

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) Civil Action
) File No. 1:02-CV-2325-CC
)
) Plaintiffs,)
)
) v.)
)
) COBB COUNTY SCHOOL DISTRICT,)
) COBB COUNTY BOARD OF)
) EDUCATION,)
) JOSEPH REDDEN, SUPERINTENDENT,)
)
) Defendants)
)
)

PLAINTIFFS' PRETRIAL BRIEF

This case examines the constitutionality of a disclaimer that was placed in the Cobb County School District's science textbooks. The disclaimer is unconstitutional because it singles out one scientific theory for disfavored treatment and supports religious theories.

I. Statement of Facts

The Defendants unanimously voted to place a sticker in each Cobb County School District Science textbook that reads:

This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.

No other theory, topic, or subject in the School system has a disclaimer. Freed Aff., ex. B.2., at ¶ 11, 12; Plenge Dep. at 12, 18, 21, 43; Johnston Dep. at 19; Tippins Dep. at 81.¹

The science textbooks used prior to the adoption of the current books did not teach evolution, even though the topic was mandated by the state. Instead, the textbooks had blank pages where the book, in its original form, discussed evolution. Tippins Dep. at 86. In late 2001 or early 2002, the Cobb County School Board set out to adopt new textbooks for its science curriculum. Redden Dep. at 5-6. The textbook adoption process starts with a Committee, that reads and studies various books and then recommends certain books to the Board. *Id.* at 5-6. All of the books that were recommended by the Committee were adopted by the Board. *Id.* at 6. The only books that raised concern from the Board were the books that taught evolution.

An examination of the Citizen Textbook Comment Records shows that only two citizens reviewed textbooks that contained evolution curriculum. Ex. C.1. One parent said he was “very happy with the inclusion of evolution, even if not by that term . . . we must teach this.” *Id.* The only other citizen to review these books was Marjorie Rogers. She criticized the evolution curriculum and demonstrated her desire to have the school teach creationism. Ex. C.2.

¹ Exhibit numbers refer to the documents listed in the Notice of Filing of Discovery Materials Index.

Lindsey Tippins brought the citizen complaint to the Board and expressed concern about the section of science textbooks that taught evolution. Redden Dep. at 23-25. Accordingly, adoption of the textbooks was conditioned upon placing a disclaimer in the textbooks. *Id.* at 25. The Board explained that “[s]ince there had been citizen concerns expressed regarding the evolution information in the textbooks, it was decided that the Superintendent would review the process of science textbook adoption and read a statement that would be placed in front of the textbooks.” Minutes of March 27, 2002 meeting, ex. C.3.

After agreeing to the language of the current disclaimer, but before placing the disclaimer in the textbooks, the Board considered and rejected an alternative disclaimer. The alternative disclaimer was both more accurate and more comprehensive, but was rejected by the Board in favor of the disclaimer that more clearly, and less accurately targeted evolution. Text of alternative disclaimer, ex. D.²

The current disclaimer was chosen because it fell in line with the complaints from parents who wanted creationism and intelligent design taught in the classroom. Johnston, Dep. at 7,9,16,21,22; Comments, ex. C.1., C.2.

²“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.”

II. The Disclaimer Violates the Establishment Clause.

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. This “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).

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*, 353 F.3d at 1295. The Cobb County Board of Education’s placement of the evolution disclaimer in its science textbooks violates all three prongs.

A. The Disclaimer Advances and Endorses Religion.

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. 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).

In the case before us, the text, the context, and the history of the disclaimer creates an endorsement of religion.

1. The Text of the Disclaimer Endorses Religion.

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 non-religious scientific theory of evolution, to the benefit of the religious beliefs of creationism and intelligent design.

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."³ The Cobb County disclaimer similarly discredits evolution and implicitly encourages students to consider alternate theories. See Order on Summary Judgment at 9 ("The sticker is clearly not neutral to evolution."); Order on Defendant's Motion for Reconsideration of the Motion for Summary Judgment at 9-10 (hereinafter Reconsideration Order). By discrediting evolution, the school board provides "persuasive advantage to a particular religious doctrine that rejects the factual basis

³ The Defense may point to *Moeller v. Schrenko*, 554 S.E.2d 198 (Ga. App. 2001) and claim that its analysis should be applied to this case. The case before us, however, is more like *Freiler* in that both involved a disclaimer that "urged" the students to think a certain way and understand evolution in a certain way. *Freiler*, 185 F.3d at 341 ("students are urged to use Critical thinking and gather all information possible and closely examine each alternative . . ."); Cobb disclaimer ("The material *should* be approached with an open mind, studied carefully, and critically considered.") (emphasis added). In *Moeller*, however, the book only recited information about alternative explanation and stated that such theories were not scientifically accurate. 554 S. E. 2d at 152-53. It did not give directives to the students.

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.

There are two uses of the word “theory.” Webster’s New World Dictionary (2nd College Ed.). One is the common usage, which defines theory as “speculation, a mental viewing or a contemplation.” *Freed Aff.*, ex. B.2., at ¶ 10. The other is the scientific usage. *Id.* A scientific theory “is the most parsimonious coordinated statement that a scientist uses to explain natural phenomena.” *Id.* “It’s basis is factual; its application is predictive.” *Id.* A scientific theory is a “thoroughly tested and well-substantiated scientific explanation.” *Pallas Aff.*, ex. B.3., at ¶ 10.

Evolution is a *scientific* theory. *Id.* at ¶ 13. As such, evolution is “something known to occur.” *Id.* at ¶ 16. “There is no scientific dispute in the peer-reviewed scientific literature as to whether evolution is fact and occurs.” *Freed Aff.*, ex. B.2. at ¶ 16. Indeed, evolution “is one of the best supported theories in all of science.” *Pallas Aff.*, ex. B.3., at ¶ 16. “There is no scientific evidence that evolution does not occur, and there is a tremendous amount of active research into the details of how it occurs and how it can be applied for the human good.” *Id.* at ¶ 13. Evolution is a fact. *Id.* at ¶¶ 19-20; *Freed Aff.*, ex. B.2., at 19.

The 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.”⁴ Pallas Aff., ex. B.3., at ¶ 16. The only alternative explanations to evolution are creation science and intelligent design—both religious beliefs. Scott Aff., ex. B.4., at 4-6; Pallas Aff., ex. B.3., at ¶¶ 23,25. Thus, just by discrediting evolution, the School Board is promoting religion.

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. Ex. D. This rejected disclaimer stated that evolution is “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.” *Id.* Although this statement is also not fully accurate,⁵ it at least acknowledges that

⁴The Board may claim that it was using the scientific usage of “theory.” That cannot be true, however, because a scientific theory essentially is a fact. Thus, if written that way, the sentence would contradict itself.

⁵ Freed Aff., ex. B.2. at ¶ 16; Pallas, Aff., ex. B.3. at ¶. Nonetheless, the disclaimer rejected by the School Board does not totally discredit evolution as the current disclaimer does.

evolution is a “scientific theory,” and that it is “accepted by a majority of scientists.” *Id.* The Board instead chose to use the current disclaimer that misleads students about the theory’s scientific basis and completely discredits it.

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 Summary Judgment at 17 (“Indeed, most of the Board members concurred that they wanted students to consider other alternatives.”); Reconsideration 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.*, ex. B.2. at ¶ 16; *Pallas Aff.*, ex. B.3. 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;⁶ Redden Dep. at 13;⁷ 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.

2. The Context Emphasizes the Endorsement of Religion.

a. The Disclaimer is Placed in Board Approved Textbooks that Students Are Required to Read and Study.

In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the Court held that prayers at football games were unconstitutional, even if student-initiated and student-led. This was 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

⁶ Mr. Johnston did acknowledge Raelian, which is not a scientific theory. Raelian believes that “life on Earth is not the result of random evolution, nor the work of a supernatural ‘God.’ It is a deliberate creation, using DNA, by scientifically advanced people who made human beings literally ‘in their image’ what one can call ‘scientific creationism.’” <<http://www.rael.org/english/index.html>>, Ex. H. 4.

⁷ Superintendent Redden named the Big Bang theory, which is a scientific theory, but is not an alternative to the theory of evolution. Instead, it is a scientific theory in astronomy that explains the creation of the universe. Webster’s Ninth New Collegiate Dictionary.

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.

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).

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.⁸ 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)). 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).

Here, however, 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.

⁸For a contrast, look to cases where students had a religious objection to the teaching of subjects not required by the state curriculum. In these cases, individual students were given exemptions to the assignments. The other students in the class were not denied the benefit of completing the assignment, were not required to learn and consider the reasons why those students were exempted, and the assignment was not belittled by the school. See *e.g. Grove v. Mead Sc. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985). In *Cornwell v. State Bd. Of Educ.*, 314 F. Supp. 340 (D. Md. 1969), where the curriculum was required by the state, no exemption was granted and the class was taught as originally created.

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.

b. Evolution is the Only School Topic With A Disclaimer.

In *Epperson*, 393 U.S. 233-24, the Court held an evolution statute 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.

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. Reconsideration 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., ex. B.3., at ¶ 13. The Board chose only to disclaim evolution-a scientific theory that conflicts with creation science and intelligent design.

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. H.1 (“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. H.2 (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.commonssencescience.org>, ex. H.3. Yet, the School District does not disclaim these theories either.

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. D (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.

The Board chose only to disclaim evolution, which 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.

3. The History Creates the Perception of Endorsement.

a. The History of the Creationism/Evolution Debate

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.”

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.

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”).

Antievolutionists have attacked the teaching of evolution in different ways. *Scott Aff., ex. B.4.*, at 2. First antievolutionists tried to ban the teaching of evolution. *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.

b. The History of the Cobb County Disclaimer.

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.⁹ The reasonable observer would be aware of the history of the adoption of the disclaimer.

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.

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. 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, C.2.; Redden Dep. at 24. Her comments included the following statements:

- “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.’”

⁹A Westlaw search for “‘cobb county’ /p evolution” in the U.S. News Multibase found 92 stories and this does not include local papers or local and national television news outlets, which are not in the database.

- “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.”

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. F.9.

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, ex. F.1.

These citizens challenged the decision because “creationism was not being given equal status or appropriate status with regards to the discussion of evolution.”

Redden Dep. at 24; Johnston Dep. 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. at 19 (some of the parents specified that they wanted creationism and intelligent design taught in the schools).

Ultimately, the language of the disclaimer was then drafted to “address their issues”: it was “a reaction to the parents coming in and complaining.” Johnston Dep. 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.

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. 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. at ¶ 20 Tippins Dep. 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.

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. at 29, 41; Johnston Dep. at 10-15, 24-25.

The Board approved the disclaimer even though they did almost no research on the alleged scientific controversies surrounding evolution. Plenge Dep. at 21, 30; Johnston Dep. at 17; Tippins Dep. at 19, 33, 48; *see McLean v. Arkansas 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.¹⁰ Nonetheless, they decided to place a disclaimer in their science textbooks, which serves to discredit evolution.

¹⁰ The only scientist Mr. Tippins talked to on the subject of evolution was a member of his church and Kennesaw State Chemistry Professor, Leon Combs, Ph.D. Mr. Combs, according to a publication on his Living Theology website “believe[s] that it is only the scientist who is a Christian and who therefore knows that the Bible is the only unchanging source of absolute truth who can make consistent, real progress in scientific investigations.” Tippins Dep. at 48; Leon L. Combs, Ph.D., “Science and Christianity, Living Theology. October 2001 at <<http://livingtheology.com>>, ex. H.5. In accordance with this view, he believes that “the Bible alone has the absolute truth” about the origin of life. *Id.* Tippins also spoke with a retired medical doctor. Tippins Dep. at 49.

After the adoption of the disclaimer, many citizens,¹¹ organizations,¹² churches,¹³ and academics¹⁴ 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

¹¹ See, e.g. Petition with 2,000 signatures (expressing “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. E.; Letter from Judy Coppedge, Aug. 26, 2002 (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. F.5.

¹² See, e.g. Letter from Concern Women of America, Aug. 29, 2002, ex. F.2. (“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.”); Letter from American Family Association of North Georgia, Aug. 22, 2002, ex. F.3. (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”); Letter from the Triangle Association for Science Creation, Sept. 14, 2002, ex. F.4 (supporting the disclaimer and the teaching of intelligent design); Letter from the Institute for Creation Research, Sept. 20, 2002, ex. F.6 (seeing Cobb’s disclaimer and policies on evolution as proposals to “teach creation science.”).

¹³ See, e.g. Letter from Open Bible Tabernacle, Sept. 19, 2002, ex. F.7. (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.”).

¹⁴ See, e.g., Dr. Michael A. Corey, Ph.D, ex. F.8 (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.”).

invitation to discuss religious views in the science classroom.

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.

B. That the Discussion May Originate From the Students Does Not Save the District From the Establishment Clause Violation.

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).¹⁵

¹⁵It 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*

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.

C. The Disclaimer Impermissibly Entangles the School and Religion.

"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

[] *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).

governing that discussion actually calls on teachers to moderate the discussion. Regulation, ex. G.2, ("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.

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, 91. 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.

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.

School Board members believe that even with the current policy¹⁶ and regulation¹⁷ creation science and intelligent design are appropriate areas of

¹⁶The policy states: “It is the intent of the Cobb County Board of Education that this policy not be interpreted to restrict the teaching of evolution; to promote or require the teaching of creationism; or to discriminate for or against a particular set of religious beliefs, religion in general, or non-religion.” Policy, ex. G.1. This policy is not helpful to teachers who are forced to determine whether student initiated religious discussion or comments are permissible or whether they are “too religious.” Nor does it tell a teacher what to do when comments cross the line into proselytizing or what a teacher can say in response to religious comments. Even if the policy were, on its own, satisfactory, it is essentially already violated by the presence of the disclaimer, which discredits science and directs students to consider religious alternatives.

¹⁷The regulation governing the teaching of evolution reads: “Discussion should be moderated to promote a sense of scientific inquiry and understanding of scientific methods, and to distinguish between scientific and philosophical or religious issues.” Regulations, ex. G.2. But, School Board members believe, that discussions of intelligent design and creationism do not violate the regulation.

discussion for class. Regulation, ex. G.2.; Plenge Dep. 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. 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. F.10.

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

Plenge Dep. at 46-47; Johnston Dep. at 24; Tippins Dep. at 37-39, 45-46. Indeed, the regulation itself encourages teachers to tell students that “science itself has limits, and is not intended to explain everything.” But even that step is discretionary, creating an environment where teachers have little direction as they moderate the religious discussion.

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. G.2.

D. The County Was Motivated By a Religious Purpose¹⁸

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.

McLean v. Arkansas 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

¹⁸Plaintiff's counsel recognizes that the Court found that the Board did not violate the purpose prong of the *Lemon* test. Plaintiff is pointing the Court to purpose again because some courts specifically state that the government's purpose plays a role in determining whether endorsement exists. *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 309 (5th Cir. 1999); (defining the endorsement test as having an effects and a purpose prong); *Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997) (referring to the endorsement test's purpose prong).

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.¹⁹ 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.

V. Conclusion

As demonstrated above, the disclaimer endorses religion, entangles religion

¹⁹To avoid repetition, the Plaintiff will not flesh out these arguments in this portion of the brief. The section pertaining to the religious effect of the law sufficiently analyzes each point.

and government, and was passed with a religious purpose. Accordingly, the disclaimer violates the Establishment Clause of the Constitution.

DATED: This the ____th day of November, 2004.

Respectfully submitted,

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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 _____) Civil Action
) File No. 1:02-CV-2325-CC
)
) Plaintiffs,)
)
) v.)
)
)
) COBB COUNTY SCHOOL DISTRICT,)
) COBB COUNTY BOARD OF)
) EDUCATION,)
) JOSEPH REDDEN, SUPERINTENDENT,)
)
) Defendants)
_____)

CERTIFICATE OF SERVICE

I hereby certify that I have, on this date, served a copy of the foregoing Plaintiffs' Pretrial Brief by facsimile and by placing a copy of the aforementioned in the U.S. mail to the following counsel of record:

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)
) Defendants)
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LOCAL RULE 7.1. CERTIFICATION

Counsel for Plaintiff, by her signature below, certifies that "Plaintiff's Response to Defendant's Expedited Motion for Further Extension of Time for Discovery" was prepared in Book Antigua, 13 point font, which is an approved font and point selection as designated in Local Rule 5.1(B).

This _____ day of _____, 2004.

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