No. 05-10341-I

In the UNITED STATES COURT OF APPEALS
for the ELEVENTH CIRCUIT

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.

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

BRIEF OF THE STATES OF ALABAMA AND TEXAS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE

The amici States respectfully file this brief pursuant to Fed. R. App. P. 29(a). Since 1996, the State of Alabama has affixed stickers concerning the theory of evolution to the fronts of biology textbooks used in public schools. The current sticker, approved by the State Board of Education, reads as follows:

> **A MESSAGE FROM THE ALABAMA STATE BOARD OF EDUCATION**
>
> The word "theory" has many meanings. Theories are defined as systematically organized knowledge, abstract reasoning, a speculative idea or plan, or a systematic statement of principles. Scientific theories are based on both observations of the natural world and assumptions about the natural world. They are always subject to change in view of new and confirmed observations.
>
> Many scientific theories have been developed over time. The value of scientific work is not only the development of theories but also what is learned from the development process. The Alabama Course of Study: Science includes many theories and studies of scientists' work. The work of Copernicus, Newton, and Einstein, to name a few, has provided a basis of our knowledge of the world today.
>
> The theory of evolution by natural selection is a controversial theory that is included in this textbook. It is controversial because it states that natural selection provides the basis for the modern scientific explanation for the diversity of living things. Since natural selection has been observed to play a role in influencing small changes in a

> population, it is assumed that it produces large changes, even though this has not been directly observed. Because of its importance and implications, students should understand the nature of evolutionary theories. They should learn to make distinctions between the multiple meanings of evolution, to distinguish between observations and assumptions used to draw conclusions, and to wrestle with the unanswered questions and unresolved problems still faced by evolutionary theory.
>
> There are many unanswered questions about the origin of life. With the explosion of new scientific knowledge in biochemical and molecular biology and exciting new fossil discoveries, Alabama students may be among those who use their understanding and skills to contribute to knowledge and to answer many unanswered questions. Instructional material associated with controversy should be approached with an open mind, studied carefully, and critically considered.

Whether or not controlling, it is clear that any ruling concerning the constitutionality of Cobb County's textbook sticker will have an important bearing on the validity of Alabama's sticker. Further, and on a more philosophical level, amici have a profound interest in ensuring that public-school classrooms remain centers of open inquiry, critical thinking, and tolerance.

STATEMENT OF THE ISSUE

Does a textbook sticker that (i) states that "[e]volution is a theory, not a fact, regarding the origin of living things" and emphasizes that "[t]his

material should be approached with an open mind, studied carefully, and critically considered," but (ii) does not include a single religious reference constitute an "establishment of religion" within the meaning of the First Amendment?

SUMMARY OF THE ARGUMENT

The district court's decision here cannot be squared with (i) existing precedent concerning the teaching of evolution in public schools, (ii) any reasonable understanding of Establishment Clause doctrine more generally, or (iii) sound education policy.

1. To this point, courts have been willing to invalidate on Establishment Clause grounds laws that (i) actually prohibit the teaching of evolution; (ii) explicitly require equal time for the teaching of "creation-science"; and (iii) mandate disclaimers that expressly reference "the Biblical version of Creation." A ruling for plaintiffs here would require this Court to go a good deal farther. The challenged sticker does not prohibit (but rather candidly acknowledges) the teaching of evolution. Nor does it require (or even itself purport to permit) the teaching of creationism or Intelligent Design theory. Nor, finally – and this is the key point – does the sticker so much as mention creationism, Genesis, the Bible, God, or anything else religious.

2. The district court correctly found, having reviewed what it called the "highly credible testimony of the School Board members," that the board's *purpose* in affixing the stickers was secular; the stickers, it found, serve the dual purposes of "[f]ostering critical thinking" and "accommodat[ing] or reduc[ing] offense." But the district court's conclusion concerning the sticker's *effect* – that it endorses religion – does not withstand scrutiny, for three reasons. First, having found the board's purpose to be properly secular, the district court wrongly relied on evidence of motivation (often the motivation of private citizens) to find an impermissibly religious effect. Second, the district court erroneously analogized this case to *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S. Ct. 3086 (1989), to show that the board had "take[n] a position on [a] question of religious belief." The comparison is inapt. *Allegheny* concerned a crèche display, complete with Mary, Joseph, the Baby Jesus, angels, and the declaration "Glory to God in the Highest"; the sticker here, by contrast, is completely silent as to all matters religious. Finally, the district court wrongly relied on what it perceived to be the school board's rejection of an alternative phrasing for the sticker put forward by a local science teacher; in fact, the board rejected proposals from both "sides" and prudently adopted a

compromise of sorts. And, in any event, the subtle distinctions between the board's and teacher's stickers do not amount to a constitutional difference.

3. The plaintiffs' position here – which seems, in the end, to be a *Scopes*-like effort to insulate a new orthodoxy from meaningful evaluation – contravenes sound education policy. The textbook sticker simply urges schoolchildren to approach the subject of evolution "with an open mind," to "stud[y]" it "carefully," and to "consider[]" it "critically." That, of course, is precisely what our students should be doing. This case, then, is not about people the district court's opinion repeatedly calls "Christian fundamentalists and creationists" cramming their worldview down other people's throats. This is a case about the freedom of academic inquiry; about the values of open-mindedness, tolerance, and critical thinking; and about the importance of a truly liberal education.

ARGUMENT

We should emphasize at the very outset that we do not doubt for a moment the good faith and conscientiousness with which the district court considered and decided this case. Both are evident in its written opinion. With respect, though, the result – invalidating as an "establishment of religion" a textbook sticker that does not so much as hint at anything religious – seems to us indefensible. As we seek to show below, the district

court's decision cannot be squared with either (i) existing precedent concerning the teaching of evolution in schools, (ii) any reasonable understanding of Establishment Clause precedent more generally, or (iii) sound education policy.

I. Plaintiffs' Position Here Requires a Quantum Leap Beyond Existing Precedent Concerning the Teaching of Evolution.

The fact that this case has any legs at all is a testament, if to anything, to just how far Establishment Clause jurisprudence has gone off track. That is true on two levels. Initially, there are first principles. Appropriately, the district court's analysis opens by quoting the First Amendment: "Congress shall make no law respecting an establishment of religion ...." *Selman v. Cobb County Sch. Dist.*, No. Civ. A. 1:102-CV-2325-C, 2005 WL 83829, at *10 (N.D. Ga. Jan. 13, 2005) (quoting U.S. Const. amend. I). But this litigation is impossible to square with the concerns that underlay the Framers' adoption of the Establishment Clause. Even setting aside the question whether that Clause as originally understood validly applies to state policies concerning religion (or was instead meant to prevent "Congress" from meddling with those policies), *see, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330-31 (2004) (Thomas, J., concurring in the judgment), there is, as a recent and exhaustive historical analysis makes

clear, a vast and important difference between the notion of *disestablishment*, which the First Amendment plainly embodies, and the strict *separation* of church and state, on which the plaintiffs' position here depends. *See generally* Philip Hamburger, *Separation of Church and State* 9 (2002) ("[I]t is misleading to understand either eighteenth-century religious liberty or the First Amendment in terms of separation of church and state.").

More immediately relevant here is just how far down the road this case would take the Court from where existing Establishment Clause doctrine leaves off. To support its decision, the district court (2005 WL 83829, at *11) pointed to the following cases involving "anti-evolution statutes, policies, and disclaimers as well as balanced treatment legislation": *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266 (1968); *Edwards v. Aguillard*, 482 U.S. 578, 107 S. Ct. 2573 (1987); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975); and *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982). But even a cursory review of those decisions (which we summarize briefly in chronological order) shows that plaintiffs' position here would carry the Court well beyond existing case law:

- In *Epperson*, the Supreme Court invalidated an "'anti-evolution' statute" that flatly "prohibit[ed] the teaching in its public schools and universities of the theory that man evolved from other species of life." 393 U.S. at 98, 89 S. Ct. at 267.

- In *Daniel*, the Sixth Circuit struck down a state statute that required any textbook referencing evolution to "'give in the same text-book and under the same subject commensurate attention to, and an equal amount of emphasis on, the origins and creation of man and his world as the same is recorded in other theories, including, but not limited to, the Genesis account in the Bible.'" 515 F.2d at 487 (quoting 1973 Tenn. Pub. Acts ch. 377).

- In *McLean*, a district court invalidated a state statute that similarly required schools to "'give balanced treatment to creation-science and to evolution science.'" 529 F. Supp. at 1256 (quoting Ark. Stat. Ann. § 80-1663).

- In *Aguillard*, the Supreme Court invalidated what it called Louisiana's "Creationism Act," which "forb[ade] the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.'" 482 U.S. at 581, 107 S. Ct. at 2576 (quoting La. Rev. Stat. Ann. §17:286.4A).

- Finally, in *Freiler*, the Fifth Circuit struck down a local school board directive requiring elementary and secondary school teachers to advise students, in relevant part, that "the Scientific Theory of Evolution [is] presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept." 185 F.3d at 341.

Setting aside the question whether any or all of these cases were correctly decided as an initial matter, the present point is simply this: Up to now, then, courts have invalidated on Establishment Clause grounds laws that (i) actually prohibit the teaching of evolution (*Epperson*); (ii) explicitly require equal time for the teaching of "creation-science" (*Daniel*, *McLean*, *Aguillard*); and (iii) mandate disclaimers that expressly reference "the Biblical version of Creation" (*Freiler*). One look shows that the school

board policy at the heart of this case is quite different. The language of the sticker affixed to textbooks in Cobb County reads in full:

> 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.

The sticker's language is utterly and completely neutral, sterile – even, one might say, agnostic. It certainly does not prohibit the teaching of evolution; by contrast, the sticker was adopted, as the district court acknowledged, as part of an effort to "strengthen" the teaching of evolution in the Cobb County schools. 2005 WL 83829, at *3, *5. Nor does the policy at issue here require (or even permit) the teaching of creationism or Intelligent Design theory in public school classrooms. Nor, finally, does the sticker adopted by the school board – and this seems to us dispositive – reference in any way, shape, form, or fashion either creationism or Intelligent Design or the Book of Genesis or the Bible or God or even religion generally. Far from it. Indeed, it would seem that the sticker's only failing (in the eyes of the plaintiffs here) is that it does not endorse evolutionary theory quite enthusiastically enough. But the Establishment Clause prohibits (at least under current doctrine) the endorsement of religion; it does not *require* the unabashed endorsement of evolution.

Were it to rule for plaintiffs here, this Court would be out on its own, well beyond where others have seen fit to go.

II. Plaintiffs' Position Here Cannot Be Defended as an Effort To Avoid the "Effect" of "Endorsing" Religion.

The district court's decision does not hold up as a matter of generic Establishment Clause doctrine, either.

As an initial matter, the district court correctly found that the sticker satisfies the co-called "purpose prong" of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971). Indeed, the record here permits no other conclusion. As the district court noted, the sticker could be found to violate the purpose prong "only if it is 'entirely motivated by a purpose to advance religion'" and, accordingly, passes the purpose test "'even if it is "motivated in part by a religious purpose."'" 2005 WL 83829, at *13 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985), and *Adler v. Duval County* Sch. Bd., 206 F.3d 1070, 1084 (11th Cir.) (en banc), *vacated on other grounds*, 531 U.S. 801, 121 S. Ct. 31 (2000), *opinion and judgment reinstated*, 250 F.3d 1330 (11th Cir. 2001)). Having considered the "evidence in this case," and particularly the "highly credible testimony of the School Board members," 2005 WL 83829, at *16-*17, the district court was "convinced that that the Sticker at issue serves at least two secular

purposes," *id.* at *19. Specifically, the district court found that the sticker served the dual purposes of "[f]ostering critical thinking" and "accommodat[ing] or reduc[ing] offense to those persons who hold beliefs that might be deemed inconsistent with the scientific theory of evolution." *Id.* at *15, *16. There is nothing in this case to indicate that the district court's findings concerning the sticker's purpose were erroneous, let alone clearly erroneous.

The district court's conclusion concerning the sticker's "effect," by contrast – that it "surpasses accommodation and endorses religion" and thus violates the Establishment Clause, *id.* at *24 – does not withstand scrutiny. There are several fundamental problems with the district court's effect holding. First, that holding rests, in significant part, on smuggled-in (and misplaced) purpose evidence. On its face, the sticker is perfectly neutral – agnostic, as we have said. It states, without any reference to religion whatsoever, simply that "[e]volution is a theory, not a fact, regarding the origin of living things" and that "[t]his material should be approached with an open mind, studied carefully, and critically considered." In order to find an impermissibly religious effect, the district court was required to ignore the sticker's plain language. The court was left to rely on a perception that some Cobb County citizens "had voiced opposition to the teaching of

evolution for religious reasons" (*id.* at *20), that those citizens were "largely motivated by religion" (*id.*), and that the sticker was merely "one of the latest strategies to dilute evolution instruction employed by anti-evolutionists with religious motivations" (*id.* at *21). *See also id.* at *20 ("religiously-motivated citizens"); *id.* at *23 ("religiously-motivated individuals"); *id.* at *24 ("School Board sought to communicate to students ...").

The district court reiterated time and time again (even in the course of its effect analysis) that "the School Board's purpose ... was not impermissible." *Id.* at *24. As we have said, the court was surely right about that. But if the purpose and effect inquiries of *Lemon* are to have independent bite, the very same evidence that was found insufficient to carry the day under the purpose prong cannot simply be recycled and repackaged as indicative of an impermissible effect.

A second problem with the district court's effect analysis is its reliance on *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S. Ct. 3086 (1989). Quoting *Allegheny*, the district court emphasized that the Establishment Clause "'prohibits government from appearing to take a position on questions of religious belief'" and held that "this is exactly what the [Cobb County] School Board appears to have done." 2005 WL 83829, at

*21 (quoting *Allegheny*, 492 U.S. at 593-94, 109 S. Ct. at 3101). Even a cursory review of *Allegheny*, however, shows the two cases – in terms of impermissible endorsement – to be worlds apart. At issue in *Allegheny* was a depiction of a crèche, which the Supreme Court described as follows:

> The crèche in the county courthouse, like other crèches, is a visual representation of the scene in the manger in Bethlehem shortly after the birth of Jesus, as described in the Gospels of Luke and Matthew. The crèche includes figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims "Gloria in Excelsis Deo!"

492 U.S. at 580, 109 S. Ct. at 3094 (footnote omitted). Now, without conceding the correctness of *Allegheny* as an initial matter (four Justices dissented there), it is at least arguable that one might perceive in a public depiction of Christ's birth – complete with Mary, Joseph, the Baby Jesus, angels, and the declaration "Glory to God in the Highest" – that government had "take[n] a position on [a] question[] of religious belief." *Id.* at 593-94, 109 S. Ct. at 3101. It is inconceivable to us, however, that the same can be said of the textbook sticker here – which, as we have said, contains no religious references whatsoever. At the very worst, the sticker here is agnostic concerning alternatives to evolution.

A third and final problem with the district court's effect analysis is its reliance on the School Board's failure to adopt alternative phrasing for the sticker suggested by high school science teacher Wes McCoy. Dr. McCoy's proposed language, slightly wordier than that adopted, read as follows:

> This textbook contains material on evolution, a scientific theory, or explanation, for the nature and diversity of living things. Evolution is accepted by the majority of scientists, but questioned by some. All scientific theories should be approached with an open mind, studied carefully and critically considered.

2005 WL 83829, at *7. The district court concluded that because the school board opted for the phrasing it did instead of language that "did not place the emphasis so heavily on evolution," it communicated that the board "believes there is some problem peculiar to evolution." *Id.* at *22. And, the district court continued, "[i]n light of the historical opposition to evolution by Christian fundamentalists and creationists in Cobb County and throughout the Nation, the informed, reasonable observer would infer the School Board's problem with evolution to be that it does not acknowledge a creator." *Id.*

There are two difficulties with the district court's emphasis on Dr. McCoy's proposed alternative. First, it is just not the case that the school board simply rebuffed the McCoy alternative in favor of its own. Rather, the

board rejected alternatives proposed by both "sides" to come to a compromise position. For instance, one individual, Marjorie Rogers, "who identifie[d] herself as a six-day biblical creationist," requested, "among other things, that the Board ensure the presentation of all theories regarding the origin of life ...." *Id.* at *4. In the lingo of the current debate, Ms. Rogers sought "balanced-treatment" of the sort invalidated in the *Aguillard*, *Daniel*, and *McLean* cases. *See supra* at 7-8. The school board rejected that proposal in favor of one it "thought would be constitutional." 2005 WL 83829, at *4. Similarly, the record reflects that the school board declined an offer from a representative of the Discovery Institute (a pro-Intelligent-Design think tank) "to assist the Board in, among other things, drafting a sticker presumably to go into textbooks." Id. at *7. Finally, after the adoption of the sticker, Ms. Rogers objected that it "did not go far enough in stating that there were criticisms of evolution" and formally "requested in writing that the School Board revise the Sticker." *Id.* The School Board refused Ms. Rogers' request. *See id.* Thus, the real story here is not simply of the school board rejecting Dr. McCoy's proposal (which, like Ms. Rogers', was submitted *after* the board had already approved the language in question) in favor of its own. Rather, the real story is of the board

consulting with counsel concerning constitutional requirements and then prudently steering a middle course between competing alternatives.

The second difficulty with the district court's emphasis on the McCoy proposal is simply this: Surely the difference between constitutionality and unconstitutionality cannot lie in the subtle differences of two so similar phrasings. Consider the alternative proposals clause-by-clause:

This textbook contains material on evolution.	This textbook contains material on evolution ...
Evolution is a theory, not a fact, regarding the origin of living things.	[Evolution is] a scientific theory, or explanation, for the nature and diversity of living things. Evolution is accepted by the majority of scientists, but questioned by some.
This material should be approached with an open mind, studied carefully, and critically considered.	All scientific theories should be approached with an open mind, studied carefully and critically considered.

There are, to be sure, distinctions between the two proposals. But are those distinctions really of *constitutional* import, such that the McCoy proposal is obviously valid and the sticker as adopted obviously not? Is the McCoy proposal really categorically less "religious" (or more secular) than the sticker adopted by the board? Not at all, it seems to us. The distinctions are

marginal: The McCoy proposal (i) includes a clause noting the general acceptance of evolutionary theory among scientists but also, as a counterweight, adding that it is "questioned by some"; and (ii) substitutes the words "All scientific theories" for "This material" in the third clause. Those minor variations, we respectfully submit, are not the stuff of which constitutional distinctions are made.

* * *

At the end of the day, the textbook sticker is at most an accommodation – and a very minor one, at that – of the religious beliefs of many Cobb County citizens. Indeed, in the sticker's absence one might readily argue that the board had favored irreligion over religion, thereby forsaking constitutionally required neutrality in favor of constitutionally prohibited hostility. In any event, "even Plaintiffs concede that '[t]he intention of the Board was to accommodate parents who held a belief contrary to evolution.'" 2005 WL 83829, at *17. The district court itself found that "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." *Id.* at *16. Because it is settled law that "the government may accommodate religious practices ... without violating the Establishment Clause," *Hobbie v. Unemployment Appeals*

Comm'n, 480 U.S. 136, 144-45, 107 S. Ct. 1046, 1051 (1987), and, indeed, that the Constitution "affirmatively mandates accommodation" of religious belief, *Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S. Ct. 1355, 1359 (1984), the district court's decision invalidating the textbook sticker should be reversed.

III. Plaintiffs' Position Here Is Irreconcilable With the Values of Open-Mindedness and Freedom of Inquiry That Underlie Modern Liberal Education.

It is worth emphasizing in closing the policy implications of the district court's ruling, which has a certain *Closing of the American Mind*[1] quality about it.

Dissenting in *Aguillard*, in response to what he perceived to be the Court's "instinctive reaction that any governmentally imposed requirements bearing upon the teaching of evolution must be a manifestation of Christian fundamentalist repression," Justice Scalia had the following to say about the invalidation of Louisiana's balanced-treatment statute:

> In this case, however, it seems to me the Court's position is the repressive one. The people of Louisiana, including those who are Christian fundamentalists, are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their

[1] The reference, which we realize is not quite perfect, but nonetheless captures the sentiment, is to Allan Bloom's seminal 1987 work.

> schools, just as Mr. Scopes was entitled to present whatever scientific evidence there was for it. Perhaps what the Louisiana Legislature has done is unconstitutional because there *is* no such evidence, and the scheme they have established will amount to no more than a presentation of the Book of Genesis. But we cannot say that on the evidence before us in this summary judgment context, which includes ample uncontradicted testimony that "creation science" is a body of scientific knowledge rather than revealed belief. *Infinitely less* can we say (or should we say) that the scientific evidence for evolution is so conclusive that no one could be gullible enough to believe that there is any real scientific evidence to the contrary, so that the legislation's stated purpose must be a lie. Yet that illiberal judgment, that *Scopes*-in-reverse, is ultimately the basis on which the Court's facile rejection of the Louisiana Legislature's purpose must rest.

482 U.S. at 634, 107 S. Ct. at 2604-05 (Scalia, J., joined by Rehnquist, C.J., dissenting).

How much more "illiberal" – to use Justice Scalia's word – is the district court's decision here? Unlike Louisiana's balanced-treatment act, Cobb County's policy does not seek to bring "creation science" (or any religious or even quasi-religious idea) into the classroom. Not by a long shot. Cobb County's sticker, as we have said, does not mention – or even hint at – religion. And, to repeat, the sticker was adopted as part of a sustained effort to "strengthen" the teaching of evolution in the Cobb County schools. 2005 WL 83829, at *3, *5.

Again, the only real flaw in Cobb County's policy (from the plaintiffs' perspective) seems to be that it fails to endorse evolution enthusiastically enough. That it dares to question the orthodoxy of evolution. That it dares to tell schoolchildren to approach that sacred subject "with an open mind," to "stud[y]" it "carefully," and to "consider[]" it "critically." With all deference to Justice Scalia, this case, not *Aguillard*, is the true "*Scopes*-in-reverse." 482 U.S. at 634, 107 S. Ct. at 2605. In the *Scopes* line of cases, creationists were disparaged for (the story went) demanding unquestioned and undivided adherence to their theory of the origin of man. They were vilified for tolerating no open-mindedness, no critical thinking, and no dissent. Well, the worm has turned. Ironically, today, it is the accusers who are preaching intolerance. Today, as a distinguished professor of psychiatry and behavioral science at Johns Hopkins School of Medicine recently pointed out (commenting on this case), "*any* questioning of the Darwinian narrative, no matter how sympathetic, is shouted down." Paul McHugh, *Teaching Darwin: Why We're Still Fighting About Biology Textbooks*, The Weekly Standard p. 25 (Mar. 28, 2005). But, as he quite rightly says, "[b]oth legal mandates – no Darwin yesterday, nothing but Darwin today – look less like science than exercises in thought control." *Id.* At 23.

This case, then, is not about people the district court's opinion repeatedly calls "Christian fundamentalists and creationists" cramming their worldview down other people's throats. 2005 WL 83829, at *20, *22, *24, *25. This is a case about the freedom of academic inquiry; about the values of open-mindedness, tolerance, and critical thinking; and about the importance of a truly liberal education. After all, the point of the school board's policy, as recited by the district court itself, is "to foster critical thinking among students, to allow academic freedom consistent with legal requirements, to promote tolerance and acceptance of diversity of opinion, and to ensure a posture of neutrality toward religion." 2005 WL 83829, at *15. To that end, the textbook sticker assailed in this case "specifically tells students to keep an open mind and to study evolution carefully," and "encourage[s] students to analyze the material on evolution themselves and make their own decision[s] regarding its merit." *Id.* at *15-*16.[2]

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[2] *See also, e.g.*, 2005 WL 83829, at *5 (goal for students "to consider carefully information regarding evolution and try to determine its validity"); *id.* ("open discussion"); *id.* at *6 (point to "encourage students to think critically"); *id.* ("toleran[ce]"); *id.* ("critical thinking"); *id.* ("toleran[ce] of the diverse range of views"); *id.* (purpose to make classroom "safe enough for a youngster to express themselves, whatever their views are"); *id.* at *7 ("tolerance and acceptance of diversity of opinion"); *id.* ("promote critical thinking"); *id.* at *8 ("discussion of disputed views"); *id.* ("balanced education"); *id.* ("objectivity"); *id.* ("critical thinking"); *id.* at *9 ("academic freedom"); *id.* ("tolerance and acceptance of diversity"); *id.* ("neutrality"); *id.* ("respect[]"); *id.* ("sense of scientific inquiry and understanding of

In a society that values freedom of thought and inquiry, what could possibly be wrong with that?

CONCLUSION

For the foregoing reasons, this Court should REVERSE the district court's decision.

Respectfully submitted,

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scientific methods"); *id.* ("encourage ... respect"); *id.* ("neutrality"); id. at *13 ("critical thinking"); *id.* at *15 ("critical thinking"); *id.* ("open mind"); *id.* ("study ... carefully"); *id.* ("critical consideration"); *id.* at *19 ("critical thinking").