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STATEMENT OF THE CASE

OPINIONS BELOW

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

CONSTITUTIONAL PROVISIONS INVOLVED

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

STANDARD OF REVIEW

In cases raising First Amendment issues the appropriate standard of review is *de novo*. *Rankin v. McPherson*, 483 U.S. 378, 386 (1987).

STATEMENT OF THE FACTS

Respondent Dr. Peter Girsh (“Dr. Girsh”) is a high school biology teacher at Arklatex School for Mathematics and Sciences (ASMS). (R.4). Dr. Girsh helped establish ASMS by testifying to the Arklatex legislature about the need for a high school that concentrated on math and science skills. (R.5). In addition to being one of the first faculty members at ASMS, Dr. Girsh has devoted much of his time to the school by serving on the selection board and steering committee for numerous school functions, and the curriculum committee for the past seven years. (R.5). Dr. Girsh has also served nine years as the faculty advisor for the Biology club and the Future Engineers of America Club. (R.5). Dr. Girsh’s AP Biology students have had a 100% pass score of “5” on the AP exam for the past 10 years. (R.5).

Dr. Girsh is a graduate of Yale University, he holds a Ph.D. in Biochemistry from Harvard University and he has become a prominent and sought-after speaker on the subject of

Intelligent Design. (R.4). Dr. Girsh views Intelligent Design as a purely scientific theory with no connection to any religious movement. (R.4.) Dr. Girsh has spoken on numerous television programs including CNN's *Hardball* and the *O'Riley Factor* on the Fox News Network, and has expressed strong disagreement with religiously affiliated organizations that seek to use the theory of Intelligent Design to prove religious beliefs. (R.4). While Dr. Girsh acknowledges the theory of Intelligent Design lends some support to the Christian creation story, he focuses on the scientific evidence of Intelligent Design and believes it can and should be taught without mentioning "God."(R.4).

Most recently Dr. Girsh contributed to and served on the editorial board of a textbook entitled *From Koalas to Humans* ("*Koalas*"), which demonstrates how evidence can be used to rebut the theory of evolution. (R.5). *Koalas* has been distributed in seven school districts in Canada, and it serves as an alternative to religiously affiliated Intelligent Design textbooks by using scientific evidence to explain the theory of Intelligent Design. (R.5).

The Arklatex State Department of Education mandates that ASMS adhere to the "exceptional schools" curriculum, which prohibits the teaching of "non-scientific" evidence. (R.5). Dr. Girsh has always followed the mandated curriculum and taught strictly from textbooks approved by the Department of Education, and prior to this incident has never spoken to any student about Intelligent Design. (R.5). Dr. Richard Rice, principal of ASMS, knew of Dr. Girsh's outside work and never objected to his speaking on the theory of Intelligent Design. (R.5). In fact, Dr. Rice expressed hope that one day Intelligent Design could be taught in public schools. (R.5).

On September 8, 2003 the ASMS School Board adopted a new policy identified as, § 1701.2 Teaching of Creationism and Intelligent Design Theory, prohibiting teachers from

instructing students on Creationism or Intelligent Design. (R.5). The apparent reason for the policy as stated by Anita Pascal, President of the School Board, 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.6).

In order to foster a rich learning environment, Dr. Girsh encouraged his students to frequently and to openly engage in candid discussions. (R.6). On January 26, 2004 Dr. Girsh planned to teach his AP Biology class about Punnett Squares and genetics. (R.6). However, Randall Johnson, a high school junior, raised his hand and said that he and several students “googled” Dr. Girsh and they found he had written a book on Intelligent Design. (R.6). The students questioned why Dr. Girsh failed to teach them this scientific theory, and Randall Johnson is quoted as saying “There is a whole science out there you haven’t been teaching us! Why have we been deprived?” (R.6).

With the desire to be straightforward and honest with his students about the Intelligent Design theory, but also cognizant and worried that doing so may violate the new School Board policy, Dr. Girsh dismissed the class early without answering any questions. (R.6). However, the next morning Dr. Girsh was immediately inundated with questions about Intelligent Design. (R.6). Dr. Girsh explained the School Board’s policy prohibiting him from teaching Intelligent Design and stated he felt the policy was a violation of the Establishment Clause and of his First Amendment right to free speech. (R.7).

Dr. Girsh proceeded to discuss the theory of Intelligent Design with his class, and explained the theory holds that evolution alone cannot explain the origin and complexity of life, and that empirical evidence shows intelligent beings designed the universe. (R.7). Additionally, Dr. Girsh discussed the three main ways in which scientists have detected intelligent design in

nature; through the complexity of certain biological systems, the ability of the universe to support human life, and the information content of DNA. (R.7). Students were captivated by the discussion. (R.8). Dr. Girsh never used the word “God” in the discussion, nor did he in any way indicate the nature of the intelligent designer. (R.8). Dr. Girsh showed the students his contribution to *Koalas*, as well as a few of his articles that had been published in *Origins* magazine. (R.8). Dr. Girsh showed the students a two-minute video clip of him talking with Bill O’Riley about the basics of Intelligent Design theory. (R.8). At the end of class, Dr. Girsh offered his students an informational pamphlet that gave a brief overview of the three categories of scientific evidence Dr. Girsh discussed in the lecture. (R.8). The articles, video, and pamphlet that Dr. Girsh shared with his class contained identical information to his previous class discussion. (R.8).

The following morning Dr. Rice confronted Dr. Girsh indicating he had received a phone call from Dorothy Klinger, a student’s mother, complaining that Dr. Girsh’s Intelligent Design lecture undermined their efforts to raise their children as Atheists. (R.8). Dr. Rice reminded Dr. Girsh of the new School Board policy and told Dr. Girsh not to mention Intelligent Design again in the classroom. (R.9). Dr. Rice also informed Dr. Girsh that he had received fifteen calls from parents of students who begged him to allow Dr. Girsh to continue teaching Intelligent Design. (R.9). The same morning, in class, Dr. Girsh answered questions dealing with Intelligent Design and how scientific evidence could be used to refute the theory of evolution. (R.9). It was at this time that May Klinger, daughter of Dorothy Klinger, and two other students left the classroom.(R.9).

On January 28, 2004 the *Arklatex Tribune* printed two open letters regarding Dr. Girsh. The first letter, written by Dorothy Klinger, urged the State of Arklatex to pull all funding from

ASMS. (R.9). In addition to withdrawing her daughter from ASMS, Ms. Klinger encouraged students not to apply to ASMS. (R.9). Maya Klinger indicates she withdrew from ASMS because she felt uncomfortable with the discussion of Intelligent Design in Dr. Girsh's classroom, and she felt the discussion separated her from her peers. (R.9). However, neither Maya nor her mother present specific incidents, comments or even state that her peers treated her any differently following the discussions. (R.9).

The second letter to *Arklatex Tribune* was from Ranada Johnson, Randall Johnson's mother. In this letter Ms. Johnson urged the State to implement the teaching of Intelligent Design in the classroom. (R.9). Ms. Johnson states that her son's interest in biology was renewed through the discussion of Intelligent Design, causing him to spend hours researching both evolution and Intelligent Design on the Internet. (R.9). Additionally, she states that Dr. Girsh's lecture motivated Randall to improve his grades in order to go to college to pursue a biology degree and conduct research that could help contribute to the understanding of the origins of life. (R.9).

Later that afternoon, before class, Dr. Rice handed Dr. Girsh his personnel file, in which Dr. Girsh is cited twice for insubordination once on January 26, 2004 and once on January 27, 2004. (R.9). Dr. Rice told Dr. Girsh he had been reprimanded twice for insubordination due to his "willful violation of School Board policy § 1701.2" and for "insubordinate disparagement of School Board policies." (R.10). Dr. Rice explained that another violation would result in a formal hearing before the School Board, which would determine the future of his employment with ASMS. (R.10). Dr. Rice proceeded to hand Dr. Girsh a letter from the School Board, signed by both the Superintendent and President of the Board, which states Dr. Girsh is free to privately

promote his ideas about Intelligent Design, but is “prohibited from, in any shape, form, or fashion, mentioning ASMS in conjunction with Intelligent Design.” (R.10).

The following morning an open letter from the School Board, signed by the Superintendent, was published in the Arklatex Tribune. The letter said Dr. Girsh had been reprimanded and prohibited from teaching Intelligent Design and “the teaching of Intelligent Design is unacceptable in the Arklatex Schools.” (R.10).

PROCEDURAL HISTORY

After summary judgment was granted for defendants, Dr. Girsh filed an appeal with the Fourteenth Circuit Court of Appeals. (R.15). Dr. Girsh argued unresolved questions of material fact exist, and therefore, the District Court should not have granted summary judgment. Subsequently, Dr. Girsh sought and received a writ of certiorari from the United States Supreme Court to consider the following: (R.20):

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

SUMMARY OF THE ARGUMENT

As a teacher at a public high school, Dr. Girsh is required to comply with the Establishment Clause in his teaching. The Court has developed three tests to determine whether government actions violate the Establishment Clause: the *Lemon* test, the endorsement test, and the coercion test. If a government regulation or action fails any of the three tests, the court may declare the action unconstitutional.

Dr. Girsh's teaching of Intelligent Design is based entirely on scientific principles and should not be considered a religious theory simply because its principles can be used to support religious creation theories. Dr. Girsh's purpose in teaching the concept is secular, and his lectures did not result in religious indoctrination or excessive government entanglement between the government and religion; therefore his lectures do not violate the Establishment Clause under the *Lemon* test. Additionally, the lectures neither coerced students to participate in or support religion nor conveyed a religious message which served to alienate any student.

Dr. Girsh may have a valid argument that School Board Policy § 1701.2 is unconstitutional because the Establishment Clause prohibits hostility towards religion. This issue should have been submitted to a jury for findings of fact. However, because Dr. Girsh's teaching of Intelligent Design is not religious in nature, the School Board should change School Board Policy § 1701.2 so it no longer applies to this theory.

Speech that touches upon matters of public concern is entitled to First Amendment protection. Dr. Girsh's discussion on Intelligent Design and criticism of School Board's policy is a matter of public concern; it was given in the appropriate "context, content and form." Intelligent Design is a topic that incites debate and is considered a newsworthy subject.

Once speech is deemed to touch on a matter of public concern, it is entitled to undergo the balancing test set out in *Pickering*. This test requires a court to weigh the interest of a public employee in speaking on an issue and the interest of the employer in promoting an effective and efficient work environment. Dr. Girsh's interest to teach Intelligent Design outweighs the School Board's interest in regulating the speech so as to ensure an orderly and efficient work environment. When considered as a whole, Dr. Girsh's speech was in the appropriate "manner, time and place," and was not a threat to the school environment. Dr. Girsh's conduct is protected under the *Pickering* test.

An employee must demonstrate that their conduct was the "motivating factor" in the adverse employment action. Evidence including Dr. Girsh's flawless employment record and his students consistently impressive test scores suggest the School Board's disciplinary actions were taken for reasons that violate the First Amendment. The School Board must now prove by a preponderance of the evidence that it would have reached the same decision in the absence of the protected activity.

In order to prevent viewpoint discrimination and ensure citizens fundamental right to free speech, it is necessary to limit public employers deference in regulating speech. The Supreme Court has held religion to be a viewpoint rather than a subject matter. School Board regulation § 1701.2 violates the First Amendment because it has singled out theories that lend support to religious beliefs.

ARGUMENT

I. THE APPELLATE COURT DID NOT ERR IN REVERSING THE DISTRICT COURT'S DETERMINATION THAT RESPONDENT'S LECTURES ON INTELLIGENT DESIGN VIOLATED THE ESTABLISHMENT CLAUSE AS A MATTER OF LAW AND THAT DISTRICT POLICY SECTION 1701.2 DID NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Dr. Girsh's lectures on Intelligent Design were not, as a matter of law, violative of the Establishment Clause of the First Amendment, and the United States Court of Appeals for the Fourteenth Circuit was correct in reversing the summary judgment for the defendants. Because Dr. Girsh teaches in a public school, he is a government actor and his actions in the classroom must not violate the Establishment Clause. The key concept of the Establishment Clause is that the government should not prefer one religion to another or religion to non-religion. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994). Therefore, the Establishment Clause prohibits the government from sponsoring or supporting religious activity, and the Supreme Court has consistently held that the Establishment Clause requires the government to maintain a position of neutrality toward religions. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Comm. for Pub. Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995).

As Chief Justice Burger wrote in *Lynch v. Donnelly*, "in every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible." *Lynch*, 465 U.S. 668, 672 (1984). The Court has, over the years, formulated three tests to determine whether government actions violate the Establishment Clause: the *Lemon* test, the endorsement test, and the coercion test. *Lemon*,

403 U.S. 602 (1971); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lee v. Weisman*, 505 U.S. 577 (1992). The Court has chosen to apply only one test in some cases or all three in others. David A. Toy, *The Pledge: The Constitutionality of an American Icon*, 34 J.L. & Educ. 25, 40 (2005). If a government action fails any of the three tests, the court may declare the action unconstitutional. *Id.* However, questions of fact exist regarding whether Dr. Girsh's lectures failed any of them. Based on the facts, the Court of Appeals was correct in its determination that Dr. Girsh's impromptu lectures on Intelligent Design were not, as a matter of law, equivalent to an endorsement of religious activity or an abandonment of neutrality, and the issue should have been submitted to a jury. The Court of Appeals was also correct in determining that Dr. Girsh may have a valid argument that District Policy § 1701.2 violates the Establishment Clause.

A. Respondent's Lecture on Intelligent Design Did Not Fail the *Lemon* Test Because the Lecture Had a Secular Purpose and Its Primary Effect Neither Advanced nor Inhibited Religion.

In *Lemon v. Kurtzman*, this Court held that two different state statutes granting state funding to teachers of secular subjects in parochial schools violated the Establishment Clause. *Lemon*, 403 U.S. at 606-7. In making its determination, the Court used a three-prong test commonly known now as the *Lemon* test. A statute or action does not violate the Establishment Clause if 1) it has a secular purpose; 2) its principal or primary effect neither advances nor inhibits religion; and 3) it does not foster excessive government entanglement with religion. *Id.* at 612-13. In 1997, this Court modified the *Lemon* test by keeping the "purpose" prong and combining the second two elements to form an "effects" prong. *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997). Pursuant to the modified test, the Court considers government entanglement as one of three factors to consider when determining the effect of a government

action. *Id.* at 232-33. Dr. Girsh’s lectures do not violate the Establishment Clause under the *Lemon* test because their purpose was to impart scientific knowledge and the effect of presenting this scientific knowledge neither advanced nor inhibited religion.

1. Respondent’s Lecture Had a Secular Purpose, Which Was to Expose Students to Another Scientific Theory Besides Evolution.

A secular purpose is simply one that is non-religious. However, the requirement that a government action have a secular purpose does not mean that the action can in no way correspond with the tenets of a religion or religions. *Harris v. McRae*, 448 U.S. 297, 319 (1980). A government action may even confer a benefit on religion as long as the primary purpose of the action is secular and the benefit to religion incidental. *Widmar v. Vincent*, 454 U.S. 263, 274-5 (1981); *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 248 (1990). Government actions that do not violate the Establishment Clause despite their incidental benefit to religion include a school voucher program intended to provide educational assistance to poor children in demonstrably failing public school system, which incidentally benefited religion because a majority of the participating students used the vouchers to enroll in religiously affiliated schools and a public university policy allowing access to and use of its facilities to a wide array of student groups, which incidentally benefited religion because the facilities were available to groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653-5 (2002); *Rosenberger*, 515 at 842.

The Court has stated that where both lower courts do not find an “arguably valid secular purpose” it also should hesitate to find one. *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 125 S.Ct. 2722, 2726 (2005). However, in the immediate case, the appellate court did find a plausible argument for secular purpose in Dr. Girsh’s lectures. The purpose of Dr.

Girsh's lectures was to expose his students to a scientific theory, not a religious doctrine. All parties have stipulated that Dr. Girsh presented the theory in terms of empirical evidence and that he never mentioned God or religion. One of the main reasons for Dr. Girsh's prominence in the field of Intelligent Design is his view that Intelligent Design is purely scientific and has no connection to any religious movement. Although some Christians purport that Intelligent Design proves the Christian God's role in the creation of the universe, the fact that Intelligent Design can be construed to correspond with the creation story in Genesis does not strip Dr. Girsh's lectures of a secular purpose. Dr. Girsh's primary purpose was to teach his students about another theory for the origin of the universe, which is based on scientific evidence. Any benefit to religion derived from his lectures was merely incidental.

2. The Primary Effect of Respondent's Lecture Neither Advanced Nor Inhibited Religion Because It Was Presented in Scientific Terms Only and It Did Not Excessively Entangle the Government With Religion.

After determining what the government intended to communicate, the reviewing court must examine what message was actually conveyed by the action. *Kitzmiller v. Dover Area School District*, 400 F.Supp.2d 707, 714 (M.D. Penn. 2005). When the *Agostini* court modified the Lemon test, it considered the following in determining whether the effect of a government action advanced religion: 1) government indoctrination, 2) defining the recipients of government benefits based on religion, and 3) excessive entanglement between government and religion. *Agostini*, 521 U.S. at 234. These are not criteria that must be met but merely factors to be considered. Because speech is not state monetary aid, it is not necessary to determine whether the recipients were chosen based on religion in the immediate case.

Government indoctrination of religion would result from an action performed by the government infusing religious beliefs into a person or persons. If Dr. Girsh were teaching

Creationism, that would result in government indoctrination of religion because that theory is based solely on the Creation story as found in the Book of Genesis. *McLean v. Ark. Board of Ed.*, 529 F.Supp. 1255, 1264-5 (1982). The *Kitzmiller* court held that the effect of requiring teachers to tell students Intelligent Design was an alternative was to endorse a theory with an “evident” religious nature because “it involves a supernatural designer.” *Kitzmiller*, 400 F.Supp.2d at 720. The court went on say that although some Intelligent Design proponents have suggested possibilities for the being or being’s identification other than the Christian God, “no serious alternative to God as the designer has been proposed.” *Kitzmiller v. Dover Area School District*, 400 F.Supp.2d 707, 718-9 (M.D. Penn. 2005). Witnesses in the *Kitzmiller* trial for the defendant school district admitted that their personal views were that the supernatural designer is God. *Id.* at 718. The opinion traces the history of religion-based Intelligent Design, yet it neglects to address the development of science-based Intelligent Design, Dr. Girsh’s field, and makes “supernatural” synonymous with “religious.” Because the trial court granted summary judgment for the defendants, Dr. Girsh did not have the opportunity to present any suggestions he may have on the identity of the Intelligent or supernatural being to a jury.

The lectures given by Dr. Girsh did not indoctrinate the students with religion but educated them about science. He did not replace a lecture on evolution with the lectures on Intelligent Design; rather, he taught evolution as he had every other year of his tenure at ASMS. Additionally, he told the students that Intelligent Design holds that evolution *alone* cannot explain the origins of life (*emphasis supplied*). Although Dr. Girsh stated that scientific evidence relating to Intelligent Design could “refute” evolution, he never stated that Intelligent Design disproved evolution or that he did not believe in evolution. During television and radio interviews, he has openly disagreed with organizations that seek to use Intelligent Design to

promote their religious beliefs. The textbook Dr. Girsh contributed to, *From Koalas to Humans*, is designed to be an alternative to religiously affiliated Intelligent Design textbooks, and thus this book can be distinguished from the book at issue in *Kitzmiller*, which was published by a Christian organization and authored by acknowledged creationists. *Id.* at 721. He presented a video clip to the class that showed him in an interview saying he does not advocate Intelligent Design as a religious theory. Most Christians would not consider a lecture on Intelligent Design by a scientist with a decidedly scientific perspective that rejects any religious elements of the theory one that supports their beliefs and thus indoctrinates others with the belief that the Christian God created the universe.

The second applicable factor to consider in determining the effect of Dr. Girsh's lectures is whether or not it fostered an excessive government entanglement with religion. Entanglement between church and state must be excessive before it "runs afoul of the Establishment Clause." *Agostini*, 521 at 233. "Political divisiveness" or requiring cooperation between governmental and religious entities is not enough. *Id.* A government action requiring "comprehensive, discriminating and continuing surveillance" would qualify as excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 620.

As applied to school curriculums, few courts have considered excessive government entanglement. The *McLean* court found that a curriculum including creationism made excessive government entanglement with religion inevitable because of the "pervasive nature of religious concepts in creation science texts." *McLean*, 529 F.Supp. at 1272. The court stated that the state would be continually required to review textbooks and monitor classrooms to ensure that creationism was being taught in a secular manner. *Id.* *McLean* can be distinguished from the immediate case because Dr. Girsh's teaching of Intelligent Design is not supportive of religious

concepts, and he has no desire to teach Intelligent Design in a sectarian manner. Presumably the textbook Dr. Girsh would refer students to would be *From Koalas to Humans*, which presents Intelligent Design from a scientific viewpoint only. There would be no need for the government to monitor Dr. Girsh's class to ensure that he was not using Intelligent Design to advocate religion.

B. Respondent's Lecture Did Not Fail the Coercion Test Because It Was Not Religious in Nature and Students Were Not Coerced to Listen or Participate.

The coercion test for Establishment Clause violations originated in Justice Anthony Kennedy's dissenting opinion of *County of Allegheny v. ACLU*, and the test was used in the majority opinion of *Lee v. Weisman*. In its majority opinion, the Lee court stated, "it is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Lee*, 505 at 587, quoting *Lynch*, 465 at 678. Under the coercion test, the government action is violative of the Establishment Clause if it coerces people to support or participate in religion against their will. (cite). In *Lee*, the Court held that offering a non-sectarian prayer at a public school graduation ceremony violated the Establishment Clause because students felt "public pressure, as well as peer pressure" to stand and be silent with their classmates during the prayer, seeming to show support for the religious exercise. *Id.* at 593. The Court also stated that adolescents are often susceptible to peer pressure, especially in matters of social convention, and that pressure of this type is equivalent to overt coercion to participate in a religious exercise. *Id.*

Because Dr. Girsh's lectures were not of a religious nature, his students, though compelled to attend class as public high school students, were not compelled to support or participate in religion. Even so, those students who chose not to listen to the lecture obviously

did not feel coerced to stay, and they were not penalized in any way for walking out of class. Dr. Girsh had not planned to include Intelligent Design in his curriculum, only lectured on it after receiving student requests, and made no mention of testing the class on this material. This implies a student did not have to participate in the discussion by listening or taking notes. Conversely, Dr. Girsh encourages candid scientific discussions in his class. It is unlikely he would require any student who wished to share his or her viewpoint on the issue to “maintain respectful silence” as one would do during a graduation prayer. *Id.* The Court said that adolescents are susceptible to peer pressure in *Lee*, yet it also said “there is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination.” *Tilton v. Richardson*, 403 U.S. 672, 686 (1971). High school juniors at Arklatex School for Mathematics and Sciences are arguably at least as mature as average college freshmen. These are “exceptionally talented students” who were required to apply and interview for acceptance into the school, and they are required to reside on campus like college students. Even if they were exposed to a lecture that was of a religious nature, it is doubtful that these advanced ASMS students would feel that they were being coerced to support or participate in religion against their will. However, Dr. Girsh’s lecture was not religious and thus could not coerce students as such.

C. Respondent’s Lecture Did Not Fail the Endorsement Test Because It Did Not Convey a Religious Message and Thus Could Not Make Students Who Did Not Adhere to It Feel Excluded.

The endorsement test has often been invoked in cases where the government has engaged in expressive activities, such as religious symbols on government property, prayer at public school events, and religion in the curriculum. *Allegheny*, 492 U.S. 573; *Doe v. Santa Fe Independent School Dist.*, 168 F.3d 806 (5th Cir. 1999); *Kitzmiller*, 400 F.Supp.2d 707 (M.D. Penn. 2005). It originated in Justice O’Connor’s concurring opinion in *Lynch v. Donnelly*, in which she stated that a government endorses religion if it conveys a religious message that makes those who do not accept it feel like “outsiders, not full members of the political community,” while those who do accept are feel like “insiders, favored members of the political community.” 456 U.S. 668, 688 (1984). A reviewing court applying the endorsement test assumes the viewpoint of a reasonable observer and identifies “situations in which government makes adherence to a religion relevant ... to a person's standing in the political community.” *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 33 (2004) (O’CONNOR, J., concurring in judgment).

The *Kitzmiller* court stated that the endorsement test has become “primarily a lens through which to view ‘effect’” and devoted much of its “endorsement test” analysis to the effect of the policy in question. *Kitzmiller*, 400 F.Supp.2d at 714-46. Applying the traditional endorsement test to the facts, Dr. Girsh’s lecture should not have made a reasonable observer feel that any students were being singled out or made to feel like outsiders if they did not accept Intelligent Design. First and foremost, Dr. Girsh’s theory did not have a religious purpose nor did it have the effect of advancing religion. Even so, Dr. Girsh did not ask any students whether or not they accepted the theory, nor is there any evidence that he favored students who seemed interested in the theory or even tested students on the theory, thus requiring them to learn it.

Maya Klinger and two other students left the classroom, and they faced no consequences for doing so. The *Kitzmiller* court states that “the stark choice that exists between submitting to state-sponsored religious instruction and leaving the public school classroom presents a clear message to students ‘who are nonadherents that they are outsiders, not full members of the political community.’” *Id.* at 728. However, this case can be distinguished from *Kitzmiller* because Dr. Girsh’s students were not submitting to “religious instruction.” Maya Klinger’s contention that the discussion led to estrangement from her peers is not supported by specific incidents or comments. While her feelings of estrangement are valid, they should not have been caused by Dr. Girsh’s lecture, which was not conveying a religious message but a scientific theory.

D. Respondent May Have a Valid Argument that District Policy Section 1701.2 Violates the Establishment Clause.

Because it found that teaching Intelligent Design in public schools violates the Establishment Clause, the District Court dismissed Dr. Girsh’s claim that District Policy § 1701.2 violates the Establishment Clause because it singles out for disapproval those theories that lend support to religious beliefs. The Establishment Clause not only prohibits government action that advances religion, but it also prohibits hostility to religion. *Lynch*, 465 U.S. at 673. A jury may construe a policy prohibiting the teaching of creationism or Intelligent Design as being hostile to religion, thus a question of fact exists. However, even if the policy is struck down as unconstitutional, a religious-based theory taught in public schools will not pass any of the tests that determine whether a government action violates the Establishment Clause. If the Court finds that Intelligent Design as taught by Dr. Girsh does not violate the Establishment Clause, the School Board should change its policy to be congruent with the law.

II. DISCIPLINARY ACTION TAKEN BY THE SCHOOL BOARD VIOLATED RESPONDENT’S FIRST AMENDMENT RIGHTS TO FREE SPEECH.

Freedom of speech, which is guaranteed by the Constitution, embraces the right to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. *Thornhill v. State of Alabama*, 310 U.S. 88,102 (1940). Additionally, a state cannot require a public employee, including public school teachers, to relinquish First Amendment rights they would otherwise enjoy as citizens. *Pickering v. Board of Education*, 391 U.S. 563,568 (1968).

In *Pickering*, the Court developed a balancing test in which to evaluate a public employee’s First Amendment retaliation claim. First, the court considers whether (1) the speech in question addresses a “matter of public concern” (2) if so, the court must then balance both the employee’s interest in expression and government employer’s interest in “regulating speech of its employees in order to maintain an efficient and effective workplace,” (3) if the speech is protected, the employee must show that this speech was a “substantial or motivating factor” for the adverse employment action, and (4) if the employee makes that showing, the burden shifts to the employer to show that by a preponderance of evidence it would have reached the same decision in the absence of the protected speech. *Id.*; *Lytle v. City of Haysville*, 138 F.3d 857 (10th Cir.1998). The first two steps of the above test are questions of law to be resolved by the court; in contrast the third and fourth steps of the test involve questions of fact to be resolved by the jury. *Gardetto v. Mason* 100 F.3d 803 (10th Cir. 1996).

Dr. Girsh’s speech is protected under the First Amendment of the Constitution. Dr. Girsh’s discussion on Intelligent Design and his criticism of the School Board’s policy are a “matter of public concern,” and his interest in expression far outweighs the School Board’s interest in regulating speech so as to avoid criticism of policies.

A. Respondent's Speech Regarding Intelligent Design and Criticism of the School Board's Policy is a Matter of Public Concern.

The threshold question in analyzing a government employee's First Amendment retaliation claim is to determine whether the employee has spoken "as a citizen upon matters of public concern" or merely "as an employee upon matters only of personal interest." *Connick v. Myers*, 461 US 138,147 (1983). While the court in *Pickering* did create a balancing test to analyze a public employees speech, it will not allow for all statements made by a public employees to undergo such balancing. To do so could compromise the proper functioning of government offices. This concern prompted the Court in *Connick* to explain the need for speech to touch on a matter of public concern. *Id.* at 143. In *Connick*, an assistant district attorney's interoffice questionnaire was held not touch on a matter of public concern but rather on internal workplace grievances, and therefore *Pickering* balance was not required. *Id.* at 141 and 143.

In general, to determine if a government employee's speech is of "public concern" it is important to reference the broad guarantee of freedom of speech the First Amendment provides. The Framers found it necessary to provide the public with information, through free discussion, that encompasses all issues necessary to "enable the members of society to cope with the exigencies of their period." *Thornhill*, 310 U.S. at 102. *Pickering* recognized the difficulty of articulating "a general standard against which all...statements may be judged" and while the boundaries of the public concern test in *Pickering* are not well defined, *Connick* provides some guidance. *Pickering*, 391 U.S. at 569.

In order to determine whether an employee's speech addresses a matter of public concern, *Connick* directs the court to examine the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 146-47. For purposes of public employee's retaliatory discharge claim, matters of public concern are those which can "be fairly considered

as relating to any matter of political, social, or other concern to the community.” *Id.* In addition *Connick* notes that the standard for determining whether expression is of public concern is the same standard used to determine whether a common-law action for invasion of privacy is present. *Id.* at 143. That standard makes clear that public concern is something that is “a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.” *Time Inc. v. Hill*, 385 U.S. 374,387-88 (1967).

As one analyzes Dr. Girsh’s statements under the guidelines provided by *Connick*, it is clear that the discussion Dr. Girsh held with his class on the topic of Intelligent Design touches upon a “matter of public concern.” First, the content of Dr. Girsh’s speech was composed purely of scientific evidence. Dr. Girsh discussed the theory of Intelligent Design and how scientists use this evidence to rebut the theory of evolution. Dr. Girsh never mentioned “God” and never alluded to the impact Intelligent Design has on religious beliefs. Second, Dr. Girsh’s speech was given in the form of a discussion. As a teacher, Dr. Girsh’s objective is to create and foster a learning environment, which promotes the free flow of ideas. Third, Dr. Girsh’s speech took place during science class in a classroom composed of AP biology students. Additionally, the students in the classroom initiated the discussion of Intelligent Design, and Dr. Girsh, as a science teacher, responded to their questions.

In *Pickering*, a “matter of legitimate public concern is one upon which free and open debate is vital to informed decision making by the electorate.” 391 U.S. at 571-72. It is clear that the topic of Intelligent Design is the “subject of legitimate news interest,” passing the standard set by *Time Inc.*, and a matter for debate. The presence of a debate on the topic of Intelligent Design is verified by phone calls Dr. Rice received from parents, the majority of which approved of Dr. Girsh’s discussion on Intelligent Design. Additionally, the *Arklatex Tribune* published

three letters two of which came from parents of students in Dr. Girsh's class. One parent discussed her disapproval with the discussion and encouraged students not to attend ASMS, while the other parent applauded the discussion, and said it renewed her son's interest in science. Speech that addresses the use of public funds was found to touch upon the matter of public concern. *Kincade v. City of Blue Springs*, 64 F.3d 389,396 (8th Cir. 1995). The dismissal of a high school teacher for criticizing a board of education's allocation of school funds was found to violate the First Amendment. *Pickering*, 391 U.S. at 571-72. ASMS is a public school that receives funding from the Arklatex Department of Education. Dr. Girsh's "speech" indirectly touches on the matter of school funding. The school's primary focus is on the subjects of math and science. The discussion of Intelligent Design as a scientific theory as well as criticism of the School Board's policy are matters that once decided upon will determine allocation of school funds. Additionally, in her open letter to *Arklatex Tribune*, Dorothy Klinger urged the State to pull its funding to ASMS. While Dr. Girsh's speech was on the topic of Intelligent Design, it is clear that any decision regarding the this speech will touch upon the matter of public funds.

The controversial character of the public employee's statement is irrelevant to the question of whether it deals with a matter of public concern. *Rankin v. McPherson*, 483 U.S. 378, 387 (1987). Courts focus on the motive of the speaker when attempting to classify a particular speech. *Connick*, 461 U.S. at 146. Courts attempt to determine "whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Id.* Clearly, Dr. Girsh spoke out on the same motivation that would move the public to speak out. Dr. Girsh discussed Intelligent Design with his science class because they were enthused and desired to know more about the scientific theory. Additionally, Dr. Girsh did not criticize the

School Board's policy to address a personal grievance, but instead did so to address questions as to why he had deprived the class of such important information.

Even where a public employee's speech does not touch upon a matter of public concern, that speech is not "totally beyond the protection of the First Amendment." *Connick*, 461 U.S. at 147. The question of whether the speech touches on a "matter of public concern" is a question of law, and if Dr. Girsh's non-disruptive speech were found not to touch on a matter of public concern it would not preclude protection under the First Amendment.

Dr. Girsh's speech is a "matter of public concern." The discussion on Intelligent Design was given in the appropriate content, context and form. Furthermore, the speech addressed a topic that incites debate and it is the "subject of legitimate news interest." Dr. Girsh's speech is entitled to First Amendment protection.

B. Under the *Pickering* Balancing Test, Dr. Girsh's Interest to Teach Intelligent Design Outweighs ASMS's Interest in Promoting Efficiency of its Services and is Entitled to First Amendment Protection.

Once a court determines that the plaintiff's speech involves a matter of public concern, the *Pickering* balancing test requires a court to weigh "the interest of a public employee in commenting on such matters against the interest of the employer in promoting the efficiency of its services." *Ware v. Unified School Dist.* 881 F.2d 906,910 (10th Cir. 1989). In performing this balancing the court should not consider the statement in a vacuum, but rather consider the "manner, time, and place of the employee's expression," as well as the context in which the statement arose. *Connick*, 461 U.S. at 152-3

Under the *Pickering* balancing test, the employee's First Amendment free speech rights are protected, "unless the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *Columbus*

Education Ass'n v. Columbus City School District, 623 F.2d 1155,1159 (6th Cir. 1980). Relevant considerations include “whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.” *Rankin*, 483 U.S. at 388. The government’s concern about the impact of speech must be reasonable and formed in good faith; it cannot be based on pure speculation that the speech will cause disruption and therefore justify the regulation of employee speech. *Waters v. Churchill*, 511 U.S. 661,676 (1994). In *Connick*, a questionnaire was prepared and distributed at the office, and in order for it to be completed it required that employee’s set aside their work. The speech was exercised at the office supporting the employer’s fears that the functioning of his office was endangered. *Id.* at 153.

The goal of the *Pickering-Connick* rationale is to seek a “balance” between the interest of public employees in speaking freely and that of public employers in operating their workplaces without disruption. *Connick*, 461 U.S. at 142. The employer’s burden to justify its restriction on speech increases in proportion to the value of that speech in public discourse. *Id.* at 152.

It is recognized that public employees are often members of the community who are likely to have informed opinions as to the operations of their public employers, which are of substantial concern to the public. *Id.* at 572. If employees were not able to speak on these matters, the community would be deprived of informed opinions on important public issues. *Id.* The interest at stake is, as much the public’s interest in receiving informed opinions, as it is the employee’s own right to disseminate it. *Id.*

Dr. Girsh’s discussion of Intelligent Design is protected under the *Pickering* test. Dr. Girsh’s interest in discussing the theory of Intelligent Design far outweighs the interest of the

government in “promoting the efficiency of its services.” The Supreme Court has addressed the issue of academic freedom of speech stating “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.” *Keyishian v. Board of Regents*, 385 U.S. 589,603 (1967).

Dr. Girsh asserts it is helpful for him to explain the theories of both evolution and Intelligent Design together so that students can better understand the competing scientific theories. His discussion on Intelligent Design took place during science class and was initiated by student questions. Unlike *Connick*, Dr. Girsh’s exercise of free speech occurred in the proper time, place, manner and context. During this discussion, three students walked out of the class. Other than this incident, the school district has no basis for which to illustrate that without a restriction barring Intelligent Design there would be disruption to the function of school services.

If an employee’s activities are protected under the *Pickering* test, he must then demonstrate that this conduct was a “motivating factor” in the adverse employment action. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). Dr. Girsh has maintained an impressive employment file while at ASMS. In fact, while Dr. Girsh’s employment file states he had been disciplined on two occasions for insubordination, the only incidents listed are the incidents pertaining to this suit. Dr. Girsh has devoted much of his time to serving on committees for the school, and he has an excellent teaching record, which is evidenced by the high scores his students made on the AP science exam for the past ten years. These facts suggest the disciplinary actions taken against Dr. Girsh were taken for reasons that violate the First Amendment.

ASMS now “bears the burden of showing by a preponderance of the evidence that it would have reached the same decision...in the absence of the protected activity.” *Id.* at 287. This

will be difficult due to an open letter from the School Board that was published in the *Arklatex Tribune*. In this letter, the School Board states Dr. Girsh had been reprimanded and prohibited from teaching Intelligent Design, indicating his protected activity was the sole reason for the disciplinary action.

C. School Board Policy Section 1701.2 Violates the Viewpoint Neutrality Requirement of the First Amendment.

The First Amendment was fashioned to assure “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. US*, 354 U.S. 476, 484 (1957). It is necessary to ensure that public employers do not use authority over employees to silence speech simply because superiors disagree with the content of the employee’s speech. In order for the State to justify a regulation of a particular opinion, it must show that this action was caused by something more than a desire to “avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503,509 (1969). Certainly, where there is no finding that engaging in the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained.” *Id.* Allowing the employer extreme deference in its judgment is not appropriate, and the Court has a responsibility to ensure that citizens are not deprived of fundamental rights, such as freedom of speech, by virtue of working for the government. *Connick*, 461 U.S. at 168. The presentation and solicitation of ideas and opinions are entitled to greater constitutional protection because “under the First Amendment there is no such thing as a false idea.” *Id.* at 152.

Dr. Girsh’s speech involving Intelligent Design was a discussion of a theory and a facilitation of questions and answers. It is this exchange of ideas that requires greater constitutional protection. The Supreme Court has held religion to be a viewpoint rather than a

separate subject matter that can be excluded. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). Thus, the First Amendment's requirement that limitations on such speech be viewpoint neutral applies. *Id.* By carefully defining Intelligent Design, the School Board's policy purports to be viewpoint neutral. It only bans the teaching of a scientific theory, and not a religion. However, the school board has singled out theories that lend support to religious beliefs, and this constitutes viewpoint discrimination. Thus, the School Board policy § 1701.2 violates the First Amendment.

CONCLUSION

For these reasons, the Court should affirm the appellate court's decision to reverse summary judgment for the defendants.

Respectfully submitted,

Team G
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APPENDIX

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.