**IN THE SUPREME COURT OF OHIO**

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| JOHN D. FRESHWATER,<br><br>Appellant,<br><br>v.<br><br>MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION,<br><br>Appellee. | Case No. 2012-0613<br><br>On Appeal from the Knox County Court of Appeals, Fifth Appellate District<br><br>Court of Appeals Case No. 2011-CA-00023 |

# BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND ANTI-DEFAMATION LEAGUE IN SUPPORT OF APPELLEE


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**MISCELLANEOUS**

## INTRODUCTION

The referee and the lower courts were plainly correct that appellant John Freshwater repeatedly violated the Establishment Clause and that the School District had the authority to terminate his employment to put a stop to his conduct. Simply put, public-school teachers do not have a constitutional right to impose their faith on their students. There can be no doubt that Freshwater was doing exactly that: He now frankly admits what everyone in the community knew all along—namely, that he was intentionally teaching creationism and otherwise incorporating his religious views into his classes. Although Freshwater may believe that he was benefitting the students, his actions were an affront to the religious freedom of the parents and students of the Mount Vernon City Schools. The School District had both the lawful authority and the constitutional obligation to curtail his actions; and in the face of his recalcitrance, terminating his employment was, as the referee found, more than justified.

Indeed, even if his conduct had not been constitutionally forbidden, the School District would have had the lawful authority to remove Freshwater from the classroom. By his own admission, Freshwater sought to subvert the official curriculum: He disliked the prescribed lessons on the scientific theory of evolution, so he taught the students to disbelieve those lessons, using materials and tactics that the School District specifically directed him not to use. The federal courts have consistently and unequivocally rejected the claim that individual teachers have a First Amendment right to set or alter the curriculum. As a matter of Ohio law, the authority to do that belongs to the School District, which is accountable to Mount Vernon parents for ensuring that their children receive a quality education. There is no legal authority of any kind for the suggestion that individual teachers can override or ignore a school district's set curriculum. Nor could there be: Public schools simply could not function on those terms.

Finally, there is a more straightforward reason, lurking in the background, why removing Freshwater from the public-school system was not only appropriate, but essential: Public-school teachers have no constitutional right to burn the arms of children—not in the name of religion; not in the name of science; not for any reason. Although *amici* will focus principally on the Establishment Clause issues in this brief, because that is largely how the case has been litigated, we believe, as anyone who cares about the well-being of children must, that a person who thinks that he has the legal right to injure children, and does so for more than two decades, does not belong in a classroom. The First Amendment issues here are supremely important; ensuring that this Court decides them correctly, should it choose to address them, is central to the organizational mission of each of the *amici*. But as critical as it is to ensure that public officials like John Freshwater do not arrogate to themselves the right of parents to determine our children's religious upbringing, something will have gone terribly awry if burning children takes a backseat to any of that. Firing a teacher who adamantly refused to obey the school's First Amendment obligations and/or to respect the students' and parents' First Amendment rights was a constitutional imperative; firing a teacher who intentionally injured the students in his charge was a moral one. This Court should not hesitate to say so, and to affirm on that ground.

## INTEREST OF THE *AMICI CURIAE*

*Amici* are civil-rights and religious-liberty organizations that regularly defend religious freedom by advocating for First Amendment rights in federal and state courts throughout our nation. *Amici* know through long experience that conduct like John Freshwater's is not protected by the First Amendment and does not advance religious freedom or improve the quality of education provided to students. The Constitution does not license the teaching of religious doctrines such as creationism in a public-school science class. Nor does it afford individual public-school teachers the right to disregard the established curriculum in favor of teaching their

own religious beliefs. Quite the contrary. Parents have the right to determine the religious upbringing of their children; public-school teachers have no right to intrude on that relationship. Were this Court to adopt Freshwater's unprecedented views, it would undermine the religious freedom of the parents and children of this State while making a mockery of our most cherished First Amendment values.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents more than 120,000 members and supporters across the country, including thousands who reside in Ohio. Since its founding in 1947, Americans United has served as a party, as counsel, or as an *amicus curiae* in scores of Religion Clause cases before the United States Supreme Court and other federal and state courts nationwide.

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat religious, ethnic, and racial prejudice in the United States, the Anti-Defamation League is today one of the world's leading organizations dedicated to fighting hatred, bigotry, and discrimination, and to promoting religious liberty. ADL believes that the vigorous defense of our Nation's rights of freedom of religion and conscience are essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents. In recent decades, our public schools have unfortunately become a principal battleground in the debate over the meaning of religious establishment. In this debate, ADL has long believed, and has long argued, that government-sponsored religious activity in our schools poses a particular threat to the continued vitality of religious liberty. ADL joins this brief in furtherance of that belief.

## STATEMENT OF FACTS

In his opening brief to this Court, Freshwater now finally admits what the overwhelming evidence in the termination proceeding showed and the referee specifically found: He sought to "round out the mandated discussion of evolution" with his own "discussion of the theory of creationism or intelligent design." Br. 14. He supplied his students with creationist materials, including "handouts," "motion pictures," and "videos," which he described as providing "evidence against evolution." Referee's Report at 4-5. He developed a "shortcut method of citing passages in printed materials that could be questioned," involving a signal word to identify the information in the students' textbooks that should be disbelieved. *Id.* at 5. He awarded extra credit for going to see a creationist film. Bd. Ex. 6, att. 7. He had students debate creationism and evolution in class (Tr. 1330), and offered creationism as an alternative to evolution (Tr. 1002). Simply put, he "persisted in his attempts to make eighth grade science what he thought it should be—an examination of accepted scientific curriculum with the discerning eye of Christian doctrine." Referee's Report at 12.

As early as 1994, Freshwater was warned not to pass out or use creationist materials or to give students extra credit for attending creationist programs (Bd. Ex. 84); later, in an evaluation, he was warned to comply with the District's policies against religion in the classroom (Bd. Ex. 16); and he was warned when a parent complained about the creationist material (Tr. 2244). In 2003, he went to the School Board, seeking formal approval to change the curriculum so that he could include in the curriculum creationist teachings challenging the scientific theory of evolution as presented in the District's science textbooks. Referee's Report at 4. But that "proposal was rejected and his suggested policy was not adopted." *Id.* Yet Freshwater ignored the Board's decision and simply "undertook the instruction of these eighth graders as if the suggested policy had been implemented." *Id.* In 2006, another parent complained about

Freshwater's creationist materials (*id.* at 6-7; Bd. Ex. 6, att. 10), and a committee of school staff determined that the materials came from religious, creationist websites (Referee's Report at 7). The superintendent himself then admonished Freshwater for violating the school's policy on religion in the classroom. *Id.*

All that led up to a complaint from parents in December 2007 that Freshwater had burned a Christian cross into their son's arm in class, using a high-voltage Tesla coil. Bd. Ex. 6, at 8-10. The principal sent Freshwater a letter in January 2008, ordering him to stop burning students with the device. Referee's Report at 2. Then, in April, an attorney for the parents sent the District a letter that not only repeated the complaint about burning their son's arm but also detailed a long list of other conduct by Freshwater that raised serious Establishment Clause concerns (Bd. Ex. 3); and a week later the parents' counsel sent a follow-up letter threatening a lawsuit (which the parents later filed) because the issues had not been resolved (Bd. Ex. 4). In response to the complaints, the District hired an independent investigator, who determined that Freshwater had been burning the arms of students—some 500 to 600 all together, as Freshwater would later testify (Tr. 379, 403)—year after year during his entire 21 years at Mount Vernon Middle School. Bd. Ex. 6.

As the investigator found and evidence at the termination hearing later confirmed, Freshwater also kept elaborate displays of religious materials in his classroom, including a box of Bibles at the back of the room and a Bible on display on his desk (Tr. 70); Bible verses posted around the room (Tr. 3780-81, 5950); banners for the "Cross Club," a poster of the President and Secretary of State praying, an advertisement for an evangelist revival, and a copy of the Ten Commandments on the classroom bulletin board (Tr. 969-70; Bd. Exs. 25, 27); and three more copies of the Ten Commandments and Bible verses on the windows next to the classroom door

(Tr. 3780-81, 5950; Bd. Exs. 26, 106-108). *See also* Bd. Ex. 6. The principal repeatedly directed Freshwater to remove the items, eventually presenting a list of all the specific items to be removed from the classroom. The principal had "'several meetings and several conversations'" with Freshwater about Freshwater's continued refusal to obey. Referee's Report at 10. And even after being warned that refusing to remove the items could constitute insubordination, Freshwater "decided to comply only in part." *Id.* He not only retained the poster of the praying President and Secretary of State as well as the Bible on display on his desktop, but also, in what the referee determined to be an act "of defiance, disregard, and resistance," added a second Bible and the book *Jesus of Nazareth* to his desk, flatly refusing to remove the items. *Id.* at 10-11.

The referee found that "John Freshwater was determined to inject his personal religious beliefs into his plan and pattern of instruction of his students" (*id.* at 3) and that Freshwater not only "repeatedly violated the Establishment Clause" but also "repeatedly acted in defiance of direct instructions and orders of the administrators" to cease the unconstitutional conduct (*id.* at 13). The referee thus recommended that Freshwater's employment be terminated (*id.*), the School District followed that recommendation, and the court of common pleas and the court of appeals affirmed the decision.

## ARGUMENT

**PROPOSITION OF LAW NO. 1:** A public school district's termination of a teacher's employment does not infringe the teacher's First Amendment rights when the teacher (i) repeatedly violated the Establishment Clause by incorporating religious teachings into the curriculum and by keeping religious displays in the classroom, and (ii) repeatedly attempted to subvert the officially prescribed curriculum, and (iii) injured hundreds of students over many years.

### I. The School District Had A Constitutional Obligation To Put A Stop To Freshwater's Repeated Violations Of The Establishment Clause.

Freshwater seeks nothing less than to have this Court bless the teaching of his religious beliefs in Ohio's public schools. His stated mission is to have science teachers lead classroom

discussions of "creationism or intelligent design" to "round out" discussions of the scientific theory of evolution. Br. 14. In his view, "[i]f discussions of evolution may not be banned from a science classroom, then neither may discussions of creationism be banned." Br. 12.

But the United States Supreme Court sees things differently. In keeping with the Framers' vision of religious liberty, that Court has for more than half a century made it crystal clear that the Establishment Clause forbids teaching religious precepts in public schools. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down Louisiana law requiring teaching of creation science if evolution is taught); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down law that prohibited teaching of evolution in public schools); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (holding that school-sponsored Bible reading in public schools is unconstitutional). As these cases recognize, religion is an intensely personal matter that should be left to families and their spiritual leaders, not to the public schools. And when an individual teacher seeks to usurp the role of parents by preaching his personal religious beliefs to a captive audience in the public-school classroom, the school district has both the authority and the constitutional duty to put a stop to his actions.

### A. Religious instruction does not belong in public-school classrooms.

The public-school classroom is not the proper place for students to receive instruction in matters of faith. Religious upbringing is a private matter that our Constitution wisely commits to families and their houses of worship and spiritual leaders, not to school boards or individual teachers, however well-meaning they might be. "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility committed to the private sphere, which itself is promised freedom to pursue that mission." *Lee v. Weisman*, 505 U.S. 577, 589 (1992); *see also, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). "Families entrust public schools with the education of their children, but condition their trust on

the understanding that the classroom will not purposely be used to advance views that may conflict with the private beliefs of the student and his or her family." *Edwards*, 482 U.S. at 584.[1]

1. Injecting religion into a public-school classroom poses a particularly grave threat to individual conscience and to parents' right to direct their children's religious upbringing because the public schools are a uniquely coercive environment. *See Edwards*, 482 U.S. at 584; *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007 (7th Cir. 1990); *see also Lee*, 505 U.S. at 592-94. "Students in such institutions are impressionable and their attendance is involuntary." *Edwards*, 482 U.S. at 584; *accord, e.g.*, *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972) (per curiam) (students are "a captive audience" and are "dependent on [their teacher] for grades and recommendations"). And younger children, such as those in middle school, are particularly impressionable and subject to subtle (or not-so-subtle) coercive pressures because they are still in the process of intellectual development. *Webster*, 917 U.S. at 1007. The teachers are, meanwhile, cloaked with the full authority of the state; and students are repeatedly told, by school officials, by parents, and by society in general, that their job when they go to school is to obey the instructions that they are given and to trust and believe what they are taught. *See Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (per curiam). And for families who cannot afford to send their children to private schools, there is no option but to accept what is provided—which is why the schools should neither purvey nor disparage anyone's religious beliefs.

Opening the floodgates to religious instruction in our nation's public schools would degrade religion while undermining the system of education. Justice Jackson explained seventy

[1] *Accord, e.g.*, *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 175 (3d Cir. 1999) ("some parents . . . would regard a compelled classroom exposure to [particular religious material] as an infringement of their parental right to guide the religious development of their children"), *aff'd by an equally divided court*, 226 F.3d 198 (3d Cir. 2000) (en banc).

years ago that "[f]ree public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). But, he warned, if teachers were free "to impose any ideological discipline," then "each party or denomination must seek to control, or failing that, to weaken the influence of the educational system." *Id.* For this reason, "[o]ne of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000). Schools should be free to concentrate on providing our children with a high-quality education. They cannot reliably serve that function if they are made the vehicle for enforcing religious orthodoxy of one kind or another.

2. The Establishment Clause of the First Amendment is the bulwark against the harms caused when religiously based factions seek to exert control over social institutions such as the public schools. It embodies our founding generation's recognition that "religion & Govt. will both exist in greater purity, the less they are mixed together." Letter from James Madison to Edward Livingston (July 10, 1822), *in* JAMES MADISON, WRITINGS 786, 789 (Library of Am. 1999). As the U.S. Supreme Court has elaborated,

> [the] first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.

*Engel v. Vitale*, 370 U.S. 421, 431-32 (1962) (footnotes omitted).

Public education in Ohio should not be left to the mercy of competing religious groups fighting over issues of faith that have divided humanity for millennia. The School District here properly avoided those dangers by adopting an official policy that "it is not the province of a public school to advance or inhibit religious beliefs or practices"; instead, "[s]tudents should receive unbiased instruction in the schools, so that they may privately accept or reject the knowledge thus gained, in accordance with their own religious tenets." Referee's Report at 4-5. That is not only what the Constitution requires, but also what is truly good for the children and families of Mount Vernon. An individual teacher, however well-meaning he might be, does not and should not have the right to substitute his own views about how to promote the spiritual life of District students.

### B. Teaching creationism in public-school science classes is prohibited religious instruction that infringes on religious freedom and interferes with students' education.

This dispute is only the latest in a series of cases involving religious opposition to teaching the scientific theory of evolution. In all those cases, the courts have unequivocally held that creationism, creation science, and intelligent design are religious views that have no place in the public schools, and that religiously motivated attempts to undermine instruction in the scientific theory of evolution are similarly impermissible. Freshwater's repeated insertion of these very beliefs into classroom instruction, despite repeated directives to stop from the School Board and administrators, made it necessary to terminate his employment in order to end the Establishment Clause violations.

1. Christian fundamentalism "began in nineteenth century America as part of evangelical Protestantism's response to," among other things, Charles Darwin's exposition of the scientific theory of evolution as an explanation for the diversity of species. *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1258 (E.D. Ark. 1982); *see also, e.g.*, *Edwards*, 482 U.S. at 590-92;

*Epperson*, 393 U.S. at 98, 107-08. In an "upsurge of 'fundamentalist' religious fervor of the twenties," religiously motivated groups pushed state legislatures to adopt laws forbidding public schools to teach about evolution, leading to the Scopes Monkey Trial of 1925. *Epperson*, 393 U.S. at 98; *McLean*, 529 F. Supp. at 1259; *see Scopes v. Tennessee*, 289 S.W. 363 (Tenn. 1927). But the battle against evolution was cultural as much as legal: "Between the 1920's and early 1960's, anti-evolutionary sentiment had a subtle but pervasive influence on the teaching of biology in public schools," with one consequence being that, "[g]enerally, textbooks avoided the topic of evolution." *McLean*, 529 F. Supp. at 1259. In other words, formal legal sanctions reinforced a religiously based social movement to expel the scientific theory of evolution from the nation's classrooms.

The legal landscape changed dramatically in 1968, however, when, in *Epperson*, the Supreme Court struck down a state's prohibition against teaching evolution. Although the statute at issue did not directly refer to the Book of Genesis or the fundamentalist view that religion should be protected from science, the way that the statute in *Scopes* had, the Supreme Court readily concluded that "the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." *Epperson*, 393 U.S. at 109; *accord Edwards*, 482 U.S. at 603. The Supreme Court explained that the "overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group." *Epperson*, 393 U.S. at 103. The Court therefore struck down the statute, holding unequivocally that "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." *Id.* at 106.

Following *Epperson*, evolution's religious opponents replaced the outright prohibitions that the Supreme Court had invalidated with "balanced treatment" statutes requiring public-school teachers who taught evolution to devote equal time to teaching the biblical view of creation. But the U.S. Court of Appeals for the Sixth Circuit rejected that approach as just another attempt to "establish[] the Biblical version of the creation of man." *Daniel v. Waters*, 515 F.2d 485, 487 (6th Cir. 1975). The court held that, by assigning a "preferential position for the Biblical version of creation" over "any account of the development of man based on scientific research and reasoning," the challenged statute officially promoted religion, in violation of the Establishment Clause. *Id.* at 489, 491.

Precluded from either banning science instruction or countering it with religious instruction, the religious opponents of evolution adopted a new approach: dressing up their religious beliefs in scientific-sounding language and then mandating the teaching of the resulting "creation science" as an alternative to evolution. Thus, in the wake of *Daniel*, "[f]undamentalist organizations were formed to promote the idea that the Book of Genesis was supported by scientific data." *McLean*, 529 F. Supp. at 1259. The resulting creation-science movement then pressed for state and local school boards to impose new balanced-treatment requirements that would afford equal instructional time to creation science whenever the scientific theory of evolution was taught. *See Edwards*, 482 U.S. at 590-93; *McLean*, 529 F. Supp. at 1256, 1259. But this tactic was no more successful than the previous ones had been: In 1982, a federal district court in Arkansas saw creation science for what it was—biblical creationism in a new guise—and struck down one of these new laws. *McLean*, 529 F. Supp. at 1258. And five years later, the Supreme Court did the same thing in *Edwards*.

*Edwards* established beyond doubt that teaching creationism in the public schools violates the Establishment Clause. The decision struck down a Louisiana law requiring that any public-school classes addressing evolution be "accompanied by instruction in 'creation science.'" 482 U.S. at 581. That law, the Court observed, had "no clear secular purpose." *Id.* at 585. Instead, "[t]he preeminent purpose" "was clearly to advance the religious viewpoint that a supernatural being created humankind," and thus "to endorse a particular religious doctrine." *Id.* at 591, 594. The law accordingly violated the Establishment Clause by "restructur[ing] the science curriculum to conform with a particular religious viewpoint." *Id.* at 593.

The next form that opposition to the scientific theory of evolution took was disclaimers designed to cast doubt on evolution's validity so that students would credit religious alternatives. But this effort met with the same result. *See Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999). In *Freiler*, the challenged disclaimer informed students that evolution was "presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept," and it urged students to examine alternatives to evolution. *Id.* at 341. The Fifth Circuit held, however, that "[a] teacher's reading of a disclaimer that not only disavows endorsement of educational materials but also juxtaposes that disavowal with an urging to contemplate alternative religious concepts implies School Board approval of religious principles." *Id.* at 348.

Most recently, a federal district court in Pennsylvania confronted a school district's effort to introduce creationism under the new label "intelligent design." *See Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005). In a 60-page opinion that comprehensively reviewed the history of attempts by religiously motivated groups to undermine the teaching of the scientific theory of evolution in public schools and to inject religious views in its place, the

court found that intelligent design is not science; it is just creationism—a religious view—in new clothes. *Id.* at 711-12, 717-23. The intelligent-design movement's rebranding of creationism and creation science notwithstanding, the court held that "impos[ing] a religious view of biological origins into the biology course" violates the Establishment Clause. *Id.* at 764.

2. Freshwater's efforts to inject his religious beliefs into the science curriculum in the Mount Vernon Middle School cannot be squared with this unbroken line of authority, or with the U.S. Supreme Court's repeated admonition that "'teaching and learning' must not 'be tailored to the principles or prohibitions of any religious sect.'" *Edwards*, 482 U.S. at 585 (quoting *Epperson*, 393 U.S. at 106); *see also Agostini v. Felton*, 521 U.S. 203, 223 (1997) ("government inculcation of religious beliefs has the impermissible effect of advancing religion").

Freshwater no longer contends, as he did in his Memorandum in Support of Jurisdiction, that he merely "sought to encourage his students . . . to identify and discuss instances where textbook statements were subject to intellectual and scientific debate." Mem. Supp. Jur. 5. He now concedes, and indeed proudly proclaims, that he is teaching creationism and its alter-egos, creation science and intelligent design. Br. 12, 16-17. That concession eliminates any possible doubt that his unauthorized additions to the curriculum were intended to, and did, advance religion. His bid to balance instruction in the scientific theory of evolution with instruction in "the widely-known alternative" of creationism (Br. 14) is precisely what the Supreme Court rejected in *Edwards*. *See* 482 U.S. at 598. And his system for signaling to students what they should disbelieve in the officially mandated instruction on evolutionary science was designed to accomplish just what the unconstitutional disclaimers in *Freiler* and *Kitzmiller* were intended to do. *See Freiler*, 185 F.3d at 348 ("A teacher's reading of a disclaimer that not only disavows

endorsement of educational materials but also juxtaposes that disavowal with an urging to contemplate alternative religious concepts implies School Board approval of religious principles."); *Kitzmiller*, 400 F. Supp. 2d at 724 ("an objective student would view the disclaimer as a strong official endorsement of religion").

Indeed, even if Freshwater were still adhering to his earlier insistence that he merely encouraged students to examine both sides of an academic debate, the courts in *Freiler* and *Kitzmiller* expressly rejected that rationale, too. Although the school board in *Freiler* had written its anti-evolution, pro-religion policy in terms of encouraging critical thinking and examining all sides of an issue (185 F.3d at 341), the only "alternative theory" to evolution that the school board could identify was "a religious one"—"the Biblical version of creation"—thus exposing the inherently religious purpose and effect of the policy. *Id.* at 348; *see also id.* at 342 (sponsoring board member's reference to "'two basic concepts out there'" referred "presumably [to] creation and evolution"). And in *Kitzmiller*, the court found more broadly that "no serious alternative to God as the designer has been proposed by" the intelligent-design movement. 400 F. Supp. 2d at 718-19. So too here: Freshwater has identified a religious view only, not a scientific theory, as a supposed alternative to evolutionary science. There is thus no "clear secular purpose" for his having urged his students to disbelieve evolution (*cf. Edwards*, 482 U.S. at 585), and indeed he does not try to offer one. Attempting to advance religion by denigrating a scientific theory that a teacher views as "inconsisten[t] with the faith of the larger community" does not become constitutionally permissible just because the teacher clothes it in the language of intellectual inquiry. *Freiler*, 185 F.3d at 342. Freshwater's actions here can be understood

only as a purposeful effort to leverage his authority as a public-school teacher to advance his religious viewpoint—a clear violation of the Establishment Clause.[2]

Freshwater insists, however, that the constitutional flaw that the Supreme Court identified in *Edwards* was not the teaching of creationism in public schools, but the ***requirement*** that creationism be taught. *See* Br. 13. In his view, the Constitution permits public-school teachers to teach religious doctrines on their own initiative; indeed, he contends that he has a constitutional right to do so. Br. 13-16. This revisionist interpretation is utterly irreconcilable with the language and reasoning of *Edwards*—indeed, with that of any decision, by any court. The law in *Edwards* was struck down not because it impinged on teachers' freedom, but because, as the Supreme Court reiterated in *Agostini*, teaching creationism "lack[s] a legitimate secular purpose." 521 U.S. at 523; *see Edwards*, 482 U.S. at 585 ("appellants have identified no secular purpose for the Louisiana Act"). That constitutional flaw does not depend on whether the decision to teach creationism comes in the form of a mandate from a state legislature (*e.g.*, *Edwards*, 482 U.S. at 585-89), a prescription from a school board (*e.g.*, *Kitzmiller*, 400 F. Supp. 2d at 746-63), or the choice of an individual teacher (*e.g.*, *Peloza*, 37 F.3d at 522).

### C. Freshwater's other efforts to advance religion in the classroom compounded the Establishment Clause violations.

Nor was teaching creationism Freshwater's only foray into pressing his religious beliefs on Mount Vernon students. He coupled that teaching with a wide array of other improper

[2] Even if Freshwater were now able to identify a secular purpose for teaching creationism—a logical impossibility, given that creationism presupposes a divine creator—the Establishment Clause looks to an official's actual purpose only, not to ones advanced after the fact in the course of litigation. *See, e.g.*, *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 871 (2005) (deeming "new statements of purpose . . . presented only as a litigating position" insufficient to demonstrate that official action has a predominantly secular purpose, as the Establishment Clause requires); *ACLU of Ky. v. Grayson Cnty., Ky.*, 591 F.3d 837, 846 (6th Cir. 2010) (explaining that in *McCreary*, Supreme Court "did not credit the counties' newly proffered secular reasons as they 'were presented only as a litigation position'").

religious presentations. Among other things, there was strong evidence at the termination hearing (including, in some cases, testimony from Freshwater's own mouth) that he kept a box of Bibles at the back of the classroom and a Bible on his desk (Tr. 70); that he invoked the Bible as truth and made references to a "higher being" (Tr. 344-46); that he taught about Easter and the resurrection of Jesus (Tr. 620); that he had Biblical verses posted around the room (Tr. 3780-81, 5950); that the classroom bulletin board contained banners for the "Cross Club," a poster of a praying President and Secretary of State, an advertisement for an evangelist's revival meeting, and a copy of the Ten Commandments (Tr. 969-70; Bd. Exs. 25, 27); and that he displayed Bible verses and ***three more copies*** of the Ten Commandments on the windows next to the classroom door. Tr. 3780-81, 5950; Bd. Ex. 26, 106-108. All these items raised serious constitutional concerns.[3]

And as the referee's report (and Freshwater's own opening brief) make clear, after ignoring repeated instructions to remove the religious materials from his classroom, Freshwater not only retained the poster of the praying President and Secretary of State and the desktop Bible on display, but also added a second Bible and a copy of the book *Jesus of Nazareth* (Referee's Report at 10-11; Br. 5, 20-22), thus compounding the impermissible message of religious endorsement that he was conveying to the students. As the U.S. Court of Appeals for the Tenth Circuit has held, however, a public-school teacher may be "order[ed] . . . to keep his Bible off his

[3] The U.S. Supreme Court has unequivocally held, for example, that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature," and hence that such displays violate the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 41-42 (1980). The Court elaborated: "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no . . . recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters . . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Id.*

desk during school hours" in order "to assure that none of [the] classroom materials or conduct violate[s] the Establishment Clause." *Roberts v. Madigan*, 921 F.2d 1047, 1053-54 (10th Cir. 1990). And as the U.S. Court of Appeals for the Fourth Circuit has held, Establishment Clause concerns justify forbidding teachers to display materials depicting a President in prayer. *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 690-91, 699-700 (4th Cir. 2007).

Nor does Freshwater's description of the poster as "patriotic" (Br. 5, 20) avoid the constitutional problem. Quite the contrary. The U.S. Court of Appeals for the Sixth Circuit has held that when a display "specifically links religion and civil government, . . . the reasonable observer will . . . understand that the government actor promotes [religion] as being on a par with our nation's most cherished secular symbols and documents. This is endorsement." *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 493 (6th Cir. 2004) (internal quotation marks and alterations omitted); *accord, e.g.*, *ACLU of Ky. v. McCreary Cnty., Ky.*, 354 F.3d 438, 460 (6th Cir. 2003), *aff'd*, 545 U.S. 844 (2005); *Books v. City of Elkhart, Ind.*, 235 F.3d 292, 304, 307 (7th Cir. 2000).

**D. Freshwater's actions disserved both religion and science education.**

Although Freshwater apparently believes himself to have been acting in the service of Christianity, his actions disserved both religion and science education by placing matters of faith in competition with science in the classroom. Science instruction need not compete with theology, unless the teacher sets them at odds with one another—which is just what Freshwater did.

1. As Dr. John Haught, the prominent Catholic theologian and chairman emeritus of the theology department at Georgetown University, has explained, religion and science are different spheres and address different issues: "To put it very simply, science deals with causes, religion deals with meanings. Science asks 'how' questions, religion asks 'why' questions." Test.

of John F. Haught, Ph.D., at 22, *Kitzmiller v. Dover Area Sch. Dist.*, No. 4:04-CV-02688 (M.D. Pa. Sept. 30, 2005), *available at* http://tinyurl.com/kitzhaught. Therefore, the "presupposition . . . that evolutionary theory is antithetical to a belief in the existence of a supreme being and to religion in general" is "utterly false." *Kitzmiller*, 400 F. Supp. 2d at 765. "[E]volutionary theory . . . in no way conflicts with, nor does it deny, the existence of a divine creator." *Id.* Equating science with religion, as Freshwater does, "is not merely a violation of scientific integrity, but even worse is an abasement of religion." JOHN F. HAUGHT, RESPONSES TO 101 QUESTIONS ON GOD AND EVOLUTION 73 (2001). To claim to find proof of God's existence in unexplained natural phenomena places God on the same level as naturalistic processes, amounting to "a demotion of divinity." *Id.* at 53. If the public schools were to teach—as Freshwater's creation science contends—that God's existence turns on whether natural phenomena are or are not currently understood by science, then the potential role for religion in students' lives diminishes each time a new scientific discovery is made. In the view of many religions and many people of faith, that conception of the divine is as wrong as it is destructive of religious belief. *Id.*

2. By setting up a false dichotomy between science and religion, Freshwater did what the science curriculum does not: He forced students to choose between what is being taught in the classroom and what the students learn at home and in their houses of worship. As the district court found in *Kitzmiller*, "[i]ntroducing such a religious conflict into the classroom is very dangerous because it forces students to choose between God and science, not a choice that schools should be forcing on them." 400 F. Supp. 2d at 729 (internal quotation marks omitted).

And while the harm may be most evident for those students who do not share Freshwater's faith—because the state, in the person of their public-school teacher, is teaching

them as scientific truth a religious view to which they do not subscribe—Freshwater's conduct is equally deleterious to the many who share his particular beliefs about divine creation but also believe, as a matter of religious doctrine, that public-school teachers should not be pressing those beliefs on students. For example, according to the Baptist theologian Roger Williams, the founder of Rhode Island, faith is not genuine unless adherents come to it of their own free will. Roger Williams, *The Bloudy Tenent of Persecution* (1644), *reprinted in* 3 COMPLETE WRITINGS OF ROGER WILLIAMS (Samuel L. Caldwell ed., 1963). On this view, coerced belief is not belief at all, even if it comes not at the point of a sword but in the form of state-sponsored indoctrination. Relatedly, Isaac Backus, a leading Baptist preacher during the American Revolutionary era, observed that "[r]eligious matters are to be separated from the jurisdiction of the state, not because they are beneath the interests of the state but, quite to the contrary, because they are too high and holy and thus are beyond the competence of the state." Isaac Backus, *An Appeal to the Public for Religious Liberty* (1773), *available at* http://tinyurl.com/backus1773. The many people of faith who subscribe to these doctrines today will be no more content to have coreligionists press their church's doctrine on their children in the public schools than they would be to have their children inculcated with contrary religious beliefs.

3. This understanding of the proper relationship between government and religion helped shape the vision of religious liberty that underlies the Religion Clauses of the First Amendment.[4] James Madison, the First Amendment's author, warned that governmental

[4] *See, e.g.*, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 365-67 (2002) (Roger Williams's writings inspired John Locke's *Letter Concerning Toleration*, on which the framers of the Establishment Clause relied); John Locke, *A Letter Concerning Toleration* (1689) ("All the life and power of true religion consists in the inward and full persuasion of the mind; and faith is not faith without believing. . . . [I]f we are not fully satisfied in our own mind . . . such profession and such practice, far from being any furtherance, are indeed great obstacles to our salvation.").

endorsement of matters of faith would "weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and . . . foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust to its own merits." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 6 (1785), *reprinted in Everson v. Bd. of Educ.*, 330 U.S. 1, 66 (1947) (appendix to dissent of Rutledge, J.). Thomas Jefferson, on whose earlier Virginia statute on religious freedom Madison based the Religion Clauses of the First Amendment, wrote that governmental establishment of religion "tends . . . to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it." Thomas Jefferson, *A Bill for Establishing Religious Freedom* § 1 (1777). And Benjamin Franklin observed that "[w]hen a religion is good, I conceive it will support itself; and when it does not support itself, and God does not take care to support it, so that its professors are obliged to call for the help of the civil power, 'tis a sign, I apprehend, of its being a bad one." Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), *quoted in* THE AMERICAN ENLIGHTENMENT: THE SHAPING OF THE AMERICAN EXPERIMENT IN A FREE SOCIETY 93 (Adrienne Koch ed., 1965).

### E. The School District had both the authority and the obligation to halt Freshwater's repeated violations of the Establishment Clause.

If a school board cannot make religious teachings part of its curriculum, then neither can individual teachers flout the established curriculum by introducing those teachings. The referee correctly concluded, just as the School Board did, that Freshwater "repeatedly violated the Establishment Clause." Referee's Report at 13. And once the School District became aware of Freshwater's violations, it was not only permitted to put a stop to them; it was ***required*** to do so. *Roberts*, 921 F.2d at 1055-56. That obligation follows from the U.S. Supreme Court's mandate that "[t]he State must be certain, given the Religion Clauses, that subsidized teachers do not

inculcate religion." *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971); *accord, e.g.*, *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) ("the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination"). Because Freshwater was a public-school teacher performing his teaching duties, his Establishment Clause violations were attributable to the School District; had the District failed to take action to remedy those violations, therefore, it would itself have been liable. *See, e.g.*, *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 477 (2d Cir. 1999); *Peloza*, 37 F.3d at 522; *cf. Santa Fe*, 530 U.S. at 311 (even student-initiated, student-led prayer over loudspeaker at high-school football game was attributable to school, meaning that school was constitutionally obligated to curtail it).

Indeed, the U.S. Supreme Court has made clear that public schools have a compelling interest in avoiding Establishment Clause violations. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *see also Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (same for state universities). That interest is undeniably at issue when, as here, the school district "implement[s] a plan of corrective action in hopes of forestalling legal action." Referee's Report at 9. The School Board and administration repeatedly informed Freshwater of his violations and directed him to correct the problems (*see, e.g.*, *id.* at 5-6, 10-11), but as the referee reported, Freshwater responded with "defiance, disregard, and resistance" (*id.* at 10). He "persisted in his attempts to make eighth grade science . . . an examination of accepted scientific curriculum with the discerning eye of Christian doctrine"; he "purposely used his classroom to advance his Christian religious views knowing full well or ignoring the fact that those views might conflict with the private beliefs of his students"; and he "refused and/or failed to employ objectivity in his instruction of a variety of science subjects and, in so doing, endorsed a particular religious

doctrine." *Id.* at 12-13. By his "defiant Acts" (*id.* at 13), Freshwater made clear that he simply would not adhere to the law, leaving the School Board with but one choice to fulfill its constitutional obligations: remove him from the classroom.

But even if Freshwater were correct that the School District did more here than was absolutely necessary to curtail his Establishment Clause violations (Br. 22), the District would still have been acting well within the scope of its lawful authority. The First Amendment affords "breathing space" to school districts that act to ensure that they are in compliance with the Establishment Clause. *Marchi*, 173 F.3d at 476 ("when 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"); *Webster*, 917 F.2d at 1008 (given "legitimate concern with possible establishment clause violations," school board's "prohibition on the teaching of creation science to junior high students was appropriate"). Here, the School District's disciplinary action against Freshwater came after parents threatened legal action, and the District had every reason to believe—indeed, must have been virtually certain, given the clear and incontrovertible legal precedent and the facts of this case—that it would be held liable if it did not remedy the situation that Freshwater had created. *See* Referee's Report at 9.

Finally, Freshwater appears no longer to contend (as he did in his Memorandum in Support of Jurisdiction) that the School District singled him out for disciplinary action solely because of his religious views; and he does not aver that the School District treated nonreligious teachers any differently than it treated him. Nor can he. There is no support in the record for the suggestion that this is a case of different treatment, much less one of religious persecution. On the contrary, the record evidence establishes that Freshwater's conduct was far more blatant than

any by other teachers; it had been going on for years; it resulted not only in parental complaints but in litigation against the District; and when the District properly endeavored to remedy the violations, Freshwater—and Freshwater alone, it appears—responded with open defiance. It is not selective prosecution to take more substantial corrective action to deal with more serious problems. *Cf. Orgain v. City of Salisbury, Md.*, 305 F. App'x 90, 101 (4th Cir. 2008) (per curiam) (increased police presence was not selective prosecution "given not just the quantity, but the more serious nature" of the conduct at issue); *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007) (it is not selective prosecution to prosecute more serious offenses without also punishing less serious ones).

## II. Even If His Conduct Had Not Been Constitutionally Prohibited, Freshwater Would Still Have Had No Right To Subvert The Curriculum Or To Refuse To Obey The School Board.

Like all Americans, teachers in a public middle school enjoy the full protection of the First Amendment when acting in their capacity as private citizens. When teaching in the classroom, however, they must both follow the prescribed curriculum and obey the constitutional requirements that govern the official acts of public schools. Thus, even if Freshwater's conduct were not forbidden by the Establishment Clause, he had no right to disobey the School District's direct instructions to remove religious materials from the classroom and to cease his efforts to subvert the District's science curriculum.

### A. Freshwater had no First Amendment right to undermine the prescribed curriculum.

School boards have broad authority to decide what will be taught in their classrooms, as long as they do not violate any specific constitutional proscriptions. *Epperson*, 393 U.S. at 104; *see also Edwards*, 482 U.S. at 583 ("States and local school boards are generally afforded considerable discretion in operating public schools."). Thus, the teachers in a public middle

school do not have an academic-freedom right to teach whatever they want in spite of the official curriculum. Simply put, the First Amendment "does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system." *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007).

1. To begin with, the instruction in a public-school classroom is the School District's speech, not the teacher's own. *See, e.g.*, *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1011-16 (9th Cir. 2000); *see also Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488 (3d Cir. 1998) (Alito, J.) (public university and not individual instructor has authority to determine course's instructional content). As one federal court of appeals has explained, "the teacher is acting as the educational institution's proxy during her in-class conduct, and the educational institution, not the individual teacher, has the final determination in how to teach the students." *Borden v. Sch. Dist.*, 523 F.3d 153, 172 (3d Cir. 2008). When it comes to in-class curricular content, in other words, "the school system does not 'regulate' teachers' speech so much as it *hires* that speech." *Mayer*, 474 F.3d at 479; *accord Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 340 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 3068 (2011); *see also Edwards*, 156 F.3d at 491; *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (teachers do not have academic-freedom right to choose instructional methods contrary to those specified by school district). The academic-freedom right at issue here thus belongs not to Freshwater, but to the School District. *Evans-Marshall*, 624 F.3d at 344 (citing *Borden*, 523 F.3d at 172 n.14); *see also id.* at 341 (principal can properly defend discharge of teacher as exercise of school's right to reject teacher's "curricular choices and methods of teaching"). In plain terms, a public-school teacher's First Amendment rights do

not extend to substituting his preferred lessons and methods of instruction for those that the school board has specified.

Although reasonable people may sometimes disagree over what should be taught in public middle-school classes, the decision is committed to the judgment of school-board officials in consultation with the local community (and subject, of course, to constitutional restrictions); it is not left up to individual teachers. A school district may authorize teachers to supplement or depart from the prescribed curriculum, as long as they do not violate the Establishment Clause or other constitutional or statutory proscriptions. And often that will be a good thing as a matter of pedagogy: Teachers will frequently be in the best position to know how to engage their particular students in the course material. But here, the School District forbade Freshwater to import his preferred teachings into his science class. Freshwater was not entitled to ignore that directive. "[S]chool teachers are not free, under the first amendment, to arrogate control of curricula." *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 802 (5th Cir. 1989).

Curricular decisions benefit from "an administrative process . . . with input from parents, administrators, and educators," a task that "cannot lightly be assumed by teachers alone." *Kirkland*, 890 F.2d at 802. School officials are selected in part for their expertise in balancing competing educational objectives, whereas most teachers "have no special skill in making final curricular decisions." *Id.* at 801. And school-board members are democratically accountable for these decisions, whereas individual teachers—especially teachers with tenure (*see* Ohio Rev. Code § 3319.11)—are not. *Evans-Marshall*, 624 F.3d at 341-42; *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 371 (4th Cir. 1998) (en banc). Ultimately, it is "the school, not the teacher, [that] has the right to fix the curriculum." *Boring*, 136 F.3d at 370.

2. That is as it must be. "[S]tudents and parents are likely to regard a teacher's in-class speech as approved and supported by the school." *York County*, 484 F.3d at 698; *see also, e.g.*, *Boring*, 136 F.3d at 368. And it is the school board—not an individual teacher—that the community holds responsible for "determin[ing] which messages of social or moral values are appropriate in a classroom." *York County*, 484 F.3d at 700; *see also id.* at 695-96 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)); *cf. Evans-Marshall*, 624 F.3d at 341-42.

Indeed, Ohio law specifically vests curricular control in the local school boards so that citizens can hold the schools accountable for what their children are learning. Under Ohio Rev. Code § 3313.60(A), "[t]he board of education of each city . . . shall prescribe a curriculum for all schools under [its] control." State law thus "gives elected officials—the school board—not teachers, not the chair of a department, not the principal, not even the superintendent, responsibility over the curriculum." *Evans-Marshall*, 624 F.3d at 341. This legal regime is necessary, moreover, to implement Ohio's constitutional guarantee of "a thorough and efficient system of common schools throughout the State." OHIO CONST. art. VI, § 2. If individual teachers had a constitutional right to thumb their noses at the official curriculum and could run public-school classes however they please, parents would have no means to ensure that the public schools are providing a quality education to their children—because the schools themselves would be powerless to control what is being taught in their classrooms. A school district that lacks control over what is taught would thus find itself helpless to deliver on that constitutional promise.

Moreover, school boards must, as a matter of basic school administration, be able to administer a fixed curriculum. A uniform curriculum is necessary to ensure that students

assigned to different teachers for the same subject will come away with the same knowledge as they move to higher grade levels and more advanced classes. *Cf. Evans-Marshall*, 624 F.3d at 341. It is also necessary to coordinate among the various subjects and classes that the students take, so that the full scope of the prescribed course of study is covered in a rational, coherent manner. When it comes to setting the curriculum, the First Amendment cannot transform each teacher into "'a sovereign unto himself'" if Ohio's public schools are to function effectively—or at all. *Id.* at 344; *Kirkland*, 890 F.2d at 800 n.17. "There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please." *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979).

3. If Freshwater's contrary view were the law, school boards and administrators would be incapable of ensuring the quality and content of the education that their students receive. Teachers would be immune from oversight by any accountable body; neither administrators, nor the school board, nor the state legislature, nor parents would have any say over what goes on in the classroom; the teachers would have constitutional rights to ignore both law and policy, and could not be disciplined or otherwise held accountable for their actions. The math teacher who prefers Coleridge to calculus would be free to turn his course into a poetry slam, without regard for whether the students complete the year with the skills needed to succeed in college and their future careers. *Cf. Ahearn v. Bd. of Educ.*, 456 F.2d 399, 404 (8th Cir. 1972) (teacher not permitted "'to teach politics in a course in economics'"). The English teacher who prefers basketball to Byron could transform her class into a slam-dunk contest, ignoring the need to impart basic discipline and restraint in the learning environment. *Cf. Bradley*, 910 F.2d at 1176 (teacher had no academic-freedom right to employ "pedagogical method" of "Learnball,"

in which students compete as teams and earn rewards by shooting baskets with foam ball, when school district disapproved of the technique).

Nor does the fact that Freshwater claims to have been teaching science (*contra Edwards*, *Epperson*, *Freiler*, *Kitzmiller*, and the rest of the cases) ameliorate that concern. On his view, the history teacher who is a Holocaust denier could hold debates on whether "Hitler was right" about the proper role of Jews in society, without a thought or care for how it would affect individual students or the school community as a whole, because the teacher believes that in so doing he is teaching history. *Cf. Kirkland*, 890 F.2d at 801 (history teacher incorrectly claimed that he "could limit reading material to subject matter consistent with his own political concerns . . . despite being entrusted with the teaching of a class in world history"); *Palmer*, 603 F.2d at 1274 (kindergarten teacher had no right to refuse, based on her religion's proscription against idolatry, to teach about President Abraham Lincoln). The health teacher would be free to insist on extolling the virtues of free love in the unit on reproduction. The social-studies teacher could instruct students in the reasons that the 9/11 attackers were justified. And neither administrators, nor school-board members, nor parents could do anything to change any of this.

That cannot be (and happily isn't) the law. No school system could function on those terms. And no decision by any court anywhere has ever suggested that the Constitution so requires.

4. Freshwater purports to find a constitutional right to flout the District's authority in *Hazelwood* and in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Those cases avail him nothing.

To begin with, both address student speech, not teachers' classroom instruction. Students speak on their own behalf, whereas teachers instruct students on behalf of—and at the direction

of—the school district. "[W]hether the First Amendment requires a school to tolerate certain speech, such as the speech of students, is different from the question whether the First Amendment requires a school to promote or endorse another's speech." *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 969 n.5 (9th Cir. 1999); *see generally Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). And that is particularly true when the speech at issue is a teacher's curricular speech, which belongs, as explained above, to the school district rather than to the teacher himself.

Beyond that, though, *Hazelwood* expressly recognizes that First Amendment rights in public schools are not absolute; they "must be 'applied in light of the special characteristics of the school environment.'" 484 U.S. at 266; *cf. Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) ("the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings"). Even student speech may be restrained by school officials when the restraints "are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. And the federal courts have uniformly agreed that "[p]ublic schools have a legitimate pedagogical interest in shaping their own secondary school curricula and in demanding that their teachers adhere to official reading lists unless separate materials are approved." *Kirkland*, 890 F.2d at 795; *accord*, *e.g.*, *Evans-Marshall*, 624 F.3d at 340-42; *Boring*, 136 F.3d at 369-70. Thus, even if Freshwater did have the First Amendment rights that he claims—which he does not—they would not trump the School District's right to set the curriculum, much less override the District's compelling interest in avoiding Establishment Clause violations. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 394 ("the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment"); *Peloza*, 37 F.3d at

522 ("The school district's interest in avoiding an Establishment Clause violation trumps Peloza's right to free speech."); *see also Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 651 (9th Cir. 2006) ("the [Social Services] Department's need to avoid possible violations of the Establishment Clause . . . outweighs the restriction's curtailment of Mr. Berry's religious speech on the job").

Freshwater's reliance on *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), is likewise misplaced. *Keyishian* did not hold that school districts lack power to regulate teachers' in-class conduct. On the contrary, the Court had "no doubt" about "the legitimacy of [the State's] interest in protecting its education system from subversion." *Id.* at 602. The Court thus held only that a state law threatening the employment of "subversive" teachers was unconstitutionally vague and overbroad. *Id.* at 597-601, 604, 606-10. And that was in the context of a state university, not a public middle school, where rights may be more limited. *See, e.g.*, *Bush v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 99 (3d Cir. 2009) (where "audience is involuntary and very young," parents "may reasonably expect their children will not become captive audiences to an adult's reading of religious texts"); *cf. Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 876 (7th Cir. 2011) ("the younger the children, the more latitude the school authorities have in limiting expression"). But even if *Keyishian* could be read to mean that regulations on teacher speech in public middle schools must be especially clear to avoid chilling academic discourse, that would be of no moment here. Not only was the School District's policy against religion in the classroom specific and unambiguous, but Freshwater specifically asked permission to include creationism in the curriculum, and the School Board specifically denied that request. The School Board and administrators also specifically directed Freshwater to remove the religious materials

from his classroom, and even gave him a list of items that should be taken down. There was nothing vague or ambiguous in any of that.

Freshwater also claims that the plurality opinion in *Board of Education v. Pico*, 457 U.S. 853 (1982), supports his novel claim to have a First Amendment right to override the School Board's judgments about the curriculum. But *Pico* disavowed that notion. The plurality's conclusion that a school board could not remove disfavored books from library shelves turned on its view that the school's "absolute discretion in matters of *curriculum*" did not "extend . . . beyond the compulsory environment of the classroom, into the school library." *Id.* at 869 (plurality opinion) (internal quotation marks omitted). Whereas the school library features "a regime of voluntary inquiry" in which the student chooses what knowledge to explore, and hence students have rights of access to information (*id.* at 859), classroom instruction seeks to impart particular teachings and must necessarily exclude others. The plurality was careful to note that it was not ruling "upon the[] school Board's discretion to prescribe the curricula of the Island Trees schools" and therefore that its decision "does not intrude into the classroom." *Id.* at 862; *see Downs*, 228 F.3d at 1015.

Finally, Freshwater contends that the School District's decision to prohibit teachers from invoking religion in science class constitutes viewpoint discrimination. Br. 21. That contention is incorrect. The District's official policy forbids instructing students in matters of faith, regardless of viewpoint: The teachers of the Mount Vernon City Schools may neither advocate religious belief nor disparage it. Referee's Report at 5 (describing policy mandating that "'[i]nstructional activities shall not be permitted to advance or inhibit any particular religion'"); *cf. Epperson*, 393 U.S. at 103-04, 106-07. The policy simply—and quite rightly—recognizes that shaping students' religious beliefs is not the proper role of a public school or its teachers. *See Perry Educ. Ass'n v.*

*Perry Educators' Ass'n*, 460 U.S. 37, 49 (1983) (in a nonpublic forum, such as a public-school classroom, the government may "make distinctions in access on the basis of subject matter" without engaging in viewpoint discrimination); *DiLoreto*, 196 F.3d at 969 (school district's decision not to allow messages on subject of religion does not constitute viewpoint discrimination). In all events, because classroom instruction is the School District's speech, not the teacher's, the School District is free "to promote its own policies or to advance a particular idea." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000); *see also Downs*, 228 F.3d at 1011. No viewpoint-neutrality requirement applies, because "the Government's own speech . . . is exempt from First Amendment scrutiny" under the Free Speech Clause. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005); *accord Pleasant Grove City v. Summum*, 555 U.S. 460, 464, 467-70, 481 (2009).

### B. Freshwater had no right to refuse to follow the School District's direct orders.

Freshwater's failure to adhere to the Mount Vernon curriculum was neither mistake nor misunderstanding. As the referee recounts, Freshwater approached the School Board in 2003, seeking to change the curriculum to allow him to introduce his self-styled evidence against evolution. Referee's Report at 4. "Freshwater's proposal was rejected and his suggested policy was not adopted." *Id.* Yet he was not deterred: He "undertook the instruction of these eighth graders as if the suggested policy had been implemented." *Id.* He could not have been surprised that his conduct violated school policies mandating that "[i]nstructional activities shall not be permitted to advance or inhibit any particular religion." *Id.* at 5. On the contrary, it would appear that he approached the School Board for approval of his creationist attacks on the scientific theory of evolution precisely because he knew that they did not comport with the required curriculum. He just did not like the unequivocal answer that the Board gave him. So he ignored

it. And after yet more warnings, directives, and complaints, Freshwater kept using creationist materials "as a means of sowing the seeds of doubt and confusion in the minds of impressionable students as they searched for meaning in the subject of science," against the express orders of the School District. *Id.* at 12.

The record likewise fully supports the referee's finding that Freshwater's refusals to remove the Bibles, the book on Jesus, and the poster of public officials praying were acts of "defiance, disregard, and resistance." *Id.* at 10. When the principal set a deadline for Freshwater to remove a list of religious items from his classroom, Freshwater responded by "check[ing] out religious texts from the school library and add[ing] them to the array on his classroom desk." *Id.* And although the prayer poster was on the list of items that Freshwater was specifically ordered to remove, he refused to comply, even after the principal "had a discussion [with him] about whether his continued disobedience would constitute insubordination." *Id.* at 10-11.

Freshwater contends that he committed no wrong because he covered each of the elements that he was required to teach. Br. 1. But checking the boxes on a topic list does not constitute adherence to the curriculum when, as the referee found, Freshwater at the very same time took every possible step to subvert those teachings and cause his students to disbelieve them. The referee found that Freshwater actively "gave [his] students reason to doubt the accuracy and or veracity of scientists, science textbooks, and/or science in general" and "used his classroom as a means of sowing the seeds of doubt and confusion in the minds of impressionable students as they searched for meaning in the subject of science." Referee's Report at 8, 12. Although some of the students may have scored well on standardized tests, that does not excuse Freshwater's unyielding efforts to undermine the scientific concepts specified in the official curriculum. Ideally, students should receive their teacher's help to succeed on high-stakes

standardized tests; but even when that is not the case, they certainly should not have to work overtime to overcome their teacher's efforts to confuse and misdirect them.

The Constitution does not require school districts to engage in games of Whac-A-Mole with teachers who are determined to keep defying school policy. Freshwater's repeated refusals to comply unquestionably constituted "good and just cause" for termination under Ohio Rev. Code § 3319.16. *Cf. Hale v. Bd. of Educ.*, 13 Ohio St. 2d 92, 98-99, 234 N.E.2d 583, 587 (1968). The referee's recommendations that Freshwater be terminated for disobedience and for failure to adhere to the established curriculum are amply supported by the record. And the decisions of the court of common pleas court and the court of appeals upholding those findings were not abuses of discretion; rather, they were clearly correct. There is no basis for this Court to disturb any of those decisions.

## III. Even If Freshwater's Teaching Had Been Entirely Secular, The School District Had Good Cause To Terminate His Employment For Injuring Students.

Whatever First Amendment rights Freshwater might claim, one point is beyond dispute: The First Amendment does not prohibit a school district from disciplining a teacher for intentionally burning his students' extremities. If "[a] teacher is civilly liable for an assault upon a pupil" (*Guyten v. Rhodes*, 65 Ohio App. 163, 165, 29 N.E.2d 444, 445 (1940)), a school district surely is not without power to discipline or remove that teacher. Here, Freshwater admitted in the termination hearing that he used the high-voltage Tesla coil on 500 to 600 students during his twenty-one years at the Mount Vernon Middle School. Tr. 379, 403. That fact alone ought to dispose of this case.

Freshwater contends that he branded the students with X's rather than with Christian crosses (*e.g.*, Br. 1), as though that makes everything all right. There was, of course, substantial evidence in the administrative record that the symbol he burned into the students' arms was a

cross, that students and parents recognized it as such, and that the selection of a cross was of a piece with Freshwater's other conduct advancing and endorsing religion in class. Those facts certainly add an Establishment Clause dimension to the arm burnings. But whatever Freshwater meant for the scars to look like, a public-school teacher simply has no First Amendment right to brand students in class—not with a cross, not with an "X," not with the Mount Vernon Middle School's signature Yellow Jacket mascot.

The referee opined that the burnings "did not seem to be a proper subject for" the termination hearing because there was no evidence that Freshwater burned the arms of any more students between January 2008, when the principal sent him a formal letter ordering him to stop, and June of that year, when the Board voted to initiate the termination proceedings. Referee's Report at 2. But the time between the letter and the Board's resolution hardly constitutes acquiescence in Freshwater's conduct. First of all, it appears that the School District learned only later, when investigating the concerns raised in the April 2008 complaint letters from parents (Bd. Ex. 3, 4) that the December 2007 arm burning was not an isolated incident and that this conduct had in fact been going on in every one of Freshwater's classes for the past two decades (*see, e.g.*, Bd. Ex. 6). The independent investigator issued her report in June 2008 (Bd. Ex. 6), and the Board initiated termination proceedings immediately thereafter (Bd. Ex. 1). In all events, an order to stop intentionally injuring students surely does not exhaust a School District's authority to investigate and act upon complaints that a teacher is acting so irresponsibly. Rather, it is just the critical first step in addressing the problem: Make sure that the teacher disfigures no more children, then go back and deal with any disciplinary matters or policy changes that may be required. And here, broader measures were certainly warranted: Even if Freshwater's increasingly flagrant disobedience to clear orders did not raise questions about whether he would

comply with the directive, burning the arms of children year after year with a dangerous device surely calls into question a teacher's judgment and fitness to be entrusted with the health and safety of students—on any legal standard.

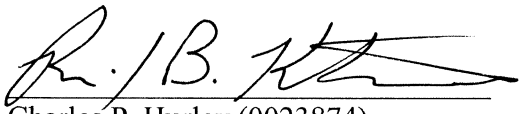
Finally, although the referee said that "there was a plausible explanation for how and why the Tesla Coil had been used" (Referee's Report at 2), and Freshwater relies heavily on that statement in his opening brief (Br. 2), neither the Referee's report nor the brief even hints at what that explanation might be. Deference to the referee's findings should not extend to an unexplained statement that simply makes no sense: There may be valid reasons to use a Tesla coil in genuine scientific experiments, but there are no valid reasons for a teacher intentionally to burn marks into students' flesh using a dangerous piece of electrical equipment that specifically warns "[n]ever [to] touch or come into contact with the high-voltage output of this device" (Bd. Ex. 6, att. 17).

This Court accordingly should not hesitate to state clearly, directly, and unambiguously that teachers have no constitutional or other legal right to injure students, and that in a civilized society, terminating the employment of a teacher who burned the arms of hundreds of students is the only acceptable response to utterly unacceptable conduct. Indeed, so obvious is that conclusion that this Court need not devote judicial resources to considering any of the other issues in this case in order to uphold the termination; but in all events, the Court should not inadvertently send the message that harming schoolchildren is acceptable by failing to recognize the arm burnings as at least an additional valid ground for removing Freshwater from the classroom.

## CONCLUSION

The judgment of the court of appeals, the court of common pleas, and the referee should be affirmed.

Respectfully submitted,



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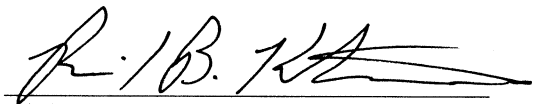

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