No. 85-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWIN W. EDWARDS, *et al.*,

Appellants,

—v.—

DON AGUILLARD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND AMERICANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE*, IN SUPPORT OF APPELLEES

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Questions Presented

I. Whether the Louisiana Balanced Treatment Act's Requirement of Teaching the Biblical Account of Creation Constitutes the Teaching of Religious Doctrine as a Matter of Law.

II. Whether the Louisiana Balanced Treatment Act's Requirement of Teaching the Biblical Account of Creation Violates the First Amendment Establishment Clause.

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Amici support the position of appellees and respectfully submit that the judgment of the United States Court of Appeals for the Fifth Circuit in the above captioned case be affirmed.[1]

STATEMENT OF THE CASE

Amici incorporate the statement of the case as set forth in the Brief for the Appellees.

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1. Appellants and Appellees have consented to the filing of this brief and their letters of consent are filed with the Clerk of the Court.

This brief was prepared with the assistance of Richard Gribetz, a legal intern at the Anti-Defamation League.

INTEREST OF THE *AMICI CURIAE*

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the League has previously filed as friend-of-the-court in numerous cases dealing with prayer and other religious activities in the public schools, *see, e.g.*, *Bender v. Williamsport*, 106 S.Ct. 1326 (1986); *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985); *Widmar v. Vincent*, 454 U.S. 263 (1981); and *Abington v. Schempp*, 374 U.S. 203 (1963). In the instant case, the League also filed a brief in the lower court. *Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir. 1985). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The Anti-Defamation League submits the accompanying brief because we believe the instant case raises serious questions concerning government support of religion in contravention of the establishment clause of the first amendment.

Americans for Religious Liberty (ARL) is a non-profit, nationwide educational organization whose members represent the entire religious spectrum. ARL is dedicated to defending religious liberty for all persons. It maintains the defense of religious liberty requires the strictest adherence to the constitutional principle of separation of church and state, and that strict religious neutrality is required of our public schools by the first amendment.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

"Religion is science, and science is religion." Is the world turned on its head? With Orwellian logic, appellants and other proponents of "scientific creationism"[2] blur the distinctions between religion and science in an effort to take their literal Biblical doctrine of creation into the Louisiana public schools.

Appellants argue the literal Biblical account of creation—a Fundamentalist religious tenet—is "science" so that it may be taught in the public schools over the first amendment establishment clause bar. They would like creationism to be treated simply as a matter of free speech, under so-called "academic freedom" or "neutrality principles." *See, e.g.*, La.Rev.Stat. § 17:286.2; Brief of Appellants at 36-37, 45. Yet these principles may not be applied to creationism because it involves the teaching of religion. Only in public forums where there is no danger of government sponsorship may religion be treated in the same fashion as non-religion. *E.g.*, *Saia v. New York*, 334 U.S. (1948). In the public schools, the distinction between teaching religion and non-religion must be preserved, as difficult as that may be. The reason is the state sponsorship—the public school system requires government land, governmentally mandated attendance, government employees, and a government goal of educating our young citizenry. Thus, if the

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2. The nature of the movement is discussed in detail in *McLean v. Arkansas*, 529 F. Supp. 1255, 1258-1260 (E.D. Ark. 1982). The court traced the term "scientific creationism" to 1965 and to anti-evolutionary publications by Fundamentalists. Fundamentalism is defined as a religious movement which began in revolutionary America as part of Evangelical Protestantism's response to social changes, new religious thought and Darwinism. *McLean*, 529 F. Supp. at 1259. Creationism is characterized as one of the beliefs of "current Fundamentalists who emphasize the literal interpretation of the Book of Genesis as the sole source of knowledge about origins." *Id.* For an extensive discussion of the creationist movement, *see* D. Nelkin, *The Creation Controversy* (1982).

public schools inculcate religion, the result is government sponsorship and advancement of religion in violation of the first amendment establishment bar. *See Grand Rapids v. Ball*, 105 S. Ct. 3216, 3224 (1985).

Moreover, the teaching of creationism in the public schools constitutes the teaching of sectarian religious doctrine. The literal Biblical account of creation is a Fundamentalist religious tenet, *see Epperson v. Arkansas*, 393 U.S. 97, 108 (1968), one not shared by other religions. Accordingly, the instant statute provides not only for support of religion generally but for a preferential support of religion violating both first and fourteenth amendment principles. *See Larson v. Valente*, 456 U.S. 228 (1982).

Let us take appellants' second assumption, reflected in prior drafts of the instant Act: "science is religion." Based on this premise, which further indicates their religious purpose, they argue the public schools may no longer teach evolution exclusively because that would constitute the "anti-religion." If science is taught, then the Biblical account, another "belief" about creation, must be taught. *See* Bird, Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 Yale L.J. 515 (1978) [hereinafter Bird, Note]. This contention is further reaching than the first for it sounds in both free exercise and establishment.

As an establishment matter, appellants allege that the teaching of evolution alone, unaccompanied by other theories, constitutes an impermissible preference accorded to nontheist religions. *See* prior draft of instant Act at § 6. (JA E114.) But the argument fails; for the courts have long recognized that the teaching of science does not, without more, constitute religion and therefore cannot raise an establishment problem in the public schools. *See Epperson*, 393 U.S. 97; *McLean*, 529 F. Supp. at 1274. *See also Willoughby v. Stever*, No. 15574-75 (D.D.C. May 25, 1973); *aff'd*, 504 F.2d 271 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *Wright v. Houston*, 366 F. Supp. 1208 (S.D. Tex. 1978), *aff'd*, 485 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974). Moreover, in the

absence of government sponsorship of religion, this Court has recognized that the secular program in the public schools, does not in itself pose an establishment problem. *See, e.g., Abington*, 374 U.S. at 225 (rejecting the notion that "religion of secularism" is established with disallowance of religious exercises); *see also Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (state is not "preferring those who believe in no religion nor those who do believe.")

Last, appellants implicitly raise an argument in free exercise. Prior drafts of the instant Act would protect the teaching of creationism by claiming the teaching of evolution conflicts with the religious freedom of students and parents; *see* Senate Bill 86. (JA E290, 292.) and it therefore must either be eliminated from the curriculum, "neutralized," *see* Bird, Note, *supra*, at 555, or "balanced" as in the instant Act. But the proposal that evolution must be eliminated from the curriculum was rejected as unconstitutional in *Epperson*, 393 U.S. at 106. Post *Epperson*, appellants would continue to oppose evolution at its every teaching. Yet, the teaching of science ought not present a religious conflict, for its teaching—as that of other secular subjects in the public schools—implies no belief and requires no oath taking. *See Wright*, 366 F. Supp. at 1212. If a conflict exists in individual cases there are accommodations other than eliminating the teaching of science from the school curriculum. *Id.* In seeking to inculcate all students with the religious doctrine of creationism, in contravention of establishment concerns, *see Grand Rapids*, 105 S. Ct. at 3224, the present statute creates more religious liberty problems than it solves. *See Thornton v. Caldor*, 105 S. Ct. 2914 (1985).

The public schools need not—and indeed may not—forgo their government purpose of forging fundamental common values among our citizenry—a purpose necessary to our democratic system of government. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972); *West Virginia v. Barnette*, 319 U.S. 624 (1943). Once and for all, let us put to rest the notion that excluding religious dogma is itself religious dogma. If the

schools were advocating hostility to religion that would be religious dogma. *See Abington*, 374 U.S. at 225. But that is not this case. Yet appellants, in supporting the Act at issue, suggest that it is. This Court found that purpose to promote religion to be unconstitutional in *Epperson*, 393 U.S. at 109. It continues to be unconstitutional today. Beyond evincing this religious legislative purpose, the Louisiana Act threatens other establishment concerns: by mandating state instruction of the literal Biblical account of creation, it has the effect of chilling religious liberty in our public schools. During the school-age years, religion is a matter for parent and child, and for the church—not for the school and the state.

ARGUMENT

I. THE LOUISIANA BALANCED TREATMENT ACT MANDATES THE TEACHING OF THE BIBLICAL ACCOUNT OF CREATION WHICH CONSTITUTES A RELIGIOUS TENET AS A MATTER OF LAW. GOVERNMENT PROMULGATION OF RELIGIOUS DOCTRINE TRIGGERS FIRST AMENDMENT ESTABLISHMENT REVIEW.

The Louisiana Act requires public schools to "give balanced treatment to creation-science and to evolution-science." La. Rev. Stat. § 17:286.4(A). This requirement mandates that every teaching of evolution be opposed by the Biblical account of creation. The statute requires state sponsorship of a religious doctrine triggering first amendment establishment review.

Pursuant to any definition of religion, the teaching of the Biblical account of creation constitutes the teaching of a religious tenet as a matter of law. This Court has already defined the literal interpretation of the Book of Genesis regarding the origins of man as a "particular religious doctrine." *Epperson*, 393 U.S. at 103.

This Court has found in its many considerations of government sponsorship of religious activity that the question of whether the activity at issue is religious is a question of law for the court. In *Lynch v. Donnelly*, Justice O'Connor declared: "whether a government activity communicates endorsement of religion is not a question of . . . fact . . . the question is . . . in large part a legal question to be answered on the basis of judicial interpretation of social facts." 104 S. Ct. 1355, 1369 (1984) (O'Connor J., concurring).

In its many cases invalidating government sponsorship of religious activities in the public schools, the Court has found certain activities to be inherently religious; these include religious instruction, even where multidenominational, *McCollum v. Board of Education*, 333 U.S. 203 (1948); state mandated school prayer, *Engel v. Vitale*, 370 U.S. 421 (1962), and Bible reading, *Abington*, 374 U.S. 203. *See also Lubbock v. Lubbock*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982).

That the teaching of creationism is inherently religious follows from the Court's characterization of the Biblical account of creation as "a particular religious doctrine," *Epperson*, 393 U.S. at 103, and from the Court's characterization of Bible study; "[s]urely the place of the Bible as an instrument of religion cannot be gainsaid." *Abington*, 374 U.S. at 224. The doctrine's God-centeredness is also inherently religious. *See* U.S. Const., Article VI, cl. 3; *Torcaso v. Watkins*, 367 U.S. 488 (1961). *Abington* and *Torcaso* recognize the religious nature of Biblical reading, outside of other contexts, and the religious nature of oaths regarding beliefs in God as a matter of law.

This was also the finding of the court below: "We approach our decision in this appeal by recognizing that irrespective of whether this is fully supported by scientific evidence, the theory of creation is a religious belief." 765 F.2d at 1253. In evaluating a similar Arkansas Balanced Treatment Act in

McLean, 529 F. Supp. at 1266, the court held "the idea of sudden creation from nothing, or creation *ex nihilo*, is an inherently religious concept."[3]

Appellants would deny the inherent religiosity of creationism and claim instead that whatever religious aspects there may be are mere coincidences. They would turn to nontheistic definitions of religion to argue that the creationism tenet of the belief in God as creator is immaterial. *See* Brief of Appellants at 18-19.

Yet, under any definition of religion, no matter how restrictive or expansive, the proposed doctrine of teaching the Biblical account of creation is per se religious. *Compare United States v. Macintosh*, 283 U.S. 605, 633-634 (1931) ("the essence or religion is belief in a relation to God") *with United States v. Seeger*, 380 U.S. 163, 176 (1965) ("a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the [orthodox] belief in God . . ."); *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (a "depth of religious conviction" test) *and* Tribe, *American Constitutional Law* 828 (1978) (anything that is "arguably non-religious" for establishment purposes).

That the Court has held religion may include more than God-centered beliefs does not, as appellants argue, *see* Brief of Appellants at 18-19, mean the reverse is true. That is, while a God-centered doctrine is not the sine qua non of what is "religious" for constitutional purposes, it is sufficient. It is per

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3. Two state attorneys general have also rejected the balanced treatment approach. *See* Balanced Treatment for Scientific Creationism and Evolution Act, Op. Att'y Gen. No. 79-126 at 179, 186, 194 (S.C. Nov. 8, 1979) (because creation-science is "most probably a religious doctrine," balanced treatment legislation would "most probably . . . violate the First Amendment"); Public Funds for Textbooks Presenting Evolutionary Theory of Origin Only—"Neutrality Requirements" *in* First Amendment, 58 Op. Att'y Gen. 262, 263, 270 (Cal. 1975) (no court would require Board of Education to give balanced treatment to creation-science because of its "status as a religious belief").

se religious as the court below found. 765 F.2d at 1253. *See also Epperson*, 393 U.S. at 103.

The teaching of beliefs in God, the Creator and Biblical accounts of the Creation, appellants claim, are mere "coincidences"—"harmonious" with other religious tenets, *see* Brief of Appellants at 23, relying on either tradition cases or de minimis government sponsorship of religious activities. *See* Brief of Appellants at 47, *citing McGowan v. Maryland*, 366 U.S. 420 (1961). Yet the blue laws sustained in *McGowan* are fundamentally different from the Louisiana statute. The blue laws themselves did not mandate a religious activity per se such as church attendance; instead they mandated a secular activity—the closing of shops—for a religious purpose. Over the years the religious purpose for the holiday, the Court found, became mixed with other secular purposes. In contrast, as found by the court of appeals below, the instant Act's requirement of teaching religious doctrine is religious as a matter of law. *See* 765 F.2d at 1251, *distinguishing McGowan*, 366 U.S. at 442.[4] Accordingly, its sponsorship by the state of Louisiana requires establishment review.

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4. Other examples of so-called comparable non-religious activities appellants rely on are "In God We Trust" on our currency, prayers in the legislature, etc. Appellants claim these cannot be "religious" since they have been sustained by the Court. This circular reasoning will not save appellants' logic. There is no question that activities such as prayers in the legislature are religious, yet the Court has found these involve minimal government sponsorship and are therefore tolerable "expressions of religious beliefs" and "acknowledgments of our religious heritage." *See Lynch*, 104 S. Ct. at 1361. In contrast, unlike the de minimis cases relied on by appellants, the religious activity herein involves extensive government sponsorship, triggering establishment review.

II. THE LOUISIANA BALANCED TREATMENT ACT IS UNCONSTITUTIONAL UNDER THE ESTABLISHMENT STANDARD OF THE FIRST AMENDMENT. THE ACT BURDENS THE TEACHING OF SCIENCE TO SERVE A RELIGIOUS PURPOSE; IT REQUIRES THE TEACHING OF THE GENESIS ACCOUNT OF CREATION, A RELIGIOUS DOCTRINE, AND ACCORDINGLY ADVANCES RELIGION AND IT EXCESSIVELY ENTANGLES THE STATE IN RELIGIOUS MATTERS; AND IT PREFERS CERTAIN FUNDAMENTALIST RELIGIONS OVER OTHERS, THUS VIOLATING THE RELIGIOUS NEUTRALITY REQUIRED OF GOVERNMENT BY THE FIRST AND FOURTEENTH AMENDMENTS.

In evaluating state involvement with religion in the public schools, the Court has employed a longstanding test fully articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). According to this test, legislation will not offend the establishment clause only if the statute passes all three requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Wallace*, 105 S.Ct. at 2489, *citing Lemon*, 403 U.S. at 612-613. This test has been consistently used by the Court as concerns religious activities in the public schools, notwithstanding appellants' assertions to the contrary. *See* Brief of Appellants at 29. In the last term, the Court reaffirmed the vitality of the *Lemon* standard, "We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children."[5] *Grand Rapids*, 105 S. Ct. at 3222. It applies in this case.

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5. Last term, in invalidating silent prayer legislation in the public schools, the Court distinguished the analysis of legislative prayers as legitimated by historical precedent, justifying eschewal of the *Lemon* test, *see Marsh v. Chambers*, 463 U.S. 783 (1983). In light of the absence of

Another standard applies where government not only supports religion in general, but prefers one or more religions in particular. Such a denominational preference invokes a strict scrutiny test. *See Larson v. Valente*, 456 U.S. 228 (1982) (striking Minnesota tax statute affording preferential tax exemptions to certain religions). In prescribing that only one religious view of creation be taught along with science, the Louisiana Act at issue triggers this test as well. It unconstitutionally prefers the Fundamentalist Christian religions. Accordingly this case presents a twofold establishment—the unconstitutional promotion of religion both preferentially and generally. As discussed *infra* the Act's unconstitutional religious purpose simultaneously predicates the absence of a compelling government interest under the *Larson* strict scrutiny test and reflects the intended effect of advancement of religion in our public schools. The Balanced Treatment Act is unconstitutional under *Larson* and pursuant to all three prongs of the test set forth in *Lemon v. Kurtzman*.

A. The Louisiana Balanced Treatment Act Unconstitutionally Burdens the Teaching of Science for a Religious Purpose and No Secular Purpose; As Such, It Violates the First Amendment Establishment Clause.

1. The Text, Context and Legislative History of the Louisiana Act Reflect an Unconstitutional Religious Purpose and No Secular Purpose.

The instant Act is unconstitutional for the same reasons rendering the Arkansas statute unconstitutional in *Epperson*. The purpose behind the legislative statute in *Epperson* was to eliminate the teaching of evolution. Post *Epperson*, this proposal returns to the Court with modified language. Instead of providing for the elimination of the teaching of evolution

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comparable history regarding the public schools, *see Wallace*, 105 S. Ct. at 2503 (O'Connor, J., concurring), the *Lemon* test clearly applies to the public schools.

already deemed unconstitutional in *Epperson*, appellants would "neutralize," *see* Bird, Note, *supra*, at 555, or "balance," that teaching. *See* La. Rev. Stat. § 17:286.4(A). Yet the purpose is the same. It is to oppose the teaching of science for a religious reason—a purpose held to be an impermissible establishment in *Epperson*. Pursuant to the first amendment establishment inquiry, unlike other constitutional analyses, and appellants' arguments to the contrary, *see* Brief of Appellants at 34-35, otherwise facially neutral legislation may be unconstitutional, because of impermissible legislative motivation. *Compare Wallace*, 105 S. Ct. at 2495; *Stone v. Graham*, 449 U.S. 39 (1980); *Abington*, 374 U.S. 203; *May v. Cooperman*, 780 F.2d 240, 251 (3d Cir. 1985), *with Palmer v. Thompson*, 403 U.S. 217 (1971); *United States v. O'Brien*, 391 U.S. 367 (1968); *United States v. Darby*, 312 U.S. 100 (1941). *See Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 685 (1980). The legislature may simply not act with a religious purpose.

The importance of a secular legislative purpose was reaffirmed in *Wallace*. This Court asked if the statute was motivated by "any clearly secular purpose," 105 S. Ct. at 2481, and "whether government's actual purpose is to endorse or disapprove of religion." *Id.* at 2490.

In determining legislative intent, the Court has looked to a statute's text, context, and legislative history. *See Wallace*, 105 S. Ct. at 2479 (1985); *Stone*, 449 U.S. 39. *See, e.g., Widmar*, 454 U.S. at 211 n. 10. These factors point to the Louisiana Balanced Treatment Act's unconstitutional purpose.

a. **The Text of the Louisiana Act Evinces an Exclusive Religious Purpose.**

As the court below found, "the plain language of the Balanced Treatment Act convinces us that it has no secular legislative purpose." 765 F.2d at 1257. Since the legislative proposal does not "balance" all curricula regarding the origin of man, but only evolution, it is clear from the Act's text that its purpose is to oppose evolution. *Id.* In *Wallace*, the Court

found the text of the statute, including insertion of language regarding prayer, indicated "the State intended to characterize prayer as a favored practice." 105 S. Ct. at 2492. The same is true of the Louisiana Act. The Act's express and exclusive selection of "creation-science" to oppose evolution indicates the clear state intent to endorse this religious doctrine. As the Court found in *Epperson*, "the law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read." 393 U.S. at 109. Similar examination of the text of the related Arkansas balanced treatment act in *McLean* led the district court to find "[b]oth the concepts and wording . . . convey an inescapable religiosity." 529 F. Supp. at 1265. *See Daniel v. Waters*, 515 F.2d 485, 491 (1975) (holding statute requiring equal emphasis for Biblical account of creation to present an establishment violation "patent and obvious on the face of the statute"). *See also Lubbock*, 669 F.2d at 1041 (policy on its face reflected 'no preeminent' secular purpose); *Karen B.*, 653 F.2d at 901. It is clear from the Louisiana statute's requirement that only the Biblical account of creation be given equal time with science that this is a religiously non-neutral purpose—unconstitutional under the first prong of *Lemon*.

b. Supporting the Religious Purpose Visible From the Text of the Balanced Treatment Act Are Its Historical Context and Legislative History.

i. Historical context

Even where the text of a statute is silent, this Court has gone beyond the legislature's express purpose to examine the context and legislative history of the statute. In *Epperson*, the Court looked toward prior similar legislation in other states, *i.e.*, the antecedent Tennessee "monkey law," *Scopes v. Tennessee*, 154 Tenn. 105, 289 S.W. 363 (1927), to conclude that it was likely to have prompted the changed Arkansas bill, resulting in the deletion of textual references to religion. Given this context, the Court maintained "fundamentalist sectarian conviction was the law's reason for existence." 393 U.S. at 108.

The historical context of the instant Louisiana Balanced Treatment Act, like the Arkansas bill in *Epperson*, reflects unconstitutional purpose, as the court held below. 765 F.2d at 1256 n. 9, *citing Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977). Analyzing the religious purpose of similar legislation in other states, including Arkansas and Texas, the court below noted the Balanced Treatment Act's context within the national creationist movement. "Nor can we ignore the fact that throughout the years religious fundamentalists have publicly scorned the theory of evolution and worked to discredit it." 765 F.2d at 1256.[6]

The posture of the instant Act within the history of the creationist movement, *see McLean*, 529 F. Supp. at 1258-59, reflects the deliberate and progressive development towards the instant legislative scheme. In *Epperson*, the Court first considered the Fundamentalist post-*Scopes* effort to burden or "blot" out the teaching of evolution "because of its supposed conflict with the Biblical account, literally read." 393 U.S. at 108-109, *citing Scopes*, 154 Tenn. 105, 289 S.W. 363. Post *Epperson*, the movement's challenges to evolution continued, grounded on free exercise claims. *See Crowley v. Smithsonian Institution*, 636 F.2d 738 (D.C. Cir. 1980); *Wright*, 366 F. Supp. 1208; *Willoughby*, No. 15574-75 (D.D.C. May 25, 1973), *aff'd*, 504 F.2d 271. These free exercise claims in large part have been rejected by the courts. *See* this brief *infra* at 26-29.

Having lost these battles, the creationist movement continues to oppose the teaching of evolution by providing for "balancing" treatment. One such legal challenge occurred in Tennessee, with the "equal-time" Bible reading statute in

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6. For cases describing this history see *Epperson*, 393 U.S. at 98-107; *Aguillard*, 765 F.2d at 1256; *Crowley v. Smithsonian Institution*, 636 F.2d 738, 741-43 (D.C. Cir. 1980); *McLean v. Arkansas Board of Education*, 529 F. Supp. 1255, 1258-60 (E.D. Ark. 1982); *Wright v. Houston Indep. School District*, 366 F. Supp. 1208, 1209-11 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974). *See also* D. Nelkin, *The Creation Controversy* (1982).

Daniel v. Waters. That Act burdened the teaching of evolution by requiring the inclusion of the "Genesis version of creation" and a disclaimer concerning the theoretical nature of evolution. 515 F.2d at 489. Almost identical balanced treatment acts followed in Arkansas, *McLean*, 529 F. Supp. 1255, and in Louisiana—the Act at issue in this case. As in *Daniel*, these statutes both involve equal time requirements for the Genesis account and disclaimers seeking to undermine the teaching of evolution. *See* La. Rev. Stat. § 17:286.4(A).

The close connection between the Act herein and the similar Arkansas Balanced Treatment Act held unconstitutional in *McLean*, 529 F. Supp. 1255, is reflected in the close relationship between the sponsors of the Arkansas bill and legislators working on the instant Act in Louisiana. *See* Letter from Paul Ellwanger, founder of the creationist organization Citizens for Fairness in Education, to Louisiana Senator Bill Keith, *McLean*, 629 F. Supp. at 1261. *See also id.* at 1262-1263.

ii. Legislative history

Either "[t]he face of the statute or its legislative history" may reflect unconstitutional religious purpose. *Wallace*, 105 S. Ct. at 2499 (O'Connor, J., concurring). The legislative history of the instant Act supports its original and longstanding religious legislative purpose. Noting in *Epperson* that the Arkansas law had "eliminated Tennessee's references to the story of the Divine Creation of man," this Court went on to hold, despite this rewording, that "there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which it was thought 'denied' the Divine Creation of man." 393 U.S. at 109. A similar analysis of antecedent legislation was key to the Court's purpose inquiry invalidating the silent prayer legislation in *Wallace*, 105 S. Ct. at 2491-2492. *See May v. Cooperman*, 780 F.2d 240, 252 (3d Cir. 1985) (affirming district court's purpose inquiry to New Jersey's facially neutral moment of silence statute by examining 20-year legislative history of "other less facially neutral efforts"). *See also McLean*, 529 F. Supp. at 1264; Project, *The Lessons of*

Creation-Science: Public School Curriculum and the Religion Clauses, 50 Fordham L. Rev. 1113, 1149 (1982).

The same progressive attempt to mask religious purpose is reflected in the instant Act's prior drafts. In June, 1980, the first proposed Senate Bill No. 956 made express religious references to God and the Bible. (JA E1.) This first proposal provided for balanced treatment by requiring that "any theory of evolution shall be presented only in conjunction with teaching creation." Bill No. 956 at § B. (JA E1 at 1b.) In this first proposal, the theory of creation *ex nihilo* is defined as "the belief that the origin of the elements, the solar system, of life, of all the species of plants and animals, the origin of man, and the origin of all things and their processes and relationships were created *ex nihilo* and fixed by God." Bill No. 956 at § A(2). (JA E1a.)

Subsequent drafts of this Act retained the original purpose to neutralize or eliminate evolution. While deleting references to God and inserting new protestations that the Act does not require teaching of religious doctrine, the bill states its legislative purpose is "prevent[ing] establishment of Theologically Liberal, Humanist, Nontheist, or Atheist religion." (JA E114.)

Last, Senate Bill No. 86, while eliminating the legislative purpose section characterizing evolution as a "religion" to be countered, continued to provide: "Evolution-science is contrary to the religious convictions . . . of many students and parents. . . . Public school presentation of any evolution-science without any alternative model of origins abridges protection of freedom of religion exercise." (JA E294.) These sections again reflect the religious animus behind the creationist movement first recognized in *Epperson*.

The religious purpose in the Louisiana Balanced Treatment Act's legislative scheme, its context within the national creationist movement, and its prior legislative history demonstrate that the Act's "pre-eminent purpose . . . is plainly religious in nature." *Stone*, 449 U.S. at 41. The government's "actual

purpose is to endorse . . . religion." *Wallace*, 105 S. Ct. at 2490.

Given this abundant indication of religious motivation, appellants may not rely on avowals of secular legislative purpose. When the text, context and legislative history of the statute indicate religious purpose, and "the secular purpose articulated by the legislature is merely a 'sham,' " *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748, 751, *citing Wallace*, 105 S. Ct. at 2494 (Powell, J., concurring), the Court will not defer to a secular pretextual purpose. *See, e.g., Stone*, 449 U.S. at 41-42; *Abington*, 374 U.S. at 223. *See also Wallace*, 105 S. Ct. at 2490; *May v. Cooperman*, 572 F. Supp. at 1561, 1571 (D.N.J. 1983), *aff'd*, 780 F.2d 240, 251. *Cf. Walz v. Tax Commission*, 397 U.S. 664 (1970).

Yet appellants seek to discount their religious purpose despite the many references in the record indicating such purpose. *See* this brief, *supra*, at 15-16. Notwithstanding, they claim their purpose is that of academic freedom. *See* La. Rev. Stat. § 17: 286.2; *see also* Brief of Appellants at 36-37, *citing* the Act's "official legislative history." Yet it is clear this purpose is mere pretext. "An 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." *Stone*, 449 U.S. at 41. Accordingly, the circuit below held the statute restricted rather than enhanced academic freedom. *See* 765 F.2d at 1257. To compel the teaching of creationism whenever evolution is taught, upon risk of sanction, is to restrict academic freedom. It reflects only a purpose to limit the teaching of evolution—the religious purpose found unconstitutional by this Court in *Epperson*.

B. Implementation of the Louisiana Balanced Treatment Act Would Involve the Public Schools in the Inculcation of Sectarian Religious Doctrine Advancing Religion in Contravention of the First Amendment Establishment Clause and Of Fourteenth Amendment Equal Protection Principles.

1. The Louisiana Balanced Treatment Act Mandates the Teaching of the Biblical Account of Creation, a Tenet of Sectarian Religious Doctrine, Constituting a Preferential Advancement of Certain Fundamentalist Religions Without a Compelling Interest.

The Louisiana statute requires, at every teaching of evolution, the teaching of the literal Biblical account of creation, a tenet of religious doctrine, as discussed *supra*. Moreover, in requiring the exclusive teaching of the Genesis account, according to sectarian Fundamentalist Christian religious doctrine, the statute constitutes a preferential advancement of particular Fundamentalist religions in violation of both first amendment establishment clause and fourteenth amendment equal protection principles.

Creationists would characterize the literal Genesis doctrine of creation as "Judeo-Christian" or "theistic," seeking the broadest appeal for their religious doctrine. *See* untitled prior bill at § f: "presentation of only evolution-science . . . produces hostility toward many theistic religions. . . ." (JA E117.) *See also McLean*, 529 F. Supp. at 1260-1262 (quoting Ellwanger, "I view this whole battle as one between God and anti-God forces"). Yet this characterization has generally been rejected by the courts, *see*, *e.g.*, *Epperson*, 393 U.S. at 108-109; *McLean*, 529 F. Supp. at 1258-59; *Wright*, 366 F. Supp. at 1211, and by Jewish, Protestant, and Catholic scholars. The medieval Jewish commentator Rashi noted that the Biblical account of creation, particularly its chronology, is not to be taken literally. Rashi, *Commentary on Genesis* 1:1. In this century, Rabbi Abraham Isaac Kook, former Orthodox Chief Rabbi of Israel, observed:

> It is absolutely immaterial to us whether life began from the bottom and rose from the lowest rung of existence toward a higher, and that it continues upwards. What we must recognize is that it is distinctly possible that man even after he has risen high, can forfeit everything by wickedness. . . . This is what we should learn from the story of Adam in paradise.

A.I. Kook, 10 *Encyclopedia Judaica* 1186 (1971). In contrast to those who would read Genesis literally and consider evolution as a threat to religion, Kook reconciled evolution with the traditional Jewish view of a continuously evolving world. *See id. See also* Orlinsky, *The Plain Meaning of Genesis 1:1-3, Enigmatic Bible Passages*, 46 Biblical Archaeologist 207-9 (original manuscript) (1983):

> Scientific Creationism, no matter how it is defined, has no basis in the Hebrew text of the Bible; it violates the meaning intended by the author of Genesis 1.1-3 and related passages. Moreover, by limiting itself to the Bible—as it must—it makes it impossible to understand correctly the biblical manner of explaining how the universe came to be; for the origins and historical setting of the biblical data can be comprehended properly only in the light of the ancient Near East, of which Israel was an integral part and by which it was so often and naturally influenced—and the Scientific Creationists would hardly advance or insist on the teaching of these extra-biblical materials as scientific or divinely inspired.

Id. See also L. Boadt, *Reading the Old Testament* 130-132 (1984); P. Tillich, *Systematic Theology* 253-270 (1951). The above references demonstrate that a broad spectrum of Jewish and Christian thinkers reject a literal understanding of the Biblical account of creation. *But see* Bird, Note, *supra* at 520 n. 21, *citing* Shapiro, *God, Man and Creation*, Tradition 25-26, 28-29 (1975) (Bird's reading of Rabbi Shapiro's article is incorrect. Shapiro does not advocate creationism; rather he refers to creation in the context of scriptural exegesis).

In *Larson v. Valente*, 456 U.S. 228 (1982), this Court held "the clearest command of the establishment clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. "When a state law grant[s] a denominational preference . . . precedents demand that . . . the law [be treated] as suspect and . . . strict scrutiny [applied] in adjudging its constitutionality." *Id.* at 246. The Louisiana Act, by requiring the teaching only of the Fundamentalist Christian account of our origins, grants such a preference. *See Epperson*, 393 U.S. at 107; *Scopes*, 154 Tenn. at 126, 289 S.W. at 369 (Chambliss, J., concurring) (characterizing Tennessee anti-evolution law as giving a "preference" to "religious establishments which have as one of their tenets or dogmas the instantaneous creation of man").

Pursuant to the *Larson* strict scrutiny test, appellants must demonstrate the Balanced Treatment Act "is closely fitted to further the interests that it assertedly serves." 456 U.S. at 248. The court of appeals, in analyzing the purpose which the statute assertedly serves—that of "academic freedom"—noted that the scheme of the statute failed to promote this interest. The teaching of creationism, required only if evolution was taught, "failed to promote creation-science as a genuine academic interest." 765 F.2d at 1257. Instead the Act sought to "counterbalanc[e] . . . the . . . teaching [of evolution] at every turn with the teaching of creationism, a religious belief. The statute therefore is a law respecting a particular religious belief." *Id.*

The preferential promotion of Fundamentalist doctrine is also reflected by the Act's exclusive requirement of the teaching of creationism as if that particular religious belief were the only theory regarding human origins other than evolution. As the district court noted in *Wright*, in evaluating a challenge to the teaching of evolution, and a request for equal time for the teaching of the Biblical account of creation, "[i]f the beliefs of Fundamentalism were the sole alternative to the Darwinian theory, such a remedy might be at least feasible. But virtually every religion known to man holds its own particular view of human origins. . . . The proposed solutions are more onerous

than the problem they purport to alleviate." 366 F. Supp. at 1211. *See also Daniel*, 515 F.2d at 491 (excluding "some religious concepts of creation . . . represents still another method of preferential treatment of particular faiths by State law and of course is forbidden by the establishment clause of the first amendment." *Id. See also Hendren v. Campbell*, No. 8577-0139 (Super. Ct. Ind. Apr. 14, 1977) (holding Indiana Textbook Commission's adoption of a biology textbook teaching creationism preferentially violated the establishment clause in having the religious purpose of promoting fundamentalist Christian doctrine).

"Although Establishment Clause jurisprudence is characterized by few absolutes, the clause does absolutely prohibit . . . government sponsored indoctrination into the beliefs of a particular religious faith." *Grand Rapids*, 105 S. Ct. at 3224. "The First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom." *Epperson*, 393 U.S. at 105, *citing Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

2. The Louisiana Balanced Treatment Act, Mandating the Teaching of the Biblical Account of Creation in the Public Schools, Has the Primary Effect of Advancing Religion and Thereby Violates the First Amendment Establishment Clause.

The intended effect of inculcating religious doctrine was recognized by the lower court in examining the Louisiana Act's religious purpose. "The Act's *intended effect* is to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief." 765 F.2d at 1257. *See also McLean*, 529 F. Supp. at 1266; *Karen B.*, 653 F. 2d at 897, 902. As this Court has held, "[w]henever the State itself speaks on a religious subject, one of the questions that we must ask is whether the government intends to convey a message of endorsement or disapproval of religion." *See Wallace*, 105 S. Ct. at 2492-2493.

The advancement of religious beliefs in the public schools is prohibited. "Government may not . . . undertake religious

instruction. . . ." *Zorach*, 343 U.S. at 314. As this Court recently noted, in evaluating other religious activities in the school:

> [T]he state is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. . . . [s]uch indoctrination, if permitted to occur, would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any course of pressures from the state, at the same time tainting the resulting religious beliefs with a corrosive secularism.

Grand Rapids, 105 S. Ct. at 3224. Here the state advancement of religious doctrine would be substantial, providing both direct and symbolic benefits. *Id.*

a. The Louisiana Act Would Provide Unconstitutional Government Benefits for the Promotion of Sectarian Doctrine.

This Court has recognized the many benefits provided by the state to religious sects when religious instruction is taught in the public schools. The state is barred from "employ[ing] its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone." *Abington*, 374 U.S. at 229. This principle would be threatened by implementation of the instant Act where tenets of a sectarian religious doctrine of creation would be taught by the public school: the state would provide the use of its schools, employees and compulsory attendance requirements to promote Fundamentalist religious doctrine. It "is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." *McCollum*, 333 U.S. at 210. *See also Epperson*, 393 U.S. at 108-109. *See, e.g., Lubbock*, 669 F.2d at 1046; *Brandon v. Board of Education*, 635 F.2d 971, 978-979 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). Such benefits which "advance the . . . sectarian mission" are distinguishable, *see Grand Rapids*, 105 S. Ct. at 3226, from the de minimis aid cases relied upon by appellants. *See* Brief of Appellants at 46-47.

b. The Louisiana Act Would Provide a Message of State Endorsement of Religious Doctrine.

Compounding the objective aid to religion afforded by the public school premises, compulsory attendance laws and teachers which would advance indoctrination of creationism are certain symbolic benefits.

> [A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

Grand Rapids, 105 S. Ct. at 3226. *See also Widmar*, 454 U.S. at 274.

In the instant case, the symbolism is clear. The only religious instruction in the public school would be that of the Fundamentalist faith's creationism. Moreover, these religious tenets would be presented outside of the context of a class about religion. *See Abington*, 374 U.S. at 225, *Stone*, 449 U.S. at 42. *Cf. Witters*, 106 S. Ct. 752 (sustaining aid in benefit array); *Widmar*, 454 U.S. at 274 (sustaining religion club in a large secular club array).

In addition, this Act would be implemented in both "public secondary and elementary schools," La. Rev. Stat. § 17:286.3(4), where students are young and impressionable. "The inquiry into this kind of [symbolic] effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years." *Grand Rapids*, 105 S. Ct. at 3226. *Cf. Widmar*, 454 U.S. at 274; *Marsh*, 103 S. Ct. at 3335 (distinguishing between adults not susceptible to "religious indoctrination" and children subject to "peer pressure"). The youth and impressionability of the students enhances the effect of school endorsement of the Fundamentalist doctrine which would be taught pursuant to this Act.

Even without coercion, this Court has held the mere possibility of such indoctrination of religious theory is unconstitutional in the public schools. *See Grand Rapids*, 105 S.Ct. at 3225; *Stone*, 449 U.S. 39; *Abington*, 574 U.S. 203; *Engel*, 370 U.S. at 430-31; *McLean*, 525 F. Supp. at 1266. History teaches that "powerful sects and groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the state or federal government would be placed behind the tenets of one or of all orthodoxies." *Grand Rapids*, 105 S. Ct. at 3226.

C. The Louisiana Balanced Treatment Act Mandates the Teaching of Sectarian Religious Doctrine Requiring the Excessive Entanglement of Church and State.

> The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of the denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters. [T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.

Aguilar v. Felton, 105 S. Ct. 3232, 3237 (1985), *citing McCollum*, 333 U.S. at 212.

While the instant case does not involve financial aid to a religious institution, it does involve assistance in the form of state public school teachers, *see, e.g. Aguilar*, 105 S. Ct. 3232, offering instruction in religious doctrine in the state public schools. Such state assistance to the Fundamentalist churches presents excessive entanglement problems. "[B]ecause assistance is provided in the form of teachers, ongoing inspection is

required to ensure the absence of a religious message." *Id.* at 3238.

In *Lemon*, 403 U.S. 602, this Court found the supervision necessary to ensure that teachers in parochial schools were not conveying religious messages to their students would constitute excessive entanglement:

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Lemon, 403 U.S. at 619.

The same problem—in mirror image—is presented by this case. Here, public school teachers would be engaged in teaching the literal Biblical account of creation—a religious tenet of Fundamentalist doctrine. To teach such a program without the effect of advancing religious belief requires continuous monitoring of school teachers to ensure that they play a strictly nonideological role. This gives rise to a constitutionally intolerable degree of entanglement. *See Aguilar*, 105 S. Ct. at 3238, *Lemon*, 403 U.S. at 619. *See, e.g., Lubbock*, 669 F.2d at 1047; *Karen B.*, 635 F.2d at 902; *Brandon*, 635 F.2d at 979.

Entanglement problems are also presented by the involvement of a religious group in curriculum development. "Proposed curriculum that is consistent with religious beliefs is often the product of religious organizations." Project, 50 Fordham L. Rev. 1113, 1155. *See, e.g., Wiley v. Franklin*, 468 F. Supp. 133, 151, *modified*, 474 F. Supp. 525 (1979), *modified*, 497 F. Supp. 390 (E.D. Tenn. 1980).

While some entanglement may be necessary to eschew state promotion of religion, *see* Brief of Appellants at 48, this Court has not found such entanglement to reach constitutional pro-

portions in the public schools. *See Mueller v. Allen*, 463 U.S. 388, 403 (1983) (no entanglement problem posed by state distinguishing between secular and religious texts). *Compare Epperson*, 393 U.S. 97 (striking public school anti-evolution statute) *and Abington*, 373 U.S. 203 (striking Bible reading in public school) *with Widmar*, 454 U.S. 263, 272 n. 11 (distinguishing between religious and nonreligious speech involves excessive entanglement in public university) and *Walz*, 397 U.S. 664 (church tax exemptions minimize entanglement). Even the risk of excessive entanglement to prevent the "fostering of religion," *Aguilar*, 105 S. Ct. at 3240, this Court has found to be impermissible. "The state must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion." *Meek v. Pittenger*, 421 U.S. 349, 371 (1975), *cited in Aguilar*, 105 S. Ct. at 3240 (emphasis in original).

III.

THE BALANCED TREATMENT ACT IS NOT REQUIRED BY A FREE EXERCISE INTEREST

The Louisiana statute cannot be saved by a free exercise argument. Preliminary drafts of the instant Act present the statute as a necessary accommodation of religious interests which would otherwise be infringed by the teaching of the scientific theory of evolution in the schools. This rationale has been rejected by this Court and others. In *Epperson*, the Court emphatically stated that "the First Amendment does not permit the State to require that teaching . . . must be tailored to the principles or prohibitions of any religious sect or dogma." 393 U.S. at 106. It went on to say that the Arkansas statute "cannot be defended as an act of religious neutrality." 393 U.S. at 109.

Subsequent decisions dealt similarly with proposals to prohibit the teaching of other secular subjects on free exercise grounds. In *Williams v. Board of Education of Kanawha*, 388 F. Supp. 93 (S.D.W.Va. 1975), *aff'd mem. on rehearing*, 530 F.2d 972 (4th Cir. 1975) and *Grove v. Mead School District*,

No. 354, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 85 (1985), the Fourth and Ninth Circuits affirmed decisions rejecting the contention that use of certain books and materials in the schools violated the free exercise clause. Similarly, in *Davis v. Page*, the district court denied plaintiff's request to be excused from a health education course because of the "paucity of evidence . . . that [it] will burden their religion or its free exercise." 385 F. Supp. 395, 402 (D.N.H. 1974).

Attempts to balance the teaching of secular subjects with Fundamentalist religious doctrine have also been rejected by the courts notwithstanding free exercise claims. In *Wright*, the Fifth Circuit agreed that the teaching of the theory of evolution unaccompanied by a discussion of differing versions of human origins did not burden plaintiffs' free exercise rights. *See* 486 F.2d at 138. And in *Daniel*, the Sixth Circuit did not even consider a free exercise justification when it rejected restrictions upon the teaching of evolution including an "equal time" proposal. 515 F.2d 485. Most recently, in *McLean*, a district court, declaring unconstitutional a balanced treatment statute substantially similar to the one in the instant case, rejected the claim that the exclusive teaching of evolution infringes the religious freedom of students and their parents. 529 F. Supp. at 1274.

The free exercise argument ought to be similarly rejected in the instant case since it misconstrues both the nature of science and of evolution. Science seeks to describe the natural world based upon observation, measurement and experimentation. Scientific theories are provisional and always subject to change in the light of new evidence. This evidence must be verifiable according to objective criteria. *McLean*, 529 F. Supp. at 1267. The theory of evolution is like any other scientific theory. When properly presented as provisional and incomplete, it is clearly distinct from some hypothetical set of quasi-religious beliefs which appellants would call "evolutionism" or "Darwinism." Brief of Appellants at 39, 45, 47. It has been consistently found that the teaching and presentation of evolu-

tion does not constitute an establishment of religion. *Crowley*, 462 F. Supp. at 727; *Willoughby*, No. 15574-75, slip op. at 4-5; *Wright*, 366 F. Supp. at 1210. "[I]t is clearly established in the case law, and perhaps also in common sense, that evolution is not a religion and that teaching evolution does not violate the Establishment Clause." *McLean*, 529 F. Supp. at 1274. The teaching of evolution has too "tenuous" a connection to "religion" in its First Amendment sense to require any serious constitutional review. *Wright*, 366 F. Supp. at 1210.

Moreover, the Biblical account of creation and the scientific theory of evolution are not simply alternative answers to the same question as appellants' rigidly dualistic view would suggest. *Compare* Brief of Appellants at 13-26 *with McLean*, 529 F. Supp. at 1267, 1269. The "fallacious pedagogy of the two model approach," *McLean*, 529 F. Supp. at 1267, which informs the balanced treatment statute at issue, is merely a transparent attempt to insure a place for the religious doctrine of creationism in the public school curriculum.

This Court has made clear that its rulings prohibiting Bible readings, prayer and religious education in the public schools do not manifest hostility to religion. *Abington*, 374 U.S. at 225; *Engel*, 370 U.S. at 434; *McCollum*, 333 U.S. at 211. The Court's decision in *Zorach v. Clauson* that a released time program was constitutional in no way implied that the teaching of secular subjects evinces hostility towards religion. Statutes permitting silent prayer in the public schools have not been upheld as free exercise accommodations, in as much as the Court has found no pre-existing burden on religious practice. *See Wallace*, 105 S. Ct. at 2491 n. 45 (O'Connor, J., concurring).

Remaining only is the free exercise claim that public school attendance in general may conflict with religious principles or obligations. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held public school instruction interfered with older Amish students' free exercise rights because it removed them from their community for long periods of time, thus prevent-

ing them from receiving necessary religious training. But in that case, the plaintiffs demonstrated to the Court's satisfaction that the government's interest in education could be fulfilled by the alternative of informal vocational training in the community. In the instant case, however, appellants' proposed remedy is not an acceptable alternative. The Balanced Treatment Act conflicts with the state interest in promoting its educational program. Moreover, the Act represents an unconstitutional establishment of religion in the Louisiana public schools.[7]

7. The question of mere exposure to secular subjects as a free exercise infringement remains to be decided in *Mozert v. Hawkins County Public Schools*, 579 F. Supp. 1051 (E.D. Tenn. 1984), *aff'd in part and rev'd in part*, 582 F. Supp. 201 (E.D. Tenn. 1984), *rev'd and remanded*, 765 F.2d 75 (6th Cir. 1985). Other courts have previously addressed it and held that exposure of individuals to ideas which they consider to be offensive to or inconsistent with their religious beliefs does not violate the free exercise clause. *Grove*, 753 F.2d at 1533-34; *Williams*, 388 F. Supp. at 96; *Davis*, 385 F. Supp. at 404-405. In view of these precedents and the district court's previous summary judgments in *Mozert*, it is likely that upon remand the Court will once again decide that the use in the Tennessee public schools of the textbooks in question presents no free exercise problem.

CONCLUSION

For all the reasons above we ask that the decision of the court of appeals be affirmed.

> Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice."

McCollum, 333 U.S. at 216-217 (Frankfurter, J., concurring).

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MEMORANDUM

To: National Legal Affairs Committee

From: Ruti G. Teitel & Jane Golberg*

Date: January 6, 1987

Subject: Anti-Evolution Statute Before the Supreme Court -- ADL Amicus Edwards v. Aguillard, 765 F.2d 1251 (5th Cir. 1985), appeal filed, No. 85-1513, 54 U.S.L.W. 3706 (U.S. March 12, 1986).

We are pleased to share with you ADL's amicus brief filed in support of the appellees in Edwards v. Aguillard. Edwards is a creationism case reaching the United States Supreme Court on appeal from the Fifth Circuit. The procedural history and facts surrounding the case are summarized below.

In July 1981, the Governor of Louisiana signed into law the "Balanced Treatment for Creation-Science and Evolution-Science Act." The Act required public schools to "give balanced treatment to creation-science and to evolution-science." La. Rev. Stat. §17:286.4(A). It effectively prohibits Louisiana's public school teachers from teaching evolution unless they also teach creationism.

A group of Louisiana educators, taxpayers, religious leaders and school parents successfully challenged the Act at the district court level. The district court granted their motion for summary judgment, holding that the term "creation," as used in the statute, involved "religion," rendering the Act "a law respecting an establishment of religion" in violation of the first amendment. Aguillard v. Green, No. 81-4787, slip op. (E.D. La. Jan. 10, 1985).

Louisiana appealed the district court's decision to the Fifth Circuit Court of Appeals. On July 8, 1985, the Circuit affirmed the decision of the lower court, striking down Louisiana's "Balanced Treatment for Creation-Science and Evolution Science Act" as unconstitutional. On December 1985, the Fifth Circuit voted 8-7 to deny a rehearing en banc. Louisiana has since appealed to the United States Supreme Court, which noted probable jurisdiction in May 1986.

ADL's brief urges the Supreme Court to affirm the Fifth Circuit's judgment that the Louisiana statute violates the establishment clause of the first amendment. At the outset, the brief submits that the Louisiana Balanced Treatment Act mandates the teaching of the Biblical account of creation, which

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*Jane Golberg, a third year law student at Stanford University, is a Legal Affairs Department intern this fall.

constitutes a religious tenet as a matter of law and consequently triggers first amendment establishment review. The brief further argues that the Act is unconstitutional under the tripartite establishment test set forth in Lemon v. Kurtzman.[1] Finally, the brief demonstrates that the Balanced Treatment Act is not required by a free exercise interest.

The League's brief argues the statute requires state sponsorship of a religious doctrine, triggering establishment review. The Louisiana Act mandates that every teaching of evolution be opposed by the teaching of the Biblical account of creation. The question of whether an activity at issue is religious is a question of law. Lynch v. Donnelly, 104 S. Ct. 1355, 1369 (1984) (O'Connor, J., concurring). And, the Supreme Court "has already defined the literal interpretation of the Book of Genesis regarding the origins of man as a 'particular religious doctrine.'" Amicus brief at 6, citing Epperson v. Arkansas, 393 U.S. 97, 103 (1968). Based on this definition as well as the Court's other characterizations of bible study, the brief shows the teaching of creationism is inherently religious. Amicus brief at 7. Consequently, Louisiana's sponsorship of the Balanced Treatment Act requires establishment review.

The brief goes on to show the Act violates the establishment clause of the first amendment. Both a general establishment test set forth in Lemon and a "strict scrutiny" standard of review, employed where governmental support for religion is preferential, see Larson v. Valente, 456 U.S. 228 (1982), are triggered by the Louisiana Balanced Treatment Act. ADL's brief demonstrates Louisiana's Balanced Treatment Act is unconstitutional under both the Lemon and the Larson tests.

The brief exposes the Act's shortcomings under the first prong of Lemon by reviewing it in the light of the anti-evolution Arkansas statute found unconstitutional in Epperson v. Arkansas, 393 U.S. 97 (1968). In Epperson, the purpose behind the statute was to eliminate the teaching of evolution. ADL's brief submits the Louisiana statute bears the same unconstitutional purpose as the Epperson proposal -- masked by modified language suggesting that the teaching of evolution need not be eliminated but rather "balanced." ADL argues the Louisiana Balanced Treatment Act unconstitutionally burdens the teaching of science for a religious and not a secular purpose.

The statute's text, context and legislative history evince its exclusively religious purpose. The Fifth Circuit had found "the plain language of the Balanced Treatment Act convinces us that it has no secular legislative

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[1]Under the test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971), legislation will not violate the establishment clause so long as the statute meets three requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster 'an excessive government entanglement with religion.'" Wallace v. Jaffree, 105 S. Ct. 2479 at 2489 (1985), citing Lemon, 403 U.S. at 612-613.

purpose." 765 F.2d at 1257. ADL argues "the Act's express and exclusive selection of 'creation-science' to oppose evolution indicates the clear state intent to endorse this religious doctrine." Amicus brief at 13. That the statute only requires the Biblical account of creation be given equal time with science bespeaks a religiously non-neutral purpose -- unconstitutional under the first prong of Lemon.

When viewed in historical context, the Louisiana Act reveals an unconstitutional religious purpose. Similar, religiously motivated legislation in Tennessee and Arkansas, and the posture of the Act within the history of the creationist movement, evince the religious motive underlying the Louisiana legislation.

The legislative history of the Act too supports its religious origins. Specifically, Senate Bill No. 86 eliminated an earlier legislative purpose section characterizing evolution as a religion and providing that "evolution-science is contrary to the religious convictions...of many students and parents.... Public school presentation of any evolution-science without any alternative model of origins abridges protection of freedom of religion exercise." Amicus brief at 16, citing (JAE294).

ADL's brief next demonstrates the Balanced Treatment Act violates both the second prong of the Lemon test and the Larson strict scrutiny test. By requiring the teaching only of the Biblical account of creation, the Act not only advances religion in general, but also "constitutes a preferential advancement of particular fundamentalist religions in violation of both First Amendment establishment clause and Fourteenth Amendment equal protection principles." Brief at 18. The brief distinguishes the Creationists' view from mainstream Jewish, Protestant and Catholic thought, refuting their characterization of the literal Genesis doctrine of creation as "Judeo-Christian" or "theistic." Accordingly, the Louisiana legislation is subject to strict scrutiny under Larson v. Valente, in which the Supreme Court held "the clearest command of the establishment clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. The Larson strict scrutiny test requires appellants to demonstrate that the Balanced Treatment Act "is closely fitted to further the interests it assertedly serves." 456 U.S. at 248. ADL's brief notes the court of appeals found that the statute failed to promote the purpose which it assertedly serves -- that of academic freedom. And, more fundamentally, the statute serves to preferentially promote fundamentalist doctrine over other belief.

The brief goes on to show the legislation has the primary effect of advancing religion under the Lemon test. First, the Louisiana Act would provide unconstitutional government benefits for the promotion of fundamentalist religious doctrine. Second, the Act would provide a message of State endorsement of religious doctrine. The brief emphasizes that even the mere possibility of indoctrination of religious theory in the public schools has been held unconstitutional by the Supreme Court.

The third prong of the Lemon test requires that the statute must not foster "an excessive government entanglement with religion." ADL's brief argues that the Louisiana Act involves state assistance to religion in the

form of state public school teachers offering instruction of religious doctrine in the state public schools. Excessive entanglement problems arise because the supervision necessary to ensure that teachers in public schools not transmit religious messages to their students would give rise to a "constitutionally intolerable degree of entanglement." Amicus brief at 25. The brief adds that entanglement problems are also presented by the involvement of a religious group in curriculum development.

ADL's brief concludes by showing the Balanced Treatment Act is not required by any free exercise interests. Several federal courts have rejected attempts to balance the teaching of secular subjects with fundamentalist religious doctrine. Moreover, these putative free exercise rights not only conflict with the state interest in promoting its educational program, but more fundamentally, represent an unconstitutional establishment of religion in the Louisiana public schools. Amicus brief at 29.

On December 10, 1986, just as this memorandum was to be sent out, the Supreme Court heard argument in this case. Arguing for Louisiana was Wendell Bird, and for the plaintiffs, Jay Topkis of the New York law firm Paul, Weiss, Rifkind, Wharton & Garrison. That the Solicitor General did not file amicus and hence did not argue is worthy of note.

The argument centered on the issue of whether this case should have been decided on a motion for summary judgment -- that is, whether the definition of creation science in the Louisiana Balanced Treatment Act raises an issue of fact.

The State of Louisiana argued that creation science did not involve the teaching of religious doctrine as a matter of law, relying on affidavits of the putative creation scientists. Jay Topkis argued the Louisiana legislature never saw the definition presented by Mr. Bird. Topkis relied instead on the plain meaning of Creationism, turning to the Webster dictionary definitions. These, he noted, describe Creationism as ascribing our origins to a Creator or transcendent being.

Highlights of the argument included Justice Scalia questioning Topkis regarding the possibility of distinguishing religious and secular doctrine as a matter of law. Scalia questioned Topkis about Aristotle and his theory of an "unmoved mover" -- and whether such a theory, assuming an abrupt beginning, was necessarily religious. Topkis noted it was distinguishable from creation science.

Scalia also questioned whether the abstention doctrine might not apply to this case since the Louisiana state courts had not yet defined the statutory term.

The Creationism argument raised underlying doctrinal issues challenging the Lemon test. The viability of the religious purpose inquiry is in jeopardy. Questions were directed at both attorneys concerning the possibility that the statute was enacted due to the religious "motivation" of some in the Louisiana legislature. This motivation alone ought not invalidate the statute, suggested Justices Rehnquist and Scalia. Following this case, the Lemon

purpose prong may no longer be enough to invalidate government policy or practice. This development grows out of the Court's analyses in in Wallace v. Jaffree (moment of silence) and Thornton v. Caldor (Sabbath accommodation statute). Problems with false collisions with free exercise concerns have prevented the Court from taking stock of primary legislative purpose.

The argument is too difficult to call. No side was a clear victor.

RT/JG:ms