ORIGINAL

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 REPLY BRIEF

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A. The rights Freshwater asserts here are much narrower than those claimed in the precedents the Board cites, so the analysis of this case must differ accordingly.

Freshwater does not claim a generalized First Amendment right to free speech in the classroom or to determine classroom curriculum. Rather, he seeks a modicum of protection pursuant to academic freedom and free speech principles under the First Amendment where his teaching methods and speech were consistent with Board policy but singled out for viewpoint-based censorship. This is a case of first impression,[1] and no known precedent provides a useful framework for its analysis.

1. *Evans-Marshall v. Board of Education of the Tipp City Exempted Village School District*, 624 F.3d 332 (6th Cir. 2010) and other "teacher speech" cases are distinguishable on the basis of the "rights" asserted in those cases.

Evans-Marshall must be distinguished from this case because there, the teacher asserted—in a civil rights lawsuit against the school—a broad First Amendment right "to select books and methods of instruction for use in the classroom without interference from public officials." 624 F.3d at 336. Freshwater, on the other hand, asserts First Amendment *protection* from being terminated based on teaching methods, materials, and possession of items that fully complied with Board policy but were later used as grounds for dismissal because of their alleged religious viewpoint. He asserts the First Amendment as a shield rather than a sword.

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[1] Freshwater knows of no similar case ever considered by this Court, and with the possible exception of *Mayer v. Monroe County Comm. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007) (discussed *infra*), this may be a case of first impression for any court.

Freshwater has never, at any time, refused to comply with any clear directive of the Board or administrators as to how he should teach his class, what topics could be discussed in the classroom, or what items could be displayed, and he has not challenged the Board's authority to give these orders.[2] This fact, and the correspondingly limited, defensive First Amendment protection Freshwater claims, distinguishes this case from the host of "teacher speech" cases cited by the Board. *See, e.g., Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011) (teacher challenged school's order that he remove certain banners from classroom); *Borden v. School Dist. of Tp. of East Brunswick*, 523 F.3d 153 (3d Cir. 2008) (coach challenged policy prohibiting teacher participation in student prayers); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (professor challenged university order for him to cease religious discussions in class); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (teacher claimed school's order for him to remove items from classroom violated First Amendment); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990) (teacher challenged school's prohibition against teaching alternatives to evolution).

The most similar case to this one in terms of the nature of the rights asserted is *Mayer v. Monroe County Comm. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007). In that case, a probationary teacher alleged (despite the existence of a plethora of performance issues unrelated to expression) that the school board chose not to renew her contract due to her expression of political views on the war in Iraq to a fifth-grade class during a discussion of current events. She claimed that this violated her First Amendment rights.

The Seventh Circuit upheld the school's action, noting that the teacher had been instructed that she could teach her students about the controversy surrounding the war, drawing

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[2] See Section B, *infra*, for a full discussion of this point with citations to the Record.

upon a variety of perspectives, but *she could not give her personal opinions on the subject. Id.*, at 480.[3] This distinguishes *Mayer* from the case at bar. First, Freshwater has never defied the instructions of his superiors, but in fact has, at all times, complied with Board directives and policies. Second, while the reasons for Freshwater's termination did not center on his rare statements of personal opinions, when he did give them he fully complied with the Board's policy specifically permitting teachers to offer their opinions as long as the teacher made it clear that this is what he or she was doing (App. A52)[4].

Freshwater does not claim a right to control classroom curriculum, or even classroom décor. He has not raised a First Amendment challenge to any orders or directives given to him by school officials. Freshwater claims only that First Amendment free speech and academic freedom principles protect him from termination flowing from viewpoint-based censorship where he has complied with all Board policies and all clear directives from his superiors. The analysis applied in *Evans-Marshall* and other "teacher speech" cases do not, therefore, provide a useful framework for this case.

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[3] Freshwater questions the court's reasoning in *Mayer* because, according to the district court, the instruction that teachers refrain from stating personal opinions in class was not given until *after* Mayer offered hers to the class. *See* 2006 WL 693555 (S.D. Ind. 2006). However, the Seventh Circuit framed the issue as whether teachers "have a constitutional right to determine what they say in class..." or whether instead they "must hew to the approach prescribed by principals." 474 F.3d at 479. So the court's framing of the issues makes the decision less useful as guidance for this Court than it otherwise might have been. Similarly, while the facts of *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998), might have been framed in such a way as to harmonize the issue with that presented here, the Fourth Circuit instead framed the question presented as "whether a public high school teacher has a First Amendment right to participate in the makeup of the school curriculum through the selection and production of a play." *Id.*, at 366. The court decided that issue in the negative.

[4] Unless otherwise noted, all references to the Appendix ("App.") or Supplement ("Supp.") are to Freshwater's Appendix and/or Supplement.

2. *Garcetti v. Ceballos*, 547 U.S. 410 (2006) should not apply in this context.

Under *Garcetti*, a government employee's speech is not protected by the First Amendment if it is spoken "pursuant to" his or her official duties. 547 U.S. at 421. The Board would have this Court apply this analysis here as the Sixth Circuit did in *Evans-Marshall*. However, if *Garcetti* applied to public schoolteachers' speech in the classroom, it provides school officials *carte blanche* to terminate the employment of a teacher for *any* classroom comment—however fleeting or insignificant, however consistent with the actual curriculum—that they dislike for any reason. This is because, as acknowledged by the Sixth Circuit in *Evans-Marshall*, a teacher's classroom speech is *always* "pursuant to [his or her] official duties." *See id.*, 340-42. The Supreme Court recognized this as a potential problem, explicitly noting that the *Garcetti* analysis may not apply to a case such as this one:

> Justice Souter suggests today's decision may have important ramifications for academic freedom....We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

547 U.S. at 425.

If this Court intends to preserve any measure of academic freedom or freedom of speech for teachers in the classroom setting, even if limited to freedom from *ad hoc* viewpoint-based censorship, it must reject the application of *Garcetti*'s "pursuant to" analysis in this context.

3. *Pickering* and *Connick* are unhelpful in these circumstances.

While application of the *Garcetti* "pursuant to" analysis would improperly deprive teachers completely of First Amendment protection for even innocuous classroom discussions, the frameworks of *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983) are also ill-suited to the analysis of classroom discussions and teaching methods of public schoolteachers. For instance, as noted in *Evans-Marshall*, a teacher will

almost always be able to show that his or her curricular speech involves "a matter of public concern" under *Connick*. 624 F.3d at 339. And yet this seems an insufficient basis for the protection of a teacher's classroom speech, because the classroom is arguably not the proper forum for a teacher's airing of grievances that may be of concern to the general public. *See Boring*, *supra*, 136 F.3d at 378 (Motz, J., *dissenting*, joined by Judges Hall, Murnaghan, Ervin, Hamilton, and Michael) (describing unworkability of *Connick* framework for teacher's in-class speech).

The *Pickering* balancing test (devised for the Supreme Court's analysis of First Amendment protection for teacher speech outside the classroom) likewise focuses on the wrong point for these circumstances, as it looks to the employee's "interests ... as a citizen," on the one hand, and the employer's interest in "efficiency of public services," on the other. *Pickering*, *supra*, 391 U.S. 563, 568 (1968). Neither inquiry cuts to the essential issue in the context of a teacher's curriculum-related classroom speech and teaching methods. The proper focus here should be whether the teacher's discussions and materials occupied that narrow zone, between the words in the Board-prescribed textbook (directing what the teacher *must express*) and the Board's limiting policies (describing the boundaries of teachers' classroom discussions), in which a public schoolteacher should be free to teach without fear of termination based on the viewpoint of ideas discussed or considered.

4. Topical Cases dealing with evolution/creation are inapposite.

The U.S. Supreme Court's precedents addressing laws mandating certain treatments of origins of life theories are useful in understanding its perspective on academic freedom, but do not provide a useful framework for analyzing this case, where no general Board mandate is at issue. *Kitzmiller v. Dover*, a federal district court opinion relied upon heavily by the Board, is

inapposite for both factual and analytical reasons; it involved a challenge to a school district policy that *compelled* teachers to make statements about intelligent design. 400 F.Supp.2d 707 (M.D. Pa. 2005). *McLean v. Arkansas Board of Education* is likewise unhelpful for the same reason. 529 F. Supp. 1255 (E.D. Ark. 1982). The Board has never officially prohibited classroom discussion of intelligent design, and Freshwater has not challenged its mandate of evolution curriculum.

5. Freshwater's proposed analysis recognizes limited protection for teacher speech and academic freedom.

The Court should apply an analysis that takes into account both the Board's interest in controlling its curriculum and the interests of teachers, students, and society at large in ensuring that the public school classroom—even at the junior high level—does not become a totalitarian setting in which the government is permitted to terminate teachers as a means of eliminating particular viewpoints from academic discussions. Put another way, the Court must describe the outer constitutional limits to the school's concededly broad authority to control its curriculum and the classroom speech of its teachers. The Court should find that where a teacher's classroom speech and teaching methods are consistent with duly-enacted Board policies, directly related to the curriculum[5] the teacher was hired to teach, and age-appropriate, a public school may not terminate the teacher based on the viewpoint or perspective explored with the students in a genuine effort to further the students' understanding of the subject and to foster critical thinking.[6]

Such a holding would recognize the important principle of academic freedom that the

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[5] Bd. Ex. 37, ACS pp 129-130, "Evolutionary Theory" as part of "Life Sciences," and textbook, Emp. Ex. 114, chapters 5 and 6 (table of contents, page iv), and textbook Emp. Ex 113, page 57 "...earth had existed for only thousands of years."

[6] For evidence of Freshwater's success in teaching students the Board's curriculum—including evolution—*see* Referee's Report, App. 26-27; *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*, 2009 WL 4730597, *1 (S.D. Ohio 2009), App. A38-A39.

United States Supreme Court has strongly supported, even in primary and secondary schools. *See Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (striking down viewpoint-based removal of books from high school and junior high libraries); *Shelton v. Tucker*, 364 U.S. 479 (1960) (protecting academic freedom of teachers in secondary schools); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (Frankfurter, J., concurring) (teachers "from the primary grades to the university" entitled to degree of freedom); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down law prohibiting teaching of foreign languages in primary and secondary schools).[7]

This holding would also effect, in a context-appropriate way, what is surely the *sine qua non* of First Amendment free speech jurisprudence: that government may not censor particular viewpoints on permissible topics. *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829-30 (1995) (discussing particular evils of viewpoint-based censorship of speech). Even in the special context of a junior high classroom, a free society cannot tolerate unfettered, unabashed censorship of a single viewpoint or perspective on a topic presented by the school's mandated curriculum. *See generally Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (denial of access to group exploring permitted topic from religious viewpoint held unconstitutional).

While the facts are distinguishable, the Seventh Circuit's opinion in *Zykan v. Warsaw Community School Corporation* provides useful contours for this Court's analysis. 631 F.2d 1300 (7th Cir. 1980). In *Zykan*, student plaintiffs alleged that the school had violated their academic freedom rights by removing certain books from English courses and from the school

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[7] For a discussion of the history of the right of academic freedom, *see Asociacion De Educacion Privada De Puerto Rico, Inc.*, 490 F.3d 1 (1st Cir. 2007).

library, eliminating certain courses from the curriculum, and failing to rehire certain teachers. *Id.*, at 1302. The court ultimately found that the students' complaint failed to adequately allege First Amendment violations, but in light of the importance of the principles at stake, it directed that they be given leave to amend the complaint to allege the sort of circumstances that the court identified as necessary to demonstrate the school's abridgement of academic freedom. *Id.*, at 1308-9.

Specifically, the Seventh Circuit repeatedly expressed its view that if the school's actions had been undertaken "to impose an identifiable orthodoxy," or "to eliminate a particular kind of inquiry generally," the lawsuit would raise cognizable First Amendment claims. *Id.*, at 1306-8. The court explained:

> [N]othing in the Constitution permits the courts to interfere with local educational discretion *until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute.*

Id., at 1306 (emphasis added). *See also James v. Board of Ed. of Central Dist. No. 1 of Towns of Addison et al.*, 461 F.2d 566 (2d Cir. 1972) ("More than a decade of Supreme Court precedent leaves no doubt that we cannot countenance school authorities arbitrarily censoring a teacher's speech..."). The High Court not only affirmed these principles, but also applied them in the junior high school setting in its 1982 *Pico* decision, holding that the state may not "contract the spectrum of available knowledge" in public schools by rooting out certain viewpoints. *Pico*, *supra*, 457 U.S. at 866-67.

The case before the Court today presents precisely the intolerable situation the Seventh Circuit meant to resist. The Board has gone beyond its legitimate curriculum choices and enforcement of duly-enacted policies to systematically eliminate a single line of inquiry—that which challenges evolution theory. Along the way it has also undertaken an unlawful effort to

sterilize the classroom of any acknowledgement of religion, having identified religion as the putative basis for the academic theories that challenge its orthodoxy. Under these circumstances at least, the Court should apply the First Amendment as a shield to protect Freshwater from the Board's fervor to indoctrinate students in evolution and to banish competing ideas from the classroom.

B. Freshwater complied fully with Board policies and academic content standards.

While the Board expends considerable energy in arguing that Freshwater's actions violated applicable policies, it has yet to produce a convincing argument that Freshwater violated *any* policy or failed to comply with *any* clear directive. The Board's argument must be rejected based on an analysis of Freshwater's actions under the policies themselves, and on the fact that not one of the grounds for Freshwater's termination was ever brought to his attention in any of his performance evaluations. These evaluations were the proper channel by which the Board should have alerted Freshwater of any concerns of systemic policy violations, yet it did not do so in any of Freshwater's 20 performance evaluations over the course of two decades (Employee Ex. 96, Tr., 3803).

It is important to note that the Board's Resolution to terminate Freshwater does not cite a single Policy, but rather asserts, in a conclusory fashion, that Freshwater "exceeded the bounds of all the pertinent Bylaws/Policies." (Resolution; App. A22). This assertion is simply not borne out by the record. It might be assumed that the Board had in mind Policy 2270, Religion in the Curriculum, which states, in pertinent part:

> Instructional activities shall not be permitted to advance or inhibit any particular religion.
>
> An understanding of religions and their effects on civilization is essential to the thorough education of young people and to their appreciation of a pluralistic

> society. To that end, curriculum may include as appropriate to the various ages and attainments of the students, instruction about the religions of the world.
>
> The Board recognizes that religious traditions vary in their perceptions and doctrines regarding the natural world and its processes. The curriculum is chosen for its place in the education of the District's students, not for its conformity or nonconformity to religious principles. 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.

(App. A48). It simply cannot be fairly said that Freshwater violated this Policy.

The Board's repeated assertions that Freshwater taught or promoted "religion" or "religious content" in his class are based on an erroneous determination that juxtaposing evolution with certain ideas postulated by the alternative theories of creationism or intelligent design constitutes the teaching of religion itself.[8] This idea simply cannot be sustained, for the same reasons that teaching history students about the cultural and historical influence of the prophet Mohammed does not constitute "teaching the doctrines of Islam," nor does teaching physical education students yoga moves constitute teaching them the doctrines of Hinduism. As the Board's own Policy explicitly recognizes, an understanding of the influence of religion on society simply cannot be severed from the educational process. Neither can an understanding of the gaps in evolution theory and how many scientists react to them be severed from an understanding of origins of life curriculum.

On this record, where Freshwater did nothing more than facilitate discussion and consideration of elements of the alternative theories to evolution (which happen to be consistent

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[8] Contrary to the Board's repeated statements, Freshwater never "taught" the theory of Creationism or Intelligent Design. Rather, he discussed certain aspects or elements of these theories with students in keeping with the Academic Content Standard regarding the objective examination of data and helping students to understand the strengths and weaknesses of aspects of evolution theory. *See, e.g.*, Referee's Report, p. 4-5, App. A28-A29 (explaining that in discussing "evidence" against evolution, Freshwater introduced "evidence" based upon "principles" of Creationism and Intelligent Design); *see also* Tr. 147, 1808-09, 1831, 1974, 1982, 2653, 2879, 3626, 3649, 3858-59, 5076-78; Supp. 73.

with several major world religions) *as part of a secular examination of the weaknesses of evolution theory*, it defies logic to argue that he violated Policy 2270. On its face, the Policy expresses Board approval of a neutral approach to religion in the classroom, in keeping with an implied respect for the religious traditions of its students. In this application, however, the Board itself violated the Policy by expressing intolerance for any idea that is tangentially related to religion and disposing of the idea and the one who expresses it as inherently inappropriate for the classroom. The Board concedes that the Policy permits teachers "to discuss religion on [sic] the classroom during an age-appropriate, objective lesson..." but then suggests that such discussions must be limited to "religious practices around the world in social studies class or sixteenth century art in art class." (Appellee's Brief, p. 19). Yet the Board does not explain how such a limitation on the Policy's application could logically be inferred from the text itself, nor does it assert that Freshwater (or any other teacher) was informed of any alleged narrowing construction.

The Board references the fact that it denied Freshwater's 2003 request to officially incorporate into its science curriculum an "Objective Origins Science Policy." But this decision alone, which was explicitly based on the fact *that the Board already deemed teachers to be free to present the varying theories under its Controversial Issues policy*, surely cannot be said to imply that the Board meant to *prohibit* any informal classroom discussion of alternative origins of life theories (Emp. Exhibit 187, p. 393).

The Board misuses its Controversial Issues policy in suggesting that it was Freshwater's discussion of evidence against evolution that "introduce[ed]" a "controversial issue" without proper approval. The policy itself (Policy 2240) defines "controversial issue" as "a topic on which opposing points of view have been promulgated by responsible opinion." Clearly, it is the

Board's curriculum itself that introduces the controversial issue of how life began.[9] Apart from the Board's assertion that Freshwater failed to obtain prior authorization for discussing ideas that are consistent with creationism and intelligent design—which would only have been necessary if the curriculum, itself, had not presented the "controversial issue"—it has not identified any way in which Freshwater violated this policy.[10] In fact, Policy 2240 provides specific protection for a number of alleged classroom statements with which the Board now takes issue. The Policy states, "When discussing a controversial issue, the teacher may express his/her own personal position as long as s/he makes it clear that it is only his/her opinion..."

Furthermore, the Board's position ignores entirely what was, perhaps, the most specific directive provided to guide Freshwater's teaching methodology: the Academic Content Standards for Eighth Grade Science. As Freshwater has consistently maintained, his teaching methodology was purposefully and properly designed to fulfill his Board-given mandate to enable students to "Explain why it is important to examine data objectively and not let bias affect observations." (App. A47). In fact, school officials admitted that materials used by Freshwater were properly tailored to this standard (Supp. 73-76).

The Board's position that Freshwater's classroom discussions violated Board policy also flies in the face of Policy 3218, "Academic Freedom of Teachers," which explicitly condones the right of teachers and students "to be free to discuss and debate ideas," recognizes teachers' "right to their opinion on the subject" and requires teacher objectivity "*in presenting various sides of issues.*" (App. A54) (emphasis added).

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[9] See NCSE Amicus Brief, p. 1.

[10] No teacher was required to obtain permission prior to using supplemental materials in the classroom, and no protocol existed for doing so (Tr. 1501-1502, 1769, 1815, 1855, 2017-18, 2058, 2108, 2424-25, 2917, 3979; Supp. 34, 35, 41, 44, 46, 49, 63, 69, 84).

Just as Freshwater's teaching methods were permitted by specific policies, so the items in Freshwater's classroom that formed the grounds for the "insubordination" charge had been permitted by common practice. First, it must be remembered that Freshwater's termination for alleged "insubordination" was based on the presence of a few items; not on his classroom's being "full of religious items" as the Board states in its Brief (Appellee's Brief, p. 3). But even with regard to the items that Freshwater removed upon request, the Board's Brief misleads the Court by failing to provide the Court with essential context. Most of these items were displayed by the Fellowship of Christian Athletes ("FCA") student group, for which Freshwater served as the designated faculty sponsor. The Board is required by federal law to provide this student group with equal access to bulletin board space within the school,[11] and the space provided by the administration was in Freshwater's classroom.

The Ten Commandments "posters" on the windows to Freshwater's classroom were, in fact, book covers provided to district teachers by the school office, and Freshwater placed them in the windows in order to comply with a Board directive to obscure the view of the classroom from the hallway (Tr. 511, 4420, 4422-23; Supp. 21). But, again, the Board did not terminate Freshwater for displaying any of these items, as he complied in good faith with the administration's directions to remove them.

With regard to the items that Freshwater did not remove—the presence of which resulted in Freshwater's termination for "insubordination"—the record demonstrates either that Freshwater had not been clearly directed to remove the item or that the item was allowed to be displayed or maintained in other parts of the building.

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[11] See 20 U.S.C. §4071(a).

After Principal White ordered Freshwater to remove the "religious" materials from his classroom, Freshwater endeavored to do so. Upon inspection, the only allegedly "religious" items that remained were (1) his personal Bible, which he kept at his desk; and (2) a poster of George Bush and Colin Powell in a Cabinet meeting. Principal White testified that he never instructed Freshwater to completely remove his personal Bible from the classroom, and other teachers kept their own Bibles on their classroom desks (Tr. 506, 523-25, 4123; Supp. 19, 22). (Tr. 1810, 1990, 2050, 2076, 2145, 2364, 2823, 2870, 3631-33) Referee Shepherd did not refer to the presence of Freshwater's personal Bible as forming the grounds for termination (Report, p. 11, App. A35). It is undisputed that the George Bush/Colin Powell poster, which included a verse from the Biblical book of James, was distributed to teachers via the school office, that it was displayed by at least six other school employees (Tr. 1783, 2015, 2072, 2094, 2125; Supp. 48, 50), and that many (including former Principal Kuntz) did not consider it to be "religious" (Tr. 539, 1784, 2082, 2094, 2125, 2396, 3601, 3822, 3911, 4656, 5403, 5529, 5537; Supp. 23, 39, 47, 48, 50, 62, 71, 82, 83, 92, 94, 95). In fact, as it was actually displayed in Freshwater's classroom, the Bible verse was obscured from view (Tr. 508, 1001, 2396, 2827, 2874-75; Supp. 20, 62).[12] While letters from Principal White specifically directed Freshwater to remove certain items from the classroom, they made no mention of the poster (Bd. Ex. 13, Emp. Ex. 145).

In addition to these two items that remained in Freshwater's classroom, upon inspection Principal White found the school library's *Oxford Bible* and *Jesus of Nazareth* on a lab table. However, Freshwater's possession of these items—purchased by the school's own funds and not even discussed in the classroom—surely cannot be considered "insubordination," as they were

[12] Freshwater testified that prior to taking the photograph admitted as Board Exhibit 46, school officials removed the papers that had covered the verse, thus creating an inaccurate representation (Tr. 4661).

not in Freshwater's classroom when he was ordered to remove the "religious" materials. The termination of a teacher for mere possession of works of literature, moreover, is surely the very type of infringement upon academic freedom that the Supreme Court denounced in *Pico*, *supra*. Indeed, no Board policy has been cited as supporting the idea that these books were banned from classrooms.

C. The Board engaged in viewpoint-based censorship of ideas in the classroom.

As explained above, Freshwater's actions did not violate Board policies, nor were they insubordinate. It is evident, rather, that Freshwater's termination was an effort to sterilize the classroom of a certain variety of ideas and viewpoints. If the First Amendment has any application whatsoever to the eighth-grade classroom, it should, at a minimum, preclude such censorship. *See Zykan*, *supra*, at 1308 (school many not purge ideas that are offensive to a single perception).

Freshwater does not now dispute nor has he ever denied the Board's authority to control its curriculum and classroom décor through duly-enacted policies, even-handedly applied. However, Freshwater asserts that the weight of First Amendment jurisprudence forbids the school's *ad hoc* departure from governing policies and guidelines where it is undertaken to eliminate discussion of viewpoints it disfavors or to sterilize the school of words, pictures, or ideas that have a tangential association to religion.

II. THE BOARD'S TERMINATION OF FRESHWATER'S EMPLOYMENT DEMONSTRATES A HOSTILITY TOWARD RELIGION WHICH VIOLATES THE ESTABLISHMENT CLAUSE.

A. The Board's termination of Freshwater's employment in an effort to sterilize the school of religious ideas manifests impermissible religious hostility.

"Neutrality, in both form and effect, is one hallmark of the Establishment Clause." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 846 (1995)

(O'Connor, J., concurring). Here, the Board has enacted reasonable, neutral policies allowing teachers and students to explore diverse ideas and viewpoints—including those consistent with religion—that are related to the curriculum. But in practice, the Board has punished Freshwater's facilitating the critical evaluation of a scientific theory solely because the competing ideas considered are consistent with multiple religions. Likewise, the Board has defied its Policy's neutrality requirement by classifying a poster and certain books as permissible and appropriate *except* in the context of Freshwater's classroom. The Board's actions thus fly in the face of the admonition that "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641(1978) (Brennan, J., concurring in judgment).

B. The Board's actions cannot pass muster under the "Lemon Test."

Under the Supreme Court's "Lemon Test," (requiring government actions to have a secular purpose, a primary effect that neither favors nor disfavors religion, and to avoid entanglement with religion) the Board's actions are doomed, because the primary and overwhelming effect of the Board's actions toward Freshwater is to evince an unmistakable hostility toward religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (state action must meet all three prongs of Lemon Test). A reasonable observer who is familiar with the circumstances surrounding Freshwater's termination would conclude from it that ideas that are even tangentially "religious," are, at best, disfavored by the school and, at worst, treated as so subversive as to justify banishment of the speaker from the school community.

The United States Supreme Court has left no room for doubt: regardless of the school's purpose, the effect prong is not satisfied if the school's action conveys a message of disapproval of religion. *Roberts v. Madigan*, 921 F.2d 1047, 1054 (10th Cir. 1990) (*citing Wallace v. Jaffree*, 472 U.S. 38, 56, n42 (1985); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985) (overruled on other grounds); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984)). If it is *ever* possible, as the Court has intimated, for government to convey such a message, the Board has done so here.[13]

Even if the Board could survive scrutiny under the "effects" prong of the Lemon Test, it would fail under either of the other two. The Board's putative secular purpose of avoiding an Establishment Clause violation must be rejected on these facts, as policies of true neutrality toward religion cannot violate the Establishment Clause. The U.S. Supreme Court has repeatedly rejected arguments that the Establishment Clause justifies—much less requires—the government's treating religious speakers or viewpoints less favorably than secular ones. *Rosenberger*, *supra*, at 839. If the Board had simply treated Freshwater as it treated other teachers in applying its duly-enacted policies and judging the propriety of academic discussions and items in the classroom, it could not have been said to advance religion or aid any religious cause. *See Id.*, at 840. *See also Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (policy of neutrality does not violate Establishment Clause). *Accord Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb's Chapel, supra.*

Recall that Freshwater was not terminated for having a classroom "full of religious items" but rather for failing to understand the administration's alleged desire for him to remove a few items from his room that were permitted elsewhere in the school. The fact that the Board

[13] Teacher Tamara Henry testified that she removed her personal Bible from her desk out of fear for her job (Tr. 1990).

did not deem these items to present an Establishment Clause problem in any other area of the building exposes as specious the Board's reliance on the Establishment Clause to support Freshwater's termination.[14]

And finally, the manner in which the Board has applied its policies to Freshwater demonstrates an unmistakably improper entanglement with religion, as it required the school to engage in invasive, discriminatory enforcement methods that effectively transformed school administrators into religion police. *See Widmar v. Vincent*, 454 U.S. 263, 272, n11 (1981) (monitoring efforts to enforce denial of access to religious speakers create illicit entanglement); *accord Board of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 253 (1990). For instance, while the Record establishes that administrators have freely permitted teachers to use handouts and videos to supplement curriculum topics, the Board has relentlessly parsed each one of Freshwater's supplements in an effort to uncover traces of religion lurking in the background.[15] Such parsing of handouts, classroom discussions, and décor has required the Board to make doctrine-based judgments about which ideas have religious roots or implications and are therefore off-limits. Enforcement of this policy with regard to items in the classroom is unsustainable; it requires in-depth analysis of each teacher's personal religious views, followed by a juxtaposition of those views with every book, knick-knack and poster so as to root out items that impermissibly connect the teacher's physical environment to his or her religious convictions.

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[14] At the point when the administration deemed Freshwater "insubordinate" based on his possession of "religious" items, he had removed the various religious items posted in his classroom by FCA and the Ten Commandments book covers. So the Board cannot claim that the overall context of Freshwater's classroom justified the differential treatment of his personal Bible, the Powell/Bush poster, or the library books.

[15] For instance, the handout "Darwin's Theory: The Premise" (not "The Promise," as cited in the Board's Brief) contains no reference to God, the Bible, Intelligent Design, or Creationism. But because a parent thought the resource might be linked with a group called "AllAboutGod," Freshwater was ordered to cease using handouts whose sources could not be identified (a directive with which Freshwater fully and willingly complied) (Tr. 871-72, 2252, 2258).

The Board's termination of Freshwater in an effort to sterilize the school of ideas or items with religious connections or implications fails each prong of the Lemon Test and evinces a clear and chilling hostility toward religion. The Board's actions thus violate the Establishment Clause.

CONCLUSION

In terminating Freshwater, the Board has gone far astray from foundational First Amendment principles. Freshwater does not claim a general First Amendment right to determine school curriculum, to discuss whatever he likes in the classroom setting, or even to decorate his classroom free from Board directives. Rather, Freshwater asks this Court to rule that a public school teacher retains at least this modicum of academic freedom and protection from religious hostility: that school officials may not terminate him for using teaching methods and materials or for possessing items that comply with school policies and practices but are censored due to their particular viewpoint on an otherwise approved topic, or due to their consistency with the presumed religious beliefs of the teacher in question.

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

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