

**IN UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

DOCKET NO. 05-10341-I

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

APPELLANTS,

v.

**JEFFREY MICHAEL SELMAN, DEBRA ANN POWER,
KATHLEEN CHAPMAN, JEFF SILVER, PAUL MASON, and
TERRY JACKSON,**

APPELLEES.

**BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENSE FUND IN
SUPPORT OF APPELLANTS**

**Appeal from the United States District Court
For the Northern District of Georgia
Atlanta Division**

COUNSEL FOR *AMICUS CURIAE* ALLIANCE DEFENSE FUND

ALLIANCE DEFENSE FUND

Ben Bull

Kevin Theriot

Florida Bar No. 0136761

Joel Oster

Florida Bar. No. 0659746

15660 W. 135th St.

Olathe, KS 66062

(913) 829-7755

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COBB COUNTY SCHOOL DISTRICT,)	
COBB COUNTY BOARD OF)	
EDUCATION, JOSEPH REDDEN,)	
SUPERINTENDENT,)	
)	
APPELLANTS,)	
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v.)	DOCKET NO. 05-10341-I
)	
JEFFREY MICHAEL SELMAN,)	
DEBRA ANN POWER, KATHLEEN)	
CHAPMAN, JEFF SILVER, PAUL)	
MASON, and TERRY JACKSON,)	
)	
APPELLES.)	
)	

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Counsel for Amicus Curie Alliance Defense Fund certifies pursuant to F.R.A.P. 26.1 that the following parties, firms, partnerships, counsel, and judges have an interest in the outcome of this case:

Appellants/Defendants:

- Cobb County Board of Education

- Cobb County School District

- Joseph Redden, Superintendent

Counsel for Appellants/Defendants:

Carol Callaway, Esq.

E. Linwood Gunn, IV, Esq.

Appellees/Plaintiffs:

Kathleen Chapman

Terry Jackson

Paul Mason

Debra Ann Power

Jeffrey Michael Selman

Jeff Silver

Counsel for Appellees/Plaintiffs:

American Civil Liberties Union Foundation

American Civil Liberties Union Foundation of Georgia, Inc.

David G. H. Brackett, Esq.

Jeffrey O. Bramlett, Esq.

Margaret F. Garrett, Esq.

Emily Hammond Mezell, Esq.

Gerald Weber, Esq.

Proposed Intervenors:

Allen Hardage

Larry Taylor

Counsel for Proposed Intervenors:

Alliance Defense Fund

Hollberg & Weaver

Kevin Thomas McMurry

Kevin H. Theriot

George M. Weaver, Esq.

Amicus Curiae:

Biologists and Georgia Scientists

Colorado Citizens for Science

Honorable J. Foy Guin, Jr.

Kansas Citizens for Science

Michigan Citizens for Science

Nebraska Religious Coalition for Science Education

New Mexico Academy of Science

New Mexico Coalition for Excellence in Science and Math Education

New Mexicans for Science and Reason

Parents for Truth in Education

Texas Citizens for Science

Counsel for Amicus:

Ben Bull, Esq.

David DeWolf, Esq.

Lynn Gitlin Fant, Esq.

Hollberg & Weaver

William Johnson, Esq.

Joel Oster, Esq.

Rogers & Watkins, LLP

Marjorie Rogers, Esq.

Kevin Theriot, Esq.

George M. Weaver, Esq.

Trial Judge:

Honorable Clarence Cooper

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STATEMENT OF INTEREST OF AMICUS

Alliance Defense Fund (“ADF”) is a non-profit, religious liberties organization, devoted to the defense and advocacy of religious freedom, the sanctity of human life, and traditional family values. ADF is an alliance of Christian individuals and organizations nationwide who seek to promote and defend laws and policies that further religious freedom, the sanctity of human life, and traditional family values. If the District Court’s opinion is not reversed, the efforts of Christians everywhere, including those at ADF and its allies, to promote laws consistent with Christian ideals, will be counterproductive to their mission. Consequently, their voices will be silenced, their free exercise rights compromised, and their ability to participate in the political process threatened.

STATEMENT OF THE ISSUE

Whether the District Court erred in finding that the Stickers violated the Establishment Clause *for the sole reason that it was well known that Christians supported the Stickers* when the Stickers were entirely secular in nature, and the decision to place the Stickers on textbooks was devoid of any religious purpose?

SUMMARY OF THE ARGUMENT

The District Court erred in radically expanding the Supreme Court’s endorsement test in finding that Stickers placed on science textbooks violated the Establishment Clause simply because it was well known that Christians supported the stickers. The District Court correctly found that the Cobb County School Board (“School Board”) did not act for a religious purpose when it decided to place the Stickers on science textbooks. The District Court also correctly found that the Stickers were devoid of any religious content. The only reason why the District Court concluded that the Stickers violated the Establishment Clause is because it was well known that Christians supported the Stickers, and so a reasonable observer might think that the School Board was siding with the Christians on this issue.

The District Court’s application of the endorsement test in a situation where the government action was wholly secular and devoid of any religious purpose is without support in case law. Neither the Supreme Court, nor any lower court of record, has ever applied the endorsement test to determine if secular state action, devoid of any religious purpose, violated the Establishment Clause.

The District Court’s analysis will lead to absurd results. If laws can be stricken under the Establishment Clause simply because Christians

support it, then Christians will be punished for effectively advocating for legislation. In addition, any laws that were widely supported by Christians are now in jeopardy. Marriage laws can be stricken because the “religious right” are in favor of limiting marriage as to between one man and one woman. Sunday liquor laws might be unconstitutional because churches advocated for their passage. Any abortion restriction will be unconstitutional, not because of some privacy right, but because Christians actively lobbied for them. In addition, all laws that promote religious liberty could be invalidated because religious groups advocated for their passage.

The Establishment Clause was never meant to prohibit the passage of a secular law, for a secular purpose, simply because Christians actively lobbied for the law. The District Court correctly found that the Stickers have no religious content, are devoid of a religious purpose. Consequently, the Establishment Clause is not violated.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE REASONABLE OBSERVER TEST HAS NEVER BEEN USED TO INVALIDATE SECULAR STATE ACTION.

The District Court erred in radically extending the Supreme Court’s “endorsement test” to reach an absurd result – striking down an admittedly secular sticker, that was placed on text books for admittedly secular reasons, *just because Christians supported the stickers*. This misapplication of the endorsement test sits in isolation among all other cases applying it.

It is beyond question that the face of the sticker is secular, and contains no religious reference. The sticker states:

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.

See Selman v. Cobb County School District, 2005 WL 83829 (N.D.Ga.) *5.

The sticker does not direct students to consider a particular religious theory on the origin of life, such as creationism. The sticker does not ask students to consult with clergy to get more information on other explanations for the origin of life. The sticker does not even inform the reader that evolution is the study of natural science, and therefore should not conflict with religious beliefs. The sticker is *entirely devoid* of any religious reference. The District Court even found that “the Sticker in this case does not contain a

reference to religion in general, any particular religion, or any religious theory.” *Id.* at *14.

Not only is the sticker entirely secular, its contents are correct and its admonitions to careful study are academically laudable. The reference to evolution as a theory is correct, as in science, there is a marked difference between “facts” and “theories.” (R4-Def. Exh. 4, p. 369). The District Court even found that “Evolution is the dominant scientific *theory* regarding the origin of the diversity of life” *Id.* at *5 (emphasis added). Any high school student at Cobb County high school would understand this distinction.

Not only is the sticker wholly devoid of any religious reference, and is scientifically correct and academically laudable, ***the sticker was placed on science textbooks for secular reasons.*** The District Court, after reviewing the testimony of the school board members, and finding such testimony to be “highly credible,” stated,

[T]he testimony of the School Board members persuades the Court that the School Board did not seek to disclaim evolution by encouraging students to consider it critically. Rather, the School Board sought to encourage students to analyze the material on evolution themselves and make their own decision regarding its merit.

See id. at 14-15.

A. Using The “Reasonable Observer” Test To Invalidate Purely Secular State Action Is Wholly Unsupported By Any Case Law.

Neither the Supreme Court, nor any lower court, has used the “reasonable observer” test to invalidate state action that is facially secular and devoid of any religious purpose. In every case in which the endorsement test was applied, the “item” or “state action” in question was blatantly religious.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court applied the endorsement test to uphold a government holiday display that contained a *nativity scene*. There was no question that the subject of what the “reasonable observer” was looking at was religious – a nativity scene. In *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), the Court ruled that the state did not violate the Establishment Clause by permitting the display of a private *cross* on state property. In her concurring opinion, Justice O’Conner wrote that the reasonable observer would not think that the state was endorsing religion by permitting a private party to display a cross. Again, the subject of the endorsement test was a cross, a blatantly religious item. *See also County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) (analyzing the display of a *crèche* on county property and the display of a *menorah* next to a Christmas tree under

the endorsement test); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (finding a state program of sending teachers into *religious schools* to provide remedial education “cannot reasonably be viewed as an endorsement of religion.”); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down an Alabama *prayer and meditation statute* for public schools).

In *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), this Court found that an Alabama Supreme Court judge violated the Establishment Clause by erecting a monument of the *Ten Commandments* in the middle of the Alabama State Judicial Building. This Court found that the judge had a religious purpose, which was “to acknowledge the law and sovereignty of the God of the Holy Scriptures.” *Id.* at 1296. This Court then applied the reasonable observer test and concluded that “a reasonable observer would view the monument's primary effect as an endorsement of religion.” *Id.* at 1297.

In *Bown v. Gwinnett County School District*, 112 F.3d 1464 (11th Cir. 1997), this Court upheld a state law permitting “a period of quiet reflection in schools.” In *Bowen*, a Georgia law permitted “silent prayer or mediation” at the beginning of each school day. The law was amended to permit “a period of quiet reflection.” *Id.* at 1466. In the amended law, it states, “this Code section is not intended to be and shall not be conducted as a *religious*

service or exercise ...” *Id.* The amended law then states, “The provisions of subsections (a) and (b) of this Code section shall not prevent student initiated voluntary *school prayers* at schools or school related events which are nonsectarian and nonproselytizing in nature.” Consequently, the law itself dealt with religion and prayer. This Court also noted that some legislators who voted for the law saw this law as a way to get “prayer back in schools.” *See id.* at 1471. This Court then applied the Endorsement Test to determine if the law that (1) followed a law permitting a time for prayer and meditation at school, (2) created a time for quiet reflection, (3) openly stated that such law is not to be viewed as a religious service, and (4) that such law is not limiting student’s rights to voluntary prayer, would be perceived as an endorsement of religion. The court concluded that a reasonable observer would not think that the state was endorsing religion. *See id.* at 1472; *see also Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004) (finding that the Establishment Clause was violated when a teacher asked students for *prayer requests* before the students entered into a moment of silence).

In *Freiler v. Tangipahoa Parish Bd. of Educ.*, 975 F. Supp. 819 (E.D.La. 1997), the court found that a disclaimer on a biology text book violated the endorsement test. Unlike the Sticker in the present case,

however, the disclaimer in *Freiler* *openly referenced the Biblical version of Creation*, and encouraged students to consider religious theories on origin.

The disclaimer stated:

It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence *or dissuade the Biblical version of Creation* or any other concept.... Students are urged to exercise critical thinking and gather all information possible and *closely examine each alternative* toward forming an opinion.

Id. at 341 (emphasis added). Thus, the endorsement test served the purpose of analyzing whether a reasonable observer, upon seeing the disclaimer's reference to religion and its encouragement to students to consider religious theories on origin, would think that the school was endorsing religion. It is also relevant that in *Freiler*, the court found that the school district did act with a religious purpose – “namely the protection and maintenance of a particular religious viewpoint.” *Id.* at 344-45. However, where a school acts with no religious purpose, and where the “act” in question is wholly secular with no religious content, then it is irrelevant what a reasonable observer would think.

Even when courts are not applying the endorsement test, no government action that is devoid of any religious purpose and that is secular on its face has ever been found to violate the Establishment Clause. In

Edwards v. Aguillard, 482 U.S. 578 (1987), the Supreme Court struck down a state statute that prohibited the teaching of evolution ***unless the biblical account of creation was also taught***. The Court did not get to the “effects” prong of the *Lemon* test as it found that that statute did not have a valid secular purpose, but that “the Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose.” *Id.* at 597. *Edwards* is distinguishable from this case as the face of the statute required the teaching of a religious doctrine. It was not facially secular.

In *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Supreme Court struck down an Arkansas statute that prohibited the teaching of evolution. *Epperson* came out prior to the adoption of the *Lemon* test or the “reasonable observer” test, and so it has limited value to the analysis of the case at hand. Despite this, not even *Epperson* supports the invalidation of a secular state law that was motivated by purely secular purposes. In *Epperson*, the ***state acted with a blatant religious purpose – to promote the biblical account of Creationism***. The Court stated,

In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas'

law may be justified by considerations of state policy other than the religious views of some of its citizens.

Id. at 107; *see also McLean v. Arkansas Bd. of Educ.*, 529 F.Supp. 1255 (E.D. Ark. 1982)(striking down a statute that *required balanced treatment of creation science and evolution* in public schools); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975)(finding a statute that required a disclaimer to accompany all theories of origin *except the biblical theory of creation* violated the Establishment Clause).

Thus the District Court has radically expanded the scope of the “reasonable observer” test, when it found that a Sticker with no religious content, nonetheless violated the Establishment Clause. The Establishment Clause was never meant to place such a disability on Christians.

B. The District Court’s Opinion Restricts Christian’s Ability To Participate In The Political Process.

When the District Court’s opinion is trimmed down to its roots, it is overturning a secular law simply because it was well known that Christians supported the law. The District Court found that the School Board did not act with any religious purpose. In addition, the District Court found that the Sticker itself had no religious content. However, the District Court concluded that because it was well known that Christians wanted the Sticker, the reasonable observer would think that the school was siding with the

Christians on this issue, and thus was endorsing religion by placing the Stickers on textbooks.

This argument was addressed and dismissed by the Supreme Court in *Bowen v. Kendrick*, 487 U.S. 589 (1988). “We also see no reason to conclude that the AFLA serves an impermissible religious purpose simply because some of the goals of the statute coincide with the beliefs of certain religious organizations.” 487 U.S. at 604 n.8 (citing *Harris v. McRae*, 448 U.S. 297, 319-320 (1980); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

The District Court’s misapplication of the Endorsement Test actually punishes religious people for participating in the political process. In James Madison's words, the State is “punishing a religious profession with the privation of a civil right.” 5 Writings of James Madison 288 (G. Hunt ed. 1904). In *McDaniel v. Paty*, 435 U.S. 618 (1978), the Supreme Court struck down a Tennessee constitutional provision that prohibited ministers from holding public office. The Court noted that “the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions.” *Id.* at 626; *see also* *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In addition, the Court noted the importance of participating in the

political process. “Tennessee also acknowledges the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention.” *Id.* The Court pointed out the problem in that “under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other.” *Id.*

In the same way, the District Court’s opinion conditions the exercise of one right on the surrender of the other. In order to participate in the political process, religious individuals must now hide their religion for fear that the law they support may be struck down. By invalidating the Stickers simply because it was well known that Christians supported them, the District Court’s opinion punishes Christians for acting on their religious beliefs by participating in the political process.

C. The District Court’s Radical Expansion Of The “Reasonable Observer” Test Would Invalidate Laws Recognizing Religious Liberty.

In *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court ruled that the first amendment did not require an exemption from the Oregon statute criminalizing the use of peyote. Following that decision, the Oregon legislature revised the criminal code to create an exemption for the use of peyote where it is part of

religious practice. *See* Or. Rev. Stat. § 475.992(5) (1995). A “reasonable observer” would be compelled to conclude that the legislature’s action reflected either sympathy with the religious group affected or a sign of their political influence. Nonetheless, the statute was more or less invited by the Supreme Court in its opinion. “But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.” *Dep’t of Human Res. v. Smith*, 494 U.S. 872, 890 (1990).

There can be no question that in this case the school board was attempting to address concerns that parents of the school district had expressed regarding the negative effects the textbook’s treatment of religion was having on their ability to exercise their religious liberty. To the extent that the school district, as the district court specifically found, had a secular purpose in adopting a policy to address this concern, it would be nonsensical to suggest that the first amendment would nonetheless prohibit such accommodation because it would be perceived by the reasonable observer to be in response to “pressure” from the affected religious group. Any state effort to find an accommodation for religious liberty will inevitably be perceived—correctly—as a response by the state to the influence of religious

groups. But to say that such accommodation is unconstitutional would stand first amendment liberty on its head.

CONCLUSION

The Stickers contain no religious content. The Stickers were not placed on textbooks to further any religious purpose. No, the only reason the District Court invalidated the Stickers was because it thought a reasonable observer might think that the School was endorsing religion because it was well known that Christians supported the Stickers. In so ruling, the District Court has radically expanded the “reasonable observer” test to reach an absurd result. No other case cited by the Court, or either party, has invalidated a secular state action that was devoid of a religious purpose. The District Court’s ruling should be reversed.

CERTIFICATE OF COMPLIANCE

I certify that this **Brief of Amicus Curiae** compiles the type-volume limitations set for in FRAP 32(a)(7)(B). This Brief contains 3,333 words.

/s/ Kevin H. Theriot
Kevin H. Theriot
Florida Bar No. 0136761
Joel L. Oster
Florida Bar No. 0659746
Alliance Defense Fund
15660 W. 135th St.
Olathe, Kansas 66062
Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I **CERTIFY** that on the 18th day of April, 2005, the undersigned served upon those persons listed below a copy of the within and foregoing **Brief of Amicus Curiae** Alliance Defense Fund via first class mail.

Gerald Weber, Esq.
Margaret F. Garrett, Esq.
American Civil Liberties Union
70 Fairlie Street, NW, Suite 340
Atlanta, GA 30303-2100

Jeffrey O. Bramlett, Esq.
David G. H. Brackett, Esq.
Bondurant, Mixon & Elmore
Suite 3900, IBM Tower
1202 W. Peachtree Street
Atlanta, GA 30309

/s/ Kevin H. Theriot
Kevin H. Theriot

