Nos. 05-10341-I and 05-11725-II

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Defendants-Appellants,

v.

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

Plaintiffs-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN JEWISH COMMITTEE, AND ANTI-DEFAMATION LEAGUE, ON BEHALF OF PLAINTIFFS-APPELLEES, IN SUPPORT OF AFFIRMANCE

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Cobb County School District v. Jeffrey Michael Selman,
Case Nos. 05-10341-I and 05-11725-II

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici curiae Americans United for Separation of Church and State, the Anti-Defamation League, and the American Jewish Committee each are 501(c)(3) non-profit corporations. *Amici* have no parent corporations, and no publicly-held company owns ten percent or more of any of the *amici*.

In addition to those judges, attorneys, persons, associations of persons, firms, partnerships, and corporations identified in the opening briefs of the parties, the following persons and organizations have an interest in the outcome of this appeal:

Alter, Daniel S.

Americans United for Separation of Church and State

Barkey, David L.

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The Anti-Defamation League

The American Jewish Committee

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public interest organization based in Washington, D.C., that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by the U.S. Supreme Court and by the U.S. Courts of Appeals. In furtherance of its mission, Americans United actively opposes religiously-motivated efforts to limit or denigrate the teaching of science in the public schools. Americans United has more than 75,000 members nationwide, including many within the jurisdiction of this Court.

The American Jewish Committee

The American Jewish Committee ("AJC"), a national human relations organization with over 150,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. A staunch defender of church-state separation as the surest guarantor of religious liberty for all Americans, AJC has been involved in many of the landmark Free Exercise and Establishment Clause cases in American jurisprudence. We believe that religious

doctrine is debased and trivialized when it is presented for laboratory testing on the same basis as other classroom presentations. As such, AJC has long opposed efforts to limit or denigrate the teaching of evolution in public schools for religious reasons, and believes that disclaimers play on the confusion between the popular understanding of the term "theory" (synonymous with an assumption or an educated guess) and the scientific use of the term.

The Anti-Defamation League

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of Church and State embodied in the Establishment Clause of the First Amendment. Separation, ADL believes, preserves religious freedom and protects our democracy. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and

religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: "[A] union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431, 82 S. Ct. 1261, 1267 (1962).

SOURCE OF AUTHORITY TO FILE

A motion for leave to file this brief is submitted herewith.

ISSUE PRESENTED

Was a religious purpose the primary motivation for Cobb County's placement of an anti-evolution disclaimer in its schools' science textbooks?

SUMMARY OF ARGUMENT

The district court found that the Cobb County School Board's primary purpose in placing an anti-evolution disclaimer sticker in its schools' science textbooks was to placate constituents who for religious reasons opposed the teaching of evolution. The court, however, committed an error of law by concluding that this purpose was secular and not religious. The Supreme Court has repeatedly ruled that where the Constitution prohibits the government from acting

with a particular purpose, it equally forbids the government from acting on the ground that it is merely seeking to satisfy constituents who possess the motivation forbidden to the government.

Accepting the district court's view that governmental officials act with a secular purpose when their conduct is just intended to satisfy the religion-based desires of community members would set a dangerous precedent, as the government could then always justify religiously-motivated legislation by articulating its purpose as "accommodation" of the beliefs of certain community members. Therefore, although the district court was correct in holding that the placement of the Sticker in the textbooks had the unconstitutional effect of endorsing religion, *amici* respectfully ask this Court to rule that the Sticker's primary purpose was a religious one as a matter of law and to rely on this ground, at least in part, to affirm the judgment below.

ARGUMENT

I. The Establishment Clause Prohibits The Government From Acting With A Religious Purpose

The Establishment Clause bars governmental conduct that has the purpose or effect of advancing religion. *E.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-

49, 122 S. Ct. 2460, 2465 (2002); *Holloman v. Harland*, 370 F.3d 1252, 1284-85 (11th Cir. 2004). Where a governmental action "does not have a clearly secular purpose," it is unconstitutional, and consideration of the action's effect is unnecessary. *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985).

A governmental body's "declaration of purpose may not always be a fair guide to its true intent" (*Hunt v. McNair*, 413 U.S. 734, 741, 93 S. Ct. 2868, 2873 (1973)), so a public official's "mere 'testimonial avowal of secular . . . purpose is not sufficient to avoid conflict with the Establishment Clause'" *(Holloman*, 370 F.3d at 1285 (quoting *Karen B. v. Treen*, 653 F.2d 897, 900 (5th Cir. Unit A Aug. 1981), *aff'd mem.*, 455 U.S. 913, 102 S. Ct. 1267 (1982)). "[I]t is required that the statement of such purpose be sincere and not a sham" (*Edwards v. Aguillard*, 482 U.S. 578, 586-87, 107 S. Ct. 2573, 2579 (1987)), and it is "the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one'" (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308, 120 S. Ct. 2266, 2278 (2000) (quoting *Wallace*, 472 U.S. at 75, 105 S. Ct. at 2500 (O'Connor, J., concurring))).

In determining the actual purpose of a governmental action, courts examine the historical context of the action, the specific sequence of events leading up to it, and the nature of the action itself. *See Santa Fe*, 530 U.S. at 315, 120 S. Ct. at 2282; *Edwards*, 482 U.S. at 594-95, 107 S. Ct. at 2583; *Stone v. Graham*, 449 U.S.

39, 41-42, 101 S. Ct. 192, 193-94 (1980). Among other evidence, courts may consider statements by the legislative sponsor of an action (*see Edwards*, 482 U.S. at 587, 107 S. Ct. at 2579; *Wallace*, 472 U.S. at 57, 105 S. Ct. at 2490), statements by other members of the enacting body (*see*, *e.g.*, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540-41, 113 S. Ct. 2217, 2230-31 (1993) (Kennedy, J., plurality section of opinion)), and statements by members of the public who support the action (*see id.* at 541-42, 113 S. Ct. at 2231 (Kennedy, J., plurality section of opinion); *Epperson v. Arkansas*, 393 U.S. 97, 109 n.16, 89 S. Ct. 266, 273 n.16 (1968)).

This Court reviews under the "clearly erroneous" standard a district court's findings of fact about what the specific purposes of governmental conduct were. *See Glassroth v. Moore*, 335 F.3d 1282, 1296-97 (11th Cir. 2003). But the ultimate question of whether a governmental purpose is religious and unconstitutional "is 'in large part a legal question to be answered on the basis of judicial interpretation of social facts.'" *Santa Fe*, 530 U.S. at 315, 120 S. Ct. at 2282 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694, 104 S. Ct. 1355, 1370 (1984) (O'Connor, J., concurring)); *see also Stone*, 449 U.S. at 41, 101 S. Ct. at 193-94 (refusing to grant deference to trial court's conclusion that statute's "avowed" purpose was secular).

II. The Sticker Was A Product Of Anti-Evolution Religious Sentiment

The district court's factual finding that the School Board's primary purpose in adopting the Sticker was to placate constituents who have religious objections to the teaching of evolution — a finding that is not challenged by the Board on appeal — is amply supported by the historic link between religious groups and anti-evolution measures, by the School Board's own anti-evolution history, and by the specific events leading up to the enactment of the Sticker.

A. The Historic Link Between Religious Groups And Anti-Evolution Measures

In both *Edwards* and *Epperson*, in holding anti-evolution laws to be motivated by a religious purpose and therefore unconstitutional, the Supreme Court emphasized the "historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution." *Edwards*, 482 U.S. at 591, 107 S. Ct. at 2581; *accord Epperson*, 393 U.S. at 107-09, 89 S. Ct. at 272-73. These antagonisms have flourished into the present day and have led to the enactment of anti-evolution measures such as the one at issue in this case. The district court found:

> Members of certain religious denominations historically have opposed the teaching of evolution in public schools. As early as the 1920s and continuing into the late 1960s, the judicial system was resolving challenges to anti-evolution statutes, which made it criminal to teach evolution in

> school. . . . In the 1970s and 1980s, there was a movement by anti-evolutionists to have creationism taught alongside evolution. . . . Most recently, the judicial system has witnessed efforts by anti-evolutionists motivated by religion to discredit or disclaim the theory of evolution.

R4-98-32 (citations omitted).

Explaining how such anti-evolution religious fervor resulted in the Sticker at issue here, the court added that "encouraging the teaching of evolution as a theory rather than as a fact is one of the latest strategies to dilute evolution instruction employed by anti-evolutionists with religious motivations." R4-98-35. The religion-driven historical context of the Sticker — which is comprehensively detailed in the Brief of *Amicus Curiae* National Center for Science Education — is no different from the historical setting that strongly supported the Supreme Court's rulings that the anti-evolution measures in *Edwards* and *Epperson* had unconstitutional religious purposes.

B. The School Board's Prior Anti-Evolution Measures

The Cobb County School Board has evinced a long-standing anti-evolution, pro-Creationism bias. Since at least 1979 (until 2002), teaching about the "'origin of human species'" was permitted only in elective high-school classes and was excluded entirely from the elementary-school and middle-school curricula. R4-98-4 (district court opinion ("ct. op.") (quoting Defendants' Exhibit 2)). Moreover,

"'[e]lective opportunities for students to investigate theories of the origin of human species'" were required to include "'the creation theory.'" R4-98-4 (ct. op. (quoting Def. Ex. 2)). And "it was common practice in some science classes for textbook pages containing materials on evolution to be removed from students' textbooks." R4-98-5 (ct. op.). The School Board explained that it adopted these anti-evolution policies because "'some scientific accounts of the origin of human species as taught in public schools are inconsistent with the family teachings of a significant number of Cobb County citizens.'" R4-98-4 (ct. op. (quoting Def. Ex. 1)).

The School Board revised these historic policies and added evolution to its mandatory curriculum only because the policies were inconsistent with statewide curriculum standards, which require the teaching of evolution. R4-98-5-6; R7-114- 344:17-20; R8-115-415:9-18. But the Board could not shed its bias: It made the adoption of textbooks that present instruction about evolution contingent on placement of the anti-evolution Sticker in the textbooks. R4-98-8.

This historical background is similar to that of a public-school policy held unconstitutional by the Supreme Court in *Santa Fe*, 530 U.S. 290, 120 S. Ct. 2266, which provided for student elections to determine whether there would be invocations before school football games. The policy struck down in *Santa Fe* had

been watered down — in response to legal pressures — from previous school policies and procedures that had sanctioned an office of "Student Chaplain," that had provided for the reading of Christian prayers at football games over the public-address system, and that had included a regulation entitled "Prayer at Football Games." *Id.* at 295-98, 309, 120 S. Ct. at 2271-73, 2279. The Supreme Court concluded that "[t]his history indicates that . . . the specific purpose of the policy was to preserve a popular 'state-sponsored religious practice'" (*id.* at 309, 120 S. Ct. at 2279 (quoting *Lee v. Weisman*, 505 U.S. 577, 596, 112 S. Ct. 2649, 2660 (1992)), and the Court accordingly ruled that the policy's purpose was unconstitutional (530 U.S. at 314-16, 120 S. Ct. at 2282). The same is true here.

C. Advocacy By Religious Community Members Was The Most Immediate Cause Of The Adoption Of The Anti-Evolution Sticker

The specific events surrounding the adoption of the Sticker confirm that its enactment was driven by religious sentiment. Many people in Cobb County had strong religious views concerning theories of origin of living beings and accordingly had serious concerns about the teaching of evolution. R4-98-10-11, 26-27; R7-114-393:18-24, 400:22-25. After the School Board began to consider the adoption of textbooks that presented evolution, "a significant number of Cobb County citizens . . . voiced opposition to the teaching of evolution for religious

reasons." R4-98-33 (ct. op.).

Marjorie Rogers, a six-day Biblical Creationist, was a leader of these religiously-motivated citizens. R4-98-7; R6-113-46:11-12. Ms. Rogers criticized the proposed new textbooks on the grounds that they did not present any alternative theories of origin such as Creationism and Intelligent Design,[1] did not mention a Creator, and allegedly presented the "belief system . . . of atheism" to students. R4-98-6-7; R6-113-34:21-35:13, 37:22-24, 43:5-8, 55:16-17. More than two weeks before the adoption of the Sticker, Ms. Rogers wrote a letter to the School Board recommending, in part, that a disclaimer be placed in each textbook. R4-98-26. She also organized and presented to the School Board a petition signed by about 2,300 Cobb County residents that requested, among other things, that a statement be prominently placed at the beginning of the new textbooks that would warn students that the material on evolution was theoretical rather than factual. R4-98-7, 26-27; R6-113-38:12-39:24, 47:7-13, 61:23-62:2.

Before the Sticker was adopted, the School Board also received complaints from other community members that the new textbooks did not present criticisms

[1] Intelligent Design argues that the organisms on Earth did not arise through evolution but were intelligently designed through a supernatural process. R6-113-139:23-24. Intelligent Design is a religious concept that is not supported by any scientific evidence. R6-113-139:7-11, 141:11-14.

of evolution or alternatives to it, such as Creationism and Intelligent Design. R4-98-7, 10; R6-113-190:23-191:4, 207:9-13; R7-114-239:3-10, 259:12-14, 260:16-18, 378:8-13; R8-115-417:17-418:2, 448:21-24. The Board received a number of petitions in addition to the one organized by Ms. Rogers, including at least one or two that came from churches; some of the petitions advocated for the teaching of Creationism and Intelligent Design in science class. R6-113-190:1-16; R7-114-239:14-17. The School Board also received material advocating for Creationism and Intelligent Design from members of the movements that promote those beliefs. R4-98-12; R6-113-189:11-25; R7-114-239:22-25, 304:14-16; R8-115-417:11-16, 420:4-8. At meetings of the Board, many members of the public commented that they did not want evolution taught in science class or wanted alternative theories taught. R6-113-106:16-19.

The members of the School Board then discussed what they could do to address the concerns of the community members who were unhappy with the proposed teaching of evolution. R6-113-191:12-15; R8-115-418:3-8. Lindsey Tippins, the current chair of the Board, took the lead in initiating this discussion. R4-98-7; R7-114-241:10-13, 270:22-24, 271:19-22. He brought up concerns held by some of his Creationist constituents that Creationism was not included in the proposed new textbooks. R7-114-244:13-15, 272:16-18, 274:4-18, 276:20-277:19.

Mr. Tippins also raised before the Board the idea of teaching Intelligent Design. R4-98-10; R7-114-271:23-272:15.

The Board discussed whether Creationism and Intelligent Design could be taught, but decided against this after being advised that such instruction would be illegal. R4-98-10; R6-113-205:10-18; R7-114-274:4-18, 374:23-375:9. Mr. Tippins then raised the idea of putting a disclaimer in the textbooks (R7-114-244:16-246:3), and the Board asked its legal counsel to draft disclaimer language that would address the concerns of the anti-evolution parents (R4-98-8; R6-113-191:16-18; R7-114-377:21-25; R8-115-418:9-419:19). The Board's counsel drafted the Sticker. R4-98-8. The School Board then authorized the use of the new textbooks that cover evolution, under the proviso that the textbooks would first be adorned with the Sticker. R4-98-8; R7-114-246:14-247:10, 248:13-21, 287:16-18, 399:7-10; R8-115-512:3-7.

The School Board's meeting minutes concerning the adoption of the Sticker reflect that "citizen concerns prompted the School Board to consider the idea of putting a statement at the beginning of the textbooks." R4-98-8-9 (ct. op.). And most of the Board members subsequently stated that they supported the disclaimer at least in part due to the concerns of their constituents about the teaching of evolution. R6-113-201:11-14, 207:9-11, 215:18-23 (testimony of Board member

Laura Searcy); R7-114-377:14-16 (testimony of Board member Teresa Plenge); R7-114-393:25-395:9, 400:17-401:6 (testimony of Board member Betty Gray); Docket Entry 22/23, Affidavit of Board member Johnny Johnson ¶ 3, Affidavit of Board member Gordon O'Neill ¶ 3. Some of the Board members also expressed their personal beliefs that evolution is not a fact (R7-114-291:7-292:1 (testimony of current Board chair Tippins); R8-115-422:25-423:5 (testimony of Curtis Johnson, Board chair at time of adoption of Sticker)) and that they adhere to Intelligent Design (Docket Entry 35, transcript of Plenge deposition at 35:23-36:2) or the view "that life has evolved not through happenstance but in a purposeful way" (Docket Entry 32, transcript of Tippins deposition at 82:19-24).

D. The District Court Found That The School Board's Primary Purpose In Adopting The Sticker Was To Placate Constituents Who Had Religious Objections To The Teaching Of Evolution

After examining the record, the district court made the following findings:

• "[T]he idea of placing a sticker in the textbooks originated with parents who opposed the presentation of only evolution in science classrooms and sought to have other theories, including creation theories, included in the curriculum." R4-98-26.

• "[C]itizens and parents largely motivated by religion put pressure on the School Board to implement certain measures that would . . . dilute the teaching of

evolution, including placing a disclaimer in the front of certain textbooks that distinguished evolution as a theory, not a fact." R4-98-33.

• "[T]he language of the Sticker essentially mirrors the viewpoint of these religiously-motivated citizens." *Id.*

• "[T]he arguments of the Defendants and the evidence in this case overwhelmingly show that . . . the primary purpose of the Sticker" is "to accommodate or reduce offense to those persons who hold beliefs that might be deemed inconsistent with the scientific theory of evolution." R4-98-26.

• "The School Board's decision to adopt the Sticker was undisputably influenced by sectarian interests." R4-98-28.

Having made these factual findings, the district court should have held — pursuant to the precedents set in the Supreme Court's evolution cases — that the Sticker's primary purpose was religious and unconstitutional, as the Supreme Court did in *Epperson* and *Edwards* in similar factual contexts. As in *Epperson*, here "[i]t is clear that fundamentalist sectarian conviction was and is the [enactment]'s reason for existence" (393 U.S. at 107-08, 89 S. Ct. at 272), and "[t]he overriding fact is that [the enactment] selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine" (*id.* at 103, 89 S. Ct. at 270). As in

Edwards, 482 U.S. at 593, 107 S. Ct. at 2582, the School Board's purpose was to cause "the science curriculum to conform with a particular religious viewpoint."

III. The Purpose Of Placating Constituents Who Desire Religiously-Motivated Legislation Is Not A Permissible Secular Purpose

Despite making the factual finding that the School Board's primary purpose was to "placate their constituents" (R4-98-27) who were "largely motivated by religion" (R4-98-33), and despite acknowledging that "this purpose is intertwined with religion" (R4-98-26), the district court reached the legal conclusions that this purpose was "secular" (R4-98-30) because it reflected "mere accommodation of religion" (R4-98-28) and that the purpose was therefore "insufficient to render the Sticker unconstitutional" (*id.*).

This ruling was plainly incorrect: The law is clear that where it is unconstitutional for the government to act with a particular purpose, it is no less unconstitutional for the government to effectuate the desires of *constituents* who possess that purpose. And the "accommodation" exception to the prohibition against religiously-motivated governmental action applies only to actions tailored to remove an impediment to religious exercise, typically by creating an exemption from a burden on the practice of religion; it does not apply to governmental

actions, like enactment of the disclaimer here, that change the instruction given to all students to suit the religious beliefs of some.

A. The Government May Not Cater To Constituents Who Are Motivated By A Purpose That The Government May Not Pursue Itself

It has long been settled that where the Constitution forbids the government from acting with a particular purpose — such as advancing religion or discriminating against a particular group — it equally forbids the government from acting on the purportedly "neutral" ground that it is merely seeking to satisfy *constituents* who possess the motivation forbidden to the government. Indeed, in the precise context at issue here — legislation aimed at the teaching of evolution — the Supreme Court made clear that an Arkansas law restricting the teaching of evolution could not constitutionally be justified by "the religious views of some of [Arkansas'] citizens." *Epperson*, 393 U.S. at 107, 89 S. Ct. at 272. The Court explained that protecting the religious sensibilities of constituents whose beliefs conflict with evolution was not a permissible state purpose, holding, "'[T]he state has no legitimate interest in protecting any or all religions from views distasteful to them.'" *Id.* (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505, 72 S. Ct. 777, 782 (1952)).

The Supreme Court has ruled similarly in the context of the Equal Protection

Clause. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 105 S. Ct. 3249, 3258-59 (1985), the defendant city — which had special zoning restrictions applicable to "hospitals for the feebleminded" — argued, *inter alia*, that its rules were not motivated by animus against the mentally retarded, but rather by a desire to defer to the "negative attitude" of nearby property owners. The Supreme Court squarely rejected the argument that there was a difference between the government acting based on an unconstitutional motive and the government deferring to the desire of constituents to advance that same motive:

> It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.

Id. at 448, 105 S. Ct. at 3259 (citations omitted). Similarly, in *Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S. Ct. 1879, 1882 (1984), the Court rejected the contention that public prejudice against interracial relationships could constitutionally be considered as a factor in a child custody determination, holding that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *See also*, *e.g.*, *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477-78 (3d Cir. 1996) ("An impermissible practice cannot be transformed into a constitutionally acceptable one by putting a democratic

process to an improper use.").

Likewise, although the Establishment Clause has no concern with private religious beliefs, the Clause *is* offended when the government acts to effectuate those beliefs. For instance, in *Jager v. Douglas County School District*, 862 F.2d 824, 829-30 (11th Cir. 1989), this Court ruled that "satisfy[ing] the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity" was not a permissible secular purpose for the county's practice of holding prayers before high-school football games.

In short, when the Constitution forbids governmental action motivated by a particular purpose — as it does with respect to advancement of religion — it also forbids the government from giving a nod to "wishes or objections of some fraction of the body politic" (*Cleburne*, 473 U.S. at 448, 105 S. Ct. at 3259) that are premised on the purpose forbidden to the government.

B. The "Accommodation" Exception Cited By The District Court Has No Application Here

The district court, while recognizing that the School Board's decision was "undisputably influenced by sectarian interests" (R4-98-28), held that the desire to placate religiously-motivated parents was permissible because the Supreme Court's "accommodation" cases establish that "the Constitution does not require the

government to 'show a callous indifference to religious groups'" (R4-98-27 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S. Ct. 679, 684 (1952)). In so holding, the district court expanded the narrow "accommodation" exception far beyond the bounds set for it by the Supreme Court, and in a way that threatens to swallow the established rule against religiously-motivated legislation.

To be sure, the district court was correct in recognizing that the Supreme Court has not forbidden *all* governmental action intended to aid religion. There is an exception to the general ban on such governmental action: "[T]he government may (and sometimes must) accommodate religious practices . . . without violating the Establishment Clause." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334, 107 S. Ct. 2862, 2867 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45, 107 S. Ct. 1046, 1051 (1987)). But "[t]he principle that the government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee*, 505 U.S. at 587, 112 S. Ct. at 2655.

Accordingly, the "accommodation" exception has historically been limited to governmental actions tailored to remove a significant government-imposed burden on the free exercise of religion. "[A]n accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden *on*

the exercise of religion.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 613 n.59, 109 S. Ct. 3086, 3111 n.59 (1989) (quoting *Amos*, 483 U.S. at 348, 107 S. Ct. at 2875 (O'Connor, J., concurring)) (emphasis originally in *Amos*); *see also Cutter v. Wilkinson*, __ U.S. __, No. 03-9877, 2005 WL 1262549 at *6 (U.S. May 31, 2005) (upholding statute protective of free-exercise rights of prisoners as accommodation of religion "because it alleviates exceptional government-created burdens on private religious exercise"); *Benning v. Georgia*, 391 F.3d 1299, 1310 (11th Cir. 2004) ("'where . . . a law's purpose is to alleviate significant interference with the exercise of religion, that purpose does not violate the Establishment Clause'") (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1241 (11th Cir. 2004)). Notably, in the free-exercise-of-religion context, courts have repeatedly rejected the proposition that inclusion in a public school's curriculum of instruction that conflicts with the tenets of a religion substantially burdens the exercise of the religion. *See Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1543 (9th Cir. 1985) ("distinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion"); *accord Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 690 (7th Cir. 1994); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1068-69 (6th

Cir. 1987).

Moreover, an accommodation must not impose "burdens . . . on nonbeneficiaries" or "override other significant interests." *See Cutter*, __ U.S. __, 2005 WL 1262549 at *6-7. Therefore, a permissible accommodation generally must operate "by *exempting* religious practices from general regulations" rather than altering general policies or practices to fit religious specifications. *Allegheny*, 492 U.S. at 613 n.59, 109 S. Ct. at 3111 n.59 (citing Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 3-4) (emphasis added). Thus, even if the teaching of evolution imposes a significant burden on the exercise of religion, the solution consistent with accommodation jurisprudence is to create an exemption for religious objectors rather than to change the teaching of evolution for *all* students to suit the views of religious believers.

As Justice Kennedy explained in a concurring opinion addressing this issue in *Board of Education v. Grumet*, 512 U.S. 687, 723-24, 114 S. Ct. 2481, 2501-02 (1994), the roots of the "accommodation" exception are that "[b]efore the Revolution, colonial governments made a frequent practice of exempting religious objectors from general laws," and the history of accommodation is a history of such exemptions. The Supreme Court accommodation cases cited by the district court provide a perfect illustration of this point. In *Zorach* — which the district

court cited for its language stating that the government need not show a "callous indifference" toward religion (R4-98-27 (citing 343 U.S. at 314, 72 S. Ct. at 684)) — the Supreme Court merely upheld an exemption from the requirement that students be present at school, in order "to mak[e] it possible for students to participate in" devotional exercises or religious instruction held at private religious facilities (343 U.S. at 313, 72 S. Ct. at 683). Similarly, *Hobbie* — cited by the district court for the proposition that the Supreme Court "has long recognized that the government may accommodate religious practices" without violating the Establishment Clause (R4-98-28 (citing 480 U.S. at 144, 107 S. Ct. at 1051)) — merely required an exemption for a Sabbath observer from rules under which she was denied unemployment compensation for being unavailable to work scheduled shifts on her Sabbath (480 U.S. at 139-46, 107 S. Ct. at 1048-52). Neither of these cases — nor any other Supreme Court case — holds that the government may expand the "accommodation" exception beyond removing a burden on the affected group.[2] *See also*, *e.g.*, *Grumet*, 512 U.S. at 705, 114 S. Ct. at 2492 ("the Constitution allows the State to accommodate religious needs *by alleviating special burdens*") (emphasis added); *Amos*, 483 U.S. at 338, 107 S. Ct. at 2869

[2] *Lynch*, which the district court also cited (R4-98-28), refers only in passing to the principle of accommodation (465 U.S. at 673, 104 S. Ct. at 1359); it does not attempt to define the contours of that principle.

(government may "lift[] a regulation that burdens the exercise of religion"); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972) (exemption of Amish children from compulsory attendance at high school).

Furthermore, a constitutional accommodation of religion must "confer[] no privileged status on any particular religious sect" and must be "administered neutrally among different faiths." *See Cutter*, __ U.S. __, 2005 WL 1262549 at *6-7 (citing *Grumet*, 512 U.S. at 706, 114 S. Ct. at 2493). But the Cobb County School Board has provided a special benefit to those religious believers whose faith does not accept evolution, to the detriment of the education of persons who do not share in such religious beliefs. Indeed, if the "accommodation" exception could be extended so far as to allow alteration of the school curriculum to protect the sensibilities of a religious group, it would directly contravene the Supreme Court's ruling in *Epperson*, 393 U.S. at 106, 89 S. Ct. at 271, that "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." There is simply no relevant precedent supporting the district court's ruling.

C. Acceptance Of The District Court's Expansive View Of Accommodation Would Set A Dangerous Precedent

In her concurrence in *Wallace*, 472 U.S. at 82, 105 S. Ct. at 2503, Justice O'Connor warned, "[J]udicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an 'accommodation' of free exercise rights." That is precisely the problem here. Under the district court's dangerously unconstrained view of the "accommodation" exception to the prohibition against religiously-motivated governmental action, the government could always salvage unconstitutional religiously-motivated legislation by re-articulating its purpose as mere accommodation of the beliefs of certain members of the community.

For example, in *Wallace* itself, in which the legislative history of the "moment of silence" law passed by the Alabama legislature made it clear that the sponsor of the bill saw it as an "effort to return voluntary prayer" to the schools (*id.* at 57, 105 S. Ct. at 2490), the same law could have been passed by the same legislators for the same reasons so long as the statements inserted into the legislative history were slightly altered. Had the bill in that case been justified as "an effort to accommodate the desire of many of our constituents to have prayer in

public schools," the analysis put forth by the district court here would have provided *carte blanche* for the Alabama legislature to proceed with its efforts.[3]

Similarly, the Louisiana statute requiring that evolution instruction be accompanied by instruction in "creation science" — struck down under the Establishment Clause due to its lack of a secular purpose in *Edwards*, 482 U.S. 578, 107 S. Ct. 2573 — could have been justified, in the district court's language, as an effort "to accommodate or reduce offense to those persons who hold beliefs that might be deemed inconsistent with the scientific theory of evolution" (R4-98-26). Indeed, under the district court's broad view of the "accommodation" exception, even the most blatantly religious legislation — an anti-blasphemy law, or the institution of sectarian prayer in the public schools — would be permissibly "secular" in purpose so long as legislators were deferring to the religious desires of their constituents. There is simply no support in the Supreme Court's Establishment Clause jurisprudence for such a doctrine.

Moreover, the view that it is permissibly secular to defer to the religious sensibilities of constituents runs directly contrary to two of the most fundamental

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[3] Indeed, as this example indicates, in a representative democracy in which governmental officials represent the interests of their constituents, the line between an official's own religious motivation and that official's desire to effectuate the religious motivations of constituents is, at best, a gossamer one.

purposes of the Establishment Clause, which are to prevent one group of believers from being favored over another (*see Grumet*, 512 U.S. at 696, 114 S. Ct. at 2487 (plurality opinion)), and to prevent religious majorities from using the machinery of government to impose their will on religious minorities (*see* James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶¶ 1-2, *reprinted in Everson v. Bd. of Educ.*, 330 U.S. 1, app. at 64-65, 67 S. Ct. 504, app. at 535 (1947) (Black., J., dissenting)). The Establishment Clause aims to prevent politically powerful religious groups from exercising power over government for sectarian ends. Yet, under the district court's approach, precisely this scenario is insulated from Establishment Clause "purpose" scrutiny. And there is every reason to think that governmental decisions to "placate" voters of a particular religious persuasion will improperly be exercised much more frequently in favor of majority religions than minority ones, in violation of core Establishment Clause values. *See Grumet*, 512 U.S. at 703-04, 114 S. Ct. at 2491 (noting the difficulty of ensuring that government will "accommodate" all groups equally).

In short, the district court's ruling that the School Board acted with a secular purpose in applying a special disclaimer to the teaching of evolution to satisfy religious sensibilities is without precedent in Establishment Clause case law, threatens to swallow the rule that government may not act for the purpose of

advancing religion, and is contrary to the core purposes of the Establishment Clause.

IV. The Other Purposes Proffered By The Defendants Are Not Relevant And Are Not Legitimate Secular Purposes In Any Event

The district court found that a secondary purpose of the Sticker was "fostering critical thinking" among students. R4-98-24. But because the district court found that this was not "the Sticker's main purpose" (R4-98-26), this Court need not consider whether this purpose was a legitimate secular purpose. Numerous decisions of the Supreme Court and this Court have made clear that governmental action is unconstitutional where its primary or preeminent purpose is religious, even if the action has secondary secular purposes. *See Edwards*, 482 U.S. at 590-94, 107 S. Ct. at 2581-83 (relying on "primary," "preeminent religious purpose"); *Stone*, 449 U.S. at 41, 101 S. Ct. at 194 (relying on "pre-eminent purpose"); *King v. Richmond County*, 331 F.3d 1271, 1277 (11th Cir. 2003) ("[w]hen evidence shows that endorsement or promotion of religion was a primary purpose for the challenged practice, the inquiry ends, as the practice violates the Establishment Clause"); *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1527 (11th Cir. 1993) ("[a] statute in which an

impermissible purpose predominates is invalid even if the legislative body was motivated in part by legitimate secular objectives"); *accord Lynch*, 465 U.S. at 690-91, 104 S. Ct. at 1368-69 (O'Connor, J., concurring); *Glassroth*, 335 F.3d at 1297; *Jager*, 862 F.2d at 830.[4] As explained above, the animus that the district court found was the primary purpose of the School Board's action — "to placate" "parents largely motivated by religion" (R4-98-27, 33) — is a religious purpose as a matter of law, so no consideration of any other purpose is necessary.

But even if the purpose of "promotion of critical thinking" is relevant, it does not render the School Board's conduct constitutional. The School Board acted not to promote critical thinking in general, but to cause "students to consider critically information regarding evolution to try to determine its validity." R4-98-9 (ct. op.); *accord* Plaintiffs' Exhibit 17. The School Board thus singled out evolution for negative treatment, as no disclaimer relating to any other theory, topic, or subject is placed on any Cobb County school textbook. R4-98-8; R6-113-

[4] This Court explained in *Church of Scientology*, 2 F.3d at 1528, that while the Supreme Court suggested a contrary principle in *Bowen v. Kendrick*, 487 U.S. 589, 602, 108 S. Ct. 2562, 2570-71 (1988), the language in *Bowen* was dictum that would eviscerate "purpose" analysis under the Establishment Clause if applied literally. *Cf. Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1084 (11th Cir.) (initially appearing to adopt formulation in *Bowen*, but then stating that statute is unconstitutional if it has "'preeminent purpose' which is 'plainly religious in nature'") (quoting *Stone*, 449 U.S. at 41, 101 S. Ct. at 194), *vac'd*, 531 U.S. 801, 121 S. Ct. 31 (2000), *reinstated*, 250 F.3d 1330 (11th Cir. 2001).

81:18-82:10; R7-114-294:17-19, 375:13-15. And under *Epperson* and *Edwards*, where the government acts to single out evolution for negative treatment, its purpose is deemed religious and unconstitutional. *See Epperson*, 393 U.S. at 109, 89 S. Ct. at 273 ("Arkansas' [anti-evolution] law cannot be defended as an act of religious neutrality," as "Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man," but instead "[t]he law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account"); *see also Edwards*, 482 U.S. at 593, 107 S. Ct. at 2582 ("[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").

Moreover, placement of the Sticker in biology textbooks was not necessary to further critical thinking. The record contains uncontradicted evidence that the biology textbook adopted by the School Board contains critical-thinking questions at the end of each chapter and performs without any disclaimer an excellent job of fostering critical thinking about numerous questions in biology, including evolution. R6-113-152:2-16. Where the Supreme Court has determined that a governmental action "is not necessary to further" the purpose asserted for it, the Court has rejected the purpose as a sham. *See Santa Fe*, 530 U.S. at 309, 120 S.

Ct. at 2278-79; *accord Edwards*, 482 U.S. at 587, 107 S. Ct. at 2579; *Wallace*, 472 U.S. at 59, 105 S. Ct. at 2491.

On appeal, the School Board proffers three purposes for the Sticker in addition to "promot[ing] critical thinking:" (1) "promot[ing] tolerance and respect for religious beliefs;" (2) "provid[ing] notice that evolution would in fact be taught;" and (3) "support[ing] teachers in teaching evolution." Appellants' Brief at 12.[5] The first of these three purposes does not appear to be materially different from the purpose of "accommodat[ing] or reduc[ing] offense to those persons who hold beliefs that might be deemed inconsistent with the scientific theory of evolution," which the district court found was the primary purpose of the disclaimer. *See* R4-98-26. Because this *preeminent* purpose of the Board's conduct was religious, this Court need not consider the professed secondary purposes of "provid[ing] notice" or "support[ing] teachers." *See King*, 331 F.3d at 1277. And, in any event, the district court did not find those two professed purposes to be actual purposes of the Sticker.

Furthermore, the Sticker was not necessary to advance the purpose of

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[5] The School Board also (*see* Appellants' Br. at 8, 22) references purposes set forth in a revised version of the Board's policy on "Theories of Origin" that was enacted *after* the Sticker was adopted (R4-98-9, 14-15). This is too little, too late: The Board cites no record evidence that the purposes of the Sticker were the same as the purposes of the policy.

"provid[ing] notice that evolution would be taught," since both the back cover and the table of contents of the biology textbook adopted by the Board state that "Unit 5" of the textbook will be "Evolution." R6-113-163:12-21; Def. Ex. 4. Therefore that professed purpose should be dismissed as a sham pursuant to *Santa Fe*, 530 U.S. at 309, 120 S. Ct. at 2278-79. And the professed purpose of "support[ing] teachers in teaching evolution" should likewise be dismissed as a sham because the Sticker actually *undercuts*, rather than *advances*, the teaching of evolution. *See Church of Scientology*, 2 F.3d at 1527 ("[i]f the legislature's stated purpose is not actually furthered by the enactment then that purpose is disregarded as being insincere or a sham"); *accord Santa Fe*, 530 U.S. at 309, 120 S. Ct. at 2278-79; *Edwards*, 482 U.S. at 586-89, 107 S. Ct. at 2579-81.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment of the district court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using WordPerfect 9.0.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Brief *Amicus Curiae* has been served on counsel (listed below) for each party by overnight delivery, and that an original and six copies of this Brief have been dispatched to the Clerk of the United States Court of Appeals for the Eleventh Circuit by overnight delivery, on June 9, 2005.

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