

Docket No. 06-0009

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

October Term, 2005

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ARKLATEX STATE BOARD OF EDUCATION,

*Petitioner,*

V.

DR. PETER GIRSH

*Respondent.*

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*On Writ of Certiorari*

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BRIEF FOR RESPONDENT

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## **QUESTIONS PRESENTED**

1. Does either allowing or prohibiting instruction on Intelligent Design in public schools violate the Establishment Clause of the First Amendment where its proponent focuses on the scientific evidence used to support the theory and does not make any assertions regarding the nature of the intelligent designer?

2. Does the First Amendment right to freedom of speech protect a public school teacher's discussion on the topic of Intelligent Design?

## **STATEMENT OF THE CASE**

### **OPINIONS BELOW**

The opinion of the United States District Court for the Eastern District of Arklatex is contained in the official record. ( R at 3-14 ). The opinion of the United States Court of Appeals for the Fourteenth Circuit is also contained in the official record. ( R at 15-19 ).

### **STANDARD OF REVIEW**

The questions presented here are questions of law. The standard of review for questions of law is de novo. Harris v. Parker College of Chiropractic, 286 F.3d 790, 793. (5<sup>th</sup> Cir. 2002).

### **STATEMENT OF THE CASE AND FACTS**

Founded in 1995, the Arklatex School for Math & Sciences (ASMS) is a school for exceptionally talented students. ASMS follows the “exceptional schools” curriculum as mandated by the Arklatex State Department of Education, which states that schools must adhere to the state specified Biology program. Dr. Peter Girsh provided testimony in support of the need for a high school concentrated in math and science skills of the students of Arklatex. (R. at 5). Subsequently, Dr. Girsh became one of the first faculty members at ASMS when it opened in 1995. (R. at 5.)

Dr. Girsh is married, has three children, and is actively involved in his church, the First Christian Church of the Community. He is a 1985 graduate of Yale University and received his Ph.D. in Biochemistry from Harvard University in 1990. (R. at 5). Since its opening, Dr. Girsh has served on the selection board

and steering committee for numerous school functions at ASMS. (Id.) During Dr. Girsh's tenure, he has also served on the curriculum committee for the school for the past seven years, and he served as the faculty advisor for the Biology Club and the Future Engineers of America for nine years. For the past 10 years, Dr. Girsh's AP Biology students have had a 100% pass score of "5" on the AP exam. (R. at 5)

In addition to Dr. Girsh's stellar teaching record at ASMS, he is also a prominent and sought-after speaker on the subject of Intelligent Design due to his view that ID is a purely scientific theory with no connections to any religious movement. (R. at 4). In television appearances such as CNN's Hardball and the O'Riley Factor on the Fox News Network, Dr. Girsh said he strongly disagrees with religiously affiliated organizations such as the Discovery Institute's Center for the Renewal of Science and Culture (DICRS), which openly aspires to use Intelligent Design theory to change the ground rules of science to make room for religion, specifically, beliefs consonant with a particular version of Christianity. (R. at 4).

Although Dr. Girsh recognizes the theory may lend support to some religious beliefs, he believes Intelligent Design can and should be taught without ever mentioning God. (R. at 4). Dr. Girsh's interest are in studying empirical scientific data to discover the origins of life and of the universe. (R. at 4). As he stated in his affidavit, "I am interested in the science of Intelligent Design; it's religious implications don't concern me." (R. at 4).

Most recently, Dr. Girsh made contributions to *From Koalas to Humans*, a textbook designed to be an alternative to the religious-affiliated ID textbook currently on the market. (R. at 5). *Koalas* strictly addresses only the scientific evidence used to support Intelligent Design theories. (R. at 5). This textbook states that the scientific evidence “suggests the universe was purposefully created, “but never identifies the creator, never speculates as to the nature of the creator, and never uses the word God.” (R. at 5).

The administration at ASMS knew of Dr. Girsh’s research on Intelligent Design. ASMS’s principal, Dr. Richard Rice stated in his affidavit that he had never had any major objections to his speaking on the Intelligent Design theory. (R. at 5). Dr. Rice also admitted that he and Dr. Girsh often spoke about how Intelligent Design was excluded from the curriculum and how maybe one day people could become more educated about the theory and it could be taught in public schools. (R. at 5). In addition, Dr. Rice testified that Dr. Girsh’s commitment to the school was to teach the curriculum, but that he saw the day when he could “tell the truth about the Big Bang” and when that time arose, he would be a hero for the minds of the future scientists of Arklatex. (Id.)

On September 8, 2003, the School Board adopted a new policy prohibiting teachers from instructing students on Creationism or Intelligent Design. (R. at 5). The President of the School Board, Anita Pascal, stated that the purpose of 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. at 5-6). The new policy defines Intelligent Design

in §1701.2(a)(2) as “the theory that nature and complex biological structures were designed by an intelligent being and were not created by chance.” In §1701.2(b), “teachers within the Arklatex School for Mathematics and sciences Special School District may teach alternative theories of origin in addition to the teaching of evolution, but teachers are not to teach the theories of Creationism or Intelligent Design. The teaching of theories on the origins of the universe and the formation of life that are substantially similar to creation or Intelligent Design are similarly prohibited.” (R. at 6).

Although Dr. Girsh is a proponent of Intelligent Design, he had, previous to events giving rise to this litigation, always followed the mandated curriculum and taught strictly from textbooks approved by the Department of Education, all of which included the theory of evolution and none of which ever mentioned Intelligent Design. (R. 5) Prior to the events giving rise to the litigation, Dr. Girsh had never spoken of Intelligent Design to an ASMS student. (Id.)

On January 26, 2004, Dr. Girsh prepared to lecture to his AP Biology class on Punnett Squares and genetics when a high school junior, Randall Johnson, raised his hand to ask a question. (R. at 6). Because Dr. Girsh is personally familiar with the sensitivities of being an exceptional student at a boarding school with high expectations, he encouraged his students to frequently and openly engage in candid discussions. (Id.) What happened next during the class was one that Dr. Girsh admitted in his affidavit that “in all of his experience as a teacher, he was not prepared to handle.” (R. at 6). Dr. Girsh called on Randall, who he said, “Hey doc, we Googled you last night because James over here said

that you were in Skull and Bones with Governor Wayne. We didn't find anything like that but we did find out something about an Intelligent Design. At first we thought you had patented something, but then we found out you had written a book and everything. There is a whole science out there you haven't been teaching us! Why have we been deprived?" (R. at 6).

Dr. Girsh's wanted to be honest and straightforward with his students about the entire Intelligent Design theory, but he worried doing so would violate the new School Board Policy prohibiting instruction on Intelligent Design. Instead, he dismissed class early without answering Randall's question. (R. at 6). Because of his failure to answer the question, the next day in class, the student interest in Intelligent Design was sparked and Dr. Girsh was immediately bombarded with questions about Intelligent Design. (Id.) Dr. Girsh explained to the class that the School Board had passed a new policy that prohibited him from teaching Intelligent Design. He also explained that he believed the policy was unconstitutional violation of the Establishment Clause and 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. at 7).

Next, Dr. Girsh began to tell the story about the theory of Intelligent Design. That Intelligent Design is the theory that empirical scientific evidence points to the conclusion that an intelligent begin or beings deliberately designed the universe. (R. at 7). Dr. Girsh further explained that the ID theory holds that evolution alone cannot explain the origin, complexity, and diversity of life. (R. at

7). And he explained that ID theorists believe the universe has been fine tuned to make life possible in a way that must have been by design. (R. at 7).

According to Dr. Girsh, there are three main ways in which scientists have detected intelligent design in nature. First, the irreducible complexity of certain biological systems indicates some life forms cannot be explained through the gradual changes of evolution. Irreducible complexity means a system cannot function until all its parts are in place. (R. at 7). Second, the observation that the ability of the universe to support human life is sufficiently contingent, complex, and specified that as early as the 1960s physicists announced our universe appears to have been fine-tuned to support the possibility of human life. Third, because DNA functions like a written text or machine code more complex than any computer software ever created, it is virtually impossible unguided chemistry could have created it. (R. at 7-8).

Throughout the lecture, Dr. Girsh never used the word “God”, nor did he indicate the nature of the intelligent designer. (R. at 8). As Dr. Girsh lectured, the students were silent and captivated. Following the lecture, Dr. Girsh showed the students his contribution to *Koalas* and a few articles that had been published in *Origins* magazine. Next, Dr. Girsh showed the students a video clip of him talking to Bill O’Reilly about Intelligent Design, where he explained the basic tenets of Intelligent Design theory. (R. at 8). In this video clip, Bill O’Reilly asked Dr. Girsh, “So, all this science, it proves that God created us after all, right?” And Dr. Girsh responded, “Intelligent Design is purely scientific, not 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. at 8). At the end of the class, Dr. Girsh gave the students a pamphlet he had developed to help market his textbook, which gave an overview of the three categories of scientific evidence Dr. Girsh had discussed during the lecture that day. (R. at 8) This pamphlet did not mention God, nor did it describe the nature of the intelligent designer. Instead it referred to as “some sort of intelligent agent.” (R. at 8).

The following day, Dr. Rice confronted Dr. Girsh as he entered the building that morning about his discussion with the students on Intelligent Design.

Dr. Rice informed Dr. Girsh that Maya Klinger’s mother, Dorothy Klinger, an atheist was outraged when her daughter told her about the material discussed in biology class that day. (R. at 8). Despite the negative feedback from Mrs. Klinger, Dr. Rice’s also told Dr. Girsh that he had received fifteen calls from parents of students who begged him to allow Dr. Girsh to continue teaching Intelligent Design. Dr. Rice reminded Dr. Girsh of the new School Board policy, B1701.2, and told Dr. Girsh not to mention Intelligent Design again. (R. at 9).

Dorothy Klinger sent an open letter to the Arklatex Tribune regarding Dr. Girsh that urged parents not to send their children to ASMS. Also stating that they taught God instead of science. (R. at 9). Despite Ms. Klinger’s negative reaction to the lecture, other parents supported the teaching of Intelligent Design at ASMS. Ranada Johnson, Randall Johnson’s mother also wrote an open letter to the Arklatex Tribune. In her letter, she urged ASMS to impliment the teaching of Intelligent Design at the school. Also citing Dr. Girsh’s lecture on Intelligent

Design as the “spark” that had ignited her son’s passion for biology. According to Randall’s mother, his grades had been slacking but because of the Intelligent Design lectures, his interest in biology had been renewed. (R. at 9). Now, Randall Johnson wants to become a biologist. (R. at 9).

ASMS cited Dr. Girsh twice for insubordination, once on January 26, 2004, and once on January 27, 2004. (R. at 9). Dr. Rice told Dr. Girsh that the reprimands for insubordination are due to “willful violation of School Board policy c1701.2 and for “insubordinate disparagement of School Board policies.” (R. at 10). Another violation would result in a formal hearing where the School Board would determine Dr. Girsh’s future employment with ASMS. Dr. Rice also presented Dr. Girsh with a letter from the School Board, which stated that Dr. Girsh was 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. at 10).

The next day, an open letter from the School Board to the Arklatex Tribune said Dr. Girsh had been reprimanded and prohibited from teaching Intelligent Design, and that “the teaching of Intelligent Design is unacceptable in the Arklatex Schools.” (R. at 10).

Dr. Girsh brought suit against the Board of Education for the Arklatex School of Mathematics and Sciences Special School District; Anita Pascal, President of the Board of Education for the Arklatex School of Mathematics and Sciences Special School District; Timothy Harlan, Superintendent of Arklatex School of Mathematics and Sciences Special School District; and Richard Rice,

Principal of The Arklatex School for Mathematics and Sciences. He asserted violations of his First Amendment rights under the Establishment Clause and the Free Speech Clause. The Defendants filed a motion for summary judgment, and the district court granted it. Dr. Girsh appealed to the United States Court of Appeals for the Fourteenth Circuit. The district court was reversed on appeal.

## **SUMMARY OF THE ARGUMENT**

### **I.**

Before determining whether an act or policy violates the Establishment Clause, courts first look to determine whether the act in question can be defined as 'religious.' Alvarado v. City of San Jose, 94 F.3d 1223, 1226 (9th Cir. 1996). These guidelines help to determine whether an organization is religious for purposes of the Establishment Clause. Malnak v. Yogi, 592 F.2d 197, 210 (3rd Cir. 1979). First, "a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters." Id. Second, "a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching." Id. Third, "a religion often can be recognized by the presence of certain formal and external signs." Id. Dr. Girsh's lectures on Intelligent Design cannot be classified as a religion for the purposes of the Establishment Clause because they did not deal with scientific matters, rather than the less quantitative issues of religion, did not provide a comprehensive system of views, and had no formal or external signs.

### **II.**

The principles of the Establishment Clause have been refined into a 3-part "Lemon" test. Lemon v. Kurtzman, 403 U.S. 602 (1971). School board policy c1701.2 violates the Establishment Clause because it fails the three parts of the Lemon Test. The policy violates the first prong because it favors evolution over Intelligent Design. Second, the primary effect of this policy is to endorse evolution while inhibiting Intelligent Design simply because the school board

thought Intelligent Design was a religion. And finally, this policy fails the Lemon Test because the constant monitoring of school textbooks and questions raised by students in the classroom will undoubtedly cause excessive entanglement with religion. The policy also fails the endorsement test first introduced in Lynch v. Donnelly, 465 U.S. 668, 691-692 (1984) (O'Connor, J., concurring). This test is very similar to the second portion of the Lemon test. The policy also violates the coercion test. The Constitution guarantees individuals that they will not be coerced by the government into participating in religion or religious exercises or establishing a state religion or faith. Weisman, 505 U.S. 577, 588 (1992). Here, the government is denying students the right to chose their own beliefs by only presenting one view, evolution.

### III.

Dr. Girsh's free speech rights were also infringed through retaliation for his speech. The court in Teague v. City of Flower Mound, Texas, 179 F.3d 377, 381 (5<sup>th</sup> Cir. 1999) summarizes the elements of a First Amendment retaliation claim like Dr. Girsh's in this way: 1) There must be an adverse employment decision; 2) The topic of the speech must involve a matter of public concern; 3) The employee's interest in speaking must outweigh the government's interest in efficiency; and 4) The speech must have motivated the employment decision. Dr. Girsh's did suffer reprimands. His topics, the school board policy and Intelligent Design were of public concern. He posed little to no disruption to the school or reduction in his work quality because of his speech, and the speech was the sole motivation for this reprimands. Also, government exclusion of one

viewpoint on a topic normally included in a non-public forum like a school violates free speech. May v. Evansville-Vanderburgh School Corp, 787 F.2d 1105, 1113 (1986).

## **ARGUMENT**

### **I. DR. GIRSH'S LECTURE DID NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT BECAUSE INTELLIGENT DESIGN IS A SCIENTIFIC THEORY.**

Dr. Girsh's lecture on Intelligent Design did not violate the Establishment Clause of the First Amendment because Intelligent Design is a scientific, rather than religious, theory and his lecture did not promote any particular religious belief. Before determining whether an act or policy violates the Establishment Clause, courts first look to determine whether the act in question can be defined as 'religious.' Alvarado v. City of San Jose, 94 F.3d 1223, 1226 (9th Cir. 1996). Courts also recognize that defining religion for purposes of the Establishment Clause is "difficult, if not impossible." Id. at 1227. Activities that are not derived from a socially recognized sect may also be religious. Id. at 1227. Even those small, unknown sects that deny its religious character may still be defined as religious for purposes of the Establishment Clause. Id. at 1228. In a concurring opinion by Judge Adams, he proposed three 'helpful indicia.' Although not a final test, these guidelines help to determine whether an organization is religious for purposes of the Establishment Clause. Malnak v. Yogi, 592 F.2d 197, 210 (3rd Cir. 1979). First, "a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters." Id. Second, "a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated

teaching.” Id. Third, “a religion often can be recognized by the presence of certain formal and external signs.” Id. Formal signs of a religion include “formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions.” Alvarado, 94 F.3d at 1229; Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3rd Cir. 1981) (holding that a prisoner’s beliefs were more a product of secular philosophy rather than religious orientation).

The 3rd Circuit found that a Court held that the course, SCI/TM, was religious because the school referred to the course as an “exclusive, moral teaching dedicated to creating a society of fellow believers.” Malnak v. Yogi, 440 F.Supp. 1284, 1291-96. (holding that SCI/TM was a course on religion when the organization which developed the course first denied its religious nature and had been originally incorporated as a religion before the organization changed its name.) Similarly, the Alvarado court held that New Age was not a religion because the court found no evidence that New Age was an organization, there was a membership, or any moral or behavioral obligations. There was no evidence of a comprehensive creed, texts, rituals, or guidelines. And no requirement existed to suggest that individuals who believed in New Age had to give up their religious beliefs. 94 F.3d 1223 (9th Cir. 1996). Because New Age demonstrated no “formal signs associated with traditional religion,” the court held it was not a religion. Id.

Here, Dr. Girsh lectured to his students on the scientific theory of Intelligent Design, which can and should be taught without mentioning God. Like New Age in Alvarado, there is no organization or membership involved with Intelligent Design. No formal signs associated with traditional religion exist in the study of Intelligent Design. Additionally, there is no creed, ritual, or special guidelines involved. Also, individuals in support of Intelligent Design theory are not required to give up their religious beliefs. In fact, Dr. Girsh is an active member of his own church. Unlike the professor in Malnak I, Dr. Girsh did not speak of Intelligent Design in religious terms as was the case in the SCI/TM course. Moreover, Dr. Girsh gave his students three examples of scientific evidence to support the Intelligent Design theory during his lecture. He did not mention God in this lecture, nor were there any religious overtones. For these reasons, Dr. Girsh's lecture on Intelligent Design did not violate the First Amendment because Intelligent Design is not a religion for purposes of the Establishment Clause.

**II. THE ASMS POLICY c1701.2 VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT BECAUSE IT FAILS THE LEMON TEST, LEE V. WEISMAN TEST AND THE ENDORSEMENT TEST WHICH DETERMINE ESTABLISHMENT CLAUSE VIOLATIONS.**

The Establishment Clause The Supreme Court has stated that “the Establishment Clause [has come] to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a

governmental power to a religious institution, and may not invoke itself too deeply in such an institution's affairs." Alvarado v. City of San Jose, 94 F.3d 1223, 1231 (9th Cir. 1996). The principles of the Establishment Clause have been refined into a 3-part "Lemon" test. Lemon v. Kurtzman, 403 U.S. 602 (1971). Since the Supreme Court's adoption of the Lemon test, other tests have been offered by the court as a basis for determining Establishment Clause violations. The "endorsement" test, similar to the effects prong of the Lemon was first articulated by Justice O'Connor. Lynch v. Donnelly, 465 U.S. 668, 691-692 (1984) (O'Connor, J., concurring). In 1992, the Lee v. Weisman test became the third means by which courts could determine when the Establishment Clause has been violated. The Lemon test has not been overruled by the Supreme Court and still remains the first test for determining whether a challenged act violates the Establishment Clause.

**A. The ASMS Policy Fails the Lemon Test Because The School Board Did Not Have A Secular Purpose When It Implemented The Policy, Its Primary Effect Was To Endorse Evolution And Inhibit Religious Theories, And It Fostered Excessive Entanglement With Religion.**

ASMS policy c1701.2 fails the Lemon test because the school board's purpose in implementing the policy was not secular. Although the school board's purported purpose was to prevent potential Establishment Clause violations in the classroom. Instead, the school board's policy violates the Establishment Clause because it favors evolution over Intelligent Design. Second, the primary effect of

this policy is to endorse evolution while inhibiting Intelligent Design simply because the school board thought Intelligent Design was a religion. And finally, this policy fails the Lemon Test because the constant monitoring of school textbooks and questions raised by students in the classroom will undoubtedly cause excessive entanglement with religion.

1. The ASMS School Board Did Not Have a Secular Purpose When It Implemented §1701.2 Because The Policy Singles Out Non-Religious Theories, Such As Intelligent Design, That Lend Support To Religious Beliefs.

Regardless of whether Intelligent Design is a religious doctrine, the ASMS School Board policy §1701.2 is unconstitutional because its purpose is to suppress theories that lend support to religious beliefs and advances the theory of evolution. Under the purpose prong of the Lemon test, the “challenged state action must have a secular purpose.” Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 344 (5th Cir. 1999). When a law is enacted for the sole purpose of endorsing religion, courts no longer need to consider the effects and entanglement prongs of the Lemon test. Aguillard, 482 U.S. at 586. It is not necessary for the challenged state action to have been “enacted in furtherance of exclusively, or even predominantly, secular objectives.” Freiler, 185 F.3d at 344. Under this prong, courts determine the government’s actual purpose to find whether that purpose endorses or disapproves of religion. Aguillard, 586. If the law enacted by the state senses a religious purpose the government’s intent is clear. Id. The secular

purpose must be sincere even if there may be other religious purposes. Freiler, 185 F.3d at 344.

For example, the Aguillard Court found that the appellants identified no clear purpose for the statute in question. The stated purpose was to protect academic freedom, but the Court found that the act did not actually further that purpose of academic freedom. 482 U.S. at 587. This Court reasoned that “the goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.” Id. This court further held that a requirement that schools teach creation science with evolution inhibits academic freedom. Id. at 588. This act diminished academic freedom because the teachers were no longer able to teach evolution without also teaching creation science. Id. at 588, n. 6.

Moreover, the Aguillard Court found that the school’s act did not have a secular purpose because it had a “discriminatory preference” for teaching creation science over evolution. Id. at 589. Discriminatory preferences occurred where the school required the development of curriculum guides for creation science, but no such guide was required for evolution. Id. Other discriminatory preferences included the Act’s requirement of school supplied resource services for creation science, but not for evolution; only creation scientists could serve on the panel that supplied resource services; the act forbid discrimination against creation science and the teaching of creationism; and the act failed to protect those who taught evolution or any other non-creation science theory, or refused to teach creation science. Id. Ultimately, the Aguillard Court found that if the

purpose of the Louisiana legislature was to “maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of mankind.” Id. By teaching all scientific theories to schoolchildren, the legislature could have shown that it had a valid secular purpose to enhance the effectiveness of its science instruction. Aguillard, 595.

Here, the ASMS School Board policy c1701.2 fails the purpose prong of the Lemon test because it denied Dr. Girsh’s academic freedom to teach all scientific theories to its students. Then, as the Aguillard court pointed out, ASMS could have shown it had a valid secular purpose to enhance the effectiveness of its science curriculum. But ASMS’s policy stated that teachers “may teach alternative theories of origin in addition to the teaching of evolution, but teachers are not to teach the theories of Creationism or Intelligent Design.” This policy further prohibits other theories on the origins of the universe and the formation of life that are substantially similar to Creationism or Intelligent Design. Like the policy in Aguillard, c1701.2 inhibits teacher’s academic freedom because the teachers may only teach evolution, and must ignore other theories. In fact, the phrase “alternative theory” is ambiguous. It could be determined that any theory on the origin of life other than evolution is an alternative theory. Moreover, ASMS’s policy singled out alternative theories to evolution that could be considered religious theories while allowing other alternative theories. Dr. Girsh’s academic freedom is diminished because he is unable to teach an

alternative theory. Instead, ASMS's policy favors evolution over Intelligent Design because some choose to place religious significance on the theory. Additionally, ASMS's policy is a discriminatory preference against creationism and Intelligent Design and not other alternative theories. Therefore, the ASMS policy c1701.2 is unconstitutional because it shows bias towards religious beliefs.

2. The ASMS Policy c1701.2 Fails The Effects Prong Of The Lemon Test Because It Endorses Evolution And Inhibits What It Perceives To Be A Religious Practice.

The policy c1701.2 has the effect of endorsing evolution over religion because ASMS students might perceive the schools prohibition against Intelligent Design, a scientific that that lends support to religious theory, as a non-scientific theory. Under the Lemon test, the primary effect of the challenged action must neither advance nor inhibit religion. Under this prong, the Supreme Court “cautioned that a government practice may not aid one religion, aid all religions, or favor one religion over another.” Freiler, 185 F.3d at 346. The government is prohibited from demonstrating preference for one sect or creed over another. Id. A government practice has the effect of advancing or disapproving of religion if it is “sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement and by nonadherents as a disapproval, of their individual religious choices.” Alvarado, 94 F.3d at 1231. A belief that appears to resemble a religious practice does not have a “primary effect of advancing religion.” Id. The effects prong reaches those statutes that have a primary effect of advancing religion. A policy is not defeated when its secondary

effect is to advance religion. McClellan et al. v. Arkansas School Board of Education, et al., 529 F.Supp. 1255, 1272 (E.D. Ark. 1982) (holding that the real effect of the school's policy, Act 590. was to advance religion). The effects prong asks "whether, irrespective of the School Board's actual purpose, the practice under review in fact conveys a message of endorsement." Freiler, 185 F.3d at 346. Also, the Supreme Court "advised that no realistic danger [exists] that the community would think that the [contested governmental practice] was endorsing religion or any particular creed." Id.; Lamb's Chapel v. Center Moriches Univ Free School District, 508 U.S. 384, 395 (1993) (holding constitutional the showing of religious films at a public schools after hours). The Freiler court found that the school board's disclaimer prior to teaching evolution had the effect of "protect[ing] and maintain[ing] a particular viewpoint, namely belief in the Biblical version of creation." 185 F.3d at 346. Also, this disclaimer encouraged students "to read and meditate upon religion in general and the "Biblical version of creation "in particular." Id. at 346. (holding the disclaimer violated the effects prong of the Lemon test and the endorsement test.)

Here, the primary effect of the ASMS policy c1701.2 was to prevent their students from learning all theories on the subject of how the earth was formed, which resulted in evolution being favored over other alternative theories such as Intelligent Design, a scientific theory which lends support to religious beliefs. The mere fact that a parent called ASMS's principal and stated that Dr. Girsh's discussion on Intelligent Design was the "spark" that ignited her son's passion for biology, piqued his interest in the origins of life, and resulted in his determination

to now become a biologist not only shows that the policy inhibited theories it perceived to be a religion, but it also inhibits its students interest in biology. And it inhibits the students ability to take all theories into consideration to form their own opinions or theories on the origins of life. Therefore, ASMS policy c1701.2 fails the effects prong of the Lemon test because it has the effect of endorsing Evolution, a scientific theory over Intelligent Design, a non-scientific theory that lends support to religious beliefs giving ASMS students the perception that Evolution is the only viable theory on the origins of life.

3. The implementation of c1701.2 at ASMS Policy c1701.2 Fosters Excessive Entanglement Between The School And Religion Because This Policy Requires School Administrators To Constantly Monitor Classroom Discussion And The Content Of Textbooks.

ASMS policy c1701.2 violates the Establishment Clause because it causes excessive entanglement by requiring ASMS administrators to constantly monitor its classroom lectures. State entanglement with religion occurs when state officials are required to make “delicate religious judgments.” McClellan, page 1272. The McClellan court found entanglement where school administrator’s needed to monitor classroom lectures to ensure a policy was not violated. McClellan, 1272. The Lynch Court found no evidence of entanglement. Because the city in Lynch in making the decision to display a religious symbol in a Christmas holiday display because the city did not contact church officials to get ideas on the content and design of the exhibit. Additionally, the city of Pawtucket made no expenditure for maintenance of the exhibit . Lynch, 684.

This Court found that the display required “less ongoing, day-to-day interaction between church and state than religious paintings in public galleries.” Lynch, 684.

The Arklatex School Board purports to have implemented the policy to prevent Establishment Clause violations. But like the court in McClellan recognized, how will teachers respond to questions about intelligent design, or questions about “the occurrences of world-wide floods,” or explain the “relatively recent age of the earth? Here, these same questions arose in Dr. Girsh’s lecture. These unanswered questions show that the ASMS school board would be involved in “delicate excessive entanglement with religion and also continuous entanglement. These questions could answer with each new class. Although Intelligent Design is not a religion, Dr. Girsh explained the occurrence in a non-religious manner. Like Act 590 in McClellan, the ASMS policy c1701.2 causes entanglement with religion because ASMS officials will have to monitor classroom lectures to guard against school policy violations, administrators are inevitably involved in religious questions. The potential for ASMS’s continued involvement in religious questions will create excessive and prohibited entanglement with religion. Therefore, the ASMS policy violates the entanglement prong of the Lemon test because the policy will require that ASMS administrators continuously monitor school textbooks and classroom lectures.

**B. The ASMS Policy c1701.2 Fails The Lee v. Weisman Test Because It Prohibits Dr. Girsh From Teaching All Theories On The Origins Of Life, And Disregards The Ability Of Gifted And Talented High School**

## **Students' Ability To Determine Whether To Accept Intelligent Design Or Evolution Theories.**

ASMS policy §1701.2 violates the Establishment Clause because it denies students' right to decide which theory to believe as a result of prohibiting Dr. Girsh from teaching both evolution and Intelligent Design in the classroom. The Lee v. Weisman test is the second test courts use to analyze Establishment Clause violations in public schools. Jabr v. Rapides Parish School Bd. Ex Rel. Metoyer, 171 F.Supp. 2d 653, 661 (W.D. La. 2001) (holding unconstitutional a principal setting aside time for religious exercises, but did not allow a special time for anything else). The Constitution guarantees individuals that they will not be coerced by the government into participating in religion or religious exercises or establishing a state religion or faith. Weisman, 505 U.S. 577, 588 (1992); Lynch, 465 U.S. at 678; see also County of Allegheny, 492 U.S. at 591. The challenged act violates the Establishment Clause when (1) the government directs, (2) a formal exercise (3) in such a way as to oblige the participation of objectors." Jabr, 171 F.Supp.2d at 661. This test focuses on the coercive effect that the activity has on students. Courts will determine whether the government pressured students into participating in religious activities. Id. at 661.

In determining whether a government act coerces individuals into believing one idea over another, the potential for divisiveness is relevant. Especially when "it centers around an overt religious exercise in a secondary school environment where subtle coercive pressures exist." Weisman, 505 U.S. at 588. Courts also focus on the impressionability of students in secondary and elementary schools in

many cases when determining Establishment Clause violations. Jabr, 171 F.Supp.2d at 661. “In elementary schools, the concerns animating the coercion principle are at their strongest because the impressionability of young elementary-age children.” Id. at 661. The Jabr court notes that “[e]lementary school children are vastly more impressionable than high school or university students and cannot be expected to discern nuances which indicate whether there is true neutrality toward religion on the part of a school administration. Id. at 663. Establishment Clause violations weigh more heavily when younger, more impressionable students are involved. Id.

Although the school in Weisman seemed to have given a “good faith effort” at recognizing the common aspects of religion over the divisive ones, “the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position.” 505 U.S. at 590. The potential for divisiveness existed where a high school made a choice over which member of the clergy would conduct a graduation ceremony prayer. Id. at 588. Also, the Weisman court found divisiveness when the school gave students no alternative/choice as to whether she could have “avoid[ed] the fact or appearance of participation.” Id. Although the school made a good faith attempt to maintain a secular program by controlling the type of prayer given at the graduation ceremony, the Weisman court found that “the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religion exercise which students, for all practical purposes, are obliged to attend.” Weisman, 588.

Similarly, in *Jabr*, the court found a principal's act of distributing Bible's to students to be intimidating and coercive. This coercive act was compounded by the fact that when the principal handed a copy of the bible to a Muslim student and she refused it, he said "just take it." Her refusal of the Bible caused the Muslim to become the subject of teasing and harassment by her fellow students. 171 F.Supp. 2d at 661.

The ASMS policy pressures students into disregarding their own religious beliefs in the classroom." In Weisman, the court recognized that the act of standing or remaining silent was an expression of participation in the rabbi's prayer. Here, the policy coerces students into not considering their own religious beliefs in the same manner as the principle's act of distributing Bibles from his office. This subtle coercion by the school board makes students with religious beliefs feel not discussing religion at school as an expression of participation in suppressing religion. Therefore, the ASMS policy §1701.2 also fails the Lee v. Weisman test because it coerces students into denying their own religious beliefs while at school.

**C. The ASMS Policy §1701.2 Fails The Endorsement Test Because The Policy Endorses Evolution And Other Scientific Theories While Prohibiting Intelligent Design, A Scientific Theory Which Lends Support To Religious Theories.**

The ASMS School Board policy §1702.2 violates the Establishment Clause of the First Amendment because it endorses evolution while suppressing Intelligent Design, a scientific theory which can lend support to some religious

beliefs. Again, the Endorsement test is similar to the effect prong of the Lemon test. Kitzmiller, 500 F.Supp. 2d at 713. Courts look to determine whether the challenged act “conveys a message favoring or disfavoring religion.” Id. at 714; ACLU v. Beach House Pike Reg’l Bd. of Educ., 84 F.3d 1471, 1486 (3d. Cir. 1996). When examining cases under the endorsement test, courts determine “whether an objective observer acquainted with the test, legislative history, and implementation of the statute would perceive it as a state endorsement prayer in public schools.” Kitzmiller, 400 F.Supp. 2d 707, 713 (2005); See also Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000). The Endorsement Test provides courts with a means to determine whether the government endorses religion through the challenged action. Freiler, 185 F.3d at 337. The Supreme Court’s explained the context in which the Establishment Clause is applicable to public schools: “School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are non-adherents “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” Santa Fe, 530 U.S. 290, 308; Kitzmiller, 400 F.Supp. 2d at 713.

Courts examine what the government intended to communicate and the message actually conveyed under the Endorsement Test. Kitzmiller, 714. The message conveyed is what an individual who knows the policy’s language, origins, and legislative history, as well as the community’s history. This individual also knows the historical context giving rise to the policy. Kitzmiller, 715. The

observer is “more knowledgeable than the average passerby”; this individual has the has the ability to “glean other relevant facts from the force of the policy in light of the context”; and this individual will look to the evidence to determine where the policy conveys a message of endorsement or disapproval regardless of the government’s intent. 400 F.Supp. 2d at 715.

The Kitzmiller court determined the school boards’ policy was intended for the entire community because the board made the challenged action into a public debate on whether to include Intelligent Design in to the curriculum, and approving the policy at a public school board meeting. Id. at 729. Members of the public attended the board meeting and offered comments. Id. at 730. Board members “advocated for the ID policy in expressly religious terms” and two board members used religious terms expressly to define the proposed curriculum. Id. The Board also sent newsletters to every household in Dover to “help explain the changes in the biology curriculum.” Id. And parents of students taking biology were sent a letter “asking if anyone has a problem with the disclaimer statement and asked them to decide whether they wanted their kid to remain in the class.” Id. at 731.

Here, ASMS received one comment from a parent that did not want Intelligent Design taught and fifteen for parents who wanted Intelligent Design to continue at ASMS. ASMS’s policy endorsed Evolution over Intelligent Design, a scientific theory ASMS mistakenly labeled a religious theory. ASMS students’ parents as objective observers had been given the policy, ASMS would have found that most of the parents supported teaching all theories on the origins of

life. Like the disclaimer in Kitzmiller, which had the effect of endorsing religion over Intelligent Design, the ASMS policy prefers Evolution over alternative theories such as Intelligent Design because it lends support to religious beliefs. Instead, ASMS should have shown preference over neither and taught Intelligent Design as a viable alternative on the origins of life. Therefore, the §1701.2 also fails the Endorsement test because it endorses Evolution and inhibits Intelligent Design because it lends support to religious beliefs.

**III. THE SCHOOL DISTRICT VIOLATED DR. GIRSH'S FREE SPEECH RIGHTS UNDER THE FIRST AMENDMENT WHEN IT DISCIPLINED HIM FOR SPEAKING ABOUT SCHOOL BOARD POLICY AND INTELLIGENT DESIGN, SOUGHT TO PREVENT HIM THROUGH POLICY FROM EXPRESSING HIS VIEWPOINT, AND ABRIDGED HIS ACADEMIC FREEDOM TO TEACH IN THE WAY HE CHOSE.**

A public employer may not take adverse action against an employee who speaks out on a matter of public concern unless the employer's need for efficiency in performing its services outweighs the significance of the employee's right to speak. Pickering v. Board of Education of Township High School District 205, Will County, Illinois, 391 U.S. 563, 568 (1968). If this test is not met, the freedom of speech guaranteed by the First and Fourteenth Amendments is violated. Similarly, government exclusion of one viewpoint on a topic of discussion normally included in a non-public forum like a school is contrary to the right of free speech. May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105, 1113 (1986).

When Dr. Girsh spoke to his class about his scientific research on intelligent design and mentioned that he thought "the school board has bigger things to worry about

than keeping students from fully learning science,” he assumed he was exercising a protected right to freedom of expression guaranteed under the First Amendment of the United States Constitution. ( R. at 7) He was correct. When the school subsequently reprimanded Dr. Girsh for his statements, it violated this right. School board policy against the teaching of creationism and intelligent design also violates Dr. Girsh’s right to free speech by preferring an evolutionary viewpoint to a theory based on creationism or intelligent design on the topic of the origin of life.

**A. The school district violated Dr. Girsh’s First Amendment rights to free speech when it took action against him for speaking to his students about school board policy and intelligent design.**

A public employer may not limit an employee’s speech when it is on a matter of public concern and the government’s interest in promoting the efficiency of its services is outweighed by importance of the employee’s freedom. Pickering at 568. Speech on political topics, social issues, or other community concerns is on a matter of public concern. Connick v. Myers, 461 U.S. 138, 146 (1983). When speech is on a matter of public concern, the Court looks at several factors relating to the efficient function of the government entity to determine if the need for the government regulation outweighs the existing freedom of expression. Columbus Education Association v. Columbus City School District, 623 F.2d 1155, 1160-1 (1980). After it has been determined that the speech is protected, the employee must prove that the speech was a “substantial” or “motivating” factor in the reprimand or other adverse employment decision. The employer meets its burden by showing that the same employment decision would have been reached absent the protected speech. Mount Healthy School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977). The court in Teague v. City of Flower

Mound, Texas, 179 F.3d 377, 381 (5<sup>th</sup> Cir. 1999) summarizes the elements of a First Amendment retaliation claim like Dr. Girsh's in this way: 1) There must be an adverse employment decision; 2) The topic of the speech must involve a matter of public concern; 3) The employee's interest in speaking must outweigh the government's interest in efficiency; and 4) The speech must have motivated the employment decision.

Under these precedents, the school board violated Dr. Girsh's First Amendment rights. Written reprimands appeared in Dr. Girsh's employee file. Dr. Girsh's made comments about school board policy which affects subjects taught at ASMS. This is a topic that would concern the taxpayers and parents in the state who have an interest in the school. He also commented on intelligent design, which is a subject of widespread interest and debate in today's political climate. His freedom of speech outweighs the government interest in efficiency in this case because his comments did not result in any significant distraction or reduction of efficiency in the school environment. The comments were a major factor, in fact the only factor, in the reprimands, and the school would not have disciplined Dr. Girsh if he had not spoken out.

1. The reprimands Dr. Girsh received in his file were adverse employment actions.

Whether an adverse employment action has occurred depends on an objective view of the situation rather than an employee's subjective perception that something negative has happened. Harris v. Victoria Independent School Dist., 168 F.3d 216, 221 (5<sup>th</sup> Cir. 1999) An employee need not be fired to have suffered an adverse employment action. In Harris, the plaintiff teachers suffered written reprimands and transfers to different schools. These were considered adverse employment actions. Id. at 220.

Similarly, Dr. Girsh received written reprimands in his personnel file. These are objective proof that the adverse employment action exists in the real world, rather than only in Dr. Girsh's mind. The reprimands were adverse employment actions for the purposes of the test.

2. Dr. Girsh's comments meet the threshold for protected speech because they deal with matters of public concern,

Speech on public issues occupies the highest rung of the hierarchy of the of First Amendment values and is entitled to special protection. 461 U.S. at 145. Political and social issues and material of interest to the community are considered topics of public concern. Id. In Kennedy v. Tangipahoa Parish Library Board of Control, 244 F.3d 359, 366 (5<sup>th</sup> Cir. 2001), the Court breaks down the Connick calculus of speech on public concern into two distinct tests, the "content-form-context test" and the "citizen-employee test." Under the first test, the court must determine the content, form, and context of the speech by looking at the record as a whole. Id. The "citizen-employee" test looks at whether the speaker was speaking as a citizen on a matter of public concern or as an employee on a work-related issue only of personal interest. Id.

Dr. Girsh's speech is of public concern under the first test. In Pickering, the speech was considered to be of public concern when it spoke about school policy with regard to funding for athletics and other issues applicable to students, parents, teachers, and taxpayers, was written in a letter to a newspaper, and was thus, communicated to a wide audience. 391 U.S. at 565-568. Dr. Girsh's speech is similar to this. It deals with curriculum in the school which is of interest to students, parents, taxpayers, teachers, and others involved with ASMS. It is also of interest to the public as a whole because it

relates to the teaching of evolution and intelligent design, which is a popular topic of debate. The fact that Dr. Girsh's spoke to his class also indicates that the matter was of concern to them and others, rather than just to Dr. Girsh personally.

The speech also meets the second test. Statements do not fail the "citizen-employee test" simply because they may involve some personal interest by the speaker. Kennedy, 244 F.3d at 366. In Kennedy, a library employee spoke out about safety of the patrons and employees of the library after a coworker was raped. Id. at 362. The court determined this to be of both public and private concern. Id. at 367. Mixed speech like this does not lose its First Amendment protection simply because of a personal interest. The court applies the "content-form-context test" in conjunction with this calculus to more accurately determine the nature of the speech. Id. Dr. Girsh's speech is mixed speech, most likely. The issues he discussed affected a wide of range of people but also affected him personally with regard to his personnel file and what he was allowed to teach. Dr. Girsh will still receive First Amendment protection because under the first test, his speech is on a matter of public concern.

3. Dr. Girsh's speech did not interfere with his ability to do his job or the function of the school.

Government employers may prevent speech when the need for efficiency in the agency's services outweighs the employee's right to the expression. Pickering, 391 U.S. at 568. Generally, for schoolteachers, this means that the speech must not interfere with their performance in the classroom or the functioning of the school. Columbus Education Association, 623 F.2d at 1160. The school district must show that it is not merely trying to

“avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint” and that Dr. Girsh’s speech significantly impacted the running of the school. Tinker v, Des Moines Independent Community School District, 393 U.S. 503, 509 (1969). The school district cannot say this about Dr. Girsh’s speech. The reprimands were precipitated by complaints from atheists students and the ensuing “unpleasantness,” but there was no actual disruption. A few students were offended, but many more children and parents were pleased with decision and felt learning was enhanced. Students even encouraged Dr. Girsh to engage in the discussion to begin with and to continue it. Dr. Girsh was not negatively impacted in his ability to do his job, and the school experienced no significant disruption.

4. The speech was the sole reason for the reprimands.

The last element of the retaliation claim is that the speech must have motivated the adverse employment decision. Teague, 179 F.3d at 381. The burden of proof is on the employee to prove this, and the employer must prove that the same decision would have been made absent the speech. Mt. Healthy, 429 U.S. at 287. The Court was unsure about a case where a teacher made protected comments to a radio station about a teacher dress code but also had had altercations with other faculty and students on school grounds and made obscene gestures to female students prior to his adverse employment action. *Id.* at 281-287. Dr. Girsh’s case is much more clear cut. He had no prior questionable issue before his protected speech, so he would be able to uphold his burden. The district will also be unable to uphold its burden.

**B. The school board policy against teaching intelligent design violated Dr. Girsh’s First Amendment Rights because it was not viewpoint neutral.**

Dr. Girsh's rights are further being infringed upon because his viewpoint on the origins of the universe is being discriminated against. The high school classroom is a non-public forum because it is not generally open to the public. May, 787 F.2d at 1113. In a non-public forum the government may limit speech by topic but not by viewpoint on a given subject. Id. In Dr. Girsh's case, the origin of life is part of acceptable subject matter as part of the curriculum. He is only being limited from expressing a given viewpoint on the topic, while the policy allows for the opposite viewpoint. This is contrary to the First Amendment. In Moore v. City of Van, Texas, 238 F.Supp. 2d 837, 847 (5<sup>th</sup> Cir. 2003) the court held that the city could not restrict use of its community center for religious purposes when it had previously allowed use of the facility for similar activities without a religious viewpoint. Dr. Girsh's case is similar because the school has previously allowed and even mandated that teachers teach on the origins of life but now is attempting to discriminate based on a viewpoint on that topic.

### **CONCLUSION**

For the foregoing reasons, Respondent respectfully requests that this court affirm the ruling of the Court of Appeals for the Fourteenth Circuit.