IN THE SUPREME COURT OF OHIO

John D. Freshwater Appellant, v. MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al: Appellee.	:	CASE NO. 12-0613 On Appeal from the Fifth District Court of Appeals Case No. 2011-CA-000023

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOHN D. FRESHWATER

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This is a case of first impression in Ohio involving venerated principles of academic freedom and freedom from religious hostility. Its outcome holds significant implications for teachers' rights of free speech, free exercise, and equal protection under the First and Fourteenth Amendments to the United States Constitution. If the decisions below are left standing, local school boards will henceforth be empowered to terminate the employment of public school teachers who proficiently teach all required curriculum merely because they include additional, age-appropriate information to broaden their students' understanding of the curriculum.

This Court must intervene if students and teachers in America's public schools are to remain free to engage in open, respectful dialogue about competing academic theories and their respective merits.[1] Nowhere is such freedom more crucial than in a science classroom, where the asking and answering of questions is the very basis of the universally acknowledged "scientific method."

As the United States Supreme Court has instructed, "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." *Board of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico,* 457 U.S. 853, 868 (1982) (*quoting Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

> In sum, just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.

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[1] The Supreme Court of the United States has recently recognized a dearth of jurisprudence regarding the academic freedom issues at the very heart of this case and has acknowledged the need for development of parameters for academic freedom in the classroom context. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) (recognizing the issue but finding it unnecessary to rule on it in that case).

Id. Here, the Board has ignored these essential principles and attempted to transform students into "closed-circuit recipients of only that which the State chooses to communicate." *See Tinker v. Des Moines School Dist.*, 393 U.S. 507, 511 (1969). The Board's action in this regard is at once a matter of highest public concern and a grave violation of core First Amendment values.

Moreover, the academic freedom concern presented here is of heightened importance because it involves the banishment of academic theories from the classroom based solely on the fact that they are consistent with certain religious traditions. Thus, this case presents a situation in which the threat to academic freedom also implicates the First Amendment command of official neutrality toward religion.

Finally, if the decision below is left standing, public school teachers will henceforth be subject to a significant chilling effect on the public exercise or proclamation of their religious faith. This is so because local school boards will be permitted to impose a distinct, more intense form of scrutiny on the performance of religious teachers in the classroom than that imposed upon other faculty members. School authorities will be free to cite any outward indication of an employee's religious faith as grounds for termination. The existence of such a double standard is, at once, a matter of great public concern and an issue of hostility toward religion and religious individuals that implicates the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE AND FACTS

Despite objective evidence demonstrating Freshwater's consistent excellence as an eighth-grade science teacher for over 20 years, and despite his immaculate employment record, Freshwater came under intense scrutiny following a 2008 incident in which a common classroom

science experiment with a Tesla coil used safely by other teachers for over 20 years allegedly produced a cross-shaped mark on one student's arm.

While the Referee who investigated this incident ultimately determined that "speculation and imagination had pushed reality aside," (Referee's Report, p. 2), community hysteria resulting from rumors about Freshwater and the incident prompted the Board to launch a full-scale inquisition into Freshwater's teaching methods and performance. This sweeping critique focused entirely on trace evidence of Freshwater's religious faith which allegedly appeared in the classroom. On January 10, 2011, the Board adopted a Resolution terminating Freshwater's employment contract based upon a recommendation issued by Referee R. Lee Shepherd, Esq. on January 7, 2011 that Freshwater be terminated for "good and just cause."

The Board accepted the Referee's recommendation to terminate Freshwater on only two of the specified grounds:

1. Specified Ground No. 2 (a)-(g) (Failure to Adhere to Established Curriculum)

Referee Shepherd and the Board based their conclusion that Freshwater's teaching failed to adhere to established curriculum on the facts that: (1) he allowed his students to examine evidence both for and against evolution, (2) he developed a method of allowing students to point out passages in printed materials that could be questioned or debated by saying "here," and (3) some of the evidence against evolution was based upon the principles of Creationism and Intelligent Design (Report, p. 4). However, it is undisputed that Freshwater adjusted his teaching methods to the specific requests made known to him (i.e., by ceasing the use of certain handouts) each time he was asked to do so (Transcript, pp. 920, 983, 1287, 2244, 2281, 3730 and 3816).

Finally, Shepherd and the Board found that Freshwater had failed to adhere to the established curriculum by telling his students that "the Bible states that homosexuality is a sin, so

anyone who chooses to be a homosexual is a sinner." (Report, pp. 6-7). Freshwater denies ever making this or any similar statement, and evidence conclusively demonstrates that the single witness who allegedly heard Freshwater make this statement, Jim Stockdale, was not, in fact, even present in Freshwater's class on the day in question (See School Substitute Teacher Attendance Records, attached hereto as Exhibit A).

2. Specified Ground No. 4 (Disobedience of Orders).

As part of a course of "corrective action," administrators demanded that Freshwater remove a number of items from his classroom (Report, p.8). Middle School Principal William White testified that when he returned to Freshwater's classroom thereafter, "Almost everything had been removed, but there was still the Colin Powell poster . . . out of the school library he had checked out the Bible and had a book called *Jesus of Nazareth*." (Id., citing Transcript at 513-14). Freshwater testified that he did not recall being told to remove the patriotic poster of Colin Powell (Report, p. 10, citing Transcript, at 444). Freshwater and other teachers testified that they received the poster from school's office (Freshwater, Transcript, p. 4656; Teacher Lori Miller, Transcript, p. 2396; and Teacher Dino Deottore, Transcript, p. 1784). Moreover, testimony revealed that the Board had opened classroom walls to the non-disruptive expression of its teachers, and Board policies 2270 and 3218 confirm this (Transcript, pp. 300, 525, 1786, 2024, 2142, 2147, 2366 and 2828). In fact, it is undisputed that identical posters of Colin Powell were hanging in other classrooms and offices within the school district (Transcript, pp. 539, 2082, 2094, 2125 and 3601). Nonetheless, Referee Shepherd and the Board concluded that Freshwater's display of the same patriotic poster of Colin Powell displayed by others, and the presence in the classroom of materials checked out from the school library constituted "defiance." (Report, p. 9).

On these two grounds alone, the Board thus terminated Freshwater's employment. By Journal Entry on October 5, 2011, the Knox County Court of Common Pleas affirmed the Board's decision to terminate Freshwater without further hearing or analysis. On March 5, 2012, the Court of Appeals for the Fifth District affirmed this judgment, again without any analysis of the significant First Amendment and Fourteenth Amendment Equal Protection issues raised by John Freshwater.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The termination of a public school teacher's employment contract based on the teacher's use of academic freedom where the school board has not provided any clear indication as to the kinds of materials or teaching methods which are unacceptable cannot be legally justified, as it constitutes an impermissible violation of the rights of the teacher and his students to free speech and academic freedom under the First Amendment to the United States Constitution and a manifestation of hostility toward religion in violation of the First Amendment's Establishment Clause.

As an eighth-grade science teacher, Freshwater sought to encourage his students to differentiate between facts and theories, and to identify and discuss instances where textbook statements were subject to intellectual and scientific debate. Any reasonable person in a free society would identify this methodology, particularly in the context of a science classroom, as good teaching practice. In fact, Ohio's Academic Content Standards (Board Exhibit 37, pp. 215-216) and board policy 2240 titled *Controversial Issues* (Employee Exhibit 81) emphasized teaching and discussion in this regard. The fact that one competing theory on the formation of the universe and the beginning of life is consistent with the teachings of multiple major world religions simply does not justify interference with students' and teachers' academic freedom.

It was Freshwater's encouragement of students to open-mindedly consider competing theories—his very neutrality toward religion—that has led to the termination of his employment

contract. This raises significant First Amendment concerns that were completely ignored by the courts below. The Board's action in this regard is in violation of the First Amendment guarantee of free speech—and the subsidiary right of academic freedom—with respect to both Freshwater and his students. Additionally, the Board's action manifests a clear and distinct hostility toward the major world religions whose teachings are consistent with the alternative theories discussed in Freshwater's classes. Indeed, the *only* cited reason why the discussion of alternative theories was improper was the fact that these theories were consistent with certain religious views. This reasoning runs directly afoul of the First Amendment's Establishment Clause, which forbids government to manifest hostility toward religion just as surely as it forbids government to favor a particular religion.

It is well-established that the broad discretion of school boards to manage school affairs "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982). The First Amendment's guarantees are essential not only for fostering individual expression, but also for affording access to discussion, debate, and a diversity of ideas. *Id.* at 866 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). In furtherance of these principles, the United States Supreme Court has affirmatively held that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id.* (*quoting Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

While these concepts have been expounded in a variety of factual contexts, the High Court has extrapolated from them a specific, First Amendment-based right to academic freedom that applies in the public school context. *See, e.g., Pico, supra* (school board may not remove books from library based on disagreeable content); *Keyishian v. Board of Regents*, 385 U.S. 589

(1967) (state regulations prohibiting employment of subversive teachers violated First Amendment). The Court has explained:

> 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. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'

Keyishian, *supra*, at 603 (*quoting Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *United States v. Associated Press, D.C.*, 52 F.Supp. 362, 372 (1943)). And in *Pico*, *supra*, the Court stated simply and plainly, "Our Constitution does not permit the official suppression of *ideas*." 457 U.S. at 871 (emphasis in original).

The official suppression of ideas is precisely what the Board has undertaken in this case, and its action is thus utterly repugnant to the First Amendment and the Board's own policies. Freshwater's teaching method represents the very best of the profession: the encouragement of students to engage their own minds, to consider the merits of a variety of competing ideas, and to evaluate the information they receive. The Board's actions in stifling the vitality of this inquisitive learning environment must be reversed.

The Board's ostensible reliance upon the First Amendment's Establishment Clause to justify its action is similarly misguided and demands immediate and unequivocal correction. In *Epperson v. Arkansas*, where the United States Supreme Court struck down a state law forbidding the teaching of evolution, the Court explained:

> While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion. This

> prohibition is absolute. It forbids the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.
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> The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.

393 U.S. 97, 106-107 (1968) (internal citation omitted).

The Board's hostile reaction to the purely academic consideration of popularly held positions among the students and community which differ from that presented in the students' textbook constitutes an outright hostility to religion that departs from the requirement of religious neutrality and, by so doing, violates the Establishment Clause. *See also Epperson, supra*, at 104 (government may not be hostile to any religion; First Amendment mandates government neutrality between religion and nonreligion).

Proposition of Law No. II: The termination of a public school teacher's employment contract based on the mere presence of religious texts from the school's library and/or the display of a patriotic poster cannot be legally justified, as it constitutes an impermissible violation of the rights of a teacher and his students to free speech and academic freedom under the First Amendment to the United States Constitution and a manifestation of hostility toward religion in violation of the First Amendment's Establishment Clause.

In ordering Freshwater to remove all religious books and a patriotic poster from his classroom despite the existence of policies allowing teachers to maintain non-disruptive classroom displays, school officials again interfered with core First Amendment values. Even in "non-public forums" such as a public school classroom, school officials may not constitutionally engage in viewpoint-based discrimination. *See Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). Moreover, as outlined above, the Establishment Clause has been interpreted to preclude official orders or actions that manifest hostility toward religion. *See, e.g.*,

Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (The Constitution mandates accommodation of all religions and forbids hostility toward any) (*citing Zorach v. Clauson*, 343 U.S. 306, 314-15 (1952); *McCollum v. Board of Ed.*, 333 U.S. 203, 211 (1948)).

Officials' orders for Freshwater to remove the Bible (also an object kept by other teachers in other classrooms) and religious school library books such as *Jesus of Nazareth* are constitutionally problematic for the same reasons set forth above. In particular, the order to remove works of literature from a public school classroom casts an unconstitutional "pall of orthodoxy" upon the very halls of learning where future citizens are engaged in the pursuit of knowledge and diverse ideas. *See Pico*, *supra*, at 870 (*quoting Keyishian*, *supra*, at 603).

> **Proposition of Law No. III: Where the "investigation" and subsequent termination of a public school teacher by his employer are demonstrably motivated by the teacher's public expressions of his personal religious beliefs, said investigation and termination violate the teacher's First Amendment right to free speech and Fourteenth Amendment right to equal protection under the law.**

The circumstances under which the investigation of Freshwater was initiated, as well as the facts upon which Referee Shepherd and the Board based his termination, suggest that a discriminatory animus was a substantial motivation for the investigation and ultimate firing. Indeed, each and every cited basis for the decision was connected to the religious faith for which Freshwater had become infamous as a result of the rumors and speculation that stemmed from the sensationalized Tesla coil incident.

In cases such as this, where a number of essentially groundless charges are raised as a justification for terminating a person's employment after he or she exercises protected civil liberties, it is appropriate for courts to infer that the disciplinary action was improperly motivated. *See, e.g. Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 871 (Mo. Ct. App.

2009) (where flight attendant was terminated shortly after filing harassment complaint, jury could properly conclude that sudden proliferation of criticisms about job performance after employee lodged harassment complaint were pretexts for animus). Here, in light of Freshwater's illustrious reputation among his peers, exemplary student testing results, and immaculate employment record, it is difficult to conceive of any reason for the events that have transpired over the past three years apart from the presence of a discriminatory animus. Thus, Freshwater submits that his termination is in direct contravention of his rights under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The Board's actions constitute a violation of the First Amendment academic freedom rights of both Freshwater and his students, of the First Amendment's Establishment Clause, and of Freshwater's right to Equal Protection under the Fourteenth Amendment. Because of its significant implications for academic freedom in public schools and the continued vitality of teachers' First Amendment right to openly practice and discuss their religious faith, the case is one of monumental public concern. As no reviewing court has yet examined these critical civil liberty components of this case, Freshwater prays that this Court will grant his petition and undertake that essential analysis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2012, a copy of the foregoing brief was mailed by first-class mail, postage prepaid, to

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