resulted.

VI. STICKER HAS AT LEAST TWO SECULAR PURPOSES

Appellees ask the Court to revisit the District Court's factual findings that the Sticker had at least two secular purposes including fostering critical thinking and reducing offense to students and parents whose beliefs may conflict with the

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[7] In support of the District Court's Order, Appellees contend that the Court cannot treat this case as a facial challenge because it is a government statement which is not applied in the traditional sense. See Bown, 112 F.3d at 1474 n. 13. However, many of the conjectures offered in support of the District Court's Order are based upon imagined classroom teaching or discussions which might be supposedly caused by the Sticker as applied in the classroom. On its face, the Sticker does not even mention classroom discussion, much less cause classroom discussion. As applied, the evidence shows that the Sticker caused no religious discussion whatsoever.

teaching of evolution by presenting the subject in a manner that is not unnecessarily hostile. (R4-98-30). The District Court specifically found that the testimony of school board members regarding the purposes for the Sticker was "highly credible". (R4-98-24, 27). Viewed against the backdrop of previous restrictions on evolution instruction, the District Court properly viewed the Sticker as an effort to actually enhance evolution instruction by encouraging students to keep an open mind about the subject, without regard to potential conflict with religious beliefs, and also as a genuine attempt to mitigate the offense which was clearly displayed in the opposition to the new textbook adoption.

Appellees rely upon Freiler v. Tangipahoa Parish Bd. Of Educ. for the proposition that the Court should find the purposes proffered by the School Board members to be a sham. However, the Fifth Circuit Court in Freiler found that the evolution disclaimer in that case did further the legitimate secular goal of reducing offense. 185 F.3d at 345. The disclaimer did not further the goal of promoting critical thinking because "the disclaimer as a whole furthers . . . the protection and maintenance of a particular religious viewpoint." Id. at 344-345. Unlike the Freiler case, the Sticker in this case does not even mention a particular religious viewpoint, much less suggest that a particular one should be maintained; further, none of the three factors relied upon by the Fifth Circuit in finding an

unconstitutional effect apply here. Although evolution instruction had previously been restricted, the Sticker tells students that the 101 pages of evolution curriculum should be approached with an open mind and studied carefully. The District Court's factual findings and conclusions regarding the purpose prong are correct.[8]

VII. CONCLUSION

The unspoken undercurrent behind the arguments of Appellees and *amici* is a simple disagreement with the wisdom of the School Board's decision to insert the Sticker as a gesture of tolerance. To be sure, many of the arguments are generated from a knee-jerk reaction that anyone who questions evolution, whether from a scientific basis or otherwise, must be a religious fanatic, just as Mr. Selman testified. The fundamental problem the Appellees have with the Sticker is that the decisions regarding how to go about improving the evolution curriculum might have been made differently.

The Cobb County School District was elected by its constituents to implement the curriculum in the way in which they felt would be in the best

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[8] The Appellees correctly note that the Georgia Constitution may afford additional protections beyond those of the First Amendment of the United States Constitution. However, neither Constitution should be held to prohibit a local school district from implementing a strengthened evolution curriculum which is non-religious. See Stark v. Independent School District, 123 F.3d 1068, 1077 (8th Cir. 1997) (rejecting First Amendment claim under similar provision of Minnesota Constitution).

interest of students. Appellees were not elected by the citizens of Cobb County; unless their constitutional rights are "directly and sharply implicated" through an innocuous neutral statement, their voice regarding curriculum decisions is properly made at the polling place, and in comment to their elected officials.

This Court's decision regarding whether the District Court should be reversed or affirmed will have ramifications far beyond whether school districts can make a neutral public expression regarding evolution. If members of the public can co-opt the decision-making process about a facially-neutral Sticker, then the control they exercise over curriculum decisions will be virtually unlimited. Appellees could mandate that one textbook offering more extensive evolution curriculum should be chosen rather than another, which might offer better curriculum in other areas; they might insist that the Miller textbook, which offers no gesture of tolerance or consideration with regard to evolution instruction, would be required, rather than an alternative text which might at least acknowledge the potential conflict. Perhaps Appellees might insist that a certain amount of class time be spent on evolution instruction each year, since any reduction in class time would potentially send some message of "disparagement".

There is no endorsement of religion in this case, but merely a particular way of improving an evolution curriculum. Reasonable people may disagree regarding

the methods the School Board chose; reasonable people would not view a process of strengthening the curriculum as a weakening of the curriculum, however. Appellants respectfully request that this Court protect this School Board's control over curriculum matters, and reverse the judgment of the District Court.

Respectfully submitted this 20th day of June, 2005.

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CERTIFICATE OF COMPLIANCE

I certify that this **Appellants' Reply Brief** complies with the type-volume limitations set forth in FRAP 32(a)(7)(B). This Brief contains 3,981 words.

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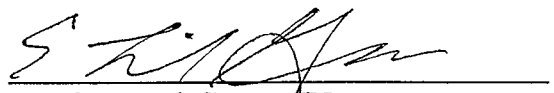

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CERTIFICATE OF SERVICE

I CERTIFY that I have this day served upon those persons listed below a copy of the within and foregoing **Appellants' Reply Brief** via Federal Express-Overnight Mail to:

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This 20th day of June, 2005.

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