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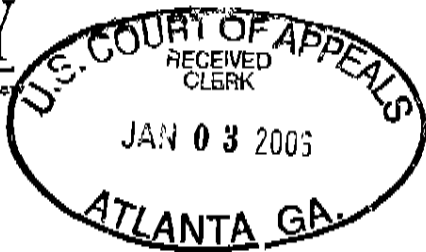
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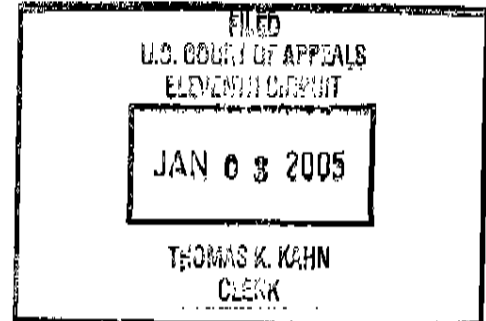


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January 3, 2005

Mr. Thomas K. Kahn
Clerk of Court
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, NW
Atlanta, GA 30303



Re: Cobb County School District, et al. v. Jeffrey Michael Selman, et al.
Court of Appeals Nos. 05-10341-I and 05-11725-II

Dear Mr. Kahn:

As directed by the Court, this is counsel's response to the factual matters asserted in Mr. Bramlett's letter of December 22, 2005, and with respect to the arguments in Appellants' Briefs regarding the timing of petitions filed with the School Board concerning the science textbook adoption. As noted in oral argument before this Court, the District Court's Order relied heavily upon its finding that the portion of the sticker which refers to evolution as a "theory, not a fact" was specific language suggested by religiously motivated citizens, including Marjorie Rogers. (R4-98-7, 26-27, 33, 39). The Order found that Ms. Rogers wrote a letter to the School Board two weeks before the adoption of the sticker suggesting a disclaimer, and that she submitted a petition signed by 2300 citizens requesting a disclaimer before the Sticker was adopted (R4-98-26-27).

While there are obviously some problems with the record, two facts are clear. The record contains no letter from Ms. Rogers preceding the sticker adoption on March 28, 2002. There is also no petition in the record tendered to the School Board prior to March 28, 2002 supporting the "theory not a fact" language. There are numerous petitions in the record both supporting and opposing the curriculum changes which were being considered by the School Board. All of these relate to changes in the policy and curriculum after the sticker had already been adopted. (See, e.g., Defendants' Exhibit 8 (Debra Power Petition dated September 20, 2002)).

With a couple of exceptions, both parties have consistently taken the position, both before and after the trial of this matter, that the document which has been referred to as "Marjorie Rogers' Petition" was the petition dated September 26, 2002. Likewise, I believe that this is the only document which echoes the specific language "the theory of evolution is not a fact and that it should be critically considered."

The Consolidated Pretrial Order lists only one petition as an Exhibit for Plaintiffs, identifying Exhibit 7 as "Marjorie Rogers' Petition." (R2-59, Attachment G-1 (a portion of which is attached hereto as Exhibit "A")).¹ Ms. Rogers is listed as a possible witness for Plaintiffs, and her anticipated testimony "concerns the petition she presented to the School Board and discussions with the School Board members and her statement to the School Board that both theories must be taught." (R2-59, Attachment F-1). After the Pretrial Order had been entered, Plaintiffs filed additional documents which they identified as "original discovery materials." (R3-77). That filing includes a single "Petition" at Exhibit 45, which is a portion of the September 26 petition (a portion of which is attached hereto as Exhibit "B").

At the conclusion of the trial, the parties jointly submitted a group of documents to the District Court pursuant to a stipulation, which was subsequently misplaced. The only portion of that stipulation which was part of the record on appeal was Plaintiffs' Amended Notice of Filing, which included only two documents, portions of the September 26 petition and a letter dated September 20 (R4-96)(a portion of which is attached as Exhibit "C"). The parties have submitted a replacement set of documents to the District Court in an effort to recreate that Stipulation, but I am confident neither set of documents included a petition from March 2002, since I have never seen such a document.

After trial, Plaintiffs' proposed Findings of Fact and Conclusions of Law (R3-76) state that the language of the sticker was prompted by citizen complaints, citing as one piece of evidence in support Exhibit 54, which is a letter by Ms. Rogers dated September 26, 2002 (Findings of Fact, Nos. 18-21). These proposed findings by Plaintiffs also suggest that the petition at issue, the only petition mentioned, "a petition with 2000 signatures" was presented to the Board "after the Board passed the disclaimer," again citing to the September 26 petition (Findings of Fact, Nos. 25-26, attached hereto as Exhibit "D"). Plaintiffs later amended their proposed Findings of Fact and Conclusions of Law (R4-91). Again, the only petition mentioned is the September 26 petition:

A petition was presented to the Board. It expressed "support for the disclaimer" and "open discussion about the theory of evolution as well as other legitimate, scientific views concerning the origin of life, such as intelligent design." Notice of Filing Original Discovery Material, Ex. 45.

(Amended Findings of Fact, Nos. 39-40)(a portion of which is attached hereto as Exhibit "E").

These consistent references to the September 26 petition as "the petition" were repeated in every Brief filed on appeal. Appellants' Briefs asserted that the District Court had erred in its findings regarding the timing of the petition, because that was consistent with the position both parties had maintained that a single petition was presented by Marjorie Rogers on September 26, 2002,

¹Although this exhibit was apparently never admitted into evidence, defense counsel mistakenly believed that it had been, which is why it was referenced in Appellant's Brief at 29, n. 4.

and because counsel is not aware of the existence of any other such document. Appellees' Brief pointed to the September 26 petition as supporting Ms. Rogers' testimony suggesting that the Board distinguish between a theory and a fact (Appellees' Brief at 12 n.38 (citing R3-77)). Appellees' Brief implicitly acknowledged that the District Court's findings regarding the timing of the petition may be in error, asserting that the Sticker was prompted by citizen comments regardless of the timing of the petition. (Appellee's Brief at 25, n. 59). Based on my recollection, Appellees acknowledged this error in oral argument as well.

In contrast to the consistent evidence supporting the idea that the "petition" references in this litigation related to the September 26 petition, the idea that there was a petition presented to the board in March appears to be based primarily upon a media report which was not in the record. In August 2003, Plaintiffs tendered an affidavit in response to Defendants' Motion for Summary Judgment asserting that there was another petition which was lost. (Letter from Jeff Bramlett, Exh. H).² Other than a passing reference in the Summary Judgment Response by Plaintiffs, this idea was never repeated in any of the pleadings or at trial. The District Court's extensive Order gives no indication that the court is relying upon a missing petition. None of the individuals who could have supported the allegation that there was a missing petition testified at trial, nor apparently was any effort made to seek this missing document through a Subpoena to the media or the school district.

The District Court's Order relied upon the testimony of Marjorie Rogers and Superintendent Joseph Redden as supporting the conclusion that a petition signed by 2300 individuals was the basis for the language in the sticker. A close reading of the evidence shows that, while there were certainly citizen comments and complaints objecting to the improved evolution curriculum, there was not a basis for finding that a 2300 signature petition asking that evolution be characterized as "theory" was the impetus for the sticker's language. The timeline of events is critical. First, the period for public review of the textbooks extended from February 18 through March 8, 2002. (R3-77, Exhibit 42). Ms. Rogers comments concerning the textbooks were dated February 26. (*Id.*) Ms. Rogers testified that she had a number of opportunities to comment on the texts, beginning with her written comment cards, and including a working meeting on the curriculum and the final vote on the texts, which occurred on or about March 28. (R6-33; see R6-187-188, 191-192).

² Ms. Powers' affidavit states that a petition "containing over 2000 signatures" was "submitted to the Cobb County School Board by Marjorie Rogers as reported in Ms. MacDonald's August 2002 article referencing the March 2002 Cobb County School Board meeting." The affidavit implies the petition was submitted in March, but does not clearly assert that fact, repeating the reporting date three times within the affidavit. The media report from March 2002 (Bramlett letter, Exh. I) states that Ms. Rogers told the Board that she had petitions signed by 2300 parents "dissatisfied with the science texts", not that a petition was submitted in March. While not in the record, September 2002 articles by the same reporter variously asserted that this petition "eventually included 2000 names" or that it was "signed by nearly 2000 parents."

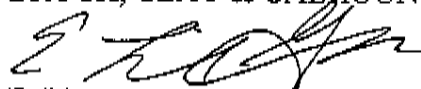
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Ms. Rogers testimony does not identify the date she may have submitted a petition to the Board, but it clearly shows that it could not have been until after the working meeting following her review of the textbooks. The decision to begin seeking signatures "wasn't immediate". (R6-38). Ms. Rogers started to gather signatures after the working meeting. (Id.) Upon information and belief, the document which Ms. Rogers discussed at trial, which was not entered into evidence, was simply notes reflecting her verbal statements made as an individual to the School Board in the working meeting, and not a 2300-signature petition.

Similarly, although Superintendent Redden testified that there was a "petition" presented prior to adoption of the sticker, he did not specifically recall the petition, and apparently was confused by the nature of the questioning, since he was never shown any document to identify. He specifically recalled that there was a "presentation at the meeting", and that the language of the sticker "was framed by the School Board with advice from our law firm." (Redden deposition, pp. 27-28). At trial, he clearly stated that the School Board received a number of petitions on the subject of evolution instruction, but that the first time he ever heard the idea of adding a sticker to the book was from Board member Lindsey Tippins, not from Ms. Rogers. (R7-245-246 (reiterating deposition testimony that "the first time he heard about it in a public meeting it was raised by Mr. Tippins"); see R7-260).

In summary, I very much appreciate the panel's careful attention to the factual details of this case. While the record is not perfectly clear, the evidence does not support the key factual findings that a petition and letter from Marjorie Rogers were the basis for the sticker's accurate characterization of evolution as a theory. Board members received a variety of input from a number of sources, including Ms. Rogers, but no petition or letter were ever entered into evidence. If you should have any questions, please do not hesitate to call me.

Sincerely,
BROCK, CLAY & CALHOUN, P.C.



E. Linwood Gunn, IV
For the Firm

ELG:sls

Enclosure

cc: Hon. Edward E. Carnes
Hon. Frank M. Hull
Hon. William H. Pryor, Jr.
Jeffrey Bramlett, Esq.

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