

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Jeffrey Michael Selman,	:	
Debra Ann Power, Kathleen Chapman,	:	
Jeff Silver, Paul Mason, and	:	
Terry Jackson,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action File
	:	No. 1:02-CV-2325-CC
	:	
Cobb County School District,	:	
Cobb County Board of Education,	:	
Joseph Redden, Superintendent,	:	
	:	
Defendants.	:	

DEFENDANTS' FIRST TRIAL BRIEF

COME NOW, Cobb County School District and Cobb Board of Education, named as Defendants in the above-styled action and, concurrently with the filing of the Pretrial Order, file this first Trial Brief in support their defenses in this case, and show as follows:

I. PLAINTIFFS' BURDEN OF PROOF IN FACIAL CHALLENGE

A. Introduction.

A facial challenge to a legislative act is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid. U.S. v. Salerno, 481 U.S. 739, 745 (1987); Adler v. Duval County School Board, 206 F.3d 1070, 1083

(11th 2000) (*en banc*). In this case, Plaintiff must establish that the evolution sticker at issue had either an unconstitutional purpose, effect, or religious entanglement in all circumstances. Lemon v. Kurtzman, 403 U.S. 602 (1971).

B. Statement of the Case.

As detailed in Defendants' Brief in Support of their Motion for Summary Judgment, and as will be shown at trial, the sticker at issue was adopted as part of a larger effort by the Cobb County Board of Education to strengthen evolution curriculum. As part of this effort, the School District began the process of revising the existing policies regarding instruction on theories of origin prior to adoption of the sticker.

The Board adopted science textbooks which incorporated comprehensive evolution instruction, and some of which also included the sticker at issue, in March 2002. In September 2002 the Board adopted the revised policy regarding instruction on theories of origin, while the regulation regarding such instruction was adopted in January 2003.

The Complaint in this action was filed on August 21, 2002, after the textbook adoption, but before either the policy or regulation regarding classroom instruction had been implemented. The Complaint itself related solely to the sticker, since it was unclear at that time what approach the District would take to

classroom instruction. When the Complaint was later amended in April 2003, the issue of classroom instruction was not added by amendment.

According to Jeff Selman, the original Plaintiff in this action, he specifically considered challenging the policy and regulation regarding actual classroom instruction on evolution. (Selman depo., p. 49, ll. 6-25, p. 52, l. 23-p.53, l.12). He waited until the regulation was adopted in January 2003, and because he felt the regulation regarding classroom instruction did not promote religion, he declined to pursue it. (Selman depo., p. 53, l. 13-p. 54, l. 22.). "In fact, I am confused as to why the policy and the regulation are even coming up when I'm suing to get the sticker out of the book, because whether or not the policy and regulation does what I expect it to do, the sticker is still wrong." (Selman Depo., p. 54, ll. 17-22).

In fact, Mr. Selman, who was the sole Plaintiff in this action through January 28, 2004, likely had no standing to raise any issue regarding classroom instruction. The science text used by his son in elementary school did not address the issue of evolution. (Selman Depo., p. 6, ll. 2-24). The sticker at issue was not in his son's textbook, and Mr. Selman had never personally seen a textbook with the sticker in it at the time his deposition was taken on July 8, 2003. (Selman Depo., p. 7,

11. 2-14). Thus, Mr. Selman explicitly considered, and deliberately declined, any amendment designed to raise the issue of classroom instruction regarding curriculum.

Indeed, the pleadings in this case have uniformly related solely to the sticker, and have never raised the issue of classroom instruction or the application of the sticker to evolution curriculum:

- (1) The Complaint in this case relates solely to the disclaimer, and does not assert that classroom instruction by the District violates the Constitution.
- (2) In Plaintiff's Mandatory Interrogatories, Plaintiff set forth his contentions as follows, in their entirety: "Plaintiff contends Defendant, a governmental entity, engaged in the establishment of religion by the imposition of a disclaimer pertaining to evolution."
- (3) The facts of the case, as set forth in Plaintiffs' portion of the Joint Preliminary Planning Report, all relate to the disclaimer. There is no hint that classroom instruction is at issue.
- (4) In Defendants' Memorandum of Law and Opposition to the Motion to Intervene, Defendants clearly set out the understanding that this case was only about the

disclaimer:

"This is case is not about the subject matter taught in science classrooms, nor does it involve any restriction on the subject matter in Cobb County School District's curriculum. The sole issue in this case is whether Defendants' insertion of a statement regarding evolution in certain science textbooks constitutes an establishment of religion. . . "

Defendants' Memorandum of Law filed April 9, 2002, pp. 1-2.

(5) Plaintiff tried to insert this issue into the case without formal amendment of the Complaint in response to the Motion for Summary Judgment, but Defendant clearly objected in its Reply Brief:

"This case is a facial challenge to a statement regarding evolution which is devoid any religious content. Although Plaintiff contemplated amending the Complaint to assert an as-applied challenge to classroom instruction, he decided not to do so because he found that the regulation adopted by the Board does not promote

religion.”

Reply Brief, p. 4, n.2.

The basis for this objection was Mr. Selman’s deposition at pages 53-54.

- (6) In its Motion for Reconsideration, Defendants again raised the issue that this was a facial challenge, not an as-applied challenge.

Motion for Reconsideration, p.7.

- (7) To date, Plaintiff has never asserted in any pleading that an as-applied challenge had been preserved as an issue in this case.

II. CONCLUSION

An as-applied challenge to classroom instruction in this case would involve evidence of instruction in thousand of science classrooms, taught to tens of thousands of students. No discovery whatsoever has been conducted on this issue.

Defendants respectfully request that the Court limit the evidence in this case to exclude any evidence related to actual classroom instruction, and that the Court construe the challenge by Plaintiffs according to the standard as set forth above.

Respectfully submitted this 8th day of September, 2004.

**BROCK, CLAY, CALHOUN,
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CERTIFICATE OF COMPLIANCE WITH PAGE AND TYPE LIMITATIONS

Pursuant to Local Rule 7.1 (D), counsel hereby files with the Court this Certificate of Compliance. The Motion to Exclude Expert Witness Testimony was composed with Courier New Font in 12-point type.

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CERTIFICATE OF SERVICE

I CERTIFY that I have this day served upon those persons listed below a copy of the within and foregoing **TRIAL BRIEF** by hand-depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon to ensure delivery to:

Michael E. Manely
The Manely Firm
7 Atlanta Street, Suite C
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This 8th day of September, 2004.

**BROCK, CLAY, CALHOUN,
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