ORIGINAL

Case No. 2012-0613

In the

Supreme Court of Ohio

JOHN FRESHWATER,

Appellant,

v.

MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION,

Appellee

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

BRIEF *AMICI CURIAE* OF THE AMERICAN HUMANIST ASSOCIATION AND THE SECULAR STUDENT ALLIANCE IN SUPPORT OF APPELLEE

WILLIAM J. BURGESS
Appignani Humanist Legal Center
American Humanist Association
1777 T Street, N.W.
Washington, D.C. 20009
(202) 238-9088
bburgess@americanhumanist.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

This *amici curiae* brief in support of the appellee is being filed on behalf of the American Humanist Association ("AHA") and the Secular Student Alliance ("SSA").

The AHA advocates for the rights and viewpoints of humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The mission of the AHA is to promote the spread of humanism, raise public awareness and acceptance of humanism and encourage the continued refinement of the humanist philosophy.

The SSA is a network of approximately over 400 atheist, agnostic, humanist and skeptic groups on high school and college campuses. Although it has a handful of international affiliates, the organization is based in the United States with the vast majority of its affiliates at U.S. high schools and colleges. The mission of the SSA is to organize, unite, educate and serve students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics.

Amici assert that this case addresses core humanist and atheist concerns about the state's responsibility to provide a secular education for our children and to avoid the promotion of religion by our public schools.

Amici wish to bolster the principle of religious neutrality—that government may not prefer religion over nonreligion—by informing the Court that *amici* support an affirmance of the Court of Appeal's decision and that a reversal of the decision would have the constitutionally impermissible effect of advancing religion.

STATEMENT OF FACTS

This case arises out of the Mount Vernon City School District Board of Education's (the "School Board") decision to terminate appellant John Freshwater's (the "Appellant") employment after he repeatedly refused to follow the School Board's established curriculum and instructions, as well as the Constitution, by instead using his governmental position to promote Christian ideas, including creationism, to the young and impressionable students in the public school science classes he was hired to teach.

Appellant, an extremely religious man and self-professed Christian who says he believes strongly in the teachings of the Bible, was a science teacher at Mount Vernon middle school for 21 years. *See* Ex. 7 (Hearing Transcript[1] *In the Matter of Termination of Employment of John Freshwater* at 1669:8-1670:1; 1707:18-1708:22); Ex. 8 (Hearing Tr. at 4400:3-4402:5).

Appellant turned his entire classroom into a religious environment, prominently displaying posters of the Ten Commandments on the front door, numerous decorations containing Bible verses on the wall and by displaying Bibles on his desk. Ex. 1 (Hearing Tr. at 70:6-71:1).[2] In January 2008, Appellant marked an unwilling student's arm with a Tesla coil in the shape of a cross. (Order, *John Freshwater v. Mount Vernon City Sch. Dist. Bd. Of. Ed.*, Case No. 11AP02-0090 (Oct. 5, 2011)).[3]

Most importantly, Appellant defied school policy by using creationist tactics to undermine the scientific theory of evolution. Ex. 2 (Hearing Tr. at 347:22- 348:10; 456:25-457:3). In 2003, Appellant proposed to the School Board that it amend its science curriculum to

---

[1] Hereinafter "Hearing Tr."
[2] Indeed, "[f]or his entire teaching career, Freshwater kept a Bible on his desk." *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*, 2012 Ohio 889, P4 (Ohio Ct. App. 2012).
[3] Hereinafter, the "Order."

supposedly "[c]ritically analyze evolution," which is a core fact underpinning all of the modern biology. Ex. 2 (Hearing Tr. at 473:16-25). The School Board and the science department naturally rejected this proposal. Ex. 2 (Hearing Tr. at 473:16-474:14); Ex. 5 (Hearing Tr. at 909:20-910:20). Disregarding the School Board's rejection, Appellant continued to promote religious "alternatives to evolution" in his science classes. *See* Ex. 10 (Hearing Tr. At 4761:24-4762:11).[4]

After receiving a complaint about Appellant's classroom Ten Commandments display, the Superintendent ordered him to remove the religious displays from his classroom. Ex. 1 (Hearing Tr. at 70:6-71:7). Appellant refused to remove the Bible displayed to the class on his desk. Ex. 1 (Hearing Tr. at 75:11-76:22). Instead, he went to the school library and checked out its copy of the Bible, along with a book called *Jesus of Nazareth*, and displayed both items prominently on his science lab table. Ex. 1 (Hearing Tr. at 76:23-77:5).

In response to Appellant's refusal to comply with school policy (and, more importantly, the Constitution), the School Board commenced proceedings to terminate his employment. Ex. 11 (Board. Ex. 1). At the conclusion of the hearing on his termination, the Special Referee recommended that the School Board terminate Appellant "for good and just cause" finding that he failed to adhere to the curriculum and was "determined to inject his personal religious beliefs into his plan and pattern of instruction of his students." Ex. 21 at 3, 13 (R. Shepherd Report, *In*

[4] It its resolution to terminate Appellant's employment, the School Board wrote: "Despite the Board's rejection of this proposal, Mr. Freshwater undertook the instruction of his eighth grade science students, as if the suggested policy had been implemented." (Board Letter/Resolution to Terminate at 3). For instance, the School Board found that *inter alia* "Mr. Freshwater used unauthorized handouts to challenge evolution, based in large part upon the Christian religious principles of Creationism and Intelligent Design." *Id.* In addition, one odd mechanism Appellant employed to further his religious agenda was to have students call out the word "here" whenever they encountered facts in their science textbook that predated any possible concurrent human observer. Ex. 9 (Hearing Tr. at 4505:9 -4507:14).

the Matter of John Freshwater).[5] The referee found that "[w]ithout question, the repeated violation of the Constitution of the United States is a 'fairly serious matter' and is therefore, a valid basis for termination of John Freshwaters contract(s)." (Report at 13).[6]

Appellant, terminated for violating the Constitution, then brought this lawsuit claiming that the termination somehow violated *his* constitutional rights.

STATEMENT OF THE ISSUES

Whether (1) a teacher, as a state employee, has a *personal* First Amendment to cause his *employer* to violate the Establishment Clause by engaging in speech promoting his religious beliefs to students while on the job, and (2) whether his employer's decision to terminate his employment for his refusal to cease such clear violations of the Establishment Clause somehow itself, absurdly, violates that clause or the other provisions of the First Amendment.

ARGUMENT

It is well-settled law that it is the "right of those authorities charged by state law with curriculum development to require the obedience of subordinate employees, including the classroom teacher," and that teachers do *not* have a First Amendment right to engage in "uncontrolled expression at variance with established curricular content." Webster v. New Lenox Sch. Dist. No. 122, 917 F. 2d 1004, 1005-07 (7th Cir. 1990) (rejecting claim of teacher that he had a First Amendment right to inject creationist ideas into his class discussions and that doing so served the "purpose of developing an open mind" in students).

---

[5] Hereinafter, the "Report."

[6] The Referee did not rely on the Tesla Coil incident as a reason to terminate appellant's contract. (Report at 13). See also *Freshwater*, 2012 Ohio 889, P28 (Ohio Ct. App., Knox County, 2012).

The curriculum the state may choose is, of course, limited to that permitted by the Establishment Clause, and therefore cannot promote religious ideas. *Id.* at 1008 (citing Edwards v. Aguillard, 482 U.S. 578, 583 (1987) (holding that a law requiring the teaching of creationism alongside evolution violated the Establishment Clause and noting that "the discretion of . . . school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives" of the Establishment Clause)).

This brief summary statement of how the federal courts have already addressed *precisely* the arguments raised by Appellant in his appeal and have clearly and decisively rejected them should lead this Court to follow the law and do likewise. Because this Court has chosen to hear his claim, however, the AHA is submitting this brief as *amicus curiae* to lend its expertise as to First Amendment jurisprudence to this Court and to offer an in depth elucidation of the principles of federal constitutional law that underpin these decisions that will show how Appellant's arguments represent a profound misunderstanding of the First Amendment. It will also correct Appellant's misunderstandings about humanism itself.

Federal courts have made clear that governmental actors, including public school teachers, do not have a *personal* First Amendment right to cause their state *employer* to violate the Establishment Clause by engaging in speech promoting religion while acting in an official capacity, as a teacher does in the classroom. When on the job, a teacher represents the state, and his or her speech rights are accordingly restricted by the Establishment Clause's prohibition of state promotion of religion. For example, the Fourth Circuit Court of Appeals, in an opinion authored by Justice Sandra Day O'Connor, sitting by designation after her retirement from the Supreme Court, held that when the government, in an effort to comply with the Establishment Clause, imposes restrictions on the official religious speech of its employees, it does not violate

either that clause or the employee's rights to freedom of speech and free exercise of religion. *See* Turner v. City Council of the City of Fredericksburg, 534 F. 3d 352 (4th Cir. 2008) (holding that city council member had no First Amendment right to deliver a sectarian prayer as part of a council meeting), *cert. denied*, 129 S. Ct. 909 (2009).

Of course, a governmental employee in his private life "remains free to pray on his own behalf, in *nongovernmental* endeavors, in the manner dictated by his conscience." *Id.* at 356 (emphasis added). It is precisely the difference between these two spheres, governmental and private, that makes the difference in the speech rights of a government employee in a given circumstance. A governmental employee retains all of his First Amendment rights in his private life but must surrender some of them when he is on the job because in that role he speaks for the state as its representative.

I. APPELLANT VIOLATED THE ESTABLISHMENT CLAUSE BY PROMOTING HIS RELIGIOUS BELIEFS IN A PUBLIC SCHOOL CLASSROOM.

The Establishment Clause is the central Constitutional guarantee of liberty of conscience at issue in this case. The very first sentence of the Bill of Rights erects a core pillar of our democracy: that it cannot be a theocracy, or anything even remotely approaching or suggesting it. To protect the liberty of all, even a democratic majority is not permitted to use the power of the state it controls to promote its religious ideas. *See* West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 638 (1943) (stating that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts"). The Establishment Clause protects just such a fundamental right that is not subject to the will of

the majority. *See e.g.* McCreary County v. ACLU, 545 U.S. 844, 884 (2005) (stating that courts "do not count heads before enforcing the First Amendment").

Our Founders protected this principle of limited government with the prohibition that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.[7] The Supreme Court has made clear what this language means, stating unequivocally in the first case to be brought before calling for an interpretation of the provision that the "First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 18 (1947). To emphasize the long-standing nature of this freedom, the Court in Everson cited and discussed Reynolds v. United States, 98 U.S. 145, 164 (1878), a 19th century case which quoted Thomas Jefferson's famous letter to the Danbury Baptists of 1802, in which he wrote that he

> contemplate[d] with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State.

The Supreme Court "has given the [Establishment Clause] a 'broad interpretation . . . in the light of its history and the evils it was designed forever to suppress. . . .' [finding that it] afford[s] protection against religious establishment far more extensive than merely to forbid a national or state church." McGowan v. Maryland, 366 U. S. 420, 442 (1961). It has emphasized that "the Constitution mandates that the government remain secular." County of Allegheny v. ACLU, 492 U.S. 573, 610 (1989). The courts must act to stop what may be characterized as even "minor encroachments" on the secular nature of government, because a "breach of

---

[7] Although the Establishment Clause itself refers only to Congress, its guarantee of liberty from state-promoted religion is part of the "fundamental concept of liberty embodied in [the Fourteenth] Amendment[, which] embraces the liberties guaranteed by the First Amendment"; it therefore restricts the powers of all governmental actors, including those of the states. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of [James] Madison, 'it is proper to take alarm at the first experiment on our liberties.'" Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 213 (1963) (quoting Madison's Memorial and Remonstrance Against Religious Assessments).

The basic analytic framework that has emerged from Court's Establishment Clause jurisprudence is sometimes called the "Lemon test" for the case in which it was first articulated. *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). It requires that any governmental "practice which touches upon religion" must be motivated by a genuine "secular purpose," must not "advance" religion and must not lead to "excessive entanglement" between government and religion. *Id.* In applying the test, the Court has explained that the government "may not promote or affiliate itself with any religious doctrine or organization." Allegheny at 590. Courts "pay particularly close attention to whether the challenged governmental practice either has the purpose or effect of [unconstitutionally] 'endorsing' religion." *Id.* at 591. Endorsement includes "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 593. Not only may the government not advance, promote, affiliate with, endorse, prefer or favor any *particular* religion, it "may not favor religious belief [in general] over disbelief or adopt a preference for the dissemination of religious ideas." *Id.* Instead, "religion must be a private matter for the individual, the family, and the institutions of private choice"; the state, however, must remain secular. Lemon at 625.

A. **By injecting his creationist ideas into a public school classroom, Appellant violated the Establishment Clause.**

It is settled law that teaching creationist ideas in any guise in public schools violates the Establishment Clause. *See* Epperson v. Arkansas, 393 U.S. 97 (1968) (holding that a statute that forbids the teaching of evolution in public schools violates the Establishment Clause); Edwards

v. Aguillard, 482 U.S. 578 (1987) (holding that a statute requiring the teaching of creationism alongside evolution in public schools violates the Establishment Clause); Webster v. New Lenox School Dist. No. 122, 917 F.2d 1004, 1008 (7th Cir. 1990) (holding that requiring that a public school teacher teach evolution and not creationism does not violate the First Amendment); Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994) (same); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F. 3d 337, 346 (5th Cir. 1999) (holding that a required disclaimer to be read before evolution lessons in public schools that states that they were "not intended to influence or dissuade the Biblical version of Creation" and that urged students "to exercise critical thinking and gather all information possible and closely examine each alternative" violates the Establishment Clause because it "protect[s] and maintain[s] a particular religious viewpoint"); Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005) (holding that teaching "intelligent design" as an alternative to evolution in public school and "teaching about supposed gaps and problems in evolutionary theory are creationist religious strategies that evolved from earlier forms of creationism," and that therefore, such teachings constitute "an endorsement of a religious view" in violation of the Establishment Clause).

For a thorough discussion of the various disguises under which the Religious Right has attempted to smuggle creationism into the public school classroom in violation of the Constitution, the brief of fellow *amicus curiae* the National Center for Science Education is extremely helpful. Its content must not be ignored but will not be duplicated here. *See* Brief of National Center for Science Education as Amici Curiae Supporting Appellees, *Freshwater v.*

Mount Vernon City Sch. Dist. Bd. of Educ., 2012 Ohio 889 (Ohio Ct. App. 2012) (No. 11-00023).[8]

In blatant disregard of not only the Constitution but also of school policy, Appellant has been using his position as teacher to spread his creationist religious ideas in the classroom. The School Board, upon concluding its investigation of Appellant,[9] found that he was doing so in contravention of its "Academic Content Standards."[10]

Appellant attempts to justify this illegal conduct as a method of teaching critical thinking skills to his students. This argument was rejected by the court in Kitzmiller. In that case, a public school board adopted a resolution wherein students would be "made aware of gaps/problems in Darwin's theory and of other theories of evolution," providing an "exercise [in] critical thinking skills." Kitzmiller at 708, 762. Declaring the resolution unconstitutional, the court rejected as a "sham," finding instead that:

> ID [intelligent design] is not science and cannot be adjudged a valid, accepted scientific theory. . . . ID, as noted, is grounded in theology, not science. Accepting for the sake of argument its proponents' . . . argument that to introduce ID to students will encourage critical thinking, it still has utterly no place in a science curriculum. Moreover, ID's backers have sought to avoid the scientific scrutiny which we have now determined that it cannot withstand by advocating that the controversy, but not ID itself, should be taught in science class. This tactic is at best *disingenuous*, and at worst a canard. The goal of [the intelligent design movement] *is not to encourage critical thought*, but to foment a revolution which would supplant evolutionary theory with ID.

Id. at 745 (emphasis added).

Appellant's attempt to disguise his religious ideas as scientific ones, or as embodying genuine critical thinking, is not only gallingly Orwellian, but must be, as in Kitzmiller,

---

[8] A copy of the NCSE's excellent brief is also available at the following address: http://ncse.com/files/pub/legal/freshwatertermination/20120110_NCSE_Amicus_Brief.pdf.

[9] Resolution at 4 ¶¶ 23, 24

[10] *Id.* ¶ 25. See also *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*, 2012 Ohio 889, P9 (Ohio Ct. App. 2012)

unsuccessful. When he attempted to undermine evolution in his classroom by teaching creationist ideas and using creationist tactics, Appellant violated the Establishment Clause.

B. Appellant's prominent classroom religious displays promote religion to students in violation of the Establishment Clause.

In addition to teaching creationism, Appellant has covered his classroom space with religious displays. He prominently displayed a Bible on his desk for over 20 years (his entire career at the school). When told to remove it, he instead replaced it with another one taken from the school library, adding as well for good measure as a book entitled *Jesus of Nazareth.*[11] He also displayed a poster of the Ten Commandments on the front door of his classroom and numerous posters containing Bible verses on the wall.[12] Appellant has resisted the School Board's repeated attempts to make him follow the law and has evidenced no intention to stop his unconstitutional conduct. *See* Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ., 2012 Ohio 889, P7 (Ohio Ct. App. 2012) (indicating that Appellant had failed to follow the curriculum for over 11 years).[13]

Taken as a whole, the religious classroom displays convert Appellant's once-secular classroom into a room full of unmistakably Christian messages. The effect of such displays on students is to clearly associate the class and its teacher with that religion. A reasonable observer would conclude that the school has approved this sectarian display and therefore endorses the religious messages displayed on its walls, doors and furniture.

A school "risks violation of the Establishment Clause if any of its teachers' activities gives the impression that the school endorses religion." Marchi v. Board of Coop. Educ. Servs.,

---

[11] Ex. 1 (Hearing Tr. at 76:23-77:5). Appellant adamantly refused to remove the Bible from his desk. Ex. 1 (Hearing Tr. at 75:11-76:22).

[12] Ex. 1 (Hearing Tr. at 70:6-71:1)

[13] Appellant had also refused to remove the Bible from his desk. Ex. 1 (Hearing Tr. at 75:11-76:22).

173 F.3d 469, 477 (2nd Cir. 1999). This includes any teacher speech or conduct that "endorses a particular religion and is an activity 'that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.'" Roberts v. Madigan, 921 F. 2d 1047, 1055 (10th Cir. 1990) (quoting Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)). To avoid this risk, "schools may direct teachers to 'refrain from expression of religious viewpoints in the classroom and like settings.'" Marchi at 475. In particular, a teacher's display of a personal Bible, other religious books and religious posters in his classroom has "the primary effect of communicating a message of endorsement of a religion to the impressionable . . . children in his class," and therefore violates the Establishment Clause. Roberts at 1057. In addition, display of the Ten Commandments in a school is unconstitutional. Stone v. Graham, 449 U.S. 39, 41-42 (1980) (stating that they "are undeniably a sacred text in the Jewish and Christian faiths" and that the "posting of religious texts on the [classroom] wall serves no . . . educational function").

Because "schools have a constitutional *duty* to make 'certain . . . that subsidized teachers do not inculcate religion,'" the School Board not only may, but must, act to prevent one of its teachers from injecting religion into its classrooms. Marchi at 475 (emphasis added) (citing Lemon[14]). It may do so by the "removal of materials from the classroom . . . that violate[] Establishment Clause guarantees." Roberts at 1055.

That Appellant's copies of the Bible and *Jesus of Nazareth* are school property taken from the library[15] does not change this conclusion. It is not the books themselves but rather the

[14] In Lemon, the Court explained that "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." As such, it necessary to simply prohibit religious speech by teachers in the classroom altogether.

[15] Ex. 1 (Hearing Tr. at 76:23-77:5).

act of making a public classroom *display* of them that sends an unequivocal message directed to his students that he, in his role as their public school teacher, endorses Christianity. There is an important difference between placing a particular religious text on a desk for public display and making a religious text available for a student to read at his or her own choosing in the context of a library. (See Section II below for an expanded discussion of this issue.)

In addition, the fact that other Mount Vernon teachers are alleged to keep Bibles on their desks[16] does not change the fact that *Appellant* has been violating the Establishment Clause. If anything, this simply further underscores the School Board's urgent need to restore religious neutrality at the school and to prevent a culture of disregard for the Constitution from taking root.

Finally, as discussed in much greater detail below in Section II, teachers have no First Amendment right to create religious displays in their classrooms. *See e.g.* Johnson v. Poway Unified School Dist., 658 F. 3d 954, 957 (9th Cir. 2011) (rejecting First Amendment challenge by teacher to school requiring that he remove classroom banners that read "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace on Thee," and "All men are created equal, they are endowed by their CREATOR"); and Lee v. York Co. School Div., 484 F. 3d 687 (4th Cir. 2007) (rejecting First Amendment challenge by teacher to school requiring that he remove from the classroom a "National Day of Prayer poster, featuring George Washington kneeling in prayer," newspaper articles about religion in politics and newsletters about local missionaries).

[16] *See* App. Br. at 20.

C. **Even if it is assumed that Appellant's actions did not violate the Establishment Clause, a school may, in the interest of protecting the value of religious neutrality that the clause embodies, do more than it strictly requires to ensure that the school is, at it must be, a completely secular institution.**

The Supreme Court has recognized that there is a compelling state interest in enforcing the Establishment Clause requirement of the separation of church and state. Widmar v. Vincent, 454 U.S. 263, 271 (1981). Even assuming, *arguendo*, that each of Appellant's actions did not violate the Establishment Clause (*i.e.* putting aside the fact that the Special Referee, School Board, trial court judge, and appellate court all have agreed that appellant made "repeated violation[s] of the Constitution"[17] by injecting "personal religious beliefs into his plan and pattern of instructing his students that also included a religious display in his classroom"[18]), however, the School Board was well within its rights to terminate Appellant. The government has a compelling interest in avoiding even the *appearance* of endorsement of religion. *See* Bishop v. Aronov, 926 F.2d 1066, 1074, 1077 (11th Cir. 1991) (stating that "[b]ecause of the *potential* establishment conflict, even the *appearance* of proselytizing" by a teacher should be avoided and noting that classroom speech could "give[ ] the *appearance* of endorsement by the University") (emphasis added). It is, after, trying to do the right thing by defending a core constitutional freedom. The courts have recognized that:

> [w]hen government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause and the limitations it imposes might restrict an individual's conduct that might well be protected by the [First Amendment] if the individual were not acting as an agent of government. . . . [T]he scope of [a school] employees' rights must [] yield to the legitimate interest of the governmental employer in avoiding litigation . . . [arising from] an Establishment Clause violation. In discharging its public functions, the governmental employer

[17] (Report at 13).
[18] *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*, 2012 Ohio 889, P12 (Ohio Ct. App. 2012)

> must be accorded some breathing space. In discharging its public functions, the governmental employer must be accorded some breathing space to regulate in this difficult context. For his part, the employee must accept that he does not retain the full extent of [First Amendment] rights that he would enjoy as a private citizen.

Marchi at 476.

Applying this principle, a school may, in the interest of avoiding an Establishment Clause violation and of protecting the value of religious neutrality that it embodies, do more than the Establishment Clause requires to ensure that it is, at it must be, a completely secular institution. *See* Stratechuk v. Bd. of Educ., 587 F.3d 597, 606 (3rd Cir. 2009) (stating that "the Constitution does not require the School to promote religion to the constitutionally permitted maximum and its failure to do so does not make it anti-religious in any constitutionally significant way. School districts can determine how close to the 'Establishment Clause line' they wish to place themselves") (citation omitted). To do so, a school "can restrict speech that falls short of an establishment violation." Bishop at 1077.

Accordingly, the School District's compelling interest in defending the separation of church and state by ensuring a secular and neutral school classroom and in avoiding even a *potential* Establishment Clause violation is sufficient to justify its actions in terminating Appellant.

D. **Enforcing the Establishment Clause by maintaining a secular curriculum is not "hostile" towards religion in violation of the Establishment Clause.**

Appellant cites Epperson for the proposition that "government may not be hostile to any religion." This is an accurate quotation. *See* Epperson at 103-04. Appellant then effectively asserts that enforcing the Establishment Clause amounts to unconstitutional hostility to religion. This is an absurdity. "No misperception could be more antithetical to the values embodied in the Establishment Clause. A secular state, it must be remembered, is not the same as an atheistic or

antireligious state. A secular state establishes neither atheism nor religion as its official creed." Allegheny at 610 (rejecting the argument that requiring that our government remain secular embodies "a 'latent hostility' or 'callous indifference' toward religion," stating that "nothing could be further from the truth, and the accusations could be said to be as offensive as they are absurd.") Worse, if courts were to adopt Appellant's rationale, concluding that failing to favor religion is in fact to instead to express hostility to it, it "would totally eviscerate the establishment clause." Smith v. Bd. of School Com'rs. of Mobile Co., 827 F. 2d 684, 692 (11th Cir. 1987) (quoting Grove v. Mead School Dist. No. 354, 753 F. 2d 1528 (9th Cir. 1985) (Canby, J., concurring), *cert. denied,* 474 U.S. 826 (1985)).

With an apparent total lack of irony, Appellant states that to read the Constitution as requiring the School Board to prohibit teaching of creationism in its classrooms "demonstrates a fundamental misunderstanding of the First Amendment that, in fact, turns this foundational freedom on its head." (App. Br. At 18). The audacity of this mischaracterization is striking. As the Supreme Court put it in rejecting an identical argument, Appellant:

> has it *exactly backwards* when he says that enforcing the Constitution's requirement that government remain secular is a prescription of orthodoxy. It follows directly from the Constitution's proscription against government affiliation with religious beliefs or institutions that there is no orthodoxy on religious matters in the secular state. . . . ***[It is] a form of Orwellian newspeak when he equates the constitutional command of secular government with a prescribed orthodoxy.*** To be sure, in a pluralistic society there may be some would-be theocrats, who wish that their religion were an established creed, and some of them perhaps may be even audacious enough to claim that the lack of established religion discriminates against their preferences. But this claim gets no relief, for it contradicts the fundamental premise of the Establishment Clause itself.

Allegheny at 610-11 (citations omitted, emphasis added).

As this Court can see, Appellant's "hostility" argument has a long and checkered history as an unsuccessful line of attack that profoundly distorts the very values of the Establishment

Clause itself, and the norm of secular governance that it embodies. As the Third Circuit Court of Appeals summed up recently, "[n]umerous courts have rejected the suggestion that 'secular' means 'anti-religious.'" Stratechuk at 608. The further cases cited and discussed below make this abundantly clear.

"The government does not discriminate against any citizen on the basis of the citizen's religious faith if the government is secular in its functions and operations." Allegheny at 610. This is because, "enforcing the Establishment Clause is not hostile to religious liberty. It protects that liberty for all." Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 861 (7th Cir. 2012). Under the Lemon test, the "purpose of adhering to the Constitution has nothing to do with [inhibiting] religion. It is a "secular purpose [to seek to] . . . act[] constitutionally." Satawa v. Macomb County Rd. Comm'n, et al., 2012 U.S. App. LEXIS 15853 (6th Cir. 2012). Action "taken to 'avoid conflict with the Establishment Clause' and maintain the very neutrality the Clause requires neither has a primary effect of advancing or inhibiting religion nor excessively entangles government with religion." Johnson at 972. *See also* Stratechuk at 604 (stating that "[a]ctions taken to avoid potential Establishment Clause violations have a secular purpose under the purpose prong of the Lemon test") (citation omitted); Nurre v. Whitehead, 580 F.3d 1087, 1096-97 (9th Cir. 2009) (holding that a school district's action in keeping all musical performances at graduation secular had "the secular effect of maintaining neutrality and ensuring . . . compliance with the Establishment Clause" and was therefore not hostile towards religion in violation thereof); Vasquez v. Los Angeles County, 487 F.3d 1246, 1255 (9th Cir. 2007) (holding that a county's removal of the image of the cross from its official seal in order "to avoid a potential Establishment Clause violation [had a] valid secular purpose" and is not hostile to religion); Roberts, at 1054 (10th Cir. 1990) (holding that a school district's order directing a

teacher not to leave his Bible in sight or read silently from it during classroom hours had a secular purpose in that it was intended "to assure that none of [the teacher's] classroom materials or conduct violated the Establishment Clause"); Locke v. Davey, 540 U.S. 712, 721 (2004) (holding that a state could deny funding under a scholarship program to a student who planned to use that funding for ministerial training, noting that the fact "[t]hat a State would deal differently with religious education for the ministry than with education for other callings is . . . not evidence of hostility toward religion").

Nor does it establish some supposed "religion of secularism" when the state remains neutral as to religion. (See Subsection E below for an in-depth discussion of this topic.) Indeed, this proposition was flatly rejected over fifty years ago by the Supreme Court in Schempp. In that case the defendant "insisted that unless these religious [Bible reading] exercises are permitted a 'religion of secularism' is established in the schools." 374 U.S. at 225. The Court noted that the State could not establish a "religion of secularism" in "the sense of *affirmatively* opposing or showing hostility to religion," but disagreed with the contention that removing religious content from classrooms would "in any sense [have] that effect." *Id.* (emphasis added).

In Engel v. Vitale, 370 U.S. 421, 433-435 (1962) the Supreme Court also rejected a hostility argument, observing:

> It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. . . . It is neither sacrilegious nor antireligious to say that each separate government in this country should . . . leave [religious matters] to the people themselves.

Likewise, in Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 203 (1948), the Court rejected a similar hostility argument and explained:

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not . . . manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.

Despite the uncontroversial, and thoroughly logical, nature of the conclusion that enforcing the Establishment Clause does not violate the Establishment Clause, courts have had to reiterate it time and again. This appears to be necessary because of a misunderstanding on the part of certain members of the dominant religion, who seem to see a failure to privilege their religion as a discriminatory attack on it and them. A secular government is not hostilely anti-religion because it refuses to promote their religion. It is simply remaining neutral. If "the establishment clause is to have any meaning, distinctions must be drawn to recognize not simply 'religious' and 'anti-religious' but 'non-religious' governmental activity as well." Grove at 1536. Like Appellant here, the plaintiffs in Grove regarded "'secular' and 'humanist' as synonyms for 'anti-religious.'" *Id.* 1535-1536. The "analytical difficulty with [this] approach is that it tends to divide the universe of value-laden thought into only two categories -- the religious and the anti-religious. By "denominating the anti-religious half of their universe as 'secular,'" Appellant erects "an insurmountable barrier to meaningful application of the establishment clause." *Id.*

Appellant is free to believe the state should not be secular, and to claim some personal offense at upholding the Constitution, but his legal argument is entirely unfounded. In this case the government is merely preventing religion from co-opting state institutions to spread its ideas. Even in cases in which it has gone much further, and expressly and affirmatively condemned a

particular religion's actions or stance on a particular issue, courts have rejected claims that such actions are hostile to religion in violation of the Lemon test.

For example, in Catholic League for Religious & Civ. Rights v. City & County of San Francisco, 624 F.3d 1043 (9th Cir. 2009), the San Francisco Board of Supervisors adopted a resolution denouncing a cardinal's directive that Catholic agencies should not place children for adoption in homosexual households. The court held that the primary purpose of the resolution was not to express disapproval of Catholic *religious* beliefs *as such*, but instead to offer a secular view (pro) on a secular issue (equality). The court stated that an

> 'objective observer' who is . . . 'familiar with the history of the government's actions and competent to learn what history has to show' would conclude that the defendants acted with a predominantly secular purpose, i.e., to promote equal rights for same-sex couples in adoption and to place the greatest number of children possible with qualified families.

Id. at 1060-61 (Silverman, J., concurring) (internal citations and quotation marks omitted).

Similarly, in Am. Family Ass'n v. City & County of San Francisco, 277 F.3d 1114, 1119 (9th Cir. 2002), a Christian group sponsored a full-page advertisement in the San Francisco Chronicle that proclaimed God's hatred of homosexuality and offered to help homosexual persons reject "self-destructive behavior." In response, the San Francisco Board of Supervisors sent a letter to the organization stating that it "denounces your hateful rhetoric," and linking the organization's discriminatory message to "the horrible crimes committed against gays and lesbians." *Id.* The Board also adopted two resolutions which criticized a religious political coalition for its anti-homosexuality position, assailed the scientific bases for the coalition's position, and urged secular television stations not to support the coalition's message of intolerance. *Id.* at 1119-20. The court found that while the letter and resolutions may have appeared to attack the plaintiff's religious views on homosexuality, there was a "plausible

secular purpose in the [city's] actions — protecting gays and lesbians from violence. . . ." *Id.* at 1121. The state may denounce a religious bigot's bigotry if, in doing so, it uses secular reasoning (i.e. by attacking it as violation of human rights, not as misreading of the Bible, for example). Government may speak on issues, even opposing religious views, so long as it does so on a secular and not a religious basis.

In this case, the government's interest in teaching evolution is to promote science, not attack religion. This purpose and effect of doing so is secular. By way of comparison, the school is not requiring teachers to post signs reading: "There is No God" or "The Bible is Full of Lies" on classroom walls. That is what actual hostility to religion might look like. The difference between such an overt promotion of atheist views and the neutrality as to religion embodied in the removal of Christian classroom displays should be readily apparent to any reasonable observer.

In conclusion, the government is not, as Appellant asserts, violating the Establishment Clause by simply enforcing the principle of neutrality that that very clause demands. Attempts even just "reasonably oriented toward complying with" the Establishment Clause "do not demonstrate hostility" to religion. Busch v. Marple Newtown Sch. Dist., 567 F.3d 89, 100 (3rd Cir. 2009). In this case, the School Board is attempting to avoid a clear constitutional violation. To state the (extremely) obvious, a "school's actions do not violate the Establishment Clause [when] they were motivated by a permissible purpose to comply with the Establishment Clause." *Id.* at 101. Neutrality is not hostility.

E. **Teaching evolution does not amount to promoting the supposed "religions" of secular humanism or "evolutionism."**

Appellant has also asserted that teaching evolution is itself a violation of the Establishment Clause as a form of promotion of the "religion of 'secular humanism.'" (App. Br.

at 19). There is an interesting discussion to be had about the nature of humanist beliefs and how they are properly characterized. [19] However, the resolution of this question has no bearing on the resolution of this case. The courts have repeatedly ruled that teaching evolution is not promoting secular humanism.

Humanists do indeed believe that evolution is an accurate description of the origin of species. This belief is not a religious belief, however. Humanists defend it because science has concluded that it is true. In the same way, humanists defend the theory of gravitation, because it accurately and usefully describes the material world. (Likewise, the Catholic Church has accepted the theory of evolution as true, and teaches it in the science classes in its schools; this does not transform evolution into a Catholic *religious* belief.) Believing something because it is true is not the same thing as believing something as an article of faith because religious dogma commands it, regardless of its evident truth. Only those whose worldview is thoroughly divorced from material reality could conflate the two kinds of belief and fail to see the difference between them.

Not only is the humanist defense of science, including evolution, not itself a religious belief, even if it were the coincidental harmony between this and a school's teaching of it would

---

[19] See: http://www.americanhumanist.org/Humanism. Please note that humanism is not a belief system with a rigid dogma of set beliefs that must be accepted, and there is a great variety of beliefs held be those who consider themselves humanists. No one humanist speaks for all humanists. The AHA itself describes humanism as "a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity." Appellant quotes the first Humanist Manifesto, dated 1933, which includes a reference to "religious humanism." The most recent statement of common humanist belief, the third Humanist Manifesto, dates to 2003, and does not once make use of the word "religion" or "religious." See http://www.americanhumanist.org/Humanism/Humanist_Manifesto_III. Furthermore, AHA is an educational, not a religious, non-profit, as affirmed by its designation as such by the Internal Revenue Service in its letter affirming the AHA's tax-exempt status as an entity "organized exclusively for educational purposes" under Section 501(c)(3) of the Internal Revenue Code.

not transform evolution into religion. As the Supreme Court has noted, mere harmony between the religious beliefs and another set of ideas does not transform those ideas into religious ones. State action does not violate the Establishment Clause simply "because it happens to coincide or harmonize with the tenets of some or all religions." McGowan at 442 (quotation marks omitted). For example, the fact that "the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." Harris v. McRae, 448 U.S. 297, 319 (1980); *see also* McGowan at 442 (stating that "the fact that [murder is illegal] agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation"). Similarly, the state may teach evolution in its classrooms because it is an accepted scientific explanation of the diversity of life on Earth even if any number of religions happen to also accept (or dispute) it.

Applying these principles, federal courts have already considered and rejected Appellant's *exact* argument. The teaching of evolution is not the promotion of a supposed "religion" of "evolutionism" or "secular humanism." Peloza v. Capistrano Unified School Dist., 37 F. 3d 517, 521 (9th Cir. 1994) (stating that the "Supreme Court has held unequivocally that while the belief in a divine creator of the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not" and has never "held that evolutionism or secular humanism are 'religions' for Establishment Clause purposes") (citing Edwards, at 592 (finding unconstitutional a law against the teaching of evolution in public schools despite noting that an opponent of it claimed it was intended to prevent the teaching of "secular humanism"). Of course, schools may teach "ideas that are consistent with secular humanism; . . . mere consistency with religious tenets is insufficient to constitute unconstitutional advancement of religion." Smith at 692 (rejecting claim that textbooks "advanced secular humanism and

inhibited theistic religion"). A school curriculum that includes secular historical or scientific facts, and that omits contrary religious views, "does not convey a message of governmental approval of secular humanism, neither does it convey a message of government disapproval of theistic religions." *Id.* at 694. Furthermore, the Establishment Clause does not permit, let alone require, "'equal time' for religion" in the school curriculum. *Id.* To so read it "turns the establishment clause requirement of 'lofty neutrality' on the part of the public schools into an affirmative obligation to speak about religion. Such a result clearly is inconsistent" with the Establishment Clause. *Id* at 695.

Although in other contexts the federal courts in recent decades have broadened the scope of what has been considered a religion, "[t]his expansive definition of religion has been developed primarily to protect an individual's *free exercise* of religion, recognizing that an individual's most sincere beliefs do not necessarily fall within traditional religious categories." U.S. v. Allen, 760 F. 2d 447, 450 (2nd Cir. 1985) (rejecting an Establishment Clause defense by anti-nuclear protesters at military facility that their prosecution amounted to state action promoting the religion of "nuclearism," noting "appellants ask us to recognize as a 'religion' what that religion's alleged adherents have not identified as such"). Although "religion" should be broadly interpreted for Free Exercise Clause purposes, "anything 'arguably non-religious' should not be considered religious in applying the establishment clause." *Id.* Therefore, although a court may recognize a humanist's belief system as constitutionally protected from discrimination, it should not be construed as a religion for purposes of the Establishment Clause "lest all 'humane' programs of government be deemed constitutionally suspect." *Id.* Appellant cites Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961), for the proposition that humanism is a religion. The context of Torcaso, a case about an atheist barred from public office, makes clear

that the court labeled it as such as for the limited purpose of extending the constitutional protection against discrimination to nontheistic belief systems, not to blow a gaping hole in its Establishment Clause jurisprudence. Its later decisions make abundantly clear that just because humanism is secular and the separation of church and state requires a secular government, that this mere coincidental harmony does not produce the absurd result that enforcing the Establishment Clause to protect the latter is a violation of that very clause by promoting the former.

II. A SCHOOL HAS THE POWER TO SET A SECULAR CURRICULUM AND ENSURE THAT ITS TEACHERS FOLLOW IT.

A. Schools have the power to determine the content of their curricula, limited only by the Establishment Clause prohibition that it not promote religion.

The Supreme Court "has long recognized that local school boards have broad discretion in the management of school affairs." Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (citing Epperson). "Public education in our Nation is committed to the control of state and local authorities, and . . . federal courts should not ordinarily intervene in the resolution of conflicts which arise in the daily operation of school systems." *Id.* (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (internal quotation marks omitted)). The Court has "repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools." *Id.*

Schools are given broad discretion to select the facts and ideas that will comprise the curriculum to be taught to the students entrusted to their care, and, as the necessary means of carrying out this policy, to require their teachers to follow this curriculum. This discretion is limited, however, by the Establishment Clause, which forbids the state to use its schools to

promote religious ideas. *See e.g.* Edwards. The state likewise cannot exclude secular ideas from its curriculum as a means of protecting contrary religious ideas. Smith at 694 (stating that the state cannot exclude "material because it conflicts with a particular religious belief") (citing Epperson). In other words, the state (1) cannot promote religious ideas in its curriculum, (2) can choose to omit a topic or viewpoint from its curriculum for secular reasons (such as factual validity, relevance or importance) but cannot do so for religious reasons (such as a desire to avoid offense to or conflict with religious belief). *See* Epperson at 107 (stating that "[t]he state has no legitimate interest in protecting any or all religions from views distasteful to them"). Every curricular decision must have a genuinely secular purpose.

"Curriculum" has been very broadly defined by the Supreme Court to include any school activities "whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student[s]." Hazelwood at 271. Appellant's conduct as a teacher within the classroom would clearly be included within this broad definition. The content of his science classes is quintessentially curricular in nature. Classroom displays, such as his various religious posters and books, are "of a curricular nature" and therefore subject to School Board control as well. York County at 694. Because this classroom speech is curricular in nature, the School Board has the power to insist that it comply with its appropriately secular curriculum, not Appellant's personal religious beliefs.

B. Teachers have no First Amendment right to deviate from the school's curriculum or inject their own ideas into the classroom.

Although "it is important to first acknowledge that schoolteachers do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'" this is far from the end of the analysis. York County at 693 (citing Tinker). This general principal

notwithstanding, "limitations are placed on the free speech rights of schoolteachers . . . due to the nature of their employment by government-operated schools." *Id.* It is "settled that the state, as an employer, undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole." *Id.* (internal quotation marks omitted).

This conclusion rests on the principle that, as the Supreme Court has put it, "when the State is the speaker, it may make content-based choices. When [a school] determines the content of the education it provides, it is the [school] speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker." Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995). Furthermore, when it comes to teacher speech promoting religious ideas, "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995).

The "Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467-468 (2009). "[T]he Government's own speech . . . is exempt from First Amendment scrutiny." Johanns v. Livestock Marketing Assn., 544 U.S. 550, 553 (2005). A government entity has the right to "speak for itself." Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 229 (2000). However, this "does not mean that there are no restraints on government speech[;] . . . government speech must comport with the Establishment Clause." Summum at 468.

As to teachers in particular, when he or she "goes to work and performs the duties he is paid to perform, he speaks not as an individual, but as a public employee, and the school district

is free to 'take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted.'" Johnson at 957. Simply put, a "public school teacher's *in class* conduct is not protected by the First Amendment." Lee v. York Co. School Div., 484 F. 3d 687 (4th Cir. 2007) (emphasis added) (citing Edwards v. California Univ. of Pa., 156 F. 3d 488, 491 n.1 (3rd Cir. 1998)). In fact, "no court has found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates." This unprotected conduct includes not just the content of the curriculum bust also "choosing one's own teaching methods." Borden v. School Dist. of Twp. of East Brunswick, 523 F. 3d 153, 172 (3rd Cir. 2008). The reason that such conduct is not protected by the First Amendment is that a "teacher is acting as the educational institution's proxy during his or her in-class conduct, and the educational institution, not the individual teacher, has the final determination in how to teach the students." *Id.*

The general principles at issue as to teacher speech are thus: the only part of the First Amendment that restrains how the government may regulate those of its individual representatives who speak on its behalf is the Establishment Clause, which forbids any government speech that would promote, endorse or affiliate it with religion. In this case, these two rules point in the same direction. The teacher, as a government representative, cannot use the Free Speech Clause to contest the restrictions regarding his classroom speech on the government's behalf that it has chosen to impose. Furthermore, the government is not permitted to grant him this power even it wanted to; it is required by the Establishment Clause to impose rules restricting the religious speech of its representatives, including teachers. The First Amendment requires that the Appellant, when he speaks as a teacher in the classroom, speak

only in secular terms. He must also follow the School Board's rules, and the School Board is required to forbid him to promote religious ideas in his class.

Unsurprisingly, courts applying these principles to cases similar to this one have already rejected the exact arguments made by Appellant. As to religious teacher speech in particular, a "school district's interest in avoiding an Establishment Clause violation trumps [a teacher's] right to free speech." Peloza, at 522. Just as "the Constitution would not protect" a teacher when he refuses to teach what is in the curriculum, "it does not permit him to speak as freely at work in his role as a teacher about his views on God" as he may in his private life. Johnson at 957. In fact, a teacher's "discuss[ion of] his religious beliefs with students during school time on school grounds would violate the Establishment Clause." *Id.* The First Amendment rights of a teacher, "in [that] role . . . rather than as a private citizen," are not violated when he is prevented from teaching the supposed "difficulties and inconsistencies" of the theory of evolution. LeVake v. Indep. School Dist. #656, 625 N.W. 2d 502, 508-9 (Minn. Ct. App. 2001). A teacher's "responsibility as a public school teacher to teach evolution in the manner prescribed by the curriculum overrides his First Amendment rights as a private citizen." *Id.* at 509. The state has a "compelling state interest in . . . adherence to suitable curriculum" that "overrides individual teachers' desire to teach what they please." *Id.* (citing Webster). A school does not infringe on its "employees' rights to the free exercise of religion, to association, and to free speech and academic freedom" when it prohibits a teacher from using his official position to promote his religious views to students because the "free expression rights [of teachers] must bow to the Establishment Clause." Doe v. Duncanville Indep. School Dist., 70 F. 3d 402, 406 (5th Cir. 1985). Rather, schools "can restrict speech that falls short of an establishment violation"; when

there is such a violation, the "case [is] over" and no analysis of a supposed right of the teacher to cause such a violation is even necessary. Bishop at 1077 (citing Roberts).

Changing the label from teacher "free speech" to "academic freedom" does not change this conclusion. The Supreme Court has described the "four essential freedoms" that constitute academic freedom as a *school*'s freedom to choose "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Regents of Univ. of California v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (internal quotation marks omitted). "Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula." Kirkland v. Northside Indep. School Dist., 890 F. 2d 794, 800 (5th Cir. 1989). There is *no* "support to conclude that academic freedom is an independent First Amendment right." In fact, to the contrary, a school "must have the final say in . . . a dispute" concerning "a matter of content in the courses [a teacher] teaches." Bishop at 1076.

As to creationism in particular, the Supreme Court has rejected the contention that teaching creationism protects "academic freedom" by requiring "teaching all of the evidence with respect to the origin of human beings," noting that it does not further "the goal of providing a more comprehensive science curriculum." Edwards at 586 (internal quotation marks omitted). To the contrary, "discrediting" evolution "does not serve to protect academic freedom" and "[t]he goal of providing a more comprehensive science curriculum is not furthered [by] . . . the teaching of creation science." *Id.* at 589, 586. This is because "'[a]cademic freedom' does not encompass the right . . . to advance a particular religious belief." *Id.* at 599 (Powell, J., concurring). A teacher's "interest in academic freedom and free speech do[es] not displace" a school's strong interest "that its courses be taught without personal religious bias." Bishop at

1075. *See also* LeVake at 508-09 (rejecting argument that teacher has "academic freedom" right to violate evolution curriculum and teach creationism instead).

Finally, Appellant's reliance on Keyishian for the proposition that his academic freedom is being violated is misplaced. As the Bishop court noted, "Keyishian dealt with that brand of regulation most offensive to a free society: loyalty oaths" and its "pronouncements about academic freedom in that context, however, cannot be extrapolated to deny schools command of their own courses." *Id.* Under Keyishian, the government generally may not punish its employees for the personal views expressed in their *private* life. It does not implicate the right of the government to control the speech of those who speak for it *when they are doing so* (*i.e.* on the job). LeVake at 509-09. Keyishian would be apposite if Appellant had been fired merely for belonging to a creationist church, not for using his position as a public school teacher to promote Christianity and creationism to students in the classroom. The First Amendment both (1) prohibits the government from punishing him for his views expressed in his private life, pursuant to its Free Speech Clause, and (2) requires the state not to permit him to use his position as a government representative to spread those views when they are religious in nature, pursuant to its Establishment Clause.

In summary, disagreements between a school and one of its teacher about his classroom speech is "nothing more than an ordinary employment dispute" and the speech at issue, because it occurs in the classroom and is directed at students, is curricular in nature and therefore "is not protected by the First Amendment." York County at 700. Appellant has no free speech right to promote his ideas in the classroom, doubly so when those ideas are religious and so would violate the Establishment Clause.

C. Students do not have a First Amendment right to receive creationist instruction in Appellant's classroom.

Appellant has also asserted that the school cannot seek to remove religious ideas from its curriculum because to do so violates the First Amendment right of students to receive this information, citing Pico, 457 U.S. 853. Pico, however, was a case contesting the power of a school board to remove books from a school library. While the Court has held "in a variety of contexts that 'the Constitution protects the right to receive information and ideas,'" it has noted the limitation of this general principle, however, stating that "[o]f course all First Amendment rights accorded to students must be construed 'in light of the special characteristics of the school environment.'. . . [b]ut the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students." *Id.* at 867, 868 (emphasis in original). The Court strongly emphasized "the limited nature of the substantive question presented in [Pico]," noting that the case did *not* involve "the power of the State to control . . . the *curriculum and classroom*." *Id.* at 861 (emphasis added). Rather, "the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading, meaning that the "case thus does not intrude into the classroom, or into the compulsory courses taught there." *Id.* at 862. As is apparent, the Court went to great lengths to repeatedly and clearly limit the right of students to receive information to the library context, and to exclude the curriculum from its orbit of its rule, noting "the unique role of the school library" which provides access to "areas of interest and thought *not covered by the prescribed curriculum*." *Id.* at 868-69 (emphasis added). The Court clearly contrasted the "discretion in matters of *curriculum*" possessed by the school with the use of "school libraries [,which] is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional." *Id.* at 868 (emphasis in original).

Appellant's reliance on Pico is therefore misplaced. The school has the power to choose the content of its own speech in the form of its curriculum to be taught in its classrooms. It lacks the power to censor the access to certain books in a library. In the library context, it is clear that the school is not the speaker, but is simply providing a multitude of texts, the viewpoints of any of which it may not endorse. In the classroom, it clearly is the speaker, and therefore has the right to control the speech made in its name to ensure compliance with its curriculum, and to avoid the risk of any potential Establishment Clause violation. The court in Pico could not have made this distinction more clearly.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the judgment of the Court of Appeals of Knox County, Ohio, be affirmed.

Respectfully submitted,

William J. Burgess
Appignani Humanist Legal Center
American Humanist Association
Counsel for *amici curiae*

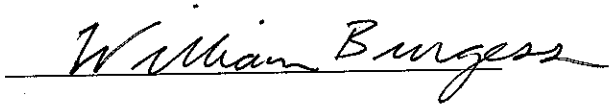
CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2012, the foregoing Brief for *amici curiae* was mailed by first-class mail, postage prepaid, to:

David K. Smith
Krista K. Keim
Paul J. Deegan
Britton, Smith Peters & Kalail Co., L.P.A.
3 Summit Park Drive, Suite 400
Cleveland, OH 44131

R. Kelly Hamilton
The Law Office of R. Kelly Hamilton, LLC
P.O. Box 824
Grove City, OH 43123

Rita M. Dunaway
The Rutherford Institute
P.O. Box 7482
Charlottesville, VA 22906



William Burgess
American Humanist Association