

**2006 BENJAMIN J. ALTHEIMER MOOT
COURT COMPETITION
UNIVERSITY OF ARKANSAS**

TRANSCRIPT OF RECORD

Docket No. 2005- 0113

SUPREME COURT OF THE UNITED STATES

October Term 2006

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

Petitioner,

v.

PETER GIRSH

Respondent.

RULES OF THE LAW SCHOOL COMPETITION

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKLATEX**

PETER GIRSH,

Plaintiff,

VS.

**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**

Defendants,

| Case No. 04cv4266

| Judge Franklin

**ORDER AND MEMORANDUM OPINION ON DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

JUNE 7, 2004

The Plaintiff, Peter Girsh, brought this action against the Board of Education of the Arklatex School for Mathematics and Sciences Special School District (hereinafter "the School Board") and

three related individual defendants alleging violations of the First Amendment to the United States Constitution. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343, and 42

U.S.C. § 1983. In addition, this Court is authorized to issue declaratory judgments pursuant to 28 U.S.C. §§ 2201 and 2202. Venue is proper in this District under 28 U.S.C. § 1391(b) because one or more Defendants reside in this District, all Defendants reside in the State of Arklatex, and the events giving rise to the claims at issue occurred in this District.

This matter came before the court on hearing after Defendants moved for Summary Judgment. After hearing, this Court finds that there are no material facts in dispute and that Defendants are entitled to judgment as a matter of law.

I. Factual and Procedural Background

The parties have agreed that the following narrative, which was composed using the affidavits of several involved individuals, is a complete and accurate account of the events giving rise to this litigation:¹

Dr. Peter Girsh is a high school biology teacher at the prestigious Arklatex School for Mathematics and Sciences (ASMS). ASMS is a public school and receives public school funding from the Arklatex Department of Education. Students must apply and go through an interview process in order to be admitted to ASMS, but once admitted, they receive the same benefits as any public school student in Arklatex. The application is open to all high school students in Arklatex.

Dr. Girsh is a 1985 graduate of Yale University and received his Ph.D. in Biochemistry from Harvard University in 1990. Dr. Girsh is well known for his features and commentary on Intelligent

Design, the theory that only an intelligent or supernatural cause could be responsible for life, living things, and the complexity of the universe. Dr. Girsh has spoken on numerous television programs, including CNN's *Hardball* and the *O'Riley Factor* on the Fox News Network.

Dr. Girsh has become a prominent and sought-after speaker on the subject of Intelligent Design due to his view that Intelligent Design is a purely scientific theory with no connections to any religious movement. In his affidavit and in numerous television and radio interviews Dr. Girsh has said he strongly disagrees with religiously-affiliated organizations such as the Discovery Institute's Center for the Renewal of Science and Culture (hereinafter "DICRS"), which openly aspire to use Intelligent Design theory to change the ground rules of science to make room for religion, specifically, beliefs consonant with a particular version of Christianity. Dr. Girsh testified in his affidavit and has stated many times in interviews that, while he recognizes the theory may lend support to some religious beliefs, he believes Intelligent Design itself is not a religious theory. In his affidavit, Dr. Girsh concedes the theory lends support to some religions and to the Christian creation story found in the Book of Genesis, but his affidavit also says Intelligent Design can and should be taught without ever mentioning God. Dr. Girsh stated in his affidavit that "like other scientists, I am interested in studying empirical scientific data to discover the origins of life and of the universe. I am interested in the science of Intelligent Design; its religious implications don't concern me."

Dr. Girsh's most recent dealings with Intelligent Design are his

¹ Although Plaintiff stipulates as to the accuracy of the facts and events described here, he declines to formally stipulate to the facts of this case on the grounds that there are remaining issues of material fact to be determined.

contributions to a textbook titled *From Koalas to Humans* (hereinafter "*Koalas*"). Dr. Girsh's affidavit stated the textbook was designed to be an alternative to the religiously-affiliated Intelligent Design textbooks on the market. The parties agree that this textbook strictly addresses only the scientific evidence used to support Intelligent Design theories, demonstrating how that evidence can be used to rebut the theory of evolution. The textbook, which has been admitted into evidence and thoroughly examined by this Court, states that the scientific evidence "suggests 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." Dr. Girsh served on the editorial board of this textbook which is distributed in seven school districts in Canada. Dr. Girsh is married, has three children, and is actively involved in his church, the First Christian Church of the Community.

Dr. Girsh was one of the first faculty members of ASMS, which was founded in 1995. Dr. Girsh 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. Since the school opened in 1995, Dr. Girsh has been on the selection board and steering committee for numerous school functions. Dr. Girsh has served on the curriculum committee for the school for the past seven years. He then served as the faculty advisor for the Biology Club and the Future Engineers of America Club for nine years. Dr. Girsh's AP Biology students have had a 100% pass score of "5" on the AP exam for the past 10 years.

ASMS is a school for exceptionally talented students, and the

Arklatex State Department of Education mandates that ASMS adhere to the "exceptional schools" curriculum. This curriculum specifically states that the school must adhere to the state specified Biology program, which strictly prohibits the teaching of "non-scientific" evidence. The parties agree that, although Dr. Girsh is a proponent of Intelligent Design, he had, previous to events giving rise to this litigation, always followed the mandated curriculum and taught strictly from textbooks approved by the Department of Education, all of which included the theory of evolution and none of which ever mentioned Intelligent Design. The parties also agree that, before the events giving rise to this litigation, Dr. Girsh had never discussed Intelligent Design with any student.

Dr. Richard Rice, principal of ASMS, stated in his affidavit that he knew of Dr. Girsh's outside work and had never had any major objections to his speaking on the Intelligent Design theory. He stated he and Dr. Girsh often spoke about how Intelligent Design was excluded from the curriculum and how maybe one day people could become more educated about the theory and it could be taught in public schools. Dr. Rice also testified in his affidavit that Dr. Girsh once told him his commitment to the school was to teach the curriculum, but that he saw the day when he could "tell the truth about the Big Bang" and when that time arose, he would be a hero for the minds of the future scientists of Arklatex.

On September 8, 2003, the School Board adopted a new policy prohibiting teachers from instructing students on Creationism or Intelligent Design. Anita Pascal, the President of the School Board, stated in her affidavit that the purpose for the new policy was to "avoid

Establishment Clause violations that might result from teaching such theories and to avoid the appearance the school endorses any particular religious belief.”

The new policy provides, in relevant part, as follows:

§ 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.

Dr. Girsh, in his affidavit, stated that on January 26, 2004, as he was preparing to deliver a lecture to his AP Biology class about Punnett Squares and genetics, Randall Johnson, a high school junior, raised his hand to ask Dr. Girsh a

question. Dr. Girsh testified in his affidavit that he was personally familiar with the sensitivities of being an exceptional student at a boarding school with high expectations and, as a result, he encouraged his students to frequently and to openly engage in candid discussions. He stated in his affidavit that this discussion was one that, in all of his experience as a teacher, he was not prepared to handle.

Dr. Girsh’s affidavit along with the affidavits of Randall Johnson and Maya Klinger, another student present in Dr. Girsh’s class that day, recount what happened next. When called upon, Randall said, “Hey doc, we googled you last night because James over here said that you were in Skull and Bones with Governor Wayne. We didn’t find anything like that but we did find out something about an Intelligent Design. At first we thought you had patented something, but then we found out you had written a book and everything. There is a whole science out there you haven’t been teaching us! Why have we been deprived?”

Dr. Girsh testified in his affidavit that he wanted to be straightforward and honest with his students about the entire Intelligent Design theory, but he worried doing so would violate the new School Board policy prohibiting instruction on Intelligent Design. He dismissed the class early without answering Randall’s question.

Randall’s question and Dr. Girsh’s failure to respond sparked the interest of his class, and when Dr. Girsh entered the classroom the next morning he was immediately bombarded with questions about Intelligent Design. According to the affidavits of Dr. Girsh and the two students, Dr. Girsh told his class the School Board had passed a new

policy prohibiting him from teaching Intelligent Design. He went on to tell the class he believed the policy was an unconstitutional violation of the Establishment Clause and of his First Amendment right to free speech, and that he thought “the School Board has more important things to worry about than trying to prevent students from thoroughly learning science.”

According to the affidavits of Dr. Girsh, Randall Johnson, and Maya Klinger, Dr. Girsh then began to tell his students about the theory of Intelligent Design. The following account was compiled using the affidavits of Dr. Girsh, Randall Johnson, and Maya Klinger, along with the hand-written notes taken by both students during class that day. The parties have agreed this is a factual account of what transpired.

Dr. Girsh told his class Intelligent Design is the theory that empirical scientific evidence points to the conclusion the universe was deliberately designed by an intelligent being or beings. He said Intelligent Design theory holds that evolution alone cannot explain the origin, complexity, and diversity of life. He told his students Intelligent Design theorists believe the universe has been fine tuned to make life possible in a way that must have been by design. Dr. Girsh told his students there are three main ways in which scientists have detected intelligent design in nature.

Dr. Girsh first told his students the irreducible complexity of certain biological systems indicates some life forms can not be explained through the gradual changes of evolution. He said “irreducible complexity” means a system cannot function until all its parts are in place. Dr. Girsh explained that Intelligent Design theorists claim some aspects of living organisms, such as, for

example, the cilium within a cell wall, are irreducibly complex, meaning they could not have evolved because each individual component is necessary or the entire mechanism would effectively cease to exist. As a result, he said, such systems cannot be created by gradual changes over time through natural selection because a biological entity must have some function in order to exist, change, and pass on change to its progeny.

According to Dr. Girsh’s class lecture, a second example of scientific evidence supporting Intelligent Design rests on the observation that the ability of the universe to support human life is sufficiently contingent, complex, and specified that as early as the 1960’s physicists announced our universe appears to have been fine-tuned to support the possibility of human life. He said scientists have discovered the existence of life depends upon a highly improbable but precise balance of physical factors. He continued that, due to the individual and collective probabilities for all of these factors to arise by chance with precisely the right values to make human life possible, physicists have estimated there is a less than a one in one hundred billion trillion trillion trillion chance life would naturally come to exist on even one planet in the universe. He said, as a result, Intelligent Design theorists argue life on Earth, especially human life, would be an absurdly improbable event were it not for an intelligent agent who fine-tuned the universe to support life.

Dr. Girsh’s third and final way of illustrating the scientific evidence behind Intelligent Design was based on the information content of DNA. He said because DNA functions like a written text or machine code more complex than any computer software ever created, it is

virtually impossible unguided chemistry could have created it. Dr. Girsh explained how DNA functions like a language: each DNA molecule has meaning, like words in a language, and the molecules can be combined so each combination has a meaning, like sentences and paragraphs in a language. He said Intelligent Designists assert that, at some point, someone or something must have attributed meaning to the DNA molecules and combinations in order for the language or code to function.

According to the affidavits, Dr. Girsh never used the word “God” in his lecture, nor did he in any way indicate the nature of the intelligent designer. Dr. Girsh’s affidavit stated the students were silent and captivated as he spoke. According to the affidavits, after Dr. Girsh finished his lecture on the basic tenets of Intelligent Design, he next 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 articles that had been published in *Origins* magazine. The court has entered the textbook and magazine articles into evidence and, after careful examination, agrees with the parties that the material covered therein was virtually identical to what Dr. Girsh had just presented in his lecture on Intelligent Design.

Dr. Girsh then showed the students a video clip of him talking with Bill O’Riley about Intelligent Design. In the two-minute video clip, Dr. Girsh is seen explaining the basic tenets of Intelligent Design theory. Again, this Court has reviewed the evidence and agrees with the parties that Dr. Girsh’s explanation of Intelligent Design as seen on the video was virtually identical to the information on Intelligent Design he had just conveyed to his class during the

lecture. However, the video also shows Mr. O’Riley asking Dr. Girsh, “So, all this science, it proves that God created us after all, right?” Dr. Girsh responded, “Intelligent Design is a purely scientific, not religious, theory. It suggests the universe was not created by chance and cannot be explained by evolution alone, but does not speculate as to the nature of who or what did create it or how.”

Dr. Girsh stated in his affidavit he was thrilled with his students’ interest in the subject and, as he dismissed the class for the day, offered students an informational pamphlet he had developed to help market his textbook. This pamphlet gave a very brief overview of the three categories of scientific evidence Dr. Girsh had used in his lecture that day. It did not mention God, nor did it in any way describe the nature of the intelligent designer, which it referred to as “some sort of intelligent agent.”

Both Dr. Girsh’s and Dr. Rice’s affidavits describe the events of the next day, and the parties have agreed as to the accuracy of the following account of what took place. As Dr. Girsh was entering the building the next morning, Dr. Rice confronted him about discussing Intelligent Design with his students. Dr. Rice told him Maya Klinger’s mother called him at home to complain about Dr. Girsh’s Intelligent Design lecture. In her affidavit, Maya’s mother, Dorothy Klinger, confirms she was outraged when her daughter told her about the material discussed in her biology class that day. Mrs. Klinger stated in her affidavit she and her husband are both Atheists, and that she felt the Intelligent Design lecture undermined their efforts to raise their children as Atheists. In her affidavit, Maya Klinger similarly stated that, as an Atheist, she was horrified to have Intelligent Design taught in her science

class. Maya stated she felt uncomfortable during the discussion of Intelligent Design because she “[doesn’t] believe in supernatural beings with the power to create the universe” and she felt like Dr. Girsh was “trying to tell us that science had proven God exists.”

According to his affidavit, Dr. Rice also told Dr. Girsh that he had received fifteen calls from parents of students who begged him to allow Dr. Girsh to continue teaching Intelligent Design. Both affidavits state Dr. Rice reminded Dr. Girsh of the new School Board policy § 1701.2 and told Dr. Girsh not to mention Intelligent Design again in the classroom.

However, according to the affidavits of the two students, Dr. Girsh’s class was again more interested in Intelligent Design than Punnett Squares. According to all, when Dr. Girsh began to answer questions about how the scientific evidence he had previously explained to the students could be used to refute the theory of evolution, Maya Klinger and two other students walked out of class, saying “I can’t hear this.” Dr. Girsh tried to stop them, but they said they would return when he began acting like a “teacher instead of a preacher.”

According to the affidavits, two open letters to the *Arklatex Tribune* regarding Dr. Girsh were printed in the newspaper’s editorial section the following morning. One letter was from Dorothy Klinger, urging the State of Arklatex to pull all funding from ASMS. She encouraged students not to apply to ASMS and even stated that her daughter had withdrawn from ASMS because someone was up there “teaching about God instead of science.” Maya’s affidavit states she withdrew from the school because she felt uncomfortable there as a result of the Intelligent Design

discussions in Dr. Girsh’s classroom. According to her affidavit, Maya felt as if the discussion had led to her estrangement from her peers. She did not point to any specific incidents or comments or state that her peers had treated her any differently following the Intelligent Design discussions, but stated she felt as if her religious beliefs now separated her from her classmates.

The other letter to the *Arklatex Tribune* was from Ranada Johnson, Randall Johnson’s mother. She urged the State to implement the teaching of Intelligent Design in the classroom. She also cited Dr. Girsh’s Intelligent Design discussion as a “spark” that had ignited her son’s passion for biology. According to both the letter and Randall Johnson’s affidavit, Dr. Girsh’s Intelligent Design discussion piqued Randall’s curiosity in the origins of life, causing him to spend hours that evening researching both evolution and Intelligent Design on the Internet. Her affidavit stated Randall, who had always been a good student, had recently been slacking off in school. She stated she was thrilled to see his interest in biology renewed. Randall’s affidavit confirms Dr. Girsh’s lecture motivated him to improve his grades in order to be able to go to college and pursue a biology degree. He stated he would eventually like to become a biologist in order to do research that might help contribute to our understanding of the origins of life.

According to their affidavits, later that afternoon Dr. Rice approached Dr. Girsh before class and handed him his personnel file. In the file, which this Court has reviewed, Dr. Girsh is cited twice for insubordination, once on January 26, 2004, and once on January 27, 2004. The parties both testified in their affidavits to the following facts: Dr. Rice told Dr. Girsh that he had been

reprimanded twice for insubordination due to “willful violation of School Board policy § 1701.2” and for “insubordinate disparagement of School Board policies.” The parties agree Dr. Girsh was told another violation would result in a formal hearing before the School Board which would determine the future of his employment with ASMS. Dr. Rice also presented Dr. Girsh with a letter from the School Board, signed by both the Superintendent and President of the Board, which this Court has reviewed and entered into evidence, which states Dr. Girsh is free to privately promote his ideas about Intelligent Design, but is “prohibited from, in any shape, form, or fashion, mentioning ASMS in conjunction with Intelligent Design.”

In his affidavit, Dr. Girsh stated that he was appalled the next day when he read an open letter in that morning’s edition of the *Arklatex Tribune* from the School Board, signed by the Superintendent. The letter said Dr. Girsh had been reprimanded and prohibited from teaching Intelligent Design. The letter stated “the teaching of Intelligent Design is unacceptable in the Arklatex Schools.”

Dr. Girsh filed suit alleging the School Board’s policy prohibiting the teaching of Creationism or Intelligent Design violated the Establishment Clause by singling out for disapproval only those alternative theories which lend support to religious beliefs 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. He is seeking a declaratory judgment that the policy is unconstitutional and monetary damages for the violation of his free speech rights. The School Board denies that its actions violated the

Constitution and asserted that teaching Intelligent Design in public schools would violate the Establishment Clause of the First Amendment. Defendants have moved for summary judgment on these stipulated facts, asserting they are entitled to judgment as a matter of law. Dr. Girsh’s response stated there are as-yet undecided issues of material fact and Defendants are not entitled to judgment as a matter of law.

II. Arguments of the Parties

Dr. Girsh resists summary judgment on the grounds that there is a material question of fact as to whether his Intelligent Design lecture was scientific or religious in nature. Dr. Girsh argues that, as he presented it, Intelligent Design is a scientific rather than religious theory, and teaching it in public schools does not violate the Establishment Clause. He concedes the theory lends support to religion and to the Christian creation story found in the Book of Genesis, but argues Intelligent Design can and should be taught without ever mentioning God. Dr. Girsh relies on the Ninth Circuit’s decision in *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996), to support his argument that Intelligent Design is not a religion nor does it operate in a way parallel to the way conventional religions function, so, although it be consistent with some religious beliefs, teaching it in public schools does not raise Establishment Clause concerns. In fact, Dr. Girsh asserts the School Board policy prohibiting instruction on Creationism or Intelligent Design unconstitutionally favors evolution and the Big Bang theory over other equally plausible explanations which lend support to religious doctrines. He argues the policy violates the Establishment Clause due to its bias against religion.

The School Board argues the theory presupposes the existence of a divine intelligence and attributes to this divine intelligence the power of creation, a power that the school board argues is inherently religious. The District argues teaching such a theory in public schools violates the separation of church and state by entangling government and religion and sending the message the school endorses a particular religious view. The School Board asserts Intelligent Design theory is at least comparable to nontheistic beliefs that do not teach the existence of God, but which the United States Supreme Court held to be religious in nature in *Torcaso v. Watkins*, 367 U.S. 488 (1961). Additionally, the School Board argues Intelligent Design is fundamentally similar to Creationism in that it is based on a religious position (that the universe was created by a divine being) and its teaching may be interpreted as promoting a particular religious belief. Teaching Creationism in public schools was found unconstitutional in *Edwards v. Aguillard*, 482 U.S. 578 (1987), and the School Board argues teaching Intelligent Design is essentially doing the same thing the Court has already struck down.

Dr. Girsh also argues the School Board, along with the Superintendent and the Principal, violated 42 U.S.C. §1983 by reprimanding him in retaliation for the exercise of his First Amendment right to free speech. Dr. Girsh alleges his rights were infringed when the School Board disciplined him for teaching Intelligent Design and for criticizing the new School Board policy prohibiting such instruction. Dr. Girsh asserts that he was speaking on a matter of intense public concern, and that his speech was constitutionally protected. The School Board argues that allowing teachers to teach Intelligent

Design in the classroom would violate the Establishment Clause and the School Board therefore has a very strong interest in prohibiting such speech and ensuring that its teachers do not criticize policies that are necessary to avoid constitutional violations. Additionally, the District asserts that, regardless of whether Intelligent Design violates the Establishment Clause, its interest in running an efficient school system outweighs Girsh's interests.

IV. Analysis

A. Establishment Clause Claim

Intelligent Design, by definition, is premised on the belief in a supreme supernatural being responsible for creating the universe. The parties agree on the fact Dr. Girsh told his AP Biology class empirical scientific evidence points to the conclusion the universe was deliberately designed by an intelligent being or beings. Although Dr. Girsh argues there is an undetermined question of fact as to whether his lecture was scientific or religious in nature, it is abundantly clear to this Court that, while this supernatural being may never be referred to as "God" under the theory, a belief system which attributes the creation of the universe and life to a supernatural being is clearly a religion. As the United States District Court for the Middle District of Pennsylvania recently found in *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707(M.D. Penn 2005), Intelligent Design, like the variations of Creationism and Creation Science before it, is simply another attempt to use the public school classroom to teach a religious creation theory. See *Edwards v. Aguillard*, 482 U.S. 578 (1987); *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982). Although Intelligent Design is

more complex and sophisticated than the simple Genesis-based Creationism at issue in *Edwards* and *McLean*, the theory fails for similar reasons. *Id.*

In *Edwards*, the court applied the 3-prong test established in *Lemon v. Kurtzman*. *Edwards*, 482 U.S. at 585 (citing *Lemon*, 403 U.S. 602 (1971)). The *Lemon* test requires that (1) the state action must have a secular purpose; (2) [the] principal or primary effect must be one that neither advances nor inhibits religion; [and] (3) the statute must not foster 'an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. If a state action violates any prong of the *Lemon* test, it is unconstitutional. *Id.*

Dr. Girsh's in-class discussion of Intelligent Design fails the *Lemon* test because, regardless of his intent, the effect of the discussion was to promote the religious belief a supreme supernatural being is responsible for the creation of the universe. In order to determine the effect of teaching Intelligent Design in school, this Court must examine the message received by the students. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999). When Intelligent Design is presented as an explanation for the creation of life and the universe, the similarity to the Biblical version of creation and the indirect religious message becomes the apparent. Because the message the students would receive from a lesson on Intelligent Design would be religious in nature, the primary effect of such an action would be to promote religion. Because Intelligent Design education fails the effects prong of the *Lemon* test, it is unconstitutional and there is no need to address either the purpose of such education or the extent to

which it would implicate excessive government entanglement with religion.

Additionally, it is significant to note teaching Intelligent Design in public schools implicates two other tests the Supreme Court has used in the context of Establishment Clause violations: the endorsement test and the coercion test. The endorsement test first appeared in Justice O'Connor's concurrence in *Lynch v. Donnelly*, in which she stated a government endorses religion if it "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." 465 U.S. 668, 692 (1984). Intelligent Design clearly teaches the existence of a supreme supernatural creator is scientifically proven; therefore, it clearly endorses a religious belief.

Finally, Intelligent Design education in public schools violates the coercion test as laid out by the Court in *Lee v. Weisman*, in which the Court found the Establishment Clause forbids the offering of prayers by members of the clergy at public middle school and high school graduation ceremonies. *Lee*, 505 U.S. 577 (1992). Because the state makes school attendance mandatory, the coercive nature of state action that takes place at school is heightened. *Id.* In this case, because Dr. Girsh presented Intelligent Design as a scientific theory in one of his science classes, it is reasonable to infer that his students would feel coerced to learn the theory and may even have anticipated being tested on the material.

Clearly, Intelligent Design is a religious doctrine which cannot be taught in our public schools without resulting in a violation of the Establishment Clause. Because this Court holds teaching

Intelligent Design in public schools violates the Establishment Clause, it follows that the School Board's policy prohibiting such teaching does not violate the Establishment Clause.

B. Free Speech Claim

Dr. Girsh alleges the disciplinary actions taken by the School Board violated his First Amendment rights to free speech. Dr. Girsh claims the decision to discipline him was based in part on his discussion of Intelligent Design in the classroom and his criticism of School Board Policy §1701.2. This Court applies a four-step, burden shifting analysis to a public employee's claims of retaliation made pursuant to the First Amendment of the Constitution under 42 U.S.C. §1983. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

First, this Court must determine whether the employee's speech involves a matter of public concern. *Connick*, 461 U.S. at 146. If so, then this Court must balance the employee's interest in commenting upon matters of public concern "against the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 at 568. Speech is protected only if the employee's interest outweighs the interest of the employer. *Lytle v. City of Haysville*, 138 F. 3d 857, 863 (10th Cir. 1998).

Assuming that this balancing test weighs in the favor of the employee, the employee under the third step must prove the protected speech was a motivating factor in the employment decision. *Mt. Healthy School District Board of Educ. v. Doyle*, 429 U.S. 274 (1977). Finally, if the employee makes this showing, the burden shifts to the employer to illustrate

by a preponderance that the same conclusion would have been reached even in the absence of the protected conduct. *Id.*

Because this Court has decided as a matter of law that the balance weighs in favor of the employer, the factual issues suggested by *Mt. Healthy* need not be addressed.

Intelligent Design is not a matter inherently of public concern. During his discussions, Girsh was speaking "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest." *Connick*, 461 U.S. 138,147 (1983).

Even assuming Girsh's speaking on Intelligent Design touched on a matter of public concern, the School Board's interests in ensuring that its teachers do not teach Intelligent Design, which this Court has found would result in a violation of the Establishment Clause, outweigh Girsh's right to free speech. Additionally, the School Board has an interest in running its school in a manner that does not violate the Constitution and in ensuring teachers do not undermine that goal by criticizing policies necessary to avoid constitutional violations. Finally, the manner in which Girsh raised the issue justified the adverse response by the school principal. "The state's burden in justifying a particular [adverse employment action] varies depending upon the nature of the employee's expression." *Id.* The students at ASMS are to be taught the curriculum approved by the State. Girsh's discussions on Intelligent Design disrupted that curriculum and upset several students. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employers' judgment is appropriate." *Id.*

In sum, the speech had an adverse impact on the school's ability to carry out its teaching responsibilities. Based on the factors considered by the Court in *Pickering*, *Connick*, and their progeny, this Court concludes Girsh's speech, to the extent it raised an issue of public concern, was so disruptive it is not entitled to constitutional protection.

V. Conclusions of Law

For the reasons stated above, this Court finds the School Board did not violate the First Amendment by enacting § 1701.2 and by disciplining Dr. Girsh for criticizing and violating the policy.

Accordingly, this Court grants Defendant's motion for summary judgment and dismisses Plaintiff's complaint on both claims.

Dated this 7th day of June, 2004.

/s/ Hon. Hubert. P. Franklin III

Hon. Hubert P. Franklin III
United States District Judge

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT**

PETER GIRSH,

Plaintiff-Appellant,

VS.

No. 05-7352

**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
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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**

Defendants-Appellees.

BEFORE Wilkenson, Marsh, Lindsey,
Circuit Judges.

WILKENSON, Chief Judge

OPINION

This is an appeal from the District Court's grant of summary judgment in favor of Defendants-Appellees, finding that there were no material questions of fact and defendant was entitled to

judgment as a matter of law because: (1) the Arklatex School for Mathematics and Science Special School District policy prohibiting the teaching of Intelligent Design or Creationism did not violate the

Establishment Clause of the First Amendment to the United States Constitution, (2) teaching Intelligent Design in public schools would violate the Establishment Clause, and (3) disciplining Dr. Girsh for violating and criticizing the policy against teaching Intelligent Design did not violate his First Amendment right to free speech. Because this Court finds that there are unresolved questions of material fact, we reverse the District Court's grant of summary judgment and remand for a trial on the merits.

I. Establishment Clause Claim

This court is not convinced that, as a matter of law, Intelligent Design is a religious theory. Despite the School Board's argument that Intelligent Design theory is religious in nature, the agreed-upon facts make clear there is at least a plausible argument the theory, as it was presented by Dr. Girsh in his AP Biology class, is primarily scientific in nature. As Dr. Girsh's resume and in-class discussion amply illustrate, Intelligent Design proponents have developed highly sophisticated arguments, have had their works published by prestigious presses and in academic journals, have aired their views among critics in the corridors of major universities and institutions, and have been recognized by leading periodicals, both academic and non-academic. 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. Dr. Girsh's Intelligent Design lecture clearly presented scientific data and studies, and this Court is not willing to rule that, as a matter of law, such

information becomes religious in nature simply because it could be used by some to support certain religious beliefs. By stipulating to the accuracy of the facts presented by the District Court but maintaining that there were still unanswered questions of fact to be determined, Dr. Girsh adequately preserved this issue for appeal. We agree with Dr. Girsh the scientific or religious nature of his lectures is a question of fact to be determined by the fact finder.

This Court similarly rejects the School Board's assertion that, by presenting his students with information on Intelligent Design, Dr. Girsh was essentially teaching Creationism, which was held to be unconstitutional in *Edwards v. Aguillard*, 482 U.S. 578 (1987) and *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982). Defendants-Appellees rely on *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707, for the rule that Intelligent Design theory is yet another incarnation of Creationism. However, because this case is clearly distinguishable from *Kitzmiller*, there is a material question of fact as to whether Dr. Girsh's discussion of Intelligent Design theory was either aimed at promoting any religious belief or resulted in promoting any religious belief. Dr. Girsh argues that when Intelligent Design is taught alongside evolution in public schools there is no appearance the school is endorsing either view. Further, he asserts teaching both theories would pass the *Lee v. Weisman* test because each theory would point out discrepancies in the other and as a result students would not feel coerced to accept either theory. See *Lee*, 505 U.S. 577, 599 (1992). This Court finds such arguments persuasive. Accordingly, we hold the District Court erred in holding that, as a matter of law;

Dr. Girsh's lecture violated the Establishment Clause. Whether Dr. Girsh's teachings were religious in nature, and if so, whether they were aimed at or resulted in the promotion of any particular religious beliefs are questions of fact which must be determined by the trier of fact.

Because the District Court found that instruction on Intelligent Design is unconstitutional, it dismissed the plaintiff's claim that § 1701.2 violates the Establishment Clause, reasoning the policy is necessary to prevent an Establishment Clause violation. However, Dr. Girsh has a valid argument that, regardless of whether Intelligent Design is found to be a religious doctrine, District Policy § 1701.2 could be a violation the Establishment Clause if it singles out for disapproval only those theories that lend support to religious beliefs. The Establishment Clause not only prohibits government action that advances religion, but also prohibits hostility to religion. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). The Supreme Court has held it is not necessary, in order to comply with the Establishment Clause, to suppress speech due to its religious content. *Id.* In fact, the Court said that doing so would run afoul of the Establishment Clause's commitment to neutrality. *Id.* The new School Board policy explicitly allows a teacher to teach alternate theories of origin as long as those theories do not support religion. A jury could reasonably find that, by limiting classroom instruction to only evolution, the School Board sent a strong message it endorses explanations that contradict religious beliefs and disapproves of those that support them. Accordingly, the District Court was in error when it dismissed the

plaintiff's claim the School Board policy violates the Establishment Clause. This Court reverses and remands for a trial on the merits on this issue.

II. Free Speech Claim

Dr. Girsh was disciplined for teaching Intelligent Design and for criticizing the District's policy against teaching such material. Dr. Girsh alleges that this was an adverse employment action taken in retaliation of his exercising his First Amendment right to free speech.

Public employment may not be conditioned upon relinquishment of the right to engage in activities protected by the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). However, the "state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* In order to qualify as protected speech under the First Amendment, the alleged speech must satisfy the balancing test set out in *Pickering*. The Court in *Pickering* devised 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." *Id.* at 568. Under this test, an employee's First Amendment rights are protected unless the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure the effective performance by the employee. *Columbus Education Ass'n v. Columbus City School District*, 623 F. 2d 1155, 1159 (6th Cir. 1980). For example, the government's interest may be promoted above the

individual's interest if "the statement impairs discipline by superiors or harmony among co-workers, has detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

If an employee's activities are protected under the *Pickering* test, he must then demonstrate that this conduct was a "motivating factor" in the adverse employment decision. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). The employer "then bears the burden of showing by a preponderance of the evidence that it would have reached the same decision . . . in the absence of the protected activity." *Id.* at 287.

Under the *Pickering* test for determining whether a public employer has infringed an employee's freedom of expression, the question of whether the speech at issue involves a matter of public concern is an issue for the court; issues of whether the speech in question was a substantial factor in motivating the State's decision is a matter of fact for the jury to decide. The District Court considered Girsh's free speech claim in two contexts. The first context involved analyzing the speech as a matter of public concern. The District Court incorrectly held the speech was not a matter of public concern. The District Court's alternative assessment of the factual issues were legally irrelevant.

Girsh spoke to his students about Intelligent Design. As is illustrated by the facts of this case, especially the multiple letters regarding the issue published in the *Arklatex Tribune*, Intelligent Design is a matter of public

concern that has been highly scrutinized and publicized in the media. Parents and school districts across the nation engage in dialogue daily about the teaching of Intelligent Design. As stated in the record on appeal, Girsh did not incorporate Intelligent Design into his curriculum. Furthermore, Girsh did not use Intelligent Design in a pedagogical capacity. Therefore, no restriction on his speech was necessary to insure his effective performance.

Even if he chose to incorporate Intelligent Design into his AP Biology class, this too would have been protected speech. In his affidavit, Dr. Girsh asserts that it is helpful for him to explain both evolution and Intelligent Design to his students so that they might fully understand both competing scientific theories, each of which expose important discrepancies in the other. According to the record on appeal, Dr. Girsh stated that it was necessary for him to explain the School Board's policy and its problems so his students would understand why he had, up until that point, refrained from presenting Intelligent Design to them, and why he now chose to do so. In addition, Dr. Girsh stressed the importance of the teacher-student relationship and the need for honesty and openness in his classroom in order to foster a positive learning environment. The Supreme Court addressed just such an issue of academic freedom of speech in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), where it said, "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." *Id.*

Other than the two students who walked out of class, the school district has no basis to illustrate that the restriction to the bare mention of Intelligent Design disrupts the function of the school or creates a problem in an educational setting.

Girsh's speech is protected under the *Pickering* test. Therefore, this court remands the case to the District Court which must move to the next level of the *Pickering/Mt. Healthy* analysis. In its further proceedings the District Court should develop the factual record more fully and allow the School Board to provide Girsh's complete employment record. According to the record on appeal, Girsh's employment file illustrates an exceptional history of accolades and achievements received for outstanding teaching. Students who graduate ASMS have continued to be excellent students in the science and math departments at the nation's top tier schools. Girsh's employment file specifically states he was disciplined for insubordination, and the only insubordination incidents listed are the incidents when he discussed Intelligent Design and criticized the School Board's policy. Such a record suggests the disciplinary actions taken against him were taken for reasons that violate the First Amendment. However, the School Board should be given the opportunity to rebut this inference

Furthermore, this Court does not dismiss Dr. Girsh's argument that the policy violates the viewpoint-neutrality requirement of the First Amendment. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), the United States Supreme Court held that religion is not a discrete, separate subject matter that can be excluded, but a viewpoint from which a

variety of topics can be addressed. Accordingly, the First Amendment's requirement that limitations on such speech be view-point neutral applies. *Id.* In *Rosenberger*, the Court said, "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* The Court has repeatedly held that limitations on speech that discriminate against religious viewpoints violate the First Amendment. *See Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). Accordingly, this Court finds that there is a question of material fact as to the neutrality or bias of the School Board policy which must be determined by the finder of fact.

..... REVERSED and REMANDED with instructions not inconsistent with this opinion.

Dated this Eleventh day of October, 2005.

/s/ Hon. Maxwell Wilkenson
Hon. Maxwell Wilkenson
United States Circuit Court Judge

THE SUPREME COURT OF THE UNITED STATES

Docket No. 06-0009

**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,

vs.

PETER GIRSH,

Respondent.

WRIT OF CERTIORARI

The Petition herein for writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is granted, in order that this Court may 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?

IT IS SO ORDERED. This twenty-seventh day of January, 2006.

/s/ James Jackson
James Jackson
Clerk of the Court

APPENDIX A

Rules of the Competition

I. LENGTH AND FORM OF BRIEFS

a) Length and Form. The style, font, and pitch shall be uniform for all brief contents, including footnotes, but excluding covers. The font size and type shall be **12 point Times New Roman**. The brief should be left justified only. All pages and covers shall be 8½ by 11 inches with typed matter not exceeding 6½ by 9½ inches. There shall be double spacing between each line of text. Briefs shall not exceed thirty-two (32) pages in length exclusive of the certification, questions presented, the subject index, the table of authorities, and the appendix. In computing the overall length of the brief, any partially filled page shall be counted as a full page. The Respondent’s brief shall have a red cover, and the Petitioner shall have a blue cover.

b) Duplication. All copies of a brief required to be submitted shall be identical, including paper and electronic copies. Briefs may be produced by any duplicating or copying process, which produces a clear black image on white paper, in any case to be fastened with three (3) staples along the left margin, or with a velo binding. Briefs should not be bound in any other manner. The copying process shall not impart any reduction to the character size. Briefs must be duplicated on the front of each sheet only. Five paper or “hard” copies of the brief must be submitted along with a copy on a properly labeled 3 ½ inch floppy disk, or cd. **Emailing the Brief is not correct service.** The electronic copy must be in either Word Perfect or Word format.

c) Format. Unless otherwise directed by these rules, briefs shall be in the format used in the United States Supreme Court. Briefs need not contain any formal statement of jurisdiction. All citations shall be complete and in the form prescribed in the current edition of Harvard Law Review Association’s *A Uniform System of Citation* (commonly referred to as “the Blue Book”). The letter of the team shall only be printed in the lower right corner of the cover of each brief. Briefs shall not be signed, and no matter serving to identify a team or its members shall appear within the brief itself. Appendices may be used to recite the text of statutes, constitutional provisions, regulations and material that is not generally available.

d) Certification. Each team submitting a brief in the competition shall certify that such brief has been prepared in accordance with the Rules of the competition, and that it represents the work product solely of such team’s members.²

² ⁴ The certification shall state:

We hereby certify that this [Petitioner’s/Respondent’s] brief is the work product solely of the undersigned, and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief.

(Team Member)

(Team Member)

The certification shall be submitted simultaneously with the brief but shall not be affixed, bound, or otherwise inserted therein in accordance with section (c) above. Only one copy of the certification shall be submitted.

e) Honor Code. The honor code is in force during the writing of the briefs. No team shall receive any assistance of *any kind from any faculty or other person* prior to the filing of its brief, including any assistance from, or sharing or comparison of research or work product with, members of a competing team. Briefs must be written only by the team whose letter appears on the front cover. Both team members must substantially contribute to the substance of the brief. These rules shall not be construed to prohibit the use of computerized researching or word processing software (including automated cite checking or spell-checking systems). If during research there is a case found to be dispositive of one of the issues on appeal, the team must disclose the name and citation of the case to Ali Brady or Hope Goins immediately.

II. SERVICE OF BRIEF

Each team participating in the competition shall provide five identical copies of its brief and one electronic copy to the Board of Advocates on Friday February 17, 2006 from 12:00 noon – 1:00 p.m. **LATE BRIEFS WIL BE PROPERLY PENALIZED. ANY BRIEF NOT SERVED BY 6 p.m. FEB. 17 WILL NOT BE GRADED.** Such briefs shall be submitted in the office of the Board of Advocates in Waterman Hall of the University of Arkansas. Briefs must be submitted in person. Briefs which are not in compliance with the above deadline will be duly penalized. After all briefs have been submitted, they will be posted on the University of Arkansas Law School Library website. Material from the briefs of other teams can be used to construct the oral argument portion of the competition, once the briefs are posted. However, beyond the briefs posted, no outside help on the oral argument portion of the competition will be allowed until after preliminary rounds and the team advances to the Quarter Finals of the competition. Questions on Briefs should be submitted to Ali Brady or Hope Goins, who will advise all teams as to proper format if a problem or ambiguity is detected. The brief is worth 40% of the team's score in the competition.

III. ORAL ARGUMENT

a) Participants in an Argument. Both members of a team must participate in any argument.

b) Time Allowed for Argument. Oral argument shall be limited to a total of thirty minutes per team. Judges, in their discretion, may interrupt arguments to ask questions and may allow additional time. Petitioners, **by advance arrangement with the judges and timekeeper**, may reserve up to five minutes for rebuttal.

c) Results. In all cases, the scores of competing teams shall be computed by weighing the oral arguments sixty percent (60%) and the brief forty percent (40%). The oral score shall be determined by a panel of judges without knowledge of the brief grade, and shall be arithmetically weighted and combined with the brief grade by the Board of Advocates Spring Moot Court Committee, with scores computed to decimal or fractional points, if necessary. In the event of a tie after such computation, the tie shall be broken in favor of the team with the higher oral argument score. The Board of Advocates Spring Moot Court Committee shall record and maintain for each argument of each round in the

competition the oral score and brief grade of the two competing teams.

d) Notification of Results.

1) Preliminary Rounds. Results in the preliminary rounds will be announced during the week following preliminary rounds. The announcement of these results shall determine which teams advance to the final rounds.

2) Final Rounds. In the elimination rounds (i.e. semi-finals, quarter-finals, and prize round) results of each argument shall be announced by the judges after being determined by the Board of Advocates Spring Moot Court Committee.

IV. AWARDS

The Board of Advocates will award competitors in four categories:

1. Best Brief
2. Best Oralist
3. Best Oralist in the Preliminary Rounds (16 teams)
4. Prize Round Winners

V. INTERPRETATION OF THESE RULES

Requests for interpretation of these rules should be sent via E-mail to Ali Brady (abrady@uark.edu) or Hope Goins (hgoins@uark.edu), Co-chairs of the 2006 Altheimer Moot Court Competition. Requests should be made at the earliest date possible. All interpretations of these rules and any waivers, consents, assessments of penalties, decisions, or other action taken by the Board of Advocates Spring Moot Court Committee in their administration of the competition shall be in their respective sole and absolute discretion. Such interpretations, waivers, consents, assessments of penalties, decisions, or action shall be final, and all participants shall be bound thereby. In all events, the committee shall be the ultimate authority regarding the application and interpretation of these rules and the administration of the competition.