

Docket No. 2005-0113

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2006

**BOARD OF EDUCATION OF THE ARKLATEX SCHOOL FOR
MATHEMATICS AND SCIENCES SPECIAL SCHOOL DISTRICT;
ANITA PASCAL, individually and as President of the Board of Education of
the Arklatex School for Mathematics and Sciences Special School District;
TIMOTHY HARLAN, individually and as Superintendent of the Arklatex
School for Mathematics and Sciences Special School District; and RICHARD
RICE, individually and as Principal of the Arklatex School for Mathematics
and Sciences**

Petitioner,

v.

PETER GIRSH

Respondent,

On Writ of Certiorari

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Where instruction of Intelligent Design employs scientific evidence to demonstrate existence of an intelligent being responsible for creation but does not refer to the nature of the being, does the instruction violate the Establishment Clause of the First Amendment?
2. Where a teacher's speech is of limited public concern, is the interest of protecting the speech outweighed by the school's interest in maintaining an efficient and effective workplace?

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STATEMENT OF THE CASE

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The order and memorandum opinion of the Arklatex District Court is contained in the Official Record. (R.3-14). The opinion of the Fourteenth Circuit Court of Appeals is also included in the Official Record. (R.15-19).

CONSTITUTIONAL PROVISION INVOLVED

The text of the following Constitutional provision relevant to the determination of the case is included in the appendix: U.S. Const. amend. I.

STANDARD OF REVIEW

This Court may review summary judgment *de novo*. United States v. Winstar Corp., 518 U.S. 839, 860 (1996).

STATEMENT OF THE CASE AND FACTS

Respondent is a high school biology teacher at the Arklatex School for Mathematics and Sciences (ASMS). (R.4). ASMS is a public school receiving funding from the Arklatex Department of Education. (R.4). Although students must apply to gain admission to ASMS, they receive the same benefits as any public school student in Arklatex. (R.4). Respondent was one of the first faculty members at ASMS at its founding in 1995. (R.5). Since then he has served on the selection board and on the curriculum committee for the past seven years. (R.5).

ASMS is a school for exceptionally talented students, and as such is mandated to adhere to the “exceptional school” curriculum. (R.5). The curriculum states that the school must adhere to the state specified Biology program, which strictly prohibits the teaching of “non-scientific” evidence. (R.5). Before the events of January 26, 2004

respondent always followed the mandated curriculum and taught only from textbooks approved by the Department of Education. (R.5). All of these textbooks included the theory of evolution and excluded any mention of Intelligent Design. (R.5).

On September 8, 2003, the School Board adopted a new policy¹ prohibiting teachers from instructing students on Creationism or Intelligent Design. (R.5). The President of the School Board, Anita Pascal, stated that the School Board passed this policy to “avoid Establishment Clause violations that might result from teaching such theories and to avoid the appearance the school endorses any particular religious belief.” (R.5-6). The policy specifically allows teachers to teach alternative theories of origin in addition to evolution, as long as Creationism and Intelligent Design or similar theories are not taught. (R.6).

On January 26, 2004, respondent was teaching his class when a student asked him about Intelligent Design. (R.6). Some of the students had researched respondent’s name on the Internet and discovered that he had written materials on Intelligent Design. (R.6). Respondent realized that in answering the student’s question he would violate the School Board policy and thus dismissed class early without addressing Intelligent Design. (R.6).

The next day, students again asked respondent about Intelligent Design. (R.6) Respondent told the students that the School Board had a policy prohibiting teaching about Intelligent Design. (R.6-7). He then told the students that he believed the policy was an unconstitutional violation of the Establishment Clause and of his First Amendment right to free speech and he thought that “the School Board has more important things to worry about than trying to prevent students from thoroughly learning

¹ See Arklatex School for Mathematics and Sciences Special School District Policy § 1701.2, appendix.

science.” (R.7). As a result, respondent began to discuss Intelligent Design in the classroom on January 27, 2004. (R.7).

Respondent explained the basic elements of Intelligent Design theory. (R.7). He told the students that “empirical scientific evidence points to the conclusion the universe was deliberately designed by an intelligent being or beings.” (R.7). He also noted that Intelligent Design suggests that evolution alone cannot explain the “origin, complexity, and diversity of life.” (R.7). While describing the scientific evidence supporting the “irreducible complexity” of Intelligent Design, he pointed out that “life on Earth, especially human life, would be an absurdly improbable event were it not for an intelligent agent who fine-tuned the universe to support life.” (R.7). During the lecture, respondent was careful not to use the word “God” or describe the nature of this intelligent designer, but he asserted that creation by an intelligent being is essential to the theory. (R.7-8). The students sat silently and were captivated by respondent’s lecture. (R.8). After he completed his lecture, he showed the students the Intelligent Design textbook to which he contributed, some articles he had written on the subject, and a video clip of an interview he had given on the subject matter. (R.7-8). At the end of class, respondent offered students an informational pamphlet on Intelligent Design which did not mention God, but referred to “some sort of intelligent agent.” (R.8).

That evening, Dr. Rice, the principal of ASMS, received a call at home from one of the respondent’s student’s parents, Dorothy Klinger. (R.8). Mrs. Klinger explained to Dr. Rice that her daughter, Maya, told her that respondent lectured about Intelligent Design in the classroom. (R.8). Mrs. Klinger was outraged because she and her husband are Atheists and she believed that the Intelligent Design lecture undermined their efforts

to raise their child as an Atheist. (R.8). Maya stated that she didn't feel comfortable during the discussion of Intelligent Design because she doesn't "believe in supernatural beings with the power to create the Universe" and she felt like respondent was "trying to tell us that science had proven God exists." (R.9).

On January 28, 2004, Dr. Rice approached respondent as he was entering the school and told him about the phone call from Mrs. Klinger the night before. (R.8). Dr. Rice then reminded respondent of the School Board policy prohibiting the teaching of Intelligent Design and told him not to mention Intelligent Design again in the classroom. (R.9). However, respondent began the class that day by answering questions relating to Intelligent Design, specifically questions about how the theory can be used to refute evolution. (R.9). As a result, Maya Klinger and two other students walked out of class saying, "I can't hear this." (R.9). Respondent attempted to stop them, but they said they would return when he began acting like a "teacher instead of a preacher." (R.9).

The next morning, an open letter appeared in the *Arklatex Tribune* from Dorothy Klinger urging the State to pull all funding from ASMS. (R.9). The letter also encouraged students not to apply to ASMS and stated that her daughter had withdrawn from ASMS because someone was up there "teaching about God instead of science." (R.9). Subsequently, Maya stated that she withdrew from ASMS because she felt uncomfortable there as a result of the Intelligent Design discussions and felt that these discussions had estranged her from her peers. (R.9).

PROCEDURAL HISTORY

In 2004, Plaintiff-Respondent filed suit in the United States District Court for the

Eastern District of Arklatex against Defendants-Petitioners the Board of Education of the Arklatex School for Mathematics and Sciences Special School District, Anita Pascal, Timothy Harlan, and Richard Rice alleging the School Board's policy prohibiting the teaching of Creationism or Intelligent Design violated the Establishment Clause and that the School Board's disciplinary actions against Plaintiff violated his First Amendment right to free speech. (R.10). Defendants-Petitioners moved for summary judgment. (R.10). On June 7, 2004, the Defendant's motion for summary judgment was granted, dismissing Plaintiff's complaint on both claims. (R.14). Plaintiff appealed the case to the United States Court of Appeals for the Fourteenth Circuit. (R.15). The Court of Appeals subsequently found that a question of material fact existed on both claims and reversed and remanded the District Court's decision for a trial on the merits. (R.17, 19). Defendants-Petitioners sought and received a writ of certiorari from the United States Supreme Court to consider the following issues (R.20):

1. Does either allowing or prohibiting instruction on Intelligent Design in public schools violate the Establishment Clause of the First Amendment where its proponent focuses on the scientific evidence used to support the theory and does not make any assertions regarding the nature of the intelligent designer?
2. Does the First Amendment right of freedom of speech protect a public school teacher's discussion on the topic of Intelligent Design?

SUMMARY OF ARGUMENT

I.

Under the First Amendment, government can “make no law respecting an establishment of religion.” U.S. Const. amend. 1. Intelligent Design is a theory that acknowledges the existence of a supernatural creator of the universe; therefore, it is religious in nature. Because Intelligent Design endorses such a religious belief, instruction of the theory at Arklatex School for Mathematics and Science violates the Establishment Clause. Likewise, the effect of instruction of Intelligent Design in a public school promotes a theory that favors one religious view over other theories. Further, students present during instruction on Intelligent Design in a public classroom may feel coerced to accept the religious nature of the theory. Respondent’s classroom lecture on Intelligent Design violated the Establishment Clause because the theory is inherently religious in nature.

The School Board policy prohibiting the instruction of Intelligent Design does not violate the Establishment Clause. This Court has long recognized evolution as a scientific theory. See Epperson v. Arkansas, 393 U.S. 97 (1968). Providing for the instruction of evolution does not inhibit religious belief. Since instruction of Intelligent design would inhibit religious beliefs which conflict with it, prohibition of instruction of this theory comports with the Establishment Clause. Since the policy effects the state action of teaching in public schools and not private speech, the prohibition of Intelligent Design instruction does not cause impermissible viewpoint discrimination.

II.

Respondent's speech was constitutionally unprotected in this case. A government employee's speech is only protected when it deals with matters of public concern and outweighs the interests of the State in ensuring an efficient governmental operation. In this case, respondent's statements discussing Intelligent Design in the classroom and criticizing School Board policy were not matters of public concern. More significantly, the comments undermined the authority of the school's administrative leaders, disrupted the school's operations and created an inefficient work environment between colleagues. These issues weigh heavily on the side of the School Board in weighing its interests against the limited free speech rights of respondent. As a result, under the Pickering analysis established by this court, the School Board's actions were proper as they did not violate respondent's right to free speech. 391 U.S. 563 (1968).

I. THE COURT OF APPEALS ERRED IN DENYING THE ARKLATEX SCHOOL BOARD'S SUMMARY JUDGMENT MOTION BECAUSE INSTRUCTION OF INTELLIGENT DESIGN VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The Establishment Clause states, "Congress shall make no law respecting the establishment of religion." U.S. Const. amend. I. On several occasions, this Court has examined activities in public schools to determine if the Establishment Clause has been violated. See, e.g., Epperson, 393 U.S. at 106-07. On such occasions, this Court has consistently made the importance of protecting students' constitutional freedoms in public schools clear. Lee v. Weisman, 505 U.S. 577, 592 (1992) (recognizing "heightened concerns" in protecting constitutional freedoms in public schools); Epperson, 393 U.S. at 104 (stating that the "vigilant protection" of such freedoms is "nowhere more vital" than in public schools). The Court noted that its vigilant monitoring of the Establishment Clause in public schools is required because students are "impressionable and their attendance is involuntary." Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987).

The Court has formulated several tests to determine whether an Establishment Clause violation has occurred. Lee, 505 U.S. at 584-87 (identifying the Court's Establishment Clause tests: the Lemon test, the endorsement test, and the coercion test). Regardless of which test it applies in school cases, the basic rule recognizes that the Establishment Clause "forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma." Edwards, 482 U.S. at 593. For example, a school board policy that required balanced teaching of evolution and creation science was invalidated because it preferred a particular religious doctrine. Id. at 596-597. Likewise, a law violated the Establishment Clause because it

prohibited the teaching of evolution because it was “deemed antagonistic to a particular dogma.” Epperson, 393 U.S. at 107.

This Court should hold that respondent’s instruction of Intelligent Design is a violation of the Establishment Clause because Intelligent Design is based on religious belief of a supernatural being responsible for creation. The Ninth Circuit observed, “[t]he Supreme Court has held unequivocally that while the belief in a divine creator of the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not.” Pelozo v. Capistrano Unified School District, 37 F.3d 517, 521 (9th Cir. 1994) (citing Edwards v. Aguillard, 482 U.S. 578 (1987)). The “supernatural designer” involved in Intelligent Design, like a “divine creator” evidences that the theory is religious in nature. Kitzmiller v. Dover Area School District, 400 F. Supp. 707, 721 (M.D. Pa. 2005). Despite the fact that the respondent did not mention God or discuss the nature of the “intelligent being or beings” who created the universe, the theory of Intelligent Design relies on the existence of one creator. Edwards prohibited the teaching of creation science in public school because of its inherent religious nature, likewise this Court should prohibit the instruction of Intelligent Design. Kitzmiller, 400 F. Supp. at 718. The theory of Intelligent Design, like creation science, implicitly requires the existence of a supernatural being or force; therefore, Intelligent Design is inherently religious and its instruction in public schools violates the Establishment Clause of the First Amendment.

A. The Instruction of Intelligent Design Violates the Establishment Clause Under the Endorsement Test, the Lemon Test, and the Coercion Test

Because the existence of a supernatural being provides the foundation for Intelligent Design, instruction of this theory impermissibly injects religion into the public school classroom. Since 1971, this Court has applied the three-pronged Lemon test to Establishment Clause cases to determine whether there has been government action “respecting an establishment of religion.” Edwards, 482 U.S. at 582. The test states that the government action must have a secular purpose, the primary effect may not advance or inhibit religion, and the action must not create an “excessive government entanglement with religion.” Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). However, in recent cases, the Court added two more tests in considering whether a violation of the Establishment Clause occurred: the endorsement test and the coercion test. See Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290 (2000) (applying the endorsement test to school-sponsored prayer at a football game); Lee, 505 U.S. 577 (using the coercion test to invalidate a prayer at high school graduation under the Establishment Clause). These tests may be applied in conjunction with one another or the Lemon test. See, e.g., Edwards, 482 U.S. at 585 (describing the purpose prong in terms of endorsing religion). Intelligent Design presupposes the existence of a supernatural being in its theory. While the Respondent carefully avoided mentioning God in his lecture, his discussion supported the belief that a supernatural being created the universe. Under each of this Court’s tests, the Respondent’s lecture on Intelligent Design violates the Establishment Clause.

1. Instruction of Intelligent Design Fails the Endorsement Test Because it Requires Students to Learn a Theory that Promotes a Religious Belief

The Respondent's lecture on intelligent design sent the message to students that a supernatural being created the universe; therefore, it fails the endorsement test.

Endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community" and likewise sends a message that adherents are "favored members of the political community." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The Fifth Circuit held that a disclaimer recognizing alternatives to evolution, particularly Biblical creation, violated the endorsement test because it disclaimed evolution and urged students to think about a specific religious theory. Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 346-47 (5th Cir. 1999). Another court applied the test and found that there was an endorsement of religion if an objective student would perceive a statement recognizing Intelligent Design specifically as an alternative to evolution. Kitzmiller, 400 F. Supp.2d at 734.

In this case, while the Respondent did not explicitly refer to God, the students in his class clearly connected Intelligent Design to the existence of God. Maya Klinger, a student who has been raised as an Atheist, expressed her discomfort with the lecture, saying he was "trying to tell us that science has proven God exists." (R.9). The fact that she and two other students left when Intelligent Design was discussed again, feeling like "outsiders" from the rest of the class, indicates an endorsement of religion. Id. By passing out pamphlets about Intelligent Design, the respondent urged his students to consider it as an alternative to evolution, indicia of endorsing religion in the Fifth Circuit.

Freiler, 185 F.3d at 346-47. Based on both his students' questions about refuting evolution with Intelligent Design and the other students leaving the classrooms, it is clear that an objective student would consider such an alternative to evolution an endorsement of religion. The respondent's discussion of Intelligent Design fails under any interpretation of the endorsement test.

2. Instruction of Intelligent Design Fails the Lemon Test Because its Primary Effect was a Promotion of the Religious Belief that a Supernatural Being Created the Universe

Because the respondent's discussion had the primary effect of promoting a religious belief, it fails the Lemon test. The effect prong requires that the primary effect of the government action must not advance or inhibit religion. Lemon, 403 U.S. at 612. Recently, this prong has been interpreted similarly to the endorsement test. Freiler, 185 F.3d at 346. Under such an interpretation, a government action may not "aid one religion, aid all religions, or favor one religion over another." Id.

To determine primary effect, the Court should look to the message conveyed to the students who will be involved. Id. (citing County of Allegheny v. ACLU, 492 U.S. 573 (1989)). In Freiler, the Fifth Circuit determined the effect of a disclaimer about creation and evolution was to protect and maintain a particular religious viewpoint. 185 F.3d at 346. One of the factors considered in that case was the fact that the only alternative to evolution explicitly mentioned to the students was creation. Id. Similarly, a federal court in Arkansas declared that the primary effect of a statute mandating balanced teaching of evolution and creation science was advancement of religion. McLean v. Arkansas Board of Education, 529 F. Supp. 1255, 1272 (1982) (stating that since creation science is not a science, the only effect is advancement of religion).

The respondent's classroom lecture focused on Intelligent Design; at no point did he make the students aware of other alternatives to evolution. While there is scientific evidence supporting Intelligent Design, it is premised on the existence of a supernatural creator. This particularly favors some religions while Intelligent Design is a theory that is incompatible with several religions, particularly agnostics and atheists. Matthew J. Brauer et. al., Is It Science Yet?: Intelligent Design, Creationism and the Constitution, 83 Wash. U.L.Q. 1, 129 (2005). Therefore, the discussion of Intelligent Design had the effect of promoting one alternative theory based on religious belief in a supernatural creator of the universe. Since the respondent's instruction of Intelligent Design fails the effect prong of the Lemon test, it violates the Establishment Clause. Once government action fails one prong of the Lemon test, a court does not need to further analyze the government action. Edwards, 482 U.S. at 585 (realizing that when the purpose prong of Lemon was met, consideration of the other prongs was not necessary). The primary effect of Intelligent Design is promotion of religious dogma, therefore there is no need to consider the purpose and excessive entanglement prongs.

3. Because Instruction of Intelligent Design Occurred During a High School Science Class Where Students May Have Felt Pressure to Conform, it Fails the Coercion Test

Given the mandatory nature of school attendance, the instruction of Intelligent Design during science class improperly induces students to learn the theory. Under the Establishment Clause, the government "may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes [state] religion or religious faith, or tends to do so." Lee, 505 U.S. at 587 (1992) (quoting Lynch, 465 U.S. 668). To pass the coercion test, a school may not persuade or compel a student to

participate in activity of a religious nature. Id. at 599. The Court has long recognized a need to be “particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools,” because “[s]tudents in such institutions are impressionable and their attendance is involuntary.” Edwards, 482 U.S. at 583-84. In light of these “heightened concerns” which exist in public schools, the Court should look to factors such as the setting in which the school is participating in religious activity and the voluntariness of the situation for students involved. See generally Lee, 505 U.S. 577. In Lee, religious exercise during a public school graduation was held to violate the Establishment Clause under the coercion test. 505 U.S. at 599.

Unlike high school graduation, class attendance is required. Since the students’ teacher was providing instruction on a theory entrenched in religious belief of a supernatural creator, the students could expect to learn the material and possibly pressure to accept it to please their teacher. Further, the evidence in this case demonstrates that the majority of the students were interested and accepting of the theory, leaving a minority feeling uncomfortable. Clearly, students in the classroom during a discussion asserting certain religious beliefs could feel subject not only from pressure or coercion from their teacher, but also from their peers. This pressure is similar to the coercive pressure of participating in prayer during a public school graduation, which violated the Establishment Clause. Lee, 505 U.S. at 593. The respondent’s lecture on Intelligent Design fails the coercion test because students would feel pressure to participate in religious activity by learning a theory espoused by their teacher, and possibly accepted by the majority of the other students, during a required class.

B. The Prohibition of Instruction of Intelligent Design Does Not Violate the Establishment Clause Because it is Not Improperly Religious or Inhibiting to Religion and It Does Not Cause Unfair Viewpoint Discrimination

Since Intelligent Design, a theory based on belief of a supernatural creator, violates the Establishment Clause, it follows that a policy prohibiting the instruction of such a theory does not violate the Establishment Clause. The policy allows instead for the instruction of evolution and alternative theories, provided that they are not founded on religious beliefs. The policy likewise does not violate the Establishment Clause because the scientific theory is not a religion. Edwards, 482 U.S. 578. Further, the School Board is incapable of committing viewpoint discrimination in this case because its policy applies to its own actions in the public school environment, not private speech in a limited open forum. See Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819, 841 (1995) (noting the “critical difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”). Therefore, the prohibition of instruction of Intelligent Design does not violate the Establishment Clause.

1. Prohibition of Instruction of Intelligent Design Does Not Violate the Establishment Clause by Establishing or Contradicting Religion

The School Board’s policy prohibiting instruction of Intelligent Design does not violate the Establishment Clause because it does not establish nor does it contradict religion. This Court has not held that the scientific theory of evolution is a religion. Edwards, 482 U.S. at 593. Since Epperson, this Court has recognized evolution as a scientific theory. 393 U.S. at 107. Establishment Clause jurisprudence also states that

government “may not be hostile to any religion or to the advocacy of noreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.” Id. at 104 (1968). Instruction of evolution is compatible with a variety of religions and nonreligions, such as Hinduism, Buddhism, Catholicism, atheism, and agnosticism, because it limits its theorizing to how natural processes work. See Brauer, et. al., supra, at 128-29. On the other hand, Intelligent Design is not compatible with such religions because it attempts to describe where natural processes came from or why they exist. Id. The School Board’s policy allows for the teaching of evolution and alternative scientific theories, but prohibits Intelligent Design because of its basis in a religious belief of a creator. Since evolution itself is a scientific theory and is not hostile to religion, while Intelligent Design favors a particular religious dogma, the School Board policy prohibiting the instruction of Intelligent Design does not violate the Establishment Clause.

2. Because Instruction of Intelligent Design is State Action and Not Private Speech, the School Board Policy does not Embody Viewpoint Discrimination

In enacting its policy prohibiting the instruction of Intelligent Design, the school board was limiting the speech of government actors and not private actors, therefore the policy does not commit viewpoint discrimination. Under Rosenberger, the government may not participate in viewpoint discrimination once it has created a limited public forum. 515 U.S. at 829; see also Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 395 (1993) (disallowing viewpoint discrimination against religious group when school district had opened school property for use by other groups after school hours). Rosenberger is clearly not controlling in this case. 515 U.S. 819.

The policy prohibits instruction of Intelligent Design by a public school teacher during school hours to his or her science class. If the School Board opened the campus of Arklatex School for Mathematics and Science after school hours for use by other groups, then a group advocating Intelligent Design would have to be allowed in order to avoid viewpoint discrimination. In this case, neutrality by the School Board towards Intelligent Design, an inherently religious theory, would create a violation of the Establishment Clause. Therefore, the School Board did not commit unfair viewpoint discrimination by creating its policy prohibiting instruction of Intelligent Design.

II. THE COURT OF APPEALS ERRED IN DENYING THE ARKLATEX SCHOOL BOARD'S SUMMARY JUDGMENT MOTION BECAUSE THE FIRST AMENDMENT DOES NOT PROTECT THE RESPONDENT'S FREEDOM OF SPEECH IN DISCUSSING INTELLIGENT DESIGN IN THE CLASSROOM OR CRITICIZING SCHOOL BOARD POLICY

The Court of Appeals erred in denying the Arklatex School Board's summary judgment motion. Although every citizen is guaranteed the freedom of speech by the United States Constitution, limits are placed on this right when the citizen is acting as a government employee. Connick v. Myers, 461 U.S. 138, 140 (1983). This results because the State has "interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Pickering v. Board of Education, 391 U.S. 563, 568 (1968). To determine if a government employee's freedom of speech is violated, an analysis must be conducted to determine the "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. If the speech is constitutionally protected, the employee still

must show that the speech was a substantial or motivating factor for the challenged governmental action and the employer is given the opportunity to rebut this presumption by demonstrating that the same action would have occurred in the absence of the protected speech. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

In this case, the respondent claims that the Arklatex School Board infringed on his right to free speech in two situations: 1) not permitting him to teach Intelligent Design in the classroom and 2) not permitting him to criticize the School Board Policy relating to Intelligent Design. In both situations, respondent's speech was unprotected by the Constitution as it did not meet the requirements of the analysis established by this court. First, neither of the respondent's speech claims are matters of public concern. If a limited matter of public concern is found, it must be weighed against the interests of the School Board in maintaining an efficient institution. Since respondent's actions undermined the efficiency of the School Board's ability to function properly, the government's interest greatly outweighs any potential speech infringements that may have occurred. As a result, the Pickering balancing test weighs in favor of the School Board and there is no need to determine whether the speech was a substantial or motivating factor in the governmental action. 391 U.S. at 568.

A. Respondent's First Amendment Rights Were Not Violated As His Speech Did Not Encompass Matters Of Public Concern

Neither speech relating to Intelligent Design or criticism of the School Board's policy are issues related to matters of public concern. Thus, the speech in question in this case is not protected constitutionally. Government employees maintain the right to speak on matters of public concern while in the scope of their employment. Pickering, 391 U.S.

at 568. However, when a public employee speaks on matters only of personal interest, then the speech is not protected by the First Amendment. Connick, 461 U.S. at 147. To determine whether or not an employee’s speech qualifies as a matter of public concern, the court must examine “the content, form, and context of a given statement, as revealed by the whole record.” Rankin v. McPherson, 483 U.S. 378, 385 (1987). Matters of public concern have been defined by this court as those “relating to any matter of political, social, or other concern to the community.” Connick, 461 U.S. at 146. In this case, neither set of statements qualifies under the court’s interpretation of matters of public concern.

1. Intelligent Design Is Not A Matter Of Public Concern And Thereby Respondent’s Right To Speak About It In The Classroom Is Unprotected By The Constitution

On September 8, 2003, the School Board adopted a new policy prohibiting teachers from instructing students on Creationism or Intelligent Design. Although respondent was well aware of this policy, he nonetheless spent a class period discussing Intelligent Design with his students on January 27, 2004. After Dr. Rice confronted respondent about the policy violation and warned him to refrain from speaking further on such matters, respondent answered questions about Intelligent Design in his classroom. In this situation, there can be no question that Intelligent Design was a matter of personal interest to respondent. He devoted a significant amount of time to studying, writing and advocating for Intelligent Design theory. To determine if these statements crossed into the realm of public concern, they must be examined in their “content, form, and context.” Rankin, 483 U.S. at 385.

In Rankin, the protected speech was made in the course of a conversation addressing the policies of the President’s administration. Id. at 386. As a result, it clearly fell within the rubric of matters relating to “political, social, or other concern to the community.” Connick, 461 U.S. at 146. In this case however, the respondent only discussed Intelligent Design academically with the school children. He identified the basic scientific arguments put forth by advocates of Intelligent Design, but did not mention the political or social implications of the theory. In maintaining an academic approach to the subject matter, respondent’s statements were not within the scope of public concern. Although the legitimacy of Intelligent Design may be debated nationally, the test adopted by this court specifically notes that the context of the speech must be assessed to determine the public versus private interests of the statements. In Pickering, this court held that letters to the editor from teachers regarding a proposed tax increase were matters of public concern as they were “vital to informed decision-making by the electorate.” Pickering, 391 U.S. at 572. In this context, the statements were not made for the purpose of spurring public debate on the issue. Instead, they were used to inform students about the basic theories of Intelligent Design and therefore were not matters of public concern protected by the First Amendment.

2. School Board Policy Relating To Intelligent Design Is Not A Matter Of Public Concern And Thereby Respondent’s Right To Speak About It In The Classroom Is Unprotected By The Constitution

Statements made by respondent that “the School Board has more important things to worry about than trying to prevent students from thoroughly learning science” and other criticism of the School Board policy were not constitutionally protected speech as they failed to address matters of public concern. In this case, at the time of respondent’s

statements, the School Board policy prohibiting the instruction of Intelligent Design was an established policy and not an issue being debated before the School Board. In Connick, this court held that speech in the form of a questionnaire which dealt with employee grievances concerning internal office policy “touched upon matters of public concern in only a most limited sense.” 461 U.S. at 154. This court has held that school board policy crosses into matters of public concern when it is an issue being decided by the electorate. Pickering, 391 U.S. at 572. In this case however, respondent’s criticism arises from an already established policy and not one before the electorate. As a result, the protection offered it is extremely limited as it deals with internal School Board policy, thus limiting its matters of public concern.

B. The School Board’s Interest In Regulating The Speech Of Its Employees To Guarantee An Efficient And Effective Workplace Prevails Over Respondent’s Interest In Expression Of Speech On These Matters

The School Board’s interest in guaranteeing an efficient and effective workplace prevails over the respondent’s free speech claims as his statements are limited in their scope of dealing with matters of public concern. This court has consistently held that in analyzing problems dealing with government employees it must seek a “balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” Pickering, 391 U.S. at 568. The government’s interest in such matters relates to its ability in promoting “efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service.” Connick, 461 U.S. at 150-151 (quoting Ex parte Curtis, 106 U.S. 371, 373 (1882)). To achieve these goals, this Court has established the following relevant factors in justifying

a state's regulation of its employees' speech: the content of the speech, coworker harmony, maintaining discipline by immediate supervisors, need for personal loyalty and confidence between workers and supervisors. Pickering, 391 U.S. at 569-70. In examining these factors, the statement will not be "considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." Rankin, 483 U.S. at 388. In weighing these factors against the limited role respondent's speech dealt with matters of public interest, it is clear that the School Board did not violate respondent's constitutional rights.

1. Respondent's Speech On Intelligent Design In The Classroom Infringed Upon The Ability Of The School Board To Maintain Efficiency Of Public Services

In a school setting, a teacher that disrupts the regular operation of the school infringes on the government's ability to execute its official duties. See Pickering, 391 U.S. at 572-3. However, when these actions occur in private and result in indirect disruptions of school operations they may be protected. Columbus Educ. Ass'n v. Columbus City Sch. Dist., 623 F.2d 1155, 1160 (6th Cir. 1980). In this case, respondent's statements were public and directly disruptive to the regular operation of the school.

On January 27, 2004 respondent decided to violate School Board policy by discussing Intelligent Design in his classroom. As a result of this action, the principal, Dr. Rice, received an angry phone call from a parent of one of the students. The parent believed that the teaching of Intelligent Design undermined her efforts to raise her child as an Atheist. Although Dr. Rice communicated this to respondent and instructed him not to mention Intelligent Design in class again, on January 28, 2004, respondent nonetheless discussed this topic. In response to the discussion, three students walked out of class

saying, “I can’t hear this.” (R.9). These actions prompted an open letter in the *Arklatex Tribune* the following day urging the State to pull all funding from ASMS.

Respondent’s actions disrupted the regular operation of the school in several ways. First and foremost, respondent’s actions forced students to leave the classroom because of the content of the material discussed. Their departure directly disrupted the regular operation of the school. Additionally, by spending two days discussing Intelligent Design, respondent deviated from the required curriculum to be taught at ASMS. The students will have to recoup this lost time to cover mandatory subject matter. Finally, the regular operation of the school was disrupted as the school administration was forced to spend time and resources dealing with matters directly prohibited by School Board policy.

In addition to disrupting the regular operation of the school, respondent’s actions violated the factors utilized in the balancing analysis to determine protection of government interests. By respondent discussing Intelligent Design after being warned by his superior, Dr. Rice, to not engage in such behavior, respondent directly undermined his supervisor. In doing so, respondent created a disruption in the loyalty and confidence between a supervisor and one of his employees, a factor noted in Pickering as one which weighs in the State’s balance in determining whether the speech is protected or not. 391 U.S. at 569-70.

Finally, the analysis is critical in examining the time, manner, and place of the potentially protected speech. As held in Columbus, speech that occurs in private and doesn’t disrupt the regular operation of the school is more likely to be protected. 623 F.2d at 1160. In this case however, the speech occurred in the classroom setting during the

school day. If respondent's students expressed interest in Intelligent Design he could have asked those interested in learning more to speak with him after class. Such an action would more likely have constituted protected speech. However, by conducting it during class time and creating a disruption, respondent's speech was clearly constitutionally unprotected.

2. Respondent's Speech Criticizing The School Board Policy Infringed Upon The Ability Of The School Board To Maintain Efficiency Of Public Services

When respondent openly criticized the School Board policy in his classroom, he directly undermined the authority of his supervisor and in turn infringed upon the ability of the school to maintain its effectiveness in executing its duties. In situations in which a government employee "personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." Connick, 461 U.S. at 153. In this case, respondent specifically told his class that he believed the School Board policy was an unconstitutional violation and that "the School Board has more important things to worry about than trying to prevent students from thoroughly learning science." (R.7).

Respondent's actions threatened the School Board's institutional efficiency in several ways. First, such criticism directly undermined the School Board's authority as one of its employees not only acted in contradiction to the policy, but openly criticized it. This situation is dissimilar from Pickering, as school teachers criticized a potential tax to raise money for the school, instead of an established policy. 391 U.S. at 572. In this

situation, criticism presented to students of an established policy directly undermines the authority of the School Board.

Additionally, by making these statements to students, respondent went beyond personally confronting his personal superior. If respondent told Dr. Rice in private that he strongly disagreed with the policy and would like to see it changed, the time, manner, and place would have been more appropriate for such criticism to occur. However, after being told by Dr. Rice to abide by the policy, respondent circumvented Dr. Rice's authority and discussed Intelligent Design in the classroom. Instead of personally confronting his superior, respondent openly violated his superior's orders in front of students. This action was more damaging to institutional efficiency than a private confrontation as the school is supposed to serve its students instead of bringing them directly into the middle of the employee's conflict. As a result, respondent's actions clearly infringed upon the ability of his employer to administer an efficient workplace environment and are not protected constitutionally.

CONCLUSION

For the above cited reasons, Petitioner respectfully requests this Court to affirm the District Court's granting of motion for summary judgment, and therefore reverse the Fourteenth Circuit Court of Appeals.

APPENDIX

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Arklatex School for Mathematics and Sciences Special School District Policy

§ 1701.2 – Teaching of Creationism and Intelligent Design Theory

- (a) Definitions:
 - (1) “Creationism” is the belief in the literal interpretation of the account of the creation of the universe and of all living things as found in the Book of Genesis.
 - (2) “Intelligent Design” is the theory that nature and complex biological structures were designed by an intelligent being and were not created by chance.
- (b) Teachers within the Arklatex School for Mathematics and Sciences Special School District may teach alternative theories of origin in addition to the teaching of evolution, but teachers are not to teach the theories of Creationism or Intelligent Design. The teaching of the theories on the origins of the universe and the formation of life that are substantially similar to Creationism or Intelligent Design are similarly prohibited.

