

No. 99-1625

IN THE
SUPREME COURT OF THE UNITED STATES

TANGIPAHOA PARISH BOARD OF EDUCATION; E.F. BAILEY; ROBERT
CAVES; MAXINE DIXON; LEROY HART; RUTH WATSON; DONNIE
WILLIAMS, SR; ART ZIESKE, in their capacities as members of the School
Board; TED CASON, in his capacity as Superintendent of Schools,

Petitioners,

v.

HERB FREILER; SAM SMITH, individually and in his capacity as administrator
of the estate of his minor child, Steven Smith; JOHN JONES,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a school board has unlawfully advanced and endorsed religion by enacting a policy that singles out the scientific theory of evolution as the sole topic in the curriculum subject to a mandatory disclaimer the content of which encourages students to adhere to the Biblical version of creation; and which was adopted immediately after the defeat of a Creation Science curriculum; and which was introduced specifically because the proponent believed that the overwhelming majority of students believe in the Biblical version of creation rather than in the scientific evidence.

STATEMENT OF THE CASE

This case represents the latest in the continuing series of attempts to impose upon schoolchildren a religiously-based and doctrinal interpretation of life's origins and thereby to undermine both established science curricula and the benefits of a secular public education. Prohibited by the Constitution and by Louisiana law from banning the teaching of evolution and from requiring the teaching of religious alternatives, the Tangipahoa Parish Board of Education ("School Board") has sought to do through the back door what it cannot do through the front: to instruct students not to believe their science teachers and the state-mandated science curriculum, but to adhere to religious interpretations of life's origins instead. This case, plain and simple, is about whether a school board may use its science classrooms to instruct its students to believe in religion over science. To pose the question is to answer it: a long line of, of this Court and of lower ones, make it clear that a school board may do no such thing.

By disclaiming only evolution - the one element of the school curriculum that generates religious controversy - the School Board has violated its Constitutional obligation to provide its students with secular educations free from religious indoctrination or partisanship. The Fifth Circuit twice correctly recognized the impropriety of the School Board's thinly disguised efforts to impose a religious view on its students, and twice declared the disclaimer statement unconstitutional. *Freiler et al v. Tangipahoa Parish Board of Education et al*, 185 F.3d 337 (5th Cir. 1999) ("*Freiler I*"); *Freiler et al v. Tangipahoa Parish Board of Education et al*, 201 F.3d 602 (5th Cir. 2000) ("*Freiler II*"). Those rulings were correct, and this Court should deny the request for certiorari.

The opinion that forms the basis for the Petition is explicitly limited to the factual context

of this Disclaimer (Appendix A to Petition, p. 2a). The Petition misstates the facts in several material respects, notably by mischaracterizing the stated purpose of the Disclaimer and its pertinent history. The District Court issued extensive findings of fact, all based on a stipulated record. Those facts were repeated by the Fifth Circuit in *Freiler I* and have not been challenged. (Appendix B to Petition, pp. 18a-20a and fn. 4 at 30a). Because the opinion subject to review is explicitly fact-based, a correct accounting of the facts is critical.

A. The Disclaimer Advances and Endorses Religion

1. Creation Science: The Background

The Disclaimer did not arise in a vacuum. Over a period of weeks shortly before the Disclaimer was introduced, certain members of the School Board, notably the proponent of the Disclaimer, engaged in an unsuccessful attempt to have “religious materials” - including a full-blown “Creation Science” curriculum - introduced into the schools. The matter of “religious materials” was initially taken up by the curriculum committee where it was defeated. (Appendix C to Petition, pp. 39a - 40a.) Despite its defeat in committee the proposal, including the “Creation Science” curriculum, was brought before the full School Board for consideration. By a 5-4 vote, the School Board voted not to adopt the “religious materials” policy. (Appendix C to Petition, p. 40a). It was a few weeks after this defeat that the Disclaimer was proposed and adopted. (Id.)

2. The Disclaimer Endorses and Advances Religion

The Disclaimer was introduced to the entire School Board rather than to the curriculum committee, where it belonged, because the committee had failed to approve the “Creation Science” curriculum. (Appendix C to Petition, p. 41a).¹ At the meeting at which the Disclaimer

¹The School Board attempts to make much of the fact that it never intended to eliminate evolution from the curriculum. Because this Court has ruled that School Boards may not alter

was proposed and adopted, Bailey (its proponent) made it clear that he wanted the Disclaimer precisely because he believed that his constituents “do not share the belief in evolution, that they believe the Biblical version of creation, and that they ‘resent their children being confused with the presentation of the theory of evolution.’” (Appendix C to Petition, pp. 46a-47a).

In debating the Disclaimer, the School Board rejected a motion to delete the reference to the “Biblical version of creation.” The motion failed because, in Bailey’s words, “I couldn’t accept that and I think you deserve to hear why. I think that by that, you’ve gutted the basic message of this document.” (Appendix C to Petition, p. 43a). In other words, the “basic message” of the Disclaimer - as stated by Bailey and endorsed by the School Board - was the reference to the Bible. At the meeting, Bailey emphasized that he believes that “perhaps 95 percent” of the students believe in divine creation, and that he wanted the Disclaimer so that students wouldn’t be confused by any perceived discrepancies between what they learn in school and what they learn in Sunday School. (Appendix C to Petition, pp. 43a-45a).

Although the text of the Disclaimer purports to encourage students to explore “alternatives” to evolution, the District Court correctly observed that in the debate leading up to its adoption no School Board member listed any non-religious theory as “alternatives.”(Appendix C to Petition, p. 46a)². All of the “other concepts” which the School Board members discussed were religious, including the Biblical, as well as the Hindu, Islamic, or American Indian versions.

the curriculum to eliminate evolution, *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct 2573 (1987), and because the teaching of evolution is mandatory in Louisiana public schools (Appendix C to Petition, p. 58a), the School Board has no choice in this matter. It was trying to tamper with the curriculum in the only way it could: to add a religious reference to evolution and to discourage students from believing in the science curriculum that is mandated by this Court and by state law. It is not entitled to kudos for agreeing to follow the law.

²Both the record and common sense indicate that there are no such non-religious “alternatives.” Respondents offered a report of an expert witness precisely to that effect. That report was unrefuted by the School Board.

(Id.). The discussions centered on the premise that children should not be taught evolution as “fact” because it conflicts with what they learn in Sunday School. (Appendix C to Petition, p. 47a). There were no expressed concerns about perceived conflicting secular explanations for the origins of life.

3. The Disclaimer Was Adopted to Defeat Diversity, Not to Promote It

The School Board posits that the Disclaimer was intended to address a diversity of beliefs in the school system, yet the facts show just the opposite. As the District Court recognized, “during the discussion of the proposed resolution, no Board member stated that the reason the disclaimer was being introduced was to urge students to exercise their critical thinking skills or to examine all alternatives when forming opinions, purposes later embraced by Board members in depositions or in trial testimony.” (Appendix C to Petition, p. 47a). In fact, the Disclaimer was adopted because, as Bailey stated, he believed that 95% of the students adhere to Biblical versions of creation. All of the discussion focused on concerns for Christian students who are offended, on religious grounds, by the teaching of evolution. *Id.* Nor was the reference to the Bible intended as “illustrative,” as the School Board now would have it. (Petition, p. 8). As the *Freiler I* decision explains, the reference to the Bible was not illustration but the basic message. (Appendix B to Petition, fn. 4, p. 30a). This is not, as the School Board now contends, an attempt to promote diversity or pluralism in the schools.³ It is an attempt by adherents to a particular religious doctrine to impose that doctrine on the teaching of science.

³The dissent in *Freiler II* misinterpreted the facts in stating that the purpose of the Disclaimer was to “advance tolerance and respect for diverse viewpoints.” (Appendix A to Petition, pp. 12a-13a). As the District Court found and *Freiler I* affirmed, there is no evidence whatever in the record that tolerance and respect for diversity were in any way part of the discussions. In fact the evidence is to the contrary: the Disclaimer was proposed precisely to accommodate what its proponent insisted was the religious view of 90% or 95% of the students. Attempts to incorporate references to minority religious beliefs, such as Hindu, Muslim, American Indian, or others were explicitly rebuffed. (Appendix C to Petition, pp. 42a-43a).

Moreover, evolution is the only topic in the curriculum that the School Board disclaims. (Appendix C to Petition, pp. 41a-48a). As this Court has found, objections to evolution are religiously based, and evolution is the one topic in a school curriculum that is religiously controversial. *Edwards v. Aguillard*, 482 U.S. 578, 593 107 S.Ct. 2573, 2582 (1987). If the School Board really wanted to encourage diversity of beliefs among its students, it would disclaim all manner of information, and it would encourage students at all times and in all contexts to “exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.” Singling out the religiously-charged topic of evolution for such treatment shows that the Disclaimer advances and endorses religion.

4. There Are No “Hurt Feelings” That Needed to Be Assuaged

The School Board’s post-hoc rationalization of the Disclaimer portrays it as a “sensitive response to controversy” and as an attempt to assure students that they may have their own opinions. However, the facts show that the Disclaimer was proposed not because of any expressed concern by students, but because of the religious concerns of the School Board members. The Disclaimer did not arise out of a student complaint, and there is no evidence that “hurt feelings” ever existed among students on this issue. In fact the reverse is true. Before the adoption of the Disclaimer, students had the right to discuss any alternative theories other than evolution in class, and teachers were free to - and did - discuss these concepts with their students. (Appendix C to Petition, p. 47a).

There were no student “outsiders” before the Disclaimer, as the School Board now claims (Petition, p. 21). To the contrary, everyone was included: teachers responded to student concerns individually as they arose, and all had the opportunity to discuss whatever concepts they wanted with their teachers. This is, of course, the appropriate way to deal with issues of faith in the

public schools. Only with the passage of the Disclaimer was there the chance of students becoming outsiders, because the Disclaimer mandates a specific reference to the “Biblical version of Creation,” which may be at odds with some students’ religious beliefs.

REASONS FOR DENYING THE WRIT

1. This Is Not an Exceptional Case

Given the current posture of this case, it does not meet any of the criteria of this Court for granting certiorari.⁴ The Fifth Circuit, both in its panel decision and in denying rehearing en banc, limited its opinion to the facts of this case. In *Freiler I* the court stated “we limit our analysis to the precise language of the disclaimer and the context in which it was adopted. We do not confront the broader issue of whether the reading of any disclaimer before the teaching of evolution would amount to an unconstitutional establishment of religion.” *Freiler I*, (Appendix B to Petition, p. 20a). Affirming, the court in *Freiler II* said “we decide only that *under the facts and circumstances of this case*, the statement of the Tangipahoa Parish School Board is not sufficiently neutral to prevent it from violating the Establishment Clause.” *Freiler II*, (Appendix A to Petition, p.2a, emphasis supplied).⁵ Confined as it is to its specific facts, this is a narrow ruling that does not warrant review.⁶

⁴The School Board would like this to be an “exceptional case” simply because it claims it was acting to reduce the possibility of offense occasioned by the teaching of evolution in public schools. (Petition, p. 8). However, a public school system is under no obligation to avoid offending its students or their parents. In fact the reverse may be true: it is the duty of a school to challenge its students and to broaden their minds and their horizons, not to spoon-feed only what they may want to learn. Avoiding offense to students does not create exceptional circumstances warranting the attention of this Court.

⁵It is obvious from *Freiler I* that the ruling in *Freiler II* was not intended to affirm the constitutionality of evolution disclaimers generally. *Freiler I* specified the pertinent facts, including the history of the failed Creation Science curriculum and the discussions at the meeting when the Disclaimer was adopted. (Appendix B to Petition, fn. 1 and pp. 16a-18a). The court in *Freiler II* was obviously referring to the facts it had already found in saying that *this* disclaimer, under *these* facts, fails constitutional muster.

⁶That the teaching of evolution may be of emotional import to people in Tangipahoa Parish - or, more accurately, to the members of the School Board - does not justify intervention by this Court. This Court long ago made it clear that school systems may not tamper with the state-mandated teaching of evolution, e.g. *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266 (1968); *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573 (1987). The School Board’s dissatisfaction

Certiorari is not appropriate in cases of isolated violations not likely to recur. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S.Ct. 614 (1955). “Special and important reasons” warranting the grant of certiorari “imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.” *Id.*, 349 U.S. 70, 74. Following *Rice*, and in accordance with this Court’s duty to refrain from needlessly deciding constitutional issues, certiorari should be denied in this case, which is confined to a narrow set of facts unlikely to recur.

Under the opinion subject to review, any future disclaimer statements will have to be examined individually, for their histories, contexts, and specific contents. It is a virtual certainty that the precise facts of this Disclaimer - arising just after the defeat of a “Creation Science” curriculum, adopted specifically because it includes a reference to the Bible and out of an expressed concern for the 90-95% of Christian students who adhere to Biblical precepts - will not recur elsewhere. This is as isolated a violation as any can be, and for that reason it is not appropriate for this Court’s review.

2. The Disclaimer Advances Religion in Violation of the *Lemon Test*

This Court has long held that public schools must be free of religious influences. Respect for the religious views of all Americans, particularly schoolchildren, requires a totally secular public school experience. *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 2486 (1985), *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261 (1962). Over the years there have been many unsuccessful attempts to introduce “Creation Science” into public school curricula, or otherwise to undermine the teaching of science by introducing religious beliefs. To date no court has permitted such an intrusion of religion into the classroom. E.g. *Epperson v. Arkansas*, 393 U.S.

with this Court’s clear rulings is not sufficient justification for certiorari.

97, 89 S.Ct. 266 (1968) (striking down a ban on teaching evolution); *Edwards v. Aguillard*, 482 U.S. 587, 107 S.Ct. 2573, (1987); (invalidating mandatory teaching of “Creation Science”); also *Pelozo v. Capis District*, 37 F.3d. 517 (9th Cir. 1994) (upholding a teacher’s obligation to teach evolution despite a religious objection); *Helland v. South Bend Community School Corporation*, 93 F.3d 327 (7th Cir. 1996) (upholding termination of substitute teacher who, among other things, taught creationism in a fifth-grade science class); *Webster v. New Lenox School District No. 122 et al*, 917 F.2d 1004 (7th Cir. 1990) (upholding prohibition against teaching “nonevolutionary theories of creation”).⁷

Critical to the application of the *Lemon* endorsement test, *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971) is an understanding of the facts and context of the Disclaimer.⁸ Evolution is the only topic in the Tangipahoa Parish schools that is subject to such a disclaimer. It is singled out for such treatment because School Board members have a religious objection to it. As a matter of law, this is *per se* endorsement of religion under any possible analysis of *Lemon* or any other decision of this Court.⁹ The Fifth Circuit, in both its panel and en banc opinions, correctly applied the law on endorsement. This matter therefore does not warrant review, and the Petition should be denied.

⁷These cases indicate that the Fifth Circuit is in line with the other appellate circuits and that there is no conflict among the circuits on this issue, further indicating that this case does not warrant certiorari.

⁸Respondents believe that the Disclaimer violates both the “purpose” prong of the *Lemon* test as well as the endorsement prong, and to that extent they believe that the Fifth Circuit erred in *Freiler I*.

⁹The School Board makes much of the panel’s initial substitution of the word “and” for “or” in one sentence of the Disclaimer, positing that the Disclaimer does not endorse religion when properly read because it encourages students to form their own opinions and not just adhere to those of their parents. However, because any non-scientific “opinion” about life’s origins is by definition religious, the court in *Freiler II* properly acknowledged that this error was a distinction without a difference.

CONCLUSION

For all of the above reasons, Respondents submit that the Petition for Certiorari should be denied.

Respectfully Submitted,

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