IN THE
OHIO SUPREME COURT

Case No. 2012-0613

JOHN FRESHWATER,

Appellant,

v.

MOUNT VERNON CITY SCHOOL DISTRICT
BOARD OF EDUCATION,

Appellee.

On appeal from the Court of Appeals of Knox County, Ohio,
Fifth Appellate District

APPELLANT'S MERIT BRIEF

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STATEMENT OF FACTS

The Board hired John Freshwater as an eighth-grade science teacher in 1987. All available evidence demonstrates that Freshwater's teaching career was conspicuously marked by excellence (Report, 2-3; App. A26-7). This point is not disputed, nor could it be. On average, Freshwater's students performed at or above the state requirements, and their test scores often exceeded the state test scores of other eighth-grade science students (Id.). Freshwater was recognized by his peers on multiple occasions for his outstanding teaching skills (Id.). Throughout Freshwater's employment, he was given at least 20 performance evaluations, each of which was positive. Freshwater had never been disciplined before the events giving rise to the instant case.

During his teaching tenure, Freshwater frequently availed himself of his First Amendment rights to freely exercise his religion as a private citizen in the community. He kept a Bible on his desk, as did other teachers employed by the Board. He also served as the administration-appointed facilitator, monitor, and supervisor of the eighth-grade Fellowship of Christian Athletes (hereinafter "FCA") student group for over 15 years.

In January, 2008, the parents of one of Freshwater's students complained to the Board president about an incident in which an experiment with a Tesla coil in Freshwater's classroom allegedly left marks on the student's arm. The alleged mark was presented in the shape of an "x," or, in the perspective of the accusing family, a cross. No one but the reporting family observed the alleged mark, as the family took a picture of the student's arm instead of taking the child to a physician or showing the arm to any other potentially interested adult.[1] Unfortunately,

[1] No person who would have been required by state law to report incidents of child abuse reported this alleged injury to government authorities.

this isolated complaint became the subject of rumors and speculations that spread quickly throughout the community,[2] thus prompting the Board to begin an investigation of unprecedented proportion into Freshwater's entire teaching career. Ultimately,

> it became obvious that speculation and imagination had pushed reality aside. There was a plausible explanation for how and why the Tesla Coil had been used by John Freshwater. Further, and more crucial to a review of the Amended Resolution, the use of the Tesla Coil by John Freshwater did not seem to be a proper subject for the Amended Resolution. … The issue and incident was dealt with by the administration. That case was closed.

(Report, p. 2; App. A26).

However, based upon various statements that were made concerning Freshwater during the course of the investigation of that incident, including some that were later admitted to have been fabricated,[3] the Board passed a resolution on June 20, 2008, entitled "Intent to Consider the Termination of the Teaching Contract of John Freshwater." This resolution was based primarily upon complaints (which were not made known to Freshwater prior to the hearing) that Freshwater "consistently failed to adhere to the established curriculum…" Specifically, the Resolution alleged that Freshwater taught creationism and intelligent design in his science classes.

At Freshwater's request, a public hearing pursuant to O.R.C. § 3319.16 was held before Referee Shepherd. The Referee received testimony from over 80 witnesses and admitted approximately 350 exhibits into evidence. On January 7, 2011, the Referee issued a Report

[2] See Report, p. 2; App. A26 ("Due to the sensational and provocative nature of this specified ground, it and the facts and circumstances surrounding it became the focus of the curious, including those in the video, audio, and print media.").

[3] See reference to initial administrative hearing in *Freshwater v. Mount Vernon City Sch. Dist. Board of Educ.*, 2009 WL 4730597, *2 (S.D. Ohio 2009) ("At the hearing Weston testified that the statement in the report that she had received internal and external complaints for much of her eleven years of employment with the Board of Education was 'inaccurate.'") (App. A39).

recommending that the Board terminate Freshwater's contract for "good and just cause" (Report, p. 11-12; App. A35-6).

On January 10, 2011, the Board adopted the Referee's Report and terminated Freshwater (Resolution, 3; App. A22). The reasoning provided in the Board's Resolution tracked only two of the specified grounds outlined in the Referee's Report (Resolution, 3-4; App. A22-3):

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

Referee Shepherd concluded that the evidence did not establish that Freshwater had failed to adequately teach the mandatory subject areas for his classes (Report, 3; App. A27). In fact, Shepherd pointed out that Freshwater's students "learned and tested well with regards to the mandatory subject areas" (Id.). However, Shepherd perceived that Freshwater "was determined to inject his personal religious beliefs into his plan and pattern of instruction of his students," thereby violating Board policies that "Students should receive unbiased instruction in the schools, so they may privately accept or reject the knowledge thus gained, in accordance with their own religious tenets." (Id.).

The facts upon which Shepherd and the Board based their conclusion that Freshwater's teaching violated this policy were: (1) that he allowed his students to examine evidence both for and against evolution, (2) that 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) that some of the evidence against evolution was based upon the principles of Creationism and Intelligent Design (Report, 4; App. A28). 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) when he was asked to do so (Tr. 920, 983, 1287, 2244, 2281, 3730, 3816; Supp. 24, 31, 58, 60, 77, 81).

Finally, Shepherd and the Board found that Freshwater had failed to adhere to 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, 7; App. A31). Freshwater denies ever making this or any similar statement, and evidence recently obtained proves conclusively that the single witness who alleges to have heard Freshwater make this statement, Jim Stockdale, was not, in fact, even present in Freshwater's class during the Fall of 2006, and thus he could not have witnessed the alleged statement (See Supp. 103-13).[4] In light of the facts that Freshwater has consistently and vehemently denied making the statement, and that the only witness who alleges to have heard the statement has been discredited, it cannot form a legitimate basis for Freshwater's termination.

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

According to Shepherd's Report, school administrators "began implementing a plan of corrective action in hopes of forestalling legal action against the Mount Vernon Schools." (Report, 9; App. A33). As part of this "corrective action," administrators demanded that Freshwater remove a number of items from his classroom (Id.).

Middle School Principal William White testified that following the communication of these instructions, when he returned to Freshwater's classroom, "Almost everything had been

[4] Stockdale alleged that on the day in question, in the Fall of 2006, he was substituting for Kerri Mahan, the inclusion (or special education) teacher for Freshwater's eighth-grade science class (Report, p. 7; App. A31). But an analysis of school records conclusively demonstrates that Stockdale did not, in fact, substitute for Mahan or any other inclusion teacher who could have been in Freshwater's class at any time during the Fall of 2006, and thus would have had no occasion to witness the statement he has accused Freshwater of making. The attendance records contained in the Supplement show that Stockdale never substituted for Mahan, and counsel's spreadsheet analysis shows that there was only one day when Stockdale was in the building, and both Mahan and Thompson were absent (half day each, 10/27/2006; there is no indication that the half-day absences were simultaneous.). Teacher Marth (for whom Stockdale substituted that day) was out for the entire day (half "professional," half "personal"). Substituting for Marth's classes would not locate him in Freshwater's classroom at any time.

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." (Report, 11; App. A35 (citing Tr. 513-14; Supp. 21)). Freshwater testified that he did not recall being told to remove the patriotic poster of Colin Powell (Tr. 444; Supp. 12). More importantly, it is undisputed that the identical patriotic poster was on display in other rooms throughout the school building (Transcript, pp. 539, 2082, 2094, 2125 and 3601; Supp. 23, 47, 48, 50, 71). In fact, the teachers received the poster from the school's office (Tr. 1784, 2396, 4656; Supp. 39, 62, 92). The school board president testified that he did not consider the poster, in and of itself, to be religious in nature (Tr. 5529, 5537; Supp. 94, 95). Other witnesses agreed with the board president in determining the poster was not religious in nature (Tr. 3822, 3911; Supp. 82, 83). Nonetheless, Referee Shepherd and the Board concluded that this failure to remove the patriotic poster of Colin Powell, and the presence in the classroom of materials checked out from the school library constituted "defiance" (Report, 10; App. A34).

Based on the foregoing analysis of these issues, Referee Shepherd concluded that Freshwater had "repeatedly violated the Establishment Clause" and that under either a clear and convincing evidence standard or a preponderance of the evidence standard, Freshwater's conduct represented a "fairly serious matter," and was a valid basis for his termination based upon "good and just cause" (Id. at 11-12; App. A35-36). In adopting only two of the grounds for termination, Referee Shepherd specifically noted that he had not determined whether either would be sufficient in and of itself for termination (Id.). In its Resolution of January 10, 2011, the Board adopted the Referee's Report, finding good and just cause to terminate Freshwater's employment on the basis of the aforementioned grounds.

ARGUMENT

I. Proposition of Law 1 – The termination of a public school teacher's employment based on the content or viewpoint of his curriculum-related academic discussions with students and use of supplemental academic materials violates the teacher's and students' First Amendment rights to academic freedom.

A. Freshwater's teaching methods were good practices and were in accordance with the Board's policies.

As an eighth-grade science teacher, Freshwater sought to encourage his students to differentiate between facts and theories or hypotheses, to question and test theories and hypotheses, and to identify and discuss instances where textbook statements were subject to intellectual and scientific debate. This teaching methodology—fostering critical thinking and the challenging and evaluation of a variety of postulated theories—is particularly appropriate in a science classroom.[5] Moreover, Ohio's Academic Content Standards (Board Exhibit 37, p. 215-216; App. A46-47) and Board Policy 2240, "Controversial Issues" emphasized teaching and discussion in this regard:

> The Board of Education believes that the consideration of controversial issues has a legitimate place in the instructional program of the schools.
>
> Properly introduced and conducted, the consideration of such issues can help students learn to identify important issues, explore fully and fairly all sides of an issue, weigh carefully the values and factors involved, and develop techniques for formulating and evaluating positions.

[5] For instance, Massachusetts Institute of Technology (MIT) explains on its website, "In addition to a rigorous introduction to the sciences, these [course] requirements are intended to stimulate and challenge each student to review critically his or her knowledge, and to explore alternative conceptual and mathematical formulations which may provide better explanations of natural phenomena or may lead to better applications of technology. The development of critical and constructive approaches to both theory and practice in science, engineering, and other professions is a central objective of the Institute's educational programs." (http://web.mit.edu/catalog/overv.chap3-gir.html, last viewed on August 15, 2012).

> For purposes of this policy, a controversial issue is a topic on which opposing points of view have been promulgated by responsible opinion.
>
> The Board will permit the introduction and proper educational use of controversial issues provided that their use in the instructional program:
>
> A. is related to the instructional goals of the course of study and level of maturity of the students;
>
> B. does not tend to indoctrinate or persuade students to a particular point of view;
>
> C. encourages open-mindedness and is conducted in a spirit of scholarly inquiry.

(Employee Exhibit 81; App. A51-53).

The Board has claimed that Freshwater's teaching methods violated the District Bylaw/Policy regarding "Religion in the Curriculum," which states, "Instructional activities shall not be permitted to advance or inhibit any particular religion," (App. A48-50). However, Freshwater cannot fairly be said to have advanced or inhibited "any particular religion" by merely discussing a widely-known origins of life theory for purposes of exploring its scientific value as opposed to its religious or anti-religious implications.

As Referee Shepherd noted, the District Bylaws/Policies developed specifically for science teachers states that "Students should receive unbiased instruction in the schools, so they may privately accept or reject the knowledge thus gained, in accordance with their own religious tenets" (Id). This is exactly the type of instruction Freshwater provided. In light of the widely known, genuine intellectual debate that exists regarding the relative plausibility and weaknesses of evolution and intelligent design, providing students with "unbiased instruction" might well be said to *require* the juxtaposition of these two major theories, but *a fortiori* it cannot be said to forbid it. Referee Shepherd aptly noted that Freshwater had "instruct[ed] his eighth grade

students in such a way that they were examining evidence both for and against evolution" (Report, p. 4; App. A28). In light of the fact that the two competing theories are considered by many scientists to be mutually exclusive, this is the essence of "unbiased instruction" for this particular curriculum.

Shepherd's conclusion that Freshwater improperly "injected his beliefs as associated with his own religious tenets into his science instruction" (Id.) appears to be based solely on his presumption that one of the two major theories was consistent with Freshwater's own personal belief system. This smacks of unfairness and religious hostility. Freshwater submits that his encouraging students to think critically about scientific theories, as directed by Ohio's Academic Content Standards and Board policies referenced above, cannot be rendered illegal based solely on the speculation that Freshwater's own personal beliefs are aligned with one of the competing theories considered. Freshwater did not engage in religious proselytization—he discussed a scientific theory that happens to be consistent with the teachings of multiple major world religions.

While Referee Shepherd and the Board also took issue with Freshwater's provision of handouts to supplement his use of the textbook, evidence adduced at trial clearly demonstrated that teachers were given wide latitude to use outside materials in conjunction with the curriculum, and had been encouraged to do so (Tr. 1502, 1815, 1934, 1946, 2018, 2108, 2425, 2597, 2855, 2917, 3979; Supp. 35, 41-44, 49, 63, 64, 67, 69, 84). No pre-authorization was ever necessary, nor was there a protocol in place to obtain such authorization (Tr. 1501, 2058, 2265; Supp. 34, 46, 59). The school principal admitted that Freshwater's use of the handout was for legitimate purposes of scientific instruction. (Tr. 3626-29; Supp. 73-76). Moreover, on the two occasions when school officials raised objections to materials being used by Freshwater, he

immediately ceased using them (Tr. 920, 983, 1287, 2244, 2281, 3730, 3816; Supp. 24, 28, 31, 58, 60, 77, 81). Freshwater never received any adverse notations in his personnel file to warn him that there was any problem with his teaching methodology in this regard or any other.

Referee Shepherd and the Board also found fault with Freshwater's development of means by which students could independently call attention to instances in printed materials where scientific theories or estimates appeared to the students to be portrayed as indisputable facts (Report, p. 4; App., A27-28). Freshwater encouraged students to say the word, "here," aloud as a way of briefly communicating their identification of one of these instances (Id.). This methodology was consistent with the state's Academic Content Standards, which directed eighth-grade science teachers to "explain why it is important to examine data objectively and not let bias affect observations" (Board Exhibit 37, p. 215; App., A47). Thus, the Board's termination of Freshwater's employment for the reasons stated is a direct contradiction of its own governing policies and standards, which provide the only official guidance from the Board to Freshwater on these issues.

B. Freshwater's termination based on the Board's stated reasons is a form of government censorship and a violation of the rights of academic freedom enjoyed by Freshwater and his students.

By forbidding students and teachers to be critical of any ideas contained in classroom curriculum, the Board has not only unfairly terminated Freshwater's employment, but has engaged in a course of censorship that is repugnant to the bedrock principles of the First Amendment. 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, 863-64 (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. The Court has made it clear that there are constitutional limits on the State's power even to control the curriculum within the schools, and has noted that the fact that boards are charged with educating the young for citizenship "is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Pico*, 457 U.S. 861, 864-65 (*quoting West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

The Supreme Court has demonstrated commitment to the concept of academic freedom since at least as early as 1967, when it held in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), that state regulations prohibiting employment of "subversive" teachers violated the First Amendment. The Court 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)).

More recently, in *Pico*, the Supreme Court considered a case in which a local board of education removed certain books from its high school and junior high school libraries based on its belief that they were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy." 457 U.S. at 857. In describing the nature of the rights implicated by the removal of the books, the Court discussed precedents that have: focused on the First Amendment's role in "affording the public access to discussion, debate, and the dissemination of information and ideas," recognized that the State may not "contract the spectrum of available knowledge," and protected "the right to receive information and ideas." *Id.* at 866-67 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); and *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). The Court found that the right to transmit and receive ideas is inherent in the First Amendment's explicit protections of free speech and free press. *Id.* at 867. *See also Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting) ("[P]ublic debate must not only be unfettered; it must be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.").

The Court in *Pico* went on to recognize that even young students are important beneficiaries of academic freedom, because "such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Id.* at 868. The Court concluded that if the school board had intended by its removal decision to deny access to ideas with which it disagreed, then the decision violated the Constitution. *Id.* at 871

The protection of academic freedom requires a strict application of First Amendment principles in the context of the classroom or teacher-to-student academic discussions. In this educational setting, the Court has appropriately signaled that government censorship will not be tolerated. As the Court stated quite simply in *Pico*, "Our Constitution does not permit the official suppression of *ideas*." *Id.* 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. 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.

While the caselaw on the issue of teaching evolution or creation science may appear, at first glance, to favor the Board's position (that creation science/intelligent design may not be taught in public schools), the better view of the topically relevant cases is from a higher level of generality; the lesson to be gleaned is of a constitutional nature rather than a public policy concern, and the lesson is that the state may not censor ideas from the classroom. Indeed, this interpretation is the only way to harmonize the cases addressing evolution and creation science with the well-established First Amendment prohibition of governmental hostility toward religion and the Court's explicit approval of including religious content in secular educational programs of public schools. *See Epperson v. Arkansas*, *infra*. If discussions of evolution may not be banned from a science classroom, then neither may discussions of creationism be banned.

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.
>
> ***
>
> 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).

In both *Epperson* and *Edwards v. Aguillard*, 482 U.S. 578 (1987), the two seminal United States Supreme Court cases addressing laws that focused on the teaching of evolution or creation science, the Court found fault with the laws because it understood them to impose mandates upon school curriculum for a religious purpose. In *Epperson*, the mandate prohibited the teaching of evolution, and in *Edwards*, the law required that creation science be taught along with evolution.

The lesson these cases teach is not that teachers and students may not discuss theories of creation science in public schools, but rather that government officials may not authoritatively mandate or prohibit, for ideological reasons, the intellectual pursuit of any particular academic theory. Academic freedom is the constitutional norm; government encroachment upon it must be enjoined. In *Edwards*, for instance, the Court lamented that "under the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so." 482 U.S. at 588-89. *See also id.*, 482 U.S. at 634 ("The people of Louisiana, including those who are Christian fundamentalists, are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools, just as Mr. Scopes was entitled to present whatever scientific evidence there was for it.") (Scalia, J., dissenting). The Court clearly stands on the side of true pursuit of academic freedom, whereby teachers and

students are free to view the undeniable focus of considerable scientific and societal debate from a variety of perspectives.

In terminating a teacher for allowing students to consider the widely-known alternative theory to evolution, the Board has turned the principle of law the Supreme Court announced in *Epperson* and *Edwards* on its head. For the High Court is not concerned with which scientific theories are actually taught to students in public schools, but rather in ensuring that students are free from the form of government indoctrination that results from the censorship or suppression of ideas. This is surely just as great of a concern (if not greater, in light of our nation's rich history of "benevolent neutrality" toward religion) where the indoctrination in question is anti-religious in sentiment as where it is religious. *See, e.g.*, *Epperson*, *supra*, at 104 (government may not be hostile to any religion; First Amendment mandates government neutrality between religion and nonreligion); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (official hostility toward religion forbidden); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (government may not inhibit religion).

Epperson includes an important reminder that even full-on study of religion and of the Bible is not off-limits in the public school system where it forms part of a secular program of education as opposed to the inculcation of a religious creed. 393 U.S. at 106. It would be absurd, then, to assert that the First Amendment would countenance—much less require—a Board's demand that teachers chisel from their lectures any idea that bears a relationship to some religion. To the extent that it can be considered to be a discussion of religion at all, a discussion of the theory of creationism or intelligent design, voluntarily undertaken by a science teacher to round out the mandated discussion of evolution and to allow students to examine the merits and

weaknesses of each for themselves, is unquestionably "part of a secular program of education," and it is therefore protected under the First Amendment.

The all-important distinction, heretofore ignored in Freshwater's case, is between a school board policy or state law *mandating* that a certain subject or viewpoint be taught or not taught, on the one hand, and an individual teacher's exercise of academic freedom to discuss curriculum-related ideas and theories with students in the classroom, on the other. The former represents official indoctrination: an impediment to academic freedom that, under some circumstances, courts may find to violate the Establishment Clause. The latter, however, is a picture of academic freedom in action: a teacher striving to present students with a well-rounded education on topics within the curriculum.

At least one United States Circuit Court of Appeals has taken the appropriate cue from these Supreme Court's cases dealing with academic freedom. In *Zykan v. Warsaw Community Sch. Corp.*, 631 F.2d 1300 (7th Cir. 1980), the Seventh Circuit explained:

> In the classroom there are recognized limits on local control of educational matters. School boards are for example not free to fire teachers for every random comment in the classroom. In the case of the students themselves, local school boards must respect certain strictures that for example bar them from insisting upon instruction in a religiously-inspired dogma to the exclusion of all other points of view, 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. At the very least, academic freedom at the secondary school level precludes a local board from imposing "a pall of orthodoxy" on the offerings of the classroom, which might either implicate the state in the propagation of an identifiable religious creed or otherwise impair permanently the student's ability to investigate matters that arise in the natural course of intellectual inquiry.

631 F.2d at 1305-6 (citations omitted). The court went on to reject the plaintiff students' claim that their academic freedom rights had been violated, but it did so on the basis that there was no indication that the actions by school officials of which the students complained "ha[d] been

guided by an interest in imposing some religious or scientific orthodoxy or a desire to eliminate a particular kind of inquiry generally." *Id.* at 1306. In this case, on the other hand, the course of action taken against Freshwater by school officials and the Board can be described, precisely, as "a desire to eliminate a particular kind of inquiry generally"—the line of inquiry that questions the factual basis of the theory of evolution and explores alternative theories.

Academic freedom would be an empty platitude if it provided no protection from censorship of ideas that have religious connections or implications. The impact of the loss of academic freedom on the development of science, technology, and the pursuit of learning in general would be profound and tragic. Consider that while today's science class may discuss modern theories of origins of life first espoused in the Bible (and censored on that basis alone), yesterday's classes considered theories about the Hydrologic Cycle or the spherical Earth—also enshrined in religious texts long before accepted by science.[6] The advancement of knowledge demands that students and teachers be free to consider, discuss and debate ideas of all kinds rather than forced to discard any due to the government's disdain for its source.

Finally, even if the Board could demonstrate the absolute falsity of creation science/intelligent design, it would be difficult for anyone to argue that there is no value in students merely discussing and understanding the basics of the theory and how it differs from evolution. Whatever its origins, creation science/intelligent design is a theory that continues to be believed and defended by numerous highly respected, internationally renowned scientists as well as countless laypersons. *See Edwards*, 482 U.S. at 622 (Scalia, J., dissenting) (citing witness testimony). Many scientists believe that the body of scientific evidence supporting

[6] The Hydrologic Cycle is said to be described in the Bible (Job 36:27-28; Ecclesiastes 11:3: Job 26:8), as is the fact of the Earth's spherical shape (Isaiah 40:22; Job 26:7). See http://www.godlessgeeks.com/LINKS/ScientificBible.htm (last visited August 17, 2012).

creation science is *stronger* than that supporting evolution. *Id.* at 623 (Scalia, J., dissenting) (citing evidence). *See also Epperson*, 393 U.S. at 114 ("Certainly, the Darwinian theory, precisely like the Genesis story of the creation of man, is not above challenge. In fact the Darwinian theory has not merely been criticized by religionists but by scientists…") (Black, J., concurring). Students exposed to creation science gain a better understanding of the state of scientific evidence about the origins of life. *Id.* (Scalia, J., dissenting) (citing evidence).

If academic freedom is to exist in America's public schools, then this Court must recognize that the Board's termination of Freshwater based upon his discussion of scientific theories with his students constitutes censorship and violates the First Amendment.

II. Proposition of Law II - The termination of a public school teacher's employment based on the fact that his academic discussions with students and supplemental academic materials include ideas that are consistent with multiple major world religions manifests hostility toward religion in violation of the Establishment Clause.

The First Amendment's Establishment Clause does not justify, and in fact forbids, the Board's actions. The Board's ostensible reliance upon the First Amendment's Establishment Clause to justify its actions is misguided and demands immediate and unequivocal correction.

The record of this case is utterly devoid of any evidence that Freshwater's academic discussions with students about alternative origins of life theories were used in any way to advance the creed of any religion. Rather, the theories in question were uniformly evaluated for their scientific and logical merits (Tr. 3625-3629, 3767; Supp. 72-76, 78). However genuine it may be, the Board's apparent belief that creationism and/or intelligent design theories have no scientific value cannot be accepted. The theories suggest that the physical universe and life within it appeared suddenly and have not changed substantially since appearing. *See Edwards v.*

Aguillard, 482 U.S. 578, 612 (Scalia, J., dissenting) (citing expert affidavits). According to experts, the concepts are strictly scientific and can be presented without religious reference. *Id.*

Nonetheless, because widely-accepted theories on the origins of life are consistent with the views of multiple major world religions, Referee Shepherd and the Board concluded that classroom discussion of these alternative theories constitutes a violation of the First Amendment's Establishment Clause (Report, 12; App. A36). This conclusion demonstrates a fundamental misunderstanding of the First Amendment that, in fact, turns this foundational freedom on its head.

The action of a government official does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions." *Harris v. McRae*, 448 U.S. 297, 319 (1980) (*quoting McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). Thus, 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 transform its classroom discussion into a violation of the First Amendment's Establishment Clause. Any contrary policy would lead to an absurd and unworkable result that would transform local school boards and administrators into religion police, as they would be forced to parse each classroom's curriculum and censor it of any ideas consistent with the particular teacher's own belief system.

The course upon which the Board has set itself is not one of *avoiding* an Establishment Clause violation, but rather, is one of sure collision with the Clause's demand of religious neutrality. *See Epperson, supra*, at 104 (government may not be hostile to any religion; First Amendment mandates government neutrality between religion and nonreligion); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (official hostility toward religion forbidden); *Committee for*

Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973) (government may not inhibit religion).

Not only does the Board's censorship of creation science based solely on its consistency with major world religions demonstrate hostility toward religion, it also demonstrates a favoritism of the religion of "secular humanism." *See Torcaso v. Watkins*, 367 U.S. 488, 495, n. 11 (1961) (listing "Secular Humanism" as a religion along with Buddhism, Taoism, and Ethical Culture). Evolution is a central tenet of secular humanism. See *Humanist Manifesto I, First, Second* and *Third* (1933), available at www.americanhumanist.org ("Religious humanists regard the universe as self-existing and not created." … "Humanism believes that man is a part of nature and that he has emerged as a result of a continuous process.").

The idea that evolution is a religiously-neutral theory is a myth. Just as the theory of creation or intelligent design depends on the unproven idea of an intelligent designer or creator, so the theory of evolution depends on the unexplained and unproven idea that inanimate materials suddenly became animated. The Board's course of action is far more problematic under the First Amendment than a policy of academic freedom, whereby individual teachers and their students remain free to consider and discuss a variety of perspectives on topics in the school's curriculum, free from state-mandated indoctrination in any.

III. Proposition of Law III - The termination of a public school teacher's employment based on the presence of religious texts in the classroom and the display of patriotic posters violates the teacher's and students' First Amendment rights to academic freedom and manifests hostility toward religion in violation of the Establishment Clause.

A. Freshwater's classroom was in compliance with Board policy.

Freshwater's termination rested, in part, on his failure to remove three items from his

classroom upon being directed to "remove or discontinue the display of all religious articles in his classroom, including all posters of a religious nature." (Resolution, 4; App. A23). These items included a patriotic Colin Powell poster, the *Oxford Bible* from the school's library, and a book entitled *Jesus of Nazareth*, also from the school's library. The fact that these items were not considered to be harmful in other classrooms is demonstrated by the fact that each one of them was maintained elsewhere in the school without objection, and that teachers received the posters from the school office (Tr. 1784, 2396, 4656; Supp. 39, 62, 92).

Testimony revealed that up until the Board sought to terminate Freshwater, the Board had freely allowed teachers to choose the décor of their classrooms, including the display of posters and artwork that suited their own preferences (Tr. 298-300, 525-26, 539-40, 1786, 2024, 2142, 2147, 2366 and 2828; App. A3, A22-3, A40, A45, A51-2; A61, A66). The Board has not pointed to any policy prohibiting teachers from decorating their rooms in any particular fashion. Furthermore, state law provides:

> No board of education shall prohibit a classroom teacher from providing in the teacher's classroom reasonable periods of time for activities of a moral, philosophical, or patriotic theme.

ORC §3313.601.

Ohio law thus goes beyond allowing the mere *display* of patriotic pictures (which is all Freshwater has been accused of doing); it allows teachers to actually use instructional time to conduct *activities* to emphasize moral, philosophical, or patriotic themes. Freshwater and multiple other Board employees chose to hang this particular poster because of its patriotic value. The Board is out of sync with the moral fiber of our nation, generally, and in violation of Ohio State law, specifically, in using the mere presence of this benign poster as an excuse for terminating Freshwater's employment.

Freshwater's termination for failing to remove the Bible (also an object kept by other teachers in other classrooms) and *Jesus of Nazareth* are similarly bizarre. Bibles were regularly maintained by other teachers in their classrooms (Tr. 523-25; Supp., 22). The *Jesus of Nazareth* book and *Oxford Bible* were holdings of the school's own library. Freshwater's possession of these items did not violate any Board policy, as indicated by the fact that other faculty members have not been disciplined for possessing them.

B. Freshwater's termination based on the Board's stated reasons is a form of government censorship and a violation of the rights of academic freedom enjoyed by Freshwater and his students.

Where teachers are generally free to possess books and display posters in their classrooms, the termination of one teacher for possessing books and displaying a poster with a putative religious viewpoint 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). As outlined in Proposition of Law I, above, the academic freedom inherent in the First Amendment forbids the official suppression of ideas in the classroom. *Pico, supra,* at 871. Freshwater submits that any official order commanding the removal from a classroom of a seminal work of literature such as the *Bible*, or any other book for that matter, based on the content of its ideas, is particularly appalling and deserving of this Court's outrage and opprobrium.

C. The First Amendment's Establishment Clause does not justify, and in fact forbids, the Board's actions.

It is abundantly clear that the Board and the administrative officials acting under its authority sought to sterilize Freshwater's classroom of any trace of religion. This effort may

well have been genuinely based on a desire to comply with the First Amendment's Establishment Clause, but, in fact, it had the opposite effect.

The Board has neither in practice nor in theory suggested that the display of the Colin Powell posters or the presence of Bibles and books about Jesus inside the school, generally, violate the Establishment Clause. Nor could it effectively do so in light of its allowance of these items in other parts of the school. The Board appears, then, to be postulating a theory that the items trigger Establishment Clause concerns *only where they happen to coincide with a particular teacher's personal beliefs*.

As argued earlier, if it is to be applied evenhandedly, this type of *de facto* policy requires the Board and its agents to become religion police, to familiarize themselves with the particular belief systems of each teacher and then to scrutinize the teacher's chosen décor as well as his or her classroom library to ensure that it is sterile of any religiously complementary chattel. One can only imagine the nonsensical results of such a system: Hindu health teachers barred from displaying posters depicting cows or keeping books extolling the merits of vegetarianism; Muslim history teachers precluded from keeping books about Mohammed in their classroom libraries.

As explained in Proposition of Law II, above, the central demand of the Establishment Clause is government neutrality. *See Epperson, supra*, at 104 (government may not be hostile to any religion; First Amendment mandates government neutrality between religion and nonreligion); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (official hostility toward religion forbidden); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (government may not inhibit religion). The Board's order for Freshwater to remove these few, benign items from his classroom, particularly where the same items were permitted in

other rooms within the building, can only be viewed as governmental hostility toward religion, or at least toward religious teachers.

The Board cannot argue that its purpose was to promote neutrality toward religion in light of the fact that its official policies—permitting teachers' non-disruptive classroom displays—already were policies of neutrality. *See Edwards*, *supra*, at 586, 588-89 (noting that pre-existing state law already allowed schools to teach any scientific theory, thus fulfilling the alleged "academic freedom" purposes of the law). Rather, it is apparent that the Board's purpose was to ensure that religious items were banned entirely from Freshwater's classroom. The effect was a figurative pronouncement to the entire school community that religious teachers are subject to intense scrutiny and that classrooms (or at least those of religious teachers) must be sterilized of religious references. This type of official disfavoring and inhibiting of religion, and the niggling entanglement required to effectuate it, violate the First Amendment's Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (law must have a secular purpose, a primary effect that neither advances nor inhibits religion, and must not foster an excessive entanglement with religion).

CONCLUSION

The Board's actions are nothing less than the censorship of ideas. As such, they eviscerate the First Amendment academic freedom rights of Freshwater and his students, and they transgress the neutrality requirement of the Establishment Clause. 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." *Pico*, at 868 (*quoting Keyishian*, at 603.

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). By virtue of the First Amendment, this is not permitted.

Freshwater prays that this Court reverse the decision of the court below upholding the Board's Resolution and thereby vindicate the First Amendment rights of public school teachers and students; award him monetary damages in an amount to be determined as a result of his wrongful termination and the interference with his rights under the First and Fourteenth Amendments to the United States Constitution; order that the Board reinstate him to his teaching position; and order such other relief as the Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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APPENDIX