
Docket No. 2005 – 0113

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

October Term, 2005

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

Petitioner

v.

PETER GIRSH

Respondent

On Writ of Certiorari

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Did a school district violate the Establishment Clause of the First Amendment when it prohibited the instruction on Intelligent Design but allowed the teaching of evolution?
2. Whether a public high school biology teacher's First Amendment right to freedom of speech was violated when the teacher discussed the topic of Intelligent Design with the students at a prestigious school which concentrates on both science and math?

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STATEMENT OF THE CASE

OPINIONS BELOW

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

CONSTITUTIONAL PROVISIONS INVOLVED

The text of the following Constitutional provisions relevant to the determination of this case are included in the appendix: U.S. Const. Amend. I.

STANDARD OF REVIEW

On appeal before this Court is the Appellate court's reversal and remand of Appellant's summary judgment. This authority comes from 28 U.S.C § 2106 where "the Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances (*U.S. v. Dotson*, 440 F. 2d 1224, 1225 (1971)). The issues in this case pose questions of fact, therefore, the appropriate standard of review is clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S 564, 573-574 (1985).

STATEMENT OF THE CASE AND FACTS

This Court is being asked to affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit reversing the District Court's grant of summary judgment and remand for a trial on the merits.

The Arklatex School for Mathematics and Science ("ASMS") is a school for exceptionally talented students. (R.5). Though ASMS is a public school, students must apply and go through an interview process in order to attend. (R.4). Due to its public school status, ASMS

and its students are able to enjoy the same benefits and public funds as other public school districts. (R. 4)

Dr. Peter Girsh (“Dr. Girsh”) is a high school biology teacher at ASMS. Additionally, Dr. Girsh is well known for his features and commentary on Intelligent Design, the theory that only an intelligent or supernatural cause could be responsible for life, living things, and the complexity of the universe. (R.4). Dr. Girsh’s view on Intelligent Design is not connected to a religious group and the record does not indicate he has professed a religious affiliation in any of his speeches on the subject. (R.4). He strongly disagrees with the idea that intelligent design is a religious theory and he believes Intelligent Design “can and should be taught without ever mentioning God.” (R.4).

As a teacher at ASMS, Dr. Girsh has served as a faculty advisor for the Biology Club and the Future Engineers of America Club for nine years. (R.5). He also served on the curriculum committee for seven years. (R.5). Dr. Girsh’s AP Biology students have had a 100% passage rate on the AP exam for the past ten years. (R.5).

On September 8, 2003, ASMS School Board adopted Policy § 1701.2, a policy that prohibits teachers from instructing students on Creationism and/or Intelligent Design. (R. 5). The President of the School Board, Anita Pascal, stated in her affidavit that the purpose for the new policy was to “avoid Establishment Clause violations that might result from teaching such theories and to avoid the appearance the school endorses any particular religious belief.” (R.5-6).

On January 26, 2004, as Dr. Girsh prepared to deliver a lecture to his AP Biology class, one of his students, Randall Johnson, raised his hand and asked a question about Dr. Girsh’s involvement in the Intelligent Design movement. Dr. Girsh immediately dismissed the class without answering the question. (R.6). As soon as he entered the classroom the following day, Dr. Girsh was flooded with questions about the theory of Intelligent Design. (R.6). Dr. Girsh proceeded to tell his students about the school board policy not allowing him to teach Intelligent

Design. (R.6-7). Further, he went on to tell the class that he believed the policy was an unconstitutional violation of the Establishment Clause and a violation of his First Amendment right to free speech, and that he thought “the School Board has more important things to worry about than trying to prevent students from thoroughly learning science.” (R.7). Dr. Girsh then began to tell his students about the theory of Intelligent Design. (R.7). He told his students that there are three main ways in which scientists have detected intelligent design in nature. (R.7). He never used the word God in his explanation, nor did he in any way indicate the nature of the intelligent designer. (R.8). After his lecture, he showed the students his recent contributions to an Intelligent Design textbook as well as a few of his published magazine articles. (R.8). Dr. Girsh went on to show his students a video clip of him being interviewed on the subject of Intelligent Design.(R.8). When asked by the interviewer whether the scientific evidence of Intelligent Design proves that God created people, Dr. Girsh responded by saying that “Intelligent Design is a purely scientific, and not a religious theory. It suggests the universe was not created by chance and cannot be explained by evolution alone, but does not speculate as to the nature of who or what did create it or how.” (R.8). When he dismissed class for the day, Dr. Girsh offered students an informational pamphlet he had developed to help market his textbook. (R.8). It did not mention God, nor did it in any way describe the nature of the intelligent designer. (R.8).

The next day, January 28, 2004, Dr. Rice, principal of ASMS, asked Dr. Girsh about his class discussion on Intelligent Design. (R. 8) Dr. Rice mentioned that Maya Klinger, one of Dr. Girsh’s students, told her mother, Dorothy Clinger (“Ms. Clinger”), about the class discussion on Intelligent Design. Ms. Clinger was upset about the discussion because she felt that it undermined her and her husband’s efforts to raise their children as Atheists.” (R. 8). In her affidavit, Maya stated that she felt uncomfortable during the discussion of Intelligent Design because she “doesn’t believe in supernatural beings with the power to create the universe.” (R.9). In addition to the Klinger’s complaint, Dr. Rice received fifteen calls from other parents asking

that Dr. Girsh be allowed to continue teaching Intelligent Design. (R.9). Dr. Rice reminded Dr. Girsh of the new School Board policy § 1701.2 and told Dr. Girsh not to mention Intelligent Design again in the classroom. (R.9).

During Dr. Girsh's next class, the students again questioned him on Intelligent Design. (R.9.) When Dr. Girsh began to answer questions about how the scientific evidence he had previously explained to the students could be used to refute the theory of evolution, Maya Klinger and two other students walked out of class, saying "I can't hear this." (R.9). Dr. Girsh was unsuccessful in his attempt to stop them from leaving. (R.9). The following morning two open letters regarding Dr. Girsh's class discussion on Intelligent Design were printed in the *Arklatex Tribune*. (R.9). One was from Ms. Klinger urging the state of Arklatex to pull funding from ASMS. (R.9). In her letter, Ms. Klinger stated that her daughter had withdrawn from ASMS because she felt uncomfortable there as a result of the Intelligent Design discussions in Dr. Girsh's classroom. (R.9). The other letter was from Ranada Johnson ("Ms. Johnson"), Randall Johnson's mother, urging the state to implement the teaching of Intelligent Design in the classroom. According to Ms. Johnson's letter, Dr. Girsh's Intelligent Design discussions renewed Randall's interest in school. (R.9.).

Later that afternoon, Dr. Rice approached Dr. Girsh and handed him his personnel file. (R.9). Dr. Rice told Dr. Girsh that he had been reprimanded twice for insubordination, once on January 6, 2004, and once on January 27, 2004, due to "willful violation of School Board policy § 1701.2" and for "insubordinate disparagement of School Board policies." (R.9-10). Dr. Rice then told Dr. Girsh that another violation would result in a formal hearing before the School Board which would determine the future of his employment with ASMS. (R.10). Dr. Rice also presented Dr. Girsh with a letter from the School Board stating that Dr. Girsh is free to privately promote his ideas about Intelligent Design, but is "prohibited from, in any shape, form, or fashion, mentioning ASMS in conjunction with Intelligent Design." (R.10). The next day, an

open letter from the school board regarding Dr. Girsh was printed in the *Arklatex Tribune*. (R.10). The letter said that Dr. Girsh had been reprimanded and prohibited from teaching Intelligent Design, and “the teaching of Intelligent Design is unacceptable in the Arklatex Schools.” (R.10).

Dr. Girsh filed suit alleging the School Board’s policy of prohibiting the teaching of Creationism or Intelligent Design violated the Establishment Clause by singling out for disapproval only those alternative theories which lend support to religious beliefs and that the School District violated his First Amendment right of free speech by disciplining him for speaking about Intelligent Design and criticizing the new School Board policy. (R.10)

PROCEDURAL HISTORY

On January 26 and January 27, 2004, Dr. Girsh was cited for insubordination due to “willful violation of School Board Policy § 1701.02” and for “insubordinate disparagement of School Board policies. (R. 10). Following this action taken by the Arklatex Board of Education, Dr Girsh filed suit seeking a declaratory judgment that the policy is unconstitutional and monetary damages for the violation of his free speech rights. (R.10). The Defendants representing the ASMS school district, board of education, and school (hereinafter collectively referred to as “the School Board”) moved for summary judgment on the stipulated facts of the case. (R. 10). On June 7, 2004, summary judgment was awarded for the Defendants in the United States District Court for the Eastern District of Arklatex under the Honorable Hubert P. Franklin III. (R. 14).

On October 11, 2005, the United States Court of Appeals for the Fourteenth Circuit reversed the District Court’s decision and remanded for a new trial on the merits. (R.19). The matter was heard before the Honorable Maxell Wilkinson, United States Chief Circuit Court Judge and Circuit Judges Marsh and Lindsey. (R.19). Subsequently, ASMS sought and received a writ of certiorari from the United States Supreme Court to consider the following: (R. 20):

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

SUMMARY OF THE ARGUMENT

I.

Dr. Girsh was not in violation of the Establishment Clause when he led a class discussion on the theory of Intelligent Design. However, the ASMS School Board violated the neutrality mandated by the Establishment Clause of the First Amendment by adopting a policy that specifically prohibits only the teaching of Creationism and Intelligent Design in the Classroom. To test the constitutionality of the School Board's policy, the Court has developed a three-part test. First, the rules must have a secular purpose. Second, their principal or primary effect can neither advance nor inhibit religion. Third, they must not give rise to excessive entanglement between government and religion. Dr. Girsh's class discussion on Intelligent Design satisfies each part of this test. On the other hand, the School Board policy's primary effect is that it inhibits religion. If even one part of this test is violated, the School Board's action must be declared unconstitutional and therefore void.

This Court may also recognize the endorsement test and the coercion test as a means of testing the constitutionality of the School Board's policy. Under the endorsement test, if a challenged act endorses religion, then it will send a message to nonadherents that they are outsiders and not full members of the political community. By teaching an alternative theory in addition to Evolution, Dr. Girsh was not sending a negative message to anyone. In contrast, Dr. Girsh's discussion of more than one theory of how the world came to being sent a message of acceptance of more than one theory to his class. By virtue of the adoption of the policy alone, the School Board sent a strong message that it endorses explanations that contradict religious beliefs and disapproves of those that support them.

The coercion test prohibits government from coercing anyone to support or participate in the exercise of religion. Here, Dr. Girsh was simply answering a question posed to him by a student, he did not incorporate Intelligent Design into his curriculum. Further, Dr. Girsh spoke

about Intelligent Design from a purely scientific point of view without ever once mentioning a religious being. When the school board decided to prohibit the teaching of intelligent design they endorsed and coerced students to view only an anti-religious theory and violated the Establishment Clause.

II.

The School Board's newly adopted policy was a threat to academic freedom. Teachers may not be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. The School Board reprimanded Dr. Girsh twice for speaking out on Intelligent Design and the School Board's policy regarding the teaching of Intelligent Design. These reprimands are unconstitutional because they punish Dr. Girsh for an action that he has the right to engage in.

Additionally, the School Board retaliated against Dr. Girsh's fundamental right to free speech when it reprimanded him. In determining a public employee's rights of free speech, the task of the Supreme Court is to arrive at a balance between interests 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. In order to arrive at the balance the court uses a four part analysis: this Court must first consider whether the speech in question addresses a matter of public concern. If so, the court must then consider both the employee's interest in expression and the government employer's interest in regulating speech of its employees in order to maintain an efficient and effective workplace. Third, if the speech is protected, the employee must show that it was the substantial or motivating factor for the challenged governmental action. Finally, if the employee makes that showing, the employer must be given the opportunity to show that it would have taken the same action in the absence of the protected speech.

It is apparent that Intelligent Design is a matter of interest to the community. If it were not, the School Board would not have created a policy prohibiting it. The successful performance of Dr. Girsh's duties was not affected by the exercise of his free speech rights. Essentially, Dr. Girsh's class lecture on Intelligent Design made him more successful in performing his duties as a teacher because the discussion sparked the interest of a majority of his Biology class. Finally, Dr. Girsh's record in the classroom is impeccable. His students pass the AP exam in astounding numbers. The School Board reprimanded Dr. Girsh solely because he discussed Intelligent Design and spoke out against the School Board policy that prevented its teaching.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT WAS CORRECT WHEN IT HELD THERE WERE MATERIAL QUESTIONS OF FACT WITH REGARD TO HOW DR. GIRSH'S DISCUSSION ON INTELLIGENT DESIGN DID NOT VIOLATE THE ESTABLISHMENT CLAUSE AND WHETHER THE ARKLATEX SCHOOL FOR MATHEMATICS AND SCIENCE SPECIAL SCHOOL DISTRICT'S POLICY PROHIBITING THE TEACHING OF THIS THEORY VIOLATED THE ESTABLISHMENT CLAUSE.

The Establishment Clause of the First Amendment prohibits the State from making laws that favor any establishment of religion or prohibits the free exercise of religion. U.S. Const. amend. I. In *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970), the Court held the Establishment clause was created in an attempt to avoid sponsorship of religion, financial support, and any active involvement in religious activity. The Court has recognized that total separation between church and the state is not possible. *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984). Furthermore, the Court points out that the history of the United states has many references to a divine power and uses examples such as, the Thanksgiving holiday, the Christmas holiday, compensation of Senate and military Chaplains, the language of the Pledge of Allegiance, and the national motto "In God We Trust" printed on the national currency. *Lynch v. Donnelly*,, 465 U.S. 668, 675-677(1984). The strong history *Lynch* discusses keeps the Court from applying an absolute and liberal approach to the Establishment Clause that would "undermine the ultimate constitutional objective. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)

In order to establish whether the Establishment clause has been violated, the Supreme Court has adopted a three-prong test¹ requiring that (1) the state action must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor

¹ Some courts have "folded the entanglement inquiry into the primary effect inquiry" because the analysis of these prongs uses the same evidence. *Agosostini v. Felton*, 521 U.S. 203, 218, 232-233 (1997). Further, the entanglement prong will imply whether an action will advance or inhibit religion. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

inhibits religion, and (3) it must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Only one prong of the *Lemon* test has to be violated in order for the state action to be considered unconstitutional and therefore void. *Id.* at 612-13.

In addition to the three prong test, the Supreme Court has also applied the endorsement test and the coercion test. See *Lynch v. Donnelly*, 465 U.S. 668, 692(1984).; See also *Lee v. Weisman*, 505 U.S. 577, 586 (1992). If a challenged act endorses religion, then it will send a message to nonadherents that they are outsiders and not full members of the political community. *Lynch v. Donnelly*, 465 U.S. 668, 692(1984). In Justice O'Connor's concurring opinion she notes that the challenged act endorses religion if it "sends a message to nonadherents that they are outsiders and not full members of the political community," *Id.* at 692. The coercion test prohibits the government from coercing anyone to support or participate in the exercise of religion. It also prohibits the government to establish a state of religion among a group that could be considered coercive. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 44 (2004)

A. When Dr. Girsh Answered His Students Question on Intelligent Design, He Had A Secular Purpose, His Primary Effect Neither Advanced Nor Inhibited Religion, and It Did Not Foster an Excessive Government Entanglement With Religion, Therefore He Did Not Violate The Establishment Clause of the United States.

The district court erred when it concluded that Dr. Girsh violated the second prong of the *Lemon* test. By making this error, the District Court failed to analyze the first and third prong of the test. When analyzing whether or not there is an establishment clause violation or not, the court adopted a three- prong test referred to as the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). The test states that the state action (1) must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster an excessive government entanglement with religion. *Lemon*

v. Kurtzman 403 U.S. 602, 612-613 (1971). Dr. Girsh did not violate any of these prongs and therefore did not violate the Establishment Clause.

1. Since Dr. Girsh's discussion on Intelligent Design had a strong secular purpose, he did not violate the Establishment Clause.

The purpose prong of the Lemon test requires that the issue in question must have a secular purpose. *Lemon*, 403 U.S. 602, 612(1971). If the action is dominated by a religious purpose, then a mere existence of a secular purpose will not fill the requirement. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984).. Another question to answer with respect to the purpose prong and as established in *Lynch*, is "whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691. For example, when copies of the Ten Commandments were posted in a school to demonstrate the basic values the Commandments offered to our legal system was not strong enough for the courts to consider that it had a secular purpose. This was because the overriding ideal behind the commandments were religious due to their origin and definition. *Stone .v Graham*, 449 U.S. 39, 41 (1980). Another example the Court recognizes were when school board members of Tangipahoa included a disclaimer to be read before the evolution was taught. The Court held that the members of the board were trying to satisfy the religious concerns of the majority of the school by offering the disclaimer, thus the religious purpose was dominant over the secular purpose. *Freiler v. Tangipahoa Parish Board of Education*, 185 F. 3d 337, 342 (5th Cir. 1999)

Dr. Girsh had a strong reputation for adhering to the curriculum Arklatex Schools outlined for his class. When he answered the question of his students, he did so with a secular purpose and had no intent to promote a religious belief. *Lemon*, 403 U.S. 602, 612 (1971)His brief outline on the theory of Intelligent Design did not use the word God, did not associate it to any particular belief, and he did not say it was right. His secular purpose of answering his student's question honestly was not dominated by religion. *Lynch v. Donnelly*, 465 U.S. 668,

691(1984). It was clear Dr. Girsh had no intent of approving or disapproving religion as he did not mention religion whatsoever. *Id.* at 691. Dr. Girsh's class is easily distinguishable from the public school that posted the Ten Commandments because Intelligent Design is not religious by nature and is considered a theory of science. *Stone .v Graham*, 449 U.S. 39, 41 (1980). When Dr. Girsh gave his lecture, he was not trying to satisfy the religious majority. *Freiler v. Tangipahoa Parish Board of Education*, 185 F. 3d 337, 342 (5th Cir. 1999) Instead, he wanted to introduce a different theory on creation. *Lemon v Kurtzman*, 403 U.S 602, 691 (1971) Since the District Court failed to make a purpose argument against Dr. Girsh, the District Court conceded the secular purpose prong of the *Lemon* test.

2. Dr. Girsh's lecture on Intelligent Design did not have the effect of advancing or inhibiting ideals of religion.

The second prong of the *Lemon* test states the principal or primary effect must be one that neither advances nor inhibits religion. *Lemon v. Kurtzmann*, 403 U.S 602, 612 -613 (1971) An action by the government or a statute may not favor one religion over another religion. *Freiler v. Tangipahoa Parish Board of Education*, 185 F. 3d 337, 346 (5th Cir. 1999) Under this prong, it is important the government practice does not have the effect of communicating a message of endorsement or disapproval of religion. *Lynch v. Donnelly*,, 465 U.S. 668, 692(1984). When determining the effect, the court should look at the message that was received by the public's perception. *Freiler v. Tangipahoa Parish Board of Education*, 185 F. 3d 337, 344-345 (5th Cir. 1999); See also *Lynch v. Donnelly*,, 465 U.S. 668, 692(1984).

When a religious group does not dominate the challenged act, the Court in *Capitol Square Review and Advisory Bd. v. Pinette* held there was no violation of the effect prong of the Lemon Test. See *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 791 (1995). When a school includes prayers and nonsectarian benedictions at a public school graduation, the Court held this act endorses religion violating the second prong of the *Lemon* Test. *Lee V.*

Weisman, 505 U.S. 577, 585 (1992). After a statue was constructed of a controversial mythological snake in the city of San Jose, the plaintiffs had the burden of proving this sculpture reflected Mormon beliefs and violated the Establishment Clause. Because the plaintiffs failed to introduce any evidence the public “likely perceived by adherents of the controlling denominations as an endorsement and by non adherents as a disapproval of their individual religious choices”, the Court held there was no violation of the “effects” prong of the *Lemon* Test. *Alvarado v. City of San Jose*, 94 F. 3d 1223, 1231-1232 (1996).

The District Court incorrectly applied the effect prong of *Lemon* test by failing to prove Dr. Girsh’s discussion on intelligent design neither advanced nor inhibited religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 -613 (1971). Dr. Girsh’s was not trying to promote a religious belief or favor one religion over another. *Freiler v. Tangipahoa Parish Board of Education*, 185 F. 3d 337, 346 (5th Cir. 1999). He was careful not to communicating a message of government endorsement or disapproval of religion or have the effect of doing so. The facts which are agreed upon by both sides indicate he never said he believed in intelligent design, or that the school supported intelligent design. He did profess to his students it was a theory and what many theorists believe and speculate. *Lynch v. Donnelly*, 465 U.S. 668, 692(1984). After his lecture, only two students received a message that Dr. Girsh was endorsing religion while at least fifteen students wanted to learn more. One parent cited Dr. Girsh’s Intelligent Design Discussion as a “spark” for her son to study biology. (R. 9) The two students offended by the lecture do not represent an entire public perception, rather the larger number of 15 students shows the message the students received was not religious. *Freiler v. Tangipahoa Parish Board of Education*, 185 F. 3d 337, 342 (5th Cir. 1999); See also *Lynch v. Donnelly*, 465 U.S. 668, 692(1984).

Dr. Girsh’s discussion was not in line with a religious affiliation and no particular religious group benefited from the lecture. Because of this, there was not a violation of the effect prong of the *Lemon* Test. See *Capitol Square Review and Advisory Board*, 515 U.S.753, 791

(1995). Dr. Girsh's intelligent design discussion is distinguishable from school led prayers and benedictions which are religious by nature. *Lee V. Weisman*, 505 U.S. 577, 585(1992). Often, students will learn about religion in history classes or literature because it is mentioned, where here Dr. Girsh did not even bring up a religious belief. Like the plaintiff in Alvarado and like the appellate court held, the school district cannot prove Dr. Girsh's reply to the student's questions to be perceived as religious. *Alvarado v. City of San Jose*, 94 F. 3d 1223, 1231-1232(1996). Therefore, Dr. Girsh's discussion on intelligent design did not have the effect of endorsing religion.

3. While Dr. Girsh's discussion on Intelligent Design did not implicate excessive government entanglement with religion, the School Board's policy prohibiting the theory of Intelligent Design did, thus violating the Establishment Clause.

The district court erred when it failed to address the third prong of the *Lemon* test regarding Dr. Girsh's discussion on intelligent design. Government that is considered excessive. This prong prohibits the government from encouraging a relationship between religion and This third analysis should be done since Dr. Girsh's discussion passed under the first two prongs. *Lemon v. Kurtzman*, 403 U.S 602, 612 -613 (1971). In order to establish excessive entanglement, courts will be analyzing the impact government policy has on religion. *Agostin v. Feltoni*, 521 U.S. 203, 230-34 (1997). Further the courts will look at the relationship to which public and religious organizations find themselves in and the potential for the challenged action to increase political division along religious lines. *Lemon v. Kurtzman*, 403 U.S 602, 622-633 (1971). In *Roemer*, a Maryland statute granting aid to a religious college did not foster an excessive government entanglement with religion, since the college also performs "secular educational functions." *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 768 (1976).

It is clear that Dr. Girsh did not "foster an excessive entanglement with government as outlined in the *Lemon* test. *Lemon*, 403 U.S 602, 612 -613 (1971). By introducing the idea of

intelligent design he did not form a relationship between the school and religion, nor did he increase political division along religious lines. One could easily consider, however, that he weakened political division because along side a non religious theory he introduced a new theory that can or can not be associated with religion. *Id.* at 614, 622-623. Since Dr. Girsh also performed other “secular educational functions” and had goals beyond promoting religion, he avoided any excessive entanglement and passed the third prong. *Id.* at 768.

B. By Discussing An Alternative Theory to Evolution And As Seen By A Reasonable Observer with Knowledge On The Situation, The Respondent Did Not Endorse Religion Nor Did The Respondent Send a Message to Nonadherents That They Were Outsiders.

The District Court incorrectly applied the endorsement test to the discussion of intelligent design. O’Connor further states in her opinion in *Lynch*, that each practice must be judged based on the set of circumstances while courts keep in mind the Establishment clause and the way in which the Establishment Clause “values can be eroded”. See *Lynch v. Donnelly*, 465 U.S. 668, 692(1984), See Also *Lemon v. Kurtzman*, 403 U.S. 602, 614, 622-623 (1971). Two things to analyze when using the endorsement test: (1) since the object is to find the situations in which government endorses religious beliefs then “it assumes the view point of a reasonable observer” and (2) this observer must be deemed to have knowledge of the history and facts of both the conduct and our nation. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 34-35 (2004).

Since the observer must be aware and knowledgeable about the facts around each endorsement test, the court held that a reasonable observer who knew about a city, its history, and its government practices would not perceive controversial statue to be a positive endorsement of religion. *Alvarado v. City of San Jose*, 94 F. 3d 1223, 1232(1996).

The *Lynch* case established that the city of Pawtucket’s Christmas display did not endorse a religious belief even though the nativity scene was of a religious nature because the display included other Christmas ideas like Santa Clause. *Lynch v. Donnelly*, 465 U.S. 668, 692(1984).

In *Capitol Square Review and Advisory Board v. Pinette*, the court held that a Latin cross on the grounds of the state capitol placed by the private party Ku Klux Klan did not mean the state capitol was endorsing a religious viewpoint. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 755-756 (1995).

There is no clear evidence establishing that a message was sent to nonadherents that they were outsiders following Dr. Girsh's discussion. Further, since there was not a discussion of religion, and this theory is taught in addition to the theory of evolution, then a nonadherent would not feel like an outsider. *Lynch v. Donnelly*, 465 U.S. 668, 692(1984). Taking the discussion through the endorsement test, we must assume there is a reasonable observer who knows that evolution has been taught and that Dr. Girsh did not profess any religious beliefs to his student. One could further assume this reasonable observer knows Dr. Girsh's background in teaching at ASMA and with Intelligent design. *Alvarado v. City of San Jose*, 94 F. 3d 1223, 1231-1232(1996). This observer would also be aware of Dr. Girsh's commitment to biology and the curriculum at Arklatex. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 34-35 (2004). If a religious Christian display is held by the Supreme Court to not endorse religion because other non-Christian things surround the display, then it is easy to conclude a lesson without straightforward references to a religion alongside many other non secular subjects would not endorse religion. *Lynch v. Donnelly*, 465 U.S. 668, 692(1984). The same argument holds for the Latin cross placed on the state grounds by the Ku Klux Klan. A cross has religious implications and is considered a symbol of many religious beliefs and yet the Court held it was not endorsing a religion. Intelligent design does not endorse a particular religion and is just a theory that could not possibly endorse a religious viewpoint. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 755-756 (1995).

1. The School Board's policy prohibiting the teaching of Intelligent Design alongside the Theory of Evolution does not pass the Endorsement Test and therefore violates the Establishment Clause.

The Appellate Court held that “a jury could reasonably find that, by limiting classroom instruction to only evolution, the School Board sent a strong message then it endorses explanations that contradict religious beliefs and disapproves of those that support them. Therefore, using the same analysis as above, the School Board’s policy did not pass the endorsement test and violated the Establishment Clause. By endorsing evolution, the school is sending a message to the Christian students they are outsiders and not full members of this math and science community Arklatex is trying to create. *Lynch v. Donnelly*, 465 U.S. 668, 692(1984). By creating this type of learning environment, the Establishment values will be eroded without a neutral viewpoint. *Id.* at 692. The court would consider most of these students to be reasonable observers with knowledge about the school’s goals for them and the curriculum. These students had to take interview to attend this prestigious school. These reasonable observers will not perceive the teaching of intelligent design as a positive endorsement of religion. *Alvarado v. City of San Jose*, 94 F. 3d 1223, 1231-1232 (1996).

Unlike the nature of the religious and non religious display in Pawtucket, the school board has chosen to not offer other ideals alongside evolution endorsing non religious belief. *Lynch*, 465 U.S. at 692. This argument holds true in *Capitol Square Review and Advisory Board* also. *Capitol Square Review and Advisory Board*, 515 U.S.753, 755-756 (1995).

Thus while Dr. Girsh’s lecture on intelligent design does not endorse a religious belief it passes under the endorsement test. The School board clearly endorses a non religious view point over a religious one and violates the Establishment Clause.

2. By Introducing Intelligent Design To His Students, Dr. Girsh Did Not Coerce Anyone to Support Or Participate In The Exercise of Religion or Tends to Establish A State of Religion.

As noted above, the coercion test prohibits the government from coercing anyone to support or participate in the exercise of religion or tends to establish a state of religion. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 44 (2004). Further, “any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character. *Id.* at 44. The courts considered a prayer to be coercive at a graduation ceremony even when it was not religious. Here, the Court believed the students would feel compelled to believe the school was endorsing religious beliefs. *Lee v. Weisman*, 505 U.S. 577, 599(1992).

Thus when analyzing whether intelligent design should be taught in a classroom, one should not feel coerced to support or participate in a religion since it is a theory taught alongside evolution at Arklatex. *Elk Grove Unified School District*, 542 U.S. 1, 44 (2004). Even if the courts considered the discussion to be coercive, then the holding in *Elk Grove* would prove this coercion of the students participating in the class room is inconsequential. *Id.* at 44. Intelligent design is distinguishable from the strong religious nature prayer holds in *Lee*. *Lee*, 505 U.S.577, 585 (1992). This is a classroom discussion and not a prayer.

3. ASMS Violated the Establishment Clause When It Prohibited the Teaching of Intelligent Design Because This Coerced The Students to Learn Only Evolution.

By only introducing an established non religious theory such as evolution to the students at Arklatex, the students could feel coerced not to participate in the exercise of religion. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 44 (2004). Looking at the courts analysis in *Lee* where the prayer was held to be coercive, the argument here is similar.

There prayer had this strong religious nature behind it and since students felt like they had to participate in the graduation ceremony, it was considered coercive. *Id.* 599. Looking at the

case at hand, evolution has a history of being considered non religious. By supporting this theory and no other is like *Lee*. Religious students do not have the option of leaving during the teaching of evolution and can be expected to test on it. This is not only unfair and coercive, it is a violation of the establishment clause.

Therefore after applying the endorsement test and the coercion test, Dr. Girsh's lecture on Intelligent Design does not violate the Establishment clause of the First Amendment of the Constitution. However, when the school board decided to prohibit the teaching of intelligent design they endorsed and coerced students to view only an anti-religious theory and violated the Establishment Clause.

II. THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT RESPONDENT'S DISCUSSION ON THE TOPIC OF INTELLIGENT DESIGN IS PROTECTED BY THE FIRST AMENDMENT, AND RESPONDENT'S INTEREST IN COMMENTING ON MATTERS OF PUBLIC CONCERN OUTWEIGHED PETITIONER'S INTEREST IN PROMOTING THE PUBLIC SERVICES IT PERFORMS THROUGH ITS EMPLOYEES.

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law...abridging the freedom of speech." *Virginia v. Black*. 538 U.S. 343, 358 (2003). The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—boards of education not excepted. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Teachers may not be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. *Madison Joint School District No. 8. v. Wisconsin Employment Relations Commission et al.* 429 U.S. 167, 175 (1976). The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. *Tinker v. Des Moines Independent Community School District Et Al.* 393 U.S. 503, 512 (1969). That they are educating the young for citizenship is reason for scrupulous protection of Constitutional

freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. *Id.* at 505. The classroom is peculiarly the marketplace of ideas. *Id.* at 512. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection. *Id.*

Teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. *Tinker v. Des Moines Independent Community School District* 393 U.S. 503, 506 (1969). First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers. *Id.* Although the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech in general, this Court must arrive at a balance between the interests of the teacher, as a citizen, in commenting on 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 v. Board of Education of Township High School District 205, Will County Illinois.* 391 U.S. 563, 568 (1968)

A. The School Board's Attempt to Avoid Establishment Clause Violations That Might Result From Teaching Intelligent Design Threatened Academic Freedom.

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. *Keyishian v. The Board of Regents of The University of The State of New York*, 385 U.S. 589, 603 (1967). 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. *Id.* Even though a governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Id.* at 602. A teacher should be able to teach his class that alternate theories of a subject exist. Particularly is that true in the

social sciences, where few, if any, principles are accepted as absolutes. *Keyishan*, 603. To reprimand a teacher for exercising his fundamental rights is unconstitutional. See *Madison Joint School District No. 8. v. Wisconsin Employment Relations Commission et al.* 429 U.S. 167, 175 (1976). Accordingly, this Court should grant the Respondent injunctive and declaratory relief in addition to monetary damages because the School Board stifled his fundamental right to free speech.

Since the School Board has significant discretion to determine the policies that guide teachers in the classroom, this Court must question the extent to which the First Amendment places limitation upon discretion of the School Board to stifle Dr. Girsh's speech. *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 870 (1982). The United States Constitution does not permit the official suppression of ideas. *Id.* at 871. Whether the School Board's policy aimed at preventing the teaching of Intelligent Design denied Dr. Girsh his rights depends upon the motivation behind the School Board's actions. *Id.* If the School Board *intended* to deny students access to ideas with which it disagreed, and if this intent was a substantial factor in the School Board's decision, then the School Board has exercised its discretion in violation of the Constitution. *Id.*

In *Pico*, students in the Island Tress Union Free School District brought suit against the school district claiming that the removal of books that the school board characterized as "anti-American, anti-Christian, anti-Semitic, and just plain filthy" from school libraries violated their First Amendment Rights. This Court found for the students, holding that school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 872 (1982).

In the instant case, the School Board's policy regarding the teaching of the Intelligent Design Theory was an official suppression of an idea, and it denied Dr. Girsh his fundamental right to free speech. *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 870 (1982). Although Ms. Pascal states in her affidavit that the purpose for the new policy was to "avoid Establishment Clause violations that might result from teaching such theories and to avoid the appearance the school endorses any particular religious belief," (R.5-6) it is apparent that the ASMS School Board's policy is discriminatory on its face. While the policy allows teachers to teach almost all alternative theories of origin in addition to evolution, it expressly denies students and teachers access to the idea of Intelligent Design. *Id.* Accordingly, this Court should declare School Board Policy §1701.2 unconstitutional.

B. When The School Board Cited Dr. Girsh For Willful Violation and Insubordinate Disparagement of School Board Policies, it Retaliated Against Dr. Girsh For His Choice to Exercise His First Amendment Right to Free Speech When he Discussed Intelligent Design in The Classroom

In determining a public employee's rights of free speech, the task of the Supreme Court is to arrive at a balance between interests 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. *Connick v. Myers*, 461 U.S. 138, 142 (1983). Balancing is necessary to accommodate the dual role of a public employer as provider of public services and as a government entity operating under the constraints of the First Amendment. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). In evaluating a public employee's First Amendment claim, this Court must first consider whether the speech in question addresses a matter of public concern. *Id.* If so, the court must then consider both the employee's interest in expression and the government employer's interest in regulating speech of its employees in order to maintain an efficient and effective workplace. See *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Third, if the speech is protected, the employee must show that it was the

substantial or motivating factor for the challenged governmental action. See *Id.* Finally, if the employee makes that showing, the employer must be given the opportunity to show that it would have taken the same action in the absence of the protected speech. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

The threshold determination in applying the balancing test to determine whether a public employer properly disciplined an employee for engaging in speech is whether the speech may be fairly characterized as constituting speech on matter of public concern. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

1. Intelligent Design and the School Board's position on its teaching are both matters of public concern; it matters not that Dr. Girsh's comments were critical in tone.

Statements by public officials on matters of public concern must be accorded First Amendment protection. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563, 574 (1968). Matters of public concern are those of interest to a community, whether for social, political, or other reasons. See *Connick v. Meyers*, 461 U.S. 138, 145-149 (1983). Additionally, whether a public employee's speech addresses a matter of public concern so as to shield the employee from discipline for expressing those views must be determined by content, form and context of given statement, as revealed by whole record. *Connick*, 461 U.S. 138, 147-148 (1983).

In *Pickering* a teacher sent a letter to a local newspaper criticizing the way in which the school board and the district superintendent of schools handled business for the schools. This Court found that when the school board disciplined the teacher based on his comments in the letter, the teacher's right to freedom of speech were violated. In the instant case, it is apparent that Intelligent Design is a matter of interest to the community. If it were not, the School Board would not have created a policy prohibiting it. Here, like the teacher in *Pickering*, Dr. Girsh voiced his disagreement with the School Board's policy and was reprimanded for it. The

inappropriate or controversial character of a statement by public employees is irrelevant to the question of whether it deals with matter of public concern. *Rankin v. McPherson*, 483 U.S. 378, 387 (1987). Further, it is obvious that Intelligent Design is a matter of public concern in Arklatex by the response that Dr. Girsh's class discussion received from members of the community. In the instant case, as in *Pickering*, the local newspaper felt that the topic of Intelligent Design and the School Board's position on it were important enough to publish citizens' letters discussing those issues. According to Dr. Rice's affidavit, after the in-class discussion, at least fifteen of Dr. Girsh's students' parents called begging him to allow Dr. Girsh to continue teaching Intelligent Design. (R.-9). Another parent called Dr. Rice outraged at the fact that Intelligent Design was discussed in her daughter's biology class. (R-8). Comments by teachers on matters of public concern that are substantially correct may not furnish grounds for dismissal even though they are critical in tone. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563, 570 (1968). Therefore, this Court should find that Dr. Girsh's discussion of Intelligent Design involved a matter of public concern and move to the next stage of analysis in the three part test to establish a First Amendment claim.

2. Dr. Girsh's discussion on Intelligent Design did not negatively affect the performance of his duties as a teacher.

In weighing the government employer's interests, for purposes of a First Amendment retaliatory discharge claim, the primary consideration is the impact of the disputed speech on the effective functioning of the public employer's enterprise. *Rankin v. McPherson*, 483 U.S. 378, 388. Additionally, the statement will not be considered in a vacuum; the manner, time, and place of an employee's expression are relevant, as is the context in which the dispute arose. *Rankin*, 388.

This Court has previously recognized, as a pertinent consideration, whether the statement impedes the performance of the speaker's duties. *Rankin*, 388. In the present case, Dr. Girsh's

statement did not impede the performance of his duties. In truth, it enhanced the performance of his duties. The majority of Dr. Girsh's students were sincerely interested in hearing and participating in the class lecture on Intelligent Design. Further, this Court must consider the context in which the discussion on Intelligent Design arose. Dr. Girsh did not plan to have an in class discussion on Intelligent Design, his students asked him about it during class. Rather than dismiss class each time a student asked him about Intelligent Design or stifle student interest in his science class, Dr. Girsh chose to be honest and answer his students' questions in a straightforward manner. Accordingly, Dr. Girsh's duties as a teacher were not impaired, and this Court should view Dr. Girsh's interest in Free Speech as having minimal negative impact on the effective functioning of the School District.

3. The In-Class Discussion on both Intelligent Design and the School Board policy prohibiting the teaching of it was the motivating factor behind the reprimands that the School Board gave Dr. Girsh.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969). Where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained. *Id.*

In *Tinker*, school officials sued a group of their own students for wearing black armbands to class in protest of the Vietnam War. This Court found that wearing those armbands was an act that fell within the Free Speech Clause of the First Amendment. *Tinker*, 506. This Court found that there was no reason to believe, even though the conduct may have been offensive to some, that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of others. *Id.* at 509. Likewise, in the present case before this Court,

when the School Board reprimanded Dr. Girsh for his constitutionally protected speech on the subject of Intelligent Design and the School Board's policy on it, was absent any showing that the discussion would materially interfere with the requirements in the operation of the school or encroach other's rights. In actuality, Dr. Girsh was assisting with the work of the school by presenting a different point of view in addition to the required point of view to his students. Therefore, the School Board's prohibition cannot be sustained.

CONCLUSION.

For the aforementioned 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 respectfully requests a finding that the School Board's policy prohibiting the teaching of Creationism or Intelligent Design violates the Establishment Clause and that the School District violated his First Amendment right to free speech by reprimanding him for speaking about Intelligent Design and criticizing the School Board's policy on teaching Intelligent Design. The Respondent also respectfully requests monetary damages for the violation of his free speech rights.

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.