
Docket No. 2005 – 113

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

October Term, 2006

**BOARD OF EDUCATION OF THE ARKLATEX SCHOOL OF
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 allowing or prohibiting instruction on Intelligent Design in public schools violates 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. 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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The decision and order of the United States District Court for the Eastern District of Arklatex is contained in the Official Record (R.11-14). The decision and order of the United States Court of Appeals for the Fourteenth Circuit is also contained in the Official Record (R.16-19).

CONSTITUTIONAL PROVISIONS INVOLVED

The text of the following Constitutional provision relevant to the determination of this case is included in the appendix: U.S. Const. amend. I.

STANARD OF REVIEW

This case implicates the First Amendment and poses questions of law. The Court has an obligation to “make an independent examination of the whole record” to ensure that the lower court judgment is not a “forbidden intrusion on the field of free expression.” New York Times Co. v. Sullivan, 376 U.S. 254, 284-286 (1964). Thus, the appropriate standard of review is *de novo*. Rankin v. McPherson, 483 U.S. 378, 385-86 (1987).

STATEMENT OF THE CASE AND FACTS

Respondent Dr. Peter Girsh (“Dr. Girsh”), a teacher at the prestigious Arklatex School for Mathematics and Sciences (ASMS), is a 1985 graduate of Yale University. (R.4). He earned his Ph.D. in Biochemistry from Harvard University and is a prominent commentator on the subject of Intelligent Design. (R.4). Intelligent Design is a theory that “nature and complex biological structures were designed by an intelligent being and were not created by chance.” (R.6).

Dr. Girsh has appeared on television programs such as CNN’s Hardball and Fox News’ O’Riley Factor to promote his view that Intelligent Design is exclusively a scientific theory. (R.4). Although Dr. Girsh is an active member of the First Christian Church of the Community, he has publicly disavowed religious organizations, such as the Discovery Institute’s Center for the Renewal of Science and Culture (“DICRS”), which seek to utilize the theory of Intelligent

Design to incorporate religion into science as a means of promoting Christianity. (R.4-5).

Although Dr. Girsh admits in his affidavit that Intelligent Design may lend credibility to some creation based religions, he states in his affidavit that Intelligent Design can and should be taught as a scientific theory, without mentioning God or religion. (R.4). Dr. Girsh recently contributed to a textbook entitled *From Koalas to Humans* (hereinafter “Koalas”), which strictly addresses the scientific evidence supporting Intelligent Design, and explains how empirical scientific evidence may rebut evolutionary theories. (R.4-5). The textbook “suggests the universe was purposefully created,” but it does not specify a creator or deal with the nature of a possible creator; it also does not use the word “God.” (R.5).

ASMS is a state funded school for extremely talented students, which focuses on math and science. (R.5). Dr. Girsh joined the faculty of ASMS shortly after the school was founded in 1995. (R.5). During his tenure at ASMS, Dr. Girsh has been on the selection board and steering committee for many school functions and has been the faculty advisor for the Biology Club and the Future Engineers of America Club for the past nine years. (R.5). During the past ten years, all of Dr. Girsh’s AP Biology students have scored a “5” on the AP Biology exam—the highest score possible. (R.5).

The Arklatex State Department of Education requires ASMS to use the state specified Biology curriculum, which prohibits the teaching of “non-scientific” evidence. (R.5). Prior to the events giving rise to this suit, Dr. Girsh had strictly adhered to this mandated curriculum and used only state approved textbooks, which solely advocated the theory of evolution, and had never discussed Intelligent Design with students. (R.5).

On September 8, 2003, the School board instituted a new rule prohibiting teachers from teaching students Creationism or Intelligent Design, § 1701.2 – Teaching of Creationism and Intelligent Design Theory. (R.5). The new policy allows for the teaching of theories of origin that differ from evolution, unless those theories are Creationism or Intelligent Design. Intelligent

Design is defined in the policy as “the theory that nature and complex biological structures were designed by an intelligent being and were not created by chance.” (R.6). The policy also prohibits the teaching of any theory similar to Creationism or Intelligent Design. (R.6).

Since ASMS is a school for exceptional students, Dr. Girsh encouraged his students to candidly ask questions and participate in classroom discussions. (R.6). On January 26, 2004, just before Dr. Girsh’s lecture about Punnett Squares and genetics was to begin, Randall Johnson raised his hand and informed Dr. Girsh that several of the students had “googled” his name and discovered Dr. Girsh’s book about Intelligent Design. (R.6). Randall demanded to know why he had been deprived of this science. (R.6). Dr. Girsh dismissed class early without answering the question. (R.6).

The next day in class Dr. Girsh was immediately barraged with questions about Intelligent Design. (R.6). Dr. Girsh informed the students that the school board had passed a policy prohibiting the teaching of Intelligent Design. (R.6-7). After he informed the class that he believed the policy was unconstitutional, Dr. Girsh began to explain the theory of Intelligent Design, saying evolution alone could not explain the origin, complexity, and diversity of life. (R.7).

Irreducible complexity was the next topic Dr. Girsh addressed. This is the theory that cilium within a cell wall are irreducibly complex and could not have evolved because each component is essential and none could function without all of the others. (R.7). Girsh also shared findings from physicists from as early as the 1960’s which show that human life is complex and dependent on a such a precise balance of physical factors that the mere existence of life is highly improbable. (R.7). He followed this discussion by explaining how physicists have calculated that there is less than a one in a trillion chance life would naturally come to exist on even one planet in the universe. (R.7). Dr. Girsh explained that, based on these findings,

Intelligent Design theorists believe life on Earth, in particular human life, was improbable absent a universe that was fine-tuned to support life. (R.7).

Finally Dr. Girsh explained how DNA may support the theory of Intelligent Design. (R.7). DNA functions like a written code with complexity far surpassing any computer software ever created. (R.7). Intelligent Design theorists assert that someone or something beyond random chemistry must have attributed meaning to DNA molecules. (R.8). The foundational elements of Intelligent Design were then explored, and Dr. Girsh showed the students the teaching materials he had developed on the subject. (R.8). Dr. Girsh also showed a video clip of his interview with Bill O'Riley, in which Dr. Girsh stated, "Intelligent Design is a purely scientific, not religious, theory." (R.8). During that class, Dr. Girsh neither mentioned God, nor did he describe what he referred to as "some sort of intelligent agent." (R.8). The next day the principal, Dr. Rice, confronted Dr. Girsh about his class discussion from the previous day. (R.8). Dr. Rice informed Dr. Girsh that although he had received fifteen calls from parents begging him to allow Girsh to continue teaching Intelligent Design. (R.8). He also stated that he had received a call from Dorothy Klinger, the mother of one of Dr. Girsh's students, who was an Atheists and was offended that the school would allow teaching that undermined her efforts to raise her children as Atheists. (R.8-9). Dr. Rice informed Dr. Girsh that Maya Klinger, one of his students, felt uncomfortable with his discussion of Intelligent Design and its religious implications. (R.8). Dr. Rice reminded Dr. Girsh of the new policy and told him not to discuss Intelligent Design in the classroom again. (R.9).

In a subsequent class, Dr. Girsh's students asked follow-up questions regarding the previous discussion of Intelligent Design. (R.9). Dr. Girsh began to answer questions about how the scientific evidence he had previously discussed countered the theory of evolution. (R.9). Three students, including Maya Klinger, left the classroom stating, "I can't hear this." (R.9). When Dr. Girsh tried to stop the students, they said they would come back when he started

acting like a “teacher instead of a preacher.” (R.9). Maya Klinger withdrew from ASMS claiming she felt uncomfortable in class due to the Intelligent Design discussions. (R.9). Although she could not provide any specific examples, she stated that the discussion had alienated from her from her peers. (R.9). Randall Johnson’s mother wrote a letter to the *Arklatex Tribune* claiming the discussion was the “spark” that ignited her son’s interest in science and pushed him to spend hours researching biology. (R.9). Randall now plans to attend college and pursue a biology degree. (R.9).

Dr. Rice approached Dr. Girsh and presented him with his personnel file, specifically pointing out two acts of insubordination; the first was on January 26, 2004, and the second was on January 27, 2004. (R.9). Dr. Rice told Dr. Girsh another violation would result in a formal School Board hearing to discuss his future employment. (R.10). Dr. Rice also presented Dr. Girsh with a letter from the School Board “prohibit[ing] [Dr. Girsh] from, in any shape, form, or fashion, mentioning ASMS in conjunction with Intelligent Design.” (R.10). The next day the *Arklatex Tribune* published a letter from the Superintendent stating that Dr. Girsh had been reprimanded and was forbidden from discussing Intelligent Design with his students. (R.10). The letter also stated, “the teaching of Intelligent Design is unacceptable in the Arklatex Schools.” (R.10). Dr. Girsh filed suit in the United States District Court for the Eastern District of Arklatex, arguing the School Board’s policy forbidding the teaching of Creationism or Intelligent Design violated the Establishment Clause and the School Board’s disciplinary action against him violated his right to free speech. (R.10). The School Board moved for summary judgment, arguing the facts entitle them to judgment as a matter of law. (R.10). The trial court granted summary judgment. (R.14). The Fourteenth Circuit Court of Appeals reversed the lower court’s judgment on the grounds that there remained unresolved questions of material fact. (R.15).

PROCEDURAL HISTORY

Dr. Girsh filed an action in the United States District Court for the Eastern District of Arklatex, Judge Hubert P. Franklin III presiding, against the Board of Education of the Arklatex School of Mathematics and Sciences Special School District (“School Board”) and three related individuals alleging violation of the First Amendment to the United States Constitution. (R.3).

Dr. Girsh argued two points. First, he argued that the School Board’s policy prohibiting the teaching of Creationism, Intelligent Design, and similar theories of origin violated the Establishment Clause of the First Amendment due to its bias against religion. (R.10). Second, he argued that the School Board violated 42 U.S.C. §1983 by reprimanding him in retaliation for the exercise of his First Amendment right to free speech. (R.11). The District Court found these arguments unpersuasive and granted summary judgment for the School Board. (R.14). Dr. Girsh appealed to the United States Court of Appeals for the Fourteenth Circuit, Chief Judge Maxwell Wilkerson presiding. (R.15). The appellate court found that there were unresolved questions of material fact and reversed the judgment of the District Court. (R.19). Following the appellate decision, the School Board sought and received a writ of certiorari from the United States Supreme Court to consider the following:

3. Whether allowing or prohibiting instruction on Intelligent Design in public schools violates 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.
4. Whether the First Amendment right to freedom of speech protects a public school teacher’s discussion on the topic of Intelligent Design.

SUMMARY OF THE ARGUMENT

I.

The Establishment Clause of the First Amendment to the United States Constitution protects citizens' right to freedom of religion. U.S. Const. amend. I. The United States Supreme Court has stated that not only does the Establishment Clause prohibit government advancement of religion, it also prohibits government inhibition of religion. Lemon v. Kurtzman, 403 U.S. 602 (1971). The Petitioner contends that instruction of Intelligent Design in public school classrooms is a violation of the Establishment Clause because it is a government act that advances religion. This contention is incorrect for several reasons.

First, there is still an unresolved question of material fact as to whether the theory of Intelligent Design is religious in nature. Though the theory may lend support to certain religious beliefs, it is a scientific theory supported by the same type of empirical data that supports the theory of evolution. Dr. Girsh believed Intelligent Design could and should be taught in a completely scientific way, without mentioning God or postulating as to the nature of the divine creator.

Second, Dr. Girsh's discussion of Intelligent Design in his AP Biology Class passed all three prongs of the Lemon test. Lemon requires the Court to determine the purpose of governmental action. Id. Dr. Girsh's purpose in introducing the topic into his classroom was completely secular. He felt that concurrently teaching multiple theories of origin, such as Evolution and Intelligent Design, was a good way to highlight the strengths and weaknesses of both theories and to enrich scientific debate. Lemon also requires that the action neither advance nor inhibit religion. Id. Even if Intelligent Design does have a religious component, Dr. Girsh did not advance religion by introducing it into the classroom because of the way he presented the theory. Dr. Girsh discussed both Evolution and Intelligent Design and used the same type of empirical data to support both. He simply compared the two for the sake of highlighting their

differences. Lemon lastly requires that the action not constitute an excessive entanglement of government and religion. Id. The mere mention of a purely scientific theory that is thought by some to have religious implications and a brief overview of its main tenets does not constitute excessive entanglement.

Third, teaching Intelligent Design is no more coercive to non-religious students than teaching Evolution is to religious students. The fact that the theory presupposes the existence of a divine creator makes it no less legitimate as a scientific theory than one that presupposes the non-existence of a divine creator. Spending a class period or two discussing Intelligent Design during the course of an entire semester dedicated to Evolution can clearly not be considered coercion into religion.

Fourth, a School Board policy singling out Creationism or Intelligent Design for prohibition from the classroom is a violation of the Establishment Clause. When the State singles out for exclusion only theories consistent with Creationism and Intelligent Design—that is, theories that postulate life on Earth was not created by chance—it is acting in a way that is antagonistic to religion. Prohibiting the teaching of a legitimate scientific theory simply because it may lend support for certain religious beliefs is almost as antagonistic an act toward religion as possible. When most major religions are premised on the idea that a divine being created the universe, a policy allowing *only* theories that do not include a divine creator is clearly a violation of the neutrality requirement of the Establishment Clause.

II.

The First Amendment protects a school teacher's right to discuss Intelligent Design in his classroom. The Supreme Court has laid out a four-part burden shifting analysis to determine whether a public employee was improperly disciplined for engaging in conduct protected by the First Amendment. Pickering v. Board of Education, 391 U.S. 563 (1968). Here, that analysis shows that the School Board violated 42 U.S.C. §1983 when it reprimanded Dr. Girsh in

retaliation for his discussion of Intelligent Design and for criticizing the new School Board policy prohibiting such discussion.

First, Dr. Girsh was speaking on a matter of public concern. Courts of appeal in the various circuits have employed a variety of analyses in determining whether a matter is one of public concern, but at least content, form, and context are relevant considerations. Connick v. Myers, 461 U.S. 138, 147-148 (1983). The objective content of Dr. Girsh's discussion, Intelligent Design and the School Board policy prohibiting its instruction, was a matter of inherent public concern. The form and context show that Dr. Girsh's subjective motive in making the statements was not to advance some religious belief, but to enhance the science education of his students.

Second, the interests served by allowing such discussion outweigh the interests of the School Board in such discussion. There is no evidence that the restriction in question was necessary to prevent disruption in the ordinary function of the school or to insure the quality of Dr. Girsh's performance. Therefore, the discussion is by the First Amendment.

Third, Dr. Girsh has made a showing that his protected statements were a motivating factor in the disciplinary action taken against him. The only two negative marks on his personnel file were for insubordination relating to his classroom discussion of Intelligent Design and his criticism of the School Board policy prohibiting such discussion.

Fourth, the School Board has failed to show by a preponderance of the evidence that it would have taken the same disciplinary action against Dr. Girsh in the absence of his discussion of Intelligent Design and his criticism of the School Board policy. Therefore, the disciplinary action taken by the School Board against Dr. Girsh violated 42 U.S.C. §1983.

ARGUMENT

I. TEACHING INTELLIGENT DESIGN IN PUBLIC SCHOOLS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT, BUT A SCHOOL BOARD POLICY SINGLING OUT INTELLIGENT DESIGN FOR PROHIBITION DOES VIOLATE THE ESTABLISHMENT CLAUSE.

Teaching Intelligent Design in public schools does not violate the Establishment Clause. To determine whether a state action violates the Establishment Clause of the First Amendment, the Court generally applies a three-pronged test. Edwards v. Aguillard, 482 U.S. 578, 582-83 (1987)(citing Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971)). Dr. Girsh’s teaching did not violate any part of this three-prong test.

Even if the theory of Intelligent Design does have some religious implications, it is well established that the government may accommodate the free exercise of religion. Lee v. Weisman, 505 U.S. 577, 587 (1992). The Establishment Clause does not guarantee that the government will have no affiliation with any religion at any time. What it does guarantee, at a minimum, is that “the government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, and tends to do so.’” Id. Allowing public school teachers to incorporate the theory of Intelligent Design into the classroom along with the theory of evolution in order to broaden students’ science education is not coercive action.

Singling out Intelligent Design for prohibition in public schools because of its alleged religious implications is a violation of the Establishment Clause. The Establishment Clause imposes a requirement of neutrality of government action toward religion. Rosenberger v. Virginia, 515 U.S. 819, 839 (1995). Allowing instruction on Evolution and other theories of origin that presuppose the non-existence of a divine creator is no more neutral than excluding Intelligent Design from public classrooms because it presupposes the existence of a divine creator. If Evolution is seen as a proper subject for study in public schools then Intelligent

Design, an equally plausible theory supported by the same type of empirical evidence, must be allowed as well.

A. Dr. Girsh's Discussion of Intelligent Design Did Not Violate the Establishment Clause and was not Coercive Government Action.

There exists a legitimate question of fact as to whether Dr. Girsh's discussion of Intelligent Design was religious as a matter of law. Whether or not Intelligent Design has a religious component, the Court must apply the *Lemon* test to determine whether the teaching of Intelligent Design is a violation of the Establishment Clause. Lemon, 403 U.S. at 612-613. The first part of the *Lemon* test requires that the actual purpose of any state action be neither endorsement or disapproval of religion. Edwards, 482 U.S. at 585 (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984)). The second prong of the test requires that government action neither advance nor inhibit religion. Lemon, 403 U.S. at 612-613. The third prong of *Lemon* requires that the action in question not constitute an excessive entanglement of government with religion. Id.

Allowing Intelligent Design in public school curriculum does not coerce students to support or participate in religion or its exercise, which is a practice prohibited by the Establishment Clause. Lee v. Weisman, 505 U.S. 577, 587 (1992). It is no more coercive to non-religious students to allow theories that presuppose the existence of a divine creator than it is coercive to religious students to allow theories that presuppose the non-existence of a divine creator. Also, Dr. Girsh discussed Intelligent Design for only two class periods in the midst of an entire semester of instruction on Evolution.

1. Dr. Girsh's discussion of Intelligent Design satisfies all three prongs of the *Lemon* test.

This first part of the *Lemon* test is satisfied because Dr. Girsh's purpose in introducing Intelligent Design into the classroom was secular; he wanted to enhance the quality of his students' science education. The Supreme Court opened the door to this type of situation by

stating, “[T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction.” Edwards, 482 U.S. at 594. In Edwards, after applying the *Lemon* test the Supreme Court found a Louisiana law unconstitutional because it served no secular purpose and was primarily intended to promote a specific religious belief. Id. at 587. The law limited academic freedom by requiring Creationism to be taught concurrently with Evolution, which the Court determined was an endorsement of a specific religious belief. Id. (stating the law was unnecessary because no other law in Louisiana prohibited public school teachers from “supplant[ing] the present science curriculum with” alternative theories to evolution.”). Unlike Edwards, the Court in Lynch determined that a city’s action was not unconstitutional where a nativity scene was placed on city property for the secular purpose of celebrating a public holiday and not for the purpose of endorsing Christianity. Lynch, 465 U.S. at 691

This case can be distinguished from Edwards because Dr. Girsh’s actions were intended to expand the science education available to his students and not for the purpose of excluding the teaching of evolution or for promoting a particular religious belief. Dr. Girsh’s case is similar to Lynch because both cases deal with the religious implications of a secular act that appears non-secular. Id. at 690. Although the subject of Intelligent Design may have religious implications, Dr. Girsh’s purpose introducing it into the academic setting was secular in that was meant to promote debate about differing theories regarding the origins of life. The issues discussed in the AP Biology class were “scientific in nature” and dealt with purely “quantifiable and empirical evidence.” (R.16). Dr. Girsh also presented ample evidence of scientific data, scientific studies, and articles in scientific journals that clearly identify Intelligent Design as a legitimate scientific theory. (R.16). In addition, Dr. Girsh is a well educated scientist who, prior to the events of January 27, 2004, openly stated in both television appearances and in print his desire to segregate religion from the scientific study of Intelligent Design. (R.4).

The second part of the *Lemon* test is satisfied, as the main result of teaching Intelligent Design in tandem with the theory of Evolution, as Dr. Girsh did, is not the advancement or inhibition of religion. The Supreme Court has determined that any state action that has a primary effect of advancing religion violates the Establishment Clause. Edwards, 482 U.S. at 582-83 (Citing Lemon, 403 U.S. at 612-613). The Fifth Circuit, in addressing this leg of the *Lemon* test, found a mandatory disclaimer of evolution unconstitutional, because it included a specific reference to the “Biblical version of Creation” and was intended to encourage students to think about religious theories. Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 346 (5th Cir. 1999) (holding the singling out of one particular religious ideology in the disclaimer directly and “impermissibly advances religion thereby violating the second prong of the *Lemon* test.”). However, the Supreme Court made clear in Lynch that indirect or remote benefit to a religion does not violate the second prong of the *Lemon* test. Lynch, 465 U.S. at 682-83 (contrasting indirect benefit to religion and substantial aid to religion). Unlike Freiler, where the disclaimer had a clear and apparent religious agenda that conferred a benefit upon a specific religious group, Dr. Girsh’s science-based Intelligent Design discussion conferred only a tangential and unintentional benefit upon religion. In the midst of open discussion regarding Intelligent Design, not once did the topic of God or religion surface. Dr. Girsh limited the discussion to the same type of scientific and empirical data used to support the theory of evolution. A reasonable jury could find that teaching Intelligent Design in conjunction with the theory of evolution does not advance religion.

Similarly, the teaching of Intelligent Design does not result in an endorsement of religion. The Supreme Court has incorporated the “endorsement test” as a refinement of the first two prongs of the *Lemon* test. County of Allegheny v. American Civil Liberties Union Greater, 492 U.S. 573, 593 (1989) (holding the government cannot endorse religion in either its purpose or effect). The endorsement test should be applied in a reasonable common sense manner. Id. In a

concurring opinion in another case, Justice O'Connor outlined how the endorsement test should be applied. Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 34-35 (2004) (O'Connor J. concurring). She stated that the test should seek to ensure that government speech does not limit a person's "standing in the political community" or show a favored status to a particular religious group, and must be applied under a reasonable person manner and be placed in context. Id. (finding an objective standard is necessary to avoid the "heckler's veto," where any person of one ideology can make an Establishment Clause claim against a government for a perceived endorsement of religion). Justice Kennedy further explained this approach in a 1992 case, stating, "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." Lee v. Weisman, 507 U.S. 577, 597 (1992) (specifying that Establishment Clause jurisprudence is a "delicate and fact-sensitive one"). One Maryland District Court case incorrectly applied the endorsement standard by combining an overly broad application of Edwards with an overtly biased recitation of the history of the theory of Intelligent Design. Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707, 712, 716-717 (implying Intelligent Design has no scientific backing and is merely a fundamentalist invention). Despite the holding of the Court in Kitzmiller, a reasonable jury in this case would likely find that no endorsement of religion occurred, considering the purely scientific nature of the empirical data Dr. Girsh used to explain the theory of Intelligent Design and the fact that there was no mention to God or religion whatsoever.

The third prong of the *Lemon* test requires that government action "must not result in excessive entanglement of government and religion," and Dr. Girsh's lecture of Intelligent Design passes this prong of the test. Lemon, 403 U.S. at 612-613. In 1988 the Supreme Court held that providing funding to religious based organizations that provide educational and

counseling services to adolescents does not constitute an excessive entanglement of government and religion, even though the counselors taught on “matters that are fundamental elements of religious doctrine.” Bowen v. Kendrick, 487 U.S. 589, 590-91 (1988). In 2000 the Supreme Court upheld a finding that funding of religiously based parochial schools is not an excessive entanglement of government and religion. Mitchell v. Helms, 530 U.S. 793, 794 (2000) (holding federal funding of schools is not a law respecting an establishment of religion merely because private religious schools received funding). Dr. Girsh limited his teaching to scientific theory based on empirical facts and data. There was nothing overtly or directly religious about the way he presented the theory of Intelligent Design. In fact, he had never discussed it with students before, gave only a brief overview of the theory to his class, expressed no intention of testing his students on the subject, and was simply responding to questions from his students about a theory of origin they had been introduced to outside of class. If providing funding directly to religious counselors and religious schools does not amount to excessive entanglement, then surely allowing a biology teacher to introduce the theory of Intelligent Design into the classroom for a very limited purpose does not constitute an excessive entanglement of government and religion.

2. Dr. Girsh’s discussion of Intelligent Design was not coercive government action.

Including Intelligent Design in public school curriculum will not coerce students “to support or participate in religion or its exercise,” nor will it establish a state religion or religious faith. Lee v. Weisman, 505 U.S. 577, 587 (1992). In Lee the Supreme Court held that prayer at public school graduations that was led by clergy invited by school officials was a violation of the Establishment Clause because it had a coercive effect upon non-religious students who attended. Id. at 577. Unlike Lee, no coercive affect is evident in this case. The link between Dr. Girsh’s purely scientific version of Intelligent Design and religion is tangential at best. The fact that the theory of Intelligent Design presupposes the existence of a divine creator, as do most mainstream

religions, makes it no less legitimate as a scientific theories. Maya Klinger's mother, Dorothy Klinger, said that the teaching of Intelligent Design in Maya's AP Biology class undermined her efforts to raise her daughter as an Atheist. True as this may be, singling out for prohibition scientifically legitimate theories of origin that happen to lend tangential support to religion undermines the efforts of other students' parents to bring them up non-Atheist, as well as the efforts of teachers like Dr. Girsh to give their students the most complete science education possible. Including instruction on Intelligent Design *alongside* instruction on the theory of Evolution is useful in highlighting the strengths and weaknesses of both theories, according to Dr. Girsh. If religious students are not coerced by theories that presuppose the non-existence of a divine creator, atheist students are surely not coerced by theories that presuppose the existence of a divine creator. A reasonable jury could find that the inclusion of Intelligent Design alongside other theories of origin would have no coercive effect in violation of the Establishment Clause. The Appellate court's determination should therefore be upheld, remanding the case so that a jury may make a determination on the issues mentioned above.

B. The School Board's Restriction of the Teaching of Intelligent Design Violates the Establishment Clause Because It Shows Hostility Toward Religion by Singling Out Scientific Theories Which May Be Used to Support Religion.

Assuming, arguendo, that the School Board is able to show that Intelligent Design is religious in nature, the Establishment Clause prohibits them from being antagonistic toward Dr. Girsh's teaching. The Supreme Court has clearly stated that although the government cannot take action to advance religion, it also cannot be antagonistic toward religion. Rosenberger v. Virginia, 515 U.S. 819, 839 (1995). In Rosenberger, the Supreme Court determined that the University of Virginia's efforts to marginalize and exclude a theistic viewpoint from state funded publication "risked fostering a pervasive bias or hostility to religion, which would undermine the very neutrality the Establishment Clause requires." Id. at 845-46. The Supreme Court cited a 1947 Establishment Clause case in which the Court cautioned that any efforts to "enforc[e] the

prohibition against laws respecting the establishment of religion . . . [should not] inadvertently prohibit the government from extending its . . . benefits to all its citizens without regard to their religious belief.” Id. at 839. The School Board has created an environment that is antagonistic toward religion by singling out for prohibition theories of origin that *may* be used to support religion.

As much as Intelligent Design lends support to some religions, the theory of Evolution it gives credence to Atheism. Atheism, just like a religion, is structured around a set of beliefs regarding the existence of divine beings. Atheists just happen to believe divine beings do not exist. In this case, Maya Klinger’s parents complained that Dr. Girsh’s teaching undermined their efforts to raise their daughter as an Atheist. (R.8). The Klingers had no problem with the theory of Evolution, because it did not run contrary to their beliefs. Evolution presumably ran contrary to the beliefs of non-Atheist students, but they students studied Evolution everyday in Dr. Girsh’s class in an attempt to gain a well-rounded scientific education. Assuming it is objectionable to force Atheist students to learn about a theory of origin which presupposes the existence of a divine creator, it would be equally objectionable to force non-Atheist students to learn about a theory of origin which presupposes the non-existence of a divine creator. Obviously teaching Evolution to non-Atheists is not seen as objectionable by the State, so teaching Intelligent Design to Atheists should be equally unobjectionable. Policies such as School Board Policy §1701.2 implicate State support of *only* non-religious beliefs, since they are overtly antagonistic toward any theory which even tangentially lends support to a religious understanding of origin. The School Board’s policy is not neutral, as required by the Establishment Clause, but instead favors Atheists at the expense of followers of most other religions. The Supreme Court has concluded that requirement of religious neutrality is not violated by government action “following neutral criteria and evenhanded policies . . . [that] extend benefits to recipients whose ideologies and viewpoints, including religious ones, are

broad and diverse.” Id. at 839. In Lee, the Court determined a University’s actions were not neutral because they singled out one perspective for exclusion. Lee, 505 U.S. at 587. Similarly, School Board Policy § 1701.2 clearly violates the neutrality requirement, because it singles out Creationism and Intelligent Design for exclusion with the effect of closing off discussion of non-Atheistic theories.

The School Board’s policy also violates the “endorsement test,” which was first mentioned in Justice O’Conner’s concurrence in Lynch. 465 U.S. at 692. Petitioner argues this test as a reason for precluding the teaching of intelligent design, because it may favor Christians. This is a misstatement of the “endorsement test.” Justice O’Conner found it “crucial . . . that a government practice not have the effect of communicating a message of government endorsement *or disapproval* of religion.” Id. (emphasis added). Thus, it would be inappropriate to forbid teachers at ASMS from teaching either Intelligent Design or Evolution, because the preclusion of either theory gives implied support for the other. The School Board’s policy was blatantly anti-religious, and resulted in a favored and protected status for Atheists, while marginalizing scientific theories which may give credence to the religious beliefs of Christians, Jews, Muslims, and Hindus.

Dr. Girsh’s teaching of Intelligent Design in conjunction Evolution was not a violation of the Establishment Clause, as a matter of law, because a reasonable jury could find that the theory of Intelligent Design is scientific and not religious in nature, that Dr. Girsh’s speech was not in violation of the *Lemon* test, and that his speech did not have a coercive effect upon students in his AP Biology class. Even if a jury determines that the teaching of Intelligent Design does have a religious component, the School Board’s policy prohibiting the teaching of Intelligent Design, violates the neutrality requirement under the Establishment Clause, because the policy is antagonistic to religions based on belief in a divine creator.

II. THE SCHOOL BOARD'S REPRIMAND OF DR. GIRSH WAS UNLAWFUL BECAUSE IT WAS IMPROPERLY MOTIVATED BY HIS PROTECTED SPEECH.

The School Board violated 42 U.S.C. §1983 when it disciplined Dr. Girsh for engaging in conduct protected by the First Amendment. The determination of whether a public employer has properly disciplined an employee for allegedly protected speech requires a four-part burden-shifting analysis. Pickering v. Board of Education, 391 U.S. 563, 571-572 (1968); Connick v. Myers, 461 U.S. 138, 145 (1983). If the public employee's speech is a matter of public concern and his interest in engaging in such speech outweighs the State's interest in restricting it, he is said to have passed the *Pickering* test and his speech is protected by the First Amendment. Connick, 461 U.S. at 145. If the speech passes the *Pickering* test, the employee has the burden of proving that his speech was a motivating actor in his employer's adverse employment action. Mt. Healthy School District Board of Educ. v Doyle, 429 U.S. 274 (1997). If the employee carries that burden, his employer has the opportunity to show by a preponderance of the evidence that it would have acted the same way in the absence of the protected speech. Id. In the case at hand, all four parts of the burden-shifting analysis have been satisfied and therefore the School Board's reprimand of Dr. Girsh was unlawful.

A. Dr. Girsh's Classroom Discussion of Intelligent Design and His Comments Regarding School Board Policy §1701.2 Pass the *Pickering* Test and are Therefore Protected by the First Amendment.

Dr. Girsh's discussion of Intelligent Design and his criticism of the School Board policy prohibiting instruction of the same were protected by the First Amendment because they pass the *Pickering* test. The first part of the *Pickering* analysis is determining whether the matter on which the public employee was speaking was a matter of public concern. Pickering, 391 U.S. at 571-572. Courts have differing approaches to this determination, but in any case the content, form, and context of the speech in question are the most relevant considerations. Connick, 461 U.S. at 147-148; O'Connor v. Steeves, 994 F.2d 905 (C.A.1 Mass. 1993); See, e.g., D. Gordon

Smith, Note, "Beyond Public Concern: New Free Speech Standards for Public Employees," 57 U.Chi.L.Rev. 249, 258-61 (1990) (surveying case law). Once the speech is determined to be a matter of public concern, the next step is balancing "the interest of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. The Court must weigh the interests of the employee with the interest of the public employer in promoting the efficiency of the services it provides through its employees. Id. at 556. These two steps are known as the "*Pickering* test." Connick, 461 U.S. at 166. If the speech passes the *Pickering* test, it is protected by the First Amendment. Lytle v. City of Haysville, 138 F. 3d 857, 863 (10th Cir. 1998).

That the teaching of Intelligent Design in public schools is a matter of intense public concern is evident from its presence as of late in the news media, the telephone calls received by Principal Rice from the parents of fifteen of Dr. Girsh's students requesting a continuation of the Intelligent Design discussion, and the letters to the local newspaper discussing the propriety of teaching Intelligent Design in science classrooms. Clearly, the matter is one of public concern. The School Board has presented insufficient evidence to prove that its restriction on Dr. Girsh's speech was necessary to promote the efficient operation of ASMS. Dr. Girsh's interest in commenting on the matter of public concern and his students' interest, as citizens, in receiving information about a matter of public concern outweigh the interests of the School Board in curbing such speech. Therefore, Dr. Girsh's speech satisfies the *Pickering* test.

Dr. Girsh's discussion of Intelligent Design and his comments regarding School Board policy §1701.2 were matters of public concern, and his interest in commenting on those issues outweighs the School Board's interest in curtailing such speech. The *Pickering* test balances the interest of the employee in "commenting upon matters of public concern" with the interest of the public employer "in promoting the efficiency of the public services it performs through its

employees.” Pickering v. Board of Education, 391 U.S. 563, 568 (1968). This balance is necessary in order to accommodate the dual role of public employers as providers of public service and as government entities operating under the constraints of the First Amendment. Rankin v. McPherson, 483 U.S. 378, 384 (1987). Though the Supreme Court has recognized that federal judicial review of every personnel decision of public employers would hamper the performance of public functions, it has also strongly emphasized the importance of protecting free discourse in the academic setting. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). In Keyishian, Justice Brennan said, “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). A teacher’s First Amendment right to free speech should therefore should be protected “unless the employer shows that some restriction is necessary to prevent the 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). The evidence in the case at hand shows not only that the topic of Intelligent Design and its inclusion or exclusion from the classroom are matters of public concern, but also that the School Board’s restriction on Dr. Girsh’s speech regarding Intelligent Design and School Board Policy §1701.2 was not necessary to prevent the disruption of the official function of ASMS or to insure Dr. Girsh’s effective performance. Dr. Girsh’s interest in commenting on matters combined with the interest of his students, as citizens, to receive information about a matter of public concern, outweigh the School Board’s interest in restricting Dr. Girsh’s speech, and therefore the speech passes the Pickering test.

1. Dr. Girsh's classroom discussion of Intelligent Design and his comments regarding School Board Policy §1701.2 were matters of inherent concern to the populace and were made in an attempt to contribute to discourse on the matter.

Dr. Girsh's discussion of Intelligent Design was a matter of public concern as contemplated by the Court in Pickering. The courts of appeals have taken various approaches to the determination of whether employee speech is a matter of public concern, analyzing some combination of content, form, and context in different ways. O'Connor v. Steeves, 994 F.2d 905, 913 (C.A.1 Mass. 1993); See, e.g. D. Gordon Smith, Note, "Beyond Public Concern: New Free Speech Standards for Public Employees," 57 U.Chi.L.Rev. 249, 258-61 (1990) (surveying case law). The Ninth Circuit has adopted a "content-based" analysis that focuses exclusively on "which information is needed or appropriate to enable members of society to make informed decisions about the operation of their government." McKinley v. City of Eloy, 705 F.2d 1110, 1113-14 (9th Cir.1983). Other courts have adopted an analysis which rests wholly or in part on the employee's subjective intent—whether the employee's speech was "calculated to disclose misconduct" or inspire public debate on some issue of public interest. Conaway v. Smith, 853 F.2d 789, 796 (10th Cir.1988); see also Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir.1987) ("while the content of [plaintiff's] communications touched upon an issue of public concern generally.... such speech stands unprotected from employer scrutiny when uttered in the pursuit of purely private interests"); Terrell v. University of Texas System Police, 792 F.2d 1360, 1362 (5th Cir.1986), *cert. denied*, 479 U.S. 1064 (1987) ("the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment"); Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir.1985) (Connick "requires us to look at the *point* of the speech in question") (emphasis in original).

The best approach, and the one that should be adopted by this court, is the approach taken by the First Circuit Court of Appeals in O'Connor. O'Connor, 994 F.2d at 913. The O'Connor court interpreted Connick as requiring an analysis of the objective content of the public

employee's speech to determine whether it is of *inherent* concern to the populace. Id at 913-914. If the speech is of inherent concern to the populace, the court need not inquire further into the possible motives of the speaker. Id. When the content alone of a public employee's speech would not qualify as a matter of inherent concern to the populace, the court should inquire into the form and context of the speech, as revealed by the whole record, to discover the motive of the speaker. Id. Almost anything that occurs within a public entity could be of concern to the public, so a "full-fledged 'form and context' analysis is appropriate" when there is a close question. Id. The court should examine the whole record "with a view to whether the community has *in fact* manifested a legitimate concern" in the matter and whether "the 'form' of the employee's expression suggests a subjective intent to contribute to such discourse." Id at 914. Justice Brennan's emphasis of the importance of protecting free discourse in the academic setting in Keyishian suggests a liberal approach, such as that in O'Connor, is necessary in determining when a teacher's speech is protected.

The Arklatex community had "*in fact* manifested a legitimate concern" in Intelligent Design and its inclusion or exclusion from the classroom. The objective content of Dr. Girsh's discussion of Intelligent Design and his comments regarding School Board Policy §1701.2 are therefore inherently a matter of inherent concern to the populace. These are topics of debate and discussion nationwide, as demonstrated by their ever-increasing presence in the media in the past few years. It is an especially heated topic of public debate in the state of Arklatex, as shown by the multiple letters regarding the issue that were published in the *Arklatex Tribune*. Also, the principal of ASMS, Dr. Rice, received telephone calls from the parents of fifteen of Dr. Girsh's students requesting that the classroom dialogue about Intelligent Design continue, as well as a telephone call from the mother of one student who asked that the dialogue stop. Intelligent Design, and the propriety of including it in public school science classes, is being scrutinized and

discussed in forums across the country, especially in Arklatex, and therefore the topic was one of inherent concern to the populace.

Even if the content alone of Dr. Girsh's speech does not rise to the level of inherent public concern, the form and context of Dr. Girsh's discussion of Intelligent Design show that he was speaking as a citizen with the intent to contribute to discourse on the matter of public interest. Dr. Girsh's statements about Intelligent Design and School Board Policy §1701.2 were made in response to questions from his curious students, who were looking for an explanation of a scientific theory to which they had been exposed outside of the classroom. The lecture, which provided only a brief overview of the central concepts of the theory and the empirical scientific evidence supporting it, was not incorporated into the biology curriculum. He found it necessary, in order to preserve openness and honesty in his classroom, to explain the reason he had avoided Randall Johnson's initial question about Intelligent Design on January 26—the School Board's new policy prohibiting the teaching of Intelligent Design in ASMS classrooms. Dr. Girsh had never discussed Intelligent Design with any student before this incident and had expressed his commitment to teaching the curriculum set out by the State. He did not introduce the topic into the classroom himself—he was simply answering the questions of his students. He expressed no intention of testing his students over his lecture. The form and context of the discussion show that Dr. Girsh was not speaking as an employee on matters of purely personal interest, but rather as a citizen on a matter of public concern. There is no indication Dr. Girsh was trying to promote his book or that he was attempting to convert students to his belief system. On the contrary, he gave a purely scientific lecture to inform his students of the basic precepts of a widely publicized, widely scrutinized theory of origin. ASMS is a school specializing in advanced science and mathematics education for exceptional students. Its students go on to have great success in science fields in some of the nation's best colleges and universities. Dr. Girsh's class was an AP Biology class, which means it was even more advanced than regular biology

classes. Dr. Girsh is an exceptional teacher who stated, in his affidavit, that he found it useful to compare Intelligent Design to evolution in order to highlight the strengths and shortcomings in *both* theories. If anything, Dr. Girsh wanted to avoid giving his students a myopic view of the science of origin.

Intelligent Design and its inclusion or exclusion from public science classrooms are matters of inherent concern to the populace and therefore Dr. Girsh's discussion of those topics satisfied the first prong of the *Pickering* test. Even if the objective content alone of his speech did not rise to the level of *inherent* concern, an analysis of form and context show that the speech was made by a citizen upon matters of public concern and not as a public employee on matters of purely personal interest. The classroom discussion of Intelligent Design and School Board Policy §1701.2 pass the first prong of the *Pickering* test.

2. Dr. Girsh's interest in commenting on an issue public concern outweighed the School Board's interest in promoting the efficiency of the school through regulation of his speech.

The interests served by protecting Dr. Girsh's speech outweigh the School Board's interest in regulating it because the School Board's restriction on Dr. Girsh's speech was not necessary to promote the efficient function of ASMS. In considering the interests served by the public employee's speech, the Court should consider not only the speaker's interest in freedom of speech, but also the community's interest in receiving information on a matter of public concern. *O'Connor*, 994 F.2d at 915 (citing *Pickering*, 391 U.S. at 568-575). Dr. Girsh's right to free speech should be protected unless the School Board can show that the restriction was necessary to prevent the disruption of official functions or to insure the effective performance of its employees. *Columbus Educ. Ass'n v. Columbus City School District*, 623 F.2d 1155, 1160 (6th Cir. 1980). The State's interest as a public employer may be promoted above that of the individual employee when the employee's "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 speakers duties or interferes with the regular operation of the enterprise.” Rankin v. McPherson, 483 U.S. 378, 388 (1987). The facts of this case show that the interests supporting Dr. Girsh’s right to discuss Intelligent Design and School Board Policy §1702.1 outweigh the School Board’s interest in curtailing such speech.

Aside from the two students who walked out of class and Dorothy King’s telephone call to Dr. Rice, the School Board has presented no evidence that Dr. Girsh’s discussion of Intelligent Design disrupted the function of the school or made Dr. Girsh’s or other teachers’ performance of their duties less effective. When applied to the facts of the case at hand, the Rankin scenario for when the State’s interest as a public employer may be promoted above that of the individual employee leads to the conclusion that the interests of the School Board *should not* be promoted above those of Dr. Girsh. First, there is no evidence that the discussion of Intelligent Design impaired discipline by Dr. Girsh’s superiors or harmony among his co-workers. Second, there is no evidence suggesting that the brief overview of the alternate theory of origin or Dr. Girsh’s explanation of the new School Board policy had a detrimental impact on close working relationships for which personal loyalty and confidence were necessary. Quite the opposite is true. Dr. Girsh stated in his affidavit that openness and honesty in the teacher-student relationship are essential to promote an effective learning environment. Openness and honesty are exactly what Dr. Girsh gave his students. Third, the discussion of Intelligent Design and the new School Board policy did not impede Dr. Girsh’s performance of his teaching duties. Dr. Girsh stated in his affidavit that he found comparison of the theories of Intelligent Design and evolution useful in highlighting the shortcomings of *both* theories. He did not promote Intelligent Design over evolution nor did he shirk his duty to teach evolution, so his instruction of the curriculum outlined by the School Board was not impaired. Lastly, there is insufficient evidence to support the contention that the discussion of Intelligent Design and the new School

Board policy interfered with the regular operation of the school. Again, aside from the two students who walked out of class on January 28, January 27 and the following days were just like any other. Far more parents of Dr. Girsh's students voiced support of the introduction of Intelligent Design into the classroom than voiced objection. In fact, avoidance of the subject had become quite an interference with the regular operation of the biology class. When first questioned by student Randall Johnson on January 26, about the theory of Intelligent Design, Dr. Girsh avoided discussion of the topic altogether. However, in class the next day Dr. Girsh was peppered with more questions about the theory. He told his students about the new School Board policy in order to explain why he couldn't discuss Intelligent Design with them. The exceptional and gifted students in his advanced biology class were not satisfied with this response, so Dr. Girsh proceeded to explain the basic tenets of Intelligent Design. This evidence surely suggests there was no disruption of the functioning of ASMS or interference with Dr. Girsh's ability to perform his teaching duties efficiently, so as to warrant depriving him of his First Amendment right to free speech and his students' interest, as citizens, in receiving information on a matter of public concern.

Dr. Girsh' classroom discussion of Intelligent Design and his comments regarding School Board Policy §1701.2 pass the *Pickering* test and are therefore protected. The content, form, and context of Dr. Girsh's speech support the conclusion as a matter of law that he was speaking as a citizen on a matter of public concern and not as an employee speaking on matters of purely personal interest. The School Board has presented insufficient evidence to prove that its restriction on Dr. Girsh's speech promoted the efficient function of ASMS. The interests of Dr. Girsh and his students in allowing the speech outweigh those of the School Board. The United States Court of Appeals for the Fourteenth Circuit correctly concluded that Dr. Girsh's speech passes the *Pickering* test and is therefore protected. The decision of the Court of Appeals should be affirmed.

B. The School Board’s Disciplinary Action Against Dr. Girsh was Impermissibly Motivated by Dr. Girsh’s Discussion of Intelligent Design and School Board Policy §1701.2.

The School Board acted unlawfully when it disciplined Dr. Girsh because of his classroom discussion of Intelligent Design and the new School Board policy prohibiting Intelligent Design instruction because his speech was protected by the First Amendment. Once a Court has determined that a public employee has engaged in speech protected by the First Amendment, the next step in determining whether that employee has been improperly disciplined is to decide whether that conduct was a motivating or substantial factor in the disciplinary action. Mt. Healthy, 429 U.S. at 287. If the employee can show that his protected conduct was a substantial or motivating factor in his employer’s adverse employment action, the State then has the opportunity to prove by a preponderance of the evidence that it would have taken the same action in the absence of the protected conduct. Id. If the State cannot meet this burden, the adverse employment action is deemed to have been unlawful. Id.

The evidence in this case indicates no possible explanation for the disciplinary action taken against Dr. Girsh other than his discussion of Intelligent Design on January 27, 2004. With the exception of the incidents giving rise to the present litigation, Dr. Girsh’s record at ASMS demonstrates nothing but his exceptional service to the school. The School Board agrees that prior to the events giving rise to this suit, Dr. Girsh had strictly adhered to the state-mandated curriculum for “exceptional schools,” which prohibited the teaching of “non-scientific” evidence. The textbooks used in his class were only those approved by the Department of Education. Prior to the events giving rise to this litigation, Dr. Girsh never discussed Intelligent Design with any student. Dr. Rice, the principal of ASMS, even testified that Dr. Girsh had expressed his commitment to teaching the approved curriculum. The only two black marks in Dr. Girsh’s personnel file are for insubordination—one for willful violation of the School Board policy prohibiting the teaching of Intelligent Design and another for disparagement

of School Board policies. When Dr. Rice informed Dr. Girsh of the reprimand and told him another violation could affect his future as a teacher at ASMS, he made no secret of the fact that Dr. Girsh was being disciplined for his discussion of Intelligent Design. Dr. Girsh's personnel file along with the affidavits of both Dr. Girsh and Dr. Rice provide unequivocal evidence of the causal link between Dr. Girsh's protected speech and the School Board's disciplinary action against him. The evidence also clearly shows that the School Board cannot show it would have disciplined Dr. Girsh absent his discussion of Intelligent Design. Even if the School Board could present some evidence that the reprimand was motivated by something other than Dr. Girsh's protected speech, that evidence would be in clear contradiction of the affidavits of Dr. Rice and the personnel file ASMS kept on Dr. Girsh.

Dr. Girsh's speech passes the *Pickering* test is therefore protected by the First Amendment. His protected speech was a motivating factor in the disciplinary action taken against him by the School Board. The School Board has failed to show by a preponderance of the evidence that it would have acted the same way in the absence of Dr. Girsh's protected speech. Therefore, Dr. Girsh was disciplined by the School Board in violation of 42 U.S.C. §1983.

CONCLUSION

For the above mentioned reasons, Respondent respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit.

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.