

**APPELLEE MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF
EDUCATION'S MOTION TO STRIKE PROPOSITIONS OF LAW I & II, APPENDIX
PAGES 49 & 55-56 AND SUPPLEMENT PAGES 103-116 FROM THE MERIT BRIEF
OF APPELLANT JOHN FRESHWATER**

Appellee, Mount Vernon City School District Board of Education, moves this Court to strike that portion of the Merit Brief filed by Appellant John Freshwater which contains arguments regarding his "Proposition of Law I" and "Proposition of Law II." Neither of those propositions were included in Appellant's Memorandum in Support of Jurisdiction, as set forth in S.Ct. Prac. R. 3.1(B), nor were they accepted for review by this Court. Appellant's Appendix pages 49 & 55-56 and Supplement to the Brief pages 103-116 should also be struck as those pages contain information that was not part of the record at any stage of the proceedings.

The reasons for this motion are more fully explained in the attached memorandum in support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

Appellant sought this Court's review on three propositions of law. This Court, granted review of only two of those propositions of law, specifically:

Proposition of Law I - Accepted for Review:

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.

Proposition of Law II - Accepted for Review:

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.

(Appellant's Memo. in Support of Jurisdiction, at ii.)

The Merit Brief filed by Appellant, however, contains three propositions of law, two of which were not contained in his Memorandum in Support of Jurisdiction,¹ as required by S.Ct. Prac. R.

¹ Appellant's third proposition of law found in his merit brief is nearly identical to Appellant's accepted Proposition of Law II. It reads:

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 a students' First Amendment right to academic freedom and manifests hostility toward religion in violation of the Establishment Clause.

- A. Freshwater's classroom was in compliance with Board policy.
- 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.
- C. The First Amendment's Establishment Clause does not justify, and in fact forbids, the Board's actions.

3.1(B), and therefore address issues not accepted by this Court for review.

A comparison shows that Appellant's Proposition of Law I in his Merit Brief is drastically different from both the propositions of law accepted by this Court for review.

Merit Brief Proposition of Law I states:

The termination of a public school teacher' 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.
- 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.

Merit Brief Proposition of Law I is formatively and substantively different than both propositions of law accepted for review. Nowhere in either proposition of law accepted for review is there an argument that the Board terminated Appellant's employment contract based on the "content or viewpoint" of his religious discussions with students and his use of supplemental religious materials in class. Likewise, neither proposition of law accepted for review contains an argument that Freshwater's termination was a form of "government censorship." Rather, the Proposition of Law I accepted for review contains an argument about whether the Board provided Freshwater with a "clear indication as to the kinds of materials or teaching methods which are unacceptable." The legal analysis required to resolve that issue is unrelated to the legal analysis required to determine whether the Board committed viewpoint or content discrimination and government censorship. Plus, none of the arguments in Appellant's Merit Brief even address the accepted issue of whether Appellant was provided a clear indication of which materials and teaching methods were inappropriate. Therefore, Appellant's Merit Brief

Proposition of Law I is neither proper in form nor substance and was not accepted by this Court for review. Consequently, it must be struck.

Appellant's Merit Brief Proposition of Law II should be struck for the same reasons. It states:

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.

This proposition of law is nowhere to be found in Appellant's Memorandum in Support of Jurisdiction. A comparison of this proposition with those accepted for review shows that Appellant's current arguments are a completely different approach to the appeal than that which was accepted for review. Nowhere in Appellant's Memorandum in Support of Jurisdiction does Freshwater indicate to this Court he wanted to argue that his religious "academic discussions" and religious "supplemental academic materials" were appropriate. Freshwater has never made the argument that his teaching of intelligent design and creationism was acceptable as scientific theories. Indeed, Freshwater's argument in this regard has evolved over time.

Freshwater adamantly denied teaching intelligent design and creationism during the administrative hearing. (Tr. 376, ln. 14 ("I do not teach intelligent design"); Tr. 377, ln. 9 ("I teach evolution. I do not teach ID or creationism"); see Bd. Exs. 19-20). Freshwater then claimed in his Complaint that he taught "about some commonly held beliefs of at least three of the world's major religions." (Compl. at ¶ 59). Then, at the Court of Appeals, Freshwater argued that he simply 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." (Appellant's Appellate Br., at 9). He also claimed that he simply facilitated "classroom discussion concerning popular alternative theories to the Big Bang theory...." (*Id.* at

v). Yet, in his Merit Brief, Freshwater argues that he did teach creationism and intelligent design since they are permitted concepts ("creation science"). (Appellant's Merit Br., at 16-18). Thus, Merit Brief Proposition of Law II asks this court to review an issue not raised by Appellant in the lower courts or administrative hearing.

This Court has held that as a general rule, it will not consider arguments that were not raised in the courts below. *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos.*, 67 Ohio St.3d 274, 279, 617 N.E.2d 1075 (1993). This rule should be applied here because Appellant chose not to argue this position below and did not include it in either proposition of law accepted for review by this Court. Appellant should not be permitted to argue it before this Court for the first time.

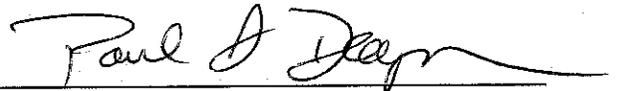
Additionally, Merit Brief Proposition of Law II is not a legal issue that must be resolved in order for this Court to reach a conclusion as to the propositions of law raised by Appellant which were accepted for review. The accepted issues of whether Appellant was given a clear indication of the materials and teaching methods which were inappropriate and whether his insubordination for refusing to eliminate his religious display was justified are distinct from unaccepted issue of whether his termination was justified for his injection of religion into his classroom. Therefore, this Court should strike Merit Brief Proposition of Law II.

Finally, Appellant's Merit Brief Appendix pages 49, and 55-56 contain material that was neither introduced below nor certified and transmitted to the Court by the Clerk of the Fifth District Court of Appeals. Consequently, those pages must be struck from the record. Likewise, Appellant's Supplement to the Brief pages 103-116 contain substitute teacher attendance records that must be struck. The trial court, in its discretion, refused to consider additional evidence and chose not to conduct another hearing. Likewise, the Fifth District Court of Appeals properly

chose not to consider the records on appeal. The substitute teacher records are not part of the official record and Freshwater does not argue in his Merit Brief that the lower courts erred in refusing to consider the material. Consequently, Supplement pages 103-116 must be struck.

For all the foregoing reasons, the Board moves this Court to strike those portions of Appellant's Merit Brief containing arguments relating to his first and second propositions of law, pages 6 - 19, as well as Appellant's Merit Brief Appendix pages 49 and 55-56, and Supplement to the Brief, pages 103-116.

Respectfully submitted,



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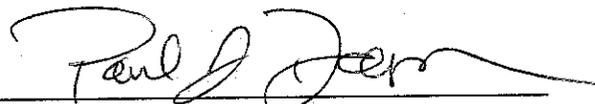
CERTIFICATE OF SERVICE

A true and correct copy of the foregoing *Appellee Mount Vernon City School District Board of Education's Motion to Strike* was filed this 24th day of September 2012, via regular U.S. mail, postage prepaid upon the following:

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