
Docket No. 06-0009

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2006

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

Petitioner,

v.

PETER GIRSH

Respondent.

On Writ of Certiorari

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether allowing instruction on Intelligent Design in public schools violates the Establishment Clause of the First Amendment, where Intelligent Design theory rests on the existence of a supernatural creator and has similarities to Creationism, a theory whose instruction in public schools has been declared unconstitutional.
2. Whether public school officials may discipline a teacher for violating and criticizing a school board policy prohibiting teachers from discussing Intelligent Design without violating his First Amendment right to freedom of speech.

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OPINIONS BELOW

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

CONSTITUTIONAL PROVISIONS INVOLVED

The text of the following Constitutional provision is relevant to the determination of this case and is set forth in the Appendix B: U.S. Const. amend I.

STANDARD OF REVIEW

The issues in this case present questions of law; therefore, the appropriate standard of review is de novo. *Pierce v. Underwood*, 487 U.S. 552 (1988).

PROCEDURAL HISTORY

Dr. Peter Girsh brought this action against the Arklatex School for Mathematics and Sciences Special School District (hereinafter “School Board”) alleging violations of the First Amendment. Dr. Girsh alleged that the School Board policy §1701.2, which prohibits the teaching of Creationism and Intelligent Design (hereinafter “ID”), violates the Establishment Clause of the First Amendment for disapproving the teaching of alternative theories of creation that lend support to religious beliefs. Dr. Girsh also alleged that the School Board violated his First Amendment right to free speech by sanctioning him for speaking about ID in the classroom and criticizing the School Board policy. (R.10).

On June 7, 2004, the United States District Court for the Eastern District of Arklatex found the School Board did not violate the First Amendment by implementing

§1701.2 and by disciplining Dr. Grish for criticizing and violating the policy. (R.14).

The court ruled there were no material facts in dispute and that Defendants were entitled to judgment as a matter of law. (R.4).

The United States Court of Appeals for the Fourteenth Circuit reversed the judgment of the trial court and remanded for further a trial on the merits on October 11, 2005. The court stated that the Defendants were not entitled to judgment as a matter of law because there were unresolved questions of material fact. (R.16).

On January 27, 2006, the Supreme Court of the United States granted certiorari to consider the following questions:

- (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 on Intelligent Design?

STATEMENT OF THE CASE

Arklatex School for Mathematics and Sciences (ASMS) is a public high school for “exceptional students” that receives public funding from the Arklatex Department of Education (ADE). (R. at 4, 5). ASMS’s enrollment is determined through a state-wide application process open to all high school students in Arklatex. Once admitted, ASMS students receive the same benefits offered to all public school students in the state. (R. at 4). Because of its student population, ASMS is required to follow an “exceptional schools” curriculum which specifically requires adherence to a state-specified Biology program that strictly prohibits the teaching of “non-scientific” evidence. (R. at 5).

On September 8, 2003, the ASMS School Board (School Board) adopted Policy § 1701.2, which prohibits teachers from instructing students on Creationism or Intelligent Design (ID), a theory of the origins of life and the universe that presupposes the existence of an intelligent or supernatural creator, and which lends support to some religions and to the biblical Christian creation story in particular. (R. at 4). The School Board’s purpose in adopting this policy was to avoid violations of the Establishment Clause of the United States Constitution and to avoid any appearance that ASMS “endorses any particular religious belief.” (R. at 4).

Dr. Peter Girsh teaches biology at ASMS and has been a faculty member at the school since 1995. Dr. Girsh is also a well-known proponent of ID, and has spoken extensively on the issue in numerous television and radio interviews as well as in a textbook he has written on the subject. While he maintains the view that ID is a purely scientific and not religious theory, Dr. Girsh does concede that ID lends support to certain religions, particularly Christianity. (R. at 4).

On January 26, 2004, approximately four months after the School Board's adoption of the new policy prohibiting the teaching of ID, Dr. Girsh refused to answer a question about ID raised by a student in his biology class. (R. at 6). The very next day, however, Dr. Girsh came to class and told his students that he disagreed with the School Board's policy and thought it was unconstitutional. (R. at 6, 7). Dr. Girsh then proceeded to deliver an in-depth lecture on ID theory. He passed out pamphlets he had written on the theory, showed video clips of his television interviews, and explained 3 different ways ID theorists justify their premise. (R. at 7). Although Dr. Girsh never used the word "God" in his lecture, his pamphlets did refer to "some sort of intelligent agent." (R. at 8).

The day after Dr. Girsh's lecture on ID, he was confronted by ASMS's principal, Dr. Rice, who told Dr. Girsh that Dorothy Klinger, the mother of one of his students, Maya Klinger, had called Dr. Rice at home to complain about Dr. Girsh's ID lecture. Ms. Klinger was outraged that ID had been taught in her daughter's biology class, and stated that she and her husband felt the lecture undermined their efforts to raise their children as Atheists. (R. at 8). In addition, Maya Klinger stated that she was horrified to have ID presented in her class, and said Dr. Girsh's lecture made her feel uncomfortable because she doesn't believe in a supernatural creator. She also said that she felt like Dr. Girsh was trying to tell the students that science has proven the existence of God. (R. at 8). At this confrontation, Dr. Rice reminded Dr. Girsh of the School Board policy and told him not to mention ID in the classroom again.

The very next day after this warning, however, Dr. Girsh again discussed ID, this time answering students' questions on how ID theory could be used to refute

evolutionary theory. (R. at 9). This discussion upset Maya Klinger and two other students so deeply that they walked out of class, saying “I can’t hear this.” When Dr. Girsh tried to stop them, they told him they would return when he started acting like a “teacher instead of a preacher.” (R. at 9). After this incident, Maya Klinger withdrew from ASMS altogether, saying she felt too uncomfortable there because of Dr. Girsh’s ID lectures. Maya felt as though the discussions had estranged from her peers at school, and that because of the lectures her religious beliefs now separated her from her classmates. (R. at 9).

Later that same day, Dr. Rice notified Dr. Girsh that he had been cited twice for insubordination due to “willful violation of School Board policy § 1701.2.” (R. at 9, 10). Dr. Rice also told Dr. Girsh that another violation would result in a formal School Board hearing regarding the continuation of his employment with ASMS. Additionally, Dr. Girsh was presented with a formal letter from the School Board stating that Dr. Girsh is free to promote his ideas about ID privately, but is “prohibited from, in any shape, form, or fashion, mentioning ASMS in conjunction with [ID].” (R. at 10).

The School Board published a report of these measures against Dr. Girsh in the next day’s newspaper in an open letter. The letter further stated that “the teaching of [ID] is unacceptable in the Arklatex Schools.” (R. 10.) Dr. Girsh subsequently brought this suit against the School Board alleging two First Amendment violations: 1) the Board’s policy violated the Establishment Clause by singling out for prohibition only those theories which lend support to religious beliefs; and 2) the Board violated his right to freedom of speech by disciplining him for discussing Intelligent Design and criticizing the Board’s policy prohibiting its teaching. (R. at 10).

SUMMARY OF THE ARGUMENT

The District court was correct in finding no material issues of fact and granting the School Board's motion for summary judgment on Dr. Girsh's Establishment Clause claim. The Establishment Clause of the First Amendment of the Constitution is violated upon teaching the theory of Intelligent Design in a public school. Accordingly, a school board policy prohibiting the teaching of Intelligent Design is constitutionally valid. The Arklatex School Board's purpose in implementing the ID policy was to prevent Establishment Clause violations. Therefore, the policy was enacted with a secular purpose. It does not inhibit religion in general, and was enacted with the effect of prohibiting the teaching of a certain faith's account of creation. Moreover, in adopting this policy the school board was not fostering an excessive government entanglement with religion.

Several students felt compelled to leave the classroom and parents withdrew their children from school as a result of Dr. Girsh's ID discussion. Additionally, the court has determined that ID is a religious theory. A reasonable objective ninth grader as well as a reasonable objective adult could conclude that the school was intending to convey a message of approval of religion when Dr. Girsh instructed his class on the theory of ID.

Because school attendance is mandatory, the coercive nature of the classroom discussion placed the students in a situation of having to either engage in or protest the nature of the discussion. The fact that several students left Dr. Girsh's classroom during his lecture indicated a desire by students to protest the ID discussion. An activity that forces a student to make the decision to leave is an unconstitutional violation of the

Establishment Clause. For these reasons, the school board policy was not an unconstitutional violation of the Establishment Clause and Dr. Girsh's discussion of ID in contravention of that policy was such a violation.

The district court also correctly granted the School Board's motion for summary judgment on Dr. Girsh's Free Speech claim. There are no questions of material fact, and Dr. Girsh's classroom lecture was not constitutionally protected, therefore the School Board's disciplinary actions against him did not violate his First Amendment rights. His speech did not involve a matter of public concern but rather a matter of merely personal interest. Moreover, the School Board's high interest as an employer in promoting the efficiency of the public services it carries out through its employees outweighs any interest Dr. Girsh has in commenting upon ID. Alternatively, even if Dr. Girsh's speech was protected by the First Amendment, any violation of his right to free speech is justified by the School Board's concern that permitting Dr. Girsh's discussion of ID would violate the Establishment Clause.

ARGUMENT

- I. THE CIRCUIT COURT ERRED IN REVERSING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE THERE ARE NO MATERIAL ISSUES OF FACT IN THAT A SCHOOL BOARD'S POLICY PROHIBITING THE TEACHING OF INTELLIGENT DESIGN DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The First Amendment of the United States Constitution provides that a state "shall make no law respecting an establishment of religion . . ." U.S. Const., amend. I. The First Amendment is applied to the states from the Fourteenth Amendment. *Lee v. Weisman*, 505 U.S. 577, 580 (1992). State action will not violate the Establishment Clause of the First Amendment when that action is found to (1) have a secular purpose; (2) have a principal or primary effect of neither advancing religion nor inhibiting religion; and (3) does not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Where the actual purpose is to endorse or disapprove of religion, or irrespective of the government's actual purpose, the practice under review conveys a message of endorsement or disapproval, the state action will violate the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 669, 690 (1984). The coercive nature of a state action is heightened where attendance is mandatory. *Lee v. Weisman*, 505 U.S. 577 (1992).

A. The School Board policy prohibiting the teaching of Intelligent Design was adopted with a secular purpose; its principal effect neither advanced nor inhibited religion; and it did not result in an excessive entanglement of government with religion.

The teaching of ID in public schools brings into question whether the Establishment Clause of the First Amendment is being violated. This court has articulated a three-prong test for determining whether a state action will violate the First

Amendment's Establishment Clause. First, the court looks at whether the policy was adopted with a secular purpose. Second, the principal or primary effect is one that neither advances nor inhibits religion. Third, the policy does not result in an excessive entanglement of government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The first prong of the *Lemon* test "asks whether the government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In evaluating this purpose inquiry, courts have focused upon whether the intent was to advance religion. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

Courts are to give deference to the purpose of the school when evaluating the enacted policy. *Freiler v. Tangipahoa Parish Board of Education*, 185 F.3d 337, 344 (5th Cir. 1999). The policy will survive scrutiny under the purpose prong of the *Lemon* test if the policy promotes its offered purpose and that purpose proves to be secular. *Id.* at 344. While the policy must not have a purpose of advancing religion, it also must not have a purpose of inhibiting religion. The policy must be implemented in order to show neutrality towards religion. *Rosenberger v. Rector*, 515 U.S. 819, 839 (1995).

Here, the school board enacted the policy prohibiting the teaching of ID in order 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). By prohibiting the teaching of Creationism, ID, and other similar theories, the school board is attempting to further this purpose. Given that certain students and parents were offended by the classroom discussion of ID, the school was clearly concerned that this

type of behavior would violate the Establishment Clause or give the appearance of the endorsement of a particular belief.

The school policy does not purport to inhibit religion. Instead the policy remains neutral in neither endorsing nor inhibiting religion. The school board policy would not be neutral if its purpose was to allow the teaching of alternative theories as long as those theories do not support religion. *Rosenberger v. Rector*, 515 U.S. 819, 839 (1995).

However, by allowing the teaching of ID, the school board would be allowing a theory that supports the Christian religion, not religion in general. Therefore, the policy does not inhibit religion and has a purpose of showing neutrality towards religion.

Had Dr. Girsh, acting on behalf of the school, followed the policy and not discussed the theory of ID with his students, the proffered purpose of the school board's policy would have been furthered. The desire to reduce religious offenses of students and parents is a permissible secular objective. *Freiler v. Tangipahoa Parish Board of Education*, 185 F.3d 337, 346 (5th Cir. 1999). Because students and parents are offended by Dr. Girsh's teaching of ID in the classroom, the school board has furthered the secular purpose of avoiding Establishment Clause violations and avoiding the appearance of a religious endorsement. Although Dr. Girsh never mentioned whether he believes the supernatural creator is God, the likely inference to be drawn is that God is the creator. (R.8). Dr. Girsh admitted in his affidavit that the theory does lend support to the Christian creation story of Genesis. (R.4). The clear purpose of discussing ID with his class was to promote a religious based theory. The second prong of the *Lemon* test asks whether "the practice under review in fact conveys a message of endorsement or

disapproval.” *Doe v. Santa Fe Independent School District*, 168 F.3d 806, 817 (5th Cir. 1999). To determine the effect of teaching ID in the classroom, the court should focus on the message the policy conveyed to the students. *Freiler v. Tangipahoa Parish Board of Education*, 185 F.3d 337, 346 (5th Cir. 1999). A preference for Christianity over other religions does not pass this analysis. *Id.* at 346.

The theory of intelligent design rests upon the belief that a supernatural being is responsible for the creation of the universe. Teaching creationism was found to be an unconstitutional violation of the First Amendment’s Establishment Clause due to its religious position and promotion of a religious belief. *Edwards v. Aguillard*, 482 U.S. 587 (1987). Courts have found that ID fails to be recognized as a science for the same reason Creationism failed to pass constitutional muster. *Kitzmiller v. Dover Area School District*, 400 F.Supp. 2d 707 (M.D. Pa. 2005). These reasons are that ID violates established rules of science by introducing supernatural causes; ID’s argument of irreducible complexity presents the same illogical contrived dualism that doomed creation science; and the scientific community has refuted ID’s attack on evolution. *Id.* at 81-81.

As discussed above, Dr. Girsh never mention God as being the supernatural creator. However, since courts have found ID to be similar in theory to that of Creationism, ID inherently suggests that God is the supernatural designer. Various experts and proponents of ID have stated that they believe the supernatural creator to be the God of Christianity. Additionally, there have been no alternatives, other than space aliens or time travelers, to God as the designer. *Id.* at 33.

A student in Mr. Girsh's biology class could have inferred that the discussion of ID was intended to promote religion. The court in *Freiler v. Tangipahoa Parish Board of Education* found that urging students to think about religious theories of "the origin of life and matter" as an alternative to evolution did purport to aid religion and thus fail the second prong of the *Lemon* test. This is exactly what Dr. Girsh is urging his students to contemplate – an alternative theory that is religious in nature to rebut the theory of evolution. Because some students decided to leave the classroom during the discussion of ID, this indicates that those students felt a religious belief was being forced upon them. Mr. Girsh's teaching of ID in his classroom would convey a religious message to the students and therefore, have the primary effect of promoting religion.

The third prong of the *Lemon* test looks at whether there is excessive government entanglement with religion. This Court does not call for a total separation of church and state, although there must not be an excessive entanglement among the two. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). When determining whether there is excessive government entanglement, this court has examined "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.* at 615.

The school board is not attempting to infringe upon or promote religion by implementing the ID policy. Were the school board to decide that the teaching of ID is allowed, only then would the school be excessively entangling with religion. Therefore, the policy is not demonstrating excessive government entanglement.

In light of the foregoing, this court should find that the teaching of ID by Dr. Girsh violates the Establishment Clause of the US Constitution and therefore, the school board policy prohibiting the teaching of ID is constitutional under the *Lemon* test.

B. A reasonable, objective ninth grade biology student and a reasonable, objective adult observer would find that Dr. Girsh's classroom lecture conveyed a message of the school's approval of religion and therefore violated the Endorsement Clause of the First Amendment.

A practice is invalid under the First Amendment of the U.S. Constitution where the “actual purpose is to endorse or disapprove of religion...irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.” *Lynch v. Donnelly*, 465 U.S. 669, 690 (1984).

This endorsement test requires the court to determine what the challenged policy conveys to a reasonable, objective student and what the policy conveys to a reasonable, objective adult observer. *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707, 23 (M.D. Pa. 2005). In looking at this test, the court looks to whether an objective student in Mr. Girsh's ninth grade biology class, as well as a reasonable and objective adult observer, would have interpreted the school board's policy prohibiting the teaching of ID to inhibit the promotion of religion and therefore, Dr. Girsh's classroom lecture to be a promotion of a religious viewpoint.

As stated in Subsection A, the purpose of the school board's 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). This purpose indicates to a reasonable observer, whether ninth grader or adult, the policy is intended to bar the promotion of a religious viewpoint.

Dr. Girsh explained to his students the theory of ID by using pamphlets, video clips, and lecture. None of his materials expressed that God was the supernatural designer, however, no alternative creator was mentioned. Several students found these teachings to indicate the supernatural creator Dr. Girsh was speaking of was in fact God. Three students left the classroom, stating that they would return once Dr. Girsh stopped acting like a preacher. Dr. Girsh's in-class discussion of ID would indicate to a reasonable, ninth grade student in his biology class that he was intending to promote a religious theory of creation.

The *Kitzmiller* court has found that ID is not a science and is religious in theory. Thus, the teaching of ID has been found to violate the Establishment Clause of the Constitution. *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707, 177 (M.D. Pa. 2005). An objective adult observer could conclude Dr. Girsh's teaching of ID was intended to promote religion. Dorothy Klinger even went so far as to remove her daughter from the school district as a result of Dr. Girsh's ID discussions. (R.9). There have been no serious alternatives to God as the supernatural creator. A reasonable adult could clearly find that Dr. Girsh's teachings were intended to promote a religious viewpoint.

Therefore, both a reasonable ninth grader in Dr. Girsh's biology class, as well as an objective adult observer, would feel the school board policy prohibiting the teaching of ID in the classroom was intended to inhibit the promotion of religion and that Dr. Girsh's in class discussion on the theory of ID did promote a theory of religion thus violating the Establishment Clause of the United States Constitution.

C. By teaching Intelligent Design in class, Dr. Girsh subjected his students to a coercive atmosphere where attendance was mandatory, therefore violating the Establishment Clause of the First Amendment.

This Court has found that the coercive nature of state action is heightened where attendance in school is mandatory. *Lee v. Weisman*, 505 U.S. 577, 592 (1992). When a state official directs a religious exercise where the student's attendance is required, the establishment clause is violated. *Id.* A school may not place a student in the dilemma of participating in the proposed activity or protesting against it. *Id.* at 592.

Section A, Subsections 1 and 2 above explain that the theory of intelligent design is a religious based explanation of creation. Therefore, the teaching of ID in the classroom is a religious exercise in a school where attendance is mandatory.

Dr. Girsh presented his views on the theory of ID in his ninth grade biology class during the class's regularly scheduled time. Students in this class may feel compelled to take notes and memorize the proffered information in the anticipation of the material being on a test. This may prevent students who do not wish to participate in the discussion from leaving the classroom. These students may feel compelled to remain in the classroom and to be forced to learn a religious theory they may or may not believe to be true.

Additionally, because school attendance is mandatory, a student may feel he or she would be punished by the teacher or subject to the ridicule of classmates if he or she decided to leave the classroom. This may also make a student feel coerced to stay in the classroom and be subject to the teachings of ID.

Several students, however, felt these reason were not enough to keep them in the classroom. They were so offended by Dr. Girsh's discussion on ID they felt the need to

leave the room. This Court has stated that a student should not be placed in the position of having to decide to protest the proffered information. *Lee v. Weisman*, 505 U.S. 577, 592 (1991). By teaching ID in the classroom, Dr. Girsh has indeed placed his students in this uncomfortable position.

For these reasons, the School Board policy did not violate the Establishment Clause of the Constitution. Rather, Dr. Girsh violated the Establishment Clause by teaching ID, theory which supports religious beliefs, in his public school classroom where attendance was mandatory and some students felt coerced to participate in the religious activity.

II. THE CIRCUIT COURT ERRED IN REVERSING THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT ON RESPONDENT'S FREE SPEECH CLAIM BECAUSE THERE IS NO MATERIAL QUESTION OF FACT IN THAT A TEACHER'S DISCUSSION OF INTELLIGENT DESIGN IN A PUBLIC SCHOOL CLASSROOM IS NOT PROTECTED BY THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH.

Because Dr. Girsh's discussion of intelligent design in his public school classroom was not protected by the First Amendment right to freedom of speech, the disciplinary actions taken against him by school officials did not violate his constitutional rights. While the "core value" of the First Amendment's Free Speech Clause is fostering open debate on matters of public importance, the protections afforded by this provision are not without borders. *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968). In shaping its First Amendment jurisprudence, this Court has drawn a distinction between speech by private persons and speech by government employees in the course of their governmental duties. *Id.* at 1734. In *Pickering*, this Court recognized that a state has compelling "interests as an employer in regulating the speech of its employees," and that

these interests differ fundamentally from “those it possesses in connection with the speech of the citizenry in general.” *Id.*

When, as here, a public employee claims that adverse employment decisions against him were retaliatory in violation of his First Amendment rights to free speech, a four-step, burden-shifting analysis is applicable. *See id.*; *Connick v. Myers*, 461 U.S. 138 (1983). The first step in this analysis requires a determination of whether the employee’s speech involves a matter of public concern. *Connick*, 461 U.S. at 146. If it does, then the employee’s interest as a citizen in commenting upon issues of public concern must be weighed against the state’s interest as an employer in promoting the effectiveness of the public services it carries out through its employees. *Id.* Only when the employee’s interest outweighs that of the state is speech protected. *See Mt. Healthy*, 429 U.S. 274, 284 (1977) (citing *Pickering*, 391 U.S. at 568).

Only if this balancing test is found to favor the employee is the next step in the analysis reached, where it becomes the employee’s burden to prove the protected speech was a “motivating factor” in the state’s employment decision. *Id.* at 287. If the employee carries this burden, then the final step of the analysis comes into play and the burden shifts to the employer to show by a preponderance that it would have made the same decision even without the protected conduct. *Id.* Because here, as the district court found, Dr. Girsh’s speech did not involve a matter of public concern and the School Board has a very high interest as an employer in promoting the efficiency of its public services carried out by its employees, Dr. Girsh’s speech was not protected under the First Amendment. Therefore, the final two steps of the analysis are inapplicable and the

School Board's disciplinary actions did not violate Dr. Girsh's constitutional rights to free speech.

A. Dr. Girsh's discussion of ID did not involve a matter of public concern and therefore his speech was not protected by the First Amendment.

Because Intelligent Design is not inherently a matter of public concern, but rather a matter merely of personal interest to Dr. Girsh, the first part of the analysis is not satisfied and Dr. Girsh's in-class discussion is not entitled to constitutional protection. No First Amendment rights are implicated by an employer's adverse personnel decision "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest." *Connick v. Myers*, 461 U.S. 138, 147 (1983). Determining whether an employee's speech addresses a matter of public concern involves a consideration of "the content, form, and context of a given statement, as revealed by the whole record." *Id.* "[M]ere extensions" of an employee's dissatisfaction with office directives do not amount to questions of public concern. *Id.*

In *Connick*, an employee upset over an order transferring her to a different division of her workplace created and sent around a questionnaire regarding office policies and morale. *Id.* at 140. When she was subsequently terminated for refusing to accept the transfer and for insubordination in distributing the questionnaire, the employee sued alleging infringement of her constitutional right to freedom of speech. *Id.* at 141. This Court determined the employee's questionnaire was not a matter of public concern; that "if released to the public, [her questionnaire] would [simply] convey the fact that a single employee is upset with the status quo[.]" and that the employee's speech merely

“reflect[ed] one employee’s dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre.” *Id.*

Here, a review of the record as a whole shows that ID is a matter of the utmost personal interest for Dr. Girsh. Indeed, nearly his entire scholarly career is devoted to the study and promotion of that theory. Moreover, the “content, form, and [particularly the in-class] context” of his statements reveal that he was not speaking as a private citizen, but rather as a highly dissatisfied employee addressing a matter of passionate personal interest. Like the questionnaire of *Connick*’s employee, Dr. Girsh’s speech was merely an extension his frustration with the School Board’s policy prohibiting the teaching of his most cherished scholarly work. His statements conveyed simply that he as an employee was displeased with the “status quo” of his workplace, and was attempting to “turn that displeasure into a cause celebre.” As this Court recognized in *Connick*, such unilateral attempts are not enough to elevate a subject to the constitutionally protected level of a matter of public concern. Therefore, Dr. Girsh’s statements were not protected under the First Amendment, and the disciplinary actions taken against him by the School Board did not infringe upon his constitutional right to free speech.

B. Even if Dr. Girsh’s discussion of ID did involve a matter of public concern, his First Amendment rights were not violated because his interest as a citizen in commenting on such matters is outweighed by the state’s interest as an employer in fostering the efficiency of the public services it carries out through its employees.

Assuming *arguendo* that Dr. Girsh’s discussion did involve a matter of public concern and thus satisfies the first part of the relevant analysis, the second part of the analysis is not met because his interests were outweighed by state’s, and therefore his speech was not entitled to constitutional protection. Under the second part of the

analysis, an employee's comments on a matter of public concern are only protected by the First Amendment when the balancing test between the employee's interest as a citizen in commenting on such matters and the state's interest as an employer in promoting the effectiveness of its public services performed through its employees weighs in favor of the employee. *See Mt. Healthy*, 429 U.S. at 284 (citing *Pickering*, 391 U.S. at 568). Here, the balancing test weighs heavily in favor of the state's interest. Thus, Dr. Girsh's speech was not constitutionally protected and the School Board's disciplinary actions did not violate his rights.

In performing the relevant balancing, important considerations include whether the employee's statements hinder the performance of the employee's duties or interfere with the regular and effective operation of the public employer's enterprise. *Rankin v. McPherson*, 438 U.S. 378, 388 (1987). This Court has recognized that avoiding these types of interference with effective functioning can be a compelling state interest. *Id.* It has also recognized that in situations where a public employee violates an announced workplace policy or makes the statements in question at the workplace, the employer's fears about endangerment of the functioning of its workplace are supported and thus the employer's position is strengthened. *Connick*, 461 U.S. at 153 (noting that if the employee in that case had violated announced office policy the employer's position would be strengthened).

Here, the record reflects that Dr. Girsh's discussion not only violated announced school policy but also took place in the workplace during school hours. His in-class statements were disruptive and interfered with his performance of his teaching duties and the effective functioning of the public school classroom. He disrupted the school

curriculum by taking time out from his duties to teach that curriculum in order to discuss ID—on more than one occasion. (R. at 6-8). Moreover, Dr. Girsh’s statements upset several students so tremendously that they got up and walked out of class, and one student, Maya Klinger, actually withdrew from school altogether. (R. 9). The combination of Dr. Girsh’s disruption of the curriculum and his causing students to leave an underway class period constitute the types of interference with effective school functioning that give rise to a compelling state interest for purposes of the relevant balancing test.

Furthermore, this Court has noted the balancing test requires that “some attention must be paid to the responsibilities of the employee within the agency,” because “the burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee’s role entails.” *Rankin*, 483 U.S. at 390. In situations where an employee “serves no . . . public contact role,” the danger posed to the successful functioning of the agency by that employee’s private speech is minimal. *Id.* at 391. The record here, however, shows that this is not the situation in this case. As a public school teacher, Dr. Girsh necessarily serves a very public role that involves extensive contact with schoolchildren—one of the most vital segments of the public. Because of this, the danger posed by his statements to the successful functioning of the public school is far from minimal. Rather, it is a significant danger and provides the state with a compelling and weighty interest in maintaining the effective functioning of its public schools.

Finally, this Court has recognized as an established principle that “when the state is the speaker, it may make content-based choices.” *Rosenberger v. Rectors and Visitors*

of the University of Virginia, 515 U.S. 819, 833 (1995) (citing *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)). This in turn goes hand-in-hand with the idea that “when [a public school] determines the content of the education it provides, it is the [school] speaking,” such that the government is permitted to “regulate the content of what is or *is not expressed* . . . [through the] private entities [it has enlisted] to convey its own message.” *Id.* These principles provide additional fortification for the School Board’s high interest as a state employer in promoting the efficiency of the public services it provides through its private employee teachers.

Because the balancing test under the second step of the relevant analysis weighs in favor of the state’s interest, Dr. Girsh’s statements were not constitutionally protected even if they touched on a matter of public concern. Therefore, the School Board’s disciplinary actions did not violate Dr. Girsh’s First Amendment rights.

C. Even if Dr. Girsh’s First Amendment Rights Were Violated, Any Such Violation is Justified by the School Board’s Concern That Permitting Discussion of Intelligent Design Would Violate the Establishment Clause.

Even assuming the School Board’s disciplinary measures did violate Dr. Girsh’s right to freedom of speech, any such violation is justified by the weight of the state’s interest in avoiding an Establishment Clause violation. This Court has recognized that a state interest in avoiding violation of the Establishment Clause is “‘compelling,’ and therefore may justify content-based discrimination” regarding its employees’ speech. *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001). In *Good News Club*, this Court rejected a public school’s claim that it had a valid Establishment Clause interest sufficient to justify its violation of a religious club’s First Amendment rights. *Id.* at 113. However, the court noted that its basis for this finding rested on the fact that the

activities at issue would not have taken place during school hours nor would have been sponsored by the school. *Id.* In support of this rationale, the *Good News Club* court cited two of its previous cases where a similar rejection of a school’s Establishment Clause interest rested upon these same grounds—that the disputed speech took place after school hours and without school, and thus government, sponsorship. *Id.* at 113, 115-16 (citing *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) and *Widmar v. Vincent*, 454 U.S. 263 (1981)).

These cases are distinguishable from the one at hand because the speech in question here was made not after school hours but during the school day in the course of classroom instruction by a public school teacher. It follows that Dr. Girsh’s speech carried the authority that stems from school sponsorship. These distinctions show that the School Board’s interest in avoiding an Establishment Clause violation constitute a compelling interest sufficient to justify any violation of Dr. Girsh’s First Amendment rights.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests this court to grant the Defendant’s Motion for Summary Judgment and to affirm the judgment of the District Court.

APPENDIX A

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.

APPENDIX B

BOARD OF EDUCATION OF THE ARKLATEX SCHOOL FOR MATHEMATICS AND SCIENCES SPECIAL SCHOOL DISTRICT POLICY §1701.2 – THE TEACHING OF CREATIONISM AND INTELLIGENT DESIGN THEORY

(a) Definitions:

- (1) “Creationism” is the belief in the literal interpretation of the account of the creation of the universe and all living things as found in the Book of Genesis.
- (2) “Intelligent Design” is the theory that nature and complex biological structures were designed by an intelligent being and were not created by change.

(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 Creationism or Intelligent Design are similarly prohibited.

CERTIFICATION

We hereby certify that this Petitioner’s brief is the work product solely of the undersigned, and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief.

Courtney Nelson

Amber Prince