UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DOE, et al.,

Plaintiffs,

v.

Case No. 2:08-cv-575
JUDGE GREGORY L. FROST
Magistrate Judge Norah McCann King

MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Defendants.

ORDER

This matter came on for consideration of the Emergency Motion for Protective Order and Gag Order by Plaintiffs and by Mount Vernon City School District Defendants. (Doc. # 22.) The Court **DENIES** the motion.

I.

Plaintiffs, John, Jane, and James Doe, assert claims against Defendant Mount Vernon City School District Board of Education, Superintendent Stephen Short, Principal William White ("Mt. Vernon Defendants"), and John Freshwater (an eighth grade science teacher). The claims are based upon alleged violations of the Establishment Clause of the First Amendment to the United States Constitution and are brought pursuant to 42 U.S.C. § 1983. (Doc. # 11.) At the time that Plaintiffs filed their original complaint, they also filed a Motion for Protective Order, requesting to pursue this action under pseudonyms. The Court granted that motion. (Doc. # 4.)

II.

James Doe is an eighth grade student at Mount Vernon Middle School. James Doe was enrolled in Defendant Freshwater's eighth grade science class. Plaintiffs allege that Freshwater

displayed the Ten Commandments, religious posters, and Bible passages within his classroom and kept several Bibles in his classroom that were not for his personal use. Further, Plaintiffs allege that Freshwater taught students in his eighth grade science class his own religious beliefs and the meaning of Easter and Good Friday. Freshwater also allegedly advised his students that, although he is forced to teach from the textbooks, the teachings are wrong or not proven according to the Bible. Plaintiffs allege that these actions violate the policy of the Mount Vernon City School District as well as the United States Constitution.

The Board of Education adopted a Resolution to consider the termination of Freshwater's teaching contract. That hearing is a state statutory administrative proceeding held pursuant to the Ohio Revised Code Section 3319.16. The hearing is conducted by a Referee and, as permitted under this Ohio statute, Freshwater requested a public hearing.

Freshwater has submitted a request to the Mt. Vernon Defendants that Plaintiffs in this case, including their minor son who is in the ninth grade, be subpoenaed to appear and testify at a public hearing. The Mt. Vernon Defendants filed a motion with the Referee, requesting that the termination hearing for Freshwater be held in closed session. The Referee denied the School District's Motion, stating that a teacher is entitled to a public hearing as requested by Freshwater. The School District then filed a motion requesting that student witnesses and family members be permitted to testify *in camera* at the Section 3319.16 hearing. That motion is pending before the Referee.

Plaintiffs and the Mt. Vernon Defendants also jointly moved for an emergency protective and gag order in the civil rights action before this Court, requesting it to order Plaintiffs' testimony at the school board hearing be held in a private session at a protected location chosen

by the parties. (Doc. # 22.) Defendant Freshwater is represented by two attorneys in this action; one represents him in his counterclaimant capacity and the other in his capacity as a defendant. Thus, two separate memoranda in opposition were filed on Freshwater's behalf (Docs. # 25, 25) and one supplemental opposition memorandum (Doc. # 27). Plaintiffs and the Mt. Vernon Defendants filed a reply in support of their motion. (Doc. # 29.)

On September 24, 2008 this Court held a telephone conference on the Emergency Motion. (*See* Doc. # 26.) On that same day, the Referee for the termination hearing indicated that he will wait until this Court issues this decision before he rules upon the request for Plaintiffs to testify *in camera*.

III.

Plaintiffs and the Mt. Vernon Defendants request that this Court issue an order that would prevent Plaintiffs from testifying in public at Freshwater's statutory termination hearing to be held on October 1, 2008. Specifically, the movants request that Plaintiffs be allowed to testify in a private session at a protected location chosen by the parties and that Freshwater and all school employees be ordered to refer to Plaintiffs throughout the termination hearing with pseudonyms. Plaintiffs contend that Defendant Freshwater and his legal counsel will be free to attend and cross examine Plaintiffs.

Defendant Freshwater argues that the Emergency Motion does not set forth a basis for jurisdiction over his termination hearing and that, even if it did this Court should abstain from ruling on the motion. Freshwater's arguments are well taken.

A. Jurisdiction

The All Writs Act provides that "a court may issue all writs necessary or appropriate in

aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). However, "a federal court must have an independent basis for subject matter jurisdiction for a writ of mandamus to be issued pursuant to 28 U.S.C. § 1651(a)." *Maczko v. Joyce*, 814 F.2d 308, 310 (6th Circuit 1987) (citing *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-35, 1 (1980) (*per curiam*)). Plaintiffs and the Mt. Vernon Defendants disagree with Freshwater as to whether this Court has an independent basis of jurisdiction over the Emergency Motion; however, this Court need not decide this issue because even if it possesses jurisdiction it cannot grant the relief requested based upon the Anti-Injunction Act, 28 U.S.C. § 2283.

When the All Writs Act is applied with respect to ongoing state court proceedings, the scope of that Act is limited by the Anti- Injunction Act, 28 U.S.C. § 2283, which states:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Courts have construed the Anti- Injunction Act as having three limited exceptions in which injunctions over state court proceedings are appropriate. In order to issue an injunction related to a state court proceeding, the federal court must find one of the three exceptions is satisfied. *See Atl. C.L.R. Co. v. Bhd. of Locomotive Eng'r*, 398 U.S. 281, 287 (1970). Thus, one of the following must apply: 1) an injunction is authorized by an Act of Congress; or 2) an injunction is necessary in aid of the court's jurisdiction; or 3) an injunction will serve to protect or effectuate the court's judgments. Plaintiffs and the Mt. Vernon Defendants argue that the second and third exceptions apply. This Court, however, disagrees.

First, the Court notes that the United States Supreme Court has instructed that these exceptions should be construed narrowly and in favor of permitting state courts "to proceed in an

orderly fashion to finally determine the controversy." *Id.* at 297.

Second, the requested injunction is clearly not requested to aid in this Court's jurisdiction. *Id.* at 295 ("[I]t is not enough that the requested injunction is related to that of jurisdiction, but it must be 'necessary in aid of' that jurisdiction.").

Finally, the last exception, commonly referred to as the "relitigation exception," was designed to permit a federal court to prevent litigation of an issue that previously was presented to and decided by the federal court. *See Torpf v. Fidelity Nat'l Title Ins. Co.*, 289 F.3d 929 (6th Cir. 2002). In this regard, the Court has not decided and has not adjudicated any motions for a protective order or gag order in regard to the subject Section 3319.16 hearing. Thus, this exception does not prevent the state termination hearing Referee from deciding this issue.

The Court notes that although it is impressed by the sensitive nature of this issue, it is simply not for this Court to decide. Indeed, the Ohio statute itself is equipped to deal with this issue. That is, Freshwater has or will issue subpoenas to require the Doe Plaintiffs and other minors and their parents to testify at his termination hearing. The Ohio statute provides enforcement power of subpoenas in a termination hearing to be held by "a judge of the court of common pleas." Ohio Rev. Code § 3319.16. Consequently, Plaintiffs and the Mt. Vernon Defendants could move that judge to quash the subpoena or to modify it. *See* Ohio R. Civ. P. 45 (C)(3) (the court has the ability to "quash or modify the subpoena, or order appearance or production only under specified conditions).

The Court concludes that the Anti-Injunction Act prohibits this Court from granting the Emergency Motion. However, even if this Court were no so prevented, it would still be compelled to abstain from doing so.

B. Abstention

In *Younger v. Harris*, 401 U.S. 37 (1971) the United States Supreme Court held that absent unusual circumstances, federal courts can not interfere with a pending state criminal proceeding. The Supreme Court later expanded that holding to include civil administrative matters. *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986); *Middlesex County v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). Generally, abstention is appropriate under *Younger* if: 1) state judicial proceedings are ongoing; 2) the state proceedings implicate important state interests; and 3) the state proceedings afford an adequate opportunity to raise federal questions. *BB & T Insurance Services, Inc. v. Ohio Dep't of Ins.*, No. 2:06-CV-09, 2006 WL 314495 (S.D. Ohio) (citing *Middlesex County v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)).

The Supreme Court requires federal courts to abstain from interfering in pending state administrative proceedings that are "judicial in nature." *New Orleans Public Serv., Inc., v. City of New Orleans*, 491 U.S. 350, 370 (1989). When determining whether an administrative proceeding is judicial in nature for purposes of *Younger* abstention, a court must examine the "nature of the final act." *Id.* at 371. According to the Supreme Court, a judicial inquiry "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Id.* at 370.

There can be no question that the administrative proceeding at issue here is judicial in nature. The statutory termination hearing will look into past and present facts to determine whether the Freshwater should be terminated under Ohio's existing laws. *See id.* Indeed, "[b]oth parties may be present at such hearing, be represented by counsel, require witnesses to be

under oath, cross-examine witnesses, take a record of the proceedings, and require the presence of witnesses in their behalf upon subpoena to be issued by the treasurer of the board." Ohio Rev. Code § 3319.16. Further, there is a specific judicial appeal process included in the statute. *See id.* It is hard to imagine a proceeding that could be more judicial in nature than the procedure just described. Thus, the Court concludes that there is an ongoing state administrative proceeding that is judicial in nature.

Further, the Section 3319.16 proceedings implicate important state interests in regard to determining the rights of public teachers, and the state proceedings afford an adequate opportunity to raise any federal questions by the Mount Vernon City School District Board of Education and Freshwater in the hearing.

Accordingly, *Younger* dictates this Court's abstention from deciding the Emergency Motion.

III.

Based on the foregoing, the Court **DENIES** the Emergency Motion. (Doc. # 22.)

IT IS SO ORDERED.

/ s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE