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 AMICUS CURIAE CLERGY AND LAITY NETWORK AND THE WITHERSPOON SOCIETY IN SUPPORT OF AFFIRMANCE

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STATEMENT OF THE ISSUES

Whether Appellants violated the Establishment Clause of the First Amendment of the United States Constitution by placing stickers on science textbooks singling out evolution as a theory deserving special scrutiny.

INTEREST OF AMICI

This Amicus Brief is being submitted on behalf of two religiously-affiliated organizations, the Clergy and Laity Network: United For Justice and Public Policy ("CLN") and the Witherspoon Society, both of which organizations agree with Appellees that the judgment of the district court should be affirmed.

CLN energizes and equips progressive religious leaders of all faiths to engage in public advocacy for justice and peace, shaped by faith-based social principles. In collaboration with an emerging progressive coalition of religious groups, it forms and coordinates networks of local, regional and national interfaith action groups committed to a progressive public policy agenda. CLN is participating in the instant amicus filing at the direction of Dr. Albert M. Pennybacker, the Chairperson and CEO of CLN.

The Witherspoon Society , founded in 1973, is a non-profit organization for ministers and members of the Presbyterian Church (U.S.A.). The Witherspoon Society engages in advocacy for justice, peace, the integrity of creation, and full inclusiveness in church and society. The Society takes its name from John Witherspoon, the only clergyman to sign the Declaration of Independence. It is active at the General Assembly of the Presbyterian Church (U.S.A.), encourages chapters in presbyteries, sponsors conferences, and maintains regular contact with

its members and the church at large through its web site (www.witherspoonsociety.org), and a quarterly periodical, *Network News.* The Society's views with respect to the separation of church and state are consistent with those set forth in the Presbyterian Social Witness Policy Compilation, p. 346 to 349. It is authorized to support this amicus filing by Catherine Zelle, Secretary of the Society, and Eugene TeSelle, Society Issues Analyst.

Both CLN and the Witherspoon Society support the affirmance of the district court's ruling because they believe that religious freedoms will best be assured and respected and the practice of faith in our country will flourish where government maintains its position of neutrality toward religion, and allows its people to make their own decisions about their religious views or practices. Amici believe that the sticker at issue was unnecessary governmental action, and that without it, students in Cobb County will remain free to express their beliefs and exercise their faith as to the issue of man's origin as they wish. Amici believe that the sticker does not advance those freedoms, but to the contrary, creates an unnecessary intertwinement of government into religious affairs.

Consistent with their views on the interplay between the Free Exercise and Establishment Clauses, Amici address in this brief the legal issues presented from a

particular perpective: how the absence of Free Exercise concerns should effect the analysis under the Establishment Clause.

SUMMARY OF ARGUMENT

Amici urge this Court to affirm the judgment of the District Court. This brief, however, is submitted not to address the specifics of the *Lemon* test, but instead to offer, from the perspective of faith-based organizations, an analysis of how this case can be distinguished from more challenging Establishment Clause cases where government action is necessary to assure a balanced treatment of religion or to remove restrictions on the exercise of religious liberties.[1] Unlike many closer Establishment Clause cases, this Court can affirm the District Court's conclusion that Appellants violated the Establishment Clause without in any way inhibiting the free exercise of religion, curtailing religious expression, or discriminating against individuals or organizations on the basis of their faith.

Moreover, given the careful selection of the science text, and the ability of teachers to respond appropriately to discussions relating to science and faith, the school board in this case did not need the sticker to assure neutrality. By showing clear favoritism toward those religious groups who are skeptical or hostile toward scientific theories that conflict with their religious beliefs, the sticker plainly violates the principal of neutrality. On the other hand, the removal of the sticker will not reflect hostility toward those who would question the current scientific

[1] Amici intimate no view as to the District Court's finding that the "purpose" prong of the *Lemon* test was not violated in this case.

theories about the origins of life. With the sticker removed from the science textbooks, students will have the same freedom to reach their own conclusions about the relationship between science and faith and to assess for themselves the strength or weakness of scientific principles or other theories about the origins of life.

ARGUMENT AND CITATIONS OF AUTHORITY

I. EFFECT OF FREE EXERCISE INTERESTS UPON ESTABLISHMENT CLAUSE ANALYSIS

The presence or absence of Free Exercise or Free Speech concerns has a dominating influence in Establishment Clauses cases.[2] "'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion,' . . . favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Ed. v. Grumet,* 512 U.S. 687 (1994) (internal citations omitted). It is well established that if the government action at issue is necessary to protect the free exercise of religion, the action is less likely to raise Establishment Clause concerns. *See, e.g., Cutter v. Wilkinson,* 2005 WL 1262549 (U.S. May 31, 2005) (rejecting

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[2] *See Sherbert v. Verner,* 374 U.S. 398, 414 (1963) (Stewart, J., concurring) ("there are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause").

Establishment Clause challenge to federal law requiring prison officials to accommodate inmates' religious free exercise); *Widmar v. Vincent*, 454 U.S. 263 (1981) (Establishment Clause did not inhibit public university from affording religious groups access to the same university facilities afforded to non-religious groups); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exemption for the Amish from the state's compulsory education system so they could freely exercise their decision to educate their children in a religious setting did not violate the Establishment Clause).

Conversely, when there is no significant constraint on religious exercise, attempts by the government to bolster religious expression or a religious organization often will be found to violate the Establishment Clause. *See, e.g., Lee v. Weisman,* 505 U.S. 577 (1992) (government sponsored prayer at middle and high school graduations violated the Establishment Clause); *Larkin v. Grendel's Den*, 459 U.S. 116, 120, 124 (1982) (state law giving church veto power over nearby liquor sales violated the Establishment Clause when the state's purpose of "shield[ing] schools and places of divine worship from the presence nearby of liquor-dispensing establishments" was one that "could be readily accomplished by other means" less endorsing of religion); *McCollum v. Bd. of Educ.,* 333 U.S. 203 (1948) (religious instruction at public school during regular school day taught by government approved outsiders violated Establishment Clause). In these instances,

government accommodation of religion "may devolve into 'an unlawful fostering of religion'" that is forbidden by the Constitution. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)).

The courts have acknowledged that there is "room for play" in the joints between the Establishment Clause and the Free Exercise Clause and that in particular situations where a serious abridgement of religious expression is threatened, Establishment Clause concerns may yield to Free Exercise Clause rights. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)). Examples of these kinds of situations, instructive by comparison to this case, involve the military, prisons, and exemptions from compulsory public school attendance.

The Supreme Court recently addressed the issue of prisoners' Free Exercise rights in *Cutter v. Wilkinson*, where the Court held that a federal law requiring prison officials to meet inmates' religious needs was a permissible accommodation of religion. 2005 WL 1262549 at *6. The Court reasoned that such accommodation was necessary because it "alleviate[d] exceptional government-created burdens on private religious exercise" by "protect[ing] institutionalized persons who are unable freely to attend to their religious needs and are therefore

dependent on the government's permission and accommodation for exercise of their religion." *Id.* at *6.

In a like vein, the Supreme Court has cited with approval cases holding that chaplain-led services in the military do not violate the Establishment Clause. *E.g., Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985), cited with approval in *Cutter*, 2005 WL 1262549 at *7, and *Lee v. Weisman*, 505 U.S. 577, 626 (1992). Such measures are necessary to secure the Armed Forces with the "rights of worship guaranteed under the Free Exercise Clause." *Abington School Dist v. Schempp*, 374 U.S. 203, 297 (1963) (Brennen, J., concurring).

The classic example in this line of cases is *Wisconsin v. Yoder,* 406 U.S. 205 (1972), in which the Supreme Court considered whether the State of Wisconsin, consistent with the Establishment Clause, could exempt the Amish from compulsory school attendance. The Court held that the state court's exemption of the Amish from compulsory school attendance did not constitute an impermissible establishment of religion because the state merely sought to accommodate the Amish in a neutral fashion to allow "their centuries-old religious society . . . to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose." *Id.* at 235. Otherwise, the state action would seriously "contravene the basic religious tenets and practice of the Amish

faith, both as to the parent and the child" in violation of the Free Exercise Clause. *Id.* at 218.

In *Yoder,* Chief Justice Burger, writing for the Court, acknowledged that when an exception is made from a general obligation of citizenship on religious grounds there is a danger it will "run afoul of the Establishment Clause." *Id.* at 221. However, that danger alone is not enough to prevent any exceptions:

> By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses "we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed."

Id. (quoting Walz v. Tax Comm'n, 397 U.S. at 672).

In contrast to those instances in which the government is simply lifting a burden of its own creation to enable the free exercise of religion, red flags are raised when the government acts to advance religion not otherwise being constrained. For example, the Supreme Court in *Schempp* invalidated a state law requiring students to read from the Bible at the opening of each school day. 374 at U.S. at 225-26. The Court rejected the parents' arguments that the action was necessary to uphold their Free Exercise rights, noting that the Free Exercise clause "has never meant that a majority could use the machinery of the State to practice

its beliefs." *Id.* Provisions authorizing chaplain services in prisons or government hospitals were distinguishable from government-sponsored religious activities in public schools because "there is no element of coercion present in the appointment of military or prison chaplains." *Id.* at 298-99 (Brennan, J., concurring). Moreover, unlike the situation of the "isolated soldier or the prisoner," the mere compelled presence of children in public schools "in no way renders the regular religious facilities of the community less accessible to him than they are to others." *Id.*

In *Lee v. Weisman,* 505 U.S. 577 (1992), the Court struck down a city policy permitting its public high school and middle school principals to invite members of the clergy to offer invocation and benediction prayers as part of the school's formal graduation ceremonies. 505 U.S. at 580-86. Even though the school did not require attendance at graduation, the Court held that the school officials' actions endorsed religion and thus violated the Establishment Clause. *Id.* at 586.

Proponents of the prayer services argued that the prayers were "an essential part" of the graduation ceremonies "because for many persons an occasion of this significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence." *Id.* at 595. The Court rejected this Free Exercise claim, stating that "the Establishment Clause

of the First Amendment is addressed to this contingency and rejects the balance urged upon us." *Id.* at 596.

Similarly, in *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948), members of the Jewish, Roman Catholic, and some Protestant faiths formed a voluntary association that obtained permission from a local school board to teach religious classes to public school students. *Id.* at 207-09. The children participated in a "released time" arrangement under which the children whose parents signed "request cards" were permitted to attend religion classes in the school building by outside teachers. *Id.* The program was subject to the approval and supervision of the Board of Education. *Id.* Students who did not attend the religious instruction were required to go to another location in the school. *Id.* at 209.

A taxpayer and parent of a student alleged that the "released time" arrangement violated the Establishment Clause because it enabled sectarian groups to give religious instruction while utilizing the state's tax-supported public school system and its machinery for compulsory public school attendance. *Id.* at 209-10. The Court agreed with the taxpayer's claim, stating, "[T]he First Amendment has erected a wall between Church and State which must be kept high and impregnable." *Id.* at 212. Arguably, the termination of the released time arrangement limited the Free Exercise rights of children attending those schools by

limiting their access to religious education. However, consistent with Court's decision in *School Dist. v. Schempp*, 374 U.S. 203 (1963), these accommodation concerns did not trump the bar against government-sponsored religious activities.

II. COBB COUNTY'S ACTION WAS UNNECESSARY TO ADVANCE ANY FREE EXERCISE INTEREST

In contrast to those cases in which government action is genuinely necessary to protect the free exercise of religion, in this case there is a total absence of any free exercise concerns. The challenged government activity – placement of the sticker – does not enable or facilitate the exercise of religious belief or worship. *Compare Widmar*, 454 U.S. at 276-77. Nor does the sticker remove any government imposed restraint on religious activity. *Compare Cutter*, 2005 WL 1262549, *6; *Katcoff*, 755 F.2d 223. Too, the decision to place the stickers in science textbooks was not done in an effort to remove the government from what would otherwise be its excessive entanglement with religion. *Compare Walz*, 397 U.S. 664, *Yoder*, 406 U.S. 205. Hence, none of the traditional bases upon which government action in the past has been tolerated as a means of accommodating religious expression are present in this case.

To the contrary, without the sticker, Cobb County students and their parents enjoy the full range of religious liberties. Most obviously, there is no restraint whatsoever on religious exercise outside the classroom. At school, students remain

free to express their own religious beliefs, either publicly at school events, *e.g. Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, 1339 (11th Cir. 2001) (schools may allow students to make public religious statements on campus during school events without violating the Establishment Clause, so long as such expression is theirs alone and not fashioned or endorsed by school officials); *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991), or privately after school on campus in student religious clubs. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001). Student religious organizations may receive an "activity fee" funding on an equal basis with non-religious groups. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995). The School Board may allow students to leave school for specific religious instruction, *Zorach v. Clauson*, 343 U.S. 306, 312 (1952), or exempt compulsory school attendance entirely if in conflict with particular religious beliefs. *Yoder*, 406 U.S. at 234-35.

Most significant, there is no contention by the government in this case that, absent the sticker, the schools will be unable to present the materials on the origins of life with the neutrality and sensitivity required by the Establishment Clause and the Free Exercise Clauses. Indeed, the School Board adopted a regulation in 2003, not challenged in this case, specifically addressing how teachers should respond to questions about theories of origin. The regulation states:

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

District Court Decision, p. 15 (quoting Defs' Ex 6). The regulations adds the following important admonishment:

> Under no circumstances should teachers use instruction in an effort to coerce students to adopt a particular religious belief or set of beliefs or to disavow a particular religious belief or set of beliefs. Instruction should be respectful of personal religious beliefs, and encourage such respect among students.

Id. The express purpose of the regulations is to ensure the appropriate instruction of science consistent with the State of Georgia's Quality Core Curriculum without endorsing, or appearing to endorse, either a religious viewpoint or an anti-religious viewpoint. Though this regulation was not adopted until several months after the School Board decided on the sticker,[3] the regulation shows what the School Board

[3] An earlier regulation directed to a similar goal of achieving a neutral accommodation of student expression about man's origin was in effect at the time the sticker was authorized.

could have done, as an alternative to the sticker, to ensure balanced and sensitive instruction.

In sum, this is not a case in which government action is necessary to accommodate religious expression. Because there was no need for the sticker in the first place, the decision to place it on every textbooks has every appearance of the government endorsement of religion -- perhaps not the purpose of the sticker, but, as the District Court held, certainly its effect.[4] The School Board would have been well-served to follow that old saying, "if it ain't broke, don't fix it."

For the foregoing reasons, the decision of the District Court should be affirmed.

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[4] *See West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitues of public controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.")

Respectfully submitted this 10th day of June, 2005.

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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 as of this date I have caused a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE** 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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