

Nos. 05-10341-II & 05-11725-II

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEFFREY MICHAEL SELMAN *et al.*,

Plaintiffs-Appellees,

v.

COBB COUNTY SCHOOL DISTRICT, COBB COUNTY BOARD OF
EDUCATION, and JOSEPH REDDEN, Superintendent,

Defendants-Appellants.

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

**MOTION FOR RECONSIDERATION OF MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF AND FOR MODIFICATION OF ORDER
DENYING *AMICUS CURIAE* BRIEF**

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

Pursuant to Fed. R. App. P. 26.1, 11th Cir. Rules 26.1-1 through 26.1-3, and 11th Cir. R. 27-1(9), undersigned counsel hereby certifies that *Amicus Curiae* Foundation for Moral Law, Inc., is a designated IRS Code 501(c)(3) non-profit corporation that has no parent corporations, and that no publicly held company owns ten percent or more of *Amicus*. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Moreover, and pursuant to the aforementioned appellate rules, undersigned counsel also certifies that the following persons or entities have or may have an interest in the outcome of this case:

1. Abbott, Greg (Attorney General for the State of Texas, *Amicus Curiae*)
2. Alabama, State of (*Amicus Curiae* with the State of Texas)
3. Alliance Defense Fund (*Amicus*; Counsel for Intervenors below)
4. American Civil Liberties Union Foundation (Counsel for Appellees Chapman, Silver, Mason, and Jackson)
5. American Civil Liberties Union Foundation of Georgia, Inc. (Counsel for Terry Jackson)
6. Biologists and Other Scientists (*Amicus Curiae*)
7. Bondurant, Mixson & Elmore, LLP (Counsel for Appellee Selman)

Jeffrey M. Selman v. Cobb County Sch. Dist., 05-10341-II & 05-11725-II

8. Brackett, David G. H. (Appellate attorney for Plaintiffs-Appellees)
9. Bramlett, Jeffrey O. (Appellate attorney for Plaintiffs-Appellees)
10. Brock, Clay & Calhoun, P.C. (Counsel for Defendants-Appellants)
11. Bull, Ben (Attorney for *Amicus* Alliance Defense Fund)
12. Callaway, Carol A. (Appellate attorney for Defendants-Appellants)
13. Chapman, Kathleen (Plaintiff-Appellee)
14. Cobb County Board of Education (Defendant-Appellant)
15. Cobb County School District (Defendant-Appellant)
16. Cooper, Honorable Clarence (Trial Judge)
17. Cooper, Seth L. (Attorney for *Amicus* Biologists and Other Scientists)
18. Fant, Lynn Gitlin (Attorney for *Amicus* Parents for Truth in Education)
19. Garrett, Margaret Fletcher (ACLUFG Attorney for Terry Jackson)
20. Gunn, Ernest Linwood IV (Attorney for Defendants-Appellants)
21. Hardage, Allen (Intervenor below)
22. Hollberg & Weaver (Counsel for Intervenors and *Amicus* below)
23. ISKCON of Atlanta (*Amicus*)
24. Jackson, Terry (Plaintiff-Appellee)
25. King, Troy (Attorney General of the State of Alabama, *Amicus Curiae*)
26. Liberman, David M. (Attorney for *Amicus* ISKCON of Atlanta)

Jeffrey M. Selman v. Cobb County Sch. Dist., 05-10341-II & 05-11725-II

27. Meazell, Emily Hammond (Attorney for Jeffrey M. Selman)
28. Manely, Michael Eric (Attorney for Plaintiffs-Appellees)
29. Mason, Paul (Plaintiff-Appellee)
30. McMurry, Kevin T. (Attorney for *Amicus* Biologists and Other Scientists and intervenors below, Hardage and Taylor)
31. Oster, Joel (Attorney for *Amicus* Alliance Defense Fund)
32. Parents for Truth in Education (*Amicus Curiae* below)
33. Power, Debra Anne (Former plaintiff; dismissed Sept. 20, 2004)
34. Redden, Joseph (Defendant-Appellant)
35. Selman, Jeffrey Michael (Plaintiff-Appellee)
36. Silver, Jeff (Plaintiff-Appellee)
37. Taylor, Larry (Intervenor below)
38. Texas, State of (*Amicus Curiae* with the State of Alabama)
39. Theriot, Kevin Hayden (Attorney for *Amicus* Alliance Defense Fund and for intervenors Hardage and Taylor)
40. Weaver, George (Atty: *Amicus* Biologists; intervenors Hardage, Taylor)
41. Weber, Gerald R. (ACLUFG Attorney for Plaintiffs-Appellees)

Benjamin D. DuPré

COMES NOW *Amicus Curiae* Foundation for Moral Law (“the Foundation”), and in accordance with 11th Cir. Rule 27-2, hereby files the following Motion for Reconsideration of the Foundation’s motion for leave to file an *amicus curiae* brief in support of Appellants and for Modification of this Court’s May 20, 2005 order denying said brief.

The Foundation filed its motion along with its *amicus curiae* brief on April 18, 2005, and this Court’s order denying said motion was entered on May 20, 2005. Because this Court’s order misconstrues the relevance of, or entirely ignores, the arguments contained in the Foundation’s brief, and because the order has dangerous implications for future constitutional litigants before this Court, the Foundation’s April 18 motion should be granted and the May 20 order should be modified accordingly.

INTRODUCTION

In this case, the Cobb County Board of Education (“the School Board”) voted to place informational stickers on certain science textbooks in the Cobb County School District (“the School District”) that stated: “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.” A suit was brought against the School District, the School Board, and its superintendent

alleging that the stickers violated the Establishment Clause of the First Amendment to the United States Constitution. The Federal District Court for the Northern District of Georgia issued an opinion on January 13, 2005, declaring that the informational stickers failed the second prong of the *Lemon* test propounded in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), and that the stickers therefore run afoul of the Establishment Clause. Specifically, the District Court employed the Endorsement test’s rendition of the “effects” prong of the *Lemon* test—from *Lynch v. Donnelly*, 465 U.S. 668 (1984)—to conclude that “an informed, reasonable observer would interpret the Sticker to convey a message of endorsement of religion.” *Selman v. Cobb County Sch. Dist.*, No. 05-10341, slip op. at 31 (N.D. Ga. Jan. 13, 2005). Additionally, the court below held that the stickers violated the Georgia Constitution. The District Court ordered the Cobb County School District to remove the stickers from all textbooks to which it had been affixed.

Defendants are appealing the District Court’s ruling to this Court. Several groups, including the Alliance Defense Fund (“ADF”), ISKCON, and a group styled “Biologists and other Scientists” filed *amici curiae* briefs in support of Defendants. The Foundation also filed an *amicus curiae* brief

in support of Defendants.¹ The Foundation’s motion for leave to file an *amicus* brief was the *only* one denied by this Court in this case. The order was signed by Judge William H. Pryor, Jr.²

DISCUSSION

1. Federal Rule of Appellate Procedure 29(b)(2) requires that an *amicus curiae* brief state “the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case.” The Foundation’s *amicus* brief clearly stated that its brief was desirable because of the organization’s intense dedication and involvement in preserving the public right to acknowledge God and in promoting a return in the judiciary to the historic and original interpretation of the United States Constitution. *See* Foundation Brief, p. 1. The brief further detailed that the matters asserted were relevant to the outcome of this case because the case involved an alleged violation of the Establishment Clause and the brief expounded on the historic, textual meaning of that clause and its application to the informational stickers at issue in this appeal. *See* Foundation’s Brief, pp. 13-25.

¹ Because Defendants withheld consent, all *amici* were compelled to file motions for leave to file said briefs.

² This motion is accompanied by a Motion for Recusal and Disqualification of Judge William H. Pryor, Jr. from consideration of this motion to reconsider.

2. The May 20 order denying the Foundation's motion stated in pertinent part: "The Foundation for Moral Law's motion for leave to file an *amici curiae* brief in support of Appellants is DENIED. The matters asserted are not relevant to our resolution of this appeal, because 'we clearly have no authority to overrule a decision of the Supreme Court.' *Kitowski v. United States*, 931 F.2d 1526, 1529 (11th Cir. 1991)." *Selman v. Cobb County Sch. Dist.*, Nos. 05-103411-II & 05-11725-II (11th Cir. May 20, 2005) (order disposing of motions for leave to file *amicus curiae* briefs) (attached hereto and incorporated herein by reference as Exhibit 1).

3. The Court erred in using the principle stated in *Kitowski* to deny the Foundation's brief. In *Kitowski*, the appellant explicitly asked this Court to overrule the holding in *Feres v. United States*, 340 U.S. 135 (1950). *Kitowski*, 931 F. 2d at 1529. To that request, this Court opined that "we clearly have no authority to overrule a decision of the Supreme Court." *Id.* In contrast, the Foundation explicitly asked this Court to rule according to the text of the First Amendment's Establishment Clause. *See* Foundation's Brief, p. 13. *Nowhere* in its brief did the Foundation contend or request that this Court "overrule" any decision of the United States Supreme Court or that this Court had such power. At most, the Foundation respectfully submitted that it was the duty of the District Court and is this Court's duty to

follow the text of the Constitution instead of judicial tests not grounded in that text.

4. Following the Foundation's suggestion would not require the overruling of any decision of the United States Supreme Court, but rather would entail not applying the principles of certain cases, such as *Lemon* and *Lynch*, because they do not fit the facts of this case. The Foundation's *amicus* brief explained in detail why *Lemon* should not be applied in this case and why application of the Endorsement test's interpretation of *Lemon's* second prong in particular yields illogical and discriminatory results on facts such as these. See Foundation's Brief, pp. 8-13, 20-22. Contrary to the summary contention of the May 20 order, these arguments are plainly relevant to this Court's resolution of this appeal since the District Court unequivocally applied the *Lemon* and Endorsement tests to the informational stickers at issue in this case.

5. Moreover, a closer look at *Kitowski* shows why the textual arguments in the Foundation's *amicus* brief are hardly the radical assertions that the May 20 order implies them to be. In *Kitowski*, this Court noted that "[i]t is true that there now appears to be some support on the Supreme Court for overruling *Feres*." *Kitowski*, 931 F.2d at 1529. Nevertheless, this Court concluded that because "the Supreme Court has continued to apply *Feres*

strictly when lower courts have sought to give the ‘doctrine’ more elasticity in cases where the facts were different from those considered in *Feres*,” and because “[i]t seems clear . . . that a majority of the Justices do not agree at this time [with overruling *Feres*],” it would not entertain the appellant’s request to overrule *Feres*.

In contrast to the situation in *Kitowski*, the United States Supreme Court has been anything but strict in its application of the *Lemon* test since its inception.³ It was not applied at all in *Marsh v. Chambers*, 463 U.S. 783 (1983), *Larson v. Valente*, 456 U.S. 228 (1982), or, most recently, in *Cutter v. Wilkinson*, ___ U.S. ___ (2005). The test was altered in *Lynch* with the advent of the Endorsement test, and another new test—the Coercion test—was emphasized in *Lee v. Weisman*, 505 U.S. 577 (1992) and repeated in cases such as *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).⁴ Indeed, *Lemon* has been applied in so many different ways (when applied at

³ See, e.g., *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (Suggesting that the *Lemon* test “provides ‘no more than [a] helpful signpos[t]’ in dealing with Establishment Clause challenges” (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (“[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.”).

⁴ Justice Scalia’s famous criticism of *Lemon* in a 1993 dissent remains true today. See *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398, 399 (1993) (comparing *Lemon* to a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried” and produces a “strange Establishment Clause geometry of crooked lines and wavering shapes”).

all) that there is notable confusion among the circuit courts of appeal as to how and when it should be applied.⁵

6. Even more so than in *Kitowski*, “there now appears to be some support on the Supreme Court for overruling [*Lemon*].” *Kitowski*, 931 F.2d at 1529. This Court has noted on several occasions that “[m]embers of the [Supreme] Court and other commentators have questioned the continued vitality of the *Lemon* test.” *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, (1999) (overruled by *Adler v. Duval County Sch. Bd.*, 531 U.S. 801 (2000)).⁶ In fact, the Supreme Court recently granted certiorari in *ACLU of Kentucky*

⁵ For example, the Third Circuit Court of Appeals has observed that “[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays.” *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled this area of the law “the often dreaded and certainly murky area of Establishment Clause jurisprudence.” *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999); the Fifth Circuit has referred to it as a “vast, perplexing desert.” *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev’d sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000); and the Tenth Circuit opined that there is “perceived to be a morass of inconsistent Establishment Clause decisions.” *Bauchman for Bauchman v. West High School*, 132 F.3d 542, 561 (10th Cir. 1997).

⁶ See, e.g., *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003) (making the “almost obligatory observation that the *Lemon* test is often maligned”); *King v. Richmond County*, 331 F.3d 1271, 1276 (11th Cir. 2003) (observing that “some Justices and commentators have strongly criticized *Lemon*”); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1388 (11th Cir. 1993) (noting that the “[*Lemon*] test has been criticized severely”).

v. McCreary County, Kentucky, 354 F.3d 438, 445 (6th Cir. 2003), in part to consider whether *Lemon* should be overruled. Given that the Supreme Court has not applied *Lemon* in a strict fashion and several of its justices,⁷ other circuits,⁸ and commentators⁹ have expressed serious misgivings about current Establishment Clause jurisprudence, it is hardly novel for the Foundation’s brief to suggest that *Lemon* should not be followed in the instant case.¹⁰ It certainly is not a legitimate reason for this Court to refuse to *accept* the Foundation’s brief.

⁷ See *Lamb’s Chapel*, 508 U.S. at 398-99 (1993) (Scalia, J., concurring); *Glassroth*, 335 F.3d at 1295; *King*, 331 F.3d at 1276 n.4.

⁸ See *supra* note 3.

⁹ See *supra* notes 3, 5.

¹⁰ In fact, Judge Easterbrook of the Seventh Circuit Court of Appeals recently put forth an argument in a dissent that is nearly identical in principle to the argument put forth in the Foundation’s *amicus* brief:

Equating “endorsement” with “establishment” is a novelty with neither linguistic nor historical provenance. Our obligation to implement the Supreme Court’s holdings does not require us to predict how an approach espoused by a few Justices, and applied unpredictably under a decision (*Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)) that a majority of sitting Justices has disavowed (though never at the same time), would deal with a situation the Court has yet to address. *We should use the Constitution’s own language and rules.*

Books v. Elkhart County, Ind., 401 F.3d 857, 869-70 (7th Cir. 2005) (emphasis added).

7. While the Foundation's arguments were unique among the parties involved, the arguments dovetail with those made in other briefs that were accepted. The Alliance Defense Fund's *amicus* brief contended that the District Court had "radically extended the Supreme Court's 'endorsement test' to reach an absurd result." ADF Brief, p. 5. The ADF *amicus* brief concluded that the Endorsement test is "irrelevant" to the facts of this case. ADF Brief, p. 10. The Foundation's brief likewise argued that the Endorsement test should not have been applied in this case, but for different reasons. The ADF *amicus* brief also observed that "[t]he sticker is **entirely devoid** of any religious reference." *Id.* (emphasis in original). This is similar to the Foundation's observation that the informational stickers do not fall under the historic definition of the term "religion" for First Amendment purposes. *See* Foundation Brief, pp. 19-20. Despite these similarities (though the briefs obviously have different emphases), the Court denied the Foundation's brief while it accepted the ADF brief.

8. Not only did other *amicus* briefs contain elements of arguments similar to those made by the Foundation, Defendants' brief also included arguments along similar lines. Defendants explicitly argued that the District Court "erred in its application of the *Lemon* test to the unique facts of this case in two respects." Defendants' Brief, p. 16. In the course of explaining

why this is so, Defendants observed that “[c]learly, the Sticker has no explicit religious message. . . . [O]n its face, it is devoid of religious endorsement, or direct benefit to religion.” *Id.* at 24. Again, this point is similar to the argument in the Foundation’s *amicus* brief that the sticker is not “religion,” *see* Foundation Brief, pp. 19-20, and it connects to the Foundation’s argument that the sticker does not represent an “establishment” of religion because the sticker “does not lend government aid to one faith over another.” *Id.* at 25. Obviously, since the Foundation’s *amicus* brief makes arguments that strengthen points made by the appealing party, the matters asserted in its brief are certainly “relevant to the resolution of this appeal.”

9. Furthermore, the Foundation’s *amicus* brief presents arguments related to the provisions of the Georgia Constitution at issue in this case that have no relation to overruling decisions of the United States Supreme Court. Section III of the Foundation’s brief contends that the District Court erred in concluding that the informational sticker violates Article I, Section II, Paragraph VII of the Georgia Constitution because the District Court failed to rule according to the text of that provision. *See* Foundation Brief, pp. 26-29. Section III of the Foundation’s brief did not implicate United States Supreme Court precedent in any way and therefore this Court’s stated reason

in its May 20 order for denying the Foundation’s brief failed to take this portion of the brief into account. This fact alone is sufficient to warrant reconsideration of the Foundation’s motion for leave to file its *amicus* brief.

10. Additionally and perhaps more importantly, the May 20 order establishes an undesirable precedent blocking briefs that suggest this Court adhere to the text of the relevant legal authority in a given case. The order in essence denied the Foundation’s brief because it suggested that the text of the United States Constitution, not the broad and murky precedent of today’s Establishment Clause jurisprudence, should control the outcome of this case. By refusing even to permit the filing of a brief making such a claim and holding that such “matters . . . are not relevant to [this Court’s] resolution of this appeal,” the Court precludes the possibility of any argument based on the original text of the Constitution. If an argument advocating faithfulness to the text is considered irrelevant to a case—as it was here—then judges may not rule based on the text but only on recent cases in that area of the law. Such a rule makes modifying precedent nearly impossible and renders constitutional fidelity judicially undesirable. Thus, the effect of the May 20 order hampers both advocates and judges alike.

11. Courts generally do not adhere to the kind of standard implied by this Court’s May 20 order. For example, recently in *Books v. Elkhart*

County, Ind., 401 F.3d 857 (7th Cir. 2005), the Seventh Circuit Court of Appeals determined that a display of the Ten Commandments in front of a county municipal building did not violate the Establishment Clause. The majority so ruled primarily on the basis of the Endorsement test. In dissent, Judge Easterbrook agreed that the display was constitutional, but disagreed with the use of the Endorsement test because he contended that “[e]ndorsement” differs from “establishment” and that the court “should use the Constitution’s own language and rules” to decide the case. *Books*, 401 F.3d at 869-70. According to the reasoning of this Court’s order denying the Foundation’s brief, Judge Easterbrook’s argument could not have even been made to the Seventh Circuit by any party, let alone followed by any of the judges deciding the case. Any brief in any case before this Court arguing that the text of the Constitution should be the court’s primary focus would be excluded as “not relevant” under the reasoning of the May 20 order.

12. However, this Court’s stated reason for denying the Foundation’s *amicus* brief would affect more than just those parties making arguments based on the original interpretation of the text of the Constitution; it would have the effect of freezing current Supreme Court precedent as the law in the 11th Circuit because no challenge to the Supreme Court’s rulings

could be presented in lower courts. Since, according to the May 20 order, this Court (and by implication any lower federal court) “clearly ha[s] no authority to overrule a decision of the Supreme Court,” and since this Court will not even entertain arguments suggesting that a certain Supreme Court case is flawed or should not be followed because such “matters asserted are not relevant to [the federal courts’] resolution” of the case, challenges to Supreme Court precedent would never succeed because the Supreme Court can only rule based on the claims presented in the courts below. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”). The Court’s reasoning in this order actually interferes with, rather than furthers, the administration of justice because it prevents reexamination of weakened precedent.¹¹

13. The U.S. Supreme Court plainly does not adhere to the reasoning set forth in this Court’s order. In *Roper v. Simmons*, ___ U.S. ___

¹¹ See, for example, *State Oil Co. v. Khan*, 522 U.S. 3 (1997), an anti-trust case in which the Seventh Circuit Court of Appeals referred to the rule from *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), as “unsound when decided” and “inconsistent with later decisions” of the Supreme Court. *Id.* at 9. The Supreme Court, taking the hint from the Court of Appeals, overruled the *Albrecht* rule, one that had “been in effect for some time,” but because “the economic realities underlying [the decision] ha[d] changed,” it had outlived its usefulness. *Khan*, 522 U.S. at 21-22. This outcome would not have even been possible under this Court’s rationale in the May 20 order.

(2005), a juvenile convicted of murder challenged his sentence of death in the Missouri courts on the ground that applying the death penalty to juveniles below the age of 18 violated the Eighth Amendment's prohibition against "cruel and unusual punishments." This argument had been rejected by the U.S. Supreme Court in *Stanford v. Kentucky*, 492 U.S. 361 (1989), yet the Missouri courts *heard* the petitioner's argument. In direct contradiction to *Stanford*, the Missouri Supreme Court ruled that the petitioner's death sentence did violate the Eighth Amendment and reduced his sentence to life without the possibility of parole. *Roper*, slip op. at 5. The United States Supreme Court then affirmed the decision of the Missouri Supreme Court and overruled *Stanford*, never stating that what the Missouri Supreme Court had done was inappropriate. *Id.*, slip op. at 14, 16.

If a state court¹² can entertain challenges to Supreme Court decisions

¹² For an example of a federal Circuit Court of Appeals declaring current Supreme Court precedent on a subject obsolete and the Supreme Court affirming the decision, see *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477 (1989). Even where a circuit has elected to follow the weakened precedent in a given area of the law, that court still considers arguments against the precedent. See *United States v. Hatter*, 532 U.S. 557 (2001) (concerning judges' claim of tax immunity which the Federal Circuit upheld based on the doubtful precedent of *Evans v. Gore*, 253 U.S. 245 (1920) because the Supreme Court had not expressly overruled *Evans*. However, the Supreme Court noted that "[n]onetheless, the court below, in effect, has invited us to reconsider *Evans*." *Hatter*, 532 U.S. at 567. How could the circuit court "invite" reconsideration without hearing the challenge to the precedent?).

(and both state and federal courts obviously hear such arguments frequently, even if they rarely rule in favor of them) and even rule in direct contradiction to a Supreme Court decision on the exact same issue that is before it, then clearly this Court as a federal circuit court can do the same.

14. The Foundation's brief did nothing more than call into question the wisdom of applying *Lemon* and its progeny to the facts of this informational sticker case and urged this Court instead to use the historic meaning of the Establishment Clause as its test.¹³ It is, of course, the Court's prerogative to decide whether to *follow* the brief's arguments, but such arguments are not irrelevant to the resolution of this case on appeal, however much one judge may disagree with the merits thereof.

CONCLUSION

For the foregoing reasons and those stated in our April 18, 2005 motion, this Court should GRANT the Foundation's motion to reconsider the Foundation's original motion for leave to file and MODIFY the May 20, 2005 order accordingly.

¹³ Judges and justices have urged the same in many cases. *See., e.g.,* Chief Justice Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1984) (Rehnquist, J., dissenting); Justice Scalia in *Lee v. Weisman*, 505 U.S. 577, 631-46 (Scalia, J., dissenting); Justice Thomas in *Elk Grove Unified Sch. Dist. v. Newdow*, ___ U.S. ___, ___ (2004) (Thomas, J., concurring in the judgment); and the aforementioned opinion of Judge Easterbrook in *Books v. Elkhart County, Ind.*, 401 F. 3d 857 (7th Cir. 2005) (Easterbrook, J., dissenting).

Respectfully submitted this 9th day of June, 2005.

Amicus Curiae: Foundation for Moral Law, Inc.

Benjamin D. DuPré (Virginia Bar No. 46832)
Gregory M. Jones (Ohio Bar No. 0074082)
Foundation for Moral Law, Inc.
P.O. Box 231264
Montgomery, AL 36123-1264
Phone: (334) 262-1245
Fax: (334) 262-1708

Counsel for *Amicus Curiae* Foundation for
Moral Law, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of this Motion for Reconsideration of the Motion for Leave to File an *Amicus Curiae* Brief and Modification of the May 20, 2005 Order have been served on counsel for each party (listed below), by first-class U.S. Mail, and that the original and three (3) copies of the same have been dispatched to a third party commercial carrier for overnight delivery to the Clerk of the United States Court of Appeals for the 11th Circuit on this 9th day of June, 2005.

Service list:

David G.H. Brackett
Emily Hammond Mezell
Bondurant, Mixson & Elmore,
LLP
1201 W. Peachtree St. NW
Atlanta, GA 30309-3449
*Attorney for Appellee Michael
Selman*

E. Linwood Gunn, IV
Carol A. Callaway
Brock, Clay & Calhoun, P.C.
49 Atlanta Street
Marietta, GA 30060-8611
Attorney for Appellant

Gerald R. Weber
Margaret Fletcher Garrett
American Civil Liberties Union
Foundation
70 Fairlie St. NW Ste 340
Atlanta, GA 30303-2100
*Attorney for Appellees Chapman,
Silver, Mason, and Jackson*

Benjamin D. DuPré