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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 for Mathematics and Sciences**

*Petitioner,*

v.

**PETER GIRSH**

*Respondent.*

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*On Writ of Certiorari*

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**BRIEF FOR PETITIONER**

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## **QUESTIONS PRESENTED**

- (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 to freedom of speech protect a public school teacher's discussion on the topic of Intelligent Design?

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### **STANDARD OF REVIEW**

The standard of review for summary judgment orders is de novo. The appropriate standard to be applied in this case is de novo. Miles v. Denver Public Schools, 944 F.2d 773 (1991).

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## **STATEMENT OF THE CASE**

### **OPINION BELOW**

The ruling of the United States District Court for the Eastern District of Arklatex appears in the Official Record (R.3-14). The ruling of the United States District Court of Appeals for the Fourteenth Circuit also appears in the Official Record (R.15-19).

### **STATEMENT OF CASE FACTS**

Petitioner Dr. Peter Girsh is a high school biology teacher at the Arklatex School for Mathematics and Sciences (ASMS), which is a public school and receives public school funding from the Arklatex Department of Education (R.4). Girsh graduated from Yale University in 1985 and received a Ph.D. in Biochemistry from Harvard University in 1990 (R.4). Girsh has appeared on television shows such as CNN's *Hardball* and Fox News' the *O'Reilly Factor* to discuss the theory of Intelligent Design, "the theory that only an intelligent or supernatural cause could be responsible for life, living things, and the complexity of the universe" (R.4). Dr. Girsh's view is that Intelligent Design is a scientific theory unrelated to any religious movement (R.4). Girsh is involved in the First Christian Church of the Community (R.5).

Girsh has contributed to the textbook *From Koalas to Humans* (R.5). The book "was designed to be an alternative to the religiously-affiliated Intelligent Design textbooks on the market" and "addresses only the scientific evidence used to support Intelligent Design theories, demonstrating that evidence can be used to rebut the theory of evolution" (R.5). The book does not use the word "God" (R.5). Girsh served on the editorial board of the textbook (R.5).

Dr. Girsh has been a faculty member of ASMS since the school opened in 1995 (R.5). He has served on the selection board and steering committee for "numerous school functions"

and has served on the curriculum committee for the past seven years. He has also been the faculty advisor for the Biology Club and the Future Engineers of America Club (R.5).

The school's curriculum states that it must follow the state specified Biology program, which prohibits the teaching of "non-scientific" evidence (R.5). On September 8, 2003, the School Board adopted a policy that prohibited the teaching of Creationism or Intelligent Design to avoid Establishment Clause violations and the appearance of an endorsement of any particular religion (R.5-6). The policy allows teachers to teach alternative theories of origin in addition to the theory of evolution but specifically forbids the teaching of the theories of Creationism, Intelligent Design, or any theory "substantially similar" to the theories of Creationism or Intelligent Design (R.6).

On January 26, 2004, Girsh was asked by his students about Intelligent Design after they had searched him on the internet and found sites relating to his Intelligent Design study (R.6). Girsh did not discuss the topic that day (R.6). When asked about the theory the next day in class, Girsh told his class of the School Board policy and told them he thought it was a violation of the Establishment Clause of the First Amendment (R.7). Girsh then explained to his students that Intelligent Design was the theory that scientific evidence supports the conclusion that the universe was designed by an intelligent being or beings (R.7). Girsh told his students of the three main ways scientists have detected intelligent design in nature (R.7). First, Girsh explained to his students the "irreducible complexity" of certain biological systems which means that the system cannot function unless all of its parts are in place (R.7). Girsh told his students that this means that such systems could not have evolved because each individual component is needed for the system to succeed and that these systems cannot be created by gradual changes over time (R.7). Girsh stated that the second example of evidence supporting Intelligent Design is "the

observation that the ability of the universe to support human life is sufficiently contingent, complex” and told his class that physicists have “announced our universe appears to have been fine-tuned to support the possibility of human life” (R.7). Girsh stated that the odds of life naturally coming into existence on any planet in the universe are one in one hundred billion trillion trillion trillion (R.7). Girsh explained that the third piece of evidence supporting Intelligent Design is the information content of DNA. He told his class that it is “virtually impossible unguided chemistry could have created it” (R.7-8). He said that someone or something must have given meaning to the DNA molecules and combinations (R.8.) Girsh did not use the word “God” or “indicate the nature of the intelligent designer” in his lecture (R.8). After the lecture, Girsh showed the students his contributions to the textbook *From Koalas to Humans*, and his articles that had appeared in *Origins* magazine (R.8). Girsh then showed a video clip of his television interview with Bill O’Reilly on the topic of Intelligent Design (R.8). The content of the television conversation was “virtually identical” to Girsh’s class lecture (R.8). After class, Girsh distributed pamphlets the three categories of evidence supporting Intelligent Design he had used in his lecture (R.8). The pamphlet did not use the word “God” and did not identify the designer (R.8).

Maya Klinger, a student in Girsh’s class told her mother of the lecture on Intelligent Design (R.8). Klinger’s affidavit states that she withdrew from school because she felt uncomfortable with the discussions on Intelligent Design (R.9). Klinger’s mother called Principal Dr. Richard Rice and complained about the lecture because her daughter felt uncomfortable because she didn’t believe in a supernatural being that created the universe (R.8-9). Rice told this to Girsh and also told him that he had received fifteen calls from parents asking Rice to allow Dr. Girsh to continue to teach Intelligent Design (R.9). Rice told Girsh not to

mention Intelligent Design in class again as it was a violation of the School Board Policy (R.9). In class on January 27, 2004 Girsh again spoke of Intelligent Design when he answered student's questions on the subject (R.9).

Dorothy Klinger wrote a letter to the *Arklatex Tribune* asking the State to pull funding from ASMS (R.9). Student Randall Johnson's mother Ranada Johnson wrote to the *Arklatex Tribune* asking the State to implement the teaching of Intelligent Design in the classroom (R.9).

Girsh was cited for insubordination on January 26, 2004 and on January 27, 2004 (R.9). Girsh was told that another violation would result in a formal hearing before the School Board to determine the future of his employment (R.10).

### **PROCEDURAL HISTORY**

Girsh filed suit alleging the School Board's Policy violated the Establishment Clause by disallowing only theories supporting religious beliefs and that the School District violated his First Amendment right to free speech by disciplining him for speaking about Intelligent Design in his class and for criticizing the School Board policy (R.10). Girsh is seeking a declaratory judgment that the policy is unconstitutional and monetary damages for the violation of his free speech rights (R.10). Defendants moved for a summary judgment as a matter of law (R.10). Girsh responded that there were undecided issues of material fact and that the Defendants were not entitled to a judgment as a matter of law (R.10). The United States District Court for the Eastern District of Arklatex granted Defendant's motion for summary judgment and dismissed both of Plaintiff's claims on June 7, 2004 (R.14).

Plaintiff appealed and on October 11, 2005 the United States District Court of Appeals for the Fourteenth Circuit found that there were unresolved issues of material fact and reversed the District Court's grant of summary judgment and remanded for a trial on the merits (R.15).

The School Board filed a writ of certiorari to the United States Supreme Court. The Court accepted on January 27, 2006 and will consider the following questions:

- (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 to freedom of speech protect a public school teacher's discussion on the topic of Intelligent Design?

## SUMMARY OF THE ARGUMENT

### I.

Petitioner's adoption of the School Board policy Section 1701.2 does not violate the Establishment Clause of the First Amendment. However, Respondent's violation of the policy is an unconstitutional establishment of religion. The First Amendment of the United States Constitution forbids governmental "establishment of religion" or the prohibition of the "free exercise thereof." U.S. const. amend. I.

The School Board's policy did not endorse any particular religion but merely limited the theories of the origin of the universe that were permitted to be taught in the classroom. Conversely, no students were forbidden from practicing any religion of their choice. The policy, in fact, is in existence to protect the student's religious freedom. It prevents them from being involuntary audience members to a lecture that might be perceived as an endorsement of religion since it would be on a topic of one of many religions and delivered by a teacher who is seen as an authority figure in the school environment.

A student hearing a lecture on a theory of origin inconsistent with his or her own would lead the student towards feelings of isolation, even if their view was common, and would dissuade him or her from continuing to exercise their own beliefs.

The influence of a school system is not so strong that limiting classroom discussion on a particular belief prohibits a student from exercising that belief. In this case it leaves the issue for the students to discuss at home, in their churches, and among themselves. The influence of a school system is so powerful that to adopt a small number of many alternative beliefs for classroom material is to in effect deem those beliefs superior.

## II.

This court should overturn the appellate court's decision to deny summary judgment because there was no First Amendment violation of free speech when the petitioner enacted Section 1701.2. There was not an issue of public concern when the respondent criticized the School Board and talked about his personal views on intelligent design, discussed his book, showed his magazine articles and TV clips, and handed out pamphlets that market his book to his AP Biology class.

The petitioners' interest as an employer outweighs the respondent's interest when the respondent violated school policy by talking about intelligent design in the classroom and was insubordinate by disregarding a direct order not to talk about intelligent design again from Dr. Rice the principal.

The petitioners were reasonable in limiting classroom discussion and did not discriminate based on views, when the petitioner's control over the classroom demonstrated that it was not a public forum and the purpose of the classroom was to teach science.

## ARGUMENT

### I. DEFENDANT’S ACTIONS DID NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The First Amendment of the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” As an authority figure in a prominent position teaching impressionable youth at a government funded school, Girsh’s introduction of Intelligent Design to his class would have been an unconstitutional establishment of religion if permitted. Allowing for the teaching of Intelligent Design, as defined by the School Board, would allow for a teaching a universe “designed by an intelligent being,” a belief held by those of a monotheistic religion. The teaching of intelligent design was ruled unconstitutional in *Kitzmiller v. Dover Area School District*, 400 F.Supp.2d 707, (2005). The School District held a policy that required students to hear a statement on intelligent design as an alternative to the theory of evolution. The court held that “it is unconstitutional under the Establishment Clause to teach intelligent design as an alternative to evolution in a public school science classroom.” *Id.*

That the word “God” was not used in Girsh’s teachings does not mean that a religion was not being promoted. A belief that the universe was created by a higher power is a religion. The American Heritage Dictionary defines religion as the “belief in and reverence for a supernatural power or powers regarded as creator and governor of the universe. The School Board’s definition of the theory of Intelligent Design is more narrow than this definition of religion, as Intelligent Design as defined by the School Board is the theory that “an intelligent being” created nature and complex biological structures. Using these definitions it is clear that the phrase “a

particular religious faith” as used in *School District of the City of Grand Rapids v. Ball*, 105 S.Ct. 3216 (1985) is applicable to the present case. Here, the court stated that “although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith. *Id.* at 3223. The court concludes that this indoctrination “would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State.” *Id.* The fact that creation science is “inspired by the book of Genesis” prompted a District Court to find that the teaching of creation science was an unconstitutional advancement of religion. *McLean v. Arkansas Board of Education*, 529 F.Supp. 1255 (1982). The court noted that creation science “assumes only two explanations for the origins of life and existence of man, plants, and animals: It was either the work of a creator or it was not” and that creation scientists claim that all scientific evidence which “fails to support the theory of evolution is necessarily scientific evidence in support of creationism. *Id.* at 1266. In *Stone v. Graham*, 101 S.Ct. 192, (1980), the United States Supreme Court held that the posting of the Ten Commandments on the walls of each public school classroom violated the Establishment Clause. The court stated that if the posting of the Ten Commandments were to have any effect at all, it would be to “induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the commandments.” This was “not a permissible state objective under the Establishment Clause.” *Id.* at 194. The Ten Commandments are used as part of the teachings of many religious denominations. As *Graham* demonstrates, a belief need not be particular to one church to be religious in nature. A belief system may be a religion even if it does not profess a belief in God. In *Torasco v. Watkins*, 81 S.Ct. 1680, (1961) (mandamus proceeding to compel issuance of notary commission to petitioner who refused to

declare belief in God), the court listed Buddhism, Taoism, Ethical Culture, and Secular Humanism as “religions in this country which do not teach what would generally be considered a belief in the existence of God.” *Id.* at 1684.

A significant part of Girsh’s teachings on Intelligent Design was his display of his expertise on the subject. He showed his students his articles published in periodicals on Intelligent Design and showed a clip of a network television interview on the topic of Intelligent Design. In addition, Girsh distributed a pamphlet to his class marketing his textbook *Koalas to Humans*, which supports Intelligent Design theories.

Given Girsh’s experience in the study of Intelligent Design, he was no doubt seen as an authoritarian to his class. Therefore, his lecture of the three ways scientists have detected intelligent design in nature took on a tone of finality and a promotion of the idea.

While calling for the teaching of Intelligent Design would be an unconstitutional establishment of religion, forbidding such teaching is not an unconstitutional prohibition of the free exercise of religion. Girsh’s actions clearly show that he has not been prohibited from furthering his views on Intelligent Design. Likewise, the students of the class remain free to practice a religion of their choosing.

**A. PLAINTIFF’S ACTIONS FAILED THE 3-PRONGED TEST ESTABLISHED IN *LEMON V. KURTZMAN*, 403 U.S. 602 (1971).**

State action is unconstitutional if lacks a secular purpose, its principal or primary effect advances or inhibits religion, or it entangles government with religion. *Lemon*. *Lemon* held unconstitutional Rhode Island and Pennsylvania statutes granting government aid to nonpublic schools, many of which were Roman Catholic affiliated schools, stating that the

“Establishment clause of the First Amendment was intended to afford protection against sponsorship, financial support, and active involvement of the sovereign in religious activity.” *Id.*

The *Lemon* test was adopted by the court in *Kitzmiller*. Here, the Dover Area School District’s policy of introducing intelligent design as an alternative to evolution violated the second prong of the *Lemon* test, as the policy “had the primary effect of imposing a religious view of biological origins into the biology course.” *Id.*

When taxpayers challenged a school district’s programs that provided classes to private school students at the expense of the taxpayers, the United States Supreme Court relied on the *Lemon* test. *Ball*. The court found that the programs violated the second prong of the *Lemon* test and “therefore violated dictates of the establishment clause of the First Amendment.” *Id.* The court noted the particular reliance of the *Lemon* test in cases “involving the sensitive relationship between government and religion in the education of our children.” *Id.* at 3222. When the government becomes involved in this area there is potential for “a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic.” *Id.* at 3222. The effect of Girsh’s teaching was evident by the response that followed. Several students mentioned to their parents what had been discussed in Girsh’s class. The parents, in turn, voiced their opinion to the school.

The court in *Ball* relied in part on the decision of *McCullum v. Board of Education*, 333 U.S. 203, (1948), which held that as part of a school program a school district could not allow even voluntary religious instruction by private school teachers on the public school’s premises. The *McCullum* court stated the public schools must remain “free from entanglement in the strife of sects. The preservation of the community from divisive conflicts requires strict confinement

of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice." *Id.* at 217. The School Board, if it allowed the teaching of Creationism or Intelligent Design, would be allowing a practice even more pervasive of the student's rights. It would be allowing involuntary religious instruction. Girsh's students were required to attend school and were subject to whatever he chose to teach.

Girsh's actions entangle government and religion even more than the actions school programs in *McCollum*. In *McCollum*, the teachers of religious instruction were nonpublic school teachers, where in the present case Girsh is a faculty member at a government-funded school. Additionally, no part of Girsh's teaching on Intelligent Design appeared voluntary. The lecture came during class time during the regular school day, when the students were required to be present.

Louisiana's Creation Act forbade public schools to teach the theory of evolution unless creation science was also taught. This act was held unconstitutional in *Edwards v. Aguillard*, 107 S.Ct. 2573 (1987) when the court found that the Act violated the Establishment Clause of the First Amendment. The Act was held to have violated the first and second prongs of the *Lemon* test. The court found that the Act "impermissibly endorses religion by advancing the religious belief that a supernatural being created humankind." *Id.* at 2575. The Arklatex School Board's policy does not endorse one religion, nor does it prohibit the free exercise of any religion. The policy allows for multiple theories of origin to be taught and only excludes the teaching of particular theories in the context of a public education. The theories taught to the students were not to be endorsed or advanced, but merely given as potential alternatives to a virtually limitless number of theories.

The *Lemon* test was again applied in *Freiler v. Tangipahoa Parish Board of Education*, 185 F.3d 337, (1999). The School Board required a disclaimer to be read before the teaching of evolution in elementary and secondary classes stating that the teaching of evolution was “not intended to influence or dissuade the Biblical version of Creation or any other concept” and that it was “the basic right and privilege of each student to...maintain beliefs taught by parents.” *Id.* The court held that the requirement violated the second prong of the *Lemon* test by not furthering the “articulated objective of encouraging informed freedom of belief or critical thinking by students.” Instead, the disclaimer furthered “the protection and maintenance of a particular religious viewpoint.” *Id.*

The actions of Girsh in the present case are even more severe than the reading of the disclaimer in *Freiler*. Girsh presented himself as an authority figure in the area of Intelligent Design. While there was surely little if no emotion in the reading of a disclaimer, Girsh was passionate about his cause. By presenting his publications on the topic of Intelligent Design and showing his television interviews he was not just telling his students that they were free to maintain beliefs taught by their parents, but that the belief in Intelligent Design was a belief he held and endorsed.

**B. GIRSH’S TEACHING OF INTELLIGENT DESIGN IN THE CLASSROOM AS FORBIDDEN BY THE SCHOOL BOARD POLICY VIOLATED THE ENDORSEMENT TEST.**

In addition to the Lemon test, the United States Supreme Court has applied the endorsement test in determining whether state action is unconstitutional under the Establishment Clause. The endorsement test was defined in [Lynch v. Donnelly, 465 U.S. 668, \(1984\)](#). Lynch was a 5-4 decision reversing a United States District Court’s decision to permanently enjoin a city from using a nativity scene in its Christmas display. Justice O’Conner’s concurrence stated

that government endorsement of religion “sends a message to nonadherents 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” and that disapproval sends “the opposite message.” [Id. at 688](#). O’Conner continues that it is important that “government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect that make religion relevant, in reality or public perception, to status in the political community.” [Id. at 692](#).

Fifteen years after [Lynch](#) introduced the endorsement test, it was stated that the test “seeks to determine whether the government endorses religion by means of the challenged action.” [Freiler, id at 343](#).

**1. Girsh acted in a manner forbidden by the Establishment Clause by endorsing the theory of Intelligent Design.**

In 1946, the United States Supreme Court found that the “establishment of religion” clause of the First Amendment means that “neither a state nor the Federal Government can set up a church. Neither can [it] pass laws which aid one religion, aid all religions, or prefer one religion over another.” [Everson v. Board of Education of Ewing Tp., 67 S.Ct. 504, \(1946\)](#). The court further interprets the Establishment Clause as forbidding government from participating “in the affairs of any religious organizations or groups and vice versa.” [Id. at 512](#).

In [Engel v. Vitale, 82 S.Ct. 1261, \(1962\)](#), the United States Supreme Court stated that the Establishment Clause’s “first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and downgrade religion” and, looking at the history of governmentally established religion, that “whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.” [Id. at 1267](#).

The United States Supreme Court again declared that the government “may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite” in [Epperson v. Arkansas, 89 S.Ct. 266, \(1968\)](#). Here, a high school biology teacher challenged her dismissal by the school district for teaching a chapter from the textbook dealing with the theory of evolution. An Arkansas statute made it illegal for a public school teacher to teach the theory of evolution or use a textbook that did. The court found that the state law was “contrary to the freedom of religion mandate of the First Amendment” and declared that while an objective presentation of the study of religions and the Bible is not necessarily prohibited by the First Amendment, “the State may not adopt programs or practices in its public schools or colleges which aid or oppose any religion.” [Id.](#) With Girsh’s experience and expertise as a backdrop, his teaching of Intelligent Design was not presented objectively. He presented to his class his contributions to a textbook *From Koalas to Humans* which suggest that “the universe was purposefully created” and distributed pamphlets promoting the textbook.

The United States Supreme Court has even suggested that a conscious attempt to promote one’s religion and persuade others to adopt it is not necessary for an Establishment Clause violation to occur. [Agostini v. Felton, 521 U.S. 203 \(1997\)](#). The court stated that “government inculcation of religious beliefs has the impermissible effect of advancing religion.” [Id. at 223](#). Girsh no doubt inculcated his students with the theory of Intelligent Design. He provided them with his contributions to a textbook and periodical and showed them a clip of a television interview which all presented the same information he had given his students in the class lecture. Such a demonstration, as the [Agostini](#) court warned, had the effect of the students feeling that Girsh was advancing Intelligent Design.

## **2. The School Board’s implementation of the policy regarding the “teaching of creationism and intelligent design theory” met the**

**endorsement test.**

The Kitzmiller court described the application of the endorsement test as consisting of the “reviewing court determining what message a challenged governmental policy or enactment conveys to a reasonable, objective observer who knows the policy’s language, origins, and legislative history, as well as the history of the community and the broader social and historical context in which the policy arose.” A reasonable, objective observer of this Act sees that the School Board is not attempting either advance or prohibit the teaching of one religion over another, but is merely, as the McCullum court stated as was mentioned earlier “leaving to the individual’s church and home, indoctrination in the faith of his choice.” [Id. at 217.](#)

The School Board’s policy falls in the area between aiding and opposing a religion, as allowed by the Court in Epperson. [Id.](#) A teaching of any theory of origin is more likely to be an endorsement of that theory than disallowing that theory would be an opposition to the theory. A teaching of one theory will be perceived as an endorsement because it will have been chosen from many alternative theories. Forbidding theories to be taught is more of an avoidance of an endorsement of a theory than it is an opposition. Disallowing one theory’s inclusion in a school curriculum only means that the School Board is leaving it to the students to form their own beliefs without the Board’s added influence.

**C. APPLYING THE COERCION TEST RENDERS GIRSH’S ACTIONS UNCONSTITUTIONAL WHETHER ALLOWED BY THE SCHOOL BOARD OR NOT.**

The coercion test was laid out in [Lee v. Wiseman, 505 U.S. 577, \(1992\)](#), where the court held that the inclusion of prayer at a public school graduation ceremony was forbidden by the Establishment Clause. The court concluded that “at minimum, the Constitution guarantees that 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.” [Id.](#) In [Freiler](#), the coercion test was described as analyzing “school-sponsored religious activity in terms of the coercive effect that the activity has on students. [Id. at 343.](#)

Since school attendance is required, the action described in [Lee](#) takes on a coercive effect. Additionally, since any number of Girsh’s students may not have been followers of the belief of Intelligent Design, and since Girsh spoke with such authority, the coercive effect became more severe. As noted in [Lee](#), “what to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy. [Id. at 592.](#)

II. THE APPELLANT COURT ERRED IN DENYING THE PETITIONERS’ MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO FIRST AMENDMENT VIOLATION WHEN IT ENACTED SECTION 1701.2 AND BY DISCIPLINING THE RESPONDENT FOR CRITICIZING AND VIOLATING THE POLICY.

“The State has an interest as an employer in regulating the speech of its employees.” *Pickering v. Board of Ed.*, 391 U.S. 563, 568 (1968). If a state employee is not a “citizen speaking on matters of public concern . . .”, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.” *Connick v. Myers*, 461 U.S. 138, 147 (1983). When a state employee is speaking on a matter of “public concern” there must be “a balance between the interests of the teacher, as a citizen, in commenting upon . . .” those matters “. . . 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. If the speech is protected, then there will be a question on whether the speech was the motivating factor in the employer’s decision. *Mt. Healthy City*

*Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). If the speech was the motivating factor for the employer’s action, then the burden shifts and the employer has to prove by “a preponderance of the evidence that it would have reached the same decision . . .,” regardless of the speech. *Id.*

A state institution can control the subject matter in a nonpublic forum, as long as the “distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” *Lamb’s Chapel v. Center Moriches School Dist.*, 508 U.S. 384, 392-93 (1993) (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)). “Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter . . . .” *Perry Educ. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 49 (1983).

- A. There was no violation of free speech when the petitioners took discipline actions against the respondent for violation of school policy.
  - 1. There was not an issue of public concern when the respondent criticized the School Board and talked about his personal views on intelligent design, discussed his book, showed magazine articles and TV clips, and handed out pamphlets that market his book to his AP Biology class.

Speech is protected when an employee speaks about public concern, not on “matters of personal interest . . . .” *Connick*, 461 U.S. at 147. “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement.” *Id.* at 147-48. The respondent’s speech was not a matter of public concern.

The respondent’s statements were based on personal interests. In *Connick*, the court determined that the plaintiff’s questions in a questionnaire pertaining to office transfer policy, need for a committee, and trust in supervisors, were of her own personal interests. *Id.* at 148. The facts in this case show, like *Connick*, that the respondent was concerned about his own

interest in expressing his disdain in the school board's policy, and talked about his personal views on intelligent design, discussed his book, showed magazine articles and TV clips, and handed out pamphlets that market his book to his AP Biology class giving information to the students to help market his book.

Second, the speech was not a matter of public concern because of the form and context in which it was given. In *Pickering*, there was a matter of public concern because the teacher's objections came in the form and context of a letter to a local newspaper. *Pickering*, 391 U.S. at 564. See also *Mt. Healthy*, 429 U.S. at 282 (there was a matter of public concern when a teacher called a local radio). In *Rankin v. McPherson*, 483 U.S. 378, 379-80 (1987), the speech was in the appropriate form and context when it was discussed privately with a co-worker. However, in this case, the respondent's speech was not given in a vehicle which people can choose to listen or read, but was given to high school students which are mandated to sit and listen. This is not the appropriate context in which speech can be considered public concern.

2. The petitioners' interest as an employer outweighs the respondent's interest when the respondent violated school policy by talking about intelligent design in the classroom and was insubordinate by disregarding a direct order not to talk about intelligent design again from Dr. Rice the principal.

In *Pickering*, the court said that there are too many facts to cover all statements by teachers, and it would not "lay down a general standard against which all such statements may be judged," but would indicate some general lines "which an analysis of the controlling interests should run." [\*Pickering\*, 391 U.S. at 569](#). When weighing a school's interest in "promoting the efficiency of the public services it performs through its employees" ([\*Mt. Healthy\*, 429 U.S. at 284](#)) and the teacher's interest, factors justifying the regulation of speech include the content of the speech, "maintaining either discipline by immediate superiors or harmony among coworkers . . .," and

providing personal loyalty and confidence between teacher and supervisor. *Pickering*, 391 U.S. at 569-70.

The respondent's statements undermined the close working relationship between Dr. Rice the principal, and the respondent, a teacher. In *Connick*, the court found that it is important to the efficiency and success to maintain a close working relationship with superiors, and insubordination interfered with working relationships. *Connick*, 461 U.S. at 151. The court went on to say that "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Id.* at 151-52. Although in *Pickering*, it was held that there was not a close working relationship between a superintendent and a teacher (*Pickering*, 391 U.S. at 570), *Connick* shows that a direct superior and subordinate is a close working relationship. *Connick*, 461 U.S. at 151. Like *Connick*, Dr. Rice is the principal and direct superior over the respondent. When the petitioner discussed intelligent design in class after he was told not to by Dr. Rice, there was direct insubordination by the respondent. This shows there was an interference of a close working relationship, and deference should be given to the petitioner.

In observing the context in which the dispute arose, *Connick* emphasizes that "When employee speech concerning office policy arises from an employment speech concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." *Connick*, 461 U.S. at 153. In *Mt. Healthy* there was no established policy about speaking to a radio station about school memos. *Mt. Healthy*, 429 U.S. at 284. In this case, there was a clear established policy about not speaking of intelligent design in the classroom. Here, the dispute arose from school policy requiring intelligent design not to be discussed.

*Connick* also stated that the First Amendment does not require a government employer to “tolerate action which he reasonably believed would disrupt the office.” When considering whether an office is disrupted, besides violation of office policy, the court has looked to whether others have heard it, or whether it was made in private. *Rankin v. McPherson*, 483 U.S. 378, 389 (1987). There was no disruption in *Rankin* because the statement was made in privacy, and the employer was not concerned with who heard it. *Id.* Here the statements were not made in privacy and there was disruption in the classroom, as well as disruption from outside the classroom.

For maintaining discipline by immediate superiors, when 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. *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415, n. 4 (1979) (citing *Pickering*, 391 U.S. at 572-73). In *Connick* there was no harm to office efficiency when a questionnaire was prepared at work, but required Myers and others to leave work to complete it (if they wanted to do it). *Connick*, 461 U.S. at 153). However, the comments made by the respondent were made during school hours, in class, to an audience that was forced to listen.

Under *Rankin*, a public employee has a responsibility to the agency, and there is a burden of caution of what they say, that will depend on the “extent of authority and public accountability the employee’s role entails.” *Rankin*, 483 U.S. at 390. If the employee serves a policymaking, or contact role, an employee’s speech can be a “danger to the agency’s successful functioning . . .” *Id.*, at 390-91. In *Rankin*, the plaintiff’s duties were clerical, and involved civil process, but no law enforcement activity like the Constable’s office. *Id.* The respondent, in this case, had a

public and policymaking role by serving on committees for school functions, curriculum committee, and faculty advisor for several clubs. Given the function of the school in promoting good science and the respondent's large role in the school, the content of the speech in the class would give rise to a problem in the successful functioning of the school and the teacher's performance in the classroom.

- B. The petitioners were reasonable in limiting classroom discussion and did not discriminate based on views, when the petitioner's control over the classroom demonstrated that it was not a public forum and the purpose of the classroom was to teach science.

Public property that has been open to the public by the state for expressive activity cannot be limited in the content, unless the state has a compelling interest which is narrowly tailored.

*Perry*, 460 U.S. at 46. The petitioners have not committed viewpoint discrimination because it did not create a public forum in the respondent's classroom, "public property which is not by tradition or designation a forum for public communication is governed by different standards."

*Perry*, 460 U.S. at 46. "In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes . . . , as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

When looking at whether a place is a public forum, look at is what is the "normal and intended function" of that place. *Id.*, at 47. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) stated that school facilities are only considered public forums if "school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public'" *Id.*, at 261 (quoting *Perry*, 460 U.S. at 47). "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Id.* at 267 (quoting, *Cornelius*, 473 U.S. at 802).

The court has determined that there is a public forum when schools open their doors to activities after school hours, as in *Lamb's Chapel*, where the district court called the district's facilities a limited public forum. 508 U.S. at 389. The school district's express language showed intent for a public forum. However, in *Perry* the school district's interschool mail system was not a public forum because the normal and intended function of the mail facilities was to "facilitate internal communication of school related matter to the teachers . . ." and was not open to the general public. [Perry, 460 U.S. at 47](#) (PEA was the exclusive bargaining representative for the district's teachers and was granted access to the interschool mail system, but PLEA was denied. The court ruled that even though PLEA had been able to be involved in the mailing system, as well as other groups, the school could restrict them because the interschool mail system was not a limited public forum). Also in *Kuhlmeier* the court decided that a school newspaper was not intended to be a public forum, it was intended to be a journalistic lab. [Kuhlmeier, 484 U.S. at 268-69](#). *Perry* and *Kuhlmeier* illustrate that during school hours, especially in a class setting, there is no intention of having a public forum. The purpose of the classroom is to teach the curriculum of the school, not to voice public debate.

When the state has not specifically listed whether something is intended to be a public forum or not, the court will look to how much control the state has used. In *Perry*, in order to use the system to communicate with teacher, you had to get permission from the principal. [Perry, 460 U.S. at 47](#) (see also *Kuhlmeier*, 484 U.S. at 269, where the teacher had control in the editorial process, and the principal made the final approval). In this case, the School Board controlled what curriculum could be taught and Dr. Rice, the principal, told the respondent not to talk about intelligent design, so there was enough control to show the school did not intend there to be a public forum.

In *Perry* the court stated that the right to make distinctions on subject matter, is “inherent . . . in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.” [Perry, 460 U.S. at 49](#). To evaluate these distinctions you must determine whether they are reasonable for the purpose which the forum at issue serves. *Id.* The court in *Perry* reasoned that the differential access was reasonable because it was consistent with the “interest in preserving property for the use to which it is lawfully dedicated.” [Id. at 50-51](#). The mail system enabled the teachers’ union to perform its obligations to the teachers effectively, and ensure “peace within the schools” and prevent schools from squabbles. [Id. at 51-52](#). In *Kuhlmeier*, the court decided it was reasonable to limit what was said in a school newspaper when the purpose was to teach journalism responsibilities. [Kuhlmeier, 484 U.S. at 270](#). In this case, the school’s purpose was to teach science to their students, and avoid violating the establishment clause, and limiting the material to not include intelligent design for a nonpublic forum, was reasonable.

The court stated in *Kuhlmeier* that if there is no public forum, “school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.” [Kuhlmeier, 484 U.S. at 267](#). Based on this language, lower courts have decided that schools can “control the content of its curriculum, particularly that content imparted during class time.” [Bishop v. Aronov, 925 F.2d 1066, 1074 \(11th Cir. 1991\)](#) (university could limit a professors speech when he talked about a creator and physiology in his physical education classroom because there was no public forum and it was reasonable to restrict the curriculum because it could give the appearance of endorsement by the university) *see also* [Miles v. Denver Public Schools, 944 F.2d 773 \(10th Cir. 1991\)](#) (the school could limit a teachers speech in the classroom because it was not a public forum and it could give the appearance of endorsement by

the school). As in this case it would be reasonable to restrict the curriculum because the classroom is not a public forum and the school does not want to give the appearance of endorsement.

Even if the classroom is considered a public forum, the forum was limited to the subject of science, the study of physical phenomena, and intelligent design is not the subject of science. When the government allows an open public forum the government can limit the content or purpose of that forum if reasonable, but it cannot limit the views on that content. [\*Rosenberger v. Rector and Visitors of University of Virginia\*, 515 U.S. 819, 830-31 \(1995\)](#). In *Lamb's Chapel*, there was viewpoint discrimination when the school allowed property to be used for the presentation of social or civic purposes, which covered child rearing and family values. [\*Lamb's Chapel\*, 508 U.S. at 393](#). The court reasoned that since a video about child rearing and family values fell under the subject matter of the forum, to deny a religious viewpoint on that subject matter would be viewpoint discrimination. [\*Id.\*](#) at 394. However, in this case, the subject matter was science which deals with the physical. The school board had tried to prohibit non-scientific evidence in its curriculum and with intelligent design one can logically deduce the theory of a creator, which is the meta-physical, not the physical, and thus, not science. See [\*Kitzmiller v. Dover Area School District\*, 400 F. Supp.2d 707, 729 \(M.D. Penn 2005\)](#)