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Docket No. 2005-0113

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In The  
SUPREME COURT OF THE UNITED STATES

October Term 2006

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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 of Mathematics and Sciences,

*Petitioner*

v.

PETER GIRSH,

*Respondent*

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*On Writ of Certiorari to the  
United States Court of Appeals for the Fourteenth Circuit*

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BRIEF OF PETITIONER

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## **QUESTIONS PRESENTED**

1. Whether either allowing or prohibiting instruction on the Intelligent Design approach in public schools violates the Establishment Clause of the First Amendment where its proponent focuses on the scientific evidence used to support the approach and does not make any assertions regarding the nature of the intelligent designer.
2. Whether the First Amendment right to freedom of speech protects a public school teacher's in class discussion during regular school hours on the topic of the Intelligent Design.

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## **STATEMENT OF THE CASE**

### **OPINION BELOW**

The ruling of the United States District Court for the Eastern District of Arklatex is unreported; however, a copy of the opinion is contained in the Official Record (R.3-14). The opinion of the United States Court of Appeals for the Fourteenth Circuit is likewise unreported, and a copy of the decision is also contained in the Official Record (R.15-19).

### **CONSTITUTIONAL PROVISION(S) INVOLVED**

The following Constitutional provisions relevant to the disposition of this case are contained in the Appendix: U.S. Const., amend. I; US Const., amend. XIV, § 1.

### **STANDARD OF REVIEW**

This issues on appeal before this Court present questions of law which are reviewed de novo. Pierce v. Underwood, 487 U.S. 552, 558 (1988).

### **STATEMENT OF THE CASE AND FACTS**

Respondent Dr. Peter Girsh (“Girsh”) is a high school biology teacher at the Arklatex School for Mathematics and Sciences (“ASMS”), a public school that receives funding from the Arklatex Department of Education (“Dept. of Education”) (R.4). Girsh is a highly sought-after speaker because he believes Intelligent Design is a purely scientific theory with no connections to any religious movement (R.4). He also believes that Intelligent Design should be taught without any mention of “God,” and that he is interested in studying empirical scientific data to discover the origins of life and the Universe (R.4). Girsh has stated that he recognizes the fact that Intelligent Design lends support to some religious beliefs, such as the Christian creation story from the Book of Genesis (R.4). Girsh is a contributor to *From Koalas to Humans*, a textbook containing material on Intelligent Design (R.5). The textbook states that scientific

evidence “suggests the universe was purposely created,” but does not speculate as to the identity of the creator (R.5). Girsh has been a member of the ASMS curriculum committee for the past seven years (R.5). The Dept. of Education mandates that ASMS adhere to the “exceptional schools” curriculum which prohibits teaching “non-scientific” evidence in the Biology program (R.5). Prior to the events giving rise to this case, Girsh had never mentioned Intelligent Design to any student, and had taught strictly from Dept. of Education-approved textbooks which mention evolution but not Intelligent Design (R.5). Petitioner Dr. Richard Rice, Principal of ASMS, (“Principal”) was aware of Girsh’s outside work and never had any major objections to his speaking on Intelligent Design outside the school (R.5).

On September 8, 2003, the ASMS Board of Education (the “School Board”) adopted a new policy prohibiting teachers from instructing students on Creationism or Intelligent Design (R.5). Anita Pascal, President of the School Board (“School Board President”), stated that the purpose of the policy was to “avoid Establishment Clause violations.” (R.5-6). Approximately four months later on January 26, 2004, an AP Biology student told Girsh during class that he had discovered that Girsh had written a book on Intelligent Design and asked why Girsh was not teaching them about Intelligent Design (R.6). Girsh worried that answering the question would violate the School Board policy, so he dismissed class early without addressing the question (R.6).

The next day on January 27, 2004, the students asked Girsh more questions in class about Intelligent Design (R.6). Girsh told his students about the School Board policy prohibiting instruction on Intelligent Design and that he believed the policy was a violation of the First Amendment’s Establishment Clause and his right to free speech (R.6-7). Girsh then began describing Intelligent Design by explaining that it is the theory that empirical scientific evidence

points to the conclusion the universe was purposefully designed by an intelligent being or beings (R.7). He also stated that Intelligent Design holds that the theory of evolution itself cannot explain the origin, complexity, or diversity of life (R.7). Next, Girsh told the students that followers of Intelligent Design believe the universe was designed and adjusted in order to make life possible (R.7). Girsh then gave three examples of how scientists have detected Intelligent Design in nature (R.7).

In his first example Girsh explained the concept of “irreducible complexity,” which theorizes that certain biological systems can not function without all of their parts in place (R. 7). Intelligent Design incorporates the scientific theory of irreducible complexity by claiming that some aspects of living organisms could not have evolved on their own because each individual component of formation is necessary to the whole and without which the entire mechanism fail (R.7). Girsh then said that such complex systems in living organisms could not have been created through gradual changes over time via natural selection because a biological entity must have some function in order to exist, change and pass on its changes to its progeny (R. 7).

Second, Girsh said that physicists have stated that our universe appears to have been finely tuned to support the possibility of human life (R.7). Physicists have also mathematically estimated that it is extremely improbable for life to have come into existence naturally (R.7). Girsh said that as a result of these statements by physicists, the followers of Intelligent Design believe that 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).

Third, Girsh stated that it was virtually impossible that unguided chemistry could have produced DNA and likened DNA to the most complicated computer software ever created (R.7-8). According to Girsh, each molecule of DNA is like a word in a language and that at some

point someone or something must have attributed meaning to the DNA molecules in order for the language to function (R.8). Girsh then showed the class Intelligent Design material from the textbook and magazines to which he contributed and a clip of a television show in which he was discussing Intelligent Design with media personality Bill O'Reilly (R.8). Responding to a question from O'Reilly on whether God is the Intelligent Designer, Girsh stated, "Intelligent Design is a purely scientific, not religious, theory . . . suggest[ing] the universe cannot be explained by evolution alone, but does not speculate as to the nature of who or what did create it or how." (R.8). Finally, Girsh distributed a pamphlet he helped develop to market his textbook on Intelligent Design (R. 8). The pamphlet mentioned neither God nor described the nature of the intelligent designer who was referred to as "some sort of intelligent agent." (R.8).

The following morning on January 28, 2004, the Principal confronted Girsh about discussing Intelligent Design with his students and informed him that a student's mother had complained about the lecture (R.8). The mother complained that, as an atheist, she felt the lecture undermined her efforts to raise her children as atheists and that her child, a student in Girsh's class, told her that she was uncomfortable during the Intelligent Design discussion because she doesn't "believe in supernatural beings with the power to create the universe" and felt like Girsh was "trying to tell us that science had proven God exists" (R.9). The Principal also told Girsh that fifteen other parents had asked the Principal to allow Girsh to continue teaching Intelligent Design (R.9). The Principal reminded Girsh of the School Board policy and told Girsh not to mention Intelligent Design again in the classroom (R.9).

Following this discussion, Girsh again discussed Intelligent Design and how it could be used to refute the theory of evolution (R.9). During this discussion, the student who had

previously complained and two others walked out of the room saying that they would return when Girsh started acting like a “teacher instead of a preacher” (R.9).

Thereafter, two open letters regarding Girsh were published in the local newspaper (R.9). One was written by the mother who had previously complained and stated that someone from the school was “teaching about God instead of science” and that her daughter had withdrawn from ASMS because she felt uncomfortable and estranged from her peers as a result of Girsh’s lectures on Intelligent Design (R.9). The second letter was from a parent who urged the State to incorporate the teaching of Intelligent Design in the classroom (R.9). Following the appearance of the letters to the editor, the Principal presented Girsh with his personnel file (R.9). The Principal informed Girsh that he had been reprimanded twice for insubordination, once for the “willful violation of [the] School Board[’s] [policy forbidding teaching of Intelligent Design]” on January 26, 2004, and once for “insubordinate disparagement of School Board policies” on January 27, 2004 (R.9-10). At that time, Girsh was informed that one more violation would result in a School Board hearing to determine his future employment (R.10). Girsh was also given a letter signed by the President of the School Board and the Superintendent of the ASMS Special School District (“Superintendent”) prohibiting Girsh from “in any shape, form, or fashion, mentioning ASMS in conjunction with Intelligent Design” (R.10). The next day, an open letter from the Superintendent was published in the local newspaper stating that Girsh had been reprimanded and was prohibited from teaching Intelligent Design (R.10).

### **PROCEDURAL HISTORY**

Following an adverse ruling from the District Court of the Eastern District of Arklatex, Judge Hubert P. Franklin III presiding, Girsh filed an appeal with the United States Court of Appeals for the Fourteenth Circuit (R. 14, 15). Girsh argued two points on appeal: that the

district court erred in finding as a matter of law that (1) Intelligent Design is a religious theory and that teaching it in public school would violate the Establishment Clause and (2) that the School Board's discipline of him for violating and criticizing the schools policy prohibiting instruction on Intelligent Design did not violate the Free Speech Clause of the First Amendment (R. 16). The United States Court of Appeals for the Fourteenth Circuit reversed the district court, finding that there were unresolved questions of material fact and that it could not find as a matter of law that Intelligent Design is a religious theory (R.16-19). Subsequently, the defendant-appellants sought and received a writ of certiorari from the United States Supreme Court to consider the following questions (R.20):

1. Does either allowing or prohibiting instruction on Intelligent Design in public school 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 to freedom of speech protect a public school teacher's discussion on the topic of Intelligent Design?

## SUMMARY OF THE ARGUMENT

It can be fairly said that the wall between church and state has withstood numerous challenges before this Court as the proponents of religion and the proponents of separation argue both the need for and the scope of the constitutionally mandated separation. From the “monkey trials” of the 1920’s to the Fundamentalist movement spurred by changing societal views about Darwinism and religious thought, this Court has analyzed perhaps hundreds of cases dealing with state acts ranging from the requirement of “balanced-treatment” of creationism and evolution in public schools to the posting of the Ten Commandments on classroom walls. And while it can also be fairly said that the definition of what violates the Establishment and Free Speech Clauses of the First Amendment remains somewhat elusive, it can be said with sufficient certainty that when a state acts with a clear and sincere secular purpose to protect students in public schools from the often divisive inclusion of religious subject matter in their curriculum – the state will carry the day.

This Court found in Aguillard v. Edwards that concepts concerning God or a supreme being of some sort are manifestly religious and that the religious characteristics are not shed simply because the concepts are presented as either a philosophy or a science. Intelligent Design is based on the theory that an intelligent being purposefully created the universe, and it is often offered by religious proponents as an alternative to the origins of man theory of evolution. While Intelligent Design proponents may rely on other established scientific theories as underpinnings, the fact that Intelligent Design requires its followers to believe in the existence of some type of supernatural being nearly requires this Court to find that it is a creation-science with the purpose of advancing a particular religion. According to this Court in Lee v. Weisman, a state may not act for the purpose of advancing a particular religion because the state must

remain neutral as to religion in public schools. Furthermore, when students could reasonably be made to feel like outsiders in their school community because they are non-adherents of the religious beliefs involved in the state act, the state act must fall because it has indirectly coerced a student into receiving a religious message that he or she did not want to receive.

Intelligent Design has a clear and sincere purpose and primary effect of advancing a particular religious belief and the teaching of Intelligent Design results in an excessive entanglement of the state with religion. For these reasons and because of the state's duty of neutrality towards all religions, this Court must find as a matter of law that teaching Intelligent Design in a public school violates the Establishment Clause of the First Amendment even when the proponent of Intelligent Design focuses on its scientific underpinnings and does not make any assertions as to the nature of the intelligent designer. This Court should further hold that because the public school classroom is either a non-public or limited public forum, a teacher's First Amendment right to freedom of speech is not violated when the teacher is prohibited from teaching or discussing Intelligent Design in the classroom because the state's interest in protecting its students from Establishment Clause violations outweighs the teacher's right to speak on a matter of public concern.

Therefore, this Court should reverse the Fourteenth Circuit, reinstate the district court's grant of summary judgment to Petitioner and find that as a matter of law: (1) the teaching of Intelligent Design in public schools violates the Establishment Clause of the First Amendment even when the proponent focuses on the scientific underpinnings and does not make any assertions as to the nature of the intelligent designer, and (2) a teacher's right to freedom of speech is not violated when he or she is prohibited from teaching or discussing Intelligent Design in the classroom during regular school hours.

## ARGUMENT

“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates.” Tinker v. Des Moines Indep. Cmty. Sch., 393 U.S. 503, 506 (1969). What can be argued is that the Court has been saddled with the vexing responsibility of determining on an almost a case by case basis what particular type of speech or expression may be protected under which particular circumstances. In its determinations, the Court must look at the two faces of the controversy surrounding the First Amendment Establishment Clause protections. Van Orden v. Perry, \_\_\_ U.S. \_\_\_, \_\_\_, 125 S.Ct. 2854, 2859 (2005). One face represents the strong role that religion and religious traditions have played throughout our nation’s history. . The other considers the possibility that government intervention in religion may itself endanger religious freedom. . “This case, like all Establishment Clause challenges, presents [the Court] with the difficulty of respecting both faces.”

In analyzing the facts of this case and the precedent established by this Court, it is clear that the approach of intelligent design is based on religious beliefs and that a public school teacher may not teach Intelligent Design without violating the First Amendment.

### **I. THE ESTABLISHMENT CLAUSE PROHIBITS THE TEACHING OR DISCUSSION OF INTELLIGENT DESIGN IN A PUBLIC SCHOOL BECAUSE IT HAS EITHER THE PRIMARY PURPOSE OR EFFECT OF ADVANCING A PARTICULAR RELIGION.**

The Establishment Clause of the First Amendment states: “Congress shall make no law respecting an establishment of religion...[and] [u]nder the Fourteenth Amendment, this ‘fundamental concept of liberty’ applies to the States.” Edwards v. Aguillard, 482 U.S. 578, 583 (1987) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)). Some relationship between the state and religion is inevitable, and this Court often acknowledged the long history our nation

has with religion and the fact that our Constitution does not require complete separation but rather “affirmatively mandates accommodation, not mere tolerance, of all religions, and forbids hostility toward any.” Lynch v. Donnelly, 465 U.S. 668, 673 (1984). But this Court has been equally vigilant in protecting students in public schools, particularly elementary and secondary, from the divisive nature of religious teachings when included in the school’s curriculum. Lee v. Weisman, 505 U.S. 577, 592 (1992); Aguillard, 482 U.S. at 583-84 (stating that “[s]tudents in [elementary and secondary] institutions are impressionable and their attendance is involuntary”). Indeed, “[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with private beliefs of the student and his or her family.” Aguillard, 482 U.S. at 584.

The Court further explained that “[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools....” Id. (quoting McCullum v. Bd. of Educ., 333 U.S. 206, 231 (1948)). Furthermore, “[t]he preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to [pubic school] instruction other than religious, leaving to the individual’s church and home, indoctrination in the faith of his choice.” McCullum, 333 U.S. at 216-17. In this case, the Arklatex School for Mathematics and Sciences has prohibited the teaching of Intelligent Design and Creationism because excluding these creation-sciences from its curriculum would help to prevent violations of the Establishment Clause (R. 5-6).

“This Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.”

**A. A Public School May Not Include Either Intelligent Design or Creationism in Its Curriculum Without Violating The Establishment Clause.**

Aguillard, the Court dealt with challenges to the constitutionality of Louisiana’s “Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction” Act (hereinafter “Creationism Act”). Id. at 581 (citing La.Rev.Stat. Ann. §§ 17:286.1-17:286.7 (West 1982)). The Creationism Act, often referred to as “balanced-treatment legislation”, forbade the teaching of the theory of evolution, unless paired with instruction in “creation science”. Id. The Act did not require the teaching of either evolution or creation science, but instead required that they be taught hand-in-hand if at all. Id. The Act defined the theories as “the scientific evidence for [creation or evolution] and inferences from those scientific evidences”. Id. (citing La.Rev.Stat. Ann. §§ 17.286.3(2) and (3)).

The Louisiana officials charged with implementing the Creationism Act defended the Act by saying that its purpose was to “protect a legitimate secular interest, namely, academic freedom”. Id. at 581. After several procedural moves in 1983 from the district court to the State Supreme Court and back, the district court held in 1985 that there could be no valid secular reason for prohibiting the teaching of evolution because the groups that had historically opposed the theory were generally religious in nature. Id. The court further held that “‘the teaching of ‘creation science’ and ‘creationism,’ as contemplated by the statute, involves teaching ‘tailored to the principles’ of a particular religious sect or group of sects’”. Id. at 582 (quoting Aguillard v. Treen, 634 F.Supp. 426, 427 (E.D.La. 1985)). The district court therefore concluded that the Creationism Act violated the Establishment Clause because it either prohibited the teaching of evolution or because it required the teaching of creation science with the purpose of advancing a

particular religious doctrine. *Id.* at 582. The Fifth Circuit affirmed and “observed that the statute’s avowed purpose of protecting academic freedom was inconsistent with requiring, upon risk of sanction, the teaching of creation science whenever evolution is taught.” *Id.* at 582. The appellate court further held that the Louisiana Legislature’s “actual intent was ‘to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief’”. *Id.* (quoting *Aguillard v. Edwards*, 765 F.2d 1251, 1257 (5th Cir. 1985)). This Court then affirmed because the Creationism Act advanced a particular religious belief thereby violating the Establishment Clause. *Id.* at 582.

**1. Teaching Creation-Science Violates The Lemon Test Because Its Has the Purpose of Advancing Religious Rather Than Secular Views.**

In finding an Establishment Clause violation in *Aguillard*, this Court applied the three-part *Lemon* test. *Id.* at 583; see *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). The *Lemon* test requires that: (1), the government act in question must have a secular purpose, (2), the primary effect of the government act may neither advance nor inhibit religion, and (3) the government act may not constitute an excessive entanglement of government with religion. *Id.*; see also *McClellan*, 529 F.Supp. at 1258 (applying the *Lemon* test to balanced treatment legislation in Arkansas). The first prong of the *Lemon* test looks at whether the state’s actual purpose is to endorse or approve of religion. *Aguillard*, 482 U.S. at 585 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Conner, J., concurring)). A state’s intention to promote religion is clear when the state adopts legislation to serve a religious purpose. *Id.* The intention may be evidenced by promotion of religion in general or by advancement of a particular religious belief. *Id.* (citing *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (holding that banning the teaching of evolution in public schools violates the First Amendment since “teaching and learning” must not “be tailored to the principles or prohibitions of any religious sect or dogma”).

If the state act is found have been enacted for the purpose of endorsing religion, “no consideration of the second or third criteria [of Lemon] is necessary”. Id. (quoting Wallace v. Jaffree, 472 U.S. 38, 56 (1985)).

In Aguillard, the Court found that the appellant state legislators failed to identify a clear secular purpose for the balanced-treatment Creationism Act. Id. In analyzing the purpose of the Creationism Act, the Court noted that a State is accorded deference as to its announced articulation of the secular purpose for an act. Id. at 586. However, the State’s purpose must be “sincere and not a sham”. Id. at 587. After looking at the legislative history of the Creationism Act and noting that the Act’s sponsor stated that “[his] preference would be that neither [creationism nor evolution] be taught”, the Court concluded that the purpose of the Creationism Act was to “narrow the science curriculum”. Id. It was also equally clear to the Court that “requiring schools to teach creation science with evolution does not advance academic freedom” because science teachers were already free to include in their curriculum any scientific concept that was based on established fact. Id. Thus, the Creationism Act did not further the secular purpose of enhancing academic freedom and was instead found to be an unconstitutional endorsement of a particular religious doctrine. Id. at 594. The Act was unconstitutional because its primary purpose of advancing one religion viewpoint violated the Establishment Clause’s prohibition against the symbolic endorsement and financial support of a religious purpose by the State. Id. at 597.

**2. Intelligent Design, a Creation-Science, Does Not Shed Its Religious Nature at the Schoolhouse Doors Simply Because it is Characterized as Either a Science or Philosophy.**

The experts in Aguillard, in a manner very similar to Girsh’s assertions, insisted that creation science is a strictly scientific concept that can be presented without religious reference.

Id. (Scalia, J. dissenting). In his dissenting opinion in Aguillard, Justice Scalia concluded that the Creationism Act did not require the presentation of a religious doctrine. Aguillard, 482 U.S. at 612 (Scalia, J. dissenting). Justice Scalia based this conclusion on the affidavits of five experts claiming extensive knowledge of creation science who stated that “[creation science] is essentially a collection of scientific data supporting the theory that the physical universe and life within it appeared suddenly and have not changed substantially since appearing.” Id. (Scalia, J. dissenting).

However, the majority in Aguillard held that the experts’ affidavits alone were insufficient to defeat the motion for summary judgment by appellants and affirmed the district court’s finding that creation-science was a religious doctrine and not a scientific theory. Id. at 595. In her concurring opinion Justice O’Conner also concluded that creation-science is a religious doctrine. Id. at 599 (O’Conner, J. concurring). Justice O’Conner first cited Webster’s Third New International Dictionary 532 (unabridged 1981) as defining the “doctrine or theory of creation” as “‘holding that matter, the various forms of life, and the world were created by a transcendent God out of nothing.’” Id. at 598-99 (O’Conner, J. concurring). Next Justice O’Conner relied on the Court’s finding that “[c]oncepts concerning God or a supreme being of some sort are manifestly religious... These concepts do not shed that religiosity merely because they are presented as philosophy or as a science.” Id.; Kitzmiller v. Dover Area School Dist., 400 F.Supp.2d 707, 720 (M.D.Pa. 2005) (holding that the teaching of Intelligent Design in a high school biology class violated the Establishment Clause because it required students to hear a statement mentioning Intelligent Design as an alternative to the theory of evolution and that Intelligent Design inherently involves a supernatural designer).

**B. A State May Not Incorporate Intelligent Design Into the Public School Curriculum Because Doing so Would Result in a Constitutionally Prohibited Coercion of Students.**

“At a minimum”, the state may not act in a way to coerce anyone to support or participate in religion or its exercise or otherwise act in a way which “establishes a [state] religion or religious faith, or tends to do so.” Weisman, 505 U.S. at 577-78 (quoting Lynch, 465 U.S. at 678). This Court, while not overruling the Lemon test in Weisman, affirmed the “particular risk of indirect coercion” in public schools – particularly elementary and secondary. Id. at 592. In Weisman, this Court was confronted with school-official led prayer at high school graduation ceremonies in Rhode Island. Id. at 593. This Court stated that:

[t]he undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Id. (emphasis added). Here, like in Weisman, high school students have been subjected to the creation-science theory of Intelligent Design (R.6-7). It seems appropriate to say that an unconstitutional school act requiring a student to participate in some manner in a school-led prayer at a high school graduation ceremony is not unlike a high school student being required to receive and, perhaps, be tested on a creation-science theory based upon the religious belief in a

supernatural or intelligent being while attending a mandatory class lecture. In this case, the three students actually left the classroom to get away from Girsh's lecture on Intelligent Design (R.9). Even more troubling, one student withdrew from ASMS citing concerns that she felt uncomfortable at school and was estranged from her peers (R.9). Therefore, this Court should conclude that when Girsh violated the Establishment Clause (and ASMS policy) when he engaged in a discussion on Intelligent Decision, a religious theory, in the classroom during a mandatory class session. See Sante Fe Ind. School Dist. v. Doe, 530 U.S. 290, 309-10 (2000) (stating that "[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience what are non-adherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community'" (quoting Lynch, 465 U.S. at 688) (O'Connor, J. concurring)).

**C. The Exclusion of Intelligent Design From a Public School's Curriculum Does Not Violate the Establishment Clause by Creating a Religion of Secularism.**

"In the relationship between man and religion, the [s]tate is firmly committed to a position of neutrality." School Dist. of Abington v. Schempp, 374 U.S. 203, 226 (1963). The plaintiff-petitioners in Schempp argued that the literal reading of the Bible each morning followed by the recitation of the Lord's Prayer in unison at the public high school attended by their two children was contrary to the religious beliefs that they held as a family. Id. at 208. The trial court found and this Court affirmed that:

The reading of the verses, even without comment, possesses a devotional and religious character and constitutes in effect a religious observance. The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's Prayer. The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises does not mitigate the

obligatory nature of the ceremony for [the statute] unequivocally requires the exercises to be held every school day in every school in the Commonwealth. The exercises are held in the school buildings and perforce are conducted by and under the authority of the local school authorities and during school sessions. Since the statute requires the reading of the 'Holy Bible', a Christian document, the practice prefers the Christian religion. The record demonstrates that it was the intention of the Commonwealth to introduce a religious ceremony into the public schools of the Commonwealth.

Id. at 210-11 (quoting Schempp v. School Dist. of Abington, 201 F.Supp 815, 819 (E.D.Pa. 1962)). In reaching their conclusion that the statute was unconstitutional, the Court acknowledged the long, intertwined history of our nation and religion, citing such examples as the oaths of office used throughout the nation requiring the oath giver to pledge to carry out the duties of the office “So help me God” and the United State House of Representatives recitation of an opening prayer led by its chaplain that invokes the grace of God at its close. Id. 213. But the Court also recognized the existence of over 83 distinct religious bodies in the United States, each having over 500,000 members, as well as enumerable smaller religious groups. Id. at 214. These numbers from 1960’s have significance today because there is no data to suggest that the number of religious bodies or their respective memberships has not decreased over the past 40 years. See Van Orden, 125 S.Ct. at 2871 (Breyer, J. concurring). The clear inference being that when a state uses an instrument in a public school setting (and perhaps more generally), like the Bible, which promotes the ideology of only some of the religions in the United States, the state violates the Establishment Clause’s prohibition against any state action that has the primary effect of advancing or promoting a particular religion. See Rosenberg v. Rectors and Visitors of Univ. of Virginia, 515 U.S. 819, 839-40 (1995); Lemon, 403 U.S. at 612-613. The Schempp Court, therefore, held that the prohibiting of certain state actions that have either the primary purpose or effect of advancing a particular religion does not create a religion of secularism.

**D. Intelligent Design is a Religious Theory by Definition, and Therefore is Not a Science.**

In this case, Girsh himself has conceded that the Intelligent Design approach comports with only some religious beliefs but maintains his personal belief that Intelligent Design is not a religious theory (R.4). “Under the modern view, ‘religion’ is not confined to the relationship of man with his Creator, either as a matter of law or as a matter of theology. Even theologians of traditionally recognized faiths have moved away from a strictly theistic approach in explaining their own religions. Such movement, when coupled with the growth in the United States, of many Eastern and non-traditional belief systems, suggests that the older, limited definition would deny “religious” identification to faiths now adhered to by millions of Americans. The Court’s more recent cases reject such a result.” Malnak v. Yogi 592 F.2d 197, 207 (9th Cir. 1979); Kitzmiller, 400 F.Supp.2d at 756-56 (holding that both a reasonable adult and a reasonable child observer would conclude that Intelligent Design is an “interesting theological argument, but that it is not a science). Because even Girsh admits that (1) Intelligent Design has been endorsed by some religions and (2) Intelligent Design relies on the existence of an intelligent or supernatural being at its core, this Court should find as a matter of law that Intelligent Design is a religious theory and not a science.

**II. THE IN-CLASS SPEECH OF A PUBLIC SCHOOL TEACHER, ON INTELLIGENT DESIGN IS NOT PROTECTED BY THE RIGHT TO FREE SPEECH BECAUSE IT WAS NOT A MATTER OF PUBLIC CONCERN AND THE INTERESTS OF THE SCHOOL OUTWEIGH THOSE OF TEACHER.**

In the context of the First Amendment right to free speech, a state employer may take adverse employment action against an employee so long as that employee does not have a constitutionally protected interest in freedom of speech. Perry v. Sinderman, 408 U.S. 593, 597 (1972). A public employee’s speech is not protected when, in balancing both parties’ interests,

the interests of the state employer outweigh the interests of an employee in making his statement. Rankin v. McPherson, 483 U.S. 378, 384 (1987) (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)). The threshold question when applying this balancing test is whether an employee's speech can be fairly characterized as commenting on a matter of public concern. Connick v. Myers, 461 U.S. 138, 146 (1983). If the speech does touch on a matter of public concern, the Court then weighs the interests of the employee in exercising his freedom of speech against the interests of the state employer in ensuring effective and efficient administration of the public services it provides. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

**A. A Public School Teacher's Speech Regarding Intelligent Design is Not Constitutionally Protected When he is Not Speaking as a Citizen on a Matter of Public Concern, But as an Employee Upon Matters Only of Personal Interest.**

There is no violation of the Constitution for taking adverse employment action against one who is speaking as an employee on matters only of personal interest and not public concern in almost all circumstances. Connick, 461 U.S. at 146. In determining whether employee speech touches on matters of public concern, the Court looks to a number of factors in relation to the whole record: the speech's (1) content, (2) form, and (3) context. Id. at 147-48. Further, when an employee is commenting on internal institutional policies and grievances, such matters are not of public concern. See Connick, 461 U.S. at 148.

In the instant case, Girsh's speech is not Constitutionally protected because he was speaking as an employee on matters of personal concern. Id. at 146. This is seen when considering the factors laid out by the Court in Connick. The content of the statement indicates Girsh was airing his grievances with the School Board concerning its internal policy prohibiting the teaching of Intelligent Design (R.6-7). While the form of the speech does not tend to indicate that it is of a personal nature, the context of the statement does. Girsh gave his lecture on

Intelligent Design only after indicating his disagreement with the School Board policy (R.6-7). Given this context, it appears that the lecture was designed to show his dissatisfaction with the School Board policy and disagreement with the ASMS administration.

Further, as a proponent and scholar of the Intelligent Design approach, Girsh has a personal interest in seeing it taught in public schools. In addition, Girsh is the co-author of a textbook discussing Intelligent Design (R.4-5). Currently, the book is used in only seven school districts in Canada (R.5). Given his role as a co-author, Girsh also has a personal financial interest in the adoption of the Intelligent Design approach.

Respondent may argue that Girsh's discussion of Intelligent Design was a matter of public concern and point to the letters appearing in the local newspaper discussing the merits and criticisms of teaching Intelligent Design as evidence of such (R.9-10). While this argument seems to have merit, the public discussion of Intelligent Design did not take place until after Girsh gave his lecture in class (R.6-10). Consequently, Girsh's speech regarding the Intelligent Design approach was of a personal nature and not a matter of public concern, and merits no Constitutional protection in this case.

**B. Respondent's Interest Merits no Constitutional Protection Under the Pickering Balancing Test Because The Interest of Respondent, a Public School Teacher, in Speaking in Support of Intelligent Design is Outweighed by the School Board's Interest in Efficiently and Effectively Administering the Public Services it Provides Even if the Respondent is Speaking on a Matter of Public Concern.**

Even when a public employee is speaking on a matter of public concern, a point Petitioner does not concede, his First Amendment rights are not absolute. Rankin, 483 U.S. at 384. It is true that a public employee does not lose his First Amendment right to free speech simply because he is a public employee. Pickering, 391 U.S. at 568. However, the state's interest as an employer regarding the regulation of employee speech "differ[s] significantly from

those it possesses in connection with the regulation of the speech of the citizenry in general.” Id. As a result, when an individual employee’s speech clashes with a state employer’s interest in carrying out its purpose, the Court uses a balancing test to determine whether the employee’s interest in making a statement outweighs his public employer’s interest in ensuring the effective and efficient administration of the public services it provides through its employees. Connick, 461 U.S. at 140. This test is known as the Pickering balancing test. Id. at 158.

When carrying out the Pickering test, the Court uses several factors to determine whether a state employer’s interest outweighs that of a public employee and focuses on the effective function of the government enterprise. Rankin, 483 U.S. at 388. These factors include whether the employee speech (1) impairs discipline by superiors; (2) interferes with the harmony of close working relationships; or (3) impedes the performance of the employee’s duties or disrupts the regular operation of the government enterprise. Id. In consideration of these factors in the Pickering test, the Court has stated, “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. When a balance of these interests considering the factors provided by the Court weighs in favor of the public employer, the employee’s speech is not protected under the First Amendment. See Lytle v. City of Haysville, 138 F.3d 857, 868 (10th Cir. 1998).

Additionally, the Court looks at two additional factors when dealing with a regulation that proscribes certain forms of expression. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967). First, the Court looks to whether a legitimate government purpose can be achieved through a more narrow regulation. Id. at 602. Second, the “[d]anger of the chilling effect upon [free

speech] must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.” Id. at 604.

**1. Respondent’s Right to Free Speech Under the First Amendment is Diminished Because The Place of Respondent’s Speech, a High School Classroom, Was a Non-Public or Limited Public Forum.**

The Court has upheld restriction of the freedom of speech depending upon the character of the place where the speech occurred. Perry Educ. Ass’n v. Perry Local Educator’s Ass’n, 460 U.S. 37, 45-47 (1983). A tripartite classification is used to determine the character of the forum and the level of restriction permitted therein. See Id. at 45-47. The first type of forum, a public forum, is a place that “by long tradition or government fiat ha[s] been devoted to assembly and debate.” Id. at 45. Examples of public forms are streets and parks which “have immemorially been held in trust for the use of the public [when exercising the freedoms of speech and assembly].” Id. (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). In a public forum, for the state to enforce a content based restriction it must show a compelling state interest and be narrowly tailored to achieve that interest. Id.

The second type of forum, a limited public forum, is a location “the state has opened for use by the public as a place for expressive activity.” Id. A state is not required to maintain a limited public forum indefinitely. Id. However, as long as the forum is open, the state is bound by the same standards that apply to a public forum. Id. at 46. In addition, a state may place reasonable time, place and manner restrictions on a limited public forum. Id. Therefore, a forum may be a limited public forum only during a designated time of day as long as such restrictions are reasonable. An example of a limited public forum is a public library or an elementary school resource room used after the school day has ended. See Good News Club v. Milford Central School, 533 U.S. 98 (2001); Kreimer v. Bureau of Police for the Town of Morrison, 958 F.2d

1242, 1259 (3d Cir. 1992). Further, the Court has ruled that in a limited public forum for community use, speech discussed from a religious viewpoint may be excluded if it does not concern a subject that is otherwise permissible. Good News Club, 533 U.S. at 111-12.

The third type of forum, a nonpublic forum, is “[p]ublic property which is not by tradition or designation a forum for public communication[.]” Perry Educ. Ass’n, 460 U.S. at 46. “In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” Id. Further, the state has the power to preserve its property so that it may be used for the purpose to which it is dedicated. Id.

A classroom is not a public forum. Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993). In addition to considerations regarding the character of the forum, the Court has ruled that public schools may restrict classroom speech in order to promote educational goals. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969). The purpose of allowing restriction of speech in a classroom setting is to promote the learning of the curriculum designed by the administration and to assure “that the views of the individual speaker are not erroneously attributed to the school.” Hazelwood Sch. Dist. v. Kuhlmier, 484 U.S. 260, 271 (1988). Further, a public forum does not exist when an expression is part of the curriculum and a “regular classroom activity.” Kuhlmier, 484 U.S. at 268.

In the instant case, ASMS is not a public forum. A public high school is not a place that has by tradition or fiat been held for the public to exercise its First Amendment rights. Perry Educ. Ass’n, 460 U.S. at 45. Further a high school, and ASMS in particular, cannot be said to

have been held in the public trust since time immemorial. Id. The record is devoid of evidence indicating any such history.

ASMS is also not a limited public forum. The only indication in the record that ASMS has ever been opened for use by the public mentions the existence of Biology and Future Engineers clubs (R.5). However, the record contains no evidence indicating that such clubs were allowed to meet in a classroom when it was operating as such. However, if this Court does determine that ASMS is a limited public forum, which Petitioner does not concede, the inquiry is not ended. Pursuant to Perry Educ. Ass'n and Ward, ASMS may reasonably regulate the time, place, and manner of the speech. In addition, such regulations must be reasonably related to a pedagogical concern. Kuhlmier, 484 U.S. at 273. Here, it is reasonable for Petitioners to restrict the operation of the school as a limited public forum to a time that is not during regular classroom activity so that ASMS may efficiently and effectively carry out its public function of education without frustration of that objective by disruptive speech. Further, pursuant to Good News Club, Girsh's speech may be excluded because teaching of Intelligent Design, an inherently religious approach, is a violation of the Establishment Clause and therefore, not otherwise permissible.

While the Court may find ASMS is a limited public forum, it is best characterized as a nonpublic forum. There is no evidence whatsoever indicating ASMS has ever been held out as a forum for public communication either by tradition or designation. Perry Educ. Ass'n, 460 U.S. at 46. Therefore, Petitioners may reserve ASMS for its intended purpose—education. Id. In this case the regulation of speech is reasonable because it is reasonably related to a pedagogical concern (as mentioned above).

Further, the reprimand of Girsh regarding his speech was not merely because Petitioners oppose his view but because his advancement of that view was in violation of the School Board policy and the Establishment Clause (R.9-10). See supra, Section I (discussing teaching of Intelligent Design approach as Establishment Clause violation). Allowing such speech would frustrate ASMS's educational goals and advance the view that Girsh's speech is attributable to the school in violation of the Establishment Clause. Kuhlmier, 484 U.S. at 260; Tinker, 393 U.S. at 507. Indeed, such disruption has already occurred and will continue to occur unless the Court rules in favor of Petitioner (R.8-9). For the reasons stated above, ASMS is a limited or nonpublic forum. Allowing disruptive speech in a classroom would interfere with the regular operation of ASMS in its public enterprise. Rankin, 483 U.S. at 389. As a result, the "place" factor, pursuant to Pickering, indicates Girsh's interest in making his speech is not protected and is outweighed ASMS's interest in accomplishing its educational goals. Consequently, Girsh's speech does not merit protection under the First Amendment.

**2. Respondent's Right to Free Speech is Diminished Because The Time of Respondent's Speech Was Reserved For Teaching of the State-Mandated Curriculum For Which Petitioners Were Responsible, and the Manner of the Speech Given, a Lecture, Tends to Erroneously Indicate That the Content Was Part of the Approved Curriculum.**

A statement made during an instructional period in a classroom is a regular class activity and a part of the curriculum. Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993). A teacher's principal role during class is to educate students according to the school curriculum. Id. Because such speech is a part of the school curriculum, it can be said to be school-sponsored. Kuhlmier, 484 U.S. at 271. As a result schools may reasonably limit a teacher's speech in such an environment, Ward, 996 F.2d at 453, and are entitled to more deference than they would receive regarding matters that simply "happen[] to occur on the school premises." Kuhlmier,

484 U.S. at 271. This premise is based on the idea that “schools cannot be required to sponsor inappropriate speech.” Id. Further, pursuant to Rankin, when a public employee’s speech interferes with his duties or job performance it may have a disruptive effect on the effective functioning of a public employer when carrying out its goals. Rankin, 483 U.S. at 388.

In the instant case, Girsh gave his lectures regarding the Intelligent Design approach during the time regularly scheduled for his AP Biology class when the class was scheduled to discuss genetics and Punnet Squares—both parts of the approved ASMS curriculum (R.6,9). Therefore, pursuant to Ward, Girsh’s speech can be construed as part of the ASMS curriculum. ASMS is entitled to more deference regarding its regulation of Girsh’s speech because as a part of the curriculum, it is reasonably related to a pedagogical concern (as opposed to other types of expression which happen to occur on the ASMS premises). Ward, 996 F.2d at 453. Additionally, ASMS cannot be required to sponsor Girsh’s inappropriate speech and may restrict it without a First Amendment violation. Kuhlmer, 484 U.S. at 271. Finally, Girsh’s lecture came at the expense of teaching the approved curriculum and interfered with ASMS’s ability to effectively carry out its public purpose of education. This factor weighs in favor of ASMS’s interest in the effective functioning of the public services it provides pursuant to a Pickering analysis. Consequently, the consideration of the “time” factor indicates that Girsh’s speech does not merit First Amendment protection.

**3. Respondent’s Right to Freedom of Speech is Diminished Because the Context of His Speech Indicates Respondent’s Speech Disrupted the School’s Ability to Provide the Public Service For Which it Operates.**

In balancing whether a public employee’s speech is protected under the First Amendment, the Court looks at whether, given the context of the speech, there is a negative impact on the effective functioning of the public employer’s enterprise. Rankin, 483 U.S. at 388.

Further, the Court has noted that preventing interference with a government enterprise is a strong state interest. Id. Court has also stated that “[i]nterference with work, [close working] relationships, or employee[] job performance can detract from a public employer’s function[.]” Id. Additionally, an employee’s responsibilities are relevant considerations under the Pickering test. See id. The burden of caution employees bear regarding speech varies with the extent of authority and public contact the employee’s role involves. Id. at 390.

In addition to these considerations, an employee’s failure to pursue grievances internally may indicate that his speech was unnecessarily disruptive. Lytle, 138 F.3d at 866. This may diminish the weight afforded his interest in expression vis-à-vis his employer’s interest under a Pickering analysis. Id. Further, the foreseeability of effects on efficiency as documented by the employer regarding the employee’s violation of regulations prohibiting speech is relevant. See id. at 867-68.

In this case, Girsh’s speech had a negative impact on the effective functioning of ASMS’s education of its students evidenced by the fact that Girsh’s class was disrupted as a result of his lecture (R.9). Girsh’s work was also affected by his lecture on the Intelligent Design approach due to the fact that because he was teaching Intelligent Design, he was not fulfilling his primary role—teaching the state-mandated curriculum (R.5-10). Further, Girsh’s working relationships with his students were jeopardized when he made students uncomfortable and alienated from the rest of the class (R.9). Girsh’s role involves a considerable amount of authority and public contact with regard to his students. Because Girsh directly interacts with the public he is immediately responsible for the effective functioning of the public enterprise. That functioning is impaired when the public does not get the public service to which it is entitled.

An additional factor weighing against Girsh's free speech interest is the fact that, as in Lytle, Girsh failed to pursue his grievance regarding the School Board policy prohibiting the instruction of Intelligent Design (R.9). Girsh knew about the policy for nearly five months, yet there is no evidence in the record that he ever took steps to resolve his concerns with the policy in order to avoid an unnecessary disruption of the education of students in the classroom (R.5-6). Further, Girsh knew that such a disruption may take place as evidenced by the initial questions he received on January 26, 2004. With this knowledge, on January 27, 2004, Girsh made a conscious decision to disregard the School Board policy and the approved curriculum in favor of teaching Intelligent Design to the detriment of the classroom learning environment (R.6-8).

In this case, all of the dangers the Pickering court warned of—impairment of discipline by superiors (R.8-10), a detrimental impact on close working relationships (R.9), and interference with the employee's duties (R.6-7, 9)—are present and resulted in substantial interference with the regular operation of ASMS's public enterprise. Rankin, 483 U.S. at 388. Given this analysis, the interests of ASMS in providing effective and efficient public education outweigh those of Girsh in making his statement on Intelligent Design. Therefore, this Court should reverse the Fourteenth Circuit, reinstate the district court's grant of summary judgment to petitioner, and find as a matter of law that Girsh's freedom of speech was not violated when Petitioners took adverse employment action against him.

**4. Prevention of Establishment Clause Violations is the Legitimate Public Purpose of the School Board Policy Prohibiting the Instruction of Intelligent Design and it Cannot be Accomplished by a More Narrow Regulation.**

A government interest in avoiding Establishment Clause violations may be characterized as compelling. Good News Club, 553 U.S. at 112. Such a legitimate public purpose may be pursued so long as the means do not broadly stifle fundamental personal liberties when the end

can be more narrowly achieved. Keyishian, 385 U.S. at 602. Further the Court has stated that “precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” Id. at 603-604 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). The Court went on to say, in NAACP v. Button, that “standards of permissible statutory vagueness are strict in the area of free expression . . . [b]ecause First Amendment freedoms need breathing space to survive, government may only regulate in the area with narrow specificity.” 371 U.S. 415, 432-33 (1963). Therefore “sensitive tools [clearly] inform[ing] teachers what is being proscribed” are necessary to prevent the “[d]anger of the chilling effect upon [the] exercise of First Amendment rights” when one must guess what is or is not allowed. Keyishian, 385 U.S. at 604.

In the instant case, ASMS has a compelling interest in preventing Establishment Clause violations. Good News Club, 553 U.S. at 112. This purpose cannot be more narrowly achieved because to allow the teaching of Intelligent Design at all would constitute a violation of the Establishment Clause. See supra Section I (discussing teaching of Intelligent Design as Establishment Clause violation). Pursuant to Keyishian and Button, the School Board policy at issue has a high level of precision in regulating Girsh’s right to free speech. 385 U.S. at 602; 371 U.S. at 438. This precision is narrow and specific, and it allows for ample “breathing space” in order for First Amendment freedoms to flourish. Button, 371 U.S. at 432-33. Finally, the School Board policy prohibiting the teaching of Intelligent Design is a “sensitive tool” that “clearly inform[s]” Girsh of the nature of the activity being proscribed. Keyishian, 385 U.S. 604. Therefore, there is no danger of a chilling effect on First Amendment rights with regard to the School Board policy because all ASMS teachers can easily ascertain precisely what activity is proscribed. Id. Therefore, Petitioner has a legitimate public interest in regulating Respondent’s speech, and the regulation possesses the requisite amount of precision in order to prevent a

chilling effect on speech in general. Therefore, this Court should reverse the Fourteenth Circuit, reinstate the district court's grant of summary judgment to petitioner, and find as a matter of law that Girsh's freedom of speech was not violated when Petitioners took adverse employment action against him for violating the School Board policy prohibiting the teaching of Intelligent Design.

### **CONCLUSION**

For the foregoing reasons, Petitioner asks this Court to reverse the judgment of the Fourteenth Circuit Court of Appeals, reinstate the district court's grant of summary judgment to Petitioners, and find as a matter of law that (1) the teaching of Intelligent Design in public schools violates the Establishment Clause of the First Amendment even when the proponent focuses on the scientific underpinnings and does not make any assertions as to the nature of the intelligent designer, and (2) a teacher's right to freedom of speech is not violated when he or she is prohibited from teaching or discussing Intelligent Design in the classroom during regular school hours.

## **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.

### **U.S. Const. Amend. XIV, § 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **Arklatex School for Mathematics and Sciences School Board 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 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 change.

(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 theories on the origins of the universe and the formation of life that are substantially similar to Creationism or Intelligent Design are similarly prohibited.