



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

Mark S. Kaufman, Esq., GA Bar No. 409194
Bruce P. Brown, Esq., GA Bar No. 064460
MCKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE, Suite 5300
Atlanta, GA 30308
Tel: (404) 527-4000
Fax: (404) 527-4198

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

Counsel for Plaintiffs

American Civil Liberties Union Foundation

American Civil Liberties Union Foundation of Georgia

Margaret F. Garrett, Esq.

Michael Manely, Esq.

Gerald Weber, Esq.

Additional Counsel for Appellees

David G. H. Brackett, Esq.

Jeffrey O. Bramlett, Esq.

Emily Hammond Meazell, Esq.

Bondurant, Mixson & Elmore, LLP

Defendants / Appellants

Cobb County Board of Education

Cobb County School District

Joseph Redden, Superintendent

Cobb County School District, et al. v. Jeffrey Michael Selman, et al.
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Counsel for Defendants / Appellants

Carol Callaway, Esq.

E. Linwood Gunn, IV, Esq.

Proposed Intervenors

Allen Hardage

Larry Taylor

Counsel for Proposed Intervenors

Alliance Defense Fund

Hollberg & Weaver

Kevin Thomas McMurry, Esq.

Kevin H. Theriott, Esq.

George M. Weaver, Esq.

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Amicus Curiae

Biologists and Georgia Scientists

Colorado Citizens for Science

Clergy and Laity Network

Honorable J. Foy Guin, Jr.

Kansas Citizens for Science

Michigan Citizens for Science

Nebraska Religious Coalition for Science Education

New Mexico Academy of Science

New Mexico Coalition for Excellence in Science and
Math Education

New Mexicans for Science and Reason

Parents for Truth in Education

The Witherspoon Society

Texas Citizens for Science

Counsel for Amicus Curaie

Bruce P. Brown, Esq.

Mark S. Kaufman, Esq.

McKenna Long & Aldridge, LLP

David DeWolf, Esq.

Lynn Gitlin Fant, Esq.

Hollberg & Weaver, Esq.

William Johnson, Esq.

Rogers & Watkins

Marjorie Rogers, Esq.

George M. Weaver, Esq.

Trial Judge

Honorable Clarence Cooper

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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 perspective: 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

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 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

