

Docket No. 2005-0113

Supreme Court of the United States

October Term 2006

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

Petitioner

v.

PETER GIRSH

Respondent

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE
FOURTEENTH CIRCUIT

Brief of Respondent

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Spring 2006

QUESTIONS PRESENTED

- (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?

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STATEMENT OF THE CASE

I. Procedural History

Shortly after he was reprimanded for violating school board policy on January 26-27, 2004, Dr. Peter Girsh initiated a cause of action against the Arklatex School Board, alleging violations of the Establishment Clause and his First Amendment right to free speech. (R. at 10). Dr. Girsh sought both a declaratory judgment that the policy is unconstitutional and monetary damages for the violation of his free speech rights. (R. at 10). The Arklatex School Board filed a motion for summary judgment. (R. at 10). On June 7, 2004, the United States District Court for the Eastern District of Arklatex found no material questions of fact and thus granted the School Board's summary judgment motion. (R. at 4). Furthermore, the District Court dismissed Dr. Girsh's claims holding that the Arklatex School Board did not violate his First Amendment rights by enacting the new policy and taking disciplinary action against him. (R. at 14).

Dr. Girsh appealed the District Court's decision to the United States Court of Appeals for the Fourteenth Circuit. (R. at 15). On October 11, 2005, the Fourteenth Circuit reversed the summary judgment and remanded the case to a trial on the merits of Dr. Girsh's lawsuit. (R. at 16). The School Board appealed the Fourteenth Circuit's decision and on January 27, 2006 the United States Supreme Court granted certiorari to hear the case. (R. at 20).

II. Statement of Facts

Dr. Peter Girsh is employed as a public high school biology teacher at the Arklatex School for Mathematics and Sciences ("ASMS"). (R.at 4). Prior to his employment at ASMS, Dr. Girsh obtained a bachelor's degree from Yale University as

well as a Ph.D. in biochemistry from Harvard University. (R. at 4). As an ASMS faculty member since the school's inception in 1995, Dr. Girsh has been active in many administrative and instructional capacities including: the curriculum committee, the selection board and steering committee, the Biology Club and the Future Engineers of America. (R. at 5). Dr. Girsh's success as a teacher is evidenced by his students receiving a 100% passing grade on the AP Biology exam for the past ten years. (R. at 5).

In addition to his responsibilities as a teacher, Dr. Girsh is a prominent theorist on Intelligent Design theory regarding the formation of life. (R. at 4). Dr. Girsh's position on Intelligent Design is that it is a purely scientific theory and has no connection with any religious movement. (R. at 4). In his numerous speaking engagements on the subject, Dr. Girsh strongly disagrees with interest groups who want to use Intelligent Design as a means of reintroducing religion into public classrooms. (R. at 4). Dr. Girsh stated in a sworn affidavit that Intelligent Design should be taught without ever mentioning God. (R. at 4). Dr. Girsh has made significant contributions to a textbook entitled From Koalas to Humans ("Koalas"). (R. at 5). Koalas, an alternative to the religiously-affiliated Intelligent Design textbooks on the market, describes Intelligent Design by strictly addressing the scientific evidence which supports the Intelligent Design theory. (R. at 5). Koalas only suggests that the universe was purposefully created and never speculates on the nature of the creator. (R. at 5). Although Dr. Girsh is considered an expert on the theory of Intelligent Design, he has always taught strictly from the approved biology curriculum which does not include any materials involving Intelligent Design theory. (R. at 5). Dr. Richard Rice, principal of ASMS, stated that he could envision a future where Intelligent Design could be taught at ASMS. (R. at 5).

On September 8, 2003, Dr. Rice's vision took a step backwards when the Arklatex School Board adopted policy §1701.2 which prohibits the instruction of Intelligent Design theory. (R. at 5). Specifically, the school board policy stated that alternative theories of origin could be taught as long as they were not closely related to Creationism. (R. at 5). The school board stated that the purpose of the policy was to avoid Establishment Clause issues by giving the appearance that the school endorsed a certain religious belief. (R. at 6).

On January 26, 2004, Dr. Girsh was preparing to deliver a lecture to his Advanced Placement Biology class when Randall Johnson, a student at ASMS, asked why he was not being taught Intelligent Design. (R. at 6). According to Mr. Johnson, he had conducted an internet search of Dr. Girsh and discovered that he was an expert on Intelligent Design, a theory that was unfamiliar to most if not all of the students at ASMS. (R. at 6). Since he was fully aware that School Board policy §1701.2 prohibited the teaching of Intelligent Design theory, Dr. Girsh dismissed the class early without answering Mr. Johnson's question. (R. at 6).

On January 27, 2004, Dr. Girsh was inundated with questions from his AP Biology students regarding Intelligent Design Theory. (R. at 6). Dr. Girsh informed his class that the school board had recently passed a rule that prohibited instructors from teaching Intelligent Design. (R. at 6-7). Dr. Girsh then proceeded to tell his students that it was his opinion that the school board's policy was an unconstitutional violation of the Establishment Clause and of his First Amendment right to free speech. (R. at 7). Additionally, Dr. Girsh told the class he felt like the school board was attempting to prevent students from thoroughly learning science. (R. at 7). Dr. Girsh then began to

teach the class about the theory of Intelligent Design. (R. at 7). The students were taught that Intelligent Design was an alternative theory that attempted to fill in some of the holes that are present in the theory of Evolution. (R. at 7). As part of his lecture Dr. Girsh showed the students his copy of the Koalas textbook as well as magazine articles and a videotaped interview. (R. at 8). During the entire presentation, Dr. Girsh never mentioned God nor did he ever make any indication as to the nature of the intelligent designer. (R. at 8). The students were interested in the presentation and were offered a pamphlet on Koalas as they left the classroom. (R. at 8).

The following day Dr. Rice informed Dr. Girsh that approximately 15 parents called and begged him to allow Dr. Girsh to continue teaching Intelligent Design theory. (R. at 9). Dr. Rice also informed Dr. Girsh that a parent of one of his AP Biology student's called to complain about the Intelligent Design presentation. (R. at 8). The parent, Dorothy Klinger, was an atheist and did not appreciate that her daughter was taught there was a possibility that a supernatural power created the universe. (R. at 9). At the end of the conversation Dr. Rice reminded Dr. Girsh that School Board policy §1701.2 prohibited instruction on Intelligent Design theory. (R. at 9).

When Dr. Girsh arrived at his AP Biology class he was once again bombarded with questions regarding Intelligent Design. (R. at 9). As Dr. Girsh began to answer the questions, three students including Maya Klinger, walked out of class. (R. at 9). The following morning two editorial articles regarding Dr. Girsh were published in the local newspaper. (R. at 9). One letter, from Dorothy Klinger, asked the state to pull funding from ASMS since it was teaching religion instead of science. (R. at 9). The other letter, from Randall Johnson's mother Ranada, begged the state to implement the teaching of

Intelligent Design in the classroom. (R. at 9). Ms. Johnson's letter stated that her son's interest in school was revitalized by the recent Intelligent Design discussions and he now wished to pursue a career in biology. (R. at 9).

Later that afternoon Dr. Rice handed Dr. Girsh his personnel file which contained two letters for insubordination dated January 26, 2004 and January 27, 2004, respectively. (R. at 9). Dr. Rice told Dr. Girsh that the letters were for willful violation and insubordinate disparagement of School Board policy. (R. at 10). Dr. Girsh was also told that another violation would result in a formal hearing before the Arklatex School Board which would determine his future employment at ASMS. (R. at 10). Finally, Dr. Rice gave a letter to Dr. Girsh from the Arklatex School Board that stated he was free to privately promote his ideas about Intelligent Design but could not mention ASMS in conjunction with any Intelligent Design lecture. (R. at 10).

The next day an article ran in the local newspaper that stated Dr. Girsh had been reprimanded and prohibited from teaching Intelligent Design at ASMS. Dr. Girsh was appalled by the letter and filed suit alleging the school board's policy prohibiting the teaching of Intelligent Design violated the Establishment Clause because it singled out for disapproval only those alternative theories which lend support to religious beliefs. (R. at 10). Dr. Girsh's lawsuit also alleged that the School Board violated his First Amendment right to free speech by formally disciplining him for speaking about Intelligent Design and criticizing the new School Board policy. (R. at 10).

SUMMARY OF THE ARGUMENT

Arklatex School Board policy §1701.2 is an unconstitutional violation of the Establishment Clause of the First Amendment. The policy prohibits the instruction of Intelligent Design for no other reason than to avoid possible Establishment Clause conflicts. The policy restricts the teaching of a viable scientific theory on religious grounds even though Dr. Girsh taught Intelligent Design using strictly non-religious principles. Policy §1701.2 also inhibits the religious beliefs of Christians in the School District and promotes the beliefs of secular humanists or atheists. The Arklatex School Board needlessly entangled themselves in a religious matter which they, as a government entity, cannot do under the First Amendment to the United States Constitution.

Furthermore, Dr. Girsh's presentation of Intelligent Design theory does not violate the Establishment Clause because it was a secular scientific lesson. While working at ASMS, Dr. Girsh has never taught, presented, or voiced any religious teachings or doctrine. During his Intelligent Design presentations to the ASMS students, Dr. Girsh never made reference to God, the Bible, or the identity of the intelligent designer. Dr. Girsh taught Intelligent Design to the ASMS students because the vast majority of them wanted as complete an education as they could get. Secondly, Dr. Girsh presented the Intelligent Design lesson to the students because he is an expert in the scientific study of Intelligent Design theory.

The Fourteenth Circuit appropriately reversed the findings of the district court's summary judgment and remanded the matter for trial consistent with their opinion. The school board's policy violates the establishment clause, but Dr. Girsh's discussion of Intelligent Design in the classroom does not violate the Establishment Clause.

Furthermore, Dr. Girsh maintains a right to free speech that cannot be restricted under the First Amendment of the United States Constitution.

STANDARD OF REVIEW

In reviewing a district court's grant of a motion for summary judgment, a federal appellate court applies the de novo standard of review to the district court's findings.

Alvarado v. City of San Jose, 94 F.3d 1223 (9th Cir. 1996).

ARGUMENT

I. The Arklatex School Board's Prohibition On The Instruction Of Intelligent Design Theory Violates The Establishment Clause Of The First Amendment Since Dr. Girsh Presented The Theory By Focusing On The Scientific Evidence Used To Support The Theory And Did Not Make Any Assertions Regarding The Nature Of The Intelligent Designer.

The Arklatex School Board violated the Establishment Clause when it enacted a policy that prohibited Arklatex teachers from teaching students about the Intelligent Design theory regarding the origin of life. The Court has held that it is unconstitutional to enact legislation that is hostile to any particular religion or favors religion over non-religion. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). By endorsing a policy that allows the instruction of the theory of Evolution and not Intelligent Design, the Arklatex School Board violated the First Amendment of the United States Constitution. In contrast, Dr. Girsh's lessons on Intelligent Design did not violate the Establishment Clause because the presentations were not religious. The theory of Intelligent Design is not automatically considered religious subject matter because some of its material happens to coincide with the tenants of Christianity. See Harris v. McRae, 448 U.S. 297,

319 (1980). Dr. Girsh's Intelligent Design presentations were appropriate because they were a secular scientific lesson. Based on firmly established case law, it is clear that the Arklatex School Board's anti-Intelligent Design policy was a violation of the Establishment Clause, and Dr. Girsh's Intelligent Design presentations were constitutionally allowable public school lessons.

A. Under the Lemon test established by the United States Supreme Court, Arklatex School Board policy §1701.2, prohibiting the instruction of Intelligent Design, violates the Establishment Clause of the First Amendment.

The Arklatex School Board's policy prohibiting the instruction of Intelligent Design in its schools violates the Establishment Clause by restricting a scientific theory because of its possible religious connections. The three aspects of a state action that need to be shown in order to have a violation of the Establishment Clause are: (1) the state action must have a secular purpose, (2) the principal or primary effect must be one that neither advances nor inhibits religion, and (3) the statute must not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971). The Arklatex School Board passed School Board Policy § 1701.2 for the purpose of taking any link to Christianity out of its science classes. Furthermore, by endorsing Policy §1701.2, the Arklatex School Board both inhibited Christianity and endorsed Atheism. Finally, the Arklatex School Board is attempting to combine a scientific theory with a religious tenant in an effort to force its students to learn only certain theories of the origin of man. By fulfilling the requirements of the Lemon test the Arklatex School Board's policy regarding the teaching of Intelligent Design has violated the Establishment Clause of the First Amendment.

1. The policy adopted by the Arklatex School Board prohibiting Intelligent Design instruction in its schools does not have a primary secular purpose.

Although the Arklatex School Board claims that it passed School Board Policy §1701.2 to avoid Establishment Clause issues, the policy violates the Establishment Clause because it was not passed primarily for a secular purpose. A state action, regulation, or policy must have a clear secular purpose to be considered Constitutional. Lemon, 403 at 612. This prong of the Lemon test has been called the purpose prong, and the proper question to ask is whether the government's actual purpose is to endorse or disapprove or religion. Edwards v. Aguillard, 482 U.S. 578, 584. The Arklatex School Board claims that they passed policy §1701.2 to avoid Establishment Clause issues. However, the School Board's motives are highly suspect when a single scientific theory that has ties to a religious faith is singled out as unacceptable. Since the Scopes Monkey Trial, nearly every governmental statute and policy that prohibited a certain scientific theory was found to be unconstitutional on Establishment Clause grounds. See generally Scopes v. State of Tennessee, 289 S.W. 363 (Tenn. 1927), Epperson 393 U.S. 97, Edwards 482 U.S. 578. The Arklatex School Board has given no reason for offering up a policy in the hopes of avoiding Establishment Clause issues, when there was no issue regarding the Establishment Clause prior to policy §1701.2. It appears that the Arklatex School Board used the United States Constitution to prohibit a theory that was not even taught at an Arklatex district school. If the Establishment Clause was not an issue for the School Board, then their true motives for enacting policy §1701.2 must be pondered. Summarily, by prohibiting a theory that a considerable number of students wish to learn,

the board's actions appear to disapprove of Christian beliefs or at least the scientific theories that lend credibility to those beliefs.

In the past, cases dealing with an Evolution versus Intelligent Design issue look to the end result of the legislation. See Edwards, 482 U.S. 578, Selman v. Cobb County Sch. Dist., 390 F.Supp.2d 1286 (N.D. Ga. 2005). In those cases the court seemed concerned when a school or school district's policy stymied the instruction of science. Edwards at 588. The court wondered why a school board that was trying to maximize the comprehensiveness of scientific instruction would prohibit or inhibit certain theories regarding the origin of man. Id. The Arklatex School Board has failed to provide a bona fide secular reason for the passage of policy §1701.2, therefore their actual motives must be questioned.

2. By prohibiting the instruction of Intelligent Design theory, the Arklatex School Board inhibited one religion while promoting another.

Arklatex School Board Policy §1701.2 violates the second prong of the Lemon test because it both disfavors Christianity and favors Atheism or irreligion. The Supreme Court in Lynch v. Donnelly, laid out a test for determining if a state action was promoting or inhibiting a certain religion. 465 U.S. 668, 688. The "endorsement test" states that a state action violates the Establishment Clause when it creates a perception that it is endorsing or disfavoring a religion. Id. This part of the Lemon test has also been labeled as the effect test by some courts. See Selman, 390 F.Supp.2d at 1299. The main issue in this test is whether or not a message is received by non-adherents to the state action that they are outsiders and conversely adherents to the action are insiders. Id. By singling out

Creationism and Intelligent Design as prohibited subjects in Arklatex public schools, the school board separated and made outsiders of those students who have Christian beliefs.

Another argument that Arklatex School Board policy §1701.2 violated the second prong of the Lemon test is that banning Creationism and Intelligent Design from its schools but allowing evolutionary theory showed endorsement of one religion over another. Since its inception, the theory of Evolution has been intertwined with beliefs involving Secular Humanism. The Supreme Court recognizes Secular Humanism as a religion present in the United States along with Christianity, Buddhism, and Judaism. Torcaso v. Watkins, 367 U.S. 488, 495 (1961). A policy that allows a scientific theory which fosters belief in one religion while forbidding a scientific theory that advances another religion is a clear violation of the endorsement test and thus the Establishment Clause.

3. Arklatex School Board policy §1701.2 resulted in excessive entanglement of government and religion.

The Arklatex School Board violated the Establishment Clause when they needlessly entangled their governmental powers with that of ASMS and Dr. Girsh. The third-prong of the Lemon test is that the statute or governmental policy must not foster an excessive government entanglement with religion. Lemon, 403 U.S. at 613. Arklatex School Board Policy §1701.2 violates this prong of the Lemon test because the School Board is using a governmental policy to prohibit a scientific theory that lends credence to religious doctrine. The Supreme Court struck down a Louisiana statute that in effect banned the teaching of evolution because the legislature chose to affect the teaching of only one scientific theory which had historically been opposed by certain religious sects. Edwards, 482 at 592. Similarly, the Arklatex School Board chose to single out Intelligent

Design as an unacceptable scientific method. In another opinion, the Supreme Court stated that the First Amendment does not permit the state to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma. Epperson, 393 U.S. at 106. A governmental body cannot pick and choose what public school students learn based on a topic's similarity with religious principles. See generally Id. The Arklatex School Board violated the Constitutional rights of every student at ASMS when it banned a viable scientific theory from its classrooms.

B. The theory of Intelligent Design, as taught by Dr. Girsh, does not constitute the instruction or practice of religion and thus is not a violation of the Establishment Clause.

Dr. Girsh's presentation on Intelligent Design was not a sermon or a Biblical lesson on the origin of man; it was in fact a secular presentation of a valid scientific theory. The Supreme Court opinion of Edwards v. Aguillard sets a standard by which public school lessons on the origin of man should be evaluated. See generally 482 U.S. 578. The two prongs of the Edwards standard are: (1) the curriculum's textual connection to the Biblically-inspired statutes, as seen in Epperson v. Arkansas and Kitzmiller v. Dover Area Sch. Dist., and (2) the religious motivation of its promoter. See generally Id., 393 U.S. 97, 400 F.Supp.2d 707. This case is factually distinguishable from previous opinions regarding the teaching of Intelligent Design theory because Dr. Girsh taught Intelligent Design only after being asked by his students, and he taught the theory along with Evolution. Secondly, Dr. Girsh was a leading expert in the field of a non-religious study of Intelligent Design theory. No evidence has been offered by the Arklatex School Board that shows anything but a secular purpose for Dr. Girsh's instruction of Intelligent Design. Based on the two factors presented in Edwards, Dr.

Girsh's presentation of Intelligent Design to ASMS students was constitutional. See generally 483 U.S. 578.

1. Dr. Girsh's reason for teaching Intelligent Design was fundamentally different than the Genesis-inspired reasons for pro Intelligent Design statutes present in other federal court opinions.

Contrary to prior cases in which the religious faiths of those promoting Intelligent Design were the driving force behind the advancement of the theory, Dr. Girsh taught Intelligent Design from a secular perspective. In Epperson, 393 U.S. at 98, the Supreme Court struck down an anti-evolution statute because, among other reasons, the statute was passed as part of a religious fundamentalist fervor that swept America in the 1920's following the outcome of Scopes, 289 S.W. 363. The court found that the reasoning for the statute was to prevent any theory from refuting the Biblical story of Creation as stated in Genesis 1:1-2:25. A recent case from a federal district court in Pennsylvania that involved the mandatory teaching of Intelligent Design was likewise struck down because of the obvious religion driven intentions of some of the authors of the policy. Kitzmiller v. Dover Area Sch. Dist., 400 F.Supp.2d 707 (M.D. Pa. 2005). Based on extensive evidence of Dover District School Board, members repeatedly referred to God and the Biblical account of creation in their discussions of the pro-Intelligent Design policy. Id. The court found that the policy's primary purpose was to impose a religious view of the biological origin of man into the public school classroom. Id.

In contrast, Dr. Girsh never mentioned God, the Bible, or even the possible nature of the intelligent designer. Dr. Girsh, in fact, presented the textbook, From Koalas to

Humans, that was designed to be an alternative to the religious textbooks that discuss Intelligent Design theory. In a televised interview with Bill O’Riley, Dr. Girsh responds to a question about whether God created the universe by stating that Intelligent Design theory is not religious theory. Dr. Girsh’s style and reasoning for promoting Intelligent Design theory in the ASMS classroom was quite the opposite of the people involved both the Kitzmiller decision and the Epperson decision. See generally 393 U.S. 97, 400 F.Supp.2d 707.

2. Dr. Girsh had a legitimate scientific reason for teaching the ASMS students about Intelligent Design theory.

As an expert in the field of Intelligent Design theory, Dr. Girsh had a legitimate scientific reason for teaching his students about Intelligent Design. Justice Scalia stated in his opinion in Edwards, that the body of scientific evidence supporting creation science is as strong, if not stronger, as that supporting evolution. 482. U.S. at 623. Dr. Girsh is an expert in and has contributed to that body of scientific evidence that supports Intelligent Design theory. In his presentation to his students, Dr. Girsh presented, in an organized fashion, the scientific evidence that supports Intelligent Design. Similar to the young Arkansas teacher in Epperson, Dr. Girsh is highly educated on numerous theories of the origin of man and his reason for teaching about Intelligent Design was to provide his students with the most well rounded education that he could. See generally, 393 U.S. 97. Summarily, Dr. Girsh did not teach Intelligent Design because of religious motivation or because he just wanted to go against the Arklatex School Board. Dr. Girsh taught Intelligent Design because his students were interested in learning alternative theories to evolution, and he was an expert in one of those alternative theories.

II. The First Amendment's Protections Of Free Speech Reach Matters Of Public Concern Including A Teacher's Criticism Of School Board Policy As Well As Teaching On Controversial Topics.

The Fourteenth Circuit properly recognized Dr. Girsh's public criticism of Arklatex School Board policy §1701.2 as constitutionally protected speech. The First Amendment of the United States Constitution protects freedom of speech and does not tolerate its abridgment. See U.S. Const. amend. I. By criticizing School Board Policy §1701.2 and addressing the topic of Intelligent Design as a scientific theory in the classroom of a publicly funded school, Dr. Girsh touched upon a matter of public concern that the First Amendment protects through a test developed by the United States Supreme Court in Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

The essence of the Pickering test is that the interests of the teacher (employee) must be balanced with the interests of the state (employer) to determine which interest outweighs the other. Id. at 568. Once the burden is met regarding the speech being protected, a teacher's protected speech cannot constitute grounds for disciplinary action. Id. at 574. Upon determining that the speech is protected and not grounds for disciplinary action, the burden shifts from the employee to the employer to establish that the same determination would be made without considering the protected speech. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). Therefore, the finding of the Fourteenth Circuit that the case should be remanded for trial to allow for the finder of fact to determine whether Arklatex School Board policy §1701.2 was biased should be affirmed.

A. Absent major conflict, balancing the employee’s interest to freely speak and the state’s interest favors the employee over the state employer.

When balancing the interests of the involved parties, Dr. Girsh’s interests relating to his First Amendment right to free speech outweigh the regulatory interest of the ASMS School Board. A significant benefit to the public exists through freedom of speech. Pickering, 391 U.S. at 573. In determining whose interest outweighs the other, a court examines each case by the facts as there is no “general standard against which...statements may be judged.” Id. at 569. Likewise, a factor to consider is the state’s interest which focuses on its function of enterprise. Rankin v. McPherson, 483 U.S. 378, 384 (1987). In so doing, the Courts must consider the situation at issue to assess the balance. Connick v. Myers, 461 U.S. 138, 150 (1983). Overall, the right to free speech does not stop when entering school grounds. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

In Epperson, the Court struck down a state law which prohibited the teaching of Evolution in public school classrooms. 393 U.S. at 109. The state law conflicted with freedom of speech and intended to deter teachers from addressing an opposing viewpoint. Id. at 108. As evident in the Court’s decision, limiting the speech of a teacher in the classroom is not the state’s appropriate role. Id. Thus, the teacher’s interest is outweighed by those held by the state.

In the Court’s analysis of Rankin, the balance came through examination of the “manner, time, and place” of the speech while also looking to the impact experienced in the workplace as a result of the speech. 483 U.S. at 388. No evidence supported the allegation that the employee’s comments worked to disturb the workplace. Id. Thus, the

employee's interest related to her First Amendment right to free speech which outweighed the government's interest to fire her. Id. at 392. Similarly, Tinker involved protected speech through the form of demonstrative arm bands. 393 U.S. at 506. The Court held that the school must have a greater purpose than to simply avoid "discomfort and unpleasantness" from a viewpoint contrary to that held in the mainstream. Id. at 508.

Free speech exists in a public forum, but the school board has the appropriate authority to determine what speech to tolerate. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1987); (Citing Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986). Hazelwood involves a high school paper that published a story on pregnant students which also printed sexually related content. Id. at 263. The Court found the school's regulatory authority could limit expression when the "public might reasonably perceive to bear the imprimatur of the school." Id. at 271. However, Dr. Girsh distinguished his position from that of the School Board when he advised the students of policy §1701.2 and stated that he disagreed with it. Therefore, a reasonable person would know that one person's opinion does not reflect the general position of the school. In so doing, a teacher may speak his opinion on matters in the classroom to the extent that he would be free to do so in private, so long as school's regular operation continues to function. Pickering, 391 U.S. at 572-573.

The interests presently involved are the school's ability to restrict educational topics as opposed to a teacher's interest, such as that of Dr. Girsh, in presenting all possible scientific theories to his class while voicing displeasure with the school board's policy. While the school, as a public entity, does not have an interest in religion, speech regarding science and scientific theories should not be limited. As the Court stated in

Keyishian v. Bd. of Regents, information in fields change through “new discoveries” and should not be restricted in an educational setting. 385 U.S. 589, 603 (1967). Thus, not limiting the speech of teachers allows for the fulfillment of education through the free-flowing nature of ideas. Id.

Essentially, the ASMS disciplinary response to Dr. Girsh’s class was to avoid the unpleasantness generated by one parent’s complaint. In accordance with Tinker, the school cannot justify their discipline of Dr. Girsh. Dr. Girsh’s free speech serves a greater purpose than the School Board’s restriction thereof. Therefore, Dr. Girsh’s interests outweigh the interest of the school board.

B. Criticizing the School Board policy is a matter of public concern.

Dr. Girsh’s criticism of Arklatex School Board policy §1701.2 and the teaching of Intelligent Design in a public school classroom qualify as protected speech under the First Amendment as a matter of public concern. In the past, the Court has been supportive of academic freedom and recognized that this freedom benefits and concerns the public. Keyishian, 385 U.S. at 603 (1967). In determining if an issue is a matter of public concern, the Court must look to the “content, form, and context” of the matter and make that determination. Connick, 461 U.S. at 147. The Sixth Circuit also maintains that materials assigned to the class are defined as “speech” for First Amendment protection. Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch., 428 F.3d 223, (6th Cir. 2005) (Citing Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036 (6th Cir. 2001)).

Keyishian involved teachers forced to disclose party affiliation to maintain employment at a public university. 385 U.S. at 608. The purpose of the state law was to

weed out employees with opposite political viewpoints, particularly those known to be Communists. Id. However, the Court found the statute to be unconstitutional as it rejected employees through unreasonable constraints. Id. at 605-606. Similarly, Connick deals with freedom of speech in the workplace. 461 U.S. 138. In Connick, a discontented assistant district attorney circulated a questionnaire to her coworkers questioning their opinions related to office pressure to work on political campaigns. Id. While the Court did not hold for the employee, the Court held that this question reaches public concern. Id.

In examining the speech presently at issue, the School Board Policy §1701.2 sought to prevent the communication to students of an alternate perspective to Evolution. The opposition to the viewpoint held through Intelligent Design maintains a similarity to the fear of opposing viewpoints in Keyishian. See generally, 385 U.S. 589. In the classroom, Dr. Girsh presented information to his students regarding two conflicting scientific theories. Disallowing teachers to instruct students in a manner that encourages education acts as an unreasonable constraint. The theory at issue, Intelligent Design, was offered to the class in the context of a response to a series of questions from the students. The theory discussed by Dr. Girsh made no religious statement and was presented to the students on a scientific basis alone. School lessons which help to explain the present human species are a matter of public concern and an educational tool to further the knowledge of the students. The issue of Dr. Girsh criticizing the school board's position on Intelligent Design and making the subject known to his students is a matter of public concern that receives protection from the First Amendment.

C. ASMS acted improperly when it disciplined Dr. Girsh for statements he made in class as it is unconstitutional for an employee to be reprimanded for constitutionally protected speech.

The allegation of insubordination through criticism of Policy §1701.2 specifically against Intelligent Design was the only source of disciplinary action against Dr. Girsh. It is unconstitutional to disfavor speech based on the message presented. Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 828-829 (1995). Also, disciplinary action cannot stem from exercising his freedom of speech. Pickering, 391 U.S. at 574. In making such a determination, the Court looks to whether or not the protected speech is a “substantial” factor in the disciplinary action. Mt. Healthy, 429 U.S. at 285.

The Court in Rankin held that the officer’s statements regarding a potential Presidential assassination were of public concern. 483 U.S. at 390. As the content of this statement was the cause of her dismissal, her discharge was improper. Id. In Evans-Marshall, the school board voted to not renew the contract of a teacher who assigned controversial literary works and showed students some movie adaptations of the material. 428 F.3d at 227. In both of these situations, the motivating factor(s) for discipline did not exceed the individual/government employee’s speech protected by the First Amendment. Essentially, constitutional protections are for the benefit of individuals and cannot be abused by employers wishing to punish employees for actions with which the employer does not share a point of view.

Rosenberger deals with the problem of “viewpoint discrimination” and does not allow the state to validate such behavior. 515 U.S. at 829. When a school publication did not receive school funding, the denial was the result of discrimination against the

perspective of the group at issue. Id. at 832. Thus, recognizing free speech is essential in respecting other beliefs. Id. at 845.

While Dr. Girsh was not terminated like the above examples of negative employment decisions, the School Board reprimanded and threatened him with dismissal primarily based on his classroom criticism of the policy. The two disciplinary citations and the threat that another would lead to termination occurred in the period surrounding the incident and related only to that topic. No other disciplinary action was taken against him in the course of his employment at ASMS. This disciplinary action is improper through the Rankin standard and should not be allowed to stand. See generally 483 U.S. 378.

The School Board acted only when a viewpoint expressed in the classroom conflicted with a particularized viewpoint held by the school board. Such action can not be tolerated in accordance with Rosenberger. See generally 515 U.S. 819. Dr. Girsh's teaching record should not be treated negatively based upon his speech regarding a matter of public concern.

D. The employer has the burden to show that the same negative employment decision would be made disregarding the challenge to the School Board's policy.

Had Dr. Girsh not criticized the policy against Intelligent Design, no disciplinary action would have been taken against him. After the employee establishes that the protected speech was the controlling basis for disciplinary action, the burden of persuasion falls upon the state employer, the current petitioner, to establish the legitimate grounds for disciplinary action. Connick, 461 U.S. at 150. The Court requires that the

employee not be placed in a worse position based upon protected speech than would have been in otherwise. Mt. Healthy, 429 U.S. at 285.

In Mt. Healthy, an untenured teacher made objectionable comments, and the school board used the statements as its basis for not renewing his employment. Id. Ultimately, the Court remanded the case back to the district court for the finder of fact to make the determination of whether or not the employment was justifiably ended. Id. at 287.

The Arklatex School Board and other administrators were well aware of the Intelligent Design background of Dr. Girsh. In the time since his 1995 employment, the school had taken no measures to prevent Dr. Girsh from continuing as a renowned expert on the theory of Intelligent Design. Absent the events involving protected speech, no grounds for any discipline existed. The ASMS school officials were misguided and their actions violating Dr. Girsh's freedom of speech should not stand. Therefore, the disciplinary action against Dr. Girsh should be remedied.

CONCLUSION

For the reasons set forth above, the policy prohibiting instruction on Intelligent Design in Arklatex Public Schools violates the establishment clause where the instructor focuses on the scientific evidence used to support the theory and does not make any assertions regarding the nature of the intelligent designer.

Respectfully submitted,

Team C

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