
Docket No. 2005-0113

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 2006

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

—
On Writ of Certiorari

—
BRIEF FOR THE RESPONDENT
—

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STATEMENT OF THE CASE
Opinions Below

The decision of the United States District Court for Eastern Arklatex is included in the official record. (R. at 11-14). The decision of the United States Court of Appeals for the Fourteenth Circuit is also included in the official record. (R. at 15-19).

Constitutional Provisions

The text of the following Constitutional Provisions relevant to the determination of this matter are included in the appendix: U.S. Const. amend. I.

Standard of Review

The grant of a motion for summary judgment is a question of law and, as such, is reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552 (1982).

Statement of the Facts

Dr. Peter Girsh is a graduate of Yale University and holds a Ph.D. in Biochemistry from Harvard University. (R. at 4). In 1995, Dr. Girsh began teaching Biology at the Arklatex School for Mathematics and Sciences (“ASMS”), a new public school focused on providing excellent education in math and science. (R. at 4). ASMS, while a public school, exists primarily to serve exceptional students and must adhere to the Arklatex State Department of Education’s “exceptional schools” curriculum. (R. at 5). This curriculum forbids the teaching of “non-scientific” evidence in the Biology program. (R. at 5).

Outside of the classroom, Dr. Peter Girsh is recognized as a leader in the developing field of science known as Intelligent Design (“ID”). (R. at 4). This theory postulates that the precise complexity of the natural world supports the notion that such

complexity could only be produced by an intelligent designer. (R. at 4). ID makes no claim about the identity of the designer or the reason for the design. (R. at 5, 8). ID only claims that the evolution alone cannot account for all life in the universe. (R. at 7). Dr. Girsh is a frequent lecturer on the theory, having appeared on programs such as CNN's *Hardball* and Fox News' *The O'Reilly Factor*. (R. at 4).

Though some elements of the ID community contend that it supports religious notions of the origin of life, Dr. Girsh believes that ID is solely a scientific theory and should not be associated with religion. (R. at 4). Dr. Girsh openly opposes the ID theories of religious organizations such as the Discovery Institute's Center for the Renewal of Science and Culture ("DICRS"). (R. at 4). Though Dr. Girsh acknowledges that ID can support certain religious accounts of the origin of life, he opposes teaching ID with any religious aspects. (R. at 4).

Dr. Girsh is a contributor to the textbook entitled *From Koalas to Humans*. (R. at 5). This textbook is based solely the scientific evidence supporting ID and demonstrates how such evidence contradicts the theory of evolution. (R. at 5). This textbook contends that the universe was purposefully created but never identifies by whom or what or speculates as to the nature of the creator. (R. at 5). The textbook never invokes the word "God" in any fashion (R. at 5).

Over the past decade, 100% of Dr. Girsh's AP Biology students have consistently earned the highest possible score AP exam. (R. at 5). Dr. Girsh was not only involved in urging the Arklatex legislature to start ASMS, but has also served on the selection board

and steering committee for numerous school activities and the school's curriculum committee. (R. at 5).

Prior to the events in question, Dr. Girsh has never mentioned ID in class and has strictly adhered to the state mandated curriculum. (R. at 5). In his affidavit, Dr. Richard Rice, the principal of ASMS, stated that he never had any major objections to Dr. Girsh's work and that Dr. Girsh had remained committed to teaching the curriculum. (R. at 5). On September 8, 2003, ASMS adopted a new policy banning any educational instruction on Creationism or Intelligent Design. (R. at 5). School Board President Anita Pascal stated that the purpose of the new policy was to avoid any violations of the Establishment Clause and to avoid the appearance of endorsing any religion. (R. at 5, 6).

On January 26, 2004, Randall Johnson, a high school junior, following Dr. Girsh's policy of encouraging open and candid discussion, began asking Dr. Girsh regarding Intelligent Design. (R. at 6). The question arose as a result of an internet search on Dr. Girsh that revealed his work on ID. (R. at 6). Randall Johnson informed Dr. Girsh that the internet search had led to Dr. Girsh's book on the subject and questioned Dr. Girsh as to why the class had been deprived of instruction on this theory. (R. at 6). In light of the new policy prohibiting instruction on ID, Dr. Girsh declined to answer the question and dismissed class without addressing the question. (R. at 6).

The next day in class, Dr. Girsh was again bombarded with questions about ID. (R. at 6). Dr. Girsh informed the class of the new policy prohibiting the teaching of ID. (R. at 6, 7). He shared with the class his belief that the policy was unconstitutional and that the School Board was preventing the students from comprehensively learning

science. (R. at 7). Dr. Girsh then explained to the class that ID is a theory that contends that empirical scientific evidence points to the conclusion that the universe was deliberately designed by an intelligent being or beings. (R. at 7). Dr. Girsh told his class that ID theorists believe that evolution alone is insufficient to account for the origin, complexity, and diversity of life. (R. at 7).

Continuing his explanation, Dr. Girsh told the class that ID postulates that the precision of the universe is the result of design and that ID scientists point to three main ways to detect ID in the natural world. (R. at 7). Dr. Girsh first told his students of irreducible complexity, a theory contending some aspects of living things are so complex that every working part is necessary or the entire apparatus would cease to exist. (R. at 7). As an example, Dr. Girsh pointed to the cilium within a cell wall. (R. at 7). Since such organisms must have every single component to exist, Dr. Girsh informed the class, they could not have evolved through natural selection because that process requires that each biological unit must have some function in order to exist and to change into something else. (R. at 7). Dr. Girsh then used the complexity and finely tuned specialization of the universe to support human life as the second way to recognize ID. (R. at 7). Since the 1960s, Dr. Girsh told the class, physicists have recognized that the universe seems to be precisely set up to support human life. (R. at 7). The last example Dr. Girsh gave concerned DNA. (R. at 8). DNA supports the theory of ID, Dr. Girsh told his students, because the precise complexity and meaning of the strands of a DNA make it virtually impossible that unguided chemistry could have create it. (R. at 8).

As Dr. Girsh spoke, the students were captivated. (R. at 8). At no time did Dr. Girsh mention “God.” (R. at 8). Dr. Girsh also showed the students his book and some of his written articles, none of which referenced God. (R. at 8). Dr. Girsh also showed his class a clip from an interview on *The O’Reilly Factor* in which he again emphasized science and not religion in relation to ID. (R. at 8). Before dismissing class, Dr. Girsh distributed a pamphlet he had developed that explained the points he had just discussed with the class which also made no reference to God. (R. at 8).

The next day, January 27th, Dr. Rice confronted Dr. Girsh with the news that the parents of Maya Klinger, who are both atheists, complained about the lecture. (R. at 8). Maya Klinger’s indicated that she felt uncomfortable with the classroom discussion of ID and perceived that Dr. Girsh was trying to say that science had proven the existence of God. (R. at 9). Dr. Rice also informed Dr. Girsh of around fifteen calls he had received from parents praising the discussion of ID. (R. at 9). Dr. Rice then reminded Dr. Girsh of the policy against teaching ID. (R. at 9).

During that day’s class, Dr. Girsh was again inundated with questions on ID. (R. at 9). Maya Klinger and another student objected to Dr. Girsh’s efforts to answer the questions and left the classroom. (R. at 9). Maya Klinger later left ASMS, stating she felt as though her beliefs separated her from her classmates. Maya Klinger’s mother continued to voice her displeasure with letters criticizing ASMS in the editorial page of the local paper, the *Arklatex Tribune*. (R. at 9). Mrs. Ranada Johnson, Randall Johnson’s mother, also wrote editorials in the *Arklatex Tribune*, praising Dr. Girsh and stating that

the classroom discussion had rekindled her son's love for learning and even motivated him to pursue a career in science. (R. at 9).

On January 28th, Dr. Rice notified Dr. Girsh that he had been reprimanded twice for insubordination for violation of the School Board policy and for "insubordinate disparagement of School Board policies. (R. at 9). Dr. Rice also informed Dr. Girsh that another violation would result in a hearing to determine his future employment. (R. at 10). A letter from the School Board informed Dr. Girsh that he was free to pursue ID outside of class but was prohibited from any further classroom discussion. (R. at 10). The School Board also provided an open letter to the *Arklatex Tribune*, stating that Dr. Girsh had been disciplined and prohibited from further instruction on Intelligent Design. (R. at 10).

Procedural History

The respondent here filed suit in the United States District Court for the Eastern District of Arklatex. He alleged that the School Board's policy prohibiting the teaching of creationism or Intelligent Design violated the Establishment Clause of the First Amendment. He also alleged that the Arklatex 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 sought a declaratory judgment that the policy is unconstitutional and monetary damages for violation of his free speech rights. Upon motion by the petitioners, the court granted summary judgment in their favor on June 7, 2004. The respondent here appealed that decision. On October 11, 2005,

the United States Court of Appeals for the Fourteenth Circuit reversed the grant of summary judgment and remanded for a trial on all issues.

The Supreme Court of the United States granted a writ of certiorari on January 27, 2006 to consider the following questions:

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

(2) Does the First Amendment right to freedom of speech protect a public school teacher's discussion on the topic of Intelligent Design?

SUMMARY OF THE ARGUMENT

The district court was incorrect to grant the defendant's summary judgment on the issue of whether Dr. Girsh's teaching of Intelligent Decision was a violation of the Establishment Clause. The Intelligent Design theory is distinguishable from previous versions of the theory in several significant ways. Additionally, the theory as presented does not violate any of the applicable tests under the Establishment Clause.

The district court was incorrect to grant the defendant's summary judgment on the issue of whether the School Board's policy violated the Establishment Clause. The policy's prohibition on the presentation of Creationism and Intelligent Design were not neutral to religion and therefore violated the Establishment Clause.

The district court was incorrect to grant the defendant's summary judgment on the issue of whether the School Board violated Dr. Girsh's right to free speech. The facts indicate that Dr. Girsh's speech was protected under the First Amendment. The School Board's attempts to regulate that speech were a violation of Dr. Girsh's rights under the First Amendment.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE PETITIONER'S BECAUSE THE INTELLIGENT DESIGN THEORY TAUGHT BY DR. GIRSH WAS NOT RELIGIOUS IN NATURE.

The Establishment Clause of the First Amendment of the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I. This prohibition has been applied to the states through the Fourteenth Amendment. *Modrovich v. Allegheny County*, 385 F.3d 397, 400 (3d Cir. 2004); *see also Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985). To prevent violations of the Establishment Clause, the courts of the United States have developed several tests to employ in evaluating such claims. *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707, 712 (M.D. Pa. 2005). However, before a court uses the tests to determine whether a government action violates the Establishment Clause, it must first be determined whether the action in question “can be defined as ‘religious’ for establishment purposes.” *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir. 1996).

In determining whether an action is religious or a religion for Establishment Clause purposes, the Third Circuit Court of Appeals has employed three useful indicia. *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981). These indicia were also employed by the Fifth Circuit Court of Appeals to determine whether a statue, erected by a city and having some significance to those practicing New Age beliefs, implicated the First Amendment Establishment Clause. *Alvarado*, 94 F.3d at 1229. The *Alvarado* court

employed the test to determine whether the New Age belief system constituted a religion, eventually concluding that it did not. *Id.*

The indicia are as follows:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Africa, 662 F.3d at 1032. The formal and external signs include formal services, clergy, observance of holidays, and “other similar manifestations associated with the traditional religions.” *Id.* at 1035-36.

The facts of Dr. Girsh’s case reveal that the version of Intelligent Design (hereinafter “ID”) he advocates is not a religion. It does not address any deep or imponderable matters, but in fact explicitly declines to speculate as to who or what created the universe and for what purpose. (R. at 5, 8,). It is not comprehensive in nature, but is an isolated teaching involving the complexity of life. (R. at 5, 8). Additionally, it has no formal or external signs, such as services, holidays, or clergy. It focuses exclusively on empirical, scientific evidence that may conflict with the traditional theory of evolution.

The Ninth Circuit, in declining to classify the theory of evolution as a religion, stated that “[e]volution is a scientific theory based on the gathering and studying of data, and modification of new data. ... As scientific methods advance

and become more accurate, the scientific community will revise the accepted theory to a more accurate explanation of life's origins.” *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994). Dr. Girsh’s ID theory follows the same criteria. Like the theory of evolution, ID has highly developed arguments that have been widely published in esteemed academic journals and presses. Though the theory’s scientific conclusions may lend some support to religious beliefs, it does so only in the most general sense and without any attempt to elaborate upon the questions of whom or what did create the universe or by what means. (R. at 8). The trial court concluded that Dr. Girsh’s theory is “clearly a religion” just because it attributes the creation of the universe to any kind of intelligent being. This conclusion was not based on any factors or criteria employed by courts in the past.

The trial court also concluded that ID, like Creationism, was simply another attempt to use the public classroom to teach a religious creation theory. In *Edwards v. Aguillard*, the United States Supreme Court struck down a Louisiana statute that forbade the teaching of evolution in public schools unless it was accompanied by the teaching of Creation Science. 482 U.S. 578, 581 (1987). In ruling that the statute violated the Establishment Clause, the court stated that “the primary purpose of the [law] is to advance a particular religious belief.” *Id.* at 593. The *Edwards* case turned the ban on teaching Creation Science in the public school system into a national proscription. *Kitzmiller*, 400 F. Supp. 2d at 712.

The trial court relied on the *Kitzmiller* case, which determined that ID is a variation of the theories of Creationism and Creation Science and is therefore also a violation of the Establishment Clause. *Id.* at 765. There, a School Board passed a resolution mandating that a statement regarding the gaps in Darwin’s evolutionary theory and the existence of an alternative theory, known as Intelligent Design, be read to all ninth grade biology classes. *Id.* at 708-09. The statement noted that Darwin’s theory “is not a fact” and that there were gaps in the theory “for which there is no evidence.” *Id.* at 708. The statement also explicitly mentioned a particular book, *Of Pandas and People*, that students interested in ID could consult. *Id.* at 709. This book contained the major scientific tenets of the Pennsylvania ID theory. *Id.* at 718.

The ID theory promoted in the book *Of Pandas and People* (hereafter “*Pandas*”) is markedly different from the ID theory which Dr. Girsh advocates. *Pandas* makes direct reference to a “master intellect” and notes that “religion and philosophy” must answer the question of what kind of intelligent agent the designer was. *Id.* at 718-19. Dr. Girsh’s ID theory makes no reference to the nature of the intelligent designer and refers to it only as “some sort of intelligent agent.” (R. at 8.) Several of the proponents of the *Pandas* ID theory and one of the book’s editors admitted that they believed the “master intellect” to be God and that the plausibility of their argument for ID depends upon a belief in the existence of God. *Kitzmiller*, 400 F. Supp. 2d at 718, 720. There is no such evidence in the case of Dr. Girsh. In fact, the textbook to which he contributed does suggest the universe was purposely created but never speculates as to the nature of the

creator. (R. at 5.) Additionally, Dr. Girsh has never given any indication that he believes the intelligent agent to be the traditional “God.”

The *Kitzmiller* Court also focused on the company publishing the *Pandas* book. 400 F. Supp. 2d at 721. That book was published by a company whose articles of incorporation described it as a religious, Christian organization and it was written by three creationist authors. *Id.* The final text of the book was almost identical to a text written prior to the Supreme Court decision in *Edwards* that outlawed the teaching of Creationism as science. *Id.* Following that decision, the words Creationism and creationist were just replaced with the phrase “Intelligent Design.” *Id.* The definition of Creationism contained in the book remained untouched but was also relabeled as Intelligent Design. *Id.* In content, the book was still a creationist text that asserted all life on earth began “abruptly through an intelligent agency with their distinctive features intact.” *Id.* The “Intelligent Design” theory contained in *Pandas* was nothing more an attempt to rename Creationism science as something that sounded more scientific.

The similarities between the *Pandas* ID theory and Dr. Girsh’s ID theory essentially end at the name. *From Koalas to Humans* (hereinafter “*Koalas*”), the textbook used by Dr. Girsh, was designed as an alternative to the religiously-affiliated textbooks on the market, such as *Pandas*. (R. at 5). There is no evidence that any of its authors are creationists or even ascribe to the Biblical story of creation. There is also no evidence in the record that *Koalas* advocates the abrupt appearance of life in its current form. Rather, Dr. Girsh’s view is only that evolution *by itself* cannot account for the origin, complexity, and diversity of life. (R. at 7). His theory also notes that “*some* life

forms cannot be explained through the gradual exchanges of evolution,” not all life or even a majority of it. (R. at 7) (emphasis added).

The ID theory that appeared in *Pandas* was promoted by a think tank known as the Discovery Institute’s Center for Renewal of Science of Culture (hereinafter DICRS). *Kitzmiller*, 440 F. Supp. 2d at 720. An avowed goal of DICRS was to “replace science as currently practiced with theistic and Christian Science.” *Id.* (internal citations omitted). The record of Dr. Girsh’s case reveals that he “strongly disagrees” with the goals of the DICRS and is interested only in studying “empirical *scientific* data” to discover the origins of life and the universe. (R. at 4) (emphasis added).

The facts of the Dr. Girsh’s case show that, despite the similarity in name, his theory of ID is saliently different from that in the *Kitzmiller* case. The trial court’s decision to group Dr. Girsh’s theory into the same category is not supported by the facts. Therefore, it was error for the court to conclude that ID is identical to Creation Science for the purpose of the First Amendment Establishment Clause.

II. UNDER THE APPLICABLE TESTS, THE THEORY OF INTELLIGENT DESIGN TAUGHT BY DR. GIRSH DOES NOT CONSTITUTE AN ESTABLISHMENT OF A RELIGION IN VIOLATION OF THE FIRST AMENDMENT

The Supreme Court of the United States has stated that the purpose of the Establishment Clause is “to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other. *Lynch v. Donnelly*, 465 U.S. 668, 672, (1984) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)). However, the court has also acknowledged that “total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.” *Lynch*, 465 U.S. at 672 (quoting *Lemon*, 403 U.S. at 614). The task of the court in Establishment Clause cases is to “reconcile the inescapable tension between...preventing unnecessary intrusion...and the reality that...total separation of the two is not possible.” *Lynch*, 465 U.S. at 672.

In determining whether a specific action violates the Establishment Clause, the Court “has declined to take a rigid, absolutist view of the Establishment Clause.” *Id.* at 678. Such an approach “is simplistic and has been uniformly rejected by the Court.” *Id.* Rather, each challenged official action must be scrutinized to determine whether, in reality, it tends to establish a religion or religious faith. *Id.* To that end, the court has developed three tests by which to evaluate Establishment Cause Claims. The Supreme Court and other circuits have not applied each test to every Establishment Cause claim. *Lynch*, 465 U.S. at 679; *see also Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999). However, as the trial court in our present case cited all three

tests in its opinion granting summary judgment to the Petitioners, this brief will address all three in turn.

A. The Intelligent Design theory passes the *Lemon* test and does not violate the Establishment Clause

The first and most widely employed test come from the case of *Lemon v. Kurtzman*. 403 U.S. at 612-13. Under this three-part test, a state practice is unconstitutional if (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion. *Freiler*, 185 F.3d at 343; *see also Lynch*, 465 U.S. at 679; *Lemon*, 403 U.S. at 612-13.

In analyzing the first prong of the *Lemon* test, courts have noted that it does not require the challenged action occur exclusively, or even predominantly, in furtherance of secular objectives; rather, there must simply be a sincere secular purpose somewhere within the action. *Freiler*, 185 F.3d at 344. Additionally, each action must viewed in the context in which it occurred; focusing exclusively on the religious component of any activity would be to apply a rigid view that would “inevitably lead to its invalidation under the Establishment Clause.” *Lynch*, 465 U.S. at 680. Even when the benefits to religion may be substantial, the court may find a secular purpose and see no conflict with the Establishment Clause. *Id*; *see also Walz v. Tax Commission*, 397 U.S. 664, 671 (1970); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

The *Kizmiller* determined that the School Board in their case enacted the new regulation with the purpose of advancing religion. *Kitzmilller*, 400 F. Supp. 2d at 747. They based this finding on an abundance of facts that came out during the trial, none of

which are present in the current case. In *Kitzmiller*, several School Board members openly favored the introduction of creationism into the classroom and stated so on a number of occasions over a span of several years. *Id.* at 748-49. The School Board members held meetings with the school’s biology teachers to question how they taught evolution and sought input and legal advice from DRSC on the teaching of ID in the classroom. *Id.* at 749-50. The board also delayed the purchase of an evolution-based textbook for over a year because it did not address alternative theories and openly disparaged the theory of evolution on religious grounds. *Id.* at 750-51. Numerous members of the board demanded a biology book that included the theory of creationism and at least one member testified that he did not believe in the separation of church and state. *Id.* at 750. The court also found that several members of the board knew that ID was widely considered to be a form of creationism. *Id.* at 753. Some of those board members took “extraordinary measures” to hide the source of the *Panda* books that were donated to the school and actually paid for by a special collection at board member’s local church. *Id.* at 756. This information, coupled with the history of the *Pandas* book, led the court to conclude that the sole purpose of the curriculum change was to introduce Creationism into the classroom. *Id.* at 762.

The facts of the *Kitzmiller* case are, again, much different from those in the case currently before this court. There record lacks any facts to indicate that Dr. Girsh’s purpose was in any way religious. He has consistently maintained that he believes ID to be a purely scientific theory and is unconcerned with it religious implications. (R. at 4, 5, 7, 8). Dr. Girsh’s asserted purpose for discussing ID with his students was so that

students could fully understand both theories and realize that each points out important discrepancies in the other. (R. at 18). There is nothing in the record to contradict this. The introduction of the theory was part of Dr. Girsh's encouragement of open and candid class discussions and his desire to encourage a positive learning environment. (R. at 6, 18). As the Supreme Court has stated, "teaching a variety of scientific theories about the origins of humankind...might be validly done with the clear secular intent of enhancing the effectiveness of science instruction." Viewing the actions of Dr. Girsh in their proper context, there was a genuine secular purpose for his actions. Therefore, they do not violate the first prong of the *Lemon* test.

The second prong of the *Lemon* test requires the court to determine whether the primary effect of the action is one that advances or inhibits religion. Under this prong, a government practice may not "aide on religion, aid all religions, or favor one religion over another." *Freiler*, 185 F.3d at 346. However, where the benefit to religion is no more than indirect, remote or incidental, "no realistic danger exists that the community would think that the contested government practice was endorsing religion or any particular creed." *Id.* (quoting *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 395 (1993)). In assessing the effect of an action, the court will focus on the message received by a reasonable, objective member of the intended audience. *Kitzmiller*, 400 F. Supp. 2d at 714-15; *Freiler*, 185 F.3d at 346. This is an evaluation made separately from what the actor actually intended to convey. *Kitzmiller*, 400 F. Supp. 2d at 715.

In the current case, the trial court ruled that Intelligent Design's similarity to the Biblical version of creation became apparent. (R. at 12). Thus, the court concluded, the message students would be receiving would be religious in nature and a promotion of religion. (R. at 12). A review of the facts of the case indicates that a reasonable, objective student would not construe Dr. Girsh's presentation of ID as an endorsement of religion.

In reaching its conclusion that the effect of the ID policy was to impose a religious view into a biology course, the *Kitzmiller* court relied on its extensive findings of fact regarding whether ID was a science. 400 F. Supp. 2d at 764. The scientific basis, or lack thereof, in that case are significantly different from those found in Dr. Girsh's theory. In making their determination, the court noted three important factors: (1) ID violates the ground rules of science by invoking and permitting supernatural causation; (2) their central argument, irreducible complexity, was identical to that of creationism's dualism, and (3) ID's negative attacks on evolution have been refuted by the scientific community.

In reaching their first conclusion, the *Kitzmiller* court reiterated that the version of ID in question relied on abrupt, non-natural creation of animals. 400 F. Supp. 2d at 736. They also noted the dedication of DIRSC to changing the traditional laws of science to allow for supernatural causation in the natural world. *Id.* In contrast, Dr. Girsh's theory does not assert that animals were created in an abrupt, non-natural fashion. He does not advocate changing the laws of science but, in fact, strongly disagrees with any attempt to do so. (R. at 4). His methods are based on empirical scientific data, which the *Kitzmiller*

court noted was the authoritative definition of modern science. 400 F. Supp. 2d at 735-36. The first factor that the *Kitzmiller* court used to declare ID unscientific is not present in Dr. Girsh's version of Intelligent Design.

The second factor, that irreducible complexity is identical to creationism's dualism, is not identical to the theory employed by Dr. Girsh. In *Kitzmiller*, the ID theory was based completely on the concept of irreducible complexity. 400 F. Supp. 2d at 738. The court there had substantial expert testimony of flaws in the ways that particular theory of irreducible complexity had been applied to various examples, none of which are employed by Dr. Girsh. *Id.* at 739-41. The court found that reliance on this theory made ID dependent upon setting "a scientifically unreasonable burden of proof for the theory of evolution." *Id.* at 741. Though Dr. Girsh cites irreducible complexity as an example of a way scientists have detected ID in nature, it is not the primary support for his theory. He refers a number of ways in which arguments for ID can be made, several of which were not present or addressed in the *Kitzmiller* opinion. (R. at 7-8). The fact that the two theories both contain one similar concept does is not sufficient to support a finding that ID is not a science.

The third factor in *Kitzmiller* was the "complete absence" of peer-reviewed publications supporting the theory. 400 F. Supp. 2d at 744. The court noted that peer review is "exquisitely important" in the scientific process and the fact that it was lacking was further evidence that ID was "an interesting theological argument, but...not science." *Id.* at 745. Dr. Girsh, however, was the author of several articles that had been published in "prestigious presses and in academic journals" and his version of ID had been "aired...

among critics in the corridors of major universities and institutions, and...recognized by leading periodicals.” (R. at 16.) His version of ID is not susceptible to the same criticism as that found in the *Kitzmiller* case.

The *Kitzmiller* court’s decision that ID was not a science is what led it to the “inescapable” conclusion that the effect of teaching ID would be to advance religion. Since the theory of ID in the current case is not subject to same finding regarding its scientific nature, the same conclusion cannot be drawn. It was therefore error for the trial court to conclude that the students would receive a religious message from the presentation of Intelligent Design. Further fact finding is required to determine whether the fact that some tenets of Dr. Girsh’s theories lent support to some religions was more than incidental or indirect.

Under the third prong of the *Lemon* test, a court must investigate whether a state action excessively entangles government with religion. In making this determination, a court must “examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” *Lemon*, 403 U.S. at 615. Neither the trial nor appellate court addressed this issue in the present case. It was also not considered in the *Kitzmiller* or *Edwards* opinions. The test is more relevant where there is government financial support for religious institutions or a direct subsidy to church-sponsored schools and colleges. *See, e.g., Lemon*, 403 U.S. 602; *Mueller v. Allen*, 463 U.S. 388. Though political divisiveness can be coupled with other factors to create excessive entanglement, it is important to note that “political divisiveness alone cannot serve to invalidate

otherwise permissible conduct.” *Lynch*, 465 U.S. 668, 683-84. Here, there is nothing to implicate the excessive entanglement inquiry.

The theory of ID proposed and presented by Dr. Girsh does not violate any of the three prongs of the *Lemon* test. The facts of this case are distinguishable from prior ID cases and should be viewed based upon its independent facts. It was therefore error for the trial court to conclude that ID violates the second prong of the *Lemon* test and is prohibited by the Establishment Clause.

B. The ID theory passes the Endorsement Test and does not violate the Establishment Clause

The Endorsement test was first adopted by a majority of the Supreme Court in *County of Allegheny v. ACLU*. 492 U.S. 573 (1989). The Endorsement test has been employed by the Supreme Court and Circuit courts as a “gloss” on *Lemon* that encompasses both its purposes and effect prongs. *Kitzmiller*, 400 F. Supp. 2d 707, 714. It has since become a “lens through which to view ‘effect’, with purpose evidence being relevant to the inquiry derivatively.” *Id.* It involves the determination of what message a challenged action “conveys to a reasonable, objective observer” who knows the challenged conduct’s history and will glean other relevant facts from the face of the policy in light of its context. *Id.* at 715. In *Kitzmiller*, the conduct was evaluated from the viewpoint of both an objective student and an objective adult observer. *Id.* at 715-16.

An objective student in *Kitzmiller* would be imputed with detailed historical and background knowledge and who would interpret the challenged conduct in light of that knowledge, with the level of intellectual sophistication that a child of the relevant age would bring to bear. 400 F. Supp. 2d at 723. An evaluation under the circumstances

present in that case would lead a student to “unquestionably perceive [the action]...as conferring a religious concept [with the school’s seal of approval].” *Id.* at 724. As already noted, the history and background of the ID theory taught by Dr. Girsh is significantly different than that challenged in *Kitzmiller*. Additionally, the relevant child in Dr. Girsh’s class is an “exceptionally talented student[.]” attending a school specially created to concentrate science and math skills. (R. at 5). They would not be measured by the same objective student in *Kitzmiller* but would be held to a higher standard and charged with knowing the different historical background of Dr. Girsh’s particular theory of Intelligent Design.

The *Kitzmiller* court used the objective adult observer standard because the School Board had made their curriculum change a public matter. There is no evidence in the current record to indicate that the Arklatex School Board (hereinafter “Board”) took any of the same steps that were present in the *Kitzmiller* case, such as numerous School Board meetings on the topic, a newsletter sent to every household in the school district, and a letter asking for parental input on the disclaimer. *Id.* at 729-31. The *Kitzmiller* court then decided that objective adults in the community would view the policy as an endorsement of a religious view. *Id.* at 731. The court based this decision on the findings that a reasonable observer would know the social history of creationism in the schools, the singling out of the theory of evolution for criticism, and the fact that the entire community became involved in the debate. *Id.* at 731-32. The facts of Dr. Girsh’s case are, again, dissimilar to those of the *Kitzmiller* case. A reasonable adult in the current case would know the history of Dr. Girsh’s theory, not that of ID found in the

Kitzmiller case, the theory of evolution was not singled out for criticism, and the debate lacked the pervasive community involvement present in *Kitzmiller*.

ID survives the Endorsement test's evaluation of purpose and effect upon the intended audience. It was error for the trial court to conclude that ID teaches the existence of a supreme supernatural is scientifically proven because such an assertion is supported by the facts. ID does not endorse a religious belief in violation of the Establishment Clause under the Endorsement test.

C. ID does not violate the Coercion test and is therefore not a violation of the Establishment Clause

The Establishment Clause guarantees, at a minimum, that a “government may not coerce anyone to support or participate in religion or its exercise,” *Lee v. Weisman*, 505 U.S. 577, 577-78 (1992). The *Lee* case dealt with a requirement that public school students stand and remain silent during a “nonsectarian” prayer at a graduation ceremony. 505 U.S. 577 at 581-83. The decision in that case was based upon the fact that school officials directed the performance of a religious exercise where attendance and participation were obligatory. *Id.* at 586. The court found “the government activity with religious activity...pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school.” *Id.* at 587.

The situation is not the same in Dr. Girsh's classroom. As previously mentioned, whether or not ID is a science is a question of fact which has not been determined. The trial court's determination that students would feel coerced to learn the theory and possibly have anticipated being tested on it does not address the relevant issues.

Assuming, however, for the purpose of this test that ID may be a religion, the mere fact

that it was presented in class does amount to coercion under *Lee*. There was no compulsion to participate in a religious event or exercise. There is no indication in the record that students were expected to learn the material presented or would be expected to be familiar with it in any way.

The fact that a few students were offended by the presentation does not, by itself, meet the coercion test. “We do not hold that every state action implicating religion is invalid if one or a few students find it offensive.” *Id.* at 597. The presentation of information which may conflict with the personal beliefs of students does not amount to a violation of the Establishment Clause. “To endure the speech of...offensive content and then to counter it is part of learning how to live in a pluralistic society...which insists upon open discourse towards the end of a tolerant citizenry.” *Id.* at 591. Dr. Girsh, in presenting both ID and evolution in his classroom, was providing students with both the potentially offensive theories and the means by which to counter them.

The findings by the trial court that Dr. Girsh’s actions violated the applicable Establishment Clause tests are not supported by the facts in evidence. Further fact finding is required in order to answer crucial questions regarding Dr. Girsh’s theory and its status as a scientific or religious matter. It was therefore error for the trial court to grant summary judgment for the defendants on this matter.

III. THE SCHOOL BOARD POLICY PROHIBITING THE PRESENTATION OF INTELLIGENT DESIGN IS A VIOLATION OF THE ESTABLISHMENT CLAUSE

In prohibiting the teaching of Intelligent Design, the Arklatex School Board acted in violation of the Establishment Clause of the First Amendment. The Supreme Court has stated that “[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.” *Lee*, 505 U.S. at 598. It is a well-settled principle of Establishment Clause jurisprudence that “a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion.” *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 839. To prohibit an activity or action simply because of its religious viewpoint is a violation of the Establishment Clause. *Id.* at 830-31.

The School Board Policy on Creationism and ID (hereinafter “Policy”) permits the teaching of alternative theories of origin, except for those of Creationism or Intelligent Design. (R. at 6). The avowed purpose of this new policy was to “avoid Establishment Clause violations...and to avoid the appearance the school endorses any particular belief.” (R. at 5-6). In reality, however, this Policy is in itself a violation of the Establishment Clause because it is hostile to religion. While the Arklatex School Board’s decision to ban the teaching of Creationism may be justified because that theory is completely religious in nature, Dr. Girsh’s version of ID is not.

The School Board’s only reason for banning the presentation of ID was because of its potential religious implications. The purpose of the statute was not to enhance the freedom of teachers to teach what they will or to provide a more comprehensive science

curriculum, objectives the Supreme Court indicated could be valid reasons for the inclusion of new theories on the origin of life. *Edwards*, 482 U.S. at 586. Rather, the School Board was seeking to “diminish academic freedom by removing the flexibility” of teachers to teach any scientific theory, even if the diminished curriculum resulted in less effective and comprehensive science instruction. *Id.* at 586 n.6.

Such a position is the direct opposite of the situation in *Epperson v. Arkansas*. 393 U.S. 97 (1968). *Epperson* was the case in which the Supreme Court struck down statutory prohibitions against teaching evolution. In so doing, they noted that “[t]he State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit. . . the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.” *Epperson*, 393 U.S. at 107. Now, the School Board seeks to do precisely what the *Epperson* Court forbade – prevent the teaching of a theory that they find to be antagonistic to the currently accepted belief. Just as the Arkansas policy was invalid for discriminating in *favor* of non-scientific theories that supported religious theory, so the Arklatex Policy is invalid for discriminating *against* scientific theories which may also support religious views. Both policies are a violation of the Establishment Clause mandate for neutrality.

By refusing to allow any theory which may support religious views, the Arklatex School Board violates the second prong of the *Lemon* test. Rather avoiding the appearance that they endorse any particular belief, the School Board makes it clear they support only those scientific views that do not involve religion. In analyzing the School Board's new policy, it is certainly possible that an objective member of the community,

familiar with the history and background of Dr. Girsh's theory, as well as that of evolution, would view a prohibition on only ID as the School Board's endorsement of explanations that contradict religious beliefs.

At the least, the trial court should have allowed for the presentation of evidence on this issue. Their conclusion that the School Board's policy was not a violation of the Establishment Clause was predicated solely upon their finding that ID was a religious theory. Regardless of whether it is a religious theory doctrine or not, the trial court's dismissal of Dr. Girsh's claim leaves material questions of fact unanswered.

IV. THE SCHOOL BOARD VIOLATED DR. GIRSH'S FIRST AMENDMENT RIGHT TO FREE SPEECH

Dr. Peter Girsh, like Americans everywhere, relied on his right to free speech, even in the classroom. In doing so, he correctly felt free to share information about Intelligent Design with his class in response to repeated questions from his students. The Supreme Court has long held that public employment may not carry with it the requirement that public employees surrender their right to protected speech under the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). The *Pickering* Court formulated a balancing test that weighs the employee's interest in commenting on matters of public concern against the employer's interest in promoting efficiency in its public services. *Id.* at 568.

The *Pickering* test protects an employee's First Amendment rights unless the employer shows a restriction is necessary to prevent disruption of official functions or to insure effective performance by the employee. *Columbus Education Ass'n v. Columbus City School District*, 623 F.2d 1155, 1159 (6th Cir. 1980). When an employee's activities are deemed protected under the *Pickering* test, it must then be demonstrated that this conduct was a "motivating factor" in the unfavorable employment decision. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). Once this is established, the burden shifts to the employer to prove it did not undertake its decision in response to the protected activity but would have reached the same decision regardless of the protected activity. *Id.* at 287.

The facts of this instant case show that Dr. Girsh did indeed comment on a matter of public concern, Intelligent Design. As such, Dr. Girsh's speech was protected under

the First Amendment. Dr. Girsh's interest in addressing a matter of public concern raised by his students outweighed any interest the school had in promoting efficiency. In fact, the real danger to educational efficiency would have been realized if Dr. Girsh had continued to ignore legitimate questions from curious students and thereby contributed to their growing impatience. This constitutionally protected act by Dr. Girsh served as the motivating factor for the school's disciplinary actions. Absent Dr. Girsh's response to students' questions on Intelligent Design, no reprimand would have been handed down. Therefore, this Court should affirm the decision of the Fourteenth Circuit in holding that Dr. Girsh's speech was protected.

In *Pickering*, an Illinois teacher was dismissed for commenting on school funding and criticizing the school board's handling of fund raising issues in a local newspaper. 391 U.S. at 564. The Supreme Court rejected the notion that teachers may be forced to yield their First Amendment rights. *Id.* at 568. The Court weighed the interest of the Illinois teacher in commenting on a matter of public concern against the school's interest in delivering efficient services through its employees. *Id.* After doing so, the Court concluded that the dismissal could not be justified. *Id.* at 575-576. While the statements of the teacher in *Pickering* were in a newspaper instead of the classroom, the principle that they were given on a matter of public concern is still applicable to the present case. The Fourteenth Circuit correctly viewed the topic of Intelligent Design as a matter of public concern. (R. at 18). The classroom interest, media coverage, and legal battles over the issue support only the conclusion that Intelligent Design is indeed a

matter of public concern. Therefore, it must be determined whether Dr. Girsh's comments on a matter of public concern are constitutionally protected.

A necessary element of this determination is whether Dr. Girsh's comments interfered with the school's interest in promoting efficiency. The school's interest may outweigh Dr. Girsh'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). This element is particularly important in this case since, unlike the teacher in *Pickering*, Dr. Girsh made his statements in the course of his official duties.

The record indicates that Dr. Girsh did not volunteer his information about Intelligent Design, but rather responded to repeated questions from students after much hesitation. In doing so, Dr. Girsh in no way impaired the discipline of his superiors or disrupted the harmony among his co-workers. A school is a place that by its very purpose should embrace open dialogue and candid discussion. Dr. Girsh's response to his students' interest was only meant to promote the school's primary interest in education and not to undermine the school itself. When Dr. Girsh addressed the school board policy, he was speaking as a citizen on matter of public policy. The real efficiency interest in this case is honest responses to legitimate questions.

When considering the efficiency standard, it is important to remember that an employee's First Amendment rights are protected unless the employer shows that some

sort of resulting disruption of official functions necessitates a restriction. *Columbus Education Ass'n*, 623 F.2d at 1159. The *Rankin* Court supported the view that some sort of significant interference with the official function of the employer must exist in order to justify a restriction of an employee's First Amendment rights. *Rankin*, 483 U.S. at 388. Here, the record indicates that only two students were so offended at Dr. Girsh's comments that they left one of his classes. (R. at 19). There is no proof of widespread controversy among the faculty, outcry from the student body, or serious anger from many parents. Rather, a few controversial editorials along with some upset parents are being used as a justification for silencing Dr. Girsh. The Fourteenth Circuit held that since Dr. Girsh did not use his discussion of Intelligent Design as a part of his curriculum, no restriction was needed. (R. at 18). Furthermore, the Court viewed Dr. Girsh's speech as protected even if he had incorporated Intelligent Design into the curriculum. (R. at 18). Accordingly, Dr. Girsh's class discussion does not meet the level of interference that is necessary for such a free speech restriction to survive constitutional scrutiny. Dr. Girsh's comments on Intelligent Design are protected under the First Amendment.

The next step in the analysis of the school's actions against Dr. Girsh is the "motivating factor" test. Once it is established that an employee's protected activity served as the primary justification for the adverse employment decision, the burden shifts to the employer to show that the same decision would have been reached in the absence of the protected activity. *Mt. Healthy*, 429 U.S. at 287. In *Mt. Healthy City Board of Education*, a teacher without the benefit of tenure suffered dismissal in substantial part because of speaking out about a new school dress code on the radio. *Id.* at 274. The

Court held that the employer must show that its action against the teacher would have been undertaken even if the protected activity had not taken place. *Id.* at 285.

In this case, there is little doubt that Dr. Girsh's statements on Intelligent Design served as the "motivating factor." The record shows that Dr. Girsh is a very well-educated professional with an outstanding rate of success in the classroom. (R. at 4-5). Dr. Girsh's excellent qualifications, long record of success, and significant volunteer work at the school support the conclusion that only his discussion of Intelligent Design served as the basis for the school's actions. As such, the school's action is a restriction of a constitutionally protected activity.

One of the most important issues involved in this case is that of academic freedom. A hallmark of American Democracy is a commitment to academic freedom. Even where some teachers sought to advocate for the forcible overthrow of the government, the Supreme Court said that academic freedom has a "transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The First Amendment cannot tolerate laws that indoctrinate rather than educate students. *Id.* Here, no one is advocating the overthrow of a government. Rather, the Arklatex School Board has chosen to exclude an idea from the classroom not because it is dangerous to society but because it contradicts the majority view.

It is the rights of the minority and not the majority that the First Amendment exists primarily to protect. A paramount goal of a quality education must be the exposure to differing points of view and the ability to think quickly. The actions of the Arklatex School Board seek, as the state policy did in *Keyishian*, to force all teachers and

classrooms to adhere to one point of view. This policy is in conflict with the highest purposes of education. Great achievement is realized not through unyielding acceptance of one idea but through vigorous debate and intellectual labor that eventually produces a level of excellence unattainable in the absence of critical thinking.

Critical thinking is needed nowhere more urgently than when studying the theory of evolution. Serious disagreement and dissent, though a minority viewpoint, still exists both in the scientific as well as academic communities over the issue of evolution. This provides a rare opportunity for schools to cultivate an essential skill, critical thinking. Rather than indoctrinating students with only one view on the origin of life, schools should present both positions to students and let the theories stand or fall on the merits. Academic freedom requires that teachers be permitted to engage students, as students in this case desired to be, on legitimate educational issues that will enrich a student's learning process. It must be both a chief purpose of the First Amendment and a high aim of the educational system to ensure that all legitimate viewpoints are welcome in the classroom. It should be political correctness and not the cultivation of independent thinking that is unwelcome in the classroom.

Lastly, the issue of religion must be addressed. The record indicates and no one disputes that Dr. Girsh does not adhere to a religious implementation of Intelligent Design. (R. at 8.) Nowhere in his lecture did he discuss religion. (R. at 8). Even so, the possibility that Intelligent Design may give support to some religious view points cannot render it inappropriate for classroom discussion, especially in response to a question. Where a university sought to reject funding to student newspaper with a Christian themed

editorial, the Supreme Court said that “[i]t is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.” *Rosenberger*, 515 U.S. at 832. A serious danger to free speech that must be guarded against is “the chilling of individual thought and expression.” *Id.* at 835.

The theme of the *Rosenberger* case is that the First Amendment does not require the exclusion of certain points of view but rather the equal treatment of all viewpoints. *Id.* Therefore, the issue of Intelligent Design being used by some for religious purposes cannot require its educational exclusion so long as educators treat the theory equally with others. Policies that discriminate against viewpoints that have religious elements are unconstitutional. When a public school sought to exclude a religious student club from meeting after hours on school grounds, the Supreme Court concluded that the school’s action constituted viewpoint discrimination and was therefore impermissible. *Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001). Likewise, where a school district excluded a private organization from showing films because of their religious perspective, the Supreme Court held that the school district violated the Free Speech Clause of the First Amendment. *Lamb’s Chapel*, 508 U.S. at 394.

Based upon the above facts and precedent, the Circuit Court was correct to conclude that there were material questions of fact remaining to be determined. It was therefore error for the trial court to grant summary judgment for the defendants upon this issue.

CONCLUSION

For the above cited reasons, Respondent respectfully requests that this court affirm the decision of United States Court of Appeals for the Fourteenth Circuit reversing the lower court's grant of summary judgment and remanding for the presentation of fact on the relevant issues at trial.

Respectfully submitted,

Counsel for Respondent

APPENDIX

United States Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.