

In the Supreme Court of the  
United States

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**BOARD OF EDUCATION OF THE ARKLATEX SCHOOL FOR  
MATHEMATICS AND SCIENCES SPECIAL SCHOOL DISTRICT, ET AL,**

*Petitioners,*

v.

**PETER GIRSH,**

*Respondent.*

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***ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT***

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**BRIEF FOR THE PETITIONERS**

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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?

## **PARTIES TO THE PROCEEDING**

The Petitioners are the Board of Education of the Arklatex School for Mathematics and Sciences Special School District; Anita Pascal, individually and as President 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.

The Respondent is Peter Girsh, who is a teacher at the Arklatex School for Mathematics and Sciences.

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## **BRIEF FOR THE PETITIONERS**

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### **OPINIONS BELOW**

The opinion of the Court of Appeals for the Fourteenth Circuit is unpublished. It has been reprinted in the Transcript of Record at 15-19. The Order and Memorandum Opinion of the District Court for the Eastern District of Arklatex is likewise unpublished, and has been reprinted in the Transcript of Record at 3-14.

### **JURISDICTION**

The court of appeals entered its judgment on October 11, 2005. A petition for a writ of certiorari was timely filed and granted on January 27, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL PROVISIONS AND POLICY INVOLVED**

This case involves the Establishment and Free Speech Clauses of the First Amendment to the United States Constitution: “Congress shall make no law respecting an establishment of religion, . . . or abridging the freedom of speech.” U.S. CONST. amend. I, cls. 1 & 3. This case also involves the Petitioners’ policy on the Teaching of Creationism and Intelligent Design Theory, which is set out in the appendix to this brief.

### **STATEMENT OF THE CASE**

The Arklatex School for Mathematics and Sciences (“ASMS”) is a public high school for exceptionally talented students. R. 5. As with all high schools in the State of Arklatex, ASMS receives public school funding from the Arklatex Department of Education. R. 4. Unlike most public schools, though, students must apply and undergo an interview process to be admitted to ASMS. R. 4. Any high school student in Arklatex is eligible to apply. R. 4.

Since the school was founded in 1995, Dr. Peter Girsh has been on the faculty at ASMS. R. 5. Separate from his teaching work, Girsh is a well-known advocate of Intelligent Design, the theory that only an intelligent or supernatural source could be responsible for living things and the complexity of the universe. R. 4. The theory is widely advanced by religious organizations as supporting the creation story found in the Book of Genesis, but Girsh claims he has no interest in Intelligent Design's religious implications. R. 4. Girsh has appeared on numerous television and radio programs, and has even contributed to a textbook, titled *From Koalas to Humans*, that advances the theory of Intelligent Design. R. 4-5. Dr. Richard Rice, the principal of ASMS, is aware of Girsh's outside work, and has never objected to him speaking about Intelligent Design outside of the school. R. 5.

As a prestigious and selective public high school, ASMS is required to adhere to the "exceptional schools" curriculum prescribed by the Arklatex Department of Education. R. 5. The curriculum strictly prohibits the teaching of any non-scientific biology theory. R. 5. Pursuant to the state mandates, and to avoid violating the Establishment Clause of the U.S. Constitution, on September 8, 2003, the ASMS school board adopted a policy directing its teachers to not teach the theories of Creationism or Intelligent Design. R. 5-6; *see app.* Prior to the events giving rise to this case, Girsh had always complied with the school's policy and had never discussed Intelligent Design with any ASMS student. R. 5

On January 26, 2004, ASMS student Randall Johnson was in Girsh's biology class when he raised his hand to ask a question. R. 6. Stating that he had learned on the Internet about Girsh's outside work on Intelligent Design, Johnson asked why the class had not been taught about the theory. R. 6. Girsh, afraid of violating the school board's policy, dismissed the class without answering. R. 6. The next morning, students came to Girsh's class asking more

questions about Intelligent Design. R. 6. At first, Girsh told the students that it was against the school board's policy to teach Intelligent Design. R. 6-7. Then Girsh went on to air his views about the policy, telling the class that he thought it was unconstitutional, and opining that "the School Board has more important things to worry about than trying to prevent students from thoroughly learning science." R. 7.

For the remainder of the class period, Girsh gave the students a detailed lecture on his theory of Intelligent Design. R. 7. He said that the complexity of biological systems, the precise balance of physical factors in the universe, and the complexity of DNA are all evidence that, once upon a time, someone or something must have fine-tuned the universe so as to make life possible. R. 7-8. Girsh unlocked a closet and pulled out the *From Koalas to Humans* textbook, as well as some articles he had published. R. 8. To further illustrate Intelligent Design to the class, Girsh then showed the students a video clip from one of his appearances on a television program. R. 8. Girsh was so thrilled with the students' interest in Intelligent Design that, as they left class, he offered them some informational pamphlets he had been using to help market his textbook. R. 8.

Student Maya Klinger was in Girsh's class when he gave his lecture about Intelligent Design. R.8. Klinger's parents are both atheists, and upon hearing about Girsh's lecture, Klinger's mother called Principal Rice at home to express her horror that Intelligent Design was being taught in a science class. R. 8-9. Maya's impression was that Girsh was "trying to tell us that science had proven God exists." R. 9.

On the morning of January 28, 2004, Principal Rice confronted Girsh about discussing Intelligent Design in violation with school board policy. R. 8. Later that afternoon, Rice approached Girsh before class and handed him his personnel file. R. 9. The file revealed that

Girsh had been cited for two counts of insubordination, once on January 26, and once on January 27. R. 8. Further violations would result in a formal hearing before the school board, and possible dismissal. R. 9. Rice also presented Girsh with a letter from the school board, which stated that Girsh was free to privately promote his ideas about Intelligent Design, but that he was “prohibited from, in any shape, form or fashion, mentioning ASMS in conjunction with Intelligent Design.” R. 10. Further, the school board wrote an open letter to the *Arklatex Tribune*, disclaiming Girsh’s actions and reiterating its policy that “the teaching of Intelligent Design is unacceptable in the Arklatex Schools.” R. 10. Nothing in the record suggests that Girsh challenged the citations or requested any administrative relief. *See* R. 10.

After reading the school board’s letter in the newspaper, Girsh filed a lawsuit in the United States District Court for the Eastern District of Arklatex, alleging that the school had violated his right to free speech. R. 10. Girsh sought a declaratory judgment that the policy was unconstitutional, as well as monetary damages. R. 10. The school board denied that it had acted unconstitutionally, and moved for summary judgment. R. 10.

The district court agreed with the school board, and granted judgment as a matter of law. R. 14. Specifically, the court held that the school board’s policy was proper, because teaching Intelligent Design in a public school would violate the Establishment Clause. R. 12-13. Further, the court held that the school’s interest in carrying out its curriculum and avoiding Establishment Clause violations was so strong that Girsh’s speech inside the classroom was not entitled to constitutional protection. R. 13-14. Girsh appealed.

A three-judge panel of the Court of Appeals for the Fourteenth Circuit reversed, and remanded the case for further proceedings. R. 19. The court of appeals did not find that Girsh should win as a matter of law, only that there were questions of fact as to whether Intelligent

Design is a religious theory, whether Girsh was disciplined for speaking about a matter of public concern, and whether the school board's policy was viewpoint-neutral. R. 16-19. Because the court of appeals erred, the school board sought a writ of certiorari, which was granted. R. 20.

### **SUMMARY OF ARGUMENT**

Education of the nation's youth is primarily the responsibility of parents, teachers, and local school officials, not federal judges. A school's curriculum is government speech, and there is no requirement that it be viewpoint-neutral. Supposing, *arguendo*, that the First Amendment applied to the Respondent's in-class lecture during instructional hours, the classroom was not a public forum, and the Petitioners acted reasonably in regulating the time, place, and manner of the Respondent's speech. To hold otherwise would transfer control over a school's curriculum to any individual who brings suit under the First Amendment.

In addition, the school's policy against teaching Intelligent Design served the compelling state interests of avoiding Establishment Clause violations, limiting biology instruction to scientific evidence, following the state curriculum guidelines, and promoting a productive classroom environment. The Respondent was notified of the policy, which had been in effect for four months before he violated it in January of 2004. On balance, the Petitioners' interests in regulating the speech of its teachers overwhelmingly outweighs the teacher's personal interest, as well as the public's interest, in discussing Intelligent Design during instructional time.

It is patently clear that, as a matter of law, Intelligent Design is not a scientific theory. The Petitioners' policy of prohibiting the theory from being taught did not violate the Establishment Clause because it was neutral to religion and reflected a legitimate state policy against teaching "non-scientific evidence" to biology students. Further, the Petitioners have compelling interest in preventing Establishment Clause violations at the school. Teaching

Intelligent Design, which is nothing more than creationism with a new name, clearly fails the *Lemon* test and would expose the school to liability for violating the Establishment Clause.

## **ARGUMENT**

To reverse the court of appeals and affirm the district court's dismissal of this case, this court need only determine that: (1) the Free Speech clause of the First Amendment does not deny a local school district the authority to require its teachers to adhere to the state curriculum; and (2) prohibiting a biology teacher from teaching religious dogma to his students during instructional time does not violate the Establishment Clause. The Petitioners are entitled to a judgment as a matter of law on both of the Respondent's First Amendment claims, and the decision of the court of appeals should be reversed.

### **I. THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT IS NOT VIOLATED WHEN A PUBLIC HIGH SCHOOL TEACHER IS CITED FOR VIOLATING SCHOOL POLICY DURING HIS LECTURE TO STUDENTS IN A CLASSROOM DURING INSTRUCTIONAL HOURS.**

This Court has consistently held that the education of the nation's youth is primarily the responsibility of parents, teachers, and local school officials, not federal judges. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). When a public school prescribes its curriculum, it will naturally facilitate the expression of some viewpoints instead of others. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). Hence, public school curriculum is government speech, and the school need not be viewpoint-neutral in limiting classroom discussion. Whatever right to speak Girsh might have had, the classroom is not a public forum, and the school acted reasonably by restricting the content of his lectures. By holding that Girsh's in-class lecture was subject to the First Amendment, the court of appeals clearly erred, and transferred control over the school's curriculum to any individual who brings suit under the First Amendment. *See Forbes*, 523 U.S. at 675. This Court should reverse.

**A. A public school teacher’s speech, during class time, is government speech, so there is no requirement of viewpoint-neutrality.**

Because public school curriculum is a form of government speech, there is no requirement that it be viewpoint-neutral. A government entity has the right to use its own funds to advance a particular message. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). For example, when a university determines the content of the education it provides, the university itself is speaking, and it may make viewpoint-based distinctions when it conveys its own message. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). Similarly, when high school officials manifest school board policy by exercising final control over the content of speech, it is the school’s speech, and not the individual teacher’s. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000). By enacting policy § 1701.2, and by adhering to the “exceptional schools” curriculum, the ASMS school board exercised final control over any speech that occurred in Girsh’s classroom. Thus, Girsh’s lecture was the speech of ASMS, and not his own.

While this Court has not yet enunciated a test to determine exactly when the government is “speaking,” several federal circuits have addressed the question in varying contexts. *See Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dept. of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002) [hereinafter *SCV, Inc.*]; *Wells v. City and County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001); *Downs*, 228 F.3d at 1011-12; *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000). Those courts of appeals have examined: (1) the central purpose of the program in which the speech occurs; (2) the degree of editorial control over the content of the speech exercised by the government actor; (3) the identity of the “literal

speaker”; and (4) whether the government or private entity bears the “ultimate responsibility” for the content of the speech. *SCV, Inc.*, 288 F.3d at 618.

Based on the *SCV, Inc.*, factors, classroom lectures at ASMS are “government speech,” so viewpoint-neutrality was never required. First, the central purpose of the classroom time at ASMS was instruction of the state-prescribed biology curriculum, and not expressive individual speech. Indeed, both the state curriculum, and the school policy, limited classroom instruction to scientific theories. R. 4, 6. Second, the school exercised a great deal of control over what happened in Girsh’s classroom. In fact, ASMS specifically disallowed the teaching of Intelligent Design several months before Girsh violated the policy. R. 5-6. When Principal Rice discovered that Girsh had spoken to the students about the theory, he took immediate action, indicating a high level of editorial control.

As to the third factor, the identity of the “literal speaker,” Girsh gave his lecture in the course of his duties as a teacher at ASMS, during school hours. R. 6-8. There was no way for the students to infer that Girsh was acting in his individual, rather than official, capacity. Finally, ASMS bore the “final responsibility” for Girsh’s speech. Not only did ASMS take public responsibility for Girsh’s conduct by writing a letter to the newspaper, but the parents of ASMS students addressed their concerns to Principal Rice, not Girsh. R. 8-10. Were this Court to apply the *SCV, Inc.*, factors to this case, it would have no trouble finding that Girsh’s in-class lecture was the speech of ASMS, not Girsh. Because Girsh’s lecture was government speech, there was no requirement of viewpoint-neutrality, and the court of appeals erred as a matter of law.

**B. A public high school teacher’s discussion with his students during class time is a regular part of the educational curriculum, not a public forum.**

Supposing, *arguendo*, that Girsh had a right to speak freely on his own behalf while he was supposed to be teaching the state-prescribed curriculum, such right could not have been

violated by any action on the part of the school. A public school classroom, during instructional hours, is not a public forum. Even where the First Amendment forbids the government from making viewpoint-based distinctions, the government may reasonably regulate the time, place, and manner of speech to further its significant interests. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). Teachers and students do not have an absolute right to use all parts of a school building for expressive purposes, and expressive activity can certainly be restricted if the conduct materially interferes with classwork. *Id.* at 118. Time, place, and manner regulations only apply to a traditional or designated public forum—if by policy or practice, government property has not been opened for indiscriminate use by the public, then the property may be reserved to its lawfully intended use. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983). By speaking about Intelligent Design for an entire class period, Girsh took state-sponsored instructional time away from the students and ASMS, and appropriated the school’s resources for his own personal use. Even if Girsh’s speech was protected, his classroom during instructional hours was the wrong time, the wrong place, and the wrong manner.

In the context of public schools, public forum principles are manifestly out of place. Public schools do not possess the characteristics of traditional public forums. *Kuhlmeier*, 484 U.S. at 267. Hence, school facilities may be deemed public forums only if school authorities have opened the facilities for indiscriminate use by the general public, or by some segment of the public. *Id.* If the facilities have instead been reserved for other intended purposes, then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. *Id.* To create a public forum, the school must take affirmative steps to open its property up for public discourse—a public

forum is not born of inaction. *Id.*; *United States v. Am. Library Ass'n*, 539 U.S. 194, 206 (2003). Where a school maintains control over a regular classroom activity, it has not created a public forum. *Kuhlmeier*, 484 U.S. at 270.

Just as a public library has broad discretion to decide what material it makes available to its patrons, a public school may, consistent with the First Amendment, make content-based restrictions as to its curriculum. *See Am. Library Ass'n*, 539 U.S. at 204; *Forbes*, 523 U.S. at 674; *Kuhlmeier*, 484 U.S. at 270. State regulations required ASMS to adhere to a specific biology curriculum, and the school was prohibited from teaching non-scientific theories. R. 5. In light of the strict mandates of the “exceptional schools” curriculum, the ASMS school board acted reasonably in restricting the content of classroom lectures. By failing to recognize that Girsh’s classroom was not a public forum, and that ASMS was therefore entitled to restrict the content of his lectures, the decision of the court of appeals was in error.

**C. A public school teacher has no retaliation claim when he was cited for violating a school policy as to what curriculum must be taught in the classroom during instructional hours.**

Once again, the school board’s policy does not violate any constitutional provision, and the school officials acted legitimately pursuant to that policy. Supposing, *arguendo*, that the policy did somehow restrict Girsh’s freedom of speech, any such restrictions advanced the compelling state interest of avoiding Establishment Clause violations. Further, the restrictions also advanced the school’s strong pedagogical interests of limiting biology instruction to scientific evidence and promoting a productive classroom environment.

The First Amendment protects a government employee’s right to speak on matters of public concern, but it does not require that public facilities be run as a roundtable for employee complaints over internal office affairs. *Connick v. Myers*, 461 U.S. 138, 149 (1983). Once it has

been determined that the employee's speech concerns a matter of public interest, the court must balance the employee's interest in speaking against the government's interest in the effective and efficient fulfillment of its responsibilities to the public. *Id.* at 150. In addition, if an employee's speech on his own time brings the mission of his employer and the professionalism of his coworkers into serious disrepute, it is not protected by the First Amendment. *City of San Diego v. Roe*, 543 U.S. 77, 80-81 (2004) (per curiam). Simply put, a teacher's right to participate in a public debate is diminished "in light of the special characteristics of the school environment." *Kuhlmeier*, 484 U.S. at 266.

On questions where free and open debate is vital to informed-decision making by the electorate, there is a matter of legitimate public concern. *Pickering v. Board of Education*, 391 U.S. 563, 571 (1968). Making and selling materials for profit is not a "public concern." *City of San Diego*, 543 U.S. at 79. In addition, a secondary school teacher does not have a right to academic freedom, and must obey state authorities in following the proscribed curriculum. *Miles v. Denver Pub. Sch.*, 944 F.2d 733, 779 (10th Cir. 1991); *Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004, 1007 (7th Cir. 1990). When Girsh started teaching Intelligent Design, rather than just mentioning to his students that the school had a policy against teaching the theory, he stepped outside the bounds of public concern. As an advocate of the theory, Girsh's discussion with the students was inspired by his own personal beliefs, not by free and open debate in the community. Furthermore, Girsh stood to gain financially from the discussion, and he even passed out brochures he had used to sell his textbook. R. 8. At the time Girsh spoke to his class about Intelligent Design, the theory was a matter of minimal or nonexistent public concern.

Whatever the level of public concern in Intelligent Design, the school has compelling pedagogical interests in preventing its teachers from speaking about the theory. Once again, a

public school classroom is not a public forum. *Kuhlmeier*, 484 U.S. at 270. There is a compelling state interest in the choice and adherence to a suitable curriculum for schoolchildren. *Palmer v. Board of Education*, 603 F.2d 1271, 1274 (7th Cir. 1979). A public school has a legitimate, perhaps compelling, interest in preventing violations of the Establishment Clause. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Moreover, the school has a strong interest in the effective and efficient fulfillment of its educational responsibilities. *Miles*, 944 F.2d at 777. It cannot be left to individual teachers to teach what they please. *Id.* A school may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern; and (2) the school provided the teacher with notice of what conduct was prohibited. *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993).

The school's policy against teaching Intelligent Design served the compelling state interests of avoiding Establishment Clause violations, limiting biology instruction to scientific evidence, following the state curriculum guidelines, and promoting a productive classroom environment. Girsh was notified of the policy, which had been in effect for four months, well before he violated it. On balance, the school's interests in regulating Girsh's speech overwhelmingly outweighed his personal interest, as well as the public's interest, in discussing such matters during classroom time. Girsh's retaliation claim has no merit, and should be denied as a matter of law.

**II. A PUBLIC HIGH SCHOOL HAS A STRONG INTEREST IN PROHIBITING A TEACHER'S DISCUSSION OF INTELLIGENT DESIGN BECAUSE THE THEORY IS NOT SCIENTIFIC AND WOULD EXPOSE THE SCHOOL TO LIABILITY FOR VIOLATING THE ESTABLISHMENT CLAUSE.**

It is patently clear that, as a matter of law, Intelligent Design is not a scientific theory. By prohibiting the theory from being taught in biology classes at the Arklatex School for Mathematics and Sciences, the school board's policy was neutral to religion and reflected a

legitimate state policy against teaching “non-scientific evidence” to biology students. In addition, the school board has a compelling interest in preventing Establishment Clause violations at the school. Because Intelligent Design entails a belief in a supernatural being, the theory is religious in nature and would fail the *Lemon* test. This Court should reverse the decision of the court of appeals.

**A. Because Intelligent Design is not a scientific theory, prohibiting its teaching in a public school biology class does not violate the Establishment Clause of the First Amendment.**

Except for the litigation at bar, the only federal court to review the Intelligent Design theory has been the District Court for the Middle District of Pennsylvania, in the case of *Kitzmiller v. Dover Area Sch. Dist.* 400 F. Supp. 2d 707 (M.D. Pa. 2005). In that case, the school board instituted a policy requiring each of its ninth-grade biology teachers to read a disclaimer to students during class stating that evolution is only a theory, that “gaps” in the theory exist, and referring the students to a textbook about Intelligent Design. *Id.* at 708. Characterizing the evidence for Intelligent Design as “entirely complex, if not obtuse,” the district court in *Kitzmiller* was confident that it could “prevent the obvious waste of judicial resources,” because, “no other tribunal in the United States is in a better position . . . to traipse into this controversial area.” *Id.* at 735. The court then, after a lengthy and detailed analysis, reached “the inescapable conclusion that [Intelligent Design] is an interesting theological argument, but that it is not science.” *Id.* at 745-46.

This Court is no stranger to assessing whether the reasoning and methodology of a theory constitutes “scientific knowledge.” *See Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592-93 (1993) (“We are confident that federal judges possess the capacity to undertake this review.”). In *Daubert*, this court set forth a non-exclusive checklist for assessing the reliability of a

scientific theory advanced by an expert witness at a jury trial. *Id.* Those factors are: (1) whether the theory is testable and can be falsified; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error of the theory when applied; (4) the existence and maintenance of standards of controls; and (5) whether the theory has been generally accepted in the scientific community. *Id.* at 593-95. The focus must be solely on the principles and methodology, not on the conclusions they generate. *Id.* at 595.

Intelligent Design fails the *Daubert* test miserably—it is not science. One of the hallmarks of Intelligent Design is that it is not testable or falsifiable. Indeed, Girsh advances the theory, based not on knowledge, but rather, a lack of knowledge. R. 7. Girsh points to the “irreducible complexity” of certain biological systems, the “highly improbable but precise balance of physical factors,” and the “virtual impossibility” that DNA could come to exist without the guiding hand of an Intelligent Designer. R. 7-8. Intelligent design is premised on the idea that “gaps” in the theory of evolution convincingly shows the existence of a creator. R. 5. Such a concept relies on a false dichotomy that where evolution fails, Intelligent Design must be true. *Kitzmiller*, 400 F. Supp. 2d at 738. A forced conclusion, not based on testable or quantifiable facts, is nothing more than conjecture and speculation masquerading as science. The only way to test Intelligent Design is to make contact with the Intelligent Designer, whoever or whatever that might be.

Secondly, to the extent that Intelligent Design has been subject to peer review and publication, such review has only confirmed that the theory is not scientifically valid. In *Kitzmiller*, the court noted that the National Academy of Sciences has rejected the claim that biological systems are “irreducibly complex,” and that the NAS has provided a cogent explanation for biological complexity. *Kitzmiller*, 400 F. Supp. 2d at 740. A convenient aspect

of Intelligent Design is, that because it is not testable, it has no potential or known rate of error, and no standards or controls. An advocate of the theory starts with the assumption that the theory is true, and then counts as support the lack of evidence for competing theories. *See* R. 5 (noting that Girsh’s textbook “can be used to rebut the theory of evolution”). Such a method depends on faith, not science. Finally, Girsh himself would likely agree with the findings of the *Kitzmiller* court that Intelligent Design is not generally accepted in the scientific community. *Id.* at 725; *see* R. 4-5. Because Intelligent Design fails all five factors of the *Daubert* test, it fails to meet the necessary standards for assisting a trier of fact in a federal case. FED. R. EVID. 702.

If Intelligent Design is not good enough to help a jury to find the truth in a court of law, then it should not be taught as science to children in a public school. This is exactly why teaching Intelligent Design and Creationism are forbidden at the Arklatex School for Mathematics and Sciences—not because the theories are religious in nature, but because the theories are not science. The school board’s policy is neutral to religion and reflects a legitimate state policy against teaching “non-scientific evidence” to biology students. R. 5-6; *see Rosenberger*, 515 U.S. at 840 (“There is no suggestion that the University created [the program] to advance religion or adopted some ingenious device with the purpose of aiding a religious cause.”). The school’s policy did not violate the Establishment Clause. By holding otherwise, the court of appeals was plainly in error.

**B. Allowing Intelligent Design to be taught in a public school biology class would expose the school to liability for violating the Establishment Clause.**

A public school has a legitimate, perhaps compelling, interest in preventing violations of the Establishment Clause. *Lamb’s Chapel*, 508 U.S. at 394; *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994); *Roberts v. Madigan*, 921 F.2d 1047, 1058 (10th Cir. 1990); *Webster*, 917 F.2d at 1008 (7th Cir. 1990). As this Court has frequently pronounced,

“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Families entrust public schools with the education of their children, but understand that the classroom will not be used to advance religious views that may conflict with the family and student’s private beliefs. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). Under the test of *Lemon v. Kurtzman*, the government’s action violates the Establishment Clause unless: (1) the action has a secular purpose; (2) the primary effect of the action neither advances nor inhibits religion; and (3) the action does not result in an excessive entanglement of the government and religion. 403 U.S. 602, 612-13 (1971); *Edwards*, 482 U.S. at 583. Allowing Intelligent Design to be taught in a public school would violate the Establishment Clause under the *Lemon* test, and at the very least, would expose the school to numerous First Amendment lawsuits.

Teaching Intelligent Design would violate all three prongs of the *Lemon* test. There is no dispute that teaching “Creation Science” fails the *Lemon* test and violates the Establishment Clause, even when the idea is taught alongside evolutionary science. *Edwards*, 482 U.S. at 596. Intelligent Design, which is essentially Creation Science with a new name, likewise fails the *Lemon* test. See *Kitzmiller*, 400 F. Supp. 2d at 722 (finding that “[Intelligent Design] is creationism re-labeled”). As with Creation Science, Intelligent Design embodies the belief that a supernatural being was responsible for the origins of humankind. See *Edwards*, 482 U.S. at 592; R. 5, 8, 11. Teaching such a theory cannot possibly have a secular purpose, and has the primary effect of advancing a particular religious viewpoint. *Edwards*, 482 U.S. at 594; *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968). In addition, teaching Intelligent Design involves an “excessive entanglement” of the school and religion, as evidenced by the fact that members of the public associated the theory with religious dogma. R. 9 (parent believing that Girsh was

“teaching about God instead of science”); *Kitzmiller*, 400 F. Supp. 2d at 734 (finding that “the community collectively perceives the ID policy as favoring a particular religious view”). Thus, teaching Intelligent Design would fail all three prongs of the *Lemon* test. The court of appeals erred by holding otherwise.

### CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed, and the case remanded with instructions to dismiss.

Respectfully submitted,

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## **APPENDIX**

### **Policy of the Board of Education of the Arklatex School for Mathematics and Sciences Special School District**

#### **§ 1701.2—Teaching of Creationism and Intelligent Design Theory**

(a) Definitions:

- (1) “Creationism” is the belief in the literal interpretation of the account off 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 the theories on the origins of the universe and the formation of life that are substantially similar to Creationism or Intelligent Design are similarly prohibited.