No. 05-10341-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

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BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, INC., IN SUPPORT OF DEFENDANTS-APPELLANTS AND IN SUPPORT OF REVERSAL

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

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. Rules 26.1-1 through 26.1-3, 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. Alliance Defense Fund (Counsel for Intervenors below)
2. American Civil Liberties Union Foundation (Counsel for Appellees Chapman, Silver, Mason, and Jackson)
3. American Civil Liberties Union Foundation of Georgia, Inc. (ACLUFG)
4. Biologists and Scientists (*Amicus Curiae* below)
5. Bondurant, Mixson & Elmore, LLP (Counsel for Appellee Selman)
6. Brackett, David G. H. (Appellate attorney for Plaintiffs-Appellees)
7. Bramlett, Jeffrey O. (Appellate attorney for Plaintiffs-Appellees)
8. Brock, Clay & Calhoun, P.C. (Counsel for Appellants)

9. Callaway, Carol A. (Appellate attorney listed for Defendants-Appellants)
10. Chapman, Kathleen (Plaintiff-Appellee)
11. Cobb County Board of Education (Defendant-Appellant)
12. Cobb County School District (Defendant-Appellant)
13. Cooper, Honorable Clarence (Trial Judge)
14. Fant, Lynn Gitlin (Attorney representing *Amicus* Parents for Truth in Education)
15. Garrett, Margaret Fletcher (ACLUFG Attorney representing Plaintiffs-Appellees)
16. Gunn, Ernest Linwood IV (Attorney representing Defendants-Appellants)
17. Hardage, Allen (Intervenor below)
18. Hollberg & Weaver (Counsel for Intervenors and *Amicus* below)
19. Jackson, Terry (Plaintiff-Appellee)
20. Meazell, Emily Hammond (Appellate attorney representing Plaintiff-Appellee Jeffrey Michael Selman)
21. Manely, Michael Eric (Attorney representing Plaintiffs-Appellees)
22. Mason, Paul (Plaintiff-Appellee)

23. McMurry, Kevin Thomas (Attorney representing intervenors Hardage and Taylor)
24. Parents for Truth in Education (*Amicus Curiae* below)
25. Power, Debra Anne (Former plaintiff; terminated from case September 20, 2004)
26. Redden, Joseph (Defendant-Appellant)
27. Selman, Jeffrey Michael (Plaintiff-Appellee)
28. Silver, Jeff (Plaintiff-Appellee)
29. Taylor, Larry (Intervenor below)
30. Theriot, Kevin Hayden (Attorney representing intervenors Hardage and Taylor)
31. Weaver, George M. (Attorney representing *Amicus* Biologists and Scientists and intervenors Hardage and Taylor)
32. Weber, Gerald R. (ACLUFG Attorney representing Plaintiffs-Appellees)

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Benjamin D. DuPré

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STATEMENT OF THE ISSUES

1. Whether the text of the First Amendment of the United States Constitution should determine the constitutionality of the Cobb County School District's textbook sticker.

2. Whether, under the First Amendment, the textbook sticker is a "law respecting an establishment of religion."

3. Whether the textbook sticker violates the text of the Georgia Constitution.

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law, Inc. ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God, especially when exercised by public officials. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and provides education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments.

The Foundation has an interest in this case because it believes that the removal of the informational sticker on Cobb County School District science textbooks is based on a misinterpretation of the Constitution's Establishment

Clause, which has resulted in religious discrimination. Moreover, the Foundation represents Barrow County, Georgia, in a similar federal suit featuring allegations that a display of the Ten Commandments in a Barrow County building violates the Establishment Clause and the Georgia Constitution.

SOURCE OF AUTHORITY TO FILE

Because only Jeffrey Selman *et al.* (Appellees) have consented to the filing of this *amicus curiae* brief, and pursuant to Fed. R. App. P. 29(a)-(b) and 11th Cir. Rule 29-1, *Amicus* has contemporaneously filed with this Honorable Court a motion for leave to file this brief.

SUMMARY OF ARGUMENT

Information stickers concerning evolution placed by the Cobb County School Board ("the School Board") on certain science textbooks of the Cobb County School District ("the School District") in no way violate the Establishment Clause of the First Amendment because such stickers do not conflict with the text of that Amendment, particularly as it was historically defined by common understanding at the time of the Amendment's adoption.

It is the responsibility of this Court and any court exercising judicial authority under the U.S. Constitution to do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case tests rather than the text of the constitutional provision at issue. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the supreme law of the land.

The text of the Establishment Clause states that "Congress shall make no **law** respecting an **establishment** of **religion**." U.S. Const. amend. I (emphasis added). When these words are applied to the textbook sticker at issue, it becomes evident that the sticker is not a law, it does not dictate religion, and it does not represent a form of an establishment. The First Amendment was intended to protect religion, not foster animus toward it; but the district court's departure from

the constitutional text resulted in open discrimination against religion and its adherents.

Finally, the textbook stickers do not violate the Constitution of the State of Georgia, Art. I, Sec. II, Para. VII, because Cobb County has not taken public money "from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." The district court's finding that the sticker violates this section because it "aids the beliefs of Christian fundamentalists and creationists" is again unsupported by the law—the Georgia Constitution—and extends the court's hostility toward certain religious individuals in Cobb County, Georgia, into state law.

For the district court's erroneous constitutional interpretations, the decision below should be reversed; for its blatant discrimination against religiously-motivated individuals, the decision should be renounced.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE STICKERS PLACED ON SCIENCE TEXTBOOKS IN THE COBB COUNTY SCHOOL DISTRICT SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court properly framed the issue in this case to be "whether the sticker placed in certain Cobb County School District science textbooks violates the Establishment Clause of the First Amendment of the United States Constitution and/or Article 1, Section II, Paragraph VII of the Constitution of the State of Georgia." *Selman v. Cobb County Sch. Dist.*, No. 05-10341, slip op. at 2 (N.D. Ga. Jan. 13, 2005). The district court even quoted the text of the Establishment Clause. *See Selman*, slip op. at 17. But it was not the Constitution that ultimately determined the outcome of this case. Instead, the district court echoed this Court's sentiments that "'there is no bright-line rule for evaluating Establishment Clause challenges' and 'each challenge calls for line-drawing based on a fact-specific, case-by-case analysis.'" *Id.* at 19 (quoting *King v. Richmond County*, 331 F.3d 1271, 1275-76 (11th Cir. 2003)). The district court abandoned the law of the First Amendment and regrettably moved immediately to the *Lemon* test, a three-prong test formulated by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), to determine whether "the challenge under the Establishment Clause succeeds." *Selman*, slip op. at 19. In an impressive show of judicial "line-drawing," the court below never actually applied *the Establishment*

Clause, the true law of the case, but it nevertheless concluded that the textbook stickers had violated that Clause.

A. The Constitution is the "supreme Law of the Land."

Our constitutional paradigm dictates that *the Constitution itself* and all federal laws are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oath of office to support *the Constitution itself* (and no person, office, government body, or judicial opinion). *Id.* *Amicus* respectfully submits that this Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803) (emphasis in original). It remains true today that

> [i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added."

Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840). Instead of heeding this truth, the district court below evaluated the sticker under the guise of the *Lemon* test at the expense of the actual words of the Establishment Clause.

B. The *Lemon* test and other constitutional counterfeits foment hostility toward religion and its adherents.

By adhering to the *Lemon* test rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. Reliance upon precedents such as *Lemon* and its progeny is a poor and improper substitute for the concise language of the Establishment Clause.

The *Lemon* Court claimed that "[t]he language of the Religion Clauses of the First Amendment is at best opaque" and that, therefore, "[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines" delineating what is constitutionally permissible or impermissible. *Lemon*, 403 U.S. at 612. *See also Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984) ("[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed"). However, jurisprudential experiments with various extra-textual "tests" such as *Lemon* have produced a

continuum of disparate results.[1] This is because attempting to draw a clear legal line without the "straight-edge" of the Constitution is simply impossible. The abandonment of "fixed, *per se* rule[s]" results in the application of judges' complicated substitutes for the law. No judicial decision should coerce a court to abandon the text of the Constitution.

This jurisprudential experiment is doomed to fail because *Lemon's* fundamental premises are false, and that is no more clearly demonstrated than in this case. The Cobb County School Board placed a sticker on certain textbooks stating:

> *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.*

Selman, slip op. at 8. The simple fact is that the School Board's placement of this sticker does not violate the Establishment Clause because the School Board has not made a "law respecting an establishment of religion." U.S. Const. amend. I. But

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[1] Many courts have expressed frustration with the difficulty in applying the *Lemon* test. For example, the Third Circuit 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 . . . ." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). *See also Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999); *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), *rev'd sub nom. Mitchell v. Helms*, 530 U.S. 793 (2000); *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

the district court below felt itself bound, not by the "bright-line" of the law, but by the imprecise and extra-constitutional prongs of the *Lemon* test.

The first prong of the *Lemon* test, as the district court explained, holds that "a government-sponsored message violates the Establishment Clause of the First Amendment if it does not have a secular purpose . . . ." *Selman*, slip op. at 19. This prong draws the one bright line in the *Lemon* test—a stark separation between what is "religious" and what is "secular"—and ironically it does so in the one area where no such clear division exists. Religion has influenced culture and *vice versa* both directly and subtly in an untold number of ways almost since the beginning of history. *See generally*, Charles N. Cochrane, *Christianity and Classical Culture: A Study of Thought and Action from Augustus to Augustine* (Oxford University Press 1940); Richard Tarnas, *The Passion of the Western Mind* (Ballantine Books 1993). For the federal courts to demand the stripping away of all religious influence to yield a purely secular purpose as the only constitutionally justifiable basis for any government action is not only unrealistic; it fosters the very hostility toward religion that government is supposed to avoid. *See School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963) ("the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe." *Quoting Zorach v. Clausen*, 343 U.S. 306, 314 (1952)).

The district court in this case takes this division between "secular" and "religious" to a new extreme by saying that even labeling a scientific explanation for the origin of life a "theory" is religious. The district court found that because "the Sticker refers to evolution as a theory, the Sticker . . . has the effect of undermining evolution education to the benefit of those who would prefer that students maintain their religious beliefs regarding the origin of life." *Selman*, slip op. at 38. In other words, according to the district court, any "undermining" of evolution automatically and unconstitutionally benefits those with religious beliefs. Thus, under the rubric of strict separation between "secular" and "religious," a scientific explanation supported by the majority of the scientific community must be 100 percent confirmed as indisputable fact or else the government has uttered a "religious" statement. *See Selman*, slip op. at 36 ("By *denigrating* evolution, the School Board *appears* to be endorsing the well-known prevailing alternative theory, creationism or variations thereof, even though the Sticker does not specifically reference any alternative theories." (emphasis added)). Such a paradigm is patently absurd; even the district court conceded that "evolution is subject to criticism," *Selman*, slip op. at 36, yet because there is no mix between the secular and the religious under *Lemon*, the district court denominated the sticker's message as religious.

The second prong of *Lemon* is equally flawed when it commands that a government-sponsored message's "principal or primary effect must be one that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612. Federal courts have aimed to achieve a mythical "neutrality" concerning religion in the public square that does not exist and was never intended in our law. Our United States was never intended to be "neutral" toward religion. The primary author of the Declaration of Independence, Thomas Jefferson, observed that, "No nation has ever existed or been governed without religion. Nor can be." T. Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). George Washington similarly declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX, (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered, like the Declaration of Independence, to be part of this nation's organic law, declared that, "Religion, morality, and knowledge [are] necessary to good government." Northwest Ordinance of 1789, Article III, *reprinted in America's God and Country*, at 484.

Concerning the Constitution in particular, John Adams observed that, "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our constitution was made only for a moral

and religious people. It is wholly inadequate to the government of any other." *The Works of John Adams, Second President of the United States* 229, vol. IX (1854). The United States Congress affirmed these sentiments in a Senate Judiciary Committee report concerning the constitutionality of the Congressional chaplaincy in 1853:

> [The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

S. Rep. No. 32-376 (1853). Likewise, the United States Supreme Court noted in *Schempp* that "religion has been closely identified with our history and government." 374 U.S. at 213.

Lemon's "neutrality" principle, as its application by the district court in this case demonstrates, results in a blatant discrimination against those with religious beliefs. The district court found that the sticker was placed with an acceptable "secular purpose," but nevertheless it somehow had the effect of endorsing religion, not because of what the *sticker said*, but because of who would or did support the placement of the sticker: "religiously-motivated individuals," or more specifically, "Christian fundamentalists and creationists." *See Selman*, slip op. at 36, 39, 41-42. In other words, *Lemon* is not so concerned with the governmental act, but only with whether "religiously-motivated individuals" happen to support it.

Such *Lemon*-aided religious discrimination is found in neither the text of the First Amendment nor in the contemplated purposes of its Framers.

The district court's opinion in this case is rife with logical fallacies, due in no small part to the fact that it is based on the flawed foundation of *Lemon's* logic. For too long, the "strict interpretation of the Constitution" has been abandoned, and "fixed rules" no longer govern Establishment Clause cases. The text of the Establishment Clause contains a definite, relatively straightforward meaning that should be followed in this case. As the judicial oath of office requires, this Court should rule in this case based on the text of the First Amendment's Establishment Clause, rather than follow the judicially-fabricated *Lemon* test. *See Marbury*, 5 U.S. at 180.

II. THE SCHOOL BOARD'S PLACEMENT OF A STICKER ON CERTAIN SCIENCE TEXTBOOKS STATING THAT "EVOLUTION IS A THEORY, NOT A FACT," IS NOT A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment states, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. In no way could the School Board's placement of stickers on certain science textbooks be a "law respecting an establishment of religion."

A. The Sticker is not a "law."

It should be patently obvious that the textbook stickers in question are not "laws" in the constitutional sense of the term. At the time of the ratification of the

First Amendment, Sir William Blackstone had defined a "law" as "a rule of civil conduct . . . commanding what is right and prohibiting what is wrong." I W. Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Several decades later, Noah Webster's 1828 Dictionary stated that "[l]aws are *imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or *permissive*, declaring what may be done without incurring a penalty." N. Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828) (emphasis in original).

As noted above, the sticker at issue in this case characterizes evolution as "a theory, not a fact, regarding the origin of living things" that should be "approached with an open mind, studied carefully, and critically considered." *Selman*, slip op. at 8. This language does not force anyone to believe, espouse, or teach any particular thing. Indeed, the district court itself found that,

> [i]n over two years since the adoption of the science textbooks and the placement of the Sticker in the textbooks, neither the Superintendent of the Cobb County School District, the Supervisor of High School Science Curriculum, nor the Board members who testified at trial have received complaints about the teaching of religion or religious theories of origin in science classes. Moreover, students have brought up the topic of religion as it relates to the theory of evolution no more frequently than they did before the Sticker was played in textbooks.

Selman, slip op. at 15-16 (citations omitted). This is not surprising because there is no coercion whatsoever behind the language on the sticker. "Words do not

coerce." *Books v. Elkhart County, Ind.*, No. 04-2074, slip op. at 23 (7th Cir. Mar. 25, 2005) (Easterbrook, J., dissenting). The sticker simply provides to the students contextual information concerning evolution.

Likewise, the School Board did not make a law when it adopted the new science textbooks for the School District "with the condition that the Sticker would be placed in certain of the science textbooks." *Selman*, slip op. at 8. Placement of the stickers on the textbooks has not commanded any action from the residents of Cobb County nor has it restrained them from any action or conduct that they wish to pursue.

According to the district court, the only effects in the classroom allegedly caused by the sticker are that "[s]ome students have pointed to the language on the Sticker to support arguments that evolution does not exist," and a teacher testified that "the Board's misuse of the word 'theory' in the Sticker causes 'confusion' in his science class and consequently requires him to spend significantly more time trying to distinguish 'fact' and 'theory' for his students." *Selman*, slip op. at 16. Even if it is true that some students have used the sticker to "argue" that evolution does not exist, by its very terms making an argument means that no student is forced to believe anything by virtue of what the sticker says. Likewise, even if the School Board has misused the word "theory," there is no force (or threat thereof) behind the wording that requires students to do anything. Students may read or not

read the sticker, they may believe or not believe that evolution is a theory, and they may examine the materials in the science textbook concerning evolution with an "open mind" or not. At most, the stickers *encourage* students to think critically, but there is no mandate with the force of law behind that advice. Without some mandate or coercion, the stickers in question simply are not "laws" under the First Amendment.

Ironically, it is the district court's decision that has become a mandate for Cobb County. The district court stated that the problem with the sticker is that it "*disavows the endorsement of evolution*, a scientific theory, and [therefore] contains an implicit religious message advanced by fundamentalists and creationists . . . ." *Selman*, slip op. at 41 (emphasis added). In other words, no questioning of evolution is permitted without a school district running afoul of the Establishment Clause, which is tantamount to the district court mandating that only *unquestioned* evolution—as a scientific fact—may be taught in public schools. The United States Supreme Court, however, has expressly denounced such pedagogical repression: "We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught." *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987). Cobb County is not even *teaching* a scientific critique of evolution, but now the district court has mandated that it cannot merely *suggest* the students approach evolution with an open, and scientific,

mind. The district court's mandate is all the more egregious since the stickers are not laws under the First Amendment in any meaningful sense.

B. Placement of the stickers on certain textbooks does not respect "an establishment of religion."

The stickers placed on certain science textbooks by the School Board do not violate the Establishment Clause because they do not "respect," *i.e.*, concern or relate to, "an establishment of religion."

1. The definition of "Religion"

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, in James Madison's *Memorial and Remonstrance*, and echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[2] "Religion" was defined as: **"The duty which we owe to our Creator, and the manner of discharging it."** Va. Const. of 1776, art. I, § 16 (emphasis added); *see also Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330

[2] The U.S. Supreme Court later reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent in *Torcaso v. Watkins*, 367 U.S. 488, 492 n.7 (1961).

U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as that term in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has *reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will*. . . . (emphasis added)).

In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned[3] by the Supreme Court, quoted from *Beason* in defining "the essence of religion." *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting).

> Sixteen years later in *Everson*, the Supreme Court noted that it had
>
> previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the

[3] *Macintosh* was overturned by the United States Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946).

> same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson's 1785 Act for Establishing Religious Freedom].

Everson, 330 U.S. at 13. The *Everson* Court emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout Virginia," and played a pivotal role in garnering support for the passage of the Virginia statute. *Id*. at 12. Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution. For good measure, Justice Rutledge attached Madison's *Memorial* as an appendix to his dissent in *Everson* which was joined by Justices Frankfurter, Jackson, and Burton. *See id.* at 64.

Thus, the United States Supreme Court has recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16; *see also*, *Cantwell v. Connecticut*, 310 U.S. 296, 303, (1940) ("The constitutional inhibition of legislation on the subject of religion . . . forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship").

Assuming, *arguendo*, that the School Board's placement of the stickers on textbooks is in some sense a "law," it cannot be considered a law concerning "religion" because the stickers in no way explain or dictate the duties that Cobb County school children owe to God nor the way in which those duties ought to be

carried out. In fact, as the district court had to concede, the stickers do not even mention God, a Creator, creation, or a specific religion or religious belief of any sort. *See Selman*, slip op. at 25 ("the Sticker in this case does not contain a reference to religion in general, any particular religion, or any religious theory"). Moreover, the court admitted, "[t]here is no evidence in this case that the School Board included the statement in the Sticker that "evolution is a theory, not a fact' to promote or advance religion." *Id.* at 35.

Despite the lack of any reference to religion in the sticker, and without defining "religion," the district court found that the sticker somehow "convey[s] a message of endorsement of religion." *Selman*, slip op. at 31. The problem with the sticker, the court held, is that it "would appear to advance the religious viewpoint of the Christian fundamentalists and creationists who were vocal during the textbook adoption process regarding their belief that evolution is a theory, not a fact, which students should critically consider." *Id.* at 33. Such invidious discrimination against religious persons by the court below is neither an isolated example nor an inference strained from the words of the district court's opinion; rather it was the express basis of the court's finding that Cobb County had acted unconstitutionally:

> [T]he basis for this Court's conclusion that the Sticker violates the effects prong is not that the School Board should not have called evolution a theory or that the School Board should have called evolution a fact. Rather, the distinction of evolution as a theory rather

> than a fact *is the distinction that religiously-motivated individuals have specifically asked school boards to make in the most recent anti-evolution movement, and that was exactly what parents in Cobb County did in this case*. By adopting this specific language, even if at the direction of counsel, *the Cobb County School Board appears to have sided with these religiously-motivated individuals*.

Id. at 39 (emphasis added).

The district court thus reasoned that if a government action has a history of support from "religious" people, or even so much as appears to be supported by "religious" people, the action is religious and it therefore runs afoul of the Establishment Clause. The U.S. Supreme Court expressly rejected this reasoning decades ago when it upheld Maryland's Sunday Closing law:

> [T]he 'Establishment' Clause *does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions*. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And *the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation*. So too with the questions of adultery and polygamy. *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637; *Reynolds v. United States*, 98 U.S. 145 (1878). The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

McGowan v. Maryland, 366 U.S. 420, 442 (1961) (emphasis added). Without a proper definition of religion, it was enough for the district court that the sticker at issue merely harmonized with a certain belief held by "Christian fundamentalists

and creationists." The Supreme Court and, more importantly, the text of the First Amendment prove the lower court wrong.

The constitutional definition of religion says nothing about whether a particular group supports the government action in question or whether the action is "religiously motivated." The definition simply intones that if the government action relates to the duties we owe to the Creator and the manner of discharging those duties, it is an action concerning religion. The statement on the sticker does not tell students about duties owed to God or how those duties should be carried out; it does not even state whether there is a God to whom duties are owed. Therefore, the sticker unequivocally does not relate to religion according to the constitutional definition of the term.

Even if the district court's mental gymnastics to discover religion in the sticker are accepted, the result contradicts the foundation of our Constitution. According to the district court, by stating that "evolution is a theory, not a fact," the sticker somehow "contains an implicit religious message advanced by Christian fundamentalists and creationists." *Selman*, slip op. at 41. That message apparently is that God exists and played a role in creation. By completely prohibiting this message—one that, even by the district court's standards is only "implied" by the sticker—the district court has held that as a matter of constitutional law any discussion of science must be divorced from God. Yet, banning God from the

discussion of the creation of life directly contradicts a founding principle of this country: the belief—as the country's founding document, the Declaration of Independence, proclaims—that we "are endowed by [our] Creator with certain unalienable rights."[4] Declaration of Independence, para. 2.

Requiring as a matter of constitutional law that evolution be taught as a fact beyond question means that the Constitution dictates that God be eliminated from science, although the text of the Constitution does not state or imply any such thing. If suggesting that man was created by God is "religious" rather than "scientific" because such a proposition cannot be proven, then surely teaching that evolution is a fact beyond question is also religious rather than scientific because it means that evolution need not be tested or verified.

In sum, no reasonable interpretation of the sticker could hold that it represents an attempt by the School District to dictate the duties its students owe to the Creator and the manner in which the students should discharge those duties. Consequently, the sticker is not a law respecting an establishment of "religion." U.S. Const. amend. I.

2. The definition of "Establishment"

Even if it is assumed that the sticker is a "law" under the First Amendment—which it is not—and even if it is assumed that the sticker pertains to

[4] Should this Declaration language also be stricken from Cobb County civics textbooks lest evolution be undermined?

"religion" under the First Amendment—which it does not—the School Board has not "establish[ed]" a religion by placing the sticker on science textbooks.

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II J. Story, *Commentaries on the Constitution* § 1871 (1833). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Cong*. 757 (1789) (Gales & Seaton's ed. 1834). The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the Army and Navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and

> penalties for the non-conformist. There never was an established religion without all these.

H.R. Rep. No. 33-124 (1854).

At the time of its adoption, therefore, "[t]he text [of the Establishment Clause] . . . meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they existed in the various states." Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 690 n19 (1992).

The placement of informational stickers concerning evolution on certain science textbooks by the School Board does not in any fashion represent the setting up of a state-sponsored church, nor does it in any way lend government aid to one faith over another. Indeed, the district court specifically found that "[t]here is no evidence in this case that the School Board included the statement in the Sticker that 'evolution is a theory, not a fact' to promote or advance religion." *Selman*, slip op. at 35. Not only did the School Board *not* intend to promote a religion, the sticker cannot plausibly be said to support a specific church, sect, or denomination. Instead, the sticker merely informs students that there exist legitimate questions about evolution and that they should study it "carefully," "critically," and "with an open mind." *Id.* at 8. Thus, placement of the stickers on textbooks does not even remotely involve an "establishment" of religion. U.S. Const. amend. I.

III. THE TEXTBOOK STICKER DOES NOT VIOLATE THE TEXT OF THE GEORGIA CONSTITUTION.

As the court below did with the federal constitutional claims, the court began its analysis of the Georgia Constitution claim with the text itself. The Constitution of the State of Georgia, Article I, Section II, Paragraph VII (hereafter "Para. VII"), provides as follows:

> No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.

Again, however, the district court did not even feign application of the constitutional text to this case. Instead, after citing three cases, the court's analysis consisted only of this rubberstamp conclusion:

> In the instant case, it is undisputed that the Cobb County School Board used the money of taxpayers to produce and place the Sticker in dispute in certain of the Cobb County School District science textbooks. *This Sticker aids the beliefs of Christian fundamentalists and creationists*. In light of the prior interpretation of the Georgia Constitution provision challenged by the Plaintiffs and given the Court's conclusion above that the Sticker violates the Establishment Clause of the First Amendment, the Court likewise concludes that the Sticker runs afoul of the Georgia Constitution.

Selman, slip op. at 43 (emphasis added). The court's departure from the Georgia Constitution text again led to an erroneous conclusion regarding the Plaintiffs' claims as to Para. VII.

The text of the Georgia Constitution should guide this Court's determination of the claims that are based upon the state's constitution. As the Georgia Supreme Court held years ago when interpreting the very provision at issue:

> Courts are not concerned with the wisdom of legislation. *It is the duty of the court to decide in a proper case whether legislation is in conflict with the Constitution*; but in all cases the conflict must be clear and manifest before the court will declare the same void. All doubts must be resolved in favor of the constitutionality, certainly with regard to the Constitution of this state.

Wilkerson v. City of Rome, 110 S.E. 895, 904 (Ga. 1922) (emphasis added).

By its terms, the Georgia constitutional provision at issue prevents the taking of "money" from the "public treasury" for the "aid of any *church, sect, cult, or religious denomination or of any sectarian institution*." Ga. Const., Art. I, Sec. II, Para. VII (emphasis added). But the court below never established that through the textbook stickers public money has aided any "church, sect, cult, or religious denomination" or "sectarian institution." Instead, the court retreated to its earlier guilty-by-association conclusion that the "Sticker aids the beliefs of Christian fundamentalists and creationists." *Selman*, slip op. at 43. But "aid[ing] the beliefs" of certain people is not equivalent to the constitutional text's prohibition against aiding any of the religious *institutions* or entities mentioned in Para. VII. There is no "Church of Creationism" or "Christian Fundamentalist" denomination that has received public monies through the actions of Cobb County; nor did the

court below find such to be the case. Thus, by its own findings, the court's conclusion below is not supported by the constitutional text.

The Georgia Supreme Court would agree. In *Wilkerson*, *supra*, the Georgia high court held that an act certainly more "religious" than the Cobb County textbook sticker—"[t]he reading of the Scriptures in the public schools"—does not make the school into "a sectarian institution." 110 S.E. at 904. The *Wilkerson* court explained:

> [N]o theological doctrines are required to be taught. The creed of no sect must be affirmed or denied. There is no necessary interference, by way of instruction, with the views of the scholars, whether derived from parental or sacerdotal authority. . . . No one is required to believe, or punished for disbelief, either in its inspiration or want of inspiration, in the fidelity of the translation or its accuracy, or in any set of doctrines deducible or not deducible therefrom.

110 S.E. at 903. The same can be said of Cobb County School District's textbook sticker. In its quixotic zeal to root out religion where none exists, the district court below has twisted the Georgia Constitution to forbid the mere aligning of language on a textbook sticker with the beliefs of some of Cobb County's citizens. The result is both constitutionally unfaithful and politically "unreligious."

Even *Bennett v. City of LaGrange*, 112 S.E. 482 (Ga. 1922), cited by the district court below, in which the Georgia Supreme Court held that Para. VII prohibited city money from supporting the Salvation Army because the para-church organization was a "sectarian institution" under Para. VII (then Para. XIV),

does not support the district court's holding. Unlike the district court below, the *Bennett* court actually applied the constitutional text and explained the definition of "sectarian institutions" prohibited from receiving public funds.

> Is the Salvation Army a sectarian institution? A religious sect is *a body or number of persons*, united in tenets, but *constituting a distinct organization or party* holding sentiments or doctrines different from those of other sects or people. In the sense intended in the Constitution every sect of that character is sectarian and all members thereof are sectarians.
>
> A religious sect or denomination is *one having a common system of faith*. The term "church" is one of very comprehensive signification, and imports an *organization* for religious purposes, for the public worship of God.

Id (emphasis added). This Court will certainly note that the constitutional definition of "sectarian institutions," as confirmed by the *Bennett* court, involves an identifiable *entity* or religious group: "a body or number of persons" or a "distinct organization or party." *Id.* While the Salvation Army is an example of a distinct organization that is arguably within the tenor of Para. VII, "religiously-motivated individuals" or "Christian fundamentalists and creationists" loosely lumped together for their opposition to evolution are *not*. Even under a broad interpretation of the very specific prohibition in Georgia Constitution, Art. I, Sec. II, Para. VII, the district court below erred in holding that the Cobb County textbook sticker violated this portion of the state constitution.

CONCLUSION

Because the Cobb County School District's textbook sticker is not contrary to the text of the United States Constitution or the Georgia Constitution, *Amicus* respectfully submits that the district court's decision and order below should be reversed.

Dated this 18th day of April, 2005.

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Dated this 18th day of April, 2005.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of this Brief of *Amicus Curiae* have been served on counsel (listed below) for each party, by certified mail, and that the original and six (6) copies of this Brief of *Amicus Curiae* have been dispatched to the Clerk of the United States Court of Appeals for the 11th Circuit, by first-class U.S. Mail, on this 18th day of April, 2005.

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