
Docket No. 06-0009

**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 RESPONDENT

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QUESTIONS PRESENTED

1. Whether the allowing or prohibiting instruction on Intelligent Design in public schools violates the Establishment Clause of the First Amendment when 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. Whether the First Amendment right to freedom of speech protects a public school teacher's discussion on the topic of Intelligent Design.

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STATEMENT OF THE CASE

OPINIONS BELOW

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

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution is the pertinent provision relevant to the outcome of this case. The text of the First Amendment is included in the appendix.

STATUTORY PROVISION INVOLVED

The text of the following statutory provision relevant to the determination of this case is also included in the appendix: Arklatex School for Mathematics and Sciences Special School District § 1701.2 – Teaching of Creationism and Intelligent Design Theory.

STANDARD OF REVIEW

The appropriate standard of review is de novo because the issues in this case pose questions of law. Townsend v. Sain, 372 U.S. 293 (1963).

STATEMENT OF FACTS

Dr. Peter Girsh is married with three children and is an active member of his community. (R.5). After graduating from Yale University in 1985 and subsequently receiving his Ph.D. in Biochemistry from Harvard University in 1990, Dr. Girsh became

one of the first faculty members at the prominent Arklatex School for Mathematics and Sciences (ASMS). (R.4,5). Dr. Girsh played an integral role in the establishment of ASMS by approaching the Arklatex legislature. (R.5). In his testimony to the legislature, Dr. Girsh addressed the need for a high school focusing on Arklatex students' math and science skills. (R.5). In 1995, ASMS successfully opened as a public school. (R.4). Although students must apply and undergo an interview process for admittance, ASMS receives public school funding and students receive identical benefits to other public school students in Arklatex. (R.4). All high school students in Arklatex are eligible to apply to ASMS. (R.4).

Currently, Dr. Girsh teaches biology at ASMS. (R.4). During the past decade, he has served on the selection board and steering committee for various school functions. (R.5). Dr. Girsh also served on the school's curriculum committee for the past seven years and as faculty advisor for both the Biology and the Future Engineers of America Clubs for nine years. (R.5). Dr. Girsh's AP Biology students maintain a 100% pass score of "5" on the AP exam for the past ten years. (R.5).

Dr. Girsh is also recognized as a leading proponent of Intelligent Design, the theory that life, living things, and the complexity of the universe are all a product of an intelligent or supernatural cause. (R.4). Due to his extensive knowledge, Dr. Girsh is frequently asked to speak on the subject – even appearing on CNN's *Hardball* and Fox News Network's *The O'Riley Factor*. (R.4). Dr. Girsh is a highly sought-after speaker, not only because of his expertise, but because of his resolute belief that Intelligent Design is a purely scientific theory with absolutely no correlation to religion. (R.4). Dr. Girsh

publicly disagrees with religiously-affiliated organizations, such as the Discovery Institute's Center for the Renewal of Science and Culture's (DICRS), attempt to invalidate established scientific evidence and reinforce Christian concepts with the Intelligent Design theory. (R.4).

Dr. Girsh does admit that Intelligent Design may support some religious notions, such as the Christian creation story found in the Book of Genesis. (R.4). However, he firmly believes that Intelligent Design itself is not a religious theory and should be taught without ever mentioning God. (R.4). More specifically, as a scientist, Dr. Girsh is “interested in the science of Intelligent Design; its religious implication don't concern [him].” (R.4).

Most recently, Dr. Girsh contributed to the Intelligent Design textbook, *From Koalas to Humans* (hereinafter “*Koalas*”) as an editorial board member. (R.5). This textbook was created to provide an alternative to the religiously-affiliated textbooks on the market. (R.5). *Koalas* solely focuses on how the scientific evidence used to substantiate Intelligent Design theories may potentially refute the theory of evolution and never mentions the word “God.” (R.5).

Despite his close involvement with the Intelligent Design theory, Dr. Girsh neither teaches nor discusses the theory at ASMS. (R.5). The school's principal, Dr. Richard Rice, never objected to Dr. Girsh's public commitment to the theory but Dr. Girsh dutifully followed the school's curriculum. (R.5). The Arklatex State Department of Education recognizes that exceptionally talented students attend ASMS and mandates that the school complies with the “exceptional schools” curriculum. (R.5). As part of

this curriculum, biology teachers are strictly prohibited from teaching “non-scientific” evidence and are required to use Department of Education approved textbooks, all of which include the theory of evolution. (R.5).

In accordance with this curriculum, on September 8, 2003, the School Board adopted its new policy, § 1701.2, prohibiting teachers from instructing students on Creationism or Intelligent Design. (R.5). The School Board’s goal was to avoid Establishment Clause violations and to ensure that ASMS did not appear to endorse a particular religion. (R.6).

Several months later during biology class, senior Randall Johnson asked Dr. Girsh why the students were being deprived from learning about a science in which their teacher played such an integral role. (R.6). Despite his desire to maintain an candid relationship with students, Dr. Girsh opted to dismiss class early without answering Randall’s question for fear of violating the School Board’s policy. (R.6). Dr. Girsh’s evasive behavior aroused his students’ curiosity, prompting a barrage of questions the following morning. (R.6).

This time, Dr. Girsh honestly informed his students about the new School Board policy and also shared that he believed the policy unconstitutionally violated the Establishment Clause and his First Amendment right to free speech. (R.7). To appease his inquisitive students, though, Dr. Girsh willingly began to discuss the basics of Intelligent Design theory. (R.7). He described three primary means in which scientists have detected intelligent design in nature. (R.7).

First, Dr. Girsh explained that the irreducible complexity of certain biologically systems suggests that certain life forms cannot be explained with evolution. (R.7). Next, Dr. Girsh pointed to the fact that Intelligent Design theorists have found there is a less than one in a hundred billion trillion trillion trillion chance life would naturally come to exist on any planet in the universe due to the intricate complexity of supporting human life. (R.7). Thus, human life on Earth would be virtually impossible without the assistance of an intelligent being. (R.7). Finally, Dr. Girsh told his students that someone or something must have deciphered the complicated structure of DNA molecules and combinations because DNA functions like an elaborate language more complex than any known computer program. (R.7-8).

During his discussion, Dr. Girsh noticeably never made a reference to “God” or even to the nature of the intelligent designer. (R.8). Encouraged by his silent, captive students, Dr. Girsh displayed his contributions to the textbook *Koalas*, his published articles, and his interview with Bill O’Riley. (R.8). None of these media pieces added any new information to Dr. Girsh’s lecture. (R.8). In fact, the *O’Riley Factor* interview reiterated Dr. Girsh’s perspective that Intelligent Design is an entirely scientific, and not religious, theory. (R.8). At the end of class, Dr. Girsh offered students a pamphlet containing the same information he discussed in class. (R.8).

At school the next day, Dr. Rice informed Dr. Girsh that fifteen parents called to beg Dr. Rice to allow the teaching of Intelligent Design. (R.9). However, Dr. Rice also stated that student, Maya Klinger’s, mother was outraged at Dr. Girsh’s Intelligent Design class discussion. (R.8). Dorothy Klinger felt the lecture had undermined her

efforts to raise Maya as an Atheist and made Maya feel uncomfortable. (R.8). Dr. Rice reminded Dr. Girsh of the new School Board policy and forbid Dr. Girsh from mentioning Intelligent Design in class again. (R.9). When Dr. Girsh began to answer more questions concerning Intelligent Design in class, Maya and two other students left the classroom. (R.9). Dr. Girsh made an attempt to stop them to no avail. (R.9).

The next morning, two editorial letters were sent to the local newspaper, the *Arklatex Tribune*. (R.9). Randall's mother, Ranada Johnson, submitted a letter imploring the State to allow the teaching of Intelligent Design at ASMS. (R.9). Mrs. Johnson observed the effect Dr. Girsh's discussion had on Randall – his renewed enthusiasm in science and overall motivation to excel in school was promising. (R.9). Dorothy Klinger also submitted a letter recommending that the state pull ASMS's funding and stated that Maya had withdrawn from the school. (R.9)

Later that day, Dr. Rice handed Dr. Girsh his personnel file containing two citations for insubordination due to “willful violation of School Board policy § 1701.2” and for “insubordinate disparagement of School Board policies.” (R.9). Dr. Rice also warned Dr. Girsh that another violation would lead to a formal hearing before the School Board to determine his future employment at ASMS. (R.10). In addition, Dr. Girsh received a letter from the School Board signed by both the Superintendent and President forbidding any discussion of Intelligent Design in conjunction with ASMS. (R.10).

The School Board's Superintendent submitted an open letter in the next morning's *Arklatex Tribune* informing readers that Dr. Girsh had been reprimanded and prohibited from teaching Intelligent Design because “the teaching of Intelligent Design

is unacceptable in the Arklatex schools.’’ (R.10). Subsequently, Dr. Girsh filed this suit seeking a declaratory judgment that the School Board’s policy is unconstitutional and monetary damages for the violation of his free speech rights. (R.10).

PROCEDURAL HISTORY

Dr. Peter Girsh filed suit against the Board of Education of the Arklatex School for Mathematics and Sciences Special School District and three individual defendants – Anita Pascal, individually and as President of the Board, Timothy Harlan, individually and as Superintendent of the school, and Richard Rice, individually and as Principal of the school. (R.10). Dr. Girsh’s allegations were two-fold. First, he argued that the School Board’s policy prohibiting the teaching of Creationism or Intelligent Design violated the Establishment Clause by discriminating against only the alternative theories associated with religion. (R.10). Second, Dr. Girsh asserted that the School District violated his First Amendment right to free speech by citing him twice for insubordination. (R.10).

The case went before the Eastern District Court of Arklatex on hearing after the Defendants moved for summary judgment. (R.4). The District Court granted the Defendants’ motion for summary judgment and dismissed Dr. Girsh’s complaint on both claims. (R.14). On appeal to the Fourteenth Circuit Court of Appeals, the court reversed the District Court’s grant of summary judgment and remanded for a trial on the merits. (R.16).

Consequently, the Defendants sought and received a writ of certiorari from the United States Supreme Court to consider the following (R.20):

1. Does either allowing or prohibiting instruction on Intelligent Design in public schools violate the Establishment Clause of the First Amendment where its proponent focuses on the scientific evidence used to support the theory and does not make any assertions regarding the nature of the intelligent designer?
2. Does the First Amendment right to freedom of speech protect a public school teacher's discussion on the topic of Intelligent Design?

SUMMARY OF THE ARGUMENT

I.

The Establishment Clause of the First Amendment prohibits the government from enacting a law respecting an establishment of religion. Dr. Girsh clearly embodies a legitimate secular purpose and thus did not offend the establishment clause because simply informed his students about a variety of scientific interpretations of existing data in an effort to enhance his students' critical thinking skills. Further, to deny discussion of an important scientific issue because it causes discomfort to some would indeed be a violation of the First Amendment. Additionally, Dr. Girsh made no effort to advance religion during his classroom discussion of intelligent design because he did not mention the word "God" nor did he attempt to promote his personal religious beliefs. Finally, because Dr. Girsh was relaying information to his students about the scientific principles supporting the theory of intelligent design, his classroom discussion did not excessively entangle the ASMS with religion.

II.

Dr. Girsh's speech was First Amendment Protected and his constitutional right outweighs the Board's interest in regulating speech. Speech is constitutionally protected if it involves public concern and Dr. Girsh meets the burden of establishing his prima facie case because the subject of Intelligent Design constitutes a matter of public concern. The Board fails to demonstrate it has a justifiable interest in restricting teachers from discussing Intelligent Design; thus, Dr. Girsh's interest in his right to exercise free speech outweighs the Board's interest in maintaining an efficient workplace. As a public school

teacher, Dr. Girsh's academic freedom of speech is vigilantly protected in the classroom. Additionally, a public school may not regulate speech in a manner which favors certain perspectives or beliefs at the expense of others so the Board's new policy violates the viewpoint-neutrality requirement of the First Amendment.

The Board acted in retaliation after Dr. Girsh exercised his First Amendment right to free speech by citing him for two acts of insubordination. In the absence of his protected conduct, the Board would not have implemented its adverse employment action. Dr. Girsh maintained an impeccable employment record and his only two citations were a direct result of the events in question. Accordingly, Dr. Girsh's in-class discussion of Intelligent Design was a motivating factor in the Board's decision and it has no legitimate evidence to show that it would have punished Dr. Girsh in the absence of this protected conduct.

ARGUMENT

I. RESPONDENT’S TEACHING OF INTELLEGENENT DESIGN CAN SERVE A SECULAR PURPOSE AND WHEN PRESENTED WITH SCIENTIFIC EVIDENCE THE EFFECT DOES NOT ADVANCE RELIGION OR EXCESSIVELY ENTANGLE THE GOVERNEMENT WITH RELIGION.

The Establishment Clause of the First Amendment prohibits the government from enacting a law “respecting an establishment of religion.”¹ This guarantees, at a minimum, that the government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that tends to establish a state religion. Lee v. Weisman, 505 U.S. 577, 586 (1992). This fundamental concept of liberty, embodied in the First Amendment, applies to states through the Fourteenth Amendment. Wallace v. Jaffree, 472 U.S. 38, 49-50 (1985). This law applies to public elementary and secondary schools because they are state actors. Id. In Lemon v. Kurtzman, the Supreme Court developed a three-pronged test to be applied on a case by case basis analyzing the particular facts presented to determine whether state action offends the Establishment Clause. 403 U.S. 602, 612-613 (1971).² First, the act must have a legitimate secular purpose. Id. Second, the act’s primary effect must be one that neither advances nor inhibits religion. Id. Third, the act must not result in excessive entanglement of government with religion. Id. State action violates the Establishment Clause if it fails to satisfy any of these prongs. Edwards v. Aguillard, 482 U.S. 578, 583 (1987). The Lemon test is not to be rigidly applied; instead, it is simply a method to draw the appropriate line

¹ U.S. Const, amend. 1.

² Lemon reiterated and synthesized the holdings of Abinoton Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963) and Walz v. Tax Commission, 397 U.S. 664, 674 (1970)

in this often difficult area. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 590 (1989).

A. Respondent's In -Class Discussion of Intelligent Design Served a Legitimate Secular Purpose Because it Focused on Scientific Evidence

Dr. Girsh's in-class discussion served a secular purpose because he focused on scientific evidence supporting the theory of Intelligent Design. The secular purpose prong of the Lemon test does not require that the challenged state action have been enacted in furtherance of exclusively, or even predominately, secular objectives.

Wallace, 472 U.S. at 56. However, a "sincere secular purpose for the contested state action must exist, even if that secular purpose is but one in a sea of religious purposes."

Id. The purpose prong of the Lemon test makes an initial examination as to whether or not the government's actual purpose is to endorse or disapprove of religion. Lynch v. Donnelly, 465 U.S. 668, 690 (1984). Governmental activity may be invalidated only when there is "no question that the statute or activity was motivated wholly by religious considerations." Id.

In Edwards v. Aguillard, a Louisiana statute requiring teachers to teach both evolution and creation science was held unconstitutional because there was no clear secular intent behind the legislation. 482 U.S. 578 (1987). Although Edwards is frequently cited in arguments against the teaching of Intelligent Design, the Court recognized the value of expanding scientific education by noting "teaching a variety of scientific theories about the origins of humankind to school children might be validly done with the clear secular intent of enhancing the effectiveness of science instruction." 482 U.S. 578, 594 (1987). Thus, the Court's ruling in Edwards does not apply to

Intelligent Design theory and can provide no grounds for excluding discussion of design from the public school science curriculum.

Edwards explicitly permits the inclusion of alternatives to Darwinian evolution so long as those alternatives are based on scientific evidence and not motivated by strictly religious concerns. 482 U.S. at 594. Since the Intelligent Design theory is based on scientific evidence rather than religious assumptions, it clearly meets this test.

Additionally, including discussions of design in the science curriculum serves an important goal of academic freedom. FRANCIS J. BECKWITH, LAW, DARWINSIM, AND PUBLIC EDUCATION: THE ESTABLISHMENT CLAUSE AND THE CHALLENGE OF INTELLIGENT DESIGN, 148 (2003). In addition, it provides students a way to resolve scientific controversies-by a careful and fair-minded examination of the evidence. DAVID K. DEWOLF ET AL, TEACHING THE ORIGINS CONTROVERSY: SCIENCE, OR RELIGION, OR SPEECH? 2000 UTAH L. REV. 39 (2000). Unlike Edwards, in the present case, the secular purpose behind Dr. Girsh's intelligent design is apparent.

Assuming, *arguendo*, that Dr. Girsh had a religious as well as scientific purpose for wanting to expose his students to the theory of Intelligent Design, the classroom discussion would still meet the first prong of the Lemon test. Again, the Lemon test does not require that government action have only a secular purpose, but that it have a secular purpose. Lemon, 403 U.S. at 612. Because Dr. Girsh seeks to inform his students about a variety of scientific interpretations of existing data and to enhance his students' critical thinking skills, he clearly evinces a legitimate secular purpose. To deny discussion of an

important scientific issue because it causes discomfort to some would indeed be a violation of the First Amendment.³

B. Respondent Presented Specific Scientific Evidence While Informing His Students About Intelligent Design Without Advancing Religion

Dr. Girsh clearly did not make an effort to advance religion during his classroom discussion of Intelligent Design because he did not mention the word “God” nor did he attempt to promote his personal religious beliefs. The second prong of the Lemon test inquires whether the government’s action actually conveys a message of endorsement of religion. 403 U.S. at 602. In order to determine if an action advances religion, it is first necessary to create a working definition of what constitutes “science.” Alvarado v. City of San Jose, 94 F.3d 1223, 1227 (1996). This has proven to be a difficult task for many courts.

In McLean v. Arkansas Bd. of Educ., Federal District Court Judge William Overton ruled that an Arkansas law requiring the teaching of “creation science” in public schools violated the First Amendment’s Establishment Clause. 529 F.Supp. 1255 (E.D. Ark. 1982). Judge Overton found that creation science does not qualify as science, and as a result, it constituted religion. Id. In making his determination, he relied upon the expert testimony of witnesses that provided criteria for determining whether a theory qualifies as scientific.⁴ Eleven years after McLean, the Supreme Court acknowledged that many well-known scientific theories initially meet resistance from the majority of scientists.

³ See Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) (striking internet restrictions as violating the First Amendment).

⁴ See McLean v. Arkansas Bd. of Educ., 529 F.Supp. 1255, 1267 (E.D. Ark. 1982) “[T]he essential characteristics of science are: (1) It is guided by natural law; (2) It has to be explanatory by reference to natural law; (3) It is testable against the empirical world; (4) Its conclusions are tentative, i.e., are not necessarily the final word; and (5) It is falsifiable.”

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Further, science often involves dispute between competing theories and perspectives. Id. The Daubert court noted, “scientific conclusions are subject to perpetual revision...The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to do so, and that in itself advance.” Id.

For seventy years, scientific views were excluded as evidence inside the courtroom if they failed to be generally accepted by the scientific community. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). The Daubert court disagreed with the “general acceptance” test of Frye. As an alternative, the court noted, trial courts should admit evidence if it is “supported by appropriate validation—i.e., ‘good grounds,’ based on what is known.” Id. at 582. Daubert illustrates a dramatic change in the judicial system’s appreciation of the nature of science.⁵ More importantly, scientific claims are no longer evaluated by the level of popularity among scientists or by the fulfillment of a set of arbitrary criteria. Id. Rather, the test for scientific legitimacy comes from the validation of the empirical research supporting the evidence. Id. at 590. By analogy, the theory of Intelligent Design should not be excluded from the school curriculum at the outset because it is not endorsed by a majority of scientists. Rather, Dr. Girsh should be permitted to present competing theories to the students and allow the students themselves to debate and discuss the merits of the individual theories on the basis of empirical data.

⁵ See Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (extending Daubert to apply to the expert testimony of nonscientists).

Traditionally, Establishment Clause cases have been evaluated using the Lemon test. In more recent Establishment Clause cases the Supreme Court has developed additional tests presented as either glosses on or replacements for the Lemon test.⁶ The Supreme Court has repeatedly recognized there can be no precise Establishment Clause test capable of ready application, and therefore has resisted confining such sensitive analyses to "any single test or criterion." Lynch, 465 U.S. at 678-79 (1984). Because the second prong of the Lemon test focuses on endorsement, courts often use an additional endorsement test. Id. Applying Justice O'Connor's analysis, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that "religion or a particular religious belief is favored or preferred." County of Allegheny, 492 U.S. at 592-593. Justice O'Connor went on to note in her concurrence that a government endorses religion if it "sends a messages 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," Lynch, 465 U.S. at 688 (O'Connor, J., concurring).

Purposeful, deliberate, and intentional efforts to advance or disapprove religion violate the Establishment Clause. Id. at 687-690. Furthermore, not every governmental activity that confers a remote, incidental or indirect benefit upon religion is constitutionally invalid. Id. at 678. The Establishment Clause prohibits only those activities which, in the eyes of a reasonable observer, advance or promote religion or a

⁶ Lemon v. Kurtzman, 403 U.S. 602 (1971) (three- prong test); Lynch v. Donnelly, 465 U.S. 668 (1984) (endorsement test); Lee v. Weisman, 505 U.S. 577 (1992) (coercion test)

particular religious belief. This is an objective inquiry. Bauchman for Bauchman v. West High Sch., 132 F.3d 542 (10th Cir. 1997). A proper reading of Supreme Court precedent establishes that the Establishment Clause prohibits public school teachers from utilizing their positions for the deliberate purpose of endorsing or disapproving religion. Id. at 576.

The decision to apply a particular Establishment Clause test rests upon the nature of the Establishment Clause violation asserted. Freiler v. Tangipahoa Parish Bd. of Educ., 185 F3d. 337 (5th Cir. 1999). Generally, the coercion test is used when students are directed to participate in a formal religious exercise. Id. at 344. The coercion test analyzes school-sponsored religious activity in terms of the coercive effect on the students. Under this test, school-sponsored activity contravenes the First Amendment when (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors. See Lee v. Weisman, 505 U.S. 577 (1992). In Lee the court found that the Establishment Clause forbids the offering of prayers by members of the clergy at public middle school and high school graduation ceremonies. Id. The Court also noted in Lee that, “[t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact.” Id. at 598.

Clearly, Dr. Girsh did not deliberately or purposely conduct a classroom discussion about Intelligent Design for the purpose of advancing religion. Throughout the lesson, students intrigued by the topic were asking questions and encouraging the discussion. This is generally what is expected of students at this level. These students

are of superior intellect and thrive in a classroom that embraces lively discussion. It would be unreasonable to conclude that Dr. Girsh informed his students of the scientific arguments supporting the theory of Intelligent Design for the purpose of promoting religion.

C. Properly Structured Curriculum Authorizing the Teaching of Intelligent Design Through Scientific Evidence Would Not Promote Excessive Government Entanglement With Religion

Because Dr. Girsh was relaying information to his students about the scientific principles supporting the theory of Intelligent Design, his classroom discussion did not excessively entangle the ASMS with religion. The third prong of the Lemon test requires that the act must not result in an excessive entanglement of government with religion. 403 U.S. at 612-613. In order to determine whether government entanglement with religion is excessive, the court must take into consideration the character and purpose of the institution involved. Id. at 615. In the case at bar, the institution involved is a special school for students that excel in science and mathematics. Students enrolling in this special school do so with the intention of extensively studying math and science. According to the record, after Dr. Girsh's classroom discussion of Intelligent Design, his students became curious and eagerly researched both evolution and intelligent design. (R.6).

Courts have acknowledged that the average student in a normal public school setting may be immature and impressionable, therefore may not possess the intellectual sophistication necessary to understand the scientific arguments behind Intellectual Design. See Webster v. Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990).

However, the same cannot be said about students enrolled in ASMS. In order to attend ASMS, students must first submit an application and then go through an interview process. (R. 4). Further, in Edwards the court noted that the “state exerts great authority and coercive power through mandatory attendance requirements.” 482 U.S. at 584.

Although ASMS is a public school, students are not required to attend. Only the students that voluntarily submitted applications and agreed to interviews are enrolled for classes at the school. (R.4). Simply stated, reasons that may prevent the teaching of Intelligent Design in a regular public school simply are not applicable in the present case.

Furthermore, the argument that teaching Intelligent Design in public schools violates the Establishment Clause because it assumes the existence of a supreme being, seems ironic because both the theory of Evolution and the Big Bang, as taught in public schools today, presume the absence of a supreme being. Matthew J. Brauer, et al, “*Is it Science Yet?: Intelligent Design, Creationism and the Constitution*,” WASH. U. L. Q. 2005. This clearly shows favoritism to an Atheistic view. The Supreme Court has repeatedly declared that the Establishment Clause requires government neutrality and forbids government hostility toward religion. For example, in Lynch v. Donnelly, Chief Justice Burger observed, “nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance of all religions and forbids hostility toward any.” 465 U.S. at 673.

Dr. Girsh, as well as other experts in the theory of Intelligent Design, concedes that there are coincidental similarities between Intelligent Design and some aspects of mainstream religion. (R.4). However, Dr. Girsh did not focus on these similarities while

discussing the subject with his class. Rather, Dr. Girsh explained the scientific evidence to his students without mentioning the word “God.” (R.5). Given this specific set of circumstances, it seems that the ASMS is prohibiting the teaching of intelligent design simply because it coincidentally resembles some aspects of religion. It is clear, however that the Establishment Clause does not exist to prohibit the teaching of legitimate science. Again, schools should not prohibit the teaching of scientific material simply because it is contrary to religious doctrines, and states should not forbid the teaching of legitimate science simply because it may coincide with religious doctrines. Courts have repeatedly supported this idea.

The Ninth Circuit found in Brown v. Woodland Joint Unified Sch. Dist., that “mere consistency with or coincidental resemblance to a religious practice does not have the primary effect of advancing religion.” 27 F.3d 1373, 1380 (9th Cir. 1994). Additionally, the Seventh Circuit stated that, “the Establishment Clause is not violated because government action happens to coincide or harmonize with the tenets of some or all religions.” Fleischfresser v. Dir. of Sch. Dist. 200, 15 F.3d 680, 698 (7th Cir. 1994). While the state undoubtedly has the right to prescribe curriculum for public schools, it does not have the right to forbid the teaching of any scientific theory, doctrine, or other subject merely because it may be contrary to various religious doctrines. Epperson v. Arkansas, 393 U.S. 97 (1968).

The ASMS School Board should allow the teaching of Intelligent Design in the classroom to further the strong public policy that favors academic freedom. There is a possibility that students are simply missing out on important and ground-breaking

scientific theories. Recent discoveries in a variety of fields – molecular biology, cell biology, paleontology, comparative anatomy, genetics, and physics—have persuaded many scientists to re-examine the Intelligent Design hypothesis. DEWOLF ET AL, supra. Although there are many arguments that support the theory of Intelligent Design, Dr. Michael Behe has detailed how “irreducibly complex” molecular machines and circuits in cells can best be explained by reference to an intelligent cause rather than an undirected process such as natural selection. See MICHAEL J. BEHE, DARWIN’S BLACK BOX: THE BIOCHEMICAL CHALLENGE TO EVOLUTION, 12 (1996).

In a recent case, United States District Court Judge John E. Jones held that reading a disclaimer which required students to hear a statement mentioning Intelligent Design as an alternative to Darwin’s theory of evolution violated the constitution. See Kitzmiller v. Dover, 400 F. Supp. 2d 707 (M.D. Penn. 2005). The Supreme Court addressed a similar issue in Stone v. Graham when the Court invalidated a state statute requiring a posting of a copy of the Ten Commandments on a public classroom walls. 449 U.S. 39 (1980). Further the court noted, “although it is not per se unconstitutional to introduce religion or religious concepts during school hours, there is a fundamental difference between introducing religion and religious concepts in “an appropriate study of history, civilization, ethics, comparative religion, or the like.” Id. at 42. Unlike Kitzmiller and Stone, in the present case, Dr. Girsh did not subject the students to the Ten Commandments, nor did the faculty at ASMS read aloud a mandatory disclaimer.

Rather, Dr. Girsh’s class enthusiastically engaged in free discussion of conflicting scientific theories. Dr. Girsh informed his students in an appropriate manner

about the strengths and weakness of evolution and of Intelligent Design. Students pursued their study of Intelligent Design outside of the classroom and repeatedly asked Dr. Girsh to answer their questions while during class discussion. (R.9). Therefore, after application of the tests articulated by the Supreme Court in Lemon, Lynch, and Lee, Dr. Girsh's classroom discussion of Intelligent Design does not violate the Establishment Clause.⁷

II. RESPONDENT'S SPEECH WAS PROTECTED BY THE FIRST AMENDMENT AND PETITIONER IMPLEMENTED ITS ADVERSE EMPLOYMENT ACTION IN RETALIATION ONLY BECAUSE RESPONDENT EXERCISED HIS RIGHT TO DISCUSS INTELLIGENT DESIGN IN A PUBLIC SCHOOL.

Dr. Girsh's in-class discussion was First Amendment protected and the School Board reprimanded him purely in retaliation. Teachers in public schools may not be forced to surrender the First Amendment rights they would possess as ordinary citizens. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill., 391 U.S. 563, 568 (1968). Protecting constitutional freedoms, especially in the realm of public schools, is an essential characteristic of this country's foundation. Epperson., 393 U.S. 97. This Court has found that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." Keyishian v. Bd. Of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967). As an employer, though, the State's interest in regulating employees' speech clearly differs from its interest in regulating ordinary citizens' speech. Pickering, 391 U.S. at 568. Therefore, courts must exercise vigilance to

⁷ Lemon v. Kurtzman, 403 U.S. 602 (1971) (three prong test); Lynch v. Donnelly, 465 U.S. 668 (1984) (endorsement test); Lee v. Weisman, 505 U.S. 577 (1992) (coercion test)

prohibit a state's abuse of power by ensuring that the employer is truly regulating conduct based on disruption of public functions, and not based on a disagreement over content.

Rankin v. McPherson, 483 U.S. 378, 384 (1987).

In order to determine whether Dr. Girsh's Intelligent Design discussion qualifies as First Amendment protected speech, this Court must apply what is known as the Pickering balancing test. See Pickering, 391 U.S. 563. This Court will consider whether Dr. Girsh's interest in his right to free speech outweighs the Board's interest in sustaining an effective public service by means of its employees. Id. at 568. First, Dr. Girsh's speech must be a matter of public concern to be First Amendment protected. Id. His in-class discussion is protected unless the Board can demonstrate the restriction on Dr. Girsh's speech was crucial to the success of its overall operation. Rankin, 483 U.S. at 388. In this situation, the debate concerning Intelligent Design plainly constitutes speech on a matter of public concern and the Board fails to demonstrate Dr. Girsh's speech disrupted the efficiency of ASMS. Further, the policy itself infringes on the viewpoint-neutral requirement of the First Amendment. Ultimately, Dr. Girsh's in-class discussion was First Amendment protected.

In response to Dr. Girsh's exercise of his right to free speech, the Board retaliated with two citations of insubordination. To determine whether the Board acted in retaliation, this Court will continue applying its burden shifting test. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); see also Pickering, 391 U.S. 563. Initially, the burden is on Dr. Girsh to prove his speech was constitutionally protected but the burden shifts back to the Board to demonstrate its interest outweighs this

constitutional right. See Mt. Healthy, 429 U.S. at 287. Once this Court determines Dr. Girsh’s speech is First Amendment protected and that this right outweighs the School Board’s interest, the burden then shifts to Dr. Girsh to establish his conduct was a “‘motivating factor’” in the Board’s adverse employment action. Id. Finally, the burden shifts back to the Board to show by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. Id. In this instance, the record clearly indicates that Dr. Girsh’s citations were a direct result of the protected conduct and it is unlikely that the Board would have reprimanded Dr. Girsh otherwise based upon his prior perfect employment record. Therefore, the Board reprimanded Dr. Girsh in retaliation for the exercise of his First Amendment right to free speech.

A. Respondent’s In-Class Intelligent Design Discussion Was First Amendment Protected Because His Right To Speech Outweighs Any Potential Interest Of The School Board.

1. Respondent’s speech is protected because it involved a matter of public concern.

The controversy surrounding the Intelligent Design theory is unmistakably a matter of public concern; thus, Dr. Girsh’s speech is First Amendment protected. This Court constitutionally protects speech involving matters of public concern – issues that are of interest to the community for social, political, or other reasons. Connick v. Myers, 461 U.S. 138 (1983). This type of speech is not only a form of self-expression, it epitomizes self-government. Id. at 145. Moreover, speech involving matters of public concern occupies the “‘highest rung of the hierarchy of First Amendment values.’” Id. at 145 (quoting NAACP v. Claiborne Hardware, Co., 458 U.S. 886, 913 (1982)). To determine whether an employee’s speech involves a matter of public concern, this Court

must determine the content, form, and context of the speech, based on the facts given in the record. See id. at 147 (finding that an Assistant District Attorney's self-made questionnaire distributed to her co-workers constituted a matter of public interest because one question asked about the pressure to work in a political campaign); Rankin, 483 U.S. at 386 (determining an employee's opinion concerning the attempted assassination of the President plainly dealt with a matter of public concern).

The subject matter at issue here is undeniably a matter of public concern. The theory of Intelligent Design is greatly controversial and consequently appears regularly in the media. Dr. Girsh is highly regarded for his features and commentary on Intelligent Design. (R.4). Although it is to be expected that professionals such as scientists or other Intelligent Design theorists maintain an interest in Dr. Girsh's work, the record indicates that the interest in this topic exceeds expectations. Dr. Girsh has appeared on nationally televised news programs and there is clearly a market for textbooks like *Koalas*. (R.4, 5). Furthermore, once the content of Dr. Girsh's in-class discussion became public, the community's attention was instantly roused, demonstrated by the heated letters sent to the *Arklatex Tribune*. (R.9-10). The form and context of Dr. Girsh's discussion also establish that his speech touches on a matter of public concern. The theory of Intelligent Design peaked inquisitive students' interest and their questions bolster the notion that Dr. Girsh's discussion concerns a matter of public interest. (R.6) Dr. Girsh acted in a manner which he deemed appropriate and candidly answered his students' questions. Based on the content, form, and context of his speech, provided in the record, it is indisputable that Dr. Girsh's discussion involves a matter of public concern.

2. The School Board fails to demonstrate an interest that outweighs Dr. Girsh's First Amendment right.

Since Dr. Girsh's speech addressed a matter of public interest and is First Amendment protected, his interest in the right to free speech outweighs the Board's interests in restricting the discussion of Intelligent Design with its new policy. This Court must consider the employee's interest in exercising his First Amendment right and the government employer's interest in maintaining a proficient workplace. Pickering, 391 U.S. at 568. The burden shifts to the employer in this part of the balancing test so speech is protected only if the employer's interest outweighs the interest of the employee. See e.g., Rankin, 483 U.S. 378; Connick, 461 U.S. 138; Pickering, 391 U.S. 563. A government employer may justify its regulation of speech in numerous ways; thus, the manner, time, and place in which the speech is delivered are all relevant. See Rankin, 483 U.S. at 388.

This Court must consider the effect of the employee's expression and whether it hindered the "effective functioning of the public employer's enterprise." Id. Avoiding interference with work, co-worker relationships, or the speaker's job performance are all compelling state interests. See id.; Pickering, 391 U.S. at 572-73 (despite some factual errors, a teacher's critical letter published in newspaper was protected and did not justify dismissal because there was no evidence of poor performance in his daily duties or of any interference with the school's normal operation); but see Lytle v. City of Haysville, Kan., 138 F.3d 857 (10th Cir. 1998) (police officer's speech was not protected because his disclosure to the press concerning a confidential investigation significantly reduced

workplace morale and also diminished the public's confidence and loyalty to the police department).

In this case, Dr. Girsh merely performed his duties as a teacher and responded to student questions about Intelligent Design, a subject in which he is well-versed. Dr. Girsh's discussion occurred during his biology class in a public school, not an unusual setting for a teacher to inform students of a scientific theory like Intelligent Design. (R.6). According to the record, Dr. Girsh did not attempt to force students to accept the theory as absolute truth or advocate the theory in a religious manner. Although three students left the classroom, the record does not indicate that there was any major commotion during this process. (R.9) In fact, according to the affidavits of two students present at the time, Dr. Girsh's class was interested and eager to learn more about Intelligent Design. (R.9). Thus, there is no question as to a decline in Dr. Girsh's job performance. (R.9). There is also no evidence of discord among ASMS's teachers or staff – the school appears to have operated normally and effectively. Considering the absence of any significant disruption in the school's operation, the Board fails to demonstrate it has a justifiable interest in restricting teachers from ever discussing Intelligent Design, especially if the subject arises in response to student questions and not as part of the curriculum.

It is important to note that Dr. Girsh would nevertheless be constitutionally protected if he included Intelligent Design as part of the biology curriculum for two reasons. First, this Court recognizes that the transcendent value of safeguarding constitutional freedoms is most important in the community of American schools.

Keyishian, 385 U.S. at 603. Second, the Board’s policy § 1701.2 discriminates against what it believes to be a religious viewpoint and therefore violates the viewpoint-neutrality requirement of the First Amendment. See Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

This Court acknowledged that “[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.” Sweezy v. State of New Hampshire, 354 U.S. 234, 250 (1957). Accordingly, academic freedom of speech is vigilantly protected in the classroom. Keyishian, 385 U.S. at 603. In this case, Dr. Girsh’s students were exceptionally intelligent students, voluntarily attending a high school specializing in math and science. Dr. Girsh wanted to preserve an open relationship with his students so he encouraged regular questions and in-class group discussions. (R.6). By first telling the class about the Board’s policy, Dr. Girsh could explain the reason for withholding his knowledge of the Intelligent Design theory. (R.7). Since evolution is already part of the biology curriculum, Dr. Girsh’s information provided students with a novel counterpoint and strengthened his honest relationship with the class – an essential aspect of teaching because “[s]cholarship cannot flourish in an atmosphere of suspicion and distrust.” Sweezy, 354 U.S. at 250.

Finally, it is important to note that the Board’s policy itself violates the First Amendment’s viewpoint-neutrality requirement.⁸ A government employer is constitutionally prohibited from regulating speech in a manner which favors certain

⁸ See U.S. Const. Amend. I.

viewpoints or beliefs at the expense of others. Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993). Particularly, this Court found that religion should not be considered to be an isolated, distinct subject, but should be viewed as a perspective from which a variety of issues can be considered and addressed. Rosenberger, 515 U.S. 819. Therefore, an employer must maintain neutral when faced with religious and nonreligious viewpoints. Epperson, 393 U.S. at 104. The First Amendment does not allow a public school to require that “teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.” See id. (holding that Arkansas’ statute prohibiting teachers from teaching evolution in public schools, colleges, and universities violates the First Amendment).

ASMS’s biology curriculum strictly prohibits the teaching of “non-scientific” evidence but the students’ textbooks do include the theory of evolution. (R.5). Courts have consistently held that schools do not possess the right to “prohibit...the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.” Id. at 107. The Board’s new policy § 1701.2 specifically discriminates against Creationism and Intelligent Design.⁹ It is well-established that Creationism is a pure religious theory but Dr. Girsh considers Intelligent Design to be a wholly scientific theory.¹⁰

Regardless, the curriculum allows ASMS teachers to teach the theory of evolution and the Board may not limit teachers from providing another viewpoint if it discriminates

⁹ See § 1701.2 – Teaching of Creationism and Intelligent Design Theory.

¹⁰ THERESA WILSON, EVOLUTION, CREATION, AND NATURALLY SELECTING INTELLIGENT DESIGN OUT OF THE PUBLIC SCHOOLS, 34 U. TOL. L. REV. 203 (2003).

against a religious viewpoint. See e.g., Good News Club v. Milford Central School, 533 U.S. 98 (2001) (prohibiting a Christian children’s club from meeting at a New York public school after hours was unconstitutional viewpoint discrimination); Rosenberger, 515 U.S. 819 (denying funds created by the University to a Christian newspaper violated the First Amendment’s viewpoint-neutrality requirement); Lamb’s Chapel, 508 U.S. 384 (preventing a church from showing a religious film at a public school was content based discrimination). The Board’s policy is discriminatory based on one narrow interpretation of Intelligent Design. (R.4). The Board’s statute denies students from gaining a thorough grasp of an important topic, the creation of life, and the “exclusion of several views on [this] problem is just as offensive to the First Amendment as exclusion of only one.” Rosenberger, 515 U.S. at 831.

Ultimately, Dr. Girsh’s in-class discussion was First Amendment protected and the Board fails to demonstrate a justifiable interest in restricting Dr. Girsh’s academic speech.

B. The School Board’s Two Citations For Insubordination Were Given Because Respondent Exercised His Right To Free Speech; Therefore, Its Adverse Employment Action Was Violative Of His First Amendment Rights.

The Board reacted in retaliation after Dr. Girsh exercised his First Amendment right by citing him for two acts of insubordination and would not have done so in the absence of the protected conduct. Since the first part of the Pickering balancing test weighs in favor of Dr. Girsh, this Court must next consider whether the protected speech was a motivating factor in the Board’s employment decision. Mt. Healthy City, 429 U.S. 274 (1977). In this step of the balancing test, the burden shifts back to the employee to

demonstrate that his protected conduct was a substantial factor in the employer's adverse employment action. Id. Finally, this Court must then provide the Board an opportunity to show by a preponderance of the evidence that it would have still reprimanded Dr. Girsh even in the absence of the protected conduct. Id.

In the present case, Dr. Girsh actively played a role in students' lives by serving as a faculty advisor and also participated in the preservation of the school he helped establish. (R.5). The record indicates that Dr. Girsh excelled as a biology teacher at ASMS – all of his AP Biology students have earned a perfect “5” on the AP exam for the past 10 years. (R.5). Additionally, students evidently feel comfortable enough with Dr. Girsh, as a teacher and supporter, to ask challenging questions and initiate open discussions. (R.6). There is no indication of any prior employment issues or problems; therefore, Dr. Girsh's protected conduct clearly was a motivating factor for the Board's decision to render punishment.

Lastly, the Board has no legitimate evidence to show that it would have punished Dr. Girsh in the absence of his in-class discussion. When Dr. Rice handed Dr. Girsh his employment file, there were two insubordination citations listed – one for each day of his in-class discussion of Intelligent Design. (R.9,10). In Mt. Healthy, the teacher had been involved in numerous altercations with co-workers prior to discharge for disclosing the contents of a work memorandum to a local radio station. Id. at 282. In that instance, the school took these prior problems into consideration when it made the decision to fire the teacher. Id. The record in this case shows no history of complaints or trouble during Dr. Girsh's ten years of employment at ASMS. He has a perfect employment record and as a

result, the Board cannot provide a justifiable reason for reprimanding him and then threatening him with a hearing to determine future employment. The Board lacked proper grounds for enforcing any type of adverse employment action against Dr. Girsh. The Board's disciplinary measures were taken in retaliation for Dr. Girsh's protected conduct and it would not have acted in the same manner in the absence of this conduct.

CONCLUSION

For the above cited reasons, Respondent respectfully requests this Court to affirm the Fourteenth Circuit Court of Appeals decision to reverse the District Court's grant of summary judgment and remand for a trial on the merits.

APPENDIX

U.S. Const. Amend. I

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

§ 1701.2 – Teaching of Creationism and Intelligent Design Theory

(a) Definitions:

(1) “Creationism” is the belief in the literal interpretation of the account of the creation of the universe and all living things as found in the Book of Genesis.

(2) “Intelligent Design” is the theory that nature and complex biological structures were designed by an intelligent being and were not created by chance.

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