IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

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

Appellants,

v.

JEFFREY MICHAEL SELMAN, KATHLEEN CHAPMAN,
JEFF SILVER, PAUL MASON AND TERRY JACKSON,

Appellees.

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

BRIEF OF APPELLEES

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COBB COUNTY SCHOOL DISTRICT, COBB COUNTY BOARD OF EDUCATION, JOSEPH REDDEN, SUPERINTENDENT,	)	
Appellants,	)	COURT OF APPEALS CASE NOS. 05-10341-I & 05-11725-II
v.	)	
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BRIEF OF APPELLEES

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	)	CASE NO. 05-10341-I
v.	)	
JEFFREY MICHAEL SELMAN, et al.	)	
Appellees.	)	

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for Appellees Jeffrey Michael Selman, Kathleen Chapman, Jeff Silver and Terry Jackson certify that pursuant to FRAP 26.1, the following parties, firms, partnerships, counsel, and judges have an interest in the outcome of this case:

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Cobb County School District, et al. v. Jeffrey Michael Selman, et al.
Case No. 05-10341-I

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Trial Judge
Honorable Clarence Cooper

STATEMENT REGARDING ORAL ARGUMENT

Appellees would be pleased to participate in oral argument of this appeal should the Court desire to hear it.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction of this matter pursuant to 28 U.S.C. § 1331, as it involves, *inter alia*, a challenge to a governmental action based on the Establishment Clause of the First Amendment to the United States Constitution. This Court has jurisdiction to review the final judgment entered by the district court pursuant to 28 U.S.C. §§ 1291.

STATEMENT OF THE ISSUES

1. Whether Appellants violated the Establishment Clause by communicating a message from the School District on science textbooks singling out evolution as a theory deserving of a heightened degree of skepticism.
2. Whether the Appellants' actions, taken at public expense, violate the Georgia Constitution.

STATEMENT OF THE CASE

I. Nature of the Case

Appellees Jeffrey Selman, Jeff Silver, Terry Jackson, and Kathleen Chapman, taxpaying parents of children in the Cobb County, Georgia school system, brought this action pursuant to 42 U.S.C. § 1983 challenging the Appellants' (hereinafter "CCSD") decision to use science textbooks as a medium to single out and express heightened skepticism toward the scientific theory of

evolution. Appellees claimed, and the trial court found, that the School District's action violated the Establishment Clause of the United States' Constitution and the Georgia Constitution's provision mandating separation of church and state. Specifically, the trial court concluded that the School District's action, interpreted from the viewpoint of an informed, reasonable observer, conveyed a message of endorsement of religion by favoring biblical literalists who oppose evolution and disfavoring those who find inconsistencies between evolution and the *Genesis* accounts of creation either irrelevant or theologically acceptable.

II. Course of Proceedings and Disposition Below

Plaintiffs filed suit August 21, 2002. (R1-1). CCSD answered on October 25, 2002 and the issue was joined. (R1-5). CCSD filed a motion for summary judgment after the close of discovery. (R1-22). The trial court denied CCSD's motion on March 31, 2004. (R2-45).

The district court conducted a bench trial November 8 - 12, 2004. On January 13, 2005, the court issued its dispositive order making factual findings and concluding that the CCSD had violated the Establishment Clause of the First Amendment to the U.S. Constitution, and Article 1, § 2, ¶ 7 of the Georgia Constitution. (R4-98).

Defendants filed a premature notice of appeal from the trial court's January 13 Order on January 19, 2005. (R4-100). This initial appeal was assigned

the designation Case No. 05-10341-I. CCSD moved the trial court to stay enforcement of its January 13 Order pending appeal. (R4-101). On February 24, the trial court denied CCSD's motion for stay pending appeal. (R5-112). On April 11, CCSD filed an opening brief in Case No. 05-10341-I and, the next day, filed their motion for stay pending appeal in this Court. This Court denied CCSD's stay motion on May 3, 2005.

Meanwhile, on March 4, 2005, the district court entered an order awarding nominal damages to plaintiffs. (R5-117). Final judgment was entered on March 7, 2005. (R5-118). CCSD filed a second notice of appeal from the March 7 final judgment. This Court designated the second appeal as Case No. 05-11725-II. On April 26, the parties filed a Joint Motion to Consolidate the two appeals, which this Court granted on May 2, 2005. By operation of FRAP 31 and corresponding Eleventh Circuit Rule 1(c), this Brief of Appellees falls due June 1, 2005.

STATEMENT OF FACTS

Evolution is ***the*** dominant scientific theory regarding the origin of the diversity of life.[1] It is a scientific "theory" "in the same sense that quantum mechanics or the theory of relativity or of gravity is a theory[;] [i]t is one of the

[1] R4-98-3 (Trial Court's Order of January 13, 2005, at 3 (emphasis added)).

best established theories in all of science."[2] It is a "well-supported testable explanation" of "the process by which modern organisms have descended from ancient organisms."[3] It is supported by more evidence than many other scientific theories[4] and is accepted by the overwhelming majority of the scientific community.[5] In the words of R.W. McCoy, Ph.D., Cobb County science educator for 26 years:

> Evolution is, in the view of scientists, is key to understanding how the different parts of science fit together, how organisms relate to one another, how organisms have developed over time. It is sometimes called a foundational issue in science.[6]

For many years, when called upon to make decisions relating to this foundational issue in science, Cobb County's elected School Board has operated in an environment marked by political conflict rooted in religious differences.[7] Some

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[2] R7-114-364 (Carlos Moreno, Ph.D. trial testimony at 364, ll 1-4).

[3] Kenneth R. Miller & Joseph Levine, Biology 369 (2002) (Defs.' Ex. 4 & R6-113-68-69 (McCoy trial testimony at 68, ll. 4-7 & 69, ll.15-18).

[4] R7-114-362 (Moreno trial testimony at 362, ll. 4-5).

[5] R4-98-3 (Trial Court's Order of January 13, 2005, at 3); *see also* R8-115-143-152 (Miller trial testimony at 143, l. 16 – 152. l. 1); R7-114-362 (Moreno trial testimony at 362, ll. 1-6 & 12-19); R8-115-488-490 (Stickel testimony at 488 l. 25 – 490, l. 6).

[6] R6-113-71 (McCoy trial testimony at 71, ll. 18-22).

[7] Cobb County's elected officials were, of course, not operating in a vacuum. For background, the Court is urged to consider two excellent works by University of Georgia historian Edward J. Larson: *Summer for the Gods: The Scopes Trial and America's Continuing Debate Over Science and Evolution* (Harvard Univ. Press 1998) and *Evolution: The Remarkable History of a Scientific Theory*

taxpaying citizens insist that Cobb County's children ought to receive a state-of-the-art science education, including the aspects of evolutionary theory touching on human origin and common descent.[8] Other Cobb County residents are unalterably opposed to science instruction that they perceive to challenge the literal truth of biblical accounts of creation.[9] The latter group, sometimes referred to as "creationists," reject the scientific underpinnings of astronomy, geology and biology because they are perceived to conflict with the religiously-rooted premise that the universe and all living organisms were created nearly simultaneously approximately six- to ten-thousand years ago.[10]

In 1979, substituting the euphemism "family teachings" for the views of their creationist constituents, the School Board adopted policy subordinating science instruction to "family teachings:"

> The Cobb County School District acknowledges that some scientific accounts of the origin of human species as taught in public schools are inconsistent with the family teachings of a significant number of Cobb County citizens. Therefore, instructional program and curriculum of the school system shall be planned and organized with respect for these family teachings.

(Random House 2004); *see also* R7-114-314 (Selman trial testimony at 314, ll. 15-21).

[8] R6-113-196-197, 208-209 (Searcy testimony at 196, l. 20 – 197m l. 6; 208, l. 12 – 209, l. 12); R7-114-319-320 (Selman testimony at 319, l. 23 – 320, l. 2).

[9] *Genesis* 1 & 2.

[10] *See* R6-113-138-139 (Miller trial testimony at 138, l. 17 – 139, l. 3).

See Defs.' Ex. 1 (1995 version). Leaving no doubt that "family teachings" refers to the viewpoint animated by the religious opinions of the creationist constituency, the following sentence was appended to the policy: "The Constitutional principle of separation of church and state shall be preserved and maintained as established by the United States Supreme Court and defined by judicial decisions."

In 1995, the School Board issued a more specific policy pronouncement forbidding instruction on the politically controversial features of evolution in elementary and middle schools and, at the high school level, making instruction in evolution purely elective.[11] Under this regimen, teachers were restricted from

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[11] The policy statement provided:

> In respect for the family teachings of a significant number of Cobb County citizens, the following regulations are established for the teaching of theories of the origin of human species in the Cobb County School District:
> (1) The curriculum of the Cobb County School District shall be organized so as to avoid the compelling of any student to study the subject of the origin of human species.
> (2) The origin of human species shall be excluded as a topic of curriculum for the elementary and middle schools of the Cobb County School District.
> (3) No course of study dealing with theories of the origin of human species shall be required of students for high school graduation.
> (4) Elective opportunities for students to investigate theories of the origin of human species shall be available both through classroom studies and library

discussing the forbidden features of evolution in required courses.[12] Material on evolution potentially offensive to "family teachings" was actually ripped out of Cobb County science textbooks.[13]

The conflict between evolution and creationism reared its head in 2001-'02, when, during the process of selecting new science textbooks, the School District discovered that its restrictions on evolution instruction violated state curriculum standards.[14] In Georgia, the State's Department of Education prescribes public school curriculum through regulations defining "Quality Core Curriculum" ("QCC").[15] Georgia's QCC requires the teaching of evolution.[16] Cobb School

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> collections which shall include, but not be limited to, the creation theory.
>
> (5) All high school courses offered on an elective basis which include studies of the origin of human species theories shall be noted in curriculum catalogs and listings which are provided for students and parents for the purpose of course selection.

(Defs.' Ex. 2 (1995 version).)

[12] R6-113-70-71 (McCoy testimony at 70, l.15 – 71 l.9); R4-98-5 (Order of Jan. 13, 2005 at 5).

[13] R6-113-208-209, 211 (Searcy trial testimony at 208,l.12 – 209, l.6., 211).

[14] R7-114-255-257 (Redden trial testimony at 255, l. 19 – 257, l. 13) & Ptfs.' Ex. 3.

[15] In Georgia, the Quality Core Curriculum ("QCC") is mandated by O.C.G.A. § 20-2-140. The QCC is a uniformly sequenced core curriculum for grade kindergarten through grade 12 composed of content standards. Ga. Comp. R. & Regs. r. 160-4-2-.01. *See also* R7-114-254 (Redden trial testimony at 254, ll. 4-6); R8-115-415 (Johnston testimony at 415, ll. 10-19).

Superintendent Redden favored the abandonment of Cobb's restrictions on teaching evolution not merely to bring the School District into compliance with State standards, but also for practical educational reasons:

> We found ourselves in a circumstance . . . in having curriculum that is not aligned with what students would be evaluated on. And a sound basis [in] scientific theory and fact is important for young people to be able to … not only successfully attain good education here in Georgia, but move on to a future and be able to do well on standardized tests . . . . I believe that this ends up being a science foundation that is well-founded, reviewed by the National Science Foundation, and . . . gives us an opportunity to provide a better, more comprehensive presentation of science across all of our grade levels.[17]

Nevertheless, the necessary curriculum change threatened to plunge Cobb schools into conflict with the elected Board's creationist constituents who perceived this change to trample on their "family teachings."

The School District began the process of selecting new science textbooks in 2001.[18] The Board delegated the heavy lifting of textbook screening and recommendation to a textbook adoption committee.[19] Among the texts

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[16] R7-114-282 (Tippins trial testimony at 282, ll. 1-3); R8-115-415 (Johnston testimony at 415, ll. 22-24). Under the current QCC, the Theory of Evolution: Origins of Life and the Universe is topic 12 in the Biology course. It is available through the Georgia Department of Education's website, www.glc.k12.ga.us.

[17] R7-114-258-259 (Redden trial testimony at 258, l. 8 – 259, l. 1).

[18] R7-114-255 (Redden trial testimony at 255, ll. 6-14); R6-113-66-67 (McCoy trial testimony at 66, l. -67, l. 10).

[19] R7-114-236-237 (Redden trial testimony at 236, l. 19 – 237, l. 25).

recommended by the committee for Board adoption was Miller & Levine's *Biology*.[20] *Biology* is reported to be "the largest selling high school textbook in the country."[21] It has been selected for use in more than 1,000 school systems in more than thirty of the fifty 50 United States,[22] in high schools serving members of the United States armed forces around the world,[23] and in the English-speaking nations of Canada, Australia, New Zealand, and Great Britain.[24] One of the ten units in *Biology* is devoted exclusively to evolution.[25] Overall, and particularly with respect to its instruction on evolution, *Biology* is "one of the best books on the market."[26]

In his foreword to *Biology* addressed to students, Dr. Miller states: "Biology is the science of life itself. . . . You don't need a lab coat or degree to be a scientist. What you do need is an inquiring mind, the patience to look at nature carefully, and the willingness to figure things out."[27] In the very first chapter of *Biology*, Miller & Levine elaborate on these points:

> [C]ertain qualities are desirable in a scientist: curiosity, honesty, open-mindedness, skepticism, and the

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20 R6-113-67 (McCoy trial testimony at 67, ll. 17-25).
21 R6-113-127 (Miller trial testimony at 127, ll. 14-21).
22 R6-113-128 (Miller trial testimony at 128, ll.1-25).
23 R6-113-129 (Miller trial testimony at 129, ll. 4-6).
24 *Id.* (*Id.* lines 1-3).
25 Defs.' Ex. 4 at 368-467.
26 R8-115-483-484 (Stickel testimony at 483, l. 14 – 484, l. 9).
27 Defs.' Ex. 4, at xviii.

> recognition that science has limits. An open-minded person is ready to give up familiar ideas if the evidence demands it. A skeptical person continues to ask questions and looks for alternative explanations. Scientists are persuaded by logical arguments that are supported by evidence. Despite recognizing the power of science, scientists know that science has definite limits. Science cannot help you decide whether a painting is beautiful or cheating on a test is wrong.[28]

The Cobb County School District would have been well-advised to adopt this book as is--with its clear and non-dogmatic explanation of science and appropriate disclaimers about its limits--and leave well enough alone.

However, the science textbook selection decision converged with the District's recognition that its previous restrictions on the teaching of evolution would have to be abandoned.[29] With these two issues looming, the Board found itself swamped with "thousands of emails, phone calls, media contacts,"[30] a "tremendous amount of publicity,"[31] and a high "anxiety level about what you ought to teach about evolution."[32] In the words of one observer, Cobb County School Board meetings addressing the evolution/creationism controversy were "just crazy. There were--I mean it was lined with, the last one in particular, they

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28 *Id*. at 6.

29 R6-113-213-214 (Searcy trial testimony at 213, l. 17 – 214, l. 23); R7-114-255-257 (Redden trial testimony at 255, l. 19 – 257, l. 13).

30 R6-113-188 (Searcy trial testimony at 188, ll. 18-21) (Searcy).

31 R6-113-193 (Searcy trial testimony at 193, l. 3-25).

32 R7-114-393 (Gray testimony at 393, ll. 18-19).

had TV cameras. I mean, it was a zoo."[33]

In the center of this public controversy emerged Marjorie Rogers, a self-described "six-day literal biblical creationist"[34] who holds the view that "there [is] no evidence for evolution, just theories made up by people who believe in evolution."[35] Ms. Rogers reviewed several of the proposed science texts and found them deficient because they contained extensive instruction in evolution, but none in creationism.[36] Rooted in the conviction that evolution and her religious views are irreconcilable, Ms. Rogers united 2,300 of the Board's constituents in a formal petition,[37] urging the Board to convey a message to students about distinguishing fact from theory. Ms. Rogers testified as follows:

> Q: [O]ne of the things your petition said you wanted the school board to do is clearly identify presumptions and theories and distinguish them from fact?
> A: Yes.
> Q: So to say: This is a theory, not a fact, this is a theory, this is a fact, that sort of thing?
> A: Yes.[38]

On March 27-28, 2002, confronted with a public firestorm of controversy over the abandonment of the prior policy subordinating science instruction to

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33 R6-113-53-54 (Rogers testimony at 53, l. 23 – 54, l. 10).

34 *Id.* at 46, ll. 11-12.

35 *Id.* at 34, ll. 20-21.

36 R7-114-239 (Redden trial testimony at 239, ll. 7-13); *see also* R3-771 copy of Rogers' comments on textbooks).

37 R6-113-38 (Rogers trial testimony at 38 ll. 12-24).

"family teachings" and the expansion of evolution as a mandatory feature in the County's science curriculum, the Board met to consider the selection of new science textbooks containing explicit material on evolution.[39] Although there is some conflict in the evidence over whether the insertion of the Sticker was a condition of textbook selection approval,[40] the trial court found that the School Board voted to condition acceptance of the textbook selection recommendations on the requirement that a message from the School Board be inserted in science textbooks containing material on evolution.[41] The message the Board chose to insert was:

> 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.[42]

The Board crafted this message, echoing the distinctions between theory and fact advocated by Ms. Rogers' petition, as a response to the concerns of parents "unhappy that you were teaching only evolution and nothing else so far as

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[38] *Id.* at 39, ll. 17-24; *see also* R3-77 (petition).

[39] R4-98-8 (Trial Court's Order, at 8); R6-113-213-214 (Searcy trial testimony at 213, l. 17 – 214, l. 6).

[40] *See, e.g.,* R7-114-246-247 (Redden trial testimony at 246, l. 4 – 247, l. 10).

[41] R4-98-8 (Trial Court's Order, at 8, n.6). *See also* R6-113-203-204 (Searcy trial testimony at 203, l. 22 – 204, l.2); R7-114-247 (Redden testimony, 247, l. 4-6); R7-114-399 (Gray testimony at 399, ll. 7-15).

[42] Ptfs.' Ex. 1.

evolution of the species is concerned."[43]

The School District proceeded to spend general taxpayer funds and to employ school system personnel for the purpose of communicating its position on evolution through the message affixed to every textbook provided to each Cobb County family whose student took a course involving evolution.[44] To Plaintiff Jeffrey Selman, the Board's message singling out evolution "raise[d] a flag to me. . . . [n]obody else attacks evolution in the science curriculum except people with a specific religious bent."[45] To Dr. McCoy, the 26-year veteran of Cobb County science classrooms, the Board's action aimed at science textbooks containing material on evolution invited "confusion between fact and theory."[46] Dr. McCoy went further: "[I]t's an endorsement from Cobb County Board of Education that evolution is somehow different from all other scientific theories, that evolution should be considered separately from all other theories."[47] Dr. McCoy elaborated:

> [I]t's a signal to me that there are folks on the school board who definitely want to take the theory of evolution out and separate it from other theories and say that it's not the same, it's not as scientifically valid, it's not as

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43 R8-115-417-418 (Johnston testimony at 417, l. 17 – 418, l. 12).

44 R4-98-14 (Trial Court's Order, at 14); R8-115-426 (Johnston testimony at 426 ll. 15-21).

45 R7-114-314 (Selman testimony at 314, ll. 7-9; 18-19).

46 R6-113-86 (McCoy trial testimony at 86, ll. 16-24).

47 *Id.* at 86 l. 25 – 87, l. 3.

> useful to people, and as a result it should be treated differently in the classroom, should be treated differently by the students.[48]

To School Board member Betty Gray, the message was one of protection for constituents in the creationist camp:

> Q: [Y]ou voted on the sticker because you wanted to kind of safeguard the kids' feelings; is that right?
> A: I think that would be accurate, yes. Safeguard, I guess that word, I'd live with that.
> Q: You knew from the response from the community that there was a fair bit of resentment about the idea of teaching evolution; is that right?
> A: I'd say that's a fair statement, fair, yeah, fair amount.
> Q: … [Y]ou wanted to make sure that the kids . . . that had a creationist or intelligent design or other particular religious beliefs that they felt were in conflict with evolution, you wanted to protect them; is that right?
> A: I think that would be, probably, yeah.[49]

STANDARDS OF REVIEW

The district court's findings of fact are reviewed for clear error; its conclusions of law are reviewed *de novo*. *Glassroth v. Moore*, 335 F.3d 1282, 1296-97 (11th Cir. 2003).

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48 *Id.* at 107, ll.11-17.

49 R7-114-400-401 (Gray testimony at 400, l. 17 – 401, l. 6).

SUMMARY OF ARGUMENT

ARGUMENT

This Establishment Clause challenge to the CCSD's actions is properly evaluated under the *Lemon* test, which provides that Government actions are unconstitutional where they: (1) do not have a secular purpose; (2) have the primary effect of advancing or inhibiting religion; or (3) foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 603, 612-13, 91 S. Ct. 2105, 2111 (1971).

Furthermore, this case presents a special context because it involves schools. This Court has recognized, "the pervasive influence exercised by the public schools over the children who attend them, which makes scrupulous compliance with the establishment clause in the public schools particularly vital." *Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684, 689-90 (11th Cir. 1987). Accordingly, this Court and the U. S. Supreme Court have warned that the Court must be particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Id.* at 690 (*citing Edwards v. Aguillard*, 482 U.S. 578, 584, 107 S. Ct. 2573, 2577 (1987)).[50]

[50] Indeed, the fact that a governmental message is directed to school children creates a heightened level of scrutiny with regard to the Establishment Clause. *Compare Marsh v. Chambers*, 463 U.S. 783, 795, 103 S. Ct. 3330, 3338 (1983) (holding that prayers conducted at the commencement of a legislative session do

In light of these standards, the district court correctly held that the Sticker does not meet prongs (2) and (3) of the *Lemon* test; and the district court erred in holding that the Sticker did not meet prong (1).

I. The Sticker Violates the Establishment Clause.

A. The Sticker Has the Primary Effect of Advancing or Inhibiting Religion.

The district court's primary holding—that the Sticker violates the second prong of *Lemon*—was correct. In evaluating *Lemon's* second prong, the U.S. Supreme Court has particularly considered whether a government action can be said to "endorse" a religious viewpoint. *County of Allegheny v. ACLU*, 492 U.S. 573, 592, 109 S. Ct. 3086, 3100 (1989). Endorsement is likened to "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 593, 109 S. Ct. at 3101 (citation omitted). Thus, *even where evidence of a religious purpose is lacking*, the government is prohibited from "appearing to take a position on questions of religious belief."[51] *Id.* at 594,

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not violate the Establishment Clause), *with Sch. Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963) (holding that prayer at the beginning of a school day violates the Establishment Clause), *and Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962) (same).

[51] It is in this point that the CCSD fundamentally misunderstands the law. The CCSD would like to bootstrap the district court's finding of a permissible purpose into the conclusion that the Sticker does not endorse religion. But the *Lemon* test has three prongs, and a violation of any of those prongs means that the government

109 S. Ct. at 3101; *King v. Richmond County*, 331 F.3d 1271, 1278 (11th Cir. 2003).

The endorsement test is objective in nature:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is . . . in large part a legal question to be answered on the basis of judicial interpretation of social facts.

Lynch v. Donnelly, 465 U.S. 668, 693-94, 104 S. Ct. 1355, 1370 (1984) (O'Connor, J., concurring). Thus, courts inquire whether a reasonable observer would perceive the government action as endorsing religion, in light of the context of the particular community where the government action occurred. *See Allegheny*, 492 U.S. at 630, 109 S. Ct. at 3121 (O'Connor, J., concurring); *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780, 115 S. Ct. 2440, 2455 (1995) (O'Connor, J., concurring in part and concurring in judgment);[52]

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action violates the Establishment Clause. *County of Allegheny*, 492 U.S. at 594, 109 S. Ct. at 3101.

[52] In *Pinette*, the Justices disagreed as to the proper scope of knowledge attributable to the reasonable observer. Much of this discussion was dictum, however, because the plurality held that, in the case of private religious speech on government owned public fora, the endorsement test was inapplicable. 515 U.S. at 769-70, 115 S. Ct. at 2450. Furthermore, the reasonable observer espoused by Justice O'Connor in her concurrence appeared to be most like prior Court precedent. *See, e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395, 113 S. Ct. 2141, 2148 (1993) (discussing community perceptions).

Glassroth, 335 F.3d at 1297 (2003).[53]

Here, three attributes of the Sticker combine to convey an impermissible message of endorsement. First, the Sticker singles out evolution for disfavored treatment--an act that has been constitutionally problematic since challenges to evolution instruction began. Second, the Sticker appeals to the colloquial meaning of the term "theory," signaling that the government is siding with religious objectors to evolution instruction. Third, the context of the Sticker's adoption, including citizens' complaints about the changes in the CCSD's science curriculum, sends a message to the reasonable observer that the CCSD is preferring religious beliefs over the secular, scientific views presented in the textbook. Finally, the cases upon which the CCSD relies cannot avoid the inevitable result: this Sticker is an endorsement of religion.

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[53] The CCSD argues that because the Sticker is "neutral on its face," it cannot have the effect of endorsing religion. (App't's Br. at 25.) But in so arguing, the District takes the "reasonable observer" standard completely out of the equation. A "reasonable observer" "must be deemed aware of the history and context of the community and forum" in which the government message appears. *Pinette*, 515 U.S. at 780, 115 S. Ct. at 2455 (O'Connor, J., concurring). Furthermore, a state cannot hide behind facial neutrality and "remain studiously oblivious to the effects of its actions." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 n.21, 120 S. Ct. 2266, 2278 n.21 (2000) (quoting *Pinette*, 515 U.S. at 777, 115 S. Ct. at 2454 (O'Connor, J., concurring)).

1. The Sticker Singles Out Evolution.

A reasonable observer would be aware that evolution has long been a point of religious controversy. "There is a[n] historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution." *Edwards v. Aguillard*, 482 U.S. 578, 590, 107 S. Ct. 2573, 2581 (1987). *See generally Scopes v. State*, 289 S.W. 363, 363 (Tenn. 1927) (challenge to statute making it criminal to teach evolution—"a certain theory that denied the story of the divine creation of man"). And evolution has long been singled out for "special" unconstitutional treatment. As the Supreme Court emphasized in *Epperson v. Arkansas*, where it struck down a statute prohibiting the teaching of evolution,

> The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.

393 U.S. 97, 103, 89 S. Ct. 266, 270 (1968). Likewise, the Court invalidated a "balanced treatment" statute in *Edwards*, explaining "[o]ut of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects." 482 U.S. at 593, 107 S. Ct. at 2582.

Similarly here, the CCSD chose to single out evolution from all the other subjects taught in its science courses.[54] This fact would not be lost on a reasonable observer. (*See* Pltfs.' Ex. 1 (Sticker); *see also* R6-113-87 (Trial Tr. at 87 [McCoy]) (testifying Sticker has had negative impact on teaching of evolution because "it's an endorsement from the Cobb County Board of Education that evolution is somehow different from all other scientific theories, that evolution should be considered separately from all other theories"); R6-113-165 (Trial Tr. at 165 [Miller]) (explaining that it is bothersome that the Sticker singles out evolution).)

Furthermore, the reasonable observer would be aware that historically, singling out evolution was done for the purpose of promoting religious beliefs. *E.g.*, *Edwards*, 482 U.S. at 593, 107 S. Ct. at 2582; *Epperson*, 393 U.S. at 98, 89 S. Ct. at 267. And even in the narrower context of the Cobb County community, the former policy and regulation excluded the teaching of human evolution for the express purpose of catering to the "family teachings" of those in Cobb County who disagreed with human evolution.[55] (Defs.' Exs. 1, 2.) *Even if* the Sticker was not

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[54] CCSD chose to single out evolution despite the fact that other scientific topics taught in Cobb County schools have religious implications, such as the theories of gravity, relativity, and Galilean heliocentrism. R4-98-8.

[55] For this reason, the CCSD's contention that historical opposition to evolution instruction is "distant history" irrelevant to this case holds no merit. The historic antagonism between certain religious faiths and evolution has played out in Cobb County itself, as evidenced by the old policy and regulations.

implemented with the purpose of establishing religion, therefore, it signals endorsement to the reasonable observer because it singles out evolution—just like so many other unconstitutional government acts.

2. The Sticker Appeals to the Colloquial Meaning of "Theory."

The Sticker states that evolution is a theory, not a fact; even if this statement is scientifically accurate, it conveys endorsement to a reasonable observer because it plays on the colloquial understanding of the word "theory." The district court's view of the colloquial understanding of that word was supported by the evidence presented at trial. (*See* R6-113-73 (McCoy trial testimony at 73) ("[m]ost students point to the sticker and include the word 'just,' as in evolution is just a theory"); *id.* at 164 [Miller testimony] ("The popular understanding is a theory is just a hunch. . . . But in science you don't use the word 'theory' for a guess or a stupid hunch or something like that.").) And as a matter of "social facts," *Lynch*, 465 U.S. at 694, 104 S. Ct. at 1370 (O'Connor, J., concurring), a reasonable observer would consider the play on colloquial understandings to be an endorsement of religious viewpoints.[56]

[56] Indeed, although a reasonable observer may not have read various law review articles cited by the district court, such an observer would still be aware of the social facts supporting those articles. Those facts include the historic and growing use of the fact/theory distinction to evade Establishment Clause scrutiny. *See* Note, *The New Face of Creationism: The Establishment Clause and the Latest Efforts to Suppress Evolution in Public Schools*, 54 Vand. L. Rev. 2555, 2586-87

Numerous cases illustrate the constitutional undertones in distinguishing between evolution as a theory and evolution as a fact (in the colloquial sense). In his *Edwards* dissent, for example, Justice Scalia noted the legislators' concern that forbidding creation science would lead students "to believe that evolution is proven fact; thus, their education suffers and they are wrongly taught that science has proved their religious beliefs false." 482 U.S. at 624, 107 S. Ct. at 2599 (Scalia, J., dissenting).[57] In *Peloza v. Capistrano Unified School District*, 37 F.3d 517 (9th Cir. 1994), a high school biology teacher unsuccessfully opposed the teaching of evolution because he was required to teach it "not just as a theory, but rather as a fact." *Id.* at 520. And in *Freiler v. Tangipahoa Parish Board of Education*, 975 F. Supp. 819 (E.D. La. 1997), *aff'd*, 185 F.3d 337 (5th Cir. 1999), the district court held unconstitutional a school board's disclaimer of evolution; there was evidence that school board members and some members of the community wanted evolution

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(2001) (describing increasing use of distinction as method for avoiding current jurisprudence); *see also* Comment, *Evolution-Creationism Debate: Evaluating the Constitutionality of Teaching Intelligent Design in Public School Classrooms*, 25 U. Haw. L. Rev. 9, 51 (2002) ("The diminishment of evolution's validity as a scientific theory, juxtaposed with the reminder that alternative theories exist, results in a primarily religious effect.").

[57] As described in more detail below, the fact that many of the Cobb County School Board members were concerned that without the sticker, students would be given the impression that their religious beliefs were false, is part of the context leading to the adoption of the Sticker which adds to its apparent endorsement of a religious viewpoint.

"to not be taught as fact." *Id.* at 823. Although these cases did not rest their holdings on the theory/fact distinctions, they do illuminate the social context in which the theory/fact distinction arises: that is, they show an historical opposition by religious groups to the perception that evolution is a "fact," rather than a "theory," in the colloquial sense. A reasonable observer, of course, would be aware of this opposition.

By placing the "theory, not a fact" language in the Sticker, the CCSD appears to endorse religion because it echoes the sentiments of many religious groups' opposition to evolution. In this way, the CCSD appears to have "favored or preferred" a particular religious belief. *Allegheny*, 492 U.S. at 593, 109 S. Ct. at 310.

3. The Context of the Sticker's Adoption Conveys a Message of Endorsement.

One of the most important contextual elements of this case involves the circumstances giving rise to the CCSD's decision to adopt the Sticker. The CCSD *chose to insert the Sticker only after people voiced religious concerns about the changes in evolution instruction*. A reasonable observer would understand this context and perceive the District's choice as an endorsement of the objectors' religious views.

The evidence before the district court showed the following sequence of events. First, the CCSD had in place a policy and regulation that operated to forbid teaching human evolution in any courses except elective high school courses. (Defs.' Exs. 1, 2; *see also* R6-113-71 (McCoy trial testimony at 71.) Second, the School Board began the process of evaluating new science textbooks, ultimately recommending (among others) "Biology," by Miller and Levine. R6-113-67-68 (McCoy trial testimony at 67-68). Third, parents, the public, and at least one school board member complained that "Biology" did not present "alternate" theories such as creationism and intelligent design. R6-113-34-35 (Rogers trial testimony at 34-35; R6-113-188-190 (Searcy trial testimony at 188-90); R7-114-272 (Tippins trial testimony at 272). Fourth, the school board decided to add the Sticker to the text to address these concerns: *the adoption of the text was conditioned on including the Sticker*. R7-114-287 (Tippins trial testimony at 287) ("The text was adopted with a stipulation that the sticker would be in the text."); *see also* R7-114-246-248 (Redden trial testimony at 246-48). The causation in this sequence is critical; it would appear to the reasonable observer that the Sticker was adopted to placate religiously motivated individuals by showing that the CCSD endorsed their religious viewpoints.

The CCSD contends that the subsequent changes in the official Policy and revised Regulation somehow save the Sticker from running afoul of the

Establishment Clause.[58] A reasonable observer would be aware of these changes, but again, it was the *anticipated changes* in curriculum, in conjunction with the new texts, that prompted religious outcry and motivated the District to adopt the Sticker.[59] The historical context of the Sticker's adoption, of course, is a matter that an informed, reasonable observer would know. *Pinette*, 515 U.S. at 780, 115 S. Ct. at 2455 (O'Connor, J., concurring); *see Santa Fe*, 530 U.S. at 309, 120 S. Ct. at 2279 ("[m]ost striking to us is the evolution of the current policy").

4. The Cases Relied Upon By Appellant Do Not Save the Sticker.

The CCSD cites several cases for its contention that the Sticker should be upheld. But—as even the CCSD must admit—each Establishment Clause case must be considered on its own unique circumstances. *Lynch*, 465 U.S. at 694, 104 S. Ct. at 1370; *King*, 331 F.3d at 1276. The unique circumstances here easily withstand analysis in light of the CCSD's citations.

First, the CCSD contends that *King v. Richmond County* mandates a holding

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[58] The District frequently emphasizes that one of the plaintiffs in this case, Mr. Selman, wrote the School Board a letter commending the Board's revised policy on evolution instruction. This point is irrelevant; plaintiffs have not challenged the Board's revised policy.

[59] The CCSD emphasizes its view that the Sticker was adopted four months prior to the time a petition signed by 2300 residents was presented to the District. (App't's Br. at 29 n.4.) Regardless of the timing of the petition to which the district court referred, that court found that the Sticker was adopted as a response to public concern and a desire to accommodate religious views. (R4-98-7-8).

of no endorsement.[60] In *King*, this Court ruled that a depiction of Ten Commandments tablets in the Richmond County, Georgia seal, did not amount to an endorsement of religion. 331 F.3d at 1286. This Court reasoned that four factors *combined* to favor that result. *Id.* First, the Court explained that the seal was used in the limited context of authenticating legal documents; the Court emphasized, however, that "[e]ven when the government's motives are permissible, if there is not a tight nexus between the secular purpose for using a symbol and the context in which the symbol appears, a reasonable observer may suspect that the true reason for adopting the symbol was to endorse religion." *Id.* at 1283. Here of course, the Sticker's purpose (even accepting the district court's finding) is not tightly aligned with the overall context of the Sticker's text and adoption, which includes the historic opposition to evolution instruction nationally and in Cobb County.

Second, this Court noted that other symbols were used in the seal, increasing the probability that observers would associate the seal with secular law. *Id.* at 1283. And third, the Court emphasized that the size and placement of the seal made it discreet such that it would have little impact on a reasonable observer. *Id.* at 1284-85. But here, the Sticker stands alone at the front of science textbooks, an

[60] The CCSD's heavy reliance on *King*, a display case, undermines its insistence that this case should be treated as a facial challenge to a statute.

"in your face" reminder that evolution is (colloquially) "just" a theory. *See id.* at 1285. Further, singling out only one of many scientific theories presented.

Finally, it was important to this Court that the seal did not contain the text of the Ten Commandments. *Id.* at 1285-86. The CCSD would like to hang its entire case on this point, arguing that because the Sticker does not mention religion explicitly, it is "neutral" and cannot endorse religion. This argument overlooks the important point emphasized by this Court in *King*: that "*none of the* [] *factors, standing alone, would be sufficient to satisfy the effect test*." *Id.* at 1286 (emphasis added). Indeed, this argument would short-circuit the overarching scheme of endorsement clause analysis, which requires a close evaluation of the facts presented in each case. As described above, the facts here combine to convey a message of endorsement.

The CCSD similarly grasps at a single factor out of many when it relies on *Freiler v. Tangipahoa Parish Board of Education*, 185 F.3d 337 (5th Cir. 1999). There, the circuit court held a disclaimer of evolution to be an unconstitutional endorsement of religion due to "the interplay of three factors:"

> (1) the juxtaposition of the disavowal of endorsement of evolution with an urging that students contemplate alternative theories of the origin 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" as the only alternative theory explicitly referenced in the disclaimer.

Id. at 346. According to the CCSD, the Sticker here is distinguishable because unlike that in *Freiler*, it does not explicitly mention a religious viewpoint. Not only does that argument overlook the first factor, which is present in this case, but it again turns a blind eye to the requirement that *all* facts and circumstances must be considered.

The CCSD also contends that *Adler v. Duval County School Board* stands for the proposition that "facial neutrality" saves the Sticker. That argument, however, again misses the numerous factual distinctions between *Adler* and this case. First, *Adler* involved a school policy that described conduct in which students could engage; thus, it was capable of facial and/or "as-applied" analyses. *See* 250 F.3d 1330, 1332-33 (11th Cir. 2001) (en banc). Second, this Court upheld the policy because it concerned private speech, which the school had no power to direct, and contained no restrictions on the identity of the speaker chosen. *Id.* Here, the Sticker is government speech, directed by the District, which singles out a particular content. These distinctions thus highlight the message of endorsement to a reasonable observer.

B. The Sticker Fosters Excessive Government Entanglement With Religion.

Notably, the CCSD does not contend that the Sticker does not foster excessive government entanglement with religion, even though its Statement of Issues is worded broadly in terms of Establishment Clause challenges. This is so even though the district court held that entanglement was present. R4-98-42 (Order at 42). "The excessive entanglement component of the Lemon test has been interpreted to mean that 'some governmental activity that does not have an impermissible religious effect may nevertheless be unconstitutional, if in order to avoid the religious effect government must enter into an arrangement which requires it to monitor the activity.'" *Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646, 649-50 (11th Cir. 1984) (quoting *Ams. United for Separation of Church & State v. Sch. Dist. of Grand Rapids*, 718 F.2d 1389, 1400 (6th Cir. 1983).

Here, the disclaimer invites religious discussions into the classroom, requiring teachers to moderate the discussion. Indeed, there is evidence in the record that the Sticker was meant to enable discussions of whether evolution was a disputed view. R7-114-287-288 (Tippins trial testimony at 287-88). Admittedly, some witnesses testified that the Sticker would enable such discussions to occur in students' homes, (*e.g.*, R6-113-196-198 (Searcy trial testimony at 196-98), but as the district court reasoned in its summary judgment order,

> 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. This is particularly so, where as here, there is evidence that there is a group of parents in Cobb County who are advocating for intelligent design to be discussed in the classroom.

R2-45-17-18 (Order on Summ. J. at 17-18). Thus, the Sticker places teachers in the position of ensuring that students are not proselytizing to other students in the captive audience, that student comments are not "too religious," and that their responses to the students comments are not interpreted as promotion, support, or disparagement of religion or non-religion. This result is constitutionally unacceptable. *See Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. Unit A 1981), *aff'd*, 455 U.S. 913 (1982) ("It is clear that 'the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state.'" (quoting *Lemon*, 403 U.S. at 620-21, 91 S. Ct. at 2115)).[61]

C. The Sticker Does Not Have a Secular Purpose.

A governmental action is unconstitutional under the purpose prong of the *Lemon* test when the government's actual purpose is to "endorse or disapprove of

[61] The Eleventh Circuit adopted as binding authority decisions of the former Fifth Circuit handed down prior to the close of business September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

religion." *Edwards*, 482 U.S. at 585, 107 S. Ct. at 2578.[62] Such an intention to promote religion is clear when the government acts to serve a religious purpose, either through the promotion of religion in general or the advancement of a particular religious belief. *Id.*

To ascertain the Sticker's purpose, it is necessary to examine the language of the Sticker on its face. *See Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464, 1469 (11th Cir. 1997). As discussed in Section IA, *supra*, the language of the Sticker clearly reveals that it is an endorsement of certain religious beliefs. Indeed, the trial court held that the Sticker failed the second prong of the Lemon test because the effect of the Sticker is to convey to the reasonable observer a message endorsing a particular religious belief. *See* R4-98-42 (Trial Court's Order, p. 42). This provides important evidence of the School Board's purpose.

In its Order, the trial court considered a Cobb County School Board policy that was adopted almost six months after adopting the Sticker. *See* R4-98-23 (Order, p. 23). The policy's stated purpose 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

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[62] "Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief." *Allegheny*, 492 U.S. at 594, 109 S. Ct. at 3101.

neutrality toward religion." R4-98-24 (Defendants' Exhibit No. 5 quoted in R4-98-24 Order, p. 24). The Court correctly found that the promotion of critical thinking is not the Sticker's main purpose. However, the Court incorrectly found that this purpose, which was articulated six months after adopting the Sticker, was not a sham.

Given the evidence before it and its own findings of fact, the trial court erred in not concluding that the purpose for the Sticker articulated by the CCSD was a sham.

> When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one.

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308, 120 S. Ct. 2266, 2278 (2000). In determining whether a proffered purpose is a sham, the Court must consider whether the Sticker furthers the particular purpose articulated by the School Board or whether the Sticker contravenes the avowed purpose. *Freiler*, 185 F.3d at 344. In *Freiler*, a case involving a disclaimer that was required to be read prior to evolution instruction, the Fifth Circuit held that the School Board's proffered purpose "to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion" was a sham. *Id*. Just as in *Freiler*, the purported "critical thinking" purpose of the CCSD does not

withstand scrutiny. The CCSD Sticker provides:

> 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.

R-4-98-8 (Jan. 13, 2005 Order p. 8). The School Board's pronouncement that Evolution is a "theory, not a fact," is contrary to the Board's purported encouragement of critical thinking. Whether evolution is just a "theory" or a "fact" as those terms are used colloquially, is the subject that students are encouraged to critically consider, yet in the second sentence of the Sticker, the CCSD has asserted its conclusion. Just as with the disclaimer in *Freiler*, the Sticker furthers a purpose contrary to promotion of critical thinking. Instead, it protects and maintains a particular religious viewpoint. 185 F.3d at 344. *See also Edwards*, 482 U.S. at 586, 107 S. Ct. at 2579 (holding stated purpose of protecting "academic freedom" to be a sham).

While the Trial Court distinguished *Freiler* on the basis that the Sticker in this case does not contain an explicit reference to religion, *see* R4-98-25 (Trial Court's Order, p. 25), this distinction does not preclude a finding of unconstitutional purpose. The statutory language at issue in *Epperson*, for example, also lacked any specific reference to religion, and this was noted by the Court. 393 U.S. at 109, 89 S. Ct. at 273. Nevertheless, the Court concluded that

the act was an unconstitutional endorsement of religion. *Id.* ("there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, denied the divine creation of man") (quotations omitted).

Furthermore, the Sticker adds nothing to the forward and First Chapter of the Biology textbook in question except for a carefully worded endorsement of certain religious beliefs. *Compare* Defs.' Ex. 4 at 6, *with* Ptfs.' Ex. 1. Thus the textbook itself would have been sufficient to foster critical thinking. As in *Edwards*, where the statute in question did nothing to advance the purported purpose, the Court must conclude that the stated purpose is a sham. 482 U.S. at 587, 107 S. Ct. at 2579.

In ascertaining the Sticker's purpose it is also appropriate to consider the legislative history and the specific sequence of events leading up to the adoption of the Sticker. *See Bown*, 112 F. 3d at 1469. In this case the trial court found facts relating to the sequence of events leading up to the adoption of the Sticker that clearly demonstrate the CCSD's purpose in adopting the Sticker was to advance the religious beliefs of those who protested instruction on the theory of evolution. The trial court's error was simply drawing an incorrect conclusion from its findings of fact. It concluded "the chief purpose of the Sticker is to accommodate or reduce offense to those persons who hold beliefs that might be deemed inconsistent with the scientific theory of evolution." R4-98-26 (Trial Court's

Order, p. 26). The trial court also acknowledged that the foregoing purpose is intertwined with religion. *Id.*

The trial court erred by failing to recognize that the CCSD sought to reduce offense to certain constituents by issuing a statement (the Sticker) endorsing their religious viewpoint. The following findings of fact by the trial court compel the conclusion that the Sticker was placed on Cobb County textbooks for the purpose of endorsing a religious viewpoint:[63]

- Prior to requiring the Stickers to be placed in textbooks containing material relating to evolution, Cobb County's policy prohibited students from being required to take any course in which evolution was taught. *See* R4-98-24 (Trial Court's Order, p. 24).
- "[T]he School Board was aware that a large portion of Cobb County citizens maintained beliefs that would potentially conflict with the teaching of evolution." *Id.*
- "Evidence in the record suggests that the idea of placing a sticker in the textbooks originated with parents who opposed the presentation of

[63] Appellees recognize that this Circuit has recently explained that, "the purpose inquiry is a factual one" and therefore, subject to a clearly erroneous standard of review. *See Glassroth*, 335 F.3d at 1296. However, Appellees urge the Court to engage in a *de novo* review of the legal conclusions drawn from the facts found by the trial court.

only evolution in science classrooms and sought to have other theories, including creation theories, included in the curriculum." R4-98-26 (Trial Court's Order, p. 26).

- Specifically, Marjorie Rogers (a self-proclaimed six-day literal biblical creationist) wrote a letter to the School Board over two weeks before the adoption of the Sticker recommending, among other things, that the School Board place a disclaimer in each book.
- Ms. Rogers and over 2,300 other Cobb County citizens submitted a petition to the School Board asking the School Board to place a statement at the beginning of the text that warned that the material on evolution was not factual. The Trial Court found that it was clear that many of these citizens were motivated by their religious beliefs. R4-98-27 (Trial Court's Order, p. 27).

CCSD's policy prior to adopting the Sticker illuminates the Board's improper purpose. CCSD prohibited evolution instruction in any required course in deference to the religious beliefs of certain constituents. This historic endorsement of certain religious views continued when CCSD adopted the Sticker as part of an effort to comply with state curriculum requirements, which require evolution instruction. In *Santa Fe,* the Supreme Court considered a course of events in which the school district had continuously violated the Establishment

Clause but in less blatant ways as powerful evidence of a current violation because the reasonable observer was aware of the context: "Most striking to us is the evolution of the current policy. . . ." 530 U.S. at 309, 120 S. Ct. at 2279. In *Santa Fe*, the Court concluded:

> [I]n light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular state-sponsored religious practice.

Id. Similarly, CCSD's historical endorsement of religious views reveals the unconstitutional purpose behind the Sticker.

Particularly in light of the vocal opposition set forth above, the Court cannot ignore CCSD's decision to focus only on an issue of religious significance. *See Adland v. Russ*, 307 F.3d 471, 481 (6th Cir. 2002). Similarly, the Court cannot ignore CCSD's adoption of a view that emphasizes a single religious influence to the exclusion of all other religious and secular influences. *Id.* Both of these factors demonstrate an unconstitutional purpose to endorse certain religious beliefs.

II. The District Court Properly Applied the *Lemon* Test.

Appellant argues that the district court erred by failing to apply the standards for facial challenges to statutes set forth in *United States v. Salerno*, 481 U.S. 739,

745, 107 S. Ct. 2095, 2100 (1987).[64] But "[t]he Establishment Clause cannot be eviscerated by such artifice." *Bowen v. Kendrick*, 487 U.S. 589, 628 n.1, 108 S. Ct. 2562, 2584 n.1 (1988) (Blackmun, J., dissenting, but describing agreement with majority on this point). Instead, controlling Supreme Court precedent mandates that in "cases involving facial challenges on Establishment Clause grounds, . . . we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S. Ct. 2135, 29 L. Ed. 2d 745 (1971)." *Santa Fe*, 530 U.S. at 314, 120 S. Ct. at 2281-82 (2000) (quoting *Bowen*, 487 U.S. at 602, 108 S. Ct. at 2570 (quotations omitted)). Indeed, "[t]o properly examine this policy on its face, we 'must be deemed aware of the history and context of the community and forum.' " *Id.* at 317, 120 S. Ct. at 2283 (quoting *Pinette*, 515 U.S. at 780, 115 S. Ct. at 2455 (O'Connor, J., concurring in part and concurring in judgment)); *see Bowen*, 487 U.S. at 628 n.1, 108 S. Ct. at 2584 n.1 (Blackmun, J., dissenting) (noting agreement with majority in "reject[ing] the

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[64] The *Salerno* rule arose in the context of a facial challenge to a criminal statute on the ground that it violated due process and constituted cruel and unusual punishment. *Salerno* observed that the statute at issue would not be invalid on its face unless it was unconstitutional in every conceivable application, "since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." 481 U.S. at 745, 107 S. Ct. at 2100. That is, only in the First Amendment context can a plaintiff mount a facial challenge on the ground that, while the law may have some constitutional application, it also has the potential for unconstitutional application in some cases.

application of such rigid analysis in Establishment Clause cases"); *see also Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 n.2 (5th Cir. 1996) ("in establishment clause cases facial attacks are considered under the Lemon test and the Supreme Court has refused to draw distinctions between facial and 'as applied' attacks").

Furthermore, the district court correctly reasoned that this case is not susceptible to a facial challenge in the same way as a statute. R4-98-20-21 (Trial Court's Order at 20-21). Unlike a statute, the Sticker presents an unlawful statement of the government in and of itself; a potential application of a law is not at issue. The Sticker does not mandate or prohibit any certain conduct the way a traditional law would.[65] It is more closely akin to a display, which conveys a government message and is judged according to, among other things, the perceptions it creates. Thus, it is best interpreted under the traditional *Lemon* standards.

Although the *Lemon* test is frequently criticized, there can be no doubt that it is controlling on this Court. *See Glassroth*, 335 F.3d at 1295-96 (noting *Lemon* test is "often maligned" and collecting cases but reiterating that it applies to

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[65] The inevitable result of the CCSD's position would be to uphold government actions promoting religion unless those actions commanded or prohibited religious conduct. As this Court has previously reasoned, however, that position "is foreclosed by Supreme Court precedent." *Glassroth*, 335 F.3d at 1294.

Establishment Clause inquiries). Appellant admits as much; even though it contends *Salerno* should apply, it concedes that context is important and cites cases applying *Lemon*. (App't's Br. at 40); *see Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425 n.7, 430-31 (2d Cir. 2002) (noting *Salerno* argument but holding kosher-meat statute violative of *Lemon's* second prong based on contextual considerations). Appellant's real complaint is with the district court's *Lemon* analysis—but, as shown, *supra*, that analysis properly concluded that the Sticker violates the Establishment Clause.[66]

III. The Sticker Violates the Georgia Constitution.

Article I, Section II, Paragraph VII of the Constitution of the State of

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[66] The cases cited by CCSD as examples of this Court's applications of *Salerno* are inapposite. *Horton v. City of St. Augustine*, 272 F.3d 1318 (11th Cir. 2001), involved a free-speech facial challenge to an ordinance against street performers, and even recognized certain inroads and exceptions to *Salerno* in the vagueness and overbreadth contexts. *Id.* at 1330-32. In *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004), this Court applied the *Lemon* test to a multi-faceted challenge to the Religious Land Use and Institutionalized Persons Act ("RLUIPA") *even though* the challenge was otherwise facial. *See id. at* 1309. *Adler v. Duval County School Board*, cited by Appellants, does not apply. First, *Adler* involved a school policy that described conduct in which students could engage; thus, it was capable of facial and/or "as-applied" analyses. *See* 250 F.3d 1330, 1332-33 (11th Cir. 2001) (en banc). Second, this Court upheld the policy because it concerned private speech, which the school had no power to direct, and contained no restrictions on the identity of the speaker chosen. *Id.* Here, the Sticker is government speech, directed by the District, which singles out a particular content. These distinctions thus highlight the message of endorsement to a reasonable observer.

Georgia provides that "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." The trial court correctly ruled that the CCSD violated this provision based on the trial court's findings that CCSD used the money of taxpayers to produce and place the Sticker on its textbooks and that the Sticker aids the beliefs of Christian fundamentalists and creationists. R4-98-43 (Trial Court's Order, p. 43).

The Georgia Supreme Court has explained that the foregoing provision seeks to safeguard citizens from having their tax dollars "taken or appropriated" in aid of religious institutions or denominations of religionists. *Bennett v. City of LaGrange*, 153 Ga. 428, 431, 112 S.E. 482, 484 (1922). At least one court has noted that the foregoing provision of the Georgia Constitution may afford "a stronger application than the first amendment to the United States Constitution." *See Birdine v. Moreland*, 579 F. Supp. 412, 417 (N.D. Ga. 1983) (citing 1960-61 Op. Att'y Gen. p. 349). The Georgia Supreme Court has recognized in other contexts that Federal Constitutional standards represent the minimum, not the maximum protection that this State must afford its citizens. *See Fleming v. Zant*, 259 Ga. 687, 690, 386 S.E.2d 339, 342 (1989). Therefore, the trial court correctly found that the Sticker violates Article I, Section II, Paragraph VII of the Constitution of the State of Georgia. This violation provides an independent basis

for affirming the judgment of the trial court.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be affirmed.

This 1st day of June, 2005.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Motion complies with the type-volume limitation set forth in FRAP 32(a)(5) and (6). This Motion uses the type-font size of Times New Roman 14-point face containing not more than 10½ characters per inch.

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CERTIFICATE OF SERVICE

This is to certify that I have this date caused a true and correct copy of the foregoing **BRIEF OF APPELLEES** to be served upon the following counsel of record by causing same to be deposited in the United States mail in an envelope with adequate postage affixed thereto addressed as follows

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