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

NOV 8 - 2004

LUTHER D. THOMAS, Clerk
By: Deputy Clerk

JEFFREY MICHAEL SELMAN,
KATHLEEN CHAPMAN, JEFF SILVER,
PAUL MASON and TERRY JACKSON

Plaintiffs,

v.

COBB COUNTY SCHOOL DISTRICT,
COBB COUNTY BOARD OF
EDUCATION,
JOSEPH REDDEN, SUPERINTENDENT,

Defendants

Civil Action

File No. 1:02-CV-2325-CC

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

- (1) The Plaintiffs in this case are Jeffrey Michael Selman, Kathleen Chapman, Jeff Silver, Paul Mason and Terry Jackson.
- (2) All of the Plaintiffs are residents and taxpayers of Cobb County, Georgia.
- (3) Plaintiff, Jeffrey Selman's child is in the fifth grade and attends Timber Ridge Elementary School.
- (4) Plaintiff Kathleen Chapman's daughter was a sophomore at McEachern High School when this lawsuit was filed. Now, she is a senior at the same school. As part of her sophomore and senior year science classes she was assigned a

textbook that contained the disclaimer sticker.

- (5) Plaintiff Jeff Silver 's daughter is a junior at Walton High School. In her sophomore year she was assigned a science textbook that contained the disclaimer sticker.
- (6) Plaintiffs Paul Mason and Terry Jackson also have children in the Cobb County School District
- (7) All of these parents object to the Cobb County Board of Education's decision to place a sticker that disclaims evolution in the high school science textbooks that teach evolution.
- (8) The Plaintiffs object to the County expending their tax money to purchase, produce, and insert the evolution disclaimers into the textbooks.
- (9) The Plaintiffs object to the disclaimer because the School District has endorsed religion by disclaiming only the scientific theory of evolution and introducing religious theories of the origin of life into the classroom.
- (10) The disclaimer sends the message to the Plaintiffs that the School District supports the religious doctrines that oppose evolution. This makes the Plaintiffs feel like outsiders and second-class citizens in their own community.
- (11) The parents do not want the school to promote this religious doctrine to their children or to use their tax money to promote this religious doctrine to other

students.

- (12) Georgia state science curriculum requires the teaching of evolution. Tippins Dep. at 70.
- (13) The Cobb County School Board approved new science textbooks in 2002.
- (14) The School's previous high school science textbooks, in their original form, also included information about evolution. Before disseminating those books to students, the School Board removed the pages that contained that information and inserted blank pages in their place. Tippins Dep. at 86.
- (15) The high school science textbooks approved in 2002, include a section on evolution.
- (16) As part of the textbook approval process, citizens were given an opportunity to review and comment on the textbooks. Two parents commented on the high school level science textbooks through a Citizen Textbook Comment Record. Ex. 42.
- (17) One citizen approved of including evolution in the science textbooks: "very happy with the inclusion of evolution, even if not by that term . . . we must teach this." Ex. 42.
- (18) The other citizen, Marjorie Rogers, objected to the inclusion of evolution in the textbooks for religious reasons. She stated the following:

- “p. 425-426 -‘What is theoretical about the Darwinian view of life?’-last paragraph promotes atheism! BLATANT statement that theories involving God are not ‘scientific’ or ‘sound.’”
- “p.412-413 interview w/Richard Dawkins-why is his theory given prominence over other respected modern creation scientist’s theories?”
- “p. 497 - debate over origin of life-never mentions any theory involving a creator”
- “Book never mentions creationism as an alternative theory. . . some scientists believe in creationism.”
- “no alternative theory presented-no opportunity to exercise critical thinking with two possible theories presented.”

Ex. 54.

- (19) In response to this criticism, School Board member Lindsey Tippins asked the School Board to adopt a disclaimer that would be placed in every high school science textbook. Redden Dep. at 23-25; Tippins Dep. at 24; Johnston Dep. at 7-11, 18; Plenge Dep. at 19.
- (20) The School Board unanimously approved the use of and the language of a sticker that was to be placed in science textbooks that included information discounting evolution.
- (21) The disclaimer was tailored to fit the concerns of the citizen who criticized the textbook’s section on evolution. Minutes of March 27, 2002 Meeting, ex. 43; Redden Dep. at 23-25.
- (22) The language of the disclaimer states: “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." Stipulation, Pre-Trial Order, Attach. E.

- (23) The disclaimer sticker also states that it was inserted by the Cobb County School District.
- (24) The School Board members did almost no research into the theory of evolution or alternate theories of origin either before or after the passage of the disclaimer. Plenge Dep. at 21, 30; Tippins Dep. at 48-49. The only research done was by Mr. Tippins, who spoke with a Chemistry Professor who adheres to the Biblical story of Creation and to a medical doctor. Tippins Dep. at 48-49.
- (25) After the Board passed the disclaimer, numerous citizens, organizations, churches, and academics contacted the School Board to praise it for its decision to open the classroom to the teaching and discussion of creationism and intelligent design.
- (26) A Petition with 2,000 signatures was presented to the Board. It expressed "support for the disclaimer" and "open discussion about the theory of

evolution as well as other legitimate, scientific views concerning the origin of life, such as intelligent design." Ex. 45.

- (27) Judy Coppedge sent a letter to the Board asking the school to "stand firm in your resolve to broaden the teaching in school beyond naturalism's evolution" and allow the teaching of intelligent design, which teaches that "the universe has intelligence behind it and is not a product of natural causes." Ex. 50.
- (28) The Concerned Women of America wrote a letter to the Board stating: "We support the decision to allow for creation science to be taught" and "we thank you for your recent support on a balanced approach to curriculum." Ex. 47.
- (29) The American Family Association of North Georgia wrote a letter to the Board expressing "support for the Cobb School Board's position concerning the teaching of creation science [because] [t]here is little doubt all the religious people I know of every faith are clearly in support of teaching creationism, intelligent design and evolution." Ex. 48.
- (30) The Triangle Association for Science Creation wrote a letter to the Board supporting the disclaimer and the teaching of intelligent design. Ex. 49.
- (31) The Open Bible Tabernacle wrote a letter to the Board voicing concern over efforts to remove the disclaimer and the removal as an act that would

“prevent the children of Cobb County Schools from having the opportunity to be made aware of ‘creation science’ being taught in our county schools as an alternative to evolution with regard to the origins of life.” Ex. 52.

- (32) Dr. Michael A. Corey, Ph.D, wrote a letter to the Board applauding Cobb’s recent decision to “open up the teaching of origins” and suggesting the use of the book, the God Hypothesis,” which “demonstrate[s] that our universe was designed as an Intelligent Creator after all.” Ex. 53.
- (33) After the adoption of the disclaimer some parents encouraged their children to bring up religious theories of origin in the public school classroom. Ex. 55.
- (34) After approving the disclaimer, but before placing the disclaimer into school textbooks, the School Board rejected alternative language for the disclaimer. Ex. 44. The “data sources” of the disclaimer were listed as “Joseph Redden, Donald Beers, and Kay Wideman.” *Id.* That disclaimer would have stated: “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.” *Id.*

- (35) The School District expended taxpayer money to produce the sticker that contained the disclaimer and to insert the disclaimer into the textbooks. Stipulation, Pre-Trial Order, Attach. E.
- (36) School District personnel inserted the stickers into the textbooks. Redden Dep. at 29.
- (37) Students using science textbooks that contain the disclaimer cannot avoid them. The only suggested way to avoid the disclaimer is to to “take a black magic marker and mark it out,” but that would “probably get you in trouble.” Johnston Dep. at 20.
- (38) The School District does not disclaim any other scientific theories, or any non-scientific topics or subjects. Plenge Dep. at 12, 35.
- (39) The School District does not ask students to take note that gravity, newtonian physics, galilean heliocentrism, or plate tectonics are only theories. *Id.*
- (40) The School Board does disclaim other scientific theories to which other religions object. *Id.*
- (41) The germ theory of disease runs counter to the religious beliefs of Christian Scientists. The School District does not disclaim the germ theory of disease.
- (42) Scientologists oppose psychiatry and psychology because it runs counter to their faith. The School District does not disclaim these topics in health class

or disclaim its counseling program.

- (43) Geocentrists deny heliocentrism - the theory that the earth revolves around the sun- because the Bible does not support that conclusion. The School District does not disclaim heliocentrism.
- (44) Common Sense scientists reject atomism and the theory of gravity because they are theories that do not consider God. The School District does not disclaim these theories.
- (45) There are two definitions of "theory." The common usage means "speculation, a mental viewing or a contemplation." Freed Aff. at ¶10. The scientific usage connotes a "parsimonious coordinated statement that a scientist uses to explain natural phenomena." Freed Aff. at ¶ 10.
- (46) A scientific theory is a thoroughly tested and well-substantiated explanation used to make predictions, hypotheses, and that can incorporate other observations, laws, and hypotheses. Pallas Aff. at ¶ 10.
- (47) A scientific theory is one that (a) is testable; (b) is based on natural and not supernatural phenomena; and (c) is capable of being falsified if it is indeed false. Pallas Aff. at ¶ 10.
- (48) Science remains silent on the supernatural; it has nothing to say in either positive or negative terms about God, angels, or devils, because religious faith

is not subject to empirical testing. Pallas Aff. at ¶ 8.

(49) Religious faith involves the supernatural, it cannot be tested, and cannot be falsified if it is indeed false. Freed Aff. at ¶ 18. Religious faith is not science.

Id.

(50) Evolution is a scientific theory. Pallas Aff. at ¶ 18. There is no scientific dispute in any peer-reviewed scientific literature as to whether evolution occurs. There is no scientific evidence to support that evolution does not occur. Pallas Aff. at ¶ 13. No credible scientist in any biological research field disputes the theory of evolution. Pallas Aff. at ¶ 20; Matson Aff. at ¶ 20.

Evolution is one of the best supported theories in all of science. Pallas Aff. at ¶ 13.

(51) The scientific evidence that supports evolution is on par with that for other scientific theories such as the theory of gravity, the germ theory of disease, cell theory, Newtonian physics, Galilean heliocentrism, plate tectonics, and atomic theory. Pallas Aff. at ¶ 13; Matson Aff. at ¶ 13.

(52) The theory of evolution is critical in the world of science. Matson Aff. at ¶ 21. Evolution is integral in areas such as pharmaceuticals, medicine, and conservation biology. *Id.*

(53) Creationism is based upon the literal interpretation of the Book of Genesis,

which is found in the Old Testament of the Bible. According to first Chapter of Genesis, God created the heavens and the earth and all living creatures on the earth in six days.

- (54) Creationism is a religious doctrine. Creationism is not a scientific theory - it is not testable, it is based on supernatural phenomena, and it is not falsifiable.
- (55) Intelligent Design is a religious doctrine based upon a belief in a Creator. Pallas Aff. at ¶ 24; Matson Aff. at ¶ 26. Intelligent Design assumes that there are some phenomena that are forever outside the possibility of explanation through science and that this phenomena is attributed to God, the Creator. Pallas Aff. at ¶ 25. This Creator God directly designs natural phenomena that are incapable of being produced through natural causes. Freed Aff. at ¶ 18
- (56) Intelligent design is not a scientific theory - it is not testable, it is based on supernatural phenomena, and it is not falsifiable. Pallas Aff. at ¶¶ 13, 23; Freed Aff. at ¶ 18; Matson Aff. at ¶¶ 24, 25.
- (57) The scientific method consists of five generally recognized steps: (a) observations are made; (b) a question arises from the observations; (3) a hypothesis is formulates; (d) a prediction is made; and (e) the hypothesis is tested by making further observations or conducting experiments. Pallas Aff. at ¶ 9; Freed Aff. at ¶ 9. The process is then repeated on a modified, more

- detailed, or different hypothesis. Pallas Aff. at ¶ 9.
- (58) Only after repeated hypothesis-testing and vibrant, professional discussion does a scientific theory gain acceptance in the scientific community. Freed Aff. at ¶ 10. The method of disseminating scientific knowledge is through “peer-reviewed” scientific papers. Pallas Aff. at ¶ 9.
- (59) No proponent of intelligent design or creationism have used the scientific method to demonstrate the validity of the theory. Pallas Aff. at ¶ 9; Freed Aff. at ¶ 18. There are no “peer reviewed” scientific papers published that support intelligent design or creationism. Pallas Aff. at ¶ 9; Freed Aff. at ¶ 18.
- (60) The evolution disclaimer implicitly encourages students to consider alternate theories of origin. Order on Summ. J. at 9, 17-18.
- (61) There are no alternative scientific theories of origin; there are only religious and non-scientific alternate theories of origin. Pallas Aff. at ¶ 21; Scott Aff. at ¶¶ 4-6.
- (62) School Board members have stated that teaching creationism and intelligent design are alternative theories of origin that should be discussed in the classroom. Tippins Dep. at 37-39, 45-46; Plenge Dep. at 29, 41; Johnston Dep. at 10-15, 24-25.

- (63) The teacher in the classroom has the duty of monitoring the debate regarding the alternative theories of origin.
- (64) The debate over the teaching of evolution or creationism has gone on since the 19th Century. Kent Greenwalt, Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design, 17 Notre Dame J.L. Ethics & Pub. Pol'y 321, 328 (2003). The debate is well known in our legal history and in popular culture.
- (65) The controversy over teaching evolution can be divided into three periods. Scott Aff. at ¶ 2.
- (66) First, supporters of Creationism tried to ban the teaching of evolution in public schools. *Id.* at 2-3. This era ended with the decision in *Epperson v. Arkansas*, 393 U.S. 97 (1968), which held that such bans violate Establishment Clause of the United States Constitution. *Id.*
- (67) During the second period, supporters of creationism sought to require "equal time" for creationism whenever evolution was taught in the public schools. *Id.* at 3. The Supreme Court in *Edwards v. Aquillard*, 482 U.S. 578 (1987) ended that period when it held that such "equal time" provisions violated the Establishment Clause. *Id.* at 3.

- (68) The current nationwide tactic used by supporters of creationism, and now of intelligent design, is to discredit evolution and teach that evolution is a theory and not a fact. *Id.* at 3-4; Kent Greenwalt, *Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design*, 17 Notre Dame J.L. Ethics & Pub. Pol'y 321, 329 (2003); Wendy F. Hanakahi, Comment, *Evolution-Creationism Debate: Evaluating the Constitutionality of Teaching Intelligent Design in Public Classrooms*, 25 U. Haw. L. Rev. 9, 50-51 (2002); Deborah A. Ruele, *The New Face of Creationism: The Establishment Clause and the Latest Efforts to Suppress Evolution in Public Schools*, 54 Vand. L. Rev. 2555, 2558 (2001)
- (69) Macroevolution and microevolution are part of a continuum. Macroevolution is a continuation of macroevolution. The argument that a distinction exists between macroevolution and microevolution comes solely from proponents of intelligent design and creationism. Freed Aff. at ¶ 20; Pallas Aff. at ¶¶ 16, 22; Matson Aff. at ¶ 23.
- (70) Macroevolution is an extension of the very same microevolutionary forces that all scientists accept and that many proponents of intelligent design and creationism accept. Any attempt to portray macroevolution as unobservable and unfalsifiable shows a failure to review and to understand the peer-reviewed literature.

- (72) Scientists overwhelmingly view evolution as a solidly-supported scientific view. Scott Aff. at ¶ 5. There is no scientific “evidence against evolution.” Scott Aff. at ¶ 5.
- (73) There is no pedagogical reason to teach “evidence against evolution” because evolution is a well-established scientific principle. Scott Aff. at ¶ 6. It would be unprofessional for a science teacher to suggest that there is credible evidence against evolution because there is none. *Id.* Teaching that there is would be a misrepresentation of the scientific consensus. *Id.*
- (74) All of the professional science teachers associations object to teaching “evidence against evolution.” *Id.* There is no reason to regard the material as educationally useful because teaching the material misrepresents the scientific consensus. *Id.*
- (75) The practice of teaching the “evidence against evolution” derives from and is equivalent to teaching creation science or intelligent design. *Id.* at 3-4. The only reason to teach “evidence against evolution” is to promote the religious doctrine of creationism and intelligent design. *Id.*

Conclusions of Law

I. The Disclaimer Violates All Three Prongs of the *Lemon* Test.

- (76) The Establishment Clause of the First Amendment of the United States Constitution states that “Congress shall make no law respecting an establishment of religion.” U.S. Const. Amend. I.
- (77) The “prohibition against the establishment of religion applies to the states through the Fourteenth Amendment.” *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003) (citing *Cantwell v. Conn.*, 310 U.S. 296 (1940)); see also *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947); *Jaffree v. Wallace*, 705 F.2d 1526, 1529 (11th Cir. 1983).
- (78) For government action to survive Establishment Clause scrutiny, it must meet all three prongs of the *Lemon* test. *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003); see also e.g. *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (applying the *Lemon* test in an evolution case). Under *Lemon* “the challenged practice must have a valid secular purpose, not have the effect of advancing or inhibiting religion, and not foster excessive government entanglement with religion.” *Glassroth*, 335 F.3d at 1295. The Cobb County Board of Education’s placement of the evolution disclaimer in its science textbooks violates all three prongs of the *Lemon* test.

II. The Disclaimer Violates the “Effects” Prong.

- (79) The effects prong of the *Lemon* test looks at whether “the ‘principal or primary effect’ of a challenged law or conduct is to ‘advance or inhibit religion.’” See *King v. Richmond County*, 331 F.3d 1271, 1278 (11th Cir. 2003). According to the Eleventh Circuit: “The effects prong asks whether . . . the practice under review in fact would convey a message of endorsement or disapproval to an informed reasonable observer.” *Glassroth*, 335 F.3d at 1297.
- (80) The informed reasonable observer is “acquainted with the text, legislative history, and implementation” of the state action. *Turner v. Habersham County*, 290 F. Supp. 2d. 1362, 1372 (N.D.Ga., 2003). Indeed, the “‘history and ubiquity’ of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether the challenged governmental practice conveys a message of endorsement of religion.” *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989) (O’Connor, J., concurring); see also *Chabab-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1391 (11th Cir. 1993).
- (81) In the case before us, the text, the context, and the history of the disclaimer creates an endorsement of religion.
- (81) In *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968), the Supreme Court held that an evolution statute was unconstitutional because it served to “blot out a particular theory because of its supposed conflict with the Biblical account,

literally read.” In *Edwards v. Aguillard*, 482 U.S. at 582, the Court held that the state could not constitutionally require equal time for creationism whenever evolution was taught because it served to “discredit[] evolution” and benefit the religious teaching of creationism. Similarly, the Cobb County Board of Education has singled out evolution and discredited it. The effect of the disclaimer is the disparagement of the secular scientific theory of evolution, to the benefit of the religious beliefs of creationism and intelligent design.

(82) In *Tangipahoa Parish Bd. Of Educ. v. Frieler*, 185 F.3d 337, 346 (5th Cir. 1999), the court held that the state’s evolution disclaimer endorsed religion in part because of its “juxtaposition of the disavowal of endorsement of evolution with an urging that students contemplate alternative theories of the origin of life.” The Cobb County disclaimer similarly discredits evolution and implicitly encourages students to consider alternate theories. See Order on Summ. J. at 9 (“The sticker is clearly not neutral to evolution.”); Order on Defs.’ Motion for Recons. of the Motion for Summ. J. at 9-10 (hereinafter Reconsideration Order).

(83) By discrediting evolution, the school board provides “persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety.” *Edwards*, 482 U.S. at 592. It serves to “protect and maintain a

particular religious viewpoint” that discredits evolution. *Freiler*, 185 F.3d at 345.

- (84) The Cobb County disclaimer uses the *common* usage of “theory” even though the disclaimer is placed in a science textbook and makes *scientific* claims. The disclaimer, therefore, distorts the truth about evolution and conveys a message that the School District supports the belief that evolution is “speculation” and does not support the fact that evolution is “one of the best supported theories in all of science.” Pallas Aff., Notice of Filing, Aug. 13, 2003, ex. A, at ¶ 16. The only alternative explanations to evolution are creation science and intelligent design—both religious beliefs. Scott Aff., Notice of Filing, Aug. 13, 2003, ex. D, at 4-6; Pallas Aff. Notice of Filing, Aug. 13, 2003, ex. A, at ¶¶ 23,25. Thus, just by discrediting evolution, the School Board is promoting religion.
- (85) This endorsement of religion is made even more clear by the fact that the School Board rejected a disclaimer that would have more accurately explained the validity of evolution. The Board instead chose to use the current disclaimer that misleads students about the theory’s scientific basis and completely discredits it.

(86) The final sentence of the disclaimer tells students that “this material should be approached with an open mind, studied carefully, and critically considered.” This sentence implicitly directs students to consider alternative theories of origin. *Frieler*, 185 F.3d at 347; *see also* Order on Summ. J. at 17 (“Indeed, most of the Board members concurred that they wanted students to consider other alternatives.”); Recons. Order at 9-10. But, there are no alternative *scientific* theories of the origin of life. There are only *religious* alternative theories of origin. Freed Aff., Notice of Filing, Aug. 13, 2003, ex. B, at ¶ 16; Pallas, Aff., Notice of Filing, Aug. 13, 2003, ex. A, at ¶ 21. Indeed, “there is no scientific dispute in the peer-reviewed scientific literature as to whether evolution is fact and occurs.” Pallas Aff. at ¶ 20. Even school officials were unable to identify any alternative scientific theories for the origin of life. Plenge Dep. at 28-29; Johnston Dep. at 14-15; Redden Dep. at 13; Tippins Dep. at 37-39, 45-46. But, they did state that creationism and intelligent design were proper alternative explanations that should be discussed in the classroom. Tippins Dep. at 37-39, 45-46; Plenge Dep. at 29, 41; Johnston Dep. at 10-15, 24-25. To disclaim evolution—a secular scientific concept—and simultaneously encourage belief in religious alternatives is the essence of the advancement of religion.

(87) In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the Court held that prayers at football games are unconstitutional, even if student-initiated and student-led. This is because the “invocations are authorized by a government policy and take place on government property at government-sponsored school-related events.” *Id.* at 302. Here, the disclaimer—a message from the School Board and directed to the students—is placed in public school textbooks by the School Board. Students are required to study from these texts and are required to take the science course that uses the text books. Indeed, the only way for a student in a class with one of the texts to avoid the disclaimer is to “take a black magic marker and mark it out”—but that would “probably get you in trouble.” Johnston Dep. at 20. The religious message is unmistakably attributed to the School Board.

(88) The Court examines messages sent to public school children even more closely than messages sent in other contexts:

The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable, and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the

students' emulation of teachers as role models and the children's susceptibility to peer pressure.

Edwards, 482 U.S. at 583-84 (internal cites omitted).

(89) Although the school argues that it intended to simply accommodate the religion of some students, it actually acts to prefer and push the religion of these students upon all of the other students in the class. Instead of addressing the issue with those students who have a religious conflict, the school brings the conflict to the attention of *all* students; it misleads *all* students into believing that evolution is unsubstantiated, and tells *all* students to consider alternative theories. This, the school cannot do. Indeed, "the state has no legitimate interest in protecting any or all religions from views distasteful to them. . . ." *Epperson*, 393 U.S. at 107 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952)).

(90) Nor can the state give preference to a religious doctrine or prohibit the teaching of a theory that is deemed antagonistic to a particular dogma. *Id.* Science and religion "may frequently provide conflicting answers. But, as the Supreme Court said 20 years ago, it is not the business of government to suppress real or imagined attacks upon a particular religious doctrine." *Wright v. Houston Indep. Sch. Dist.*, 366 F. Supp.

1208, 1211 (S.D. Tx. 1972).

- (91) Here the school is using the machinery of the public schools to give preference to religious beliefs by discrediting a scientific theory that is contrary to those religious beliefs and directing students to contemplate the religious beliefs. Teaching evolution-as the state requires-is in itself neutral towards religion because students are not therefore prohibited from adhering to whatever religious beliefs they may hold. It is the introduction of the disclaimer that eliminates the neutrality and endorses religion.
- (92) In *Epperson*, 393 U.S. 233-24, the Court held that a statute banning the teaching of evolution in public schools was unconstitutional because the “Arkansas law selects from a body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the book of Genesis by a particular religious group.” And, in *Edwards* 482 U.S. at 522 n.7, the Court looked to the fact that the Board did not have a policy of requiring the teaching of beliefs for any area other than for the theory of evolution. There the Court held the statute unconstitutional because “[o]ut of many possible science

subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects." *Id.* at 593.

- (93) Cobb County has done the same; it has disclaimed evolution but has not disclaimed any other subject or topic that the schools teach. Plenge Dep. at 12, 35. The disclaimer specifically targets evolution. Recons. Order at 10. It does not ask students to take note that gravity, newtonian physics, galilean heliocentrism, or plate tectonics are also *only* theories. Nor does it ask students to think critically and with an open mind about these theories. This is true, even though evolution is on par with these theories. Pallas Aff., Notice of Filing, Aug. 13, 2003, ex. A, at ¶ 13. The Board chose only to disclaim evolution—a scientific theory that conflicts with creation science and intelligent design.
- (94) The School Board does not disclaim any other scientific theories that clash with religious beliefs. For example, the Board does not disclaim the germ theory of disease, even though this theory runs contrary to the religious beliefs of Christian Scientists. *Science and Health with Key to the Scriptures*, 171:27; 169:18 & 30 ("False Belief is the procuring cause of all sin and disease." "Science not only reveals the origin of all

disease as mental, but it also declares that all disease is cured by divine Mind. To think otherwise is “anti-Christian.”). Scientologists do not believe in psychiatry and psychology, yet the district has counselors to provide mental health services to students and it teaches about mental health in health class with no disclaimer to appease this sect. *The Religious Heritage of Scientology* at <http://www.scientology.org/en_US/religion/heritage/pg011.html>, ex. 58 (“In fact, the array of primitive methods dreamed up by modern psychiatrists includes hypnotic drugs, lobotomies, electric shock and bolts to the brain while a person is drugged and comatose each of which leaves a person little more than a vegetable.”). Geocentrists deny that the earth revolves around the sun, but the School Board does not tell students that heliocentrism is just a theory or ask them to think critically about the subject. <www.geocentricity.com/whygeocentricity.htm>, ex. 59 (A Professor at Baldwin Wallace College runs a website that explains that science and “the Bible’s authority is weakened by heliocentrism”). And, Common Sense Scientists reject atomism and the theory of gravity because these scientific theories “view[] matter as independent of

God.” <www.commonssensescience.org>, ex. 60. Yet, the School District does not disclaim these theories either.

- (95) The Board’s rejection of the alternative disclaimer further demonstrates that it singled out evolution for special disparaging treatment. The Board specifically rejected a disclaimer that would have encouraged students to approach “*all scientific theories*” with an open mind and to consider alternatives to *all scientific theories*. Ex. 44 (emphasis added). The Board decided not to encourage students to approach all scientific theories with an open mind, but only to approach evolution in that manner.
- (96) The Board chose only to disclaim evolution, because it conflicts with a certain religious faith. This one faith is preferred over all of these other religions and over non-religion. The selective disclaimer degrading evolution promotes creationism and intelligent design. The School District is sending students and parents the message that it endorses these religious theories and does not support the scientific theory of evolution.
- (97) The history of the evolution debate also demonstrates endorsement. Those who “accept the literal truth of the Bible, have opposed the

teaching of evolution as true in public schools.” Kent Greenwalt, *Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design*, 17 Notre Dame J.L. Ethics & Pub. Pol’y 321 at 328 (2003) (hereinafter “Greenwalt”). This debate has gone on since the 19th Century. *Id.* The debate is well know in our country and is documented in our legal history and in even in popular culture, such as the play and movie “Inherit the Wind.”

- (98) In *Epperson*, 393 U.S. at 98, the Supreme Court held that it could not ignore the fact that the 1920s “statute was a product of the upsurge of ‘fundamentalist’ religious fervor of the twenties.” Then in *Edwards*, 482 U.S. at 591, the Supreme Court held a 1982 statute unconstitutional, recognizing that, even sixty years later, “these same historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution are present in this case.” Indeed, the “historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution” was the “link that concerned the Court in *Epperson*.” *Id.* at 523.

- (99) That link is still present today: There is a “long history of controversy between evolution and creation that continues . . . across the nation today. Wendy F. Hanakahi, Comment, *Evolution-Creationism Debate: Evaluating the Constitutionality of Teaching Intelligent Design in Public Classrooms*, 25 U. Haw. L. Rev. 9 (2002) (hereinafter “Hanakahi”). It is seen in “legal halls, courtrooms, schools, and homes across the nation.” Deborah A. Ruele. *The New Face of Creationism: The Establishment Clause and the Latest Efforts to Suppress Evolution in Public Schools*, 54 Vand. L. Rev. 2555, 2556 (2001) (hereinafter “Ruele”).
- (100) Antievolutionists have attacked the teaching of evolution in different ways. Scott Aff., Notice of Filing, Aug. 13, 2003, ex. D, at 2. First antievolutionists tried to ban the teaching of evolution in the public schools. *Id.* When that was rejected as unconstitutional by the Supreme Court, it tried to achieve “equal time” for creationism whenever evolution was taught. *Id.*; *Epperson*, 393 U.S. 97. It also being rejected by the Supreme Court, antievolutionists now are attempting to discredit evolution. *Id.*; *Edwards*, 482 U.S. 578. The main nationwide tactic is to convince public schools to use a disclaimer to teach that evolution is a “theory, not a fact.” Greenwalt at 329; Ruele at 2558; Hanakahi at 50-51.

- (101) The debate among the School Board members and in the community, both preceding and subsequent to the passage of the disclaimer, received significant media coverage locally and nationally. The reasonable observer would be aware of the history of the adoption of the disclaimer.
- (102) In *Epperson*, the Court held an evolution statute unconstitutional because the law could not “be justified by state policy other than the religious views of some of its citizens.” 393 U.S. at 107. Looking at advertisements placed by citizens in support of the law, the Court found that “[i]t is clear that fundamentalist sectarian conviction was and is the law’s reason for existence.” *Id.* at 108 & n.16. Likewise, the Court in this case should look at the actions of the parents and citizens who supported the disclaimer.
- (103) The debate in the community was sparked when the Board was provided with a text from the textbook Committee that contained a section on evolution. Redden Dep., ex. A.4., at 5-6, 23-25. Only one citizen of Cobb County objected to the School Board decision to purchase science textbooks that included information about evolution by filing a formal Citizen Textbook Comment Record. See Records, ex.

42; Redden Dep., ex. A.4., at 24. Her comments were based on her religion and her concern that creationism was not taught in the textbook but that evolution was taught. *Id.* at 1. Later, she clarified her concerns in a letter that expressed her concern that students would not be taught about “intelligent causes.” Sept. 26, 2002 letter, ex. 54.

- (104) Larry Taylor, who also pushed the passage of the disclaimer explained in an email:

it is naive to think that religion can be left out of the discussion altogether. Why? We can dance around it, but it ultimately still comes down to two opposing views which have tremendous religious implications creation (or ID) vs. random natural processes (there is a God or there isn't).

Dec 17, 2002 email, Notice of Filing, Aug. 13, 2003, ex. G.10.

- (105) These citizens challenged the decision because “creationism was not being given equal status or appropriate status with regards to the discussion of evolution.” Tippins Dep., ex. A.3. at 24; Johnston Dep., ex. A.1., at 7 -11 (explaining that the parents wanted other theories of the origin of life to be taught, that the disclaimer was designed to meet their concerns, and that the disclaimer allowed intelligent design and creationism to be discussed in class); Plenge Dep., ex. A.5., at 19 (some of the parents specified that they wanted creationism and intelligent design taught in the schools).

- (106) Ultimately, the language of the disclaimer was drafted to “address their issues”: it was “a reaction to the parents coming in and complaining.” Johnston Dep., ex. A.1., at 8, 18. A reasonable observer would understand that the parents were religiously motivated. The fact that the disclaimer was adopted to address their concerns—that evolution and creationism were not being taught—shows that the disclaimer will allow and was meant to allow discussions of these topics.
- (107) The School Board’s statements and actions also create a perception of the endorsement of religion. School Board member Lindsey Tippins who was instrumental in having the disclaimer adopted, supported the disclaimer based on religious convictions. Mr. Tippins raised concerns about the textbooks because he objected to teaching macroevolution as the only theory of origin. Tippins Dep., ex. A.3., at 14. Mr. Tippins raised no concerns about the teaching of microevolution. *Id.* at 14. Such a distinction is illustrative of his religious purpose: “The argument that a distinction exists between microevolution and macroevolution comes solely from proponents of Intelligent Design and Creationism.” Freed Aff., Notice of Filing, Aug. 13, 2003, ex. B, at ¶ 20 Tippins Dep., ex. A.3., at 37-39. And, although he denied that a belief in creation science—which he defined as an understanding “that

there is an order in creation, that it's not random," –prompted the disclaimer, he also explained the "scientific debate" about evolution to be a question of whether "the whole thing comes about from a random series of events or is there order in the species." *Id.* at 39, 45-46. In short, he described the "scientific debate" that should go on in the classroom in the exact same terms as he described debate between creation science and evolution. This shows that creation science was intended to be and will likely be discussed in class.

- (108) The other Board members who were questioned also believed that intelligent design and even creationism were proper alternative scientific theories to evolution that should be discussed or taught in the classroom. Plenge Dep., ex. A.5., at ¶¶ 29, 41; Johnston Dep., ex. A.1., at 10-15, 24-25.
- (109) The Board approved the disclaimer even though they did almost no research on the alleged scientific controversies surrounding evolution. Plenge Dep., ex. A.5., at 21, 30; see *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1264 (E.D. Ark. 1982) (questioning the legislature's "lack of any legislative investigation, debate, or consultation with any educators or scientists"). Even with national media attention, the knowledge of several lawsuits and evolution controversies around the country over the last fifty years, and numerous letters and petitions from scientists and parents, the Board members who

were questioned had done almost no research into the issues themselves. None of the members who were questioned could name an alternative scientific theory of origin or even a scientific criticism of evolution. Nor could these members name one scientist who they contacted, except for Board Member Tippins, who spoke with a Chemistry Professor who adheres to the Biblical story of Creation. Nonetheless, they decided to place a disclaimer in their science textbooks to discredit evolution.

- (110) After the adoption of the disclaimer, many citizens, organizations, churches, and academics contacted the School Board to praise it for its decision to open the classroom to creationism and intelligent design. This demonstrates that parents, students, and citizens of Cobb County understand the disclaimer to be an invitation to discuss religious views in the science classroom.
- (111) In *Santa Fe*, 530 U.S. at 316, the Court rejected the District's argument that "asks us to pretend that we do not recognize what every Santa Fe High School Student understands clearly—that this policy is about prayer." Neither should the Court in this case ignore what every Cobb student and parent knows in this case —this policy is about supporting creationism and intelligent design.
- (112) The Defendants have argued that the disclaimer does not endorse religion because the students, not the School Board, will be the ones who introduce

religious beliefs into the classroom. This argument fails for two reasons. First, it is the District who, through the sticker, endorses religion and introduces alternative explanations to evolution into the classroom. Order on Summary Judgment at 17 (“Indeed, most of the Board members concurred that they wanted students to consider other alternatives.”); Reconsideration Order at 11. Second, the strategy of simply opening the floor so that students can introduce the religious content into the classroom is also impermissible. *Santa Fe*, 530 U.S. 290 (finding prayers unconstitutional at football games even though student-led and student-initiated).

- (113) It is true that “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. . . . *But. . . that [] distinction disappears whenever private speech can be mistaken for government speech. Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 763, 766 (1995) (plurality) (emphasis added). Indeed “while the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.” *Sch. Dist. Of Abington County v. Schempp*, 374 U.S. 203, 226 (1963).

(114) *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000) (en banc), *vac.*, 531 U.S. 801 (2000), *reinstated*, 250 F.3d 1330 (11th Cir. 2001), does not provide support to the Defendants' position. In contrast to the case at bar, the speech in *Adler* did not take place in a school classroom, the content of the speech was not monitored or restricted by the school, and the policy that allowed the speech did not invite or encourage religious messages. *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, 1336-37 (11th Cir. 2001). Thus, Defendant's argument must fail.

III. The Disclaimer Entangles the School and Religion.

(115) "The excessive entanglement component of the *Lemon* test has been interpreted to mean that 'some governmental activity that does not have an impermissible religious effect may nevertheless be unconstitutional, if in order to avoid the religious effect government must enter into an arrangement which requires it to monitor the activity.'" *Nartowicz v. Clayton County School Dist.*, 736 F.2d 646, 649-50 (11th Cir. 1984) quoting *Americans United for Separation of Church and State v. Sch. Dist. of the City of Grand Rapids*, 718 F.2d 1389, 1400 (6th Cir.1983). Here, the disclaimer invites religious discussions into the classroom, and the regulation governing that discussion actually calls on teachers to moderate the discussion. Regulation, ex. 47, ("Discussion should be *moderated*") (emphasis added). Indeed, the regulation

explicitly places the teacher in the role of moderator in the debate between religion and science.

(116) In *Karen B. v. Treen*, 653 F.2d 897, 902 (11th Cir. 1981) the Eleventh Circuit held that a prayer statute excessively entangled government and religion. The Court explained:

[S]chool authorities have a statutory duty to supervise the implementation of the prayer program in order to guarantee that all participation would remain purely voluntary. It is clear that 'the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state.'"

Id. (quoting *Lemon v. Kurtzman*, 403 U.S. at 620-21). Similarly, the Cobb County evolution disclaimer invites religion into the classroom. The disclaimer encourages the teacher to introduce religious beliefs to the class. Requiring students to hear religiously-based criticism of their science curriculum from the very teachers hired to present them, is on its face government entanglement with religion.

(117) Even if not introduced by the teacher, the students are encouraged to discuss religious explanations of the origins of life. Order on Summary Judgment at 17 ("Indeed, most of the Board members concurred that they wanted students to consider other alternatives."). This places the teacher in the position of ensuring that students are not proselytizing to other students in the captive

audience, that student comments are not “too religious,” that his or her response to the students comments are not interpreted as promotion, support, or disparagement of religion or non-religion. Indeed,

Inasmuch as Defendants are encouraging students to consider alternative theories to evolution, it is reasonable to expect that these alternative theories will come up on the classroom. This is particularly so, where as here, there is evidence that there is a group of parents in Cobb County who are advocating for intelligent design to be discussed in the classroom.

Order on Summary Judgement at 17-18.

- (118) School Board members believe that even with the current policy and regulation creation science and intelligent design are appropriate areas of discussion for class. Regulation, ex. 57; Plenge Dep., ex. A.5., at 46-47. Mr. Johnston would “expect a teacher to respond to a question from the class, from a student, about why do I believe differently or why does he believe differently . . .” Johnston Dep., ex. A.1., at 24. Such a response would actually have the teacher taking a position in the religious debate. As shown above, parents also believe that it is appropriate for their children to bring up religious topics and some will encourage their students to do so. August 23, 2002 email, ex. 55.
- (119) Furthermore, the fact that the School Board involved itself in an issue that it acknowledges has caused controversy for religious reasons is an important

factor in showing improper entanglement. The mere act of taking a position in a religious dispute amounts to improper government entanglement with religion. For example, in *Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985), a school board involved itself in the locally controversial question of the use of school buildings for prayer meetings. The court found:

[not] only was the issue controversial within the community, the school board was faced to address it in an attempt to resolve these conflicts. This only further embroiled local government in an issue that had already divided a community along religious lines. The district court found excessive entanglement inescapable in this context, and we agree.

766 F.2d 1391, 1407 (10th Cir. 1985). Here, Cobb County has acted similarly.

It has placed itself in the center of the creationism/intelligent design/evolution debate. Instead of allowing the school to teach science and allowing the parents and houses of worship to foster religion, the school has stepped in and become the referee in the religious debate. It has its teachers in the classroom decide which religious explanations should be discussed and which don't "present a *sense* of scientific inquiry." Cobb County Evolution Regulation, ex. 57.

(120) In *Edwards*, and *Epperson*, the two Supreme Court cases concerning evolution, the Supreme Court held that the statutes were unconstitutional because the legislatures acted with an impermissible religious purpose. Plaintiffs

maintain that the Cobb County School Board also acted with a religious purpose.

- (121) *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1264 (E.D. Ark 1982) may be instructive on the issue of purpose. In *McLean*, the Court looked at the purpose motivating the residents of Arkansas: “the publically announced motives of the legislative sponsor made contemporaneously with the legislative process; the lack of any legislative investigation, debate or consultation with any educators or scientists; the unprecedented intrusion in school curriculum; and official history of the State of Arkansas on the subject.” *Id.* An examination of these factors led the court to find that “the only inference which can be drawn . . . is that the Act was passed with the specific purpose by the General Assembly of advancing religion.” *Id.*

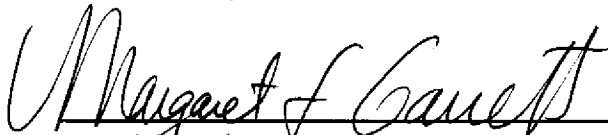
Looking at these factors in the case before us, it is clear that the School Board acted with a religious purpose.

- (122) The motivation of the parents and citizens of Cobb County was to teach religious beliefs in school; the School Board members intended that creation science and intelligent design be discussed in science class; the School Board members did not investigate the legitimacy of the claims that evolution was scientifically unsound; and there are no other disclaimers for any other topic,

issue, or scientific theory taught in the school district.

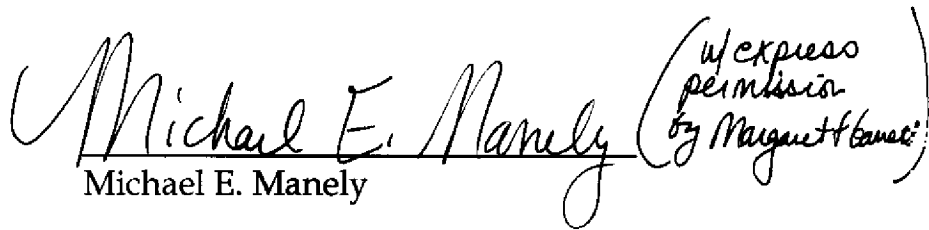
DATED: This the 8th day of November, 2004.

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

JEFFREY MICHAEL SELMAN,
KATHLEEN CHAPMAN, JEFF SILVER,
PAUL MASON and TERRY JACKSON

Plaintiffs,

v.

COBB COUNTY SCHOOL DISTRICT,
COBB COUNTY BOARD OF
EDUCATION,
JOSEPH REDDEN, SUPERINTENDENT,

Defendants

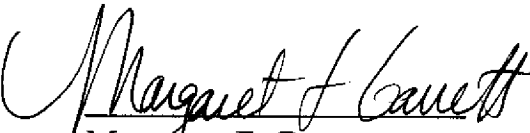
Civil Action
File No. 1:02-CV-2325-CC

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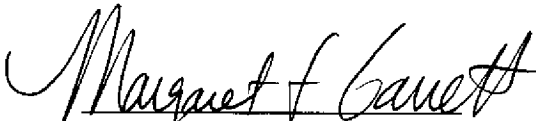
Dated: This the 8th day of November, 2004

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