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Dr. Steve Abrams
Chairman of the State Board of Education
Mrs. Kathy Martin
Mrs. Connie Morris
120 S.E. Tenth Avenue
Topeka, Kansas 66612

Dear Mr. Abrams, Mrs. Martin and Mrs. Morris:

The argument as presented by Mr. Calvert and the Intelligent Design witnesses (Evolution = Atheism = Religion = State Endorsement) is, in some aspects, correct, but where it counts, it is severely incorrect.

Issues:

1. Whether the U.S. Supreme Court found atheism to be a religion?

2. Whether evolution instruction in public schools is an advancement of religion in violation of the Establishment Clause?

Citations:

A. <u>Ricci v. Ralls</u>, 2004 WL 1147195, (Cal.App. 3 Dist., 2004)(unpublished decision).

B. <u>Reed v. Great Lakes Companies, Inc.</u>, 330 F.3d 931 (7th Cir. 2003).

C. <u>County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter</u>, 492 U.S. 573, 610, 109 S.Ct. 3086, 3110 (1989).

D. <u>Books v. City of Elkhart</u>, 235 F.3d 292, 307 (7th Cir. 2000).

E. <u>Warner v. Orange County Dep't of Probation</u>, 173 F.3d 120, 120-2[illegible] v. McCaughtry, 2004 WL 257133, (W.D.Wis., 2004)(unreported case).

G. Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680, 688, (7th Cir. 1994).

H. Wells v. City and County of Denver, 257 F.3d 1132, 1152 (10th Cir. 2001).

I. Otero v. State Election Bd. of Okla., 975 F.2d 738, 740 (10th Cir. 1992).

J. Smith v. Board of School Com'rs of Mobile County, 827 F.2d 684 (11th Cir. 1987).

Analysis:

1. Judicial Treatment of Atheism as a Religion: In this jurisdiction, the 10th Circuit operates on the assumption that atheism is a religion. Wells v. City and County of Denver, 257 F.3d 1132, 1152 (10th Cir. 2001) (assuming, without deciding, that atheism is a religion for purposes of the free exercise clause in the context of not permitting Winter Solstice display on City property); Otero v. State Election Bd. of Okla., 975 F.2d 738, 740 (10th Cir. 1992)("we will assume, without deciding, that atheism is a religion for First Amendment purposes"). Other courts have put some thought into whether atheism is a religion. In Reed v. Great Lakes Companies, Inc., 330 F.3d 931, 934 (7th Cir. 2003), the court examined atheism in the scope of Title VII and employment. Although the court ultimately decided the plaintiff did not produce evidence that he was discriminated against, the court did review "cases which hold that religious freedom includes the freedom to reject religion--"religion" includes antipathy to religion." An employee cannot be fired because his employer dislikes atheists. The court stated, "[i]f we think of religion as taking a position on divinity, then atheism is indeed a form of religion. Id.; see also, Ricci v. Ralls, 2004 WL 1147195, (Cal.App. 3 Dist., 2004)(unpublished decision)(in the scope of employment discrimination an atheist is entitled to the same protection as a member of any organized religion). The Seventh Circuit cited many cases to support the proposition that atheism equals religion: County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 589-90, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989); Wallace v. Jaffree, 472 U.S. 38, 52-53, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985); Books v. City of Elkhart, 235 F.3d 292, 307 (7th Cir. 2000); Warner v. Orange County Dep't of Probation, 173 F.3d 120, 120-22 (2d Cir. 1999). See also, Kaufman v. McCaughtry, 2004 WL 257133, (W.D.Wis., the religious freedom guaranteed by the First Amendment without fear of penalty. The parties disputed whether the free exercise clause applies to plaintiff's case because it is unclear whether

atheism qualifies as a religion in need of protection under the free exercise clause. Although this case did not require an answer to that question, the court cited the Seventh Circuit's determination that atheism is a form of religion for Title VII purposes. See also, Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680, 688, (7th Cir. 1994) (where district court has before it one who swears or (more likely) affirms that he sincerely and truthfully holds certain beliefs that comport with general definition of religion, court is comfortable that those beliefs represent his religion and that general working definition of religion for free exercise purposes is any set of beliefs addressing matters of "ultimate concern" occupying "place parallel to that filled by God" in traditionally religious persons)(citing Welsh v. United States, 398 U.S. 333, 340, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970)); Torcaso v. Watkins, 367 U.S. 488, 495, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) (religion does not have to be theistic in nature to benefit from constitutional protection).

a. What do these cases really mean? In County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 610, 109 S.Ct. 3086, 3110 (1989), the U.S. Supreme Court stated,

> the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths. A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed.

In Allegheny, the court does not say "atheism is a religion"; instead the Seventh Circuit has liberally construed the Court's statement "a secular state establishes neither atheism nor religion as its official creed" to mean atheism equals religion. Allegheny certainly does not state "'religion'" includes antipathy to religion."

b. Again the Seventh Circuit has liberally interpreted the U.S. Supreme Court. In Wallace v. Jaffree, 472 U.S. 38, 52-55, 105 S.Ct. 2479, 2487-2489 (1985), the Court places atheism in the correct context adjacent to religion. The Court states:

> Broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain

> from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects--or even intolerance among "religions"--to encompass intolerance of the disbeliever and the uncertain.

c. To recap, the Court is really saying: the First Amendment is broad enough to encompass believers and non-believers and in terms of statutes that characteristically prohibit discrimination on the basis of religion, inherent in that statute is the prohibition on discrimination on the basis of no religion, but this does not mean that atheism in and of itself is a religion.

2. Is the instruction of evolution advancing or inhibiting any religion? It is one thing for the courts to recognize that an individual may not be discriminated against because she does not carry any particular religious ideology. It is quite another for the jump to be made from preventing discrimination to a finding that evolution equates to atheism and is therefore the advancement of religion and a violation of the Lemon Test.

a. In my earlier analysis I mentioned McLean v. Arkansas Bd. of Education, 529 F.Supp. 1255 (E.D. Ark. 1982) in which the defense argued that evolution was, in effect, a religion, and that by teaching it the schools created an establishment problem that could be redressed only by giving balanced treatment to creation science. The court responded that if creation science was, in assuming that evolution was a religion or religious tenet, the remedy would be to stop teaching it, not to establish another religion in opposition to it, said the court. However, the court

added, it is established in the case law, and perhaps also in common sense, that evolution is not a religion and that teaching it does not violate the establishment clause.

b. The flip side of this issue is what happens if a court does determine that evolution is a religion. In Smith v. Board of School Com'rs of Mobile County, the district court held that the instruction of evolution was equivalent to advancing a religion and therefore should be taught in tandem with creation. Id., at 827 F.2d 684, 695 (11th Cir. 1987) (implicit in the district court's opinion is the assumption that what the establishment clause actually requires is "equal time" for religion). The Eleventh Circuit held that the "district court's opinion in effect turns the establishment clause requirement of 'lofty neutrality' on the part of the public schools into an affirmative obligation to speak about religion. Id. Such a result clearly is inconsistent with the requirements of the establishment clause. Id. Therefore, the 11th Circuit clearly agrees with the principle that evolution is not a religion.

c. Calvert claims that teaching evolution affects students' religious beliefs and is "atheistic dogma". In my opinion that would depend on how the subject is presented. If the instructor tells the class that if they hold some religious notion about the origin of life they are wrong, then the line perhaps has been crossed. If evolution is taught so that the student is left to his own analysis of the subject and can contrast that independently with his religious beliefs then this method does not establish or inhibit any religion. The Lemon test has not been violated.

My arguments regarding Mr. Calvert's formula can be summarized thus: First, there appear to be no cases in which the judiciary has stated that evolution is the equivalent of atheism. Moreover, many scientists who do embrace evolution are not atheists. Categorically defining evolution as a dogma of atheism is incorrect.

Secondly, while the courts have identified the need to protect atheists from discrimination as inherent in the Constitution and Amendments, this does not mean that atheism in and of itself is a religion in the same sense as Christianity, Islam, Judaism, Native American spirituality, or Voo Doo. Without these two elements, the formula fails and there cannot be demonstrated any state endorsement of religion. et al. v. Tangipahoa Parish Board of Education, et al., 975 F. Supp. 819 (D. La. 1997); Selman, et al. v. Cobb County School District, et al., 2005 WL 83829 (N.D. Ga.); Epperson, et al. v.

Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L. Ed. 2d 228 (1968); Edwards, Governor of Louisiana, et al. v. Aguillard, et al., 482 U.S. 578, 107 S.Ct. 2573, 96 L. Ed. 2d 510 (1987); and Peloza v. Capistrano Unified School District, et al., 782 F.Supp. 1412 (C.D. Ca., 1992). These clearly stand for the proposition that public schools must remain secular.

Cordialmente,

IRIGONEGARAY & ASSOCIATES

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PLI:MSW