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KNOX COUNTY
COURT OF COMMON PLEAS
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MARY JO HAWKINS
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS KNOX COUNTY, OHIO

JOHN FRESHWATER
7760 New Delaware Road
Mount Vernon, Ohio 43050

Case No.
11AP02-0090

PLAINTIFF,

Judge:
EYSTER

MOUNT VERNON CITY SCHOOL DISTRICT
BOARD OF EDUCATION
300 Newark Road
Mount Vernon, Ohio 43050

Defendant.

COMPLAINT

1. Now comes John Freshwater (hereinafter "Freshwater") pursuant to Ohio Revised Code 3319.16, as a public school teacher affected by an order of termination of contract, to appeal to the court of common pleas of the county in which the school is located within thirty days after receipt of notice of the entry of the Mount Vernon City School District Board of Education's (hereinafter "board") order.
2. Pursuant to RC§3319.16 this complaint states Freshwater's appeal, which shall be an original action in this court of common pleas and is commenced by the filing of this complaint against the board, in which complaint the facts are alleged upon which the teacher relies for a reversal or modification of such order of termination of contract.
3. Pursuant to RC§3319.16 upon service or waiver of summons of this complaint the board immediately shall transmit to the clerk of the court for filing a transcript of the original papers filed with the board, a certified copy of the minutes of the board into which the termination finding was entered, and a certified transcript of all evidence adduced at the hearing or hearings before the board or a certified transcript of all evidence adduced at the hearing or hearings before the referee, whereupon the cause shall be at issue without further pleading and shall be advanced

and heard without delay. RC§3319.16 does not permit an answer by the board to Freshwater's complaint.

4. Pursuant to RC§3319.16 the court shall examine the transcript and record of the hearing and shall hold such additional hearings as it considers advisable, at which it may consider other evidence in addition to the transcript and record. Freshwater alleges additional information has become available since the close of the hearing conducted by the referee, the information of which was not previously made available despite efforts by Freshwater to obtain.

5. Pursuant to Ohio law, in a teacher-termination proceeding, a court of common pleas may reverse a board of education's decision to terminate a teacher's contract when the board's decision is not supported by or is against the weight of the evidence. Other courts have and this court may hold further hearings and receive additional evidence to be certain that the board's actions were legally regular. Freshwater asserts he has additional evidence to present which contradicts the findings cited in the referee's report which was relied upon by the board and the weight of the evidence necessitates a reversal of the board's action.

6. Ohio law does not make clear whether the board's decision must be based upon clear and convincing evidence, substantial and credible evidence to support the charges or be supported by or is against the weight of the evidence. Freshwater asserts the necessary burden of proof to sustain each and every non-constitutional allegation against him requires at least clear and convincing evidence, whereas each and every constitutionally protected claim made by Freshwater requires strict scrutiny. Freshwater asserts the allegations made against him were not proved by the required burdens of proof.

7. Pursuant to RC§3319.16 after consideration of the referee's report, the board, by a majority vote, may accept or reject the referee's recommendation on the termination of the teacher's

contract. Ohio law requires a referee's report must be considered and weighed by the board which must give due deference to the findings and recommendations of the referee. If the board decides to reject the referee's findings or recommendation, the board then must provide an explanation of the reasons for so doing so that a reviewing court can determine whether or not the board improperly rejected the factual findings of the referee. Freshwater alleges the board violated the provisions stated in this paragraph.

8. Ohio law does not permit severability of the referee's report by the board without explanation. Freshwater alleges the board violated the provisions stated in this paragraph.

9. Ohio law requires a referee to make a determination whether any one of the allegations or the "...bases/grounds..." for consideration of termination would be sufficient in and of itself. Freshwater alleges the referee, then the board, violated the provisions stated in this paragraph.

10. Pursuant to RC§3319.16 upon final hearing, the court shall grant or deny the relief prayed for in the complaint as may be proper in accordance with the evidence adduced in the hearing. In addition to the prayer for relief stated below, Freshwater petitions this Court for redress and reversal of the board's resolution.

11. Pursuant to RC§3319.16 such an action is a special proceeding, and either the teacher or the board may appeal from the decision of the court of common pleas pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505 of the Revised Code.

12. Pursuant to RC§3319.16 in any court action, the board may utilize the services of the prosecuting attorney, village solicitor, city director of law, or other chief legal officer of a municipal corporation as authorized by section 3313.35 of the Revised Code. Freshwater asserts

the board can avail itself of the city law director rather than incur the costs of outside legal counsel.

13. RC§3319.16 is unconstitutional as it permits an impartial decision-maker such as the board to act as the executive, legislative and judicial authority over a public school teacher. Freshwater alleges the board acted as the executive, legislative and judicial authority in this matter.

14. RC§3319.16 is unconstitutional as it does not permit a public school teacher an opportunity to object to the findings or recommendation of a board invoked referee prior to the board vote of whether to terminate a teacher's contract. Freshwater alleges the board failed to give him an opportunity to object to the referee's findings or recommendations thus necessitating the filing of this complaint.

15. RC§3319.16 is unconstitutional as exercised by the board in that Freshwater was suspended without pay prior to the termination hearing depriving Freshwater of property without due process of law. Freshwater alleges the board violated his due process of law by suspending him without pay and without permitting him a meaningful opportunity to explain or correct his actions.

16. Ohio law requires and the contract between the board and the teacher states, "This Master Contract supersedes and prevails over all statutes of the State of Ohio (except as specifically set forth in Section 4117.10 (A) of the Ohio Revised Code), and all policies, rules, and regulations of the Board".

17. Ohio law requires and the contract between the board and the teacher states, "The Board fully recognizes all personal rights and freedoms granted to teachers by the Constitution and the laws of the State of Ohio and the United States, and will abide by all laws that pertain to the teachers it employs". Freshwater alleges the board violated the provisions stated in this paragraph and the

breach of contract by the board disadvantaged Freshwater. The board's breach of contract supersedes any further action by the board.

18. Ohio law requires and the contract between the board and the teacher states, "The person against whom the complaint is made will be given the opportunity to provide a comprehensive written response to the complaint if he/she chooses to do so. After interviewing the complainant and the teacher against whom the complaint is made, the investigator will interview all witnesses each party identifies and, if possible, obtain a written statement from each witness interviewed". Freshwater alleges the board violated the provisions stated in this paragraph and the breach of contract by the board disadvantaged Freshwater. The board's breach of contract supersedes any further action by the board.

19. On March 11, 2008, the State Board of Education adopted the Licensure Code of Professional Conduct for Ohio Educators. ODE collaborated with the Educator Standards Board to create the Code that was mandated in House Bill 190.

20. The *Licensure Code of Professional Conduct for Ohio Educators* serves as the basis for decisions on issues pertaining to licensure that are consistent with applicable law, and provides a guide for conduct in situations that have professional implications for all individuals licensed by the State Board of Education, such as teachers like Freshwater.

21. The *Licensure Code of Professional Conduct for Ohio Educators* includes the presumptive range of applicable disciplinary actions involving any individual licensed by the State Board of Education. The *Licensure Code of Professional Conduct for Ohio Educators* applies to all individuals licensed by the Ohio Department of Education. The presumptive ranges are only applicable for disciplinary actions involving an educator's licensure or application for licensure. The presumptive ranges are not applicable for any discipline imposed at the local level. Possible

discipline at the local level must follow all local contractual provisions, including but not limited to due process, progressive discipline, and just cause (emphasis added). Freshwater alleges the board's act of terminating his contract was for reasons beyond the established provisions of the licensure code. Freshwater alleges he did not engage in any conduct that was or is proscribed or prohibited by the Licensure Code. Freshwater alleges the board failed to follow progressive discipline. Freshwater alleges the board's action against him is discriminatory and against public policy.

22. Ohio law permits a terminated teacher such as Freshwater to join claims in the complaint which is also an appeal to the court of common pleas. Freshwater alleges and makes claims of defamation, false light and emotional-distress which have caused him damage.

23. Freshwater complied with the established policies of the board as detailed in the attached "John Freshwater's Closing Statement Brief" and "John Freshwater's Reply Brief To The Employer's Post-Hearing Brief".

24. The allegations against Freshwater were adjudicated previously as the result of actions taken by the board's personnel and were thereby barred for further action by the doctrine of res judicata.

25. The board's resolution states: "Mr. Freshwater injected his personal religious beliefs into his plan and pattern of instructing his students. In doing so, he exceeded the bounds of all the pertinent Bylaws/Policies of the Mount Vernon City School District".

26. Freshwater acted within the bounds of each board policy by constitutionally sharing information. The Employee Exhibits presented during the hearing show that the board-approved curriculum materials also teach about religious and other non-scientific topics.

27. Freshwater's use of information in the teaching of 8th-grade science was objective and neutral. By squelching few and rare expressions of opinion in the teaching of 8th-grade science because the Board believes that they convey a Christian viewpoint, while at the same time permitting the expression of other opinions in the curriculum, including those hostile to religion, the Board is "using the weight of government to prefer other religions while expressing hostility toward (Christianity)." The Establishment Clause of the United States Constitution forbids this. *Johnson v. Poway*, (2010) (U.S. Dist. Ct. So. Dist. CA.) 07cv783 BEN(NLS). Silencing speech that the Board considers Christian while permitting speech that is anti-religious violates the Establishment Clause.

28. The bias and hostility toward Christianity, in particular, is seen in the Referee's report and the Board's resolution.

29. The Referee's own bias and hostility is revealed in the following five quotations from his report:

A. "John Freshwater's bias grew from his fervent and deep seated Christian beliefs. Such beliefs and convictions, while admirable character traits in other settings, proved to be John Freshwater's downfall as an eighth grade science teacher in a public school. Time after time after time he injected his beliefs as associated with his own religious tenets into his science instruction." B. "Exacerbating this situation was the fact that the evidence against evolution was based, in large part, upon the Christian religious principals (sic) of Creationism and Intelligent Design." C. "...John Freshwater not only injected his subjective, biased, Christian religion based, non-scientific opinion...." D. "Instead, 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.”E. “John Freshwater purposely used his classroom to advance his Christian religious views....”

30. Freshwater was never asked, nor stated, during testimony that he is a Christian, or what his religious views are.

31. The Board’s bias and hostility toward Christianity in particular is seen in the following four quotations from the Resolution:

A. “...upon the Christian religious principals (sic)...”B. “...upon the Christian religious principals (sic)...”C. “...upon the Christian religious principals (sic)...”(Three distinct grammatically incorrect references.) D. “...subjective, biased, Christian religion based, non-scientific opinon...”

32. The Referee recommended, and Board terminated John Freshwater’s contract simply because they desire to suppress what they perceive as a Christian Viewpoint. In so doing, the Board violated the Establishment Clause.

33. The board has unconstitutionally engaged in viewpoint discrimination. Viewpoint discrimination is unconstitutional as described herein as the government is proscribed from so doing (“... ‘nor may the government discriminate against speech on the basis of its viewpoint.’ Viewpoint neutrality requires that government actors not favor one message over another. When ‘government has excluded perspectives on a subject matter otherwise permitted by the forum,’ the government is discriminating on the basis of viewpoint.”)

34. The board’s own policy, *Academic Freedom of Teachers, Policy 3218*, goes beyond the cramped view of selecting curriculum and hiring teacher speech to simply deliver the approved content of scholastic orthodoxy. The board’s own policy, *Academic Freedom of Teachers*,

Policy 3218, dictates and requires healthy exposure to OPINIONS OF ITS INDIVIDUAL TEACHERS, without necessarily endorsing or dictating adherence to the ideas expressed.

35. Freshwater acted within the bounds of each policy by teaching about some commonly held beliefs of at least three of the world's major religions. Furthermore, the exhibits show that the Board-approved curriculum materials also teach about religious and other non-scientific topics.

36. The board's resolution states: "In 2003, Mr. Freshwater unsuccessfully petitioned the Board to allow him "to critically examine the evidence both for and against evolution." 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". The board's action did not prohibit presenting evidence "for or against" evolution as the board-approved curriculum textbook also presents evidence both for and against evolution.

37. The board's resolution states: "On more than one occasion, Mr. Freshwater was reminded by his superiors that he must abide by the Bylaws & Policies, as they related to religion in the curriculum". The evidence does not support this sweeping general statement. The specific occasions listed in the board resolution do NOT relate to religion in the curriculum as denoted in bylaws and policies, 2270.

38. Freshwater contests the assertion that "more than one occasion" exists: only **one** event can be considered an "occasion" in this context, but even that is erroneous. The January 21, 2003 evaluation of Freshwater (Employee Exhibit 96) contains uniform praise for Freshwater's performance. The Growth/Improvement Areas section consists of four directives, all beginning with the word "Continue".

39. The Referee states, "Principal Kuntz also made it perfectly clear that his act of attaching the policy to the evaluation was intended to point out a deficiency in John Freshwater's method of

instruction (Transcript page 3812).” However, the context of the attachment of a copy of Policy 2270 does not indicate a deficiency. Mr. Kuntz did not say that he perceived a problem, nor that Freshwater failed to adhere to policy. He says that a parent had a concern, “I was trying to handle it in a fair way.” (Transcript page 3830) “I tried to think of something that was relevant to their concerns, and a statement I could make to John.” (Transcript page 3808) The context of the attachment of a copy of Policy 2270 specifies Freshwater is to **continue** his adherence to the policy which necessarily, grammatically, declares that Freshwater was in fact following the policy. Principal Keib states that if there was a problem being addressed by the attachment, the problem would have been identified in the “Observation” section of the form (Transcript page 3667). There is no such identification of a deficiency in the observation section of the form.

40. Former Superintendent Maley opines that the use of the word, “continue”, may at worst mean that a problem had been brought to the attention of Freshwater sometime previous to the evaluation, he had corrected it satisfactorily, and that he was being affirmed that his modified course of action was correct and satisfactory. (Transcript page 2351) Thus, the matter was adjudicated.

41. The board’s resolution states: “Mr. Freshwater’s “evidence” against evolution was based, in large part, upon the Christian religious principals (sic) of Creationism and Intelligent Design; Mr. Freshwater’s use of “against evolution” materials ran afoul of the District’s Bylaws/Policies”. Board Policy 2270, cited by the Referee but not by the board resolution, prohibits advancing or inhibiting a particular religion. Creationism and/or Intelligent Design are NOT religions, nor is either reflective of beliefs or tenets unique to any particular religion, instead being endorsed to some degree by many Christians, Muslims, Orthodox Jews, Sikhs, and perhaps in excess of 500 other world religions. Neither the Referee nor the Board produced

evidence that Freshwater advanced a particular religion; i.e. there was no allegation that any student was required to believe, practice, or support any particular religion or sect, nor were they coerced to even recall any religious elements for a graded test.

Paragraph 4 of Policy 2270 states that religious traditions VARY in their treatment of science, and that students should receive unbiased [toward any PARTICULAR religion] instruction, so that students may evaluate it "in accordance with their own religious tenets". Since the totality of Freshwater's (and the textbook's) teaching included a wide range of opinions, both scientific and non-scientific, without endorsing any particular sect, therefore, Freshwater's instruction was NOT biased. There is a distinction not apparent to the board or the referee that mandates a line of difference between speech of a religious perspective and pure religious worship. Any speech by Freshwater of a religious perspective was and continues to be permissible in a public school classroom which is distinctly different from the impermissible speech of religious worship, a line that Freshwater did not cross.

42. The board's resolution states: "Mr. Freshwater used unauthorized handouts to challenge evolution, based in large part upon the Christian religious principals (sic) of Creationism and Intelligent Design". According to witness testimony, the only "unauthorized handouts" are those specifically forbidden by Administration. Teachers are given "wide latitude" to use outside materials, and are encouraged to do so. No pre-authorization is necessary, nor is there a protocol in place to obtain such authorization. The Board's use of this term (even the Referee demurred its use) reflects an ignorance of the operation of their own school system. Freshwater did not use any "unauthorized handouts".

43. The three handouts used as evidence for challenging evolution were handled to the satisfaction of the administration at the time of each incident, without adverse entries in

Freshwater's personnel file, and are therefore improperly used to build a case against him. The allegations against Freshwater were adjudicated previously as the result of actions taken by the board's personnel and were thereby barred for further action by the doctrine of res judicata.

Administrators did not cite Christian viewpoint as the documented objection to these materials *at the time of their use* and subsequent adjudication and conclusion. Freshwater had been instructed to cease use of each one, and no evidence was presented that he used any thereafter.

44. Freshwater was never directed to cease teaching anti-evolution or intelligent design, or creationism. Freshwater was directed only to cease use of these three particular handouts. None of these three occasions resulted in a warning for future handout content.

45. The Referee is confused about these incidents. The Referee asserts that "Principal Kuntz investigated and determined that John Freshwater was not adhering to policy 2270 ('Religion in The Curriculum'...)", (Transcript page 3830). Neither that page, nor the context of his entire testimony support this assertion. Mr. Kuntz never makes this assessment, but Mr. Millstone did, without asking Mr. Kuntz to agree or disagree.

46. Former Superintendent Maley testified regarding three handouts. Handout #1, "...the principal directed John to not use the material again. I don't believe John used that material again." (Transcript page 2244) Former Superintendent Maley testified regarding handout #2, "...we directed John not to use it... it was going to be resolved... he went through a process that was appropriate...so there was self-resolution..."(Transcript page 2244) Former Superintendent Maley testified regarding handout #3, "We asked Mr. Freshwater to find the source... he was unable to do so... I issued a letter to John about not using [it]" (Transcript page 2245). In a June 8, 2006 letter from Maley, Freshwater was directed to "delete the material" and "in the future please refrain from using material that the source or author cannot be identified". Former

Superintendent Maley testified regarding all three handouts, "Each time those issues arose, I dealt with them as I felt was appropriate for the district." (Transcript page 2245)

47. The board's resolution states: "Mr. Freshwater used motion pictures (*Expelled*; *No Intelligence Allowed*) and videos (the *Watchmaker*) to challenge evolution, which were based in large part upon the Christian religious principals of Creationism and Intelligent Design."

48. *Expelled: No Intelligence Allowed* is a film about viewpoint discrimination. It is not about creationism or anti-evolution. Viewing *Expelled* did not occur in the classroom, but was offered as one of a multiplicity of voluntary extra-credit assignments to be done on a student's own time. The assignment followed the language of the Academic Content Standards regarding bias. Principal Tim Keib says, "I think that the fact that [Freshwater] is...designing an extra credit assignment that is similar to the content standards will teach the kids how to become proficient in that standard.... [T]hat is an example of... going outside of the curriculum and it being acceptable..." (Transcript page 3661)

49. The short video *Watchmaker* was not shown in class. Twelve classmates of the discredited student – who is the only source of this accusation – testified that they did not see the *Watchmaker* video in science class. (The discredited student is the same whose "speculation and imagination had pushed reality aside" in the dismissed Tesla Coil incident.) (Transcript pages 5071:3; 5119:24; 3848: 7-17; 5104:25; 5241:6; 5303:17; 5323:6; 2190:14; 5031:16; 5216:6; 5286:2; 5343:12)

50. The board's resolution states: "Mr. Freshwater taught his students to use the code word "here" when teaching students to question printed materials from science textbooks, which were approved and provided by the Board;"

51. The use of the word “here” was not an anti-evolution tactic by Freshwater, but “a shortcut method of [the students] citing passages in printed materials that could be questioned” [by the students], an outlet or mechanism for the students to question the material, not for Freshwater to question the material. The students were the ones who said “here”, not Freshwater. Board Policy 8800B Religious Expression does not infringe the students’ right to question from a religious perspective. Use of the word “here” obviously was not emphasized in class, as two students (Baer and Strack) testified they did not recall the word “here” being used at all. (Transcript page 5082, and 3856). Teacher Andrew Thompson remembers the word “here” being used in class when he was a student in Freshwater’s class as well as when he was intervention specialist; “any time the students would read about something that they felt was not necessarily fact” they would say it. The purpose was to get students to discern the difference between fact and hypothesis, not to promote religion; it was not Freshwater who identified the “here” passages, but rather the students. It helped students to pay attention to what was being read out loud. Teacher Thompson thought the use of the word “here” was a good teaching tool. (Transcript page 2880 - 2882)

52. The Scientific Method, to be taught from the Board-provided textbook, is found in Employee Exhibit 112 pages 172-174, Employee Exhibit 113, pages 192-194, and Employee Exhibit 114, pages 198-200. According to these exhibits, the first step in the Scientific Method is to “Ask a Question”.

53. The second step in the Scientific Method is to Form a Hypothesis, which is “a clear statement of what you expect the answer to your question to be.” The Hypothesis is a Truth Claim. “If observations and information cannot be gathered or if an experiment cannot be designed to test your hypothesis, it is untestable, and the investigation can go no further.”

54. The third step in the Scientific Method is to Test the Hypothesis. This step patently asks *if the Hypothesis of the Second Step is True*. The third step in the Scientific Method *questions the Truth Claim of the Second Step*. The third step in the Scientific Method *challenges the Truth Claim of the Second Step*. The Referee's Report and the board Resolution object to Mr. Freshwater teaching or allowing the students to apply the Scientific Method at its very core, by Asking Questions, particularly of Truth Claims.

55. The board's resolution states: "Mr. Freshwater taught his eighth grade students that homosexuality is a sin, so anyone who chooses to be a homosexual is a sinner. Mr. Freshwater also taught his students that science and scientists can be wrong when they declare that there is a genetic predisposition to homosexuality;"

56. Freshwater does not argue for his right to have said this; Freshwater denies saying this. Stockdale has no corroboration from students, or from parents, or from administration (Transcript page 1202), no contemporary documentation (Transcript page 4163), did not speak to anyone at the time (Transcript page 4161), admits he does not have an exact recollection of the things that happened that particular day, and at the time of the investigation he could not even remember what year this supposedly occurred. (Transcript page 1317) Yet, Stockdale is very specific in "recalling" exactly what Freshwater said to his students. (Transcript page 4170) Without corroboration, it is IRRATIONAL to conclude that his testimony is true. No students were identified who were homosexual or against whom Freshwater was prejudiced. Stockdale's imaginary student "who might be struggling with his sexual identity" is not entitled to a heckler's veto. Freshwater alleges additional information has become available since the close of the hearing conducted by the referee, the information of which was not previously made available despite efforts by Freshwater to obtain.

57. Employee Exhibit 176 includes a selection of newspaper articles from Freshwater's classroom on the topic of genetic predisposition to homosexuality. The articles state that although some scientists claim to have found a genetic link, the result has not been reproduced by other scientists. This is a public, popular example of the Scientific Method in action, reported in the newspaper of the students' own town. According to the newspaper articles, a statement to the effect that "scientists can be wrong when they declare that there is a genetic predisposition to homosexuality" is accurate, since that is one of the two possible outcomes of testing this hypothesis.

58. The board's resolution states: "Mr. Freshwater not only injected his subjective, biased, Christian religion based, non-scientific opinion into the instruction of eighth grade science students but also gave those students reason to doubt the accuracy and or veracity of scientists, science textbooks, and/or science in general;"

59. Freshwater's uses of materials deemed by the board as "Christian" were within board policy, yet few and rare. The subjective, biased, religion-based, and non-scientific opinions expressed in the board-supplied curricular materials – textbooks – for 8th-grade science are numerous and common. Board censorship of the few and rare uses of materials in its Resolution is explicitly because the Board considers them to be expressing Christian viewpoints. Freshwater acted within the bounds of each policy by teaching about some commonly held beliefs of at least three of the world's major religions. Employee exhibits show that the board-approved curriculum materials also teach about religious and other non-scientific opinions.

By squelching few and rare expressions of opinion in the teaching of 8th-grade science because the Board believes that they convey a Christian viewpoint, while at the same time permitting the expression of other opinions in the curriculum, including those hostile to religion, the Board is

using the weight of government to prefer other religions while expressing hostility toward Christianity, which is forbidden by the Establishment Clause of the United States Constitution. Silencing speech that the Board considers Christian while permitting speech that is anti-religious also violates the Establishment Clause.

60. Teacher Kerri Mahan testified to the purpose of introducing non-scientific concepts as a way to challenge the students' thinking in scientific terms. "Freshwater often presented things, some things that kind of seemed off the wall, or how could this be. And then the kids would look at what we know about science." (Transcript page 3768)

61. Following is a partial list of the numerous and common subjective, biased, religion-based, and non-scientific opinions expressed in the Board-supplied curricular materials – textbooks – for 8th-grade science. Among the quotations are statements that scientists can be wrong, admissions of scientists changing their minds over time, narrations of ancient legends, speculation on ritual uses of geologic sites, science fiction stories, reasons to doubt the accuracy of scientists, instruction to students to debate scientific topics as well as moral or ethical topics relating to science.

- A. Employee Exhibit 112, page 8, "Ptolemy thought that the Earth is at the center of the universe – with the sun and the other planets revolving around the Earth." [Textbook gives reason to doubt accuracy of this scientist.]
- B. Employee Exhibit 112, page 9, "Tycho [Brahe] favored an Earth-centered theory that was different from Ptolemy's. Tycho believed that the other planets revolve around the sun but that the sun and the moon revolve around the Earth." [Textbook gives reason to doubt accuracy of this scientist.]

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- C. Employee Exhibit 112, page 9, Self-Check, "Name two astronomers who favored an Earth-centered universe...."
- D. Employee Exhibit 112, page 30, "Scientists believe that it takes millions of years for planets to form. Photographs of TMR-1C, however, have led some researchers to speculate that this process may be much quicker than was previously thought.... If TMR-1C turns out to be older than these stars, it could not have been ejected from them.... The research continues until scientists know for certain." [Shows bias of scientists; sows seeds of confusion.]
- E. Employee Exhibit 112, page 44, "Some type of burning fuel was first thought to be the source of the sun's energy." [subjective; doubts the accuracy of science]
- F. Employee Exhibit 112, page 50, "...many scientists thought that Earth's first atmosphere also contained a lot of hydrogen compounds. New evidence is changing the way we think about Earth's first atmosphere." [sows seeds of doubt and confusion]
- G. Employee Exhibit 112, page 73, "Imagine that it is the year 2120 and you are the pilot of an interplanetary spacecraft on your way to explore Pluto." [subjective, biased, non-scientific]
- H. Employee Exhibit 113, page 23, Science Fiction "The Metal Man" by Jack Williams, about a boy who finds a metallic statue that "is, or once was, Professor Thomas Kelvin of the Geology Department." [subjective, biased, non-scientific]
- I. Employee Exhibit 113, page 25, "Irish legend claims that the mythical hero Finn MacCool built the Giant's Causeway, shown here. According to legend, these stepping stones were used to cross the sea in order to invade a neighboring island. Actually, this rock formation is the result of ..." [subjective, biased, non-scientific]

- J. Employee Exhibit 113, page 52, “Petra is sometimes referred to as a city ‘from the rock as if by magic grown.’ Why might such a city seem ‘magic’ to us today? What might have encouraged the Nabataeans to create this city? Share your thoughts with a classmate.” [subjective, biased, non-scientific]
- K. Employee Exhibit 113, page 52, “...the Great Temple- a ...religious complex...” [religion-based]
- L. Employee Exhibit 113, page 52, “The High Place of Sacrifice... a place of worship...” [religion-based]
- M. Employee Exhibit 113, page 57, Uniformitarianism Versus Catastrophism –
Uniformitarianism Wins! – Modern Geology [is] a Happy Medium [Scientist challenges the prevailing thought of his day, and now we realize that both sides were partially right.]
[sows seeds of doubt, doubts accuracy of science]
- N. Employee Exhibit 113, page 57, “In Hutton’s time most people thought that the Earth had existed for only thousands of years.” [religion- based, non-scientific]
- O. Employee Exhibit 113, page 57, “In science, assumptions must ... be made.... How does this apply to uniformitarianism?” [subjective]
- P. Employee Exhibit 113, page 117, Alfred Wegener (1880-1930) proposed his theory of continental drift, now regarded as accurate, “many scientists laughed at the idea... so ridiculous that Wegener, a university professor, had difficulty getting a job!” [biased; doubted accuracy of this scientist]
- Q. Employee Exhibit 113, page 144, “Currently, the United States government does not fund research that investigates whether animals can predict earthquakes. Have a debate with your classmates about whether the government should fund such research.” [subjective]

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- R. Employee Exhibit 113, page 161, “scientists...cannot predict...with total accuracy” [sows seeds of doubt, doubts accuracy of science]
- S. Employee Exhibit 114, page 9, In 1665, scientist Hooke “thought that cells were found only in [plants and fungi] and not in animals”. Here is a scientist who was WRONG, and no one questioned or disproved him for “almost two centuries” (p10);
- T. Employee Exhibit 114, page 53, Science Fiction, “Contagion” by Katherine MacLean, about a colony of humans on a distant planet facing alien diseases.
- U. Employee Exhibit 114, page 76, “many people debate ethical, social, and legal issues surrounding this controversial project. Look into these issues, and discuss them with your classmates!”
- V. Employee Exhibit 114, page 77, “Do you think it is acceptable for scientists to perform research on fruit flies? What about on rats, mice, and rabbits? Have a debate with your classmates about conducting scientific experiments on other species.”
- W. Employee Exhibit 114, page 92, Touches on the controversial topic of eugenics: “Genetic Counseling provides information and counseling to couples who wish to have children but are worried that they might pass a disease to their children.... Designer Genes.... Engineering Organisms”
- X. Employee Exhibit 114, page 100, “Scientific Debate.... Should DNA fingerprinting be admitted as evidence in the courtroom? Do some additional research, and decide for yourself.”
- Y. Employee Exhibit 114, page 101, Science Fiction “Moby James” by Patricia McKillip, about a boy who believes that his brother is a great white mutant whale.

- Z. Employee Exhibit 114, page 191, Laboratory exercise, “Imagine a world populated with candy... Can you think of another characteristic of these candies that can be tested to determine which candy is best adapted to survive?”
- AA. Employee Exhibit 114, page 129, Science Fiction, “The Anatomy Lesson” by Scott Sanders about a student preparing for an anatomy test with an absurdly composed skeleton model. [non-scientific]
- BB. Employee Exhibit 114, page 142, “What happened to the dinosaurs? According to one hypothesis, a large meteorite...” [It would make sense for some student to ask about other hypotheses or to offer one of their own.]
- CC. Employee Exhibit 114, page 148, “Some scientists think the Neanderthals are a separate species, *Homo neanderthalensis*, from present-day humans, *Homo sapiens*. Other scientists think Neanderthals are a race of *Homo sapiens*. There is not yet enough evidence to fully answer this question.” [At least one set of scientists must be WRONG.]
- DD. Employee Exhibit 114, page 148, “Cro- Magnons may have existed...100,000 years ago” [speculation];
- EE. Employee Exhibit 114, page 149, “...much remains to be understood...Current evidence suggests...” [leaves much room for new, different, and possibly conflicting evidence to surface];
- FF. Employee Exhibit 114, page 149, “Some scientists think A.a. is the ancestor of all hominids... BUT recent fossil discoveries indicate that another ...species gave rise to human ancestors. There is still much to be learned about the evolution of humans” [Textbook doubts accuracy of some scientists]

GG. Employee Exhibit 114, page 162, “[Carolus] Linnaeus attempted to classify all known organisms only by their shared characteristics. Later, scientists began to recognize that evolutionary changes form a line of descent from a common ancestor. Taxonomy changed to include these new ideas about evolutionary relationships.”

HH. Employee Exhibit 114, page 162, “Today’s taxonomists still classify organisms based on presumed evolutionary relationships.”

II. Employee Exhibit 114, page 178, “When did birds evolve? Was it 225 million years ago, just 115 million years ago, or somewhere in between? No one really knows for sure, but the topic has fueled a long-standing debate among scientists.”

JJ. Employee Exhibit 114, page 192, “You are a crew member on the USS *Adventure*.... To collect life-forms from outside the solar system.”

62. The board’s resolution states: “Mr. Freshwater acted in defiance of direct instructions and orders of the administrators (Insubordination); Mr. Freshwater was directed to remove or discontinue the display of all religious articles in his classroom, including all posters of a religious nature, and whereas, Mr. Freshwater has failed to comply with that directive and, further, has brought additional religious articles into his classroom, in a direct act of insubordination;”.

63. The Referee’s finding and recommendation regarding the fourth charge, Insubordination, is established entirely and completely on the interpretation of events by Principal White.

64. The broader context of Mr. White’s job performance, now known by the Board but unavailable to the Referee despite efforts by Freshwater to obtain, casts a great deal of doubt on this finding.

65. Superintendent Steve Short's only conduit for information from or directives to Mr. Freshwater was Principal White. Superintendent Short's perception of events is entirely and completely founded upon Principal White's representations to him. Superintendent Short's Directives to Mr. Freshwater were communicated to him through Principal White.

66. Freshwater has maintained throughout the hearing that Principal White was unclear in his Directives, did not faithfully communicate Freshwater's appeals for Clarification and Reasons for the Directive to remove the Bible from his desk, and that Principal White did not faithfully communicate Superintendent Short's Clarification or Reasons, if any, for the Directive to remove the Bible from his desk. Freshwater has also maintained throughout the hearing that White's directive to remove the Bible from his desk was not lawful or constitutional. White did not make Freshwater unequivocally aware of the penalty for failure to remove the Bible from his desk, neither did White consistently enforce or apply rules concerning perceived religious items in classrooms. (Freshwater Closing Brief, pages 43, 48-53, chart at page 151).

67. Parent Darcy Miller (Transcript page 3713), and Teacher Lori Miller (no relation)(Transcript page 3943) both testified to their frustration with White's poor communication skills, conflicting statements, and lack of follow-through.

68. New documentation in Principal White's performance evaluations shows that his poor communication has caused problems with other teachers in the last two years, his lack of follow-through on tasks, his lack of availability to his staff, his vague and conflicting directives, and propensity for violating Policy have caused problems with other teachers in the last two years.

69. This New Documentation was unavailable to the Referee in forming his Report, and was ignored by the Board in forming its resolution.

70. Mr. White received critical evaluations in 2009-2010 and 2010-2011 school years. The criticism consistently admonishes him for deficient Staff Relations, as he previously exhibited in 2007-2008 with Freshwater. Following is a partial list of the numerous deficiencies appearing in Principal White's personnel file which demonstrate the validity of Mr. White's failure to communicate and casts aspersion upon his credibility.

A. From Superintendent Short on 6/28/2010, "1. Curriculum and Instruction – Leadership: ...Mr. White needs to step to the front and be viewed as the curriculum leader at the building level. He needs to be the role model for his staff."

B. "3. Student Relations: ... Mr. White needs to cover a lunch or find a way to consistently be visible in the building."

C. "4. Staff Relations: Mr. White needs to build a better relationship with staff. He needs to follow through on requests, conversations and visiting classrooms. Mr. White needs to maintain his professional manner when it comes to conversations with staff. Observations should be completed in a timely manner."

D. "9. Administrative Professional Development: 1. Be the leader, be out in front, show them by your own work ethic and make decisions. 2. Follow through with ideas and job duties. 3. Work more closely with community and parents in returning calls and meeting job duties."

E. "11. Other Comments: Mr. White needs to be the leader of the building. He needs to be visible in doing his work and at the forefront of major decisions. Mr. White needs to complete tasks in a timely manner and use the people around him to be successful. Mr. White did have some personal issues this year that took some time away from his position."

F. From the evaluation on 12/17/2010, "1. Curriculum and Instruction – Leadership: ...He still needs to be 'in front' of the staff more as the curriculum leader. "Mr. White used poor judgment in sending a Merry Christmas card to all schools on Friday, December 17. Mr. White had previously directed staff not to use school e-mail to promote religious purpose and this card is an example of things not to send (other e-cards sent by buildings included the words *Happy Holidays*). Mr. White will be receiving a written reprimand with the opportunity to respond."

G. "3. Student Relations: ...Mr. White still needs to be more visible in the building."

H. "4. Staff Relations: Mr. White needs to continue to work on his staff relationships and other professional relationships. Mr. White needs to continue to maintain his professional manner when it comes to working with staff. After an episode with the Treasurer's office, Mr. White has worked to maintain a better relationship. This should be the norm for behavior."

I. "5. Community Relations: ...Mr. White has been better this year in returning phone calls in a timely manner."

J. "6. Building Operations: Mr. White needs to improve in the area of student activities and student accounts. Information that should have been to the Treasurer's office in a timely manner was not sent. It took too long to get this matter completed. Rules have been in place not to pay sheriffs, employees and volunteers form receipts of a dance or a game. Mr. White authorized on Friday, December 10, the payment of a police officer and the payment for pizza to come from gate receipts. Even though the amount is less than \$200.00, the rules are clear that this type of payment is forbidden. Mr. White will need to meet with the Treasurer's office to correct the situation. This evaluation will serve as notice of written reprimand. Any further violation of this policy will result in some form of discipline action."

K. "9. Administrative Professional Development: 1. Follow policies set by the Treasurer's office. 2. Follow through with job duties. 3. Be the curriculum leader, attend all meetings and be in front of the staff."

71. In addition to the performance evaluations, there is a multiplicity of new evidence in the form of email and other communications from teaching staff and/or parents to Superintendent Short and/or the Board with complaints about Mr. White's improper and unprofessional behavior, which is exactly like his behavior toward Freshwater in 2007-2008.

72. Here are just a few examples of Freshwater's complaints against Mr. White surrounding the event inaccurately called "Insubordination", and how Mr. White's deficiencies have persisted. This new evidence throws the weight of evidence exceedingly in favor of Mr. Freshwater and his narrative of events.

73. Mr. Freshwater received an *ambiguous* directive regarding the removal of his Bible from his desk (Transcript page 572). Mr. White has been criticized in later evaluations for needing to "build a better relationship with staff" and "maintain his professional manner when it comes to conversations with staff."

74. From April 7, 2008 to April 11, 2008, Mr. Freshwater tried in vain to meet with Mr. White, or even to find him. (Transcript page 4406, 4391) Mr. White was later criticized in his performance evaluations as needing to "consistently be visible in the building," and "be visible in doing his work."

75. On April 7, 2008, Mr. Freshwater had a conversation with Mr. White during which he received one directive, but on the same date was handed a letter from Mr. White which conflicted with that verbal directive. (Transcript page 4391) Mr. White was criticized later for

sending a Merry Christmas card to all schools on Friday, December 17, 2010, in violation of his own earlier directive to staff.

76. Freshwater was harassed with conflicting directives regarding materials that had been in his classroom for 21 years because Mr. White violated board policy 9130, Public Complaints. Mr. White was later criticized in his performance evaluation for violating a policy prohibiting payment of sheriffs, employees and volunteers from receipts of a dance or a game, for which he was officially reprimanded.

77. On April 16, 2008, the deadline for compliance with the directive, Mr. Freshwater asked for clarification about keeping his Bible on his desk, and received a commitment from Mr. White to return with an answer; the answer was not forthcoming for several days. (Transcript page 4414) Mr. White was later criticized in performance reviews for not "complet(ing) tasks in a timely manner."

78. Mrs. Miller, Mr. Thompson and Mr. Elifritz were expecting a follow-up to an important meeting with Mr. White, but he never did (Transcript page 2877). Mr. White was later criticized in his evaluations and exhorted to "attend all meetings" and "Follow through with job duties."

79. Mr. White has been given opportunity to improve his deficiencies while maintaining his employment and salary. Freshwater, who has never received a negative performance review, was given no opportunity to correct perceived deficiencies, despite being an "individual contributor" employee. Individual Contributors (such as Freshwater) bear less responsibility than Administrators (such as White), and the threshold for discipline is proportionally higher. The Board has acted inconsistently in its discrimination against Freshwater.

80. Freshwater complied with all direct orders, except removing the Bible from the desk which he appealed to Superintendent Short and the Board, but both the superintendent and the board

failed to abide by the Master Contract and respond to Freshwater's complaint except for authorizing another breach of the Master Contract by engaging in a non-contractual investigation. Materials attached to windows, cupboards, walls, and bulletin boards were all removed as directed and therefore concluded.

81. The Referee makes errors of fact when he states that White "clarified and reiterated...was forced to set a deadline...had a discussion about...insubordination..." No contemporaneous documentation clarifies or repeats the same request twice or puts an insubordination discussion in writing. Contemporaneous documentation by Freshwater associates the threat of insubordination with his cooperation with investigators HR OnCall. The contemporaneous documents detailed in Employee Exhibits 145 and 146, made on April 21, 2008, demonstrate White was not clear in his directions and did not direct Freshwater to remove his personal Bible which later was claimed by White and the board that Freshwater was insubordinate.

82. White did not follow "Progressive discipline" as defined in Ohio Administrative Code - 124-1-02. "Progressive discipline" generally means the act of disciplining an employee in graduated increments and progressing through a logical sequence, such as a written reprimand for a first offense, a short suspension for the second offense, and a longer suspension or removal for the third offense.

83. No contemporaneous documentation specifies the Colin Powell poster or library book Jesus of Nazareth as subject to removal; there is a contemporaneous document which specifies other allegations (Employee Exhibits 145 and 146) but it does not include the Bible, Jesus of Nazareth, or Powell poster. Neither Freshwater, nor many witnesses, including expert witnesses, regarded the Powell poster as religious, but rather as patriotic. Testimony revealed the board opened classroom walls to the non-disruptive expression of all its teachers and board policies (Policy

2270 and 3218) permitted and encouraged the board's teachers to provide district students with a healthy exposure to the diverse ideas and opinions of its individual teachers. The board's fostering of diversity, however, does not mean the board can bleach out or sanitize historical religious expression or mainstream morality. By squelching only Freshwater's patriotic poster of President George Bush (despite the same poster being present in other district classrooms) while permitting other diverse religious and anti-religious classroom displays, the board does a disservice to the students of Mount Vernon City School District and the federal and state constitutions do not permit this one-sided censorship.

84. The narrative of Freshwater closing brief, pages 150-164, is entirely consistent with the performance evaluations of Mr. White. The narrative of events accepted by the Referee and Board is *inconsistent* with the new evidence in the form of poor performance evaluations of Mr. White and complaining correspondence to Mr. Short and the Board.

85. Now available evidence – Principal White's performance evaluations – which was previously withheld demonstrates that White's poor communication, poor administrative skill, absenteeism from staff, has caused problems with other teachers in the last two years.

86. The Board dropped the Amended Resolution allegations regarding Fellowship of Christian Athletes (FCA) against Freshwater from its Resolution to Terminate. The Referee report asserts that Freshwater violated policies regarding the FCA, and, moreover, stated that this violation is necessary for inclusion in his finding that "the multiple incidents which gave rise to the numerous and various bases/grounds more than suffice in support of termination." The Referee did not determine that any one or combination of incidents short of all three would be sufficient for termination of contract. In its departure from the Referee's report and recommendation, the Board failed to adhere to RC3319.16 by omitting a written explanation. It is easy to see, though,

why the Board would dismiss the FCA allegations, but their dismissal serves to highlight the faulty reasoning of the entire report by the Referee.

87. The Referee's Report rejected all but two of the allegations surrounding FCA: that Freshwater participated in prayer during one single FCA event out of 17 years of supervising FCA; and that Freshwater asked one single guest to speak at FCA out of 17 years of supervising FCA. Both remaining allegations are false, and the overwhelming weight of testimony from the hearing confirms this.

88. Contemporaneous documentation shows students, not Freshwater, contacted Father Hammond. (Board Exhibit 21) Hammond himself does not recall many things (Transcript page 6074) and made no documentation of contacts (Transcript page 6069). Testimony is undisputed that Freshwater spoke with Hammond outside of the school building and outside the hours of Freshwater's teaching contract. The board's allegation is an infringement upon Freshwater's right to association resulting in the board's allegation violating constitutional freedoms and protections.

89. There is a plausible explanation for contact between Hammond and Freshwater: Ms Orsborn called Father Hammond and spoke with his secretary who answers all calls (Transcript page 6070 and 6012) Ms. Orsborn left a message and gave Freshwater's name, not her own, as a call-back contact. (Transcript page 6016).

90. The weight of evidence overwhelmingly supports Freshwater's narrative of events regarding Father Hammond.

91. The "Prayer circle" incident was initially mischaracterized by Zach Dennis, the same discredited student whose "speculation and imagination had pushed reality aside" in the dismissed Tesla Coil incident. He included wild and implausible elements such as leading a

healing session/exorcism and calling to Satan, and his other accusations have been dismissed as having no basis. With most of the allegations in this incident having been dismissed as false, the only allegation is that Freshwater uttered a concluding prayer.

92. No witnesses say Freshwater prayed. Ben Nielson (Transcript page 2658) “My eyes are closed [when praying]” so he wouldn't know if hands were up. Pastor Zirkle says, “The only two prayers I can remember were Ben's and Ruth's ... I do not remember any other person praying” (Transcript page 2800).

93. Far from corroborating the allegation, Ruth Frady's testimony gives a plausible explanation for why a concluding “amen” was necessary to quickly yet respectfully end the meeting. “It was not a prayer, but ... the tone was very much ‘you need to leave’.” (Transcript page 5184) [Note that this quote contradicts the “concluding prayer” used by the Referee, but it matches with her affidavit.] We would point out that in Ruth Frady's view, any utterance from Freshwater was directed at the students, rather than directed at God in a devotional prayer, i.e. “religious speech”.

94. Ruth Frady elaborated: “It wasn't a prayer like everyone else was saying. It was to get this wrapped up and get the kids out of there. The words were said in a way that you knew that there would be no more said.” Q: “It was a concluding prayer?” A: “If you want to call it a prayer, yes, because he said 'amen'. There's a lot of definitions of the word prayer. I told HR 'concluding prayer'.” (Transcript page 5194)

95. When Principal White and Assistant Principal Ritchie, who were not eyewitnesses of the incident, met with Freshwater to ask about this incident, their main interest was in the alleged exorcism / healing session. White's and Ritchie's testimony regarding this meeting do not agree. White recalls discussing “prayer”, Ritchie recalls discussing “hands raised”.

96. Ritchie testified, "Mr. White asked if he (Freshwater) participated in prayer, and Mr Freshwater said, I may have put my hands up." (Transcript page 5945) Freshwater did not admit to putting his hands up, but the Referee Report mischaracterizes this. Contemporaneous medical documentation shows Freshwater was not able to raise hands.

97. Mr. Ritchie was asked during the hearing, Q: "Did [Freshwater] indicate he only participated by saying 'amen'?" A: "No". (Transcript page 5946)

98. White stated "...he finally told me that he did pray for him to be – probably did pray for him to be feeling better and well..." (Transcript page 503) There was no clarification if such a prayer was the prohibited "aloud," or the Free Exercise and unrestricted "silent." Mr. White's testimony is suspect because of the New Evidence of his critical performance evaluations.

99. There was no mention in that meeting with White and Ritchey of Freshwater participating by speaking at all. White did not ask any questions about speaking a prayer. [No one else present in the prayer mentioned Freshwater speaking, and no one but the discredited Zach Dennis claim to have seen Freshwater's hands up.]

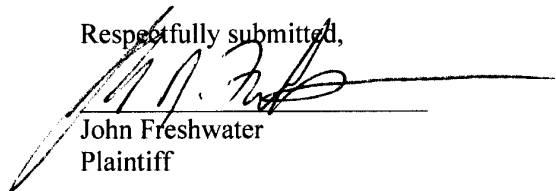
100. The Referee erred in asserting that Mr. Freshwater violated the mandates of the FCA handbook in these incidents.

101. Freshwater was damaged by the injection and admission of irrelevant materials disguised as amicus briefs which interfered with Freshwater's receipt of due process of law. Attached is a response to the unlawfully injected materials (Letter dated September 20, 2010, solicited by the Referee).

102. Freshwater prays for relief from this Court to include a reversal of the board's resolution to terminate him, monetary damages in an amount to be determined, damages for defamation, false

light, emotional distress , constitutional violations, reinstatement to his teaching position and other relief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Freshwater", is written over a horizontal line. The signature is stylized and extends to the right of the line.

John Freshwater
Plaintiff