
Docket No. 06-009

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2006

**BOARD OF EDUCATION OF THE ARKLATEX SCHOOL FOR
MATHEMATICS AND SCIENCES SPECIAL SCHOOL DISTRICT; ANITA
PASCAL; TIMOTHY HARLAN; RICHARD RICE,**

Petitioner,

v.

PETER GIRSH,

Respondent.

On Writ of Certiorari

BRIEF FOR RESPONDENT

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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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STATEMENT OF THE CASE

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

CONSTITUTIONAL PROVISIONS INVOLVED

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

STANDARD OF REVIEW

The issues posed by this case present questions of law. Therefore, the appropriate standard of review is *de novo*. Ornelas v. US., 517 U.S. 690, 697-98 (1996).

STATEMENT OF THE CASE AND FACTS

Respondent Dr. Peter Girsh graduated from Yale University in 1985, and went on to obtain his Ph.D. in Biochemistry in 1990 from Harvard University. (R. 4). He is married, has three children, and is actively involved in his church, the First Christian Church of the Community. (R. 5).

Dr. Girsh is well known for his commentary and expertise on Intelligent Design, the theory that only an intelligent or supernatural cause could be responsible for life on this universe. (R. 4). He has appeared on numerous nationally syndicated news programs and has become a prominent and sought-after speaker on Intelligent Design due to his view that Intelligent Design is a purely scientific theory with no connections to any religious movement. (R. 4). Dr. Girsh has stated in numerous television and radio

interviews that he strongly disagrees with religiously-affiliated organizations such as the Discovery Institute's Center for the Renewal of Science and Culture, which openly aspire to use Intelligent Design theory to change the ground rules of science to make room for religion, specifically, Christianity. (R. 5). Dr. Girsh's most recent dealings with Intelligent Design are his contributions to a textbook titled *From Koalas to Humans (Koalas)*. (R. 5). The textbook was designed to be an alternative to the religiously-affiliated Intelligent Design textbooks on the market. (R. 5). It addresses only the scientific evidence used to support Intelligent Design theories, demonstrating how that evidence can be used to rebut the theory of evolution. (R. 5). The textbook suggests that the universe was purposefully created, but never identifies the creator, never speculates as to the nature of the creator, and never uses the word "God." (R. 5).

Arklatex School for Mathematics and Sciences (ASMS) is a public school and receives public school funding from the Arklatex Department of Education. (R. 4). Although students must apply and go through an interview process, once a student is admitted he or she receives the same benefits which any public school student in Arklatex would receive. (R. 4). All high school students in the state of Arklatex are allowed to apply for admission to ASMS. (R. 4).

Dr. Peter Girsh teaches biology at ASMS, and was one of the first faculty members employed by the institution after its establishment in 1995. (R. 5). Prior to the school's inception, he testified to the Arklatex legislature about the need for a high school that concentrated on the math and science skills of the students of Arklatex. (R. 5). Dr. Girsh has been on the selection board and steering committee for numerous school functions since the school opened, he has served on the school's curriculum committee

for the past seven years, and has been ASMS's faculty advisor for the Biology Club and the Future Engineers of America Club for nine years. (R. 5). His AP Biology Students have a 100% pass score of "5" on the AP exam over the past 10 years. (R. 5).

ASMS is a school for exceptionally talented students, and the Arklatex State Department of Education mandates that the school adhere to the "exceptional schools" curriculum. (R. 5). This curriculum states that the school must adhere to the state specified Biology program, which prohibits the teaching of "non-scientific" evidence. (R. 5). Dr. Girsh, previous to the events giving rise to this litigation, always followed the mandated curriculum and taught strictly from the textbooks approved by the Department of Education, all of which included the theory of evolution and none of which mentioned Intelligent Design. (R. 5). Further, Dr. Girsh had never discussed Intelligent Design with any students, prior to the events that give rise to this litigation. (R. 5). Dr. Richard Rice, principal of ASMS, knew of Dr. Girsh's outside work and had never had any major objections to his speaking on the Intelligent Design theory outside of the school. (R. 5).

On September 8, 2003, the School Board adopted a new policy prohibiting teachers from instructing students on Creationism or Intelligent Design. (R. 5). The purpose of this new policy was to "avoid Establishment Clause violations that might result from teaching such theories and to avoid the appearance that the school endorses any particular religious belief." (R. 5). The new policy provides, in relevant part, as follows (R. 6): **§ 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 chance.

- (b) Teachers within the Arklatex School for Mathematics and Sciences Special School District may teach alternative theories of origin in addition to the teaching of evolution, but teachers are not to teach the theories of Creationism or Intelligent Design. The teaching of theories on the origins of the universe and the formation of life that are substantially similar to Creationism or Intelligent Design are similarly prohibited.

On January 26, 2004, as Dr. Girsh was preparing for a lecture on to his AP Biology class, a student raised his hand and inquired of Dr. Girsh's work concerning Intelligent Design. (R. 6). Dr. Girsh testified in his affidavit the dismissed class early without answering the posed question, as he worried doing so would violate the new School Board policy. (R. 6). The student's question, followed by the absence of an answer from Dr. Girsh, sparked the interest of his class. (R. 6). Dr. Girsh was "immediately bombarded" with questions concerning Intelligent Design the following morning before class began. (R. 6). At this point Dr. Girsh informed his students of the new policy prohibiting him from teaching Intelligent Design, and went on to explain his belief that this policy was a violation of his First Amendment right to free speech. (R. 7).

As the affidavits confirm, Dr. Girsh then began to tell his students about the theory of Intelligent Design. (R. 7). He explained that Intelligent Design is the theory that empirical scientific evidence points to the conclusion that the universe was deliberately designed by an intelligent being or beings. (R. 7). Dr. Girsh informed his students that there are three main ways in which scientists have detected intelligent design in nature. (R. 7). First, he explained the irreducible complexity of certain biological systems indicates some life forms cannot be explained through the gradual changes of evolution. (R. 7). Second, Dr. Girsh noted the observation that the ability of the universe to support human life is sufficiently contingent, complex, and fine-tuned to

support human life. (R. 7). Finally, he explained to his class that something must have attributed meaning to the DNA molecules and combinations in order for the code to function. (R. 8). Dr. Girsh never used the word “God” in his lecture, nor did he in any way indicate the nature of the intelligent designer. (R.8). After his lecture Dr. Girsh unlocked a closet where he kept his teaching materials and proceeded to show the students his contribution to *Koalas*, as well as a few of his published articles. (R. 8). Dr. Girsh then showed the students a video clip of him talking with Bill O’Riley, a well-known media personality, about Intelligent Design. (R. 8). In this video clip, Dr. Girsh asserts that Intelligent Design is a purely scientific theory. (R. 8). As students left the classroom, Dr. Girsh offered them an informational pamphlet he had developed to help market his book. (R. 8).

The following morning, Dr. Girsh was notified that Maya Klinger’s (a student of Dr. Girsh’s) mother, Dorothy Klinger, had called Dr. Rice at home to complain about the Intelligent Design lecture. (R. 8). As an atheist, Maya Klinger was horrified to have Intelligent Design taught in her class room. (R. 8-9). Dr. Rice also informed Dr. Girsh that he had received many more calls from parents of students who begged him to allow Dr. Girsh to continue teaching Intelligent Design.

This same day, students again began to ask questions concerning Intelligent Design in Dr. Girsh class. (R. 9). As he began explaining the answers to the students’ questions, Maya Klinger and two other students walked out of the classroom. (R. 9).

The following morning, two letters were printed in the *Arklatex Tribune*, one written by Dorothy Klinger urging the State to pull funding from ASMS, and another

written by Ranada Johnson, another student's mother, urging the State to implement Intelligent Design into the curriculum. (R. 9).

According to their affidavits, later that afternoon Dr. Rice approached Dr. Girsh before class and handed him his personnel file. (R. 9). Dr. Girsh had been cited twice for insubordination due to "willful violation of School Board policy § 1701.2" and "insubordinate disparagement of School Board policies." (R. 9-10). Dr. Rice also presented Dr. Girsh with a letter stating that Dr. Girsh was prohibited from mentioning ASMS in conjunction with Intelligent Design. (R. 10).

The next morning the School Board published an open letter in the *Arklatex Tribune* stating that Dr. Girsh had been reprimanded and prohibited from teaching Intelligent Design, and that its teaching is unacceptable in the Arklatex Schools. (R. 10). Dr. Girsh filed suit alleging the School Board's policy prohibiting the teaching of Intelligent Design violated the Establishment Clause, and that the School District violated his First Amendment right to free speech by disciplining him for speaking about Intelligent Design and criticizing the new School Board Policy. (R. 10).

PROCEDURAL HISTORY

After Dr. Girsh was reprimanded and prohibited from teaching Intelligent Design, he filed suit in the United States District Court for the Eastern District of Arklatex. (R. 10). He argued two points. First, Girsh argued that the School Board's policy prohibiting the teaching of Intelligent Design violated the Establishment Clause. Second, he argued that his First Amendment right to free speech was violated by the School Board's actions in disciplining him for speaking about Intelligent Design and criticizing the School Board policy. Judge Franklin, however, issued summary judgment in their favor. (R. 14).

Subsequently, Dr. Girsh filed an appeal which was heard by the United States Court of Appeals for the Fourteenth Circuit. There, he argued that there was an issue of material fact and that the summary judgment should be reversed. Judge Wilkenson agreed with Dr. Girsh and reversed and remanded the case. (R. 19). Consequently, the School Board sought and received a writ of certiorari from the United States Supreme Court to consider the following: (R. 20).

1. Does either allowing or prohibiting instruction on Intelligent Design in public schools violate the Establishment Clause of the First Amendment where its proponent focuses on the scientific evidence used to support the theory and does not make any assertions regarding the nature on 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.

The First Amendment prohibits Congress from making any “law respecting an establishment of religion, or prohibiting the exercise thereof”. Allowing Dr. Girsh to teach the scientific theory of Intelligent Design did not violate this clause of the First Amendment. Furthermore, ASMS School Board Policy § 1701.2 which prohibits Dr. Girsh from discussing Intelligent Design in his classroom does violate the Establishment Clause of the First Amendment.

Allowing Dr. Girsh to teach the scientific theory of Intelligent Design did not violate this Establish Clause of the First Amendment because it passes all of the applicable tests in which this Court uses to determine cases involving the issue at bar. First, Dr. Girsh’s actions pass the endorsement test as an objective observer would not perceive these actions as an official endorsement of religion. Secondly, Dr. Girsh’s actions pass the Lemon test because his actions a) had a secular purpose, b) neither advanced nor inhibited religion, and c) his actions did not foster an excessive government entanglement. Thirdly, Dr. Girsh’s actions pass the coercion test because students were not compelled to participate in any type of religious ceremony.

The School Board policy prohibiting Dr. Girsh from teaching Intelligent Design violated the Establishment Clause. This prohibition unconstitutionally favors the theory of evolution over equally plausible explanations, simply because they lend support to religion. This bias against religion violates the Establishment Clause.

II.

The First Amendment's guarantee of freedom of speech protects Dr. Girsh's conduct and instruction on Intelligent Design. This Court has repeatedly held that limitations on religion violate the First Amendment. Furthermore, Dr. Girsh's teachings on Intelligent Design convey a particularized message and are expressive and communicative in nature. Additionally, the teachings touch on a matter of public concern as they relate to matters of political, social, and other concern to the community, and are a matter of highly publicized national debate.

As the speech is considered a matter of public concern, the analysis turns to whether the public concern speech outweighs the interest of the State as an employer. Here, it does. As the School Board referred to the Establishment Clause as its primary concern in regulating Dr. Girsh's teaching on Intelligent Design, the Establishment Clause will not be violated by allowing another scientific theory to be taught in the classroom. Additionally, there insufficient facts to suggest that the school's interest in running an efficient school system would be breached by allowing Intelligent Design to be taught in the classroom. Therefore, Dr. Girsh's teachings on Intelligent Design should be deemed as protected by the First Amendment of the Constitution of the United States.

ARGUMENT

I. ALLOWING THE TEACHING OF INTELLIGENT DESIGN IN PUBLIC SCHOOLS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE, AND THE ARKLATEX SCHOOL FOR MATHEMATICS AND SCIENCE SPECIAL SCHOOL DISTRICT POLICY PROHIBITING THE TEACHING OF INTELLIGENT DESIGN DOES VIOLATE THE ESTABLISHMENT CLAUSE.

The First Amendment prohibits Congress from making any “law respecting an establishment of religion, or prohibiting the exercise thereof”. U.S. Const. amend. I. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready of application. The purpose of the Establishment Clause “was to state an objective, not to write a statute.” Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

The line between the permissible relationships and those barred by the Establishment Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Establishment Clause erects a “blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). This Court has explained that the purpose of the Establishment Clause is “to prevent, as far as possible, the intrusion of either the church or the state into the precincts of the other.” Id. at 614. In every Establishment Clause case, the court is called upon to reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible. Lynch v. Donnelly, 465 U.S. 668, 672 (1984).

The circumstances surrounding the manner in which Dr. Girsh discussed Intelligent Design do not implicate an intrusion of the church into the precinct of state.

Lemon, 403 U.S. at 614. Further, the School Board’s policy prohibiting the teaching of Intelligent Design is a denial of the right of free speech based upon a particular viewpoint and would risk fostering a pervasive bias or hostility to religion, which would undermine the very neutrality the Establishment Clause requires. Rosenberger v. Rector & Visitors of University of Virginia, 525 U.S. 819, 845-846 (1995).

A. Allowing Intelligent Design to be Taught in a Public School Classroom Does Not Violate the Establishment Clause When the Proponent Focuses on the Scientific Evidence Used to Support the Theory and Does Not Make Any Assertions Regarding the Nature of the Intelligent Designer.

In the context of public education, this Court has used three different tests to evaluate state actions challenged on Establishment Clause grounds: the three prong test of Lemon; the “endorsement” test; and the “coercion test”. Tangipahoa Parish Bd. of Educ. v. Freiler, 530 U.S. 2706, 2707 (2000). The Third Circuit Court suggests that the better practice is to treat the endorsement inquiry as a distinct test to be applied separately from, and prior to, the Lemon test. Child Evangelism Fellowship v. Stafford Township Sch. Dist., 386 F.3d 514, 531 (3d Cir. 2004). Further, a coercion test has been developed by this court, and is specifically applicable to events involving the Establishment Clause and its function in a public elementary or secondary school environment. Lee v. Weisman, 505 U.S. 577 (1992).

Dr. Girsh’s discussing Intelligent Design with his biology class passes the endorsement test, as well as the Lemon test. Additionally, his actions were not coercive in the contexts set forth by this court in Lee.

1. Dr. Girsh’s teaching of Intelligent Design passes the endorsement test because a reasonable observer would not perceive these actions as an official State endorsement of religion.

The endorsement test emanates from the “prohibition against government endorsement of religion” and it “preclude[s] government from conveying or attempting to convey a message a message that religion or a particular religious belief is *avored* or *preferred*.” Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp.2d 707, 714 (M.D. Pa. 2005) (citing County of Allegheny v. ACLU, 492 U.S. 573, 593 (1989)) (emphasis in original).

In cases involving state participation in a religious activity, the relevant question is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of religion in public schools. Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000). The United States District Court for the Middle District of Pennsylvania, when determining the constitutionality of a district’s policy that required students to hear a statement mentioning Intelligent Design as an alternative to Darwin’s theory of evolution, conducted the endorsement test analysis in three steps in Kitzmiller. Kitzmiller, 400 F. Supp.2d 707. First, whether an objective observer would know that Intelligent Design and teaching about “gaps” and “problems” in evolutionary theory are creationist, religious strategies that evolved from earlier forms of creationism. Id. at 716. Second, whether an objective student would view the disclaimer as an official endorsement of religion. Id. at 723. Finally, the Court considered whether an objective citizen would perceive the school board’s conduct to be an endorsement of religion. Id. at 729.

The Court in Kitzmiller, in an attempt to examine the first step of the endorsement test involving whether an objective observer would view a certain practice as religious and creationist, examined the historical context of Intelligent Design Theory. Id. 716. The Court began this analysis by documenting the Christian Fundamentalism that began as a response to Charles Darwin's exposition of the theory of evolution and followed it through the 1920's and into the 1960's when anti-evolutionary sentiment based upon religious doctrines resulted in legal sanctions against evolution in the classroom. Id. 716. This Court in 1987, discussing an Arkansas statute prohibiting the teaching of evolution, noted that the "motivation of this law was the same...: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." Edwards v. Aguillard, 482 U.S. 578, 590 (1987). Finally, the United States District Court for the Middle District of Pennsylvania, found that Intelligent Design is not a new scientific argument, but rather, as its history suggests, an old religious argument for the existence of God. Kitzmiller, 400 F. Supp.2d at 718. The Court concluded that the religious nature of Intelligent Design would be "readily apparent to an objective observer." Id.

The method in which the Court in Kitzmiller used to determine the first portion of the endorsement test is flawed. Further, the facts in the case at bar are easily distinguishable from those in Kitzmiller. The historical development of the theory of Intelligent Design, or similar theories, should not be the lone litmus test for determining its current and existing merit. Simply because a theory may have its origins in a religious arena, does not invalidate the scientific relevance it now holds. The United States Court of Appeals for the Fourteenth Circuit stated that, "this Court is not willing to rule that, as a matter of law, information becomes religious in nature simply because it could be used

by some to support certain religious beliefs.” (R. 16) The agreed upon facts in this case make clear there is an argument that Intelligent Design, as it was presented by Dr. Girsh in his AP Biology class, is primarily scientific in nature. (R. 16). The brief overview of Intelligent Design theory presented in Dr. Girsh’s classroom consisted solely of quantifiable and empirical scientific evidence – the same sort of scientific evidence high school biology teachers use every day to teach the theory of evolution. (R. 16). Further, unlike the facts in Kitzmiller, where students were required by the school to hear a statement discrediting evolution, and unlike the historical background of anti-evolution case law, Dr. Girsh was not hostile towards evolution. Dr. Girsh announced on a nationally syndicated news program, that “Intelligent Design is a purely scientific, not religious, theory. It suggests that 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).

The second step of the endorsement test seeks to determine whether an objective student would view the action in question as an official endorsement of religion. Kitzmiller, 400 F. Supp.2d at 723. It must be noted that, according to the Third Circuit Court of Appeals, an objective student is not a specific, actual student, but is instead a hypothetical student, one to whom the reviewing court imputes detailed historical and background knowledge, but also one who interprets the challenged conduct in light of that knowledge with the level of sophistication that a child of the relevant age would bring to bear. Child Evangelism, 386 F.3d at 531. Courts have recognized that because students are more impressionable than adults, they may be systematically less effective than adults at recognizing when religious conduct is unofficial and therefore permissible. Selman v. Cobb County Sch. Dist., 390 F.Supp.2d 1286, 1311 (N.D. Ga. 2005).

Therefore, the objective student standard is a means to ensure that courts exercise the particular vigilance that the Supreme Court has mandated for protecting impressionable children from religious messages that appear to carry official imprimatur; it is not a tool for excluding evidence or ignoring material evidence. Kitzmiller, 400 F. Supp.2d at 724.

The challenged conduct in the case at bar would hardly appear to an objective student to be an official endorsement of religion by ASMS. Even when applying the standards set forth above, defining the “objective student”, Dr. Girsh’s actions would not have suggested to this objective student that ASMS was endorsing Intelligent Design. Dr. Girsh testified in his affidavit that he wanted to be “honest” with his students about the Intelligent Design theory; however, he worried that doing so would violate the new School Board policy prohibiting the instruction of Intelligent Design. (R. 6). After being asked about the theory in question, Dr. Girsh dismissed class early without answering any questions. (R. 6). In fact, Dr. Girsh’s hesitancy to discuss Intelligent Design is a clear indication that ASMS would not endorse such a theory. Further, it should be noted that Dr. Girsh never initiated any discussion concerning the topic. An objective student would not have perceived this discussion that was spawned by students’ questions as an official endorsement by the school. Finally, Dr. Girsh explicitly notified his students that the School Board had passed a policy prohibiting him from teaching Intelligent Design. (R. 6-7). An objective student would not perceive Dr. Girsh’s actions to be an official endorsement of religion.

The final step of the endorsement test examines whether an objective citizen of the community would perceive respondent’s conduct to be an endorsement of religion. Kitzmiller, 400 F. Supp.2d at 729. The Court in Kitzmiller looks to see the extent to

which the defendant, school board, brought the public into the debate. Kitzmiller, 400 F. Supp.2d at 730. The Board in Kitzmiller brought the public into the debate over whether to include ID in the curriculum as it proposed, advocated, and ultimately approved the ID Policy in public school board meetings. Id. This facts of the case at bar are easily distinguishable from the aforementioned. A citizen of Arklatex would not perceive Dr. Girsh's actions as an endorsement of religion as ASMS published an open letter in the *Arklatex Tribune* stating that "the teaching of Intelligent Design is unacceptable in the Arklatex Schools." (R. 10).

Dr. Girsh's actions do not violate the endorsement clause because an objective observer would not view Intelligent Design as religious, an objective student would not view Dr. Girsh's actions as a religious endorsement by ASMS, and because an objective citizen of the community would not view Dr. Girsh's actions as a religious endorsement by ASMS.

2. Dr. Girsh's teaching of Intelligent Design passes all three prongs of the Lemon test: it had a secular purpose, it did not advance nor inhibit religion, and it did not foster an excessive government entanglement.

The challenged conduct must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the challenged conduct must not foster an excessive government entanglement with religion. Lemon, 403 U.S. at 612-13. This test is a conjunctive test, thus if a state action violates any prong of said test, it is unconstitutional. Id.

Concerning this first prong of the Lemon test, the "purpose inquiry", this court has stated the touchstone for an analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion

and non religion.” Epperson v. Arkansas, 393 U.S. 97, 104 (1968). When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides. Id. This Court, in Edwards, further instructed Lemon’s purpose “asks whether the government’s actual purpose is to endorse or disapprove of religion. A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose.” Edwards, 482 U.S. at 583.

Dr. Girsh’s actions serve a religiously neutral purpose. As the United States Court of Appeals for the Fourteenth Circuit stated in reversing the ruling of the U.S. District Court for the Eastern District of Arklatex, there remains a material question of fact as to whether Dr. Girsh’s discussion of Intelligent Design was aimed at promoting any religious belief. (R. 16). As mentioned, Dr. Girsh never used the word “God” in his lecture, nor did he in any way indicate the nature of the intelligent designer. (R. 8). Additionally, Dr. Girsh’s affidavit indicates that his contributions to the textbook *Koalas* were designed to provide an alternative to religiously-affiliated Intelligent Design textbooks on the market. (R. 5). Consequently, the facts of the case at hand are easily distinguishable from earlier cases, such as Edwards and Kitzmiller, which both involve State and State agents’ policies making the government’s purpose of favoring a particular religion clear. Edwards, 482 U.S. 578; Kitzmiller, 400 F.Supp.2d 707. Dr. Girsh’s only purpose in discussing the theory of Intelligent Design was to encourage his students to frequently and openly engage in candid discussions about a theory consisting solely of quantifiable and empirical scientific data. (R. 6, 16). In light of the facts given in the

agreed upon affidavits, it is clear that Dr. Girsh did not harbor a purpose to advance any religious doctrine.

In examining the second prong of the Lemon test, the “effect inquiry”, this Court has stated that the core notion animating the requirement that an official act’s “principal or primary effect be one that neither advances nor inhibits religion,” is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 9 (1989). This prong may be succinctly stated as follows: “what is the primary effect of the enactment? If it is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.” School Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1961).

Dr. Girsh’s teaching of Intelligent Design neither advances nor inhibits religion. In Kitzmiller the U.S. District Court for the Middle District of Pennsylvania found that the effect of a School Board’s adoption of a curriculum change that favored Intelligent Design was to impose a religious view of biological origins into the biology course, in violation of the Establishment Clause. Kitzmiller, 400 F.Supp.2d at 764. Clearly, the adoption, by a School Board, of religiously oriented curriculum could clearly have the effect of advancing or inhibiting religion; however, Dr. Girsh merely discussed his views concerning a theory that is purely scientific in nature with no connections to any religious

movement. (R. 4). If teaching Intelligent Design causes any effect, as Francis Beckwith suggests, it is that theory promotes State neutrality between religion and secularism, and exposes students to new and important scholarship. *Not Your Daddy's Fundamentalism: Intelligent Design in the Classroom*, 117 Harv. L. Rev. 964, 968 (2004) (reviewing FRANCIS J. BECKWITH, *LAW, DARWINISM, AND PUBLIC EDUCATION: THE ESTABLISHMENT CLAUSE AND THE CHALLENGE OF INTELLIGENT DESIGN* (2003)). Because of the Intelligent Design movement's exclusive focus on empirical evidence and philosophical argument, Beckwith makes a compelling case that Intelligent Design is "not the same animal" as creationism—a theory that courts have considered to be "transparently derived from" a fundamentalist interpretation of the Book of Genesis. *Id.* at 967. Dr. Girsh discussed Intelligent Design from a purely scientific vantage point, thus religion was neither advanced nor inhibited.

This Court addressed the third prong of the Lemon test by stating that it harkens back to the idea that "neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." Everson v. Board of Education of Ewing, 330 U.S. 1, 16 (1947). Entanglement is a question of kind and degree. Lynch, 465 U.S. at 684. Excessive entanglement with religious institutions is one which may interfere with the independence of the institutions, give the institutions access to government not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. Id. at 688.

Neither Dr. Girsh, nor the manner in which he discussed Intelligent Design, constitute a religious organization or institution. Allowing Dr. Girsh to instruct students

concerning a scientific theory can hardly be labeled as State participation in a religious organization. As the facts at hand suggest, there is no religious institution present with which the state might become excessively entangled. Intelligent Design is not, and was not presented as a religious apparatus. Furthermore, even if this Court were to find that teaching Intelligent Design has led to debate concerning the political implications of the theory, political divisiveness, even along religious lines, should not be an independent test of constitutionality. Id. at 689. Consequently, Dr. Girsh’s teaching of Intelligent Design does not constitute excessive governmental entanglement with any religion.

The agreed upon affidavits of the case at bar suggest that Dr. Girsh’s actions pass every prong of the Lemon test. His discussion of Intelligent Design had a clear secular purpose, it neither advanced nor inhibited religion in any way, and it did not foster an excessive government entanglement with religion. Lemon, 403 U.S. at 612-13.

3. Dr. Girsh’s teaching of Intelligent Design passes the coercion test as students were not compelled to participate in any type of religious practice.

As this Court has stated in previous case law, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. School Dist. of Abington, 374 U.S. at 307. This Court goes on to state that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. Id. In creating the coercion test, this Court noted that what may seem to most believers nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context might appear to the dissenter to be an attempt to employ the “machinery of the State” to enforce a religious orthodoxy. Lee, 505 U.S. at 592.

The facts in the case at bar are easily distinguishable from those deemed coercive in Lee. This Court in Lee addressed a prayer given at a high school graduation, for which the audience was asked to stand. This Court puts considerable emphasis upon the fact the dissenting party was made to stand, thus quasi-participating in the religious ceremony. The 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. Id. at 593. The factors that lead this Court to determine that the invocation in Lee was unconstitutional are not present in the case at bar. There was nothing about Dr. Girsh's lecture that would have made any of the dissenting students feel as if they were being forced to participate in a religious ceremony, and that refusing to do so would have made them stand out amongst their peers. Dr. Girsh asserts that when Intelligent Design is taught alongside evolution in public schools, there is no appearance that students are being coerced to engage in a religious practice. (R. 16). Further, Dr. Girsh argues that teaching both Intelligent Design and evolution would pass the "coercion test" because each theory would point out discrepancies in the other and as a result, students would not feel coerced to accept either theory. (R. 16). Additionally, no coercion, as defined by the aforementioned text, took place in the events that give rise to this litigation. The dissenting students were not forced to participate in any type of discussion, instead they chose to exit the classroom. (R. 9).

Dr. Girsh's teaching of Intelligent Design passes the coercion test as students were not compelled to participate in any type of religious practice. Further, the factual

circumstances giving rise to the coercion test in Lee are far more religiously intrusive than the actions of Dr. Girsh.

B. The ASMS School Board Policy Prohibiting the Teaching of Intelligent Design In a Public School Classroom Does Violate the Establish Clause.

The First Amendment prohibits Congress from making any “law respecting an establishment of religion, or prohibiting the exercise thereof”. U.S. Const. amend. I. In interpreting the prohibition portion of the Establishment Clause this Court has stated that the Constitution does not require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Lynch, 465 U.S. at 673. When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Rosenberger, 525 U.S. at 829. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. Id.

ASMS School Board policy § 1701.2 is a blatant prohibition of an individual’s opinion, and thus a violation of the Establishment Clause. Dr. Girsh asserts that regardless of whether or not this Court finds Intelligent Design to be a religious doctrine, the School Board’s policy is a violation of the Establishment Clause if it singles out for disapproval only those theories that lend support to religious beliefs. (R. 17). The current curriculum, which limits classroom instruction to evolution only, suggests the ASMS School Board sends a strong message it endorses explanations that contradict religious beliefs and disapprove of those that support them. (R. 17). The School Board has made it clear that they prohibit the teaching of Intelligent Design in an attempt to

avoid the appearance that they support a particular religious belief. (R. 5, 6). This type of viewpoint discrimination is in direct conflict with the legal standards laid down in Rosenberger. Rosenberger, 525 U.S. 819.

The School Board is sending strong messages that it strongly disapproves of those whom support Intelligent Design. Accordingly, the School Board’s policy prohibiting the teaching of Intelligent Design is a violation of the Establishment Clause.

II. THE FIRST AMENDMENT’S RIGHT TO FREEDOM OF SPEECH PROTECTS DR. GIRSH’S CONDUCT AND INSTRUCTION ON INTELLIGENT DESIGN.

Dr. Girsh’s instructions on Intelligent Design, when questioned by students, are protected by the First Amendment’s recognition of the right to free speech. In order to qualify as protected speech under the First Amendment, the alleged speech must satisfy a balancing test under which “the interest of the employee in ‘commenting upon matters of public concern’” is weighed against the interest of the employer ‘in promoting the efficiency of the public services it performs through its employees.’” Pickering v. Board of Education, 391 U.S. 563, 568 (1968). In this case, Dr. Girsh’s interests in teaching Intelligent Design outweigh the interest of the School Board. Therefore, the Court should find that Dr. Girsh’s instructions on Intelligent Design are protected by the First Amendment’s recognition of the right to free speech.

A. The Fourteenth Circuit Court of Appeals Was Correct in Ruling That Dr. Girsh’s Teaching on Intelligent Design in the Classroom Constitutes Speech and is a Matter of Public Concern as it is a Highly Scrutinized Matter of National Debate.

To determine what constitutes speech the courts have stated that the teaching should be “expressive or communicative” in nature and should carry with it an intent to convey a “particularized message”. Cockrel v. Shelby County Sch. Dist., 270 F. 3d 1036,

1049-50 (6th Cir. 2001); Fowler v. Board of Education, 819 F.2d 657, 662-64 (6th Cir. 1987). If the conduct in question is found to constitute speech, then it must be determined whether the speech is on a matter of public concern. Pickering, 391 U.S. at 568. In order to make this determination, we look to the “content, form, and context of a given statement” as revealed by the speech as a whole. Connick v. Myers, 461 U.S. 138, 147-48 (1983).

In regards to the content of the speech, “so long as the speech relates to matters of ‘political, social, or other concern to the community’ as opposed to matters ‘only of personal interest,’ it shall be considered as touching upon matters of public concern.” Cockrel, 270 F.3d at 1052. Furthermore, the United States Supreme Court has never removed in-class speech from its presumptive place within the ambit of the First Amendment. Evans-Marshall v. Board of Education of the Tipp City Exempted Village School Dist., 428 F.3d 223, 229 (6th Cir. 2005); See Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 415-16 (1979). To that end, a teacher’s conduct in using books, movies, and music as teaching aids has been considered free speech. Fowler, 819 F. 2d at 669-70. This Court has also articulated that “students and teachers do not shed their constitutional rights to freedom of speech and expression at the schoolhouse gate.” Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). Pickering expounds on this concept that “teachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest”. 391 U.S. at 568. Indeed, “our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore, a special concern of the

First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

The 6th Circuit in Fowler, ruled that a teacher’s action in showing an R-rated film without an awareness of its content was not speech because it was not expressive or communicative in nature. See 819 F. 2d at 669-70; Cockrel, 270 F. 3d at 1049-50. Here, Dr. Girsh is clearly one of the preeminent authorities on the issue of Intelligent Design as he has appeared on television shows as well as written a book on the scientific value of the subject thus establishing his awareness of the topic. (R. 4-5). Additionally, as the Court of Appeals points out, Dr. Girsh certainly has intent to convey a “particularized message” as his whole goal was to provide an alternative scientific theory to be taught along side evolution, thus satisfying the “speech” requirement. (R. 16, 18). With regard to whether Intelligent Design is a matter of public concern, all of the evidence points to the conclusion that the speech relates to matters of ‘political, social, or other concern to the community’. Id. at 1052. The facts of the case, agreed upon and applied by the Court of Appeals show that Dr. Girsh had spoken about Intelligent Design on numerous television shows including highly rated shows such as CNN’s *Hardball* and the *O’Reilly Factor* on the Fox News Network. (R. 4). Additionally, Chief Judge Wilkinson in his opinion for the Court of Appeals was correct in his application of the facts to determine that “parents and school districts across the nation engage in dialogue daily about the teaching of Intelligent Design”. (R. 18). Furthermore, based on the decisions of the Court, Dr. Girsh’s conduct in answering his student’s questions on Intelligent Design, showing the students his book, and allowing them to view his interview with Bill O’Reilly, should not be scrutinized more greatly as matters of public concern only

because the actions occurred in the classroom. To that end, the Intelligent Design debate is certainly a matter of public interest which a private citizen would be free to comment on. Therefore, Dr. Girsh should not be constitutionally compelled to relinquish his right to comment on the matter. Pickering, 391 U.S. at 568; See Tinker, 393 U.S. at 506.

Finally, looking to the facts of this case Dr. Girsh's conduct qualifies as protected speech and is a matter of public concern as articulated by Pickering, Evans-Marshall, Givhan, Fowler, Tinker, and Cockrel.

B. The Fourteenth Circuit Court of Appeals Was Correct in Ruling That Dr. Girsh's Conduct Did Not Disrupt the Function of the School or Create a Problem in the Educational Setting.

Once it is established that the speech was of public concern, it must be balanced against the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Evans-Marshall, 428 F. 3d at 231 (citing Pickering, 391 U.S. at 568). Consequently, even if the speech reaches public concern it "will not be constitutionally protected unless the employee's interest in speaking on these issues 'outweighs the interest of the State, as an employer.'" Pickering, 391 U.S. at 568. In another important ruling the Court held that academic freedom is a special concern of the First Amendment, which does not cast a "pall of orthodoxy" on the classroom. Keyishian, 385 U.S. at 603.

In the case at bar, the United States District Court for the Eastern District of Arklatex articulated that the Applicant Board of Education cited the Establishment Clause of the First Amendment as their primary concern in regulating Dr. Girsh's free speech on Intelligent Design. (R. 11). However, as discussed in section I, this concern is not warranted as Dr. Girsh's action are not in violation of the Establishment Clause in

any context. However, the Board also asserts that, regardless of whether Intelligent Design violates the Establishment, its interest in running an efficient school system outweighs Girsh's interests. However, looking to the specific facts of the case, the children in Dr. Girsh's classroom prompted the discussion on Intelligent Design when Randall Johnson expressed his interest in his teacher's works, which he had found on the internet. (R. 6). After not responding to the question, Dr. Girsh was bombarded by the students regarding Intelligent Design the following morning. (R. 6). The result of this was overwhelming community support for the instruction of Intelligent Design, as evidenced by the letters published in the *Arklatex Tribune*. (R. 18). The only negative facts which the Board can cite are the actions and feelings of the two students who walked out of class. (R. 19). These relatively minor concerns about the curriculum, which as evidenced was not religious in any way, cannot be found to outweigh Dr. Girsh's constitutionally protected right to free speech. Therefore, the Court of Appeals was correct when it ruled that the school district had "no basis to illustrate that the mention of Intelligent Design disrupts the function of the school or creates a problem in an educational setting. (R. 19). Therefore, as the interest of speaking about Intelligent Design outweighs the interest of the School Board, Dr. Girsh's actions should be considered protected activity under the First Amendment to the United States Constitution.

CONCLUSION

For the above cited reasons, Respondent respectfully requests the Court to rule that teaching Intelligent Design in the public school does not violate the Establishment Clause of the First Amendment and is protected speech under the First Amendment of the

United States Constitution. Consequently, the Judgment of the Fourteenth Circuit Court of Appeals should be affirmed and the case reprimanded for further proceedings on Respondent's retaliation claim.

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.

§ 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 chance.

(b) Teachers within the Arklatex School for Mathematics and Sciences Special School District may teach alternative theories of origin in addition to the teaching of evolution, but teachers are not to teach the theories of Creationism or Intelligent Design. The teaching of theories on the origins of the universe and the formation of life that are substantially similar to Creationism or Intelligent Design are similarly prohibited.

