

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 RECUSAL AND DISQUALIFICATION OF
JUDGE WILLIAM H. PRYOR, JR.**

**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 the Foundation for Moral Law, Inc. (“the Foundation”), and pursuant to 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and Fed. R. App. P. 47, I.O.P.-9, hereby files this motion for recusal and disqualification of Judge William H. Pryor, Jr., in any filings in the above-styled case by *Amicus Curiae* Foundation for Moral Law or former Alabama Chief Justice Roy Moore.¹ In support of said motion, *amicus* alleges as follows:

1. Judge William H. Pryor, Jr. served as Alabama’s Attorney General from 1997 until his recess appointment—to his current position on this Court—by President George W. Bush on February 20, 2004. President Bush nominated Judge Pryor on April 9, 2003, but as of the filing of this motion, Judge Pryor is still awaiting a confirmation vote in the United States Senate.

2. In a series of highly-publicized events, Alabama Chief Justice Roy Moore was prosecuted in November of 2003 by then-Attorney General Pryor on judicial ethics charges that arose from Chief Justice Moore’s decision not to follow a federal court order directing him to remove a Ten Commandments monument from the public areas of the Alabama Judicial Building.² Attorney General Pryor

¹ This motion is filed simultaneously with *Amicus’s Motion for Reconsideration of Motion for Leave to File Amicus Curiae Brief and for Modification of Order Denying Amicus Curiae Brief*.

² See *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003); *Glassroth v. Moore*, 275 F. Supp. 2d 1347 (M.D. Ala. 2003); and *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002).

personally conducted the prosecution's case and successfully demanded that the Alabama Court of the Judiciary remove Chief Justice Moore from office. *See In re Roy S. Moore*, No. 33 (Ala. Ct. Jud., Nov. 13, 2003). Attorney General Pryor likewise successfully argued orally and in appellate briefs against Chief Justice Moore's position on appeal to the Alabama Supreme Court. *See Moore v. Judicial Inquiry Comm'n*, 891 So. 2d 848 (Ala. 2004), *cert. denied*, 125 S. Ct. 103 (2004). The Foundation assisted Chief Justice Moore financially and with legal assistance throughout this litigation. Judge Pryor's recess appointment to this Court was made only three months after his prosecution of Chief Justice Roy Moore, now Chairman of the Foundation and lead counsel on the rejected *amicus* brief.

3. Attorney General Pryor hardly maintained a low profile about his role in the prosecution of Chief Justice Moore. For example, in the 2003-2004 edition of the *Cumberland Law Review*, Mr. Pryor defended his actions to the legal community, again criticizing Chief Justice Moore's arguments and actions. *See William H. Pryor, Jr., Christian Duty and the Rule of Law*, 34 *Cumb. L. Rev.* 1 (2003-4). Only two weeks before his recess appointment to this Court, Attorney General Pryor gave a speech to the Federalist Society at Harvard Law School where he again criticized Chief Justice Moore and staked out his opposition to him. In his speech, Attorney General Pryor accused Chief Justice Moore of "judicial activism . . . destructive to the Constitution" and of a "dangerous politicization of

the law.” Yingzhen Zhang, *Official Says Duty Trumps Religion*, The Harvard Crimson, News Section, Feb. 9, 2004, at <http://www.thecrimson.com/article.aspx?ref=357287> (attached hereto and incorporated herein by reference as Exhibit 1). Mr. Pryor expressed that he was “proud” of the outcome in the prosecution of Chief Justice Moore, but added that he “fear[ed] for my country that there will be additional Roy Moores” Adina Levine, *Filibustered nominee speaks on Rule of Law, religion*, The Record (Harvard Law School), Feb. 12, 2004, at <http://www.hlrecord.org/media/paper609/news/2004/02/12/News/Filibustered.Nominee.Speaks.On.Rule.Of.Law.Religion-606243.shtml> (attached hereto and incorporated herein by reference as Exhibit 2). Mr. Pryor went so far as to criticize the editors of *Human Events* for giving the publication’s Man of the Year award to Chief Justice Moore, saying that the editors “should be ashamed of themselves.” Adam White, *Pryor Convictions*, National Review Online, Feb. 17, 2004, at <http://www.nationalreview.com/comment/white200402170910.asp> (attached hereto and incorporated herein by reference as Exhibit 3).

4. While awaiting a confirmation vote on Judge Pryor in the Senate, numerous supporters of Judge Pryor have pointed to his public opposition of former Chief Justice Moore as a reason for Judge Pryor to continue to serve on this Court. *See, e.g.*, “Judiciary Committee backs Pryor nomination,” May 12, 2005, at <http://www.cnn.com/2005/POLITICS/05/12/judge.nominations/> (“Sen. Jeff

Sessions, R-Alabama, gave a spirited defense of Pryor [and] . . . noted that Pryor opposed Alabama Supreme Court Chief Justice Roy Moore when Moore put a large stone monument to the Ten Commandments in a prominent position in the state Justice Center.”) (attached hereto and incorporated herein by reference as Exhibit 4). The White House’s website specifically lists the fact that Mr. Pryor “personally prosecuted charges against then-Chief Justice Roy Moore” as evidence of Mr. Pryor’s “impressive record.” *Judge William H. Pryor Jr., Nominee to the U.S. Court of Appeals for the Eleventh Circuit*, at <http://www.whitehouse.gov/infocus/judicialnominees/pryor.html>, last visited on June 8, 2005 (attached hereto and incorporated herein by reference as Exhibit 5). Even Morris Dees, one of the plaintiffs’ attorneys in the *Glassroth v. Moore* litigation and a former opponent of Judge Pryor (and of Chief Justice Moore), publicly offered then-Attorney General Pryor “rare praise” for his prosecution of Chief Justice Moore and opined that the matter had “certainly matured” Mr. Pryor. Manuel Roig-Franzia, *For Pryor, Religious, Legal Rights in Conflict; Senators, Bible Belt Criticize Ala. Attorney General*, *The Washington Post*, Aug. 25, 2003, at A05 (attached hereto and incorporated herein by reference as Exhibit 6). Nevertheless, certain Senators continued to oppose Judge Pryor’s confirmation.

5. In his first case before this Court since the appointment of Judge Pryor, former Chief Justice Moore was listed as lead counsel on *Amicus*’s proposed

brief in the above-styled case. Three other motions for leave to file *amicus* briefs were granted by Judge Pryor, but *Amicus*'s was denied, ostensibly because the matters asserted therein were "not relevant" to this Court's determination in *Selman*. *Selman v. Cobb County Sch. Dist.*, Nos. 05-10341-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 7). The timing of this order did not go unnoticed. Barry Lynn of Americans United for Separation of Church and State commented about Judge Pryor's May 20 order: "I don't think he wants anything to do with Judge Moore. . . . I think it's a lot of posturing to make his rather extreme views in the past disappear." Jeffrey McMurray, "Pryor Moore clash again with confirmation vote near," Associated Press, May 24, 2005, at <http://www.montgomeryadvertiser.com/NEWSV5/storyV5pryor25w.htm> (attached hereto and incorporated herein by reference as Exhibit 8).

6. Only three (3) days after Judge Pryor issued the May 20 order denying the Chief Justice Moore's *amicus* brief, 14 U.S. Senators (7 Republicans and 7 Democrats) signed an agreement to allow votes in the Senate on certain federal judicial nominees but not others. The three nominees that the Senators agreed to "invoke cloture on" were Janice Rogers Brown, Priscilla Owen, and William Pryor. See *Memorandum of Understanding on Judicial Nominations*, p. 1 (May

23, 2005), at <http://www.c-span.org/pdf/senatecompromise.pdf> (attached hereto and incorporated herein by reference as Exhibit 9); Charles Hunt, *7 Republicans abandon GOP on filibuster*, Washington Times, May 24, 2005, at <http://washingtontimes.com/national/20050524-122305-7180r.htm> (attached hereto and incorporated herein by reference as Exhibit 10). As of the filing of this motion, Judges Brown and Owen have been confirmed, and Judge Pryor's vote and likely confirmation are imminent.

7. According to 28 U.S.C. § 455(a): "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Indeed, "[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the *appearance* of impropriety whenever possible.'" *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988)) (emphasis added). Under § 455(a), a judge *must* recuse himself or herself when "'an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality,' and any doubts must be resolved in favor of recusal." *Patti*, 337 F.3d at 1321 (quoting *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988)). Similarly, Canon 3(C) of the Code of Conduct for United States Judges provides that "[a] judge shall disqualify himself

or herself in a proceeding in which the judge's impartiality might reasonably be questioned."

8. Attorney General Pryor can hardly be faulted for publicly expressing his opinion, particularly in defense of his own actions. But *as a federal judge*, given Mr. Pryor's documented and publicized history of antagonism toward former Chief Justice Roy Moore, his judicial impartiality in a matter concerning the former Chief Justice would easily be questioned. Now that he has publicly singled out Chief Justice Moore's *amicus* brief for denial, his partiality has appeared to manifest itself. Judge Pryor is entitled to counter or criticize the arguments asserted in the Foundation's *amicus* brief. But his May 20, 2005 order opposing *only* Chief Justice Moore's brief demonstrates the partiality that an objective observer would expect Judge Pryor to hold against Chief Justice Moore after the intense public controversy between the two in the months and even days leading up to Judge Pryor's recess appointment.

9. Moreover, the potential that Judge Pryor could enjoy (and has enjoyed) political favor, or at least a weakening of opposition, in the United States Senate and elsewhere by continuing to oppose the efforts of Chief Justice Moore and the Foundation for Moral Law would lend additional weight to the need for recusal in this case. Regardless of Judge Pryor's personal motivations, his continued opposition to Chief Justice Moore, now from the federal bench, could

imply an impropriety on the part of a sitting-but-unconfirmed judge who may still have something to prove to his political opponents and supporters. Public confidence in the independence and integrity of the federal judiciary requires that Judge Pryor step aside and allow another judge on this Court to consider Chief Justice Moore and the Foundation's *amicus* brief and relevant motions.

CONCLUSION

Therefore, *Amicus* Foundation for Moral Law respectfully requests that Judge William H. Pryor, Jr., recuse and/or disqualify himself from any legal filings by former Chief Justice Roy Moore and the Foundation for Moral Law, including the *Motion for Reconsideration of Motion for Leave to File Amicus Curiae Brief and for Modification of Order Denying Amicus Curiae Brief* accompanying this motion.

Respectfully submitted this 9th day of June, 2005.

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 Recusal and Disqualification of Judge William H. Pryor, Jr.* 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