QUESTIONS PRESENTED

1. Whether the Establishment Clause of the First Amendment is violated when a public school teacher instructs his students on the theory of Intelligent Design, using only scientific evidence and making no reference to the identity of the intelligent designer?

2. Whether a public school teacher's First Amendment right to freedom of speech is violated when he is prohibited from engaging in a discussion of the topic of Intelligent Design with students?

TABLE OF CONTENTS

QUESTIONS PRESENTED ………………………………………………… **i**

TABLE OF CONTENTS …………………………………………………. **ii**

TABLE OF AUTHORITIES ……………………………………………... **v**

STATEMENT OF THE CASE …………………………………………… **1**

OPINIONS BELOW ……………………………………………… **1**

CONSTITUTIONAL PROVISIONS INVOLVED ……………….. **1**

STANDARD OF REVIEW ………………………………………. **1**

STATEMENT OF THE CASE AND FACTS ……………………… **1**

PROCEDURAL HISTORY ………………………………………. **5**

SUMMARY OF THE ARGUMENT ……………………………………... **6**

ARGUMENT ………………………………………………………………. **8**

I. The Establishment Clause of the First Amendment is Not Violated by a Public School Teacher's Lecture on Intelligent Design and Such Conduct Does Not Run Afoul of the Lemon Test or the Endorsement and Coercion Tests ……………………………………………… **8**

A. A Public School Teacher's Instruction on Intelligent Design Did Not Violate the First Amendment's "Establishment of Religion" Clause Because His Actions Served a Secular Purpose, the Primary Effect Neither Advanced Nor Inhibited Religion, and His Actions Did Not Foster an Excessive Entanglement of State With Religion…….. **10**

1. The Desire to Provide an Exceptional Learning Environment, to Encourage Critical Thinking, and Familiarity With the High Expectations of His Students is Demonstrative of Dr. Girsh's Secular Purpose……………………………………… **11**

2. Measured by the "Effects" Test of Lemon, the Principal or Primary Effect of Dr. Girsh's Actions Neither Advanced Nor Inhibited Religion …………………………….. 13

3. Since Dr. Girsh Did Not Openly or Secretly, Participate in the Affairs of Any Religious Groups and Vice Versa, His Conduct Does Not Foster an Excessive Entanglement of State With Religion …………………………… 14

B. There Are Two Additional Tests Implicated in the Context of an Establishment Clause Violation: The Endorsement Test is Focused on How a Reasonable Observer Viewed the Action and the Coercion Test Rests on Undue Influence ……………………………. 14

II. A Public School Teacher's First Amendment Right to Freedom of Speech is Violated When he is Prohibited From Engaging in a Discussion on the Topic of Intelligent Design With Students ……………………………. 17

A. A Public School Teacher Should Not be Compelled to Relinquish His First Amendment Right to Speak on Matters of Public Concern ………. 17

1. Intelligent Design is a Public Concern that has been Highly Scrutinized and Publicized in the Media ………………………. 18

2. Respondent's Discussion of Intelligent Design was not a Disruption of Official Functions………………………………………. 19

3. Respondent's Discussion of Intelligent Design was a Motivating Factor for the Disciplinary Actions of the School Board……. 21

B. The School Board's Policy Violates the Viewpoint-Neutrality Requirement of the First Amendment ……………………………………… 21

CONCLUSION ……………………………………………………………. 22

APPENDIX ………………………………………………………………… 24

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISION

U.S. Const. amend. I …………………………………………………………… 1,6, 24

U.S. Const. amend XIV, § 1 ……………………………………………………….1, 24

UNITED STATES SUPREME COURT CASES

Brandenburg v. Ohio, 395 U.S. 444 (1969) …………………………………… .17, 18, 21

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ………………………………. …17

Connick v. Myers, 461 U.S. 138 (1983) ……………………………………….. 18, 19, 21

Epperson v. Arkansas, 393 U.S. 97, 106 (1968) …………………………………….....12

Edwards v. Aguillard, 482 U.S. 578, 585 (1987) ………………………………………11

Garrison v. Louisiana, 379 U.S. 64 (1964) ……………………………………………...18

Good News Club v. Milford Central School, 533 U.S. 98 (2001) ………………………22

Hustler v. Falwell, 485 U.S. 46 (1988) ……………………………………… ………17

Keyishian et al. v. Regents of New York, 385 U.S. 589 (1966) ………………. ……….17

Kingsley Intl. Pictures v. Regents of New York, 360 U.S. 684 (1959) ………. ………..17

Lamb's Chapel v. Center Moriches Union
Free School District, 508 U.S. 384 (1993) …………………………………..13, 14

Lee v. Weisman, 505 U.S. 577 (1992) …………………………………………..10, 11, 15

Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) …………………………………….....14

Lynch v. Donnelly, 465 U.S. 688 (1984) …………………………………………………..15

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1987) ………………….21

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) ……………………………………………18

N.A.A.C.P. v. Claiborne, 458 U.S. 886 (1992) …………………………………………19

N.Y. Times v. Sullivan, 376 U.S. 254 (1964)……………………………………………17

Pickering v. Board of Education, 391 U.S. 563 (1968)…………………………17, 18, 19

Rankin v. McPherson, 483 U.S. 378 (1987) ……………………………………………20

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995) …….21

Roth v. United States, 354 U.S. 476 (1957) …………………………………………..17

Shelton v. Tucker, 364 U.S. 479 (1960) ……………………………………………...17

Sweezy v. New Hampshire, 354 U.S. 234 (1957) ……………………………………18

FEDERAL COURT CASES

Africa v. Pennsylvania, 662 F.2d 1025 (3rd Cir. 1981) ………………………………...8, 9

Alvarado v. City of San Jose, 94 F.3d 1223 (9th Cir. 1996) ………………………...1, 8, 9

Brown v. Woodland Joint Unified School District, 27 F.3d 1373 (9th Cir. 1994) …..10, 11

Buffkins v. Omaha, 922 F. 2d 465 (8th Cir. 1990)……………………………………17

Columbus Education Ass'n v. Columbus City School District,

623 F. 2d 1155 (6th Cir. 1980)…………………………………………...18, 19, 20

Freiler v. Tangipahoa Parish Board of Education,

185 F.3d 337 (5th Cir. 1999) …………………………...9, 10, 11, 12, 13, 15, 16

Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707 (M.D. PA 2005) ……15, 16

United States v. Associated Press, 52 F. Supp. 362 (S.D. NY 1943) ……………….17, 18

STATEMENT OF THE CASE

OPINIONS BELOW

The decision and order of the United States District Court for the Eastern District of Arklatex is contained in the Official Record (R.11-14). The decision of the United States Court of Appeals for the Fourteenth Circuit is also included in the Official Record (R.15-19).

CONSTITUTIONAL PROVISIONS INVOLVED

The text of the following Constitutional provisions which are relevant to the determination of this case are included in the appendix: U.S. Const. amend. I and U.S. Const. amend. XIV, § 1.

STANDARD OF REVIEW

The issues in this case pose questions of fact and questions of law. Therefore, the appropriate standard is de novo. Alvarado v. City of San Jose, 94 F. 3d 1223, 1226 (1996).

STATEMENT OF THE CASE AND FACTS

Dr. Peter Girsh is a highly respected scholar and educator in the field of biology. He graduated from Yale University in 1985 and received his Ph.D. in Biochemistry from Harvard University in 1990 (R.4). Dr. Girsh has appeared on many television programs in which he outlined the theory of Intelligent Design (R.4). Due to his complex research on the subject matter, Dr. Girsh has become an expert in the field receiving numerous requests to speak on Intelligent Design (R.4). Intelligent Design is the "theory that nature and complex biological structures were designed by an intelligent being and were not

created by chance" (R.6). Dr. Girsh's popularity stems from his unique perspective on the issue. He believes that Intelligent Design is purely scientific and should have no connection to any religious movement (R.4). Dr. Girsh has openly disagreed with religious organizations which use Intelligent Design to mix religion with science (R.4). Although Dr. Girsh understands that some religions will use the Intelligent Design theory to further their causes, he states that Intelligent Design can and should be taught without ever mentioning God (R.4). Specifically Dr. Girsh has stated, "I am interested in the science of Intelligent Design; its religious implications don't concern me" (R.4). As a result of his scientific approach to the theory of Intelligent Design, Dr. Girsh was called upon to contribute to a textbook that provided an alternative to the religion-based Intelligent Design textbooks on the market (R.5).

Dr. Girsh serves as a high school biology teacher at the prestigious Arklatex School for Mathematics and Sciences ("ASMS") (R.5). His students have had great success in the field of biology with his AP Biology students scoring a 100% pass score of "5" on the AP exam for the past 10 years (R.5). Dr. Girsh has always taught from the Department of Education approved textbooks, which include the theory of evolution, but never mention Intelligent Design (R.5).

Dr. Girsh's national prominence came to the attention of the ASMS School Board. On September 8, 2003, the ASMS School Board, in an attempt to stifle the teaching of Intelligent Design, adopted a new policy prohibiting the instruction of Creationism and Intelligent Design (R.5). The new policy stated that teachers could teach alternative theories to evolution, but not Creationism and Intelligent Design (R.6).

Dr. Girsh was fully aware of the new policy. However, on January 26, 2004, he was faced with an intellectual conflict. A student of Dr. Girsh's, Randall Johnson, stated, "There is a whole science out there you haven't been teaching us! Why have we been deprived?" (R.6). Always the consummate professional, Dr. Girsh did not want to violate the new School Board policy. He avoided answering the question and dismissed class early, in order to develop an appropriate response (R.6). The next day, Dr. Girsh's students returned to class and bombarded him with questions on Intelligent Design (R.6). At this point, Dr. Girsh informed his class that the School Board had adopted a new policy which prohibited the teaching of Intelligent Design (R.7). However, Dr. Girsh was familiar with the sensitivities of being an exceptional student with high expectations, and as a result gave his class an overview of Intelligent Design (R.6-7). Dr. Girsh explained that evolution alone cannot explain the origin, complexity and diversity of life (R.7). However, according to the affidavits of the students, Dr. Girsh never used the word "God" in his lecture (R.8).

The next day, Dr. Richard Rice, the principal of ASMS, confronted Dr. Girsh about the discussion on Intelligent Design (R.8). Dr. Rice informed Dr. Girsh that the mother of a student called him at home to complain about the lecture (R.8). However, Dr. Rice also received fifteen calls from parents urging Dr. Rice to allow the teaching of Intelligent Design (R.9). Nonetheless, Dr. Rice instructed Dr. Girsh not to mention Intelligent Design again in the classroom (R.9).

Like the day before, when his students returned to class, they were very interested

in the issue of Intelligent Design. But when Dr. Girsh started answering more questions, three students walked out of the class (R.9). He tried to stop them, but to no avail (R.9).

Following the classroom discussions, the *Arklatex Tribune* printed two open letters from the parents of students (R.9). One was from Dorothy Klinger, urging the State of Arklatex to stop funding ASMS (R.9). She also stated that her daughter had withdrawn from the school (R.9). The second letter was from Ranada Johnson, Randall Johnson's mother (R.9). She urged the State to not only allow the teaching of Intelligent Design, but to implement the theory as an alternative to evolution (R.9). Ms. Johnson also reported that Dr. Girsh had lit a "spark" in her son resulting in his interest in Intelligent Design and motivating him to pursue a degree in biology (R.9).

Later that afternoon, Dr. Rice presented Dr. Girsh with his personnel file which included two citations for insubordination, once on January 26, 2004 and once on January 27, 2004, due to "willful violation of School Board policy Sec. 1701.2" and for "insubordinate disparagement of School Board policies" (R. 9-10). Dr. Rice informed Dr. Girsh that another violation would result in a hearing before the School Board to determine the future of Dr. Girsh's employment.

PROCEDURAL HISTORY

On June 7, 2004, the United States District Court for the Eastern District of Arklatex held that Dr. Girsh's teaching of Intelligent Design in public schools violated the Establishment Clause, therefore the School Board's policy prohibiting such teaching was not in violation of the Establishment Clause (R.13). On the issue of the First Amendment right to freedom of speech, the court concluded that Dr. Girsh's speech, to the extent it raised an issue of public concern, was so disruptive it is not entitled to constitutional protection (R.14). The trial court granted School Board's motion for summary judgment and dismisses Dr. Girsh's complaint on both claims (R.14).

Girsh appealed the ruling to the United States Court of Appeals for the Fourteenth Circuit (R.15). The appellate court held that there were unresolved questions of material fact, reversed the District Court's grant of summary judgment and remanded for a trial on the merits (R.16).

Following the appellate court's ruling, the School Board filed a writ of certiorari to the United States Supreme Court. The Court accepted and will consider the following (R.20):

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

SUMMARY OF THE ARGUMENT

The Establishment Clause of the First Amendment declares that, "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I. This prohibition against the establishment of religion is made applicable to the states, with full force, through the Fourteenth Amendment. Although, many courts have concluded that a relentless and all pervasive attempt to exclude religion from every aspect of public life may, in itself, become inconsistent with the Constitution. With respect to the case at hand, this analysis could not be more correct. The ASMS school board claims that Dr. Girsh violated the Establishment Clause by embarking in a classroom discussion on Intelligent Design. Yet, the truth of the matter is that Dr. Girsh is a dedicated educator, with a commitment to fostering an exceptional learning environment for his students. He has spent a great deal of time detailing the theory of Intelligent Design such that he has emerged as an expert on the subject matter. Due to his scientific approach in studying the new concept, Dr. Girsh has been asked to educate others concerning Intelligent Design, on countless occasions. Likewise, when his students requested an explanation of Intelligent Design, Dr. Girsh felt compelled to provide them with an accurate assessment of this scientific theory. During his lecture, Dr. Girsh used the words, "Intelligent Designer". He never said "God", nor did he put forth to his students that Intelligent Design was actually a religious doctrine rather than scientifically based. Accordingly, the school board is mistaken in its classification of Intelligent Design as a religion, and Dr. Girsh's conduct did not violate the Establishment Clause of the First Amendment.

In addition, Americans enjoy a vibrant freedom of speech provided by the United States Constitution. This freedom is not absolute and a state may put limitations on certain types of speech. However, a public school teacher may not be compelled to relinquish his First Amendment freedom of speech as a condition to his employment. A balance must be struck between the interests of the public teacher, 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 that it performs through its employees. Also, a public school teacher's speech cannot disrupt the official functions of the classroom. In addition, a public school teacher's speech cannot be the motivating factor in disciplinary actions. The state cannot discriminate against speech on the basis of viewpoint. Furthermore, the Court held that a public school violates the First Amendment when it places limitations on speech that stems from a religious viewpoint.

In the present case, Dr. Girsh is a public school teacher who led a discussion on the topic of Intelligent Design. The appellate court held that Intelligent Design is a matter of public concern. Dr. Girsh did not disrupt the official functions of the classroom or school. Also, Dr. Girsh's speech was the motivating factor in the disciplinary actions he received from the School Board. Further, the School Board violated the viewpoint-neutrality requirement of the First Amendment. For all these reasons, this Court should affirm the holding of the United States Court of Appeals for the Fourteenth Circuit.

ARGUMENT

I. The Establishment Clause of the First Amendment is Not Violated by a Public School Teacher's Lecture on Intelligent Design and Such Conduct Does Not Run Afoul of the Lemon Test or the Endorsement and Coercion Tests.

The First Amendment's Establishment Clause is a well-settled prohibition. Throughout time, it has come to mean that a state may not promote or affiliate itself with any religious doctrine or organization and may not discriminate among persons on the basis of their religious beliefs and practices. (See Alvarado v. City of San Jose, 94 F.3d 1223, 1231 (9th Cir. 1996).) Yet, when attempting to define religion for purposes of the Establishment Clause, the court in Africa v. Pennsylvania concluded that few tasks which confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the First Amendment. Id. at 1227. In addition, the Africa court adopted the "three useful indicia" approach in constructing a definition of religion. The guidelines are as follows: 1) a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters, 2) a religion is comprehensive in nature; it consists of a belief system as opposed to an isolated teaching, and 3) a religion often can be recognized by the presence of certain formal and external signs, including formal services, ceremonial functions, the existence of clergy, and structure and organization. Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3rd Cir. 1981). Furthermore, detailed in its analysis, the Alvarado court found that there was a distinction between religion and religious significance, such that endorsement of the former is in direct opposition to the Establishment Clause, but endorsement of the latter, by itself, is insufficient to prove a constitutional violation. (See

Alvarado v. City of San Jose, 94 F.3d 1223, 1231 (9th Cir. 1996).) Finally, in the context of public education, three complimentary and sometimes overlapping tests are traditionally applied in evaluating a cause of action brought under the Establishment Clause. Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 343 (5th Cir. 1999),

Focusing on the instance case, the District Court erred in its ruling that an academic discussion, between Dr. Girsh and students enrolled in his AP Biology class, constituted a violation of the Establishment Clause of the First Amendment. (See Alvarado v. City of San Jose, 94 F.3d 1223, 1231 (9th Cir. 1996).) Alternatively, the District Court should have held that the school board's policy prohibiting the instruction of Intelligent Design was unconstitutional, because of its unwarranted bias against religion. Id. at 1231. Further, the District Court was incorrect in concluding that Intelligent Design is a religion for purposes of the First Amendment. In fact, it is an unconventional, scientific theory mainly studied by science scholars, and it employs no type of formal services, ceremonial functions, or structural hierarchy. Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3rd Cir. 1981). Although Intelligent Design contains fundamental tenets found in some religions, this is not determinative of its overall nature in being solely classified as a religion and not a scientific theory. (See Alvarado v. City of San Jose, 94 F.3d 1223, 1231 (9th Cir. 1996).) Consequently, if this Court concludes that the District Court was correct in it's ruling of Intelligent Design as a religion, this Court should still find, through the additional tests used to evaluate Establishment Clause violations, that Dr. Girsh did not offend the First Amendment. Freiler v. Tangipahoa

Parish Board of Education, 185 F.3d 337, 343 (5th Cir. 1999). Accordingly, this Court should affirm the decision of the Court of Appeals for the Fourteenth Circuit.

A. A Public School Teacher's Instruction on Intelligent Design Did Not Violate the First Amendment's "Establishment of Religion" Clause Because His Actions Served a Secular Purpose, the Primary Effect Neither Advanced Nor Inhibited Religion, and His Actions Did Not Foster an Excessive Entanglement of State With Religion.

Not every state action implicating religion is invalid if one or a few citizens find such action offensive. (See Lee v. Weisman, 505 U.S. 577, 597 (1992).) For example, a public school curriculum requiring children to discuss witches or create poetic chants and pretend they were witches or sorcerers did not promote "the practice of religion of witchcraft" in violation of the First Amendment's "Establishment of Religion" Clause. Brown v. Woodland Joint Unified School District, 27 F.3d 1373, 1378 (9th Cir. 1994). The creative and educational value of the curriculum did little to trample on the children's freedom of religion. Similarly, the court in Lee found that the First Amendment does not prohibit practices, which by any realistic measure, create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have a meaningful and practical impact. Lee v. Weisman, 505 U.S. 577, 598 (1992). That said, this Court has articulated a three-part test, also known as the Lemon test, to determine whether state action contravenes the First Amendment's Establishment Clause. Under the Lemon test, the state's practice or conduct must reflect a clearly secular purpose, have a principal or primary effect that neither advances nor inhibits religion, and avoid excessive state entanglement with religion, in order to withstand an attack grounded in

the Establishment Clause. Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 343 (5th Cir. 1999).

In the present case, Dr. Girsh was simply acting in his capacity as a facilitator of the learning process, when he undertook in the discussion on Intelligent Design. Lee v. Weisman, 505 U.S. 577, 598 (1992); Brown v. Woodland Joint Unified School District, 27 F.3d 1373, 1378 (9th Cir. 1994). Furthermore, during his lecture, Dr. Girsh made reference to an Intelligent Designer, but never used the word "God". Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 343 (5th Cir. 1999). Finally, Dr. Girsh's presentation was absent of any religious declarations. He introduced the theory of Intelligent Design to his students using only quantifiable and empirical scientific evidence. Id. at 343. Therefore, Dr. Girsh did not violate the Establishment Clause of the First Amendment.

1. The Desire to Provide an Exceptional Learning Environment, to Encourage Critical Thinking , and Familiarity With the High Expectations of His Students is Demonstrative of Dr. Girsh's Secular Purpose.

A secular purpose is established by asking whether the intent of an action is sincere. Specifically, this Court must consider whether the intent furthers the purpose for which it is articulated or whether the intent is a sham because it thwarts purpose. (See Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 344 (5th Cir. 1999).) For instance, governmental intention to promote religion is clear when a state enacts a law to serve a religious purpose. Ewards v. Aguillard, 482 U.S. 578, 585 (1987). Moreover, a ban on the teaching of evolution in public schools violates the First Amendment, since teaching and learning must not be tailored to the principles or prohibitions of any

religious sect or dogma. Epperson v. Arkansas, 393 U.S. 97, 106 (1968). Finally, once a sincere secular purpose is recognized, it is treated with deference as to survive a court's scrutiny. Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 344 (5th Cir. 1999).

In this case, Dr. Girsh testified before the state legislature concerning the need for a high school that concentrated on math and science skills. He was among the first faculty members of ASMA, since it's founding more than ten years ago. Also, Dr. Girsh has served on the school's curriculum committee from 1997 to present. He possesses a compelling desire to provide an engaging and informed environment for his students to learn science. (See Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 344 (5th Cir. 1999).) Furthermore, Dr. Girsh is personally familiar with the sensitivities of being an exceptional student and the high expectations, which follow. Such actions are conclusive of a secular purpose. Id. at 344. On the other hand, the school board claims that Dr. Girsh's actions are representative of a motive to promote religion and thus, violate the Establishment Clause. In fact, the school board violated the First Amendment by discouraging freedom of belief through its enactment of a policy prohibiting the teaching of Intelligent Design, based on its erroneous assertion that the theory is a religion. Nonetheless, this Court should hold that Dr. Girsh's conduct served a secular purpose.

2. Measured by the "Effects" Test of Lemon, the Principal or Primary Effect of Dr. Girsh's Actions Neither Advanced Nor Inhibited Religion.

Irrespective of purpose, Lemon's second prong asks the question of whether an action or conduct conveys a message of endorsement or disapproval. (See Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 346 (5th Cir. 1999).) This Court has interpreted the rule to mean; "a government practice may not aid one religion, aid all religions, or favor one religion over another". Id. at 346. However, in Lamb's, this Court held that where benefit to religion or church is no more than indirect, remote, or incidental, no realistic danger exists that the community would view the government's action as endorsing religion or any particular creed. (See Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 395 (1993).)

Turning to the facts of this case, Dr. Girsh was a prominent and sought- after speaker on the subject of Intelligent Design, due to his position that it is a purely scientific theory and void of any connections to religion. (See Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 346 (5th Cir. 1999).) In addition, Dr. Girsh has appeared, on numerous television and radio programs, expressing disagreement with religiously affiliated organizations that attempt to use Intelligent Design in advancing their beliefs. Recently, he made contributions to an Intelligent Design textbook, which was created as an alternative to religiously affiliated Intelligent Design textbooks that are currently being sold on the market. Last, Dr. Girsh's book strictly addresses scientific evidence to support the theory of Intelligent Design. Id. at 346. Still, the school board asserts that by presenting his biology students with such information, Dr. Girsh was

essentially teaching Creationism. That argument is flawed, because Intelligent Design and Creationism are not one in the same. (See Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 395 (1993).) Thus, Dr. Girsh's lecture neither advanced nor inhibited religion.

3. Since Dr. Girsh Did Not Openly or Secretly, Participate in the Affairs of Any Religious Groups and Vice Versa, His Conduct Does Not Foster an Excessive Entanglement of State With Religion.

In order to determine whether there is excessive entanglement of state with religion, this Court found that three inquiries are required. Lemon v. Kurtzman, 403 U.S. 602, 615 (1971). First, an analysis, into the character and purposes of the benefited organizations, must be made. Second, an examination as to the nature of the action is needed. Third, a court must delve into the relationship between the actor and the religious authority. (See Id. at 615.)

With Dr. Girsh, there was no participation with any religious organization. He routinely spoke out against religious organizations that tried to link their beliefs to the principles of Intelligent Design. Similarly, Dr. Girsh offered his students a neutral, scientific viewpoint on the theory of Intelligent Design. (See Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).) Finally, Dr. Girsh's students were informed of the school board's concern for the teaching of Intelligent Design. Id. at 615.

B. There Are Two Additional Tests Implicated in the Context of an Establishment Clause Violation: The Endorsement Test is Focused on How a Reasonable Observer Viewed the Action and the Coercion Test Rests on Undue Influence.

The endorsement test is much like the "effects" prong in the Lemon analysis that

is discussed above in section A (2). Both tests, examine the challenged action or conduct to determine whether its message is one of advancement or disapproval of religion. (See Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 343, 346 (5th Cir. 1999).) However, in addition to content, the endorsement test makes an inquiry into what a reasonable, objective observer understood the action to mean. (See Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707, 714-15 (M.D. PA 2005).) In Lynch, this Court articulated a more concrete explanation of how the endorsement test functions with respect to public schools. It explained that school sponsorship of a religious message is impermissible, when it sends an ancillary message to adherents that they are insiders and to non-adherents that they are outsiders. Lynch v. Donnelly, 465 U.S. 688 (1984).

As for the coercion test, an action is said to be coercive if it is performed in such a way that mandates participation from dissenters. (See Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 343 (5th Cir. 1999).) In terms of a school environment, the coercion test specifies that an action cannot persuade or compel a student to participate in religious exercises, with no real alternative for dissent. Id. at 343. For instance, this Court held that a principal's inclusion of clergy for purposes of giving a nonsectarian invocation and benediction, during a high school graduation ceremony, violated the Establishment Clause. (See Lee v. Weisman, 505 U.S. 577 (1992).)

Beginning with the endorsement test, the school's curriculum currently includes the teaching of evolution, but prohibits the same for Intelligent Design. Therefore, as Dr. Girsh has argued, when Intelligent Design is taught alongside evolution in a public school, there can be no appearance that the school is endorsing either view, for they are both

being treated the same. (See Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707, 714-15 (M.D. PA 2005).) That said, the school board taking an affirmative stance against teaching Intelligent Design should be held as a violation of the Establishment Clause. Id. at 714-15. In summary, Dr. Girsh's actions should pass the endorsement test and the school board's policy should not.

Looking at the coercion test, Dr. Girsh introduced his AP biology students to Intelligent Design, using four independent and objective teaching methods. (See Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 343 (5th Cir. 1999).) First, he presented the students with a lecture that consisted of a formal definition of the theory and three examples of scientific evidence that tend to support Intelligent Design. Next, Dr. Girsh showed his students a textbook and magazine articles that covered Intelligent Design. Third, he played the students a two-minute video clip explaining the basic tenets of Intelligent Design. Finally, at the end of class, Dr. Girsh offered his students an informational pamphlet, to be taken on a voluntary basis only. Id. at 343. Due to his universal and nondiscriminatory approach to teaching Intelligent Design, Dr. Girsh's students could compare what they learned about the theory against what they already knew about evolution and make an informed, non-pressured decision as to which doctrine to accept. Accordingly, there was no coercive effect in Dr. Girsh's actions.

II. A Public School Teacher's First Amendment Right to Freedom of Speech is Violated When he is Prohibited From Engaging in a Discussion on the Topic of Intelligent Design With Students.

Americans enjoy a vibrant freedom of speech provided by the United States Constitution. U.S. Const. amend. I. This freedom, however, is not absolute. Brandenburg v. Ohio, 395 U.S. 444 (1969). There are certain types of speech that are not protected by the First Amendment, such as obscenity, defamation and fighting words. Roth v. United States, 354 U.S. 476 (1957); N.Y. Times v. Sullivan, 376 U.S. 254 (1964); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Supreme Court has repeatedly held that unless the speech in question falls into one of these categories, the speaker will have the full protection of the First Amendment. Kingsley International Pictures v. Regents of University of New York, 360 U.S. 684 (1959); Hustler v. Falwell, 485 U.S. 46 (1988); Buffkins v. Omaha, 922 F. 2d 465 (8th Cir. 1990). The freedom of speech clause of the United States Constitution is applicable to the states. U.S. Const. amend. XIV.

A. A Public School Teacher Should Not be Compelled to Relinquish His First Amendment Right to Speak on Matters of Public Concern.

A public school teacher may not be compelled to relinquish his First Amendment freedom of speech as a condition to his employment. Pickering v. Board of Education of Township High School District 205, Will County, 391 U.S. 563, 568 (1968). Conditions on public employment that require an employee to surrender constitutional rights have been rejected. Keyishian et al. v. Board of Regents of the University of the State of New York, 385 U.S. 589, 604 (1966). The Supreme Court held that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960). In United States v. Associated

Press, the district court expressed a preference for a free exchange of ideas coming from a "multitude of tongues, rather than through any kind of authoritative selection." United States v. Associated Press, 52 F. Supp. 362, 372 (S.D. NY 1943). Furthermore, the Court stated that "teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

However, freedom of speech is not absolute. Brandenburg v. Ohio, 395 U.S. 444 (1969). Government can regulate speech with narrowed specificity. N.A.A.C.P. v. Button, 371 U.S. 415, 432 (1963). The Supreme Court has created a balancing test for when public employees can speak on matters of public concern. Pickering v. Board of Education, 391 U.S. 563, 568 (1968). There must be a balance between the interests of the public teacher, 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 that it performs through its employees. Id. A public school teacher's speech cannot disrupt the official functions of the classroom. Columbus Education Assn. v. Columbus City School District, 623 F. 2d 1155, 1160 (6th Cir. 1980).

1. Intelligent Design is a Public Concern that has been Highly Scrutinized and Publicized in the Media.

A public school teacher's speech in the classroom is protected when he is commenting on matters of public concern. Connick v. Myers, 461 U.S. 138, 142 (1983). The Court in Garrison v. Louisiana held that "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74 (1964). Furthermore, the Court has stated that speech on public issues is the

"highest rung of the hierarchy of First Amendment values" and therefore entitled to further protection. N.A.A.C.P. v. Claiborne, 458 U.S. 886, 913 (1982). The test for whether a matter is of public concern is determined by the content, form and context of a given statement, as revealed by the whole record. Connick v. Myers, 461 U.S. 138, 147-148 (1983).

The Court has held that internal issues within a place of employment are not public concern. Connick v. Myers, 461 U.S. 138, 142 (1983). In Connick, an employee distributed a questionnaire regarding the competency of her superiors. Id. at 140. The Court held that the questionnaire was a matter of internal office affairs, and therefore does not offend the First Amendment. Id. at 149.

Unlike internal office affairs, Intelligent Design is a matter of public concern. The letters to the *Arklatex Tribune* illustrate the fact that Intelligent Design is important to the public discourse on the origin of mankind. Taking the whole record into account, the content, form and context of Dr. Girsh's discussion with his students constitutes matters that are of a public concern. Therefore, Dr. Girsh's speech was on a matter of public concern and should be protected from punishment under the First Amendment. Accordingly, this Court should affirm the appellate court's holding that Intelligent Design is a matter of public concern.

2. Respondent's Discussion of Intelligent Design was not a Disruption of Official Functions.

In applying the Pickering test, the Court must determine if the employer is correct in restriction of employee's speech to prevent the disruption of official functions or to insure the effective performance by the employee. Columbus Education Ass'n v.

Columbus City School District, 623 F. 2d 1155, 1160 (6th Cir. 1980). Factors used to determine whether an employer can regulate his employees' speech include "content of the speech, coworker harmony, maintaining discipline by immediate supervisors, need for personal loyalty and confidence between workers and supervisors." Id. The manner, time and place of the employee's speech will be considered in balancing the employee's interest and the employer's interest. Rankin v. McPherson, 483 U.S. 378, 388 (1987). The employee's interest may be outweighed if "the statement impairs discipline by superiors or harmony among co-workers, has detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." Id.

In the present case, Dr. Girsh did not disrupt the official functions of the school when he embarked on the discussion of Intelligent Design with his students. The content of his speech was appropriate to a classroom setting. Dr. Girsh did not cause any coworker disunity. He simply brought understanding to his students on the issue of Intelligent Design and explained the School Board's policy on the teaching of the subject. Although three students left the room during the discussion, their departure is not a substantial cause for limiting Dr. Girsh's freedom to speak on a matter of public concern.

Accordingly, Dr. Girsh's discussion of Intelligent Design was not a disruption of official functions. Therefore, this Court should find that Dr. Girsh's freedom of speech outweighs the interest of the School Board in limiting his opportunities to contribute to a matter of public concern.

3. **Respondent's Discussion of Intelligent Design was a Motivating Factor for the Disciplinary Actions of the School Board.**

An employer violates the Constitution when he takes disciplinary action against a public employee for the employee's speech on matters of public concern. Connick v. Myers, 461 U.S. 138, 140 (1983). The employee has the burden to prove that his speech was a "motivating factor" in the employer's disciplinary action. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1987). Once the employee has met his burden, the employer must prove by a preponderance of the evidence that he would have made "the same decision in the absence of the protected conduct." Id.

Here, it is clear from the record that the School Board's decision to reprimand Dr. Girsh flowed directly from his discussion of Intelligent Design. Dr. Girsh's record up to that point was flawless with his file garnering many achievements and acclamations. The only negative incidents in his file are the two insubordination claims arising from his discussion of Intelligent Design.

Accordingly, this Court should hold that Dr. Girsh's discussion of Intelligent Design was a motivating factor in the disciplinary actions taken against him and that these actions violate Dr. Girsh's First Amendment right to free speech.

B. **The School Board's Policy Violates the Viewpoint-Neutrality Requirement of the First Amendment.**

As previously discussed, freedom of speech is not absolute. Brandenburg v. Ohio, 395 U.S. 444 (1969). However, the state cannot discriminate against speech on the basis of viewpoint. Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 829 (1995). The Court held that religion is a viewpoint from which many issues flow. Id.

Furthermore, the Court held that a public school violates the First Amendment when it places limitations on speech that stems from a religious viewpoint. Good News Club v. Milford Central School, 533 U.S. 98, 111 (2001).

In this case, Dr. Girsh explained Intelligent Design to his students after numerous questions on the subject. He did not indoctrinate the students with religion. Dr. Girsh presented a topic that has religious implications, but did not mention the word "God" during his presentation. He described an alternate theory on the origin of mankind and did not indicate the intelligent designer. Intelligent Design, much like evolution, presents a viewpoint, and Dr. Girsh was allowing his students to learn the various theories on the origin of mankind.

Accordingly, this Court should find that the School Board's policy against the teaching of Intelligent Design violated the viewpoint-neutrality requirement of the First Amendment.

CONCLUSION

For the above mentioned reasons, the Respondent respectfully requests that this Court affirm the holding of the United States Court of Appeals for the Fourteenth Circuit. Specifically, the Respondent requests a finding that the Establishment Clause of the First Amendment is not violated by a public school teacher's lecture on Intelligent Design and such conduct passes the Lemon, endorsement, and coercion tests. The Respondent also respectfully requests that this Court find a public school teacher's First Amendment right

to freedom of speech is violated when he is prohibited from engaging in a discussion on the topic of Intelligent Design with students.

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.

U.S. Const. amend. XIV, § 1

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.