No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PETER HELLAND,
Plaintiff-Petitioner

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION,
Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Prohibiting Public School Teachers from Carrying Their Bible to School, and Prohibiting Teachers from Silently Reading the Bible During Silent Reading Periods, Violates the Teachers' Free Exercise of Religion and the Religious Freedom Restoration Act, or Is Required by the Establishment Clause?

II. Whether Firing Public School Teachers in Whole or in Part for Carrying Their Bible to School, or for Silently Reading the Bible During Silent Reading Periods, or Prohibiting Either Religious Practice, Is Religious Discrimination in Employment or Is a Legitimate Nondiscriminatory Reason, When Teachers Are Allowed To Carry Other Books and To Read Other Books in the Classroom?

III. Whether Prohibiting a Public School Teacher from Briefly Responding to Specific, Voluntary, Student-Initiated Questions on Subjects Touching on Religious Matters Raised During the Presentation of School-Approved Curriculum Violates the Teacher's Academic Freedom.

IV. Whether Firing a Public School Teacher in Whole or in Part for Briefly Responding to Specific, Voluntary, Student-Initiated Questions on Subjects Touching on Religious Matters Raised During the Presentation of School-Approved Curriculum, or Prohibiting That Practice, Is Religious Discrimination in Employment, When Teachers Are Allowed to Respond to Specific, Voluntary, Student-Initiated Questions on Subjects Touching on Non-Religious Matters During Such Presentations?

LIST OF PARTIES

The parties to the proceedings below were the plaintiff-petitioner Peter Helland and the defendant-respondents South Bend Community School Corporation.

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INTRODUCTION

This case raises significant issues of the extent to which public school teachers may be deprived of their religious freedom and academic freedom rights in the classrooms, and to which religious must be treated as a dangerous toxic contaminant in our nation's primary and secondary public schools.

The courts of the Northern District of Indiana and the Seventh Circuit have held that public schools may prohibit, under penalty of termination, teachers from carrying their Bibles to school, or silently reading their Bibles at their desks during silent reading periods, or honestly answering specific, voluntary, student-initiated questions touching on religious matters as they teach school-approved curriculum. In doing so, the lower courts' decisions conflict with this Court's religious freedom decisions in, among others, *Abington v. Schempp*, with the Religious Freedom Restoration Act, with this Court's academic freedom decisions in, among others, *Pickering v. Board of Education* and *Tinker v. Des Moines School District*, and with this Court's employment discrimination decisions in, among others, *McDonnell Douglas Corp v. Green*.

OPINION BELOW

The opinion (Appendix A) is reported at 93 F.3d 327 (7th Cir 1996).

JURISDICTION

Federal jurisdiction exists under 28 U.S.C. §1331. The Seventh Circuit entered its opinion August 15, 1996. This Court's jurisdiction is under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the First and Fourteenth Amendments, the Religious Freedom Restoration Act (42 U.S.C. §2000bb), and Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§1983, 2000e). These statutes are quoted in Appendix B.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS.

Peter Helland, a long-time substitute teacher for the South Bend Community School Corporation ("Corporation"), filed this suit for religious freedom and against religious discrimination in employment in the Northern District of Indiana on October 28, 1994. The Corporation is the sole defendant. The trial court dismissed Mr. Helland's religious freedom and religious discrimination in employment claims on motion for summary judgment by written order dated December 7, 1995. The Seventh Circuit affirmed this decision on both claims by published opinion decided August 15, 1996.

B. STATEMENT OF THE FACTS.

1. The Corporation's Termination of Mr. Helland.

The Corporation fired Mr. Helland, a substitute teacher, because he carried his Bible into the classroom, because he silently read it during classroom silent reading periods, and because he honestly though briefly responded to specific, voluntary, student-initiated questions touching on religion when he taught curriculum approved by the school (Ex. V "termination letter" (Appendix C)). While the school has haphazardly and largely post-hoc attempted to develop a paper trail justifying its actions on other grounds (purported "consistent" poor performance as a substitute teacher, persistent proselytizing, reading

of religious books to students and distribution of religious materials to students (Exs. R, V)), the facts are otherwise.

The Corporation stated its reasons for firing Mr. Helland, in its termination letter (Nov. 10, 1993) and in the contemporaneous October memorandum (Oct. 29, 1993) (Appendix C):

> "you had brought a bible into the classroom"
> "your discussion of religion and evolutionary theories"
>
> "Mr. Helland had brought a bible into the classroom"
> "Mr. Helland allowed himself to get into a discussion of religion and evolutionary theories"

These reasons and other pretextual reasons are discussed in Section 3.

2. The Seventh Circuit Gloss on the Reasons for Termination.

The Seventh Circuit opinion does not accurately recite the facts of the case. Even its scathing list of bad acts is a post-firing list of things that are not true generally, were never deemed important enough to fire Mr. Helland or even to mention to Mr. Helland before his firing, and that he was never given an opportunity to explain or correct until after he filed a complaint with the EEOC and was fired (Aff. ¶¶ 8, 26, Exs. W, Y, EE, FF).

The court portrayed Mr. Helland as incompetent even though he enjoyed the benefit of a lengthy list of positive teacher evaluations covering the times he had substituted over the course of nine years in most of the Corporation's 35 different elementary, middle and high schools. The opinion states that "several principals and teachers for whom he had substituted submitted negative evaluations of Helland's performance." Mr.

Helland taught a total of 720 times (Ex. LL). The Corporation requires the regular teacher of the class to complete a short, written critique on the performance of the substitute, which is to be reviewed by the principal (Exs. DD, 7).[1] The record contains examples of some of the overwhelming majority of positive critiques Mr. Helland enjoyed (Ex. II). The Corporation produced only seven critiques with negative comments, and a scarce handful of three other documents criticizing Mr. Helland's performance as a substitute teacher (Exs. B, D-O). The Corporation refused to produce the 713 positive evaluations. The negative evaluations were a scant 1% of the total number of evaluations (seven out of 720), and the Corporation had never notified Mr. Helland of the results of any of these evaluations until after Mr. Helland filed his EEOC complaint. Mr. Helland never had the opportunity to respond to what may have been misunderstandings or unjust criticisms (Aff. ¶¶ 8, 26). The opinion further claimed that those "several principals and teachers . . . requested that he not return to their schools or classrooms." In fact, of the few such requests, one teacher specifically stated that Mr. Helland "can be sent for others" (Ex. D) and a second now supports Mr. Helland (Exs. G, 9).

The Seventh Circuit opinion alleged that "[t]he evaluations indicated that Helland failed to follow lesson plans left for him by the teachers for whom he substituted." That criticism occurred in only 5 of the 720 evluations (Exs. H, I, K, M, N), and in only one did the teacher explain this statement with any specificity (Ex. I). In this instance, the teacher of a class of honor students stated "Sub did little to no explanation of the lessons provided." Mr. Helland did, in fact, attempt to explain the material, but the students insisted that they did not want him to do this (Aff. ¶ 17). Because the honor students were capable

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[1] The Corporation also requires the substitute to prepare a written report for each day (Ex. DD). Mr. Helland prepared these reports as required. (Aff. ¶ 6.)

of completing the assignments without a comprehensive explanation, Mr. Helland gave them the assignments and invited them to bring any specific questions they had to his desk. In another instance several students of one of these teachers disputed her conclusion (Ex. S). There, a German teacher, one of the teachers who had requested that Mr. Helland no longer substitute for her (Ex. H) later reported to her principal that "many students complained when I had him as a substitute" (Ex. S). However, several students in the class said that Mr. Helland gave out the assignments left by the teacher and treated them much like any other substitute would have (Ex. S).

The Seventh Circuit opinion also claimed that "he failed to maintain control of his classes." That criticism occurred in only 5 of the 720 evaluations (Exs. D, E, H, J, N). Three others lately relied on by the Corporation, as well as the several examples of the 713 positive evaluations, rate his performance here as at least satisfactory (Exs. F, I, M, II). The Corporation's own substitute teachers' handbook extensively recognizes the difficult position substitute teachers often face in the area of classroom discipline and management (Ex. DD).[2] At one point the handbook instructs the substitute that "[i]f nothing has blown up in the room that day, including you, thank the teacher for a nice day and a super bunch of youngsters" (Ex. DD p 15).

The Seventh Circuit also portrayed Mr. Helland as irresponsible, though as with the negative evaluations, none of the school's allegations in this area was brought to his attention before he filed his EEOC ac-

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[2]Guidance on how to handle classroom discipline and uncooperative or unruly students occurs throughout the last half of the handbook (Ex. DD pp 10-16). It includes seven rules of discipline (Ex. DD pp 10-11), a list titled "CLASSROOM DISCIPLINE: A Dozen Guides for Survival" (Ex. DD pp 12-13) and various miscellaneous rules on classroom and hallway behavior.

tion and then was fired (Aff. ¶¶ 8, 26). The Court referred to a single occasion when "[o]ne teacher complained that Helland drank a non-alcoholic beer in class, and that the students believed it was alcoholic." Mr. Helland suffers from hypoglycemia and cannot drink most regular soft drinks. He had prepared his lunch that morning not knowing he would be required to eat lunch with his students (Aff. ¶ 18). It was not until he arrived at school that day that he learned he was assigned to a special education class and would be required to stay with them during lunch (Aff. ¶ 18). The opinion also said that "[t]wo teachers commented on Helland's lack of understanding of high school students." The only example given was "an incident where Helland gave his car keys to a student who had been suspended from school grounds," which, as usual, was never mentioned to Mr. Helland until he was fired (Aff. ¶¶ 8, 26). An accurate understanding of this event would show that Mr. Helland opens his home as a house for troubled boys to live in (Ex. 17), because of his deep care for youths, and one of those youths was waiting on him for a ride home after school that day. Mr. Helland gave him the car keys to allow him to unlock the car to sit in it listening to the radio, until Mr. Helland could take him home. He was not aware at that time that the boy had been suspended that day. One of the teachers who made that report now disagrees with his earlier assessment of that situation (Ex. 9).

The Seventh Circuit then portrayed Mr. Helland as a religious zealot, using the usual epithets of proselytization, Bible reading, and creationism. It states "[i]n addition, several teachers complained that Helland proselytized in his classes by reading the Bible aloud to middle and high school students." Reading the Bible aloud occurred once, seven years before the school fired him, when several students in one of his classes begged him all day to read them something from his Bible (Aff. ¶ 12). As a reward for the class' good behavior, he randomly read three verses out loud at the end of the day (Aff. ¶ 12). After the Corporation told him this was inappropriate, he never again read his

Bible out loud in class (Aff. ¶ 12).[3] There was no proselytizing. The opinion further alleges that he was "distributing Biblical pamphlets." The Corporation accused Mr. Helland of distributing what were called "Jesus Newspapers" in the classroom at Adams High School (Ex. T). Mr. Helland never distributed these pamphlets to any of the students at Adams, much less to any other student, and in fact had not substitute taught at Adams High School for over six months before the date the Corporation stamped on the pamphlet (Aff. ¶¶ 28-29, 34, Exs. LL, T). Thus, Mr. Helland could not have distributed the pamphlet while teaching. The person who was distributing those pamphlets confirmed that Mr. Helland had nothing to do with their distribution at Adams High School (Ex. 5). When Mr. Helland tried to explain this to the Corporation during the December 3 phone conversation, the Corporation's representative told him *"you may be innocent, but I can not risk the possibility that you may be breaking some law"* (Aff. ¶ 29, Ex. Y)![4]

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[3]The record contains three critiques that allege Mr. Helland read his Bible to his students in the classroom (Exs. B, E, F). Mr. Helland agrees he did do this with three verses on the one occasion in the fall of 1986 (at the students' insistence), but that he had never done it before and never did it after (Aff. ¶ 12). As with this situation, Mr. Helland has always sought to fully comply with the directives of the Corporation concerning his performance as a substitute teacher (Ex. W). On the days of two of the alleged occasions of Bible reading, he was not even at the school in question (Aff. ¶¶ 13, 14). Such date conflicts in the Corporation's records have occurred with disturbing regularity in this case (compare Ex. LL with Exs. K-M and notes in Aff. ¶ 19), and show its claims to be pretextual.

[4]In 1979, during one of Mr. Helland's first substitute teaching assignments for the Corporation, he had offered one copy of one short religious booklet to one student in an attempt to occupy the time of this particularly disruptive and uncooperative student (Aff.

The opinion also claims that he "profess[ed] his belief in the Biblical version of creation in a fifth grade science class." In fact, on the day in question, Mr. Helland was teaching on the theory of evolution and had consciously avoided a presentation on any other specific religious or scientific theory of origins (Aff. ¶ 37, Exs. U, W, FF). A student became disturbed with the thought that "he came from a monkey," and blurted out that he did not want to talk about evolution anymore (Aff. ¶ 37, Ex. W). Mr. Helland, wanting to console the boy, told him that the theory of evolution is only a theory and that he himself believed instead in the theory of creation (Aff. ¶ 37, Ex. W).[5] In doing so he fully complied with the substitute teachers' handbook which directs teachers to "[a]nswer questions to the best of your ability" and "[b]e honest if you don't know an answer, but try to find the best response by the end of the day" (Ex. DD at 15).

¶ 9, Exs. B, PP). The student, initially interested, returned the booklet at Mr. Helland's insistence within a few minutes because Mr. Helland came to believe that giving it to him was a mistake (Aff. ¶ 9, Ex. PP). He never repeated this activity (Exs. PP, Y). As with everything else, the Corporation never showed him this negative critique despite its own policy and Mr. Helland did not learn it existed until he initiated a review of his file (Aff. ¶ 9). This event and all of Mr. Helland's actions surrounding it occurred over 14 years and about 700 substitute assignments before the Corporation fired him.

[5]Several other students had earlier in the class volunteered that they believed that God created the universe (Aff. ¶ 37). The irony is that Mr. Helland strictly limited his science presentation to the theory of evolution, and has now been fired in part because he did not respond to a student's specific disagreement with that theory by insisting that any theory or belief contrary to evolution must be wrong.

Finally, the opinion claims that "Helland agreed not to give the students an assignment if they agreed not to tell anyone about the discussion." Following his effort to ease the boy's distress, Mr. Helland told the class that he could not teach the theory of creation in the public schools, and that they should not think he was trying to teach religion because he would not and could not teach religious beliefs that disagree with the theory of evolution (Aff. ¶ 37, Ex. W). The entire exchange took two or three minutes and did not disrupt the learning atmosphere of the classroom (Aff. ¶ 41). Afterward, several students in the class began to tease him, saying they wouldn't tell on him if he agreed to not give them an assignment (Aff. ¶ 37, Ex. W). Since it was Friday and no assignment had been left, he humored them, saying "ok" and explaining the real reason - it was Friday and no assignment had been left (Aff. ¶ 38). Mr. Helland often could connect with his students in ways they appreciated (Exs. S, 16, 24). The substitute teachers' handbook encouraged him to do this, directing him to "Be nice. Smile. Win them over . . . . Risk sharing that you are human" (Ex. DD p 12).

The Seventh Circuit also found numerous warnings that did not exist. "The School Corporation warned Helland numerous times that his poor performance as a substitute and his improper interjection of religion into the classroom were grounds for removing him from the substitute teacher list." There were no such "numerous" warnings. Only once, in a discussion recorded in the December memo, did the school make anything like a "warning" to Mr. Helland before he filed his EEOC complaint (Ex. P). Even then, the Corporation made no mention of alleged poor performance (Exs. Y, EE, FF). The second and only other communication on any of these issues came in the form of the May letter, and came only after Mr. Helland filed an EEOC complaint and the Corporation brought in its lawyers--and after Mr. Helland had begged the school for months to talk with him about these issues and had been forced to file the EEOC complaint (Aff. ¶ 30). In the end, the court

simply overlooked the first paragraph of the termination letter (which closely tracked the October memo). Not a single act of alleged failures to follow lesson plans or problems with classroom management surfaced between the parties until after Mr. Helland made his EEOC complaint (Aff. ¶ 8, Exs. W, Y, EE), and none occurred between the time of the May letter and the termination letter.

3. The Corporation's Reasons for Termination.

The Corporation stated its reasons for firing Mr. Helland, in its November 10, 1993 termination letter:

> This decision was made after our office was notified by the Principal of Tarkington Elementary School of your substitute teaching experience at Tarkington Elementary School on Friday, October 29, 1993. It was reported to us that students in the fifth grade were upset because of your *discussion of religion and evolutionary theories*. Also, a teacher at Tarkington reported to the principal that *you had brought a bible into the classroom* (Ex. V) (emphasis added).

This termination letter was prompted by the October memorandum from the principal, dated about October 29, 1993 ("October memorandum") (Ex. U):

> Quite a stir was caused due to fact that Mr. Helland *allowed himself to get into a discussion of religion and evolutionary theories*. Some students were upset by this discussion and came to me with the issue. After school I spoke with Mr. Helland about what had been reported to me. He explained that the discussion had occurred during science class, and he was attempting to explain the evolving of man in relation to the dinosaur era. A teacher reported that Mr. Helland had *brought a bible into the classroom*. When asked about it he stated that "he was a Gideon, and therefore must have his Bible with him at all times." I explained

to him that religion is not taught in our schools (Ex. U).

The October memorandum was otherwise silent as to Mr. Helland's performance as a substitute teacher. The termination letter was carefully massaged to give pretexts for termination, though to the extent of sketchy facts it referred to incidents many years before that had not been grounds for termination, and otherwise it gave no specifics and was mistaken in its generalities (as discussed below). Prior to the termination letter and October memo, the Corporation had only once raised the issue of poor performance and had only twice raised the issue of injection of religion in the classroom, and at neither time was Mr. Helland given any chance to discuss the specific allegations raised (First Affidavit of Peter Helland ("Aff.") ¶¶ 30-31, Exs. W, Y, EE). In most cases, the alleged incidents never occurred (See e.g. - Aff. ¶¶ 13, 14). The first such communication, described in an interoffice memorandum memorializing a meeting Mr. Helland obtained with a school official on December 3, 1992 ("December memo"), states:

> I talked with Mr. Helland today and explained our concern about passing out religious material, *reading the Bible in the classroom to* (Ex. R).

This December memorandum is otherwise silent as to Mr. Helland's performance as a substitute teacher.[6] The second communication, a May 20, 1993 letter ("May letter"), was prepared in retaliation only after Mr. Helland was forced to initiate an EEOC Charge of Discrimi-

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[6] In the termination letter the Corporation states it informed Mr. Helland of his poor performance reviews during this December 3, 1992 meeting. The December memo is conspicuously bereft of such information, and Mr. Helland specifically refutes that the Corporation informed him of any instances of alleged poor performance at that meeting (Exs. Y, EE, FF).

nation (Ex. R, Y), and is the only piece of correspondence the Corporation provided to Mr. Helland on the matter before the termination letter.[7] This letter states falsely that Mr. Helland had "consistently received poor performance reviews" and "on some occasions you interjected reading religious-oriented materials into portions of your classroom presentation" (Ex. R).[8] The Corporation did not find any infractions worthy of terminating Mr. Helland, informing him that he "continue[s] to be on the substitute list" (Ex. R). The October memorandum describes the only actions Mr. Helland actually did that the Corporation found offensive from the time of the May letter, when the Corporation confirmed that he still had his job, until the time the Corporation fired him.

4. Mr. Helland's Qualifications and Performance as a Teacher.

Mr. Helland in fact little resembles the contorted portrait painted by the Corporation and embellished in

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[7] After many months and much effort, Mr. Helland sought and obtained a meeting with the Corporation on April 14, 1993 to learn what complaint had precipitated his dismissal from one of the schools within the Corporation and to discuss his alleged improper religious activities (Aff. ¶¶ 30-31, Ex. W). Unfortunately, "nothing significant regarding these matters was discussed" (Exs. W, 3). The Corporation reneged on its promise to address these issues by letter within the next three or four days (Ex. W). In its response, the May letter, over a month late and prepared only after Mr. Helland filed a claim with the EEOC, the Corporation for the first time accused him of poor performance (Ex. W).

[8] A few months earlier the Corporation it had taken the opposite position on Mr. Helland's performance (Ex. FF). In any event, the Corporation's failure to notify him when notes and records critical of his performance were placed in the file violated the official policy of the Corporation (Ex. 11).

the Seventh Circuit's opinion. He earned a B.A. from the University of Notre Dame in 1978, majoring in German (Ex. C). He substitute taught at almost every one of the Corporation's 35 elementary, middle and high schools over a span over nine years (Ex. LL). Many students knew him as a "gentle and quiet man" who "knows me by my first name" and "always says 'Hi' to me in the hallway" (Ex. S). Other students realized he cared about them both in and out of class (e.g. - Ex. 16) and could "relate to all walks of life rich and poor" (Ex. 24). One student even described him as "the perfect teacher" (Ex. 16). His colleagues also admired his commitment to his students. Of the 720 times he substituted, nearly all teachers at all schools approved of his classroom performance and only a handful (barely 1%) ever criticized his performance. Some criticism would be expected by any substitute teacher, because misunderstandings occur at least 1% of the time. Of the few critics, most still had positive things to say about his performance (Exs. B, D-F, I-J, M-N). One teacher who had earlier criticized his handling of a situation with a student has now concluded that the Corporation "was [not] treating Mr. Helland fairly" (Ex. 9). By way of further example, one principal has stated that Mr. Helland always "performed in a satisfactory manner" (Ex. II) and a high school department head noted he has always "fulfilled his responsibilities in a competent manner" (Ex. 8). The security guard at one middle school described him as "one of our better subs" (Ex. 6).

Outside of his school duties, Mr. Helland regularly visits prisoners in the local jail and takes troubled youths off the streets and into his home (Exs. W, 12, 17). It would not be unusual to find him playing basketball down the block with some of his students after school. Substitute teaching has been his primary source of income, allowing him to subsist within a very modest lifestyle (no more than a few thousand dollars a year (Ex. RR)) while pursuing his volunteer community activities.

5. Mr. Helland's Quiet Religious Convictions.

Mr. Helland's primary motivation in life is his religious faith (Aff. ¶ 3). As part of his faith he often takes time to read his Bible silently, including in the classrooms of public schools during silent work periods (Aff. ¶ 3). Except for the two early isolated events described above (once reading the Bible to students at their insistence in 1986, and once handing a religious booklet to a disruptive and uncooperative student for a few minutes in 1979) which obviously did not cause his termination 7-14 years later, he has purposefully never read religious books as part of his classroom presentation, has not proselytized or otherwise initiated religious discussions in the classroom, and has not distributed religious materials to students in the classroom, all because he sought to comply with what he understood to be the Corporation's policy (Aff. ¶¶ 4, 12).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS, AND WITH THE RELIGION CLAUSES AND THE RELIGIOUS FREEDOM RESTORATION ACT, IN FINDING THAT TEACHERS WHO MERELY CARRY THEIR BIBLE TO SCHOOL, OR SILENTLY READ THE BIBLE DURING SILENT READING PERIODS, VIOLATE THE ESTABLISHMENT CLAUSE.

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This Court has applied these religious liberty clauses to the states through the Fourteenth Amendment.

A. Teachers Do Not Shed Their Constitutional Rights To Silently Practice Their Religion When They Enter The Classroom.

"It can hardly be argued either that students or teachers shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 506 (1969). The School Corporation conceded that Mr. Helland has a sincere religious belief in carrying his Bible and reading his Bible silently.[9] His silently reading a religious book at his desk, during silent reading time for students, is not a religious exercise for the students, though it is for Mr. Helland. The Religious Freedom Restoration Act, 42 U.S.C. §2000bb, requires the Corporation to permit Mr. Helland's religious exercise unless it can identify a compelling government interest.

The only compelling interest the Corporation has asserted is that to allow Mr. Helland to silently read a religious book during silent work periods in the classroom would be an establishment of religion prohibited by the First Amendment. Mr. Helland does not dispute that preventing an establishment of religion is a compelling interest, but has never conceded that his silently carrying his Bible or silently reading it during reading periods is an establishment of religion or something that there is a compelling interest to censor.

The Seventh Circuit incorrectly concluded on this record that silent Bible reading during silent work periods may "inculcate religion," because requiring the Corporation to accommodate this does not endorse, coerce, advance or entangle the school with religion -- the students did not participate and had no reason to believe they should. Further, such innocuous activity

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[9] The Corporation concedes that its actions substantially burdened Mr. Helland's exercise of religion. Helland v. South Bend Community School Corp. 93 F.2d at 331.

does not rise to the level of "injection of religion in the classroom," *Helland*, 93 F.3d at 331, because nothing is injected and the teacher's constitutional right is to exercise his religion silently in this way. This Court has stated that the state should neither advance nor *inhibit* religion. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The Corporation did not find single instances in 1979 and 1986 to warrant termination until it searched for pretexts in 1993, and did not attempt to notify Mr. Helland of most alleged shortcomings until after its lawyers became involved when Mr. Helland was forced to file his EEOC complaint. The Corporation carefully preserved 7 negative evaluations, and carefully did not preserve the 713 favorable ones, and then carefully did not tell Mr. Helland of the negative ones to enable him to respond. The Corporation's position is epitomized by its statement that "you may be innocent, but I cannot risk the possibility that you may be breaking some law," on December 3, 1992.

B. A Bible May Be Brought Into Public School Classrooms, and Its Use Is Not Necessarily Inculcation of Religion in Students.

In *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963), this Court rejected the idea that public schools may prohibit all uses of religious books in the classroom when it said "the Bible is worthy of study for its literary and historic qualities." It confirmed this principle in *Stone v. Graham*, 449 U.S. 39, 42 (1980) by stating "the bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." Certainly, these cases hold that the Establishment Clause prohibits the use of religious books for daily, ceremonial readings to students or the posting of religious texts for students to observe and contemplate.[10] The common thread in all of this Court's

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[10] The Establishment Clause similarly prohibits other religious exercises in the classroom that compel

decisions on religious exercises in the classroom is that when the state compels participation by the students, the policy violates the Establishment Clause. However, this Court has taken the equally clear position that religious exercises, even when they occur in the classroom, do not infringe on others' rights provided education and exposure do not become advocacy or endorsement. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 59 (1985) ("[t]he legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday."); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985) (Canby, J., concurring) ("even the Bible may occupy a place in the classroom, provided education and exposure do not become advocacy."). Thus, public schools do not establish religion when they permit religious books in the classroom, absent a showing that such books are used to inculcate religion to the students.

The obvious point is that it must be constitutional to carry the Bible into the classroom, because otherwise it could not be "stud[ied] for its literary and historic qualities." It must be constitutional to read it silently by individual choice, because it is constitutional to read it aloud for certain nondevotional purposes.

The Seventh Circuit erroneously found that the Corporation did not fire Mr. Helland in part for his actions in carrying his Bible and reading it silently in the classroom, because the very first paragraph of the termination letter and the supporting October memorandum said the contrary.[11] The Corporation could

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student participation, such as daily prayer. Engel v. Vitale, 370 U.S. 421 (1962).

[11] It is important to note here that this case comes to the Court on grant of the Corporation's motion for summary judgment. As such, the lower courts erred in not viewing all evidence and reasonable inferences

not have been any clearer when it wrote "[t]his decision was made after . . . a teacher at Tarkington reported to the principal that you had brought a bible into the classroom." This was one of only two new facts recited by the Corporation in support of its decision to fire Mr. Helland (the other being a brief discussion prompted by a student question on religion and evolution in class). The only reasonable inference that can come from the termination letter is that the Corporation fired Mr. Helland in part because he "brought a bible into the classroom."[12]

The Seventh Circuit decision conflicts with other Circuits.[13] Its inclination to adopt the holding of

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therefrom in the light most favorable to the non-movant, in this case, Mr. Helland.

[12] Although not directly prompting the termination letter, the December memorandum "warned" Mr. Helland about "reading the Bible in the classroom to[o]." This of course referred to his silent reading of the Bible, because Mr. Helland had read the Bible aloud (three randomly chosen verses) to his students on one occasion in 1986, and never again. Even by the Corporation's suspect records, it had not accused him of doing this a second time after the three verses in 1987, over five years before it wrote this memorandum.

[13] *Cf. Doe v. Duncanville Independent School Dist.*, 70 F.3d 402 (5th Cir. 1995) (holding a teacher may require choir students to participate in the singing of a religious theme song); *Grove*, 753 F.2d at 1534 (holding teachers may assign a book to students that comments on religion); *Florey v. Sioux Falls School Dist. 49-5*, 619 F.2d 1311 (8th Cir 1980) (holding religious materials may be used as a teaching resource), *with Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (holding a teacher may not silently read a religious book at his desk, or keep two religious books in his personal library for students to use voluntarily). Beyond the Seventh Circuit's conflict with this Court in the present case, the federal appeals circuits have split whether on the

Tenth Circuit in *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir 1990), also invites clear guidance from this Court to avoid unconstitutional constriction of teachers' First Amendment rights.

1. A Reasonable Observer Would Not Believe That Public Schools Endorse the Views of Teachers' Personal Reading Preferences.

The endorsement test was first adopted by Justice O'Connor, in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and by the Court in later cases. That test would "prohibit the government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch*, 465 U.S. at 687. The endorsement test would not preclude government from acknowledging religion, *Wallace v. Jaffree*, 472 U.S. 38, 70 (O'Connor, J. concurring). Here, Mr. Helland asks no more of the Corporation than that they merely allow him to carry his Bible and silently read it in the classroom during silent work times. Doing so would not send a message to his students that they are either outsiders or insiders within the classroom, because a silent work period is not inherently religious and students need not compromise their beliefs to participate. *See Wallace*, 472 U.S. at 72 (O'Connor, J. concurring). They can work, read, study or even daydream and would not be the slightest bit exposed to the pages of Mr. Helland's Bible or the thoughts going through his head while he reads. They are quite clearly left with the choice of not participating in Mr. Helland's activity, and indeed, they are themselves probably busy with an assignment or engrossed in their own book and too busy to even know what the teacher is reading. Most importantly, there is no evidence in the record that any student

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issue of whether public school teachers may carry and read religious materials in the classroom. If the materials in *Doe*, *Grove* and *Florey* can be assigned to students, the teacher may certainly read such materials silently in the classroom.

ever participated in Mr. Helland's activity or felt even the slightest need to do so.

2. A Reasonable Dissenter Would Not Believe That Students Will Be Coerced to Conform to the Views of Teachers' Personal Reading Preferences.

In *Lee v. Weisman*, 505 U.S. 577 (1992), this Court adopted the coercion test for graduation prayer cases. A public school may not "compel[] attendance and participation in an explicit religious exercise." *Lee*, 505 U.S. at 598. The Court stated an equally important rule:

> [a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. *See Abington School District, supra* at 306 (Goldberg, J., concurring). We recognize that, . . . throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public school and their students. *Lee*, 505 U.S. at 598-599.

This is that case. Mr. Helland merely wished to read his Bible, silently and to himself, while his students participate in an unquestionably valid silent work period. He has been fired in major part because he did so.

3. Public School Accommodation of Teachers' Personal Reading Preferences Has a Secular Purpose, Does Not Advance or Inhibit Religion, and Does Not Excessively Entangle the School with Religion.

As this Court stated in *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952):

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to

> worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

The *Lemon* test is met. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1973). The secular purpose of the silent reading or silent work period is unquestionably to promote the education of the students by having them perform class exercises in math, science, reading, etc. Mr. Helland's purpose in silently reading a religious book during these times is irrelevant because his activity does not require or even suggest the students must participate in it. The primary effect is equally unquestionable and equally irrelevant. Finally, public schools such as the Corporation retain the right to develop curriculum that includes religious materials, *Abington*, 374 U.S. at 203, and any entanglement concerns in the present situation (where the students do not participate) could be no greater than such concerns involving curriculum with religious content for students.

C. Discrimination against the Bible and Other Religious Books Would Violate the Religion Clauses; Because Teachers May Carry and Silently Read Other Books, Mr. Helland May Carry and Read the Bible.

Neutrality toward religion, and noninhibition of religion, must mean at least that if teachers can carry other books, they may carry the Bible. If teachers may read other books during silent reading periods, they may read the Bible. Any other view would select one book out of the world's libraries and ban it, quite discriminatorily in violation of the Fourteenth Amendment.

This Court's opinions have been misinterpreted to exclude all religion from the public square, even when

nonreligious opinion is allowed. Religion is not a radioactive contaminant that will harm all who pass nearby. Decisions that treat religion as a radioactive contaminant discriminate against one category of ideas and one form of discussion.

II. THE SEVENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN FINDING THAT FIRING TEACHERS FOR CARRYING THEIR BIBLE TO SCHOOL, OR SILENTLY READING THE BIBLE DURING SILENT READING PERIODS, IS LEGAL AND A LEGITIMATE NONDISCRIMINATORY REASON.

Title VII prohibits employers from discharging an employee because of his religion 42 U.S.C. §2000e-2. Mr. Helland does not shed his constitutional right to the free exercise of religion at the schoolhouse gate. He was discharged because

> "you had brought a bible into the classroom"
> "your discussion of religion and evolutionary theories"
>
> "Mr. Helland had brought a bible into the classroom"
> "Mr. Helland allowed himself to get into a discussion of religion and evolutionary theories"
>
> "reading the Bible in the classroom to[o]"

Mr. Helland proved a prima facie case of religious discrimination by showing that he was discharged for his religious exercise. It was not necessary for him to show an antireligious motivation, because an antireligious act occurred. His religious exercise was protected under the Constitution and the Religious Freedom Restoration Act. His dismissal on that basis was a religiously motivated, discriminatory reason prohibited by Title VII.

Consequently, the Corporation had the burden to

articulate a legitimate, nondiscriminatory reason for its action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). It instead articulated that it fired Mr. Helland in part because he "brought a bible into the classroom," "allowed himself to get into a discussion of religion" by not shutting a student up when he asked a question, and was "reading the Bible in the classroom to[o]" (silently). Mr. Helland did not invade the rights of others, as stated in Section I of this brief, and the record contains no evidence that this activity materially and substantially interfered with the requirements of appropriate discipline in the operation of the school.

This case bears a striking resemblance to *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995). There, the court held that a public employer, which fired an employee for engaging in religious practices at work (leading frequent spontaneous verbal prayers and quoting Bible passages at meetings), engaged in unlawful religious discrimination. 61 F.3d at 654. Here, of course, the religious practices were private in carrying a Bible and reading it silently.

III. THE SEVENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS BY FINDING THAT TEACHERS DO NOT HAVE THE ACADEMIC FREEDOM TO BRIEFLY RESPOND TO SPECIFIC, VOLUNTARY, STUDENT-INITIATED QUESTIONS ON SUBJECTS TOUCHING ON RELIGIOUS MATTERS DURING THE PRESENTATION OF SCHOOL-APPROVED CURRICULUM, BRIEFLY.

In *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), this Court succinctly stated the rule on academic freedom:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in

promoting the efficiency of the public services it performs through its employees.

This Court has stated that public school teachers possess academic freedom within their classrooms, even in elementary schools, so long as the teachers' conduct does not materially and substantially interfere with the discipline and operation of the school, and so long as it does not invade the rights of others (such as by violating the Establishment Clause). *Tinker*, 393 U.S. at 513. Furthermore, "[i]t is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees." *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967).[14] A public school does not establish religion merely by religious ideas being mentioned in the classroom, particularly by student questions, unless the religious ideas are introduced by the teacher in order to inculcate religion in the students.

In the present case, the Corporation adopted and the Seventh Circuit approved a blanket prohibition against Mr. Helland discussing any subject touching on religion, even when such discussion was brief (two to three minutes) and was the result of a voluntary, student-initiated question during Mr. Helland's presentation of school-approved curriculum. The religious issue discussed was at once relevant to the subject matter, presented objectively, and resulted in no disruption in the classroom. Its censorship conflicts with the rules of academic freedom found in this

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[14] As Justice Stewart eloquently phrased it in a slightly different context than the present case:

> It is quite another thing for a State to make it a criminal offense for a public school teacher to so much as to mention the very existence of an entire system of respected human thought. *Epperson*, 393 U.S. at 116 (Stewart, J., concurring).

Court's opinions. This censorship of questions and answers in one subject, among the range of human knowledge, also conflicts with decisions in other circuits.[15]

A. Teachers Do Not Invade the Rights of Others When They Give Honest Answers to Students' Questions, and Acknowledge That Religion May Provide Legitimate Insight into Issues Raised By School Approved Curriculum.

The Corporation arbitrarily restricted Mr. Helland's academic freedom by firing him for briefly responding to a student question as he accurately taught the theory of evolution in a science class, when he honestly acknowledged that the student's expressed religious beliefs that support the theory of creation

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[15] *See Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987) (a teacher may lead a discussion involving religion); *Kingsville Independent School Dist. v. Cooper*, 611 F.2d 1109 (5th Cir 1980) (a teacher may not be fired for initiating classroom discussions on controversial topics); *James v. Board of education*, 641 F.2d 566 (2nd Cir 1972) (a teacher may state his personal views in the classroom while teaching); *Roman v. Appleby*, 558 F.Supp 449 (ED· PA 1983) (a school counselor may discuss potentially sensitive topics such as religion with students). *But cf. Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir 1994) (a teacher may not discuss religious beliefs with students during school time on school grounds). The current decision also conflicts with some of its own earlier statements. *See Zykan v. Warsaw Community School Corp.* 631 F.2d 1300, 1305-1306 (7th Cir. 1980) (acknowledging that school boards are not free to fire teachers for every random comment or from placing a flat prohibition on the mention of certain relevant topics in the classroom or from forbidding students to take an interest in subjects not directly covered by the regular curriculum).

can provide valid insight into the issues raised by the school-approved curriculum. This is true under any of the three tests which this Court has applied to Establishment Clause cases. Such activity did not endorse, coerce participation, advance or inhibit, or entangle the school with religion because it was relevant subject matter presented objectively and without disruption in the classroom. All student inquiries and responses during the brief discussion were voluntary and uncoerced. The situation was even less likely to create an Establishment Clause violation because the teacher did not raise the religious aspect of the discussion; the student did.

The Corporation's act of firing Mr. Helland, and the Seventh Circuit's approval, are nothing short of extraordinary given that broad latitude courts have given schools to advocate and even endorse activity as outrageous as sexually explicit, profane, and lewd language and activity during school time on school grounds. *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir 1995). It is an odd world when condom distribution in public schools is not thought to encourage promiscuous activity, but when student mention of religion in public schools is thought to risk permanent contamination of all hearers.

B. Such Acknowledgment Does Not Advance Religion Impermissibly and Does Not Necessarily Materially and Substantially Interfere With the Operation of Public Schools.

In the words of one circuit, "freedom of expression demands breathing room." *James*, 461 F.2d at 572. Clearly, the courts have given schools the general right to prescribe curriculum and the methods for teaching this curriculum, and teachers cannot assert a general right to control the scope of all activity in the classroom. This is not a case, and this is not a teacher, that raises these issues. But the Corporation crossed the line and invaded Mr. Helland's academic freedom when it fired him for doing nothing more than

briefly responding to a student's question while he taught school-approved curriculum. The record shows the ensuing discussion lasted no more than two or three minutes. The religious nature of the discussion was presented objectively, and Mr. Helland even qualified his comments by telling the students that he could not teach religion. The record also shows no disruption occurred in the classroom. Therefore, Mr. Helland stayed within his right to academic freedom.

C. It Is Discrimination To Hold that Teachers May Answer Any Student Questions unless They Touch on Religion, and May Acknowledge that Any Discipline May Provide Insight Except Religion.

A nondiscriminatory standard should apply to teacher answers to student questions. Either teachers should be forbidden to answer questions--a position that no one advocates--or teachers should be able to give honest answers to all questions including religious questions. Permission for teachers to answer any question except a religious one cannot be called anything but discriminatory, and it conveys the clear message that religion is more toxic than racism, vulgarity, flag burning, or hate crimes and must be buried in impervious caverns deep beneath the earth.

IV. THE SEVENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS BY FINDING THAT FIRING TEACHERS FOR BRIEFLY RESPONDING TO SPECIFIC, VOLUNTARY, STUDENT-INITIATED QUESTIONS ON SUBJECTS TOUCHING ON RELIGIOUS MATTERS DURING THE PRESENTATION OF SCHOOL-APPROVED CURRICULUM IS A LEGITIMATE, NONDISCRIMINATORY REASON.

Title VII prohibits employers from discharging an employee because of his religion 42 U.S.C. §2000e-2. Teachers retain the right to academic freedom and, indeed, such freedom would be worthless if it could be cut off inside the classroom, even the classroom in an

elementary school. *See Wieman v. UpDeGraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) ("[t]o regard teachers - in our entire educational system, *from the primary grades to the university* - as the priests of our democracy is therefore not to indulge in hyperbole." (emphasis added)).

When Mr. Helland proved his prima facie case of religious discrimination, the Corporation had the burden to articulate a legitimate, nondiscriminatory reason for its action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). It has articulated that it fired Mr. Helland in part because he had a brief, student-initiated "discussion of religion and evolutionary theories" while he properly taught on the theory of evolution. Such activity is protected under the Constitution, and therefore discharge on that basis is a religiously discriminatory reason prohibited by Title VII. Mr. Helland did not invade the rights of others, for reasons stated in Section I of this petition.[16]

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[16]The lower courts viewed petitioner's employment discrimination claim primarily within the context of the pretext prong of the discrimination in employment test. On remand, this will be an issue; however, the Corporation clearly brought the issue of silent Bible reading and limited classroom discussions of religion into this case as a central part of its decision to fire Mr. Helland. Therefore, the courts incorrectly reached the pretext issue when it found the Corporation's reliance on these activities legitimate, nondiscriminatory justifications. It is worth noting here the Corporation's only other reason for firing Mr. Helland - poor performance. However, the negative critiques and comments, when placed within the context of over nine years of predominately satisfactory performance, and when explained and, in many cases, directly controverted in substance, create an insufficient basis for firing Mr. Helland apart from

CONCLUSION

Thus, we request that certiorari be granted.

Dated November 13, 1996 and respectfully submitted,

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the Corporation's predominant, religious and academic freedom discrimination justifications (silent reading of a religious book during silent reading periods and responding to specific, voluntary, student-initiated questions touching on religious matters).

A. SEVENTH CIRCUIT OPINION

No. 96-1079

PETER S. HELLAND,

Plaintiff-Appellant,

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 94 C 852-Robert L. Miller, Jr., *Judge*.

ARGUED JUNE 6, 1996 - DECIDED AUGUST 15, 1996

Before BAUER, ROVNER, and DIANE P. WOOD, *Circuit Judges*.

BAUER, *Circuit Judge*. The South Bend Community School Corporation removed Peter Helland from its list of substitute teachers because he failed to follow lesson plans, failed to control his students, and improperly interjected religion into his classrooms. Helland believes that the School Corporation unlawfully dismissed him because of his religious beliefs, so he sued under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., 42 U.S.C. § 1983, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb. The district court granted. the School Corporation's motion for summary judgment, and we affirm.

BACKGROUND

Helland's Christian and Gideon beliefs require that he carry and read the Bible. From May 1979 to June 1980, and again from August 1985 to November 1993, Helland worked as a substitute teacher for the South Bend Community School Corporation. During that time, several principals and teachers for whom he had substituted submitted negative evaluations of Helland's performance and requested that he not return to their schools or classrooms. The evaluations indicated that Helland failed to follow lesson plans left for him by the teachers for whom he substituted and that he failed to maintain control of his classes. One teacher complained that Helland drank a nonalcoholic beer in class, and that the students believed it was alcoholic. Two teachers commented on Helland's lack of understanding of high school students, noting an incident where Helland gave his car keys to a student who had been suspended from school grounds. In addition, several teachers complained that Helland proselytized in his classes by reading the Bible aloud to middle and high school students, distributing Biblical pamphlets, and professing his belief in the Biblical version of creation in a fifth grade science class. After the latter incident, Helland agreed not to give the students an assignment if they agreed not to tell anyone about the discussion.

The School Corporation warned Helland numerous times that his poor performance as a substitute and his improper interjection of religion into the classroom were grounds for removing him from the substitute teacher list. Finally, in November 1993, it notified Helland that it no longer would hire him as a substitute teacher because he did "not follow[ ] lesson plans, [had] problems with classroom management and on some occasions . . . interjected . . . religious-oriented materials into portions of your classroom presentation."

Helland filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days of his removal from the School Corporation's substitute teacher list. 42 U.S.C. § 2000e-5(e)(I). The EEOC declined to bring an action on Helland's behalf. Helland then commenced this lawsuit in federal court, alleging that the School Corporation discriminated against him because of his religion in violation of Title VII, § 1983, and RFRA.

I. *Title VII and § 1983 Claims*

The district court granted the School Corporation's motion for summary judgment on Helland's Title VII and § 1983 claims because it concluded that Helland had not responded to the motion with evidence sufficient to allow a factfinder to conclude that the School Corporation dismissed him because of his religion. Helland can prevail on his Title VII and § 1983 claims in one of two ways. He can offer direct proof of discriminatory intent, *Sample v. Aldi Inc.*, 61 F.3d 544, 547 (7th Cir. 1995), or he can rely on the indirect, burden-shifting approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Bruno v. City of Crown Point, Ind.*, 950 F.2d 355, 361 (7th Cir. 1991), *cert. denied*, 505 U.S. 1207 (1992), Under the *McDonnell Douglas* framework, the plaintiff first must establish by a preponderance of the evidence a prima facie case of discrimination, which creates a presumption that the employer unlawfully discriminated against the plaintiff. The burden then shifts to the employer to produce evidence which, if taken as true, would permit the conclusion that it had a legitimate nondiscriminatory reason for its challenged employment action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). If the employer meets this burden, the plaintiff then must prove bv a preponderance of the evidence that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Here, Helland had no direct evidence of intentional discrimination, and therefore opted for the second approach. Assuming, as did the district court, that Helland established a prima facie case of religious discrimination, the burden then shifted to the School Corporation to articulate a legitimate nondiscriminatory reason for removing Helland's name from the substitute teacher list. *Collier v. Budd Co.*, 66 F.3d 886, 889 (7th Cir. 1995). The School Corporation presented two such reasons to justify its actions. First, it stated that it removed Helland from the substitute teacher list because his job performance had not been satisfactory. In support of this contention, the School Corporation offered negative evaluations submitted by a number of teachers who criticized Helland's failure to follow the lesson plans the teachers left for him, and some of whom specifically requested that Helland not substitute for them again. Second, the School Corporation stated that it had discussed Helland because he defied repeated warnings against interjecting his religious beliefs into the classrooms. Both of these are legitimate non-discriminatory reasons for dismissing him. *See Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) (public schools must make certain that "subsidized teachers do not inculcate religion"); *Russell v. Acme-Evans Co.*, 51 F.3d 64, 69 (7th Cir. 1995) (poor job performance).

Once the School Corporation proffered these legitimate non-discriminatory reasons for its actions, HeHand had to present evidence that those reasons were a pretext for discrimination. Because a Title VII claim requires intentional discrimination, the pretext inquiry focuses on whether the employer's stated reason was honest, not whether it was accurate. "Pretext . . . means a lie, specifically a phony reason for some action." *Russell*, 51 F.3d at 68. "If the only reason an employer offers for [its challenged action] is a lie, the inference that the real reason was a forbidden one . . . may rationally be drawn ... and there must be a trial."

Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994).

Here, Helland failed to produce evidence from which a rational factfinder could infer the School Corporation lied, and so the district court properly granted summary judgment for the School Corporation. *See Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990). Helland points to evidence showing that some teachers were pleased with his performance as a substitute. He also alleges that some of the reports upon which the Corporation relied in deciding to remove him from the substitute list misinterpreted certain events. But that misses the point. What matters here is not whether there is evidence contrary to that relied on by the School Corporation in deciding to remove Helland from the substitute list, but whether the School Corporation believed the information was correct. *See Billups v. Methodist Hosp. of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991). We think that it did. The administrator who reviewed Helland's personnel file saw: numerous negative evaluations complaining about the quality of Helland's teaching, his inability to control his classes, and his failure to follow lesson plans; numerous requests that Helland not substitute for various teachers at several schools; and documentation of numerous admonitions to Helland that he stop interjecting religion into the classrooms. The reports provide sufficient nondiscriminatory reasons to conclude that Helland's work as a substitute teacher was subpar, and that the School Corporation did not unlawfully remove Helland from the substitute teacher list because of his religion itself. The district court properly granted the School Corporation's summary judgment motion as to Helland's Title VII and § 1983 claims.

II. *Religious Freedom Restoration Act*

Helland's amended complaint alleged that by "terminating [him] for refusing to cease from carrying his Bible to

work and to cease reading his Bible in privacy during job breaks, [the School Corporation] substantially burdened [his] free exercise of religion," and therefore violated RFRA. Under RFRA, the government may substantially burden a person's exercise of religion only if it demonstrates that its action furthers a compelling governmental interest and that its action is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-(l)(b). The district court granted summary judgment for the School Corporation on this claim because Helland had not responded to the motion with evidence sufficient to allow a factfinder to conclude that the School Corporation had substantially burdened his exercise of his religion without a compelling government interest.

Although we might not agree that the School Corporation's actions substantially burdened Helland's exercise of religion, *see Jones v. Mack*, 80 F.3d 1175, 1179 (7th Cir. 1996) (defining "substantial burden" under RFRA), the School Corporation concedes that issue, and we leave it at that. Helland appropriately "does not dispute that there is a compelling governmental interest against teaching religion in public schools." Indeed the Constitution requires governmental agencies to see that state-supported activity is not used for religious indoctrination. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 597 (1987); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 385 (1985); *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). Thus, the issue for us is whether removing Helland from the substitute teacher list was the least restrictive means of furthering the School Corporation's compelling governmental interest.

Helland contends that the School Corporation infringed on his right to carry his Bible to work and to read the Bible in privacy during job breaks, but he offers no evidence to show that it told him he could not do these things. In fact, in the narrative attached to his initial complaint, Helland stated that the School Corporation "never once told me that I could not carry my Bible with me to school for

personal use only." What the School Corporation frowned upon was not Helland's carrying the Bible to work and reading it in privacy, but his reading the Bible aloud to students and discussing religion during class, in contravention not only of the Constitution, but also of the lesson plans left for him.[1] A school can direct a teacher to "refrain from expressions of religious viewpoints in the classroom and like settings." *Bishop v. Aronov*, 926 F.2d 1066, 1077 (Ilth Cir. 1991). And in fact the School Corporation has a constitutional duty to make "certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." *Lemon*, 403 U.S. at 619.

Furthermore, the School Corporation gave Helland ample opportunity to practice his religion, so long as he did not use his classes for religious indoctrination. It tried to accommodate him by refraining from placing him at those schools and in those classes where teachers and students had complained about his interjection of religion in the classroom. And the School Corporation gave Helland ample warning that if he continued to do so, it would have no choice but to remove him from the substitute list. This is not only permissible, but as we already have noted, tolerating Helland's behavior would have opened up another constitutional can of worms.

Helland argues that the least restrictive means would have been to provide him with clear parameters for what the School Corporation deemed to be acceptable religious behavior. He contends that the substitute teacher handbook the Acting Superintendent gave him after the two met to discuss Helland's poor performance evaluations did not provide adequate guidance as to religious discussion in the

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[1] We note that in *Roberts v. Madigan*, 921 F.2d 1047, 1059 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992), the court upheld a school district's directive ordering a teacher to cease his silent Bible reading in the classroom during class time.

classroom, and that his actions merely reflected his confusion because of that lack of guidance.

But Helland's assertion is belied by his own actions showing that he knew he should follow lesson plans and not discuss religion in the classroom. In his affidavit submitted in opposition to the School Corporation's summary judgment motion, Helland stated that after he read the Bible to a sixth grade class, a school administrator told him "that I absolutely could not read the Bible. He further stated that he would have no choice but to fire me if I did it again. Now I knew what the School's policy was." And in a letter he wrote to the Superintendent after the School Corporation removed him from the substitute list, Helland admitted that after he discussed creationism in a fifth grade science class, he told the students that he could get into trouble for talking about Jesus and the Bible in school, and so he agreed not to assign homework if they would not tell anyone about the discussion.[2]

III. *Due Process*

Helland also contends that the district court should have addressed his due process claim, which the court found waived. Helland concedes that he "did not specifically raise the issue of a Due Process violation in the District Court." The only phrase in his original *pro se* complaint that

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[2] Because we conclude that removing Helland from the substitute teacher list was the least restrictive means of furthering the compelling governmental interest in avoiding the unconstitutional interjection of religion into the South Bend public school classrooms, we do not reach the School Corporation's argument that RFRA represents an unconstitutional exercise of Congressional power. We note, however, that we recently deferred to the Fifth Circuit's analysis of why RFRA does not violate the separation of powers or the establishment clause of the First Amendement. *Sasnett v. Sullivan*, ___ F.3d ___ (7th Cir. Aug. 2, 1996), citing *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3017 (U.S. June 25, 1996) (No. 95-2074)

conceivably might raise the issue is a statement in his narrative that "I complain that in none of these schools was I given a chance to tell the truth as I saw it." But Helland did not follow up with any constitutional or statutory predicate for this statement, and made no attempt to invoke the due process clause or 42 U.S.C. § 1983. Furthermore, Helland's amended complaint, filed by counsel, deleted that statement and contained no allegation of a due process claim. Helland's failure to raise the claim below precludes him from doing so on appeal. *Citizens Ins. Co. of Amer. v. Barton*, 39 F.3d 826, 828 (7th Cir. 1994).

Helland contends, however, that because he is a *pro se* plaintiff, we should allow him to press his claim. However, we have not routinely excused *pro se* plaintiffs from the same waiver rules attorneys face. Dixon v. Chrans, 986 F.2d 2017 203 (7th Cir. 1993). Furthermore, although Helland filed his original complaint *pro se*, he was represented by counsel when he filed his amended complaint. We see no reason to depart from the general rule of waiver in this case.

CONCLUSION

For the foregoing reasons, we affirm the district court's order granting summary judgment for the School Corporation.

AFFIRMED.

B. CONSTITUTIONAL PROVISIONS & STATUTES

U.S. CONSTITUTION AMENDMENT 1

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

U.S. CONSTITUTION AMENDMENT 14 §1

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

42 U.S.C. § 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000bb-1. FREE EXERCISE OF RELIGION PROTECTED

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person -

(1) is in furtherance of a compelling governmental interest;

and

(2) is in the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000e-2. UNLAWFUL EMPLOYMENT PRACTICES

(a) Employer practices. It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

C. TERMINATION LETTERS

SOUTH BEND COMMUNITY SCHOOL CORPORATION
635 SOUTH WAIN STREET SOUTH BEND, INDIANA
46601

November 10, 1993

Mr. Peter Helland
P.O. Box 382
Notre Dame, IN 46556

Dear Mr. Helland:

Please be informed that effective immediately you will no longer be hired as a substitute teacher for the South Bend Community School Corporation. This decision was made after our office was notified by the Principal of Tarkington Elementary School of your substitute teaching experience at Tarkington Elementary School on Friday, October 29, 1993. It was reported to us that students in the fifth grade were upset because of your discussion of religion and evolutionary theories. Also, a teacher at Tarkington reported to the principal that you had brought a bible into the classroom. The principal reported that she informed you that religion is not taught in our schools and requested that you not be assigned again as a substitute teacher at Tarkington Elementary School.

As you are aware, on December 3, 1992 I informed you that we were concerned about other incidents in our schools that were reported to us by teachers and building principals concerning your involvement in religious discussions, reading the bible in the classroom, etc. I explained to you at

that time that you would not be assigned to Riley High School, Washington High School, LaSalle High School, Adams High School, Clay Middle School, Marshall Elementary School, and Nuner Elementary School due to not following lesson plans, problems with classroom management and on some occasions you interjected reading religious-oriented materials into portions of your classroom presentation and that this type of performance would not be acceptable. I also informed you at that time, that you should consider it as your last warning and if you continued to interject religion into your classroom presentation we would no longer use you as a substitute teacher.

Also, you have been into our office during the 92-93 school year to meet with Mr. William Roberts, Director of Human Resource & Services and myself to discuss these concerns and on May 20, 1993 Mr. Ralph Komasinski, Acting Superintendent of Schools mailed you a letter which addressed these concerns.

I am sorry that you allowed this to happen again. I have no alternative but to inform you that we will no longer use you as a substitute teacher in our schools.

Sincerely,

/s/
John Hemphill
Assistant Director
Human Resource & Services

jh

cc: Dr. Virginia B. Calvin, Superintendent
Ralph Komasinski, Deputy Superintendent
Mai Pittman, Human Resource & Services

To Human Resources:

Re: Substitute Teacher

Attention - W. Roberts

On Friday, October 29, 1993, Mr. Peter Helland substituted in a fifth grade classroom at Tarkington school. Quite a stir was caused due to fact that Mr. Helland allow himself to get into a discussion of religion and evolutionary theories. Some students were upset by this discussion and came to me with the issue. After school I spoke with Mr. Helland about what had been reported to me. He explained that the discussion had occured during science class, and he was attempting to explain the evolving of man in relation to the dinosaur era. A teacher reported that Mr. Helland had brought a bible into the classroom. When asked about it he stated that "he was a Gideon, and therefore must have his Bible with him at all times. I explained to him that religion is not taught in our schools.

Due to concern and discussion among student, staff and one parent, I feel it would be a good idea for Mr. Helland not to return to Tarkington as a substitute teacher.

Respectfully Yours

Obera McDonald, Principal

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*ADMITTED IN GEORGIA, FLORIDA, ALABAMA AND CALIFORNIA
**ADMITTED IN NEW YORK, DISTRICT OF COLUMBIA AND MARYLAND
***ADMITTED IN MICHIGAN
†ADMITTED IN GEORGIA AND SOUTH CAROLINA
‡ADMITTED IN GEORGIA, ALABAMA, NEBRASKA AND SOUTH CAROLINA

November 13, 1996

Mr. Peter Helland
60289 U.S. 31 South
South Bend, IN 46614

RE: Peter Helland v. South Bend Community School Corporation – Petition for Writ of Certiorari

Dear Peter:

We hope you are doing well.

We have enclosed a copy of the petition that we filed on your behalf today. The U.S. Supreme Court has good reason to grant your petition as it would allow them to address the very important area of the constitutional rights of teachers in public school classrooms. This case has a particularly strong factual element (the November 10, 1993 termination letter) where the school clearly states that it terminated you in light of two events (your bringing a Bible into the classroom and your having a (brief) discussion on religion and evolution (in response to a student question)). As you can see from the petition, we believe the first falls within your free exercise of religion rights under the First Amendment while the second falls within your academic freedom rights under this same Amendment. In short, we have simply argued that you are entitled to believe the school did what it said it did (fired you for these activities) and that such reasons are illegal religious discrimination in employment under Title VII.

This is a strong case. The Supreme Court takes about 60 cases per year (out of about 6000 petitions). This is certainly a good one for the Court to explore important issues. We hope they take the case for the additional reason that you deserve some vindication for the shabby treatment you have received at the hands of the school and two disturbingly biased lower courts.

We will keep you informed on future developments in this case. The school now has 30 days to respond to your petition, if they wish. At that point, it's in the Court's hands.

Please contact us with any questions.

Sincerely,

Wendell R. Bird
Wendell R. Bird, P.C.
Bird & Associates, P.C.

Jeffrey L. Pombert
Bird & Associates, P.C.

Nov96Cor/CWAPeter

The law firm Bird & Associates in Atlanta has won one of the largest 25 verdicts in history, argued the lead Supreme Court case of 1986-87, and won a series of equal religious access cases. The firm also handles business litigation along with a corporate and estates practice. Wendell R. Bird is a Yale Law School graduate, a member of the prestigious American Law Institute, and the author of a *Yale Law Journal* article and other publications, and is listed in *Who's Who in America and Who's Who in the World*. Jeffrey L. Pombert is a University of Michigan Law School graduate and former Editor -in-chief of the *Michigan Law & Policy Review*.