

No. 13-1311

Supreme Court, U.S.
FILED
MAY 29 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

JOHN FRESHWATER,

Petitioner,

v.

MOUNT VERNON CITY SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio**

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Ohio law permits school districts to fire teachers for good and just cause, including insubordination. Because Freshwater's religious instruction exposed the school board to credible legal risk, his supervisor directed him to remove all religious displays from the classroom. Freshwater defied this order – even adding new theology texts to his collection – and the District fired him. Did the Ohio Supreme Court correctly find that the District complied with state law in firing Freshwater for insubordination?
2. Public school districts have the right to set curricula and teaching methodology, as well as to reduce legal risk. Exposing his employer to a possible Establishment Clause violation, Freshwater undermined evolution, and taught creationism to his eighth-grade class. Was the District permitted to terminate Freshwater's employment?

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JURISDICTION

Freshwater incorrectly invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). Ohio's Supreme Court considered the facts and rejected Freshwater's claims exclusively under state law. These adequate and independent state-law grounds preclude jurisdiction in this Court. *See infra* at 7.

STATUTORY PROVISION INVOLVED

Ohio Revised Code ("O.R.C.") § 3319.16 provides that a teacher's contract "may not be terminated except for good and just cause."

INTRODUCTION

This case offers neither a circuit split nor a conflict in state authority. It also fails to raise an important federal question, much less one decided incorrectly by a state or circuit court. Instead, this appeal presents only John Freshwater, a middle school science teacher fired for state-law insubordination, and for infusing his instruction with Christian doctrines.

To be sure, Freshwater disputes these facts. He misunderstood his employer's directives, he explains, and so he passively protested them. He denounced evolution only to sharpen his students' critical thinking skills, Freshwater insists, not to teach theology.

But the evidence discredits these claims. A hearing referee's conclusions – adopted in large part by the Ohio Supreme Court – stated that Freshwater not only flouted the principal's classroom-display directives, but also violated board policy by saturating his teaching with personal religious beliefs. Because Freshwater fails to meet even one jurisdictional element under SUP. CT. R. 10 ("Rule 10"), and specifically hinges this appeal on asserted factual errors, this Court should deny his Petition for Writ of Certiorari ("Petition").

At the outset, the District addresses Freshwater's misstatements and obfuscations by delineating the facts as determined by the Ohio Supreme Court or the hearing referee. The District then outlines the reasons this Court should deny the Petition, starting with a lack of jurisdiction – the appeal's fatal flaw. Before concluding, the District explains why Ohio's courts ruled correctly, touching briefly upon free speech and academic freedom, concepts Freshwater fundamentally misunderstands.

STATEMENT OF THE CASE

For 20 years, Freshwater taught eighth grade science at the Mount Vernon City School District ("District"). He also supervised – for most of his tenure – the Fellowship of Christian Athletes ("FCA"), an extracurricular student group. Petitioner's Appendix ("Pet. App.") 6a.

In both these roles, Freshwater routinely overstepped his boundaries, trespassing into Constitutional territory and trampling on his students' rights. For example, Freshwater distributed pamphlets touting "Answers in Genesis," encouraged students to attend religious seminars, and even offered extra credit to those who watched films about intelligent design. *Id.* at 7a, 19a. At least one seminar promised to reveal how evolution relates to family troubles, abortion, and lawlessness. *Id.* at 7a. Additional materials included handouts entitled "Darwin's Theory of Evolution – The Premise and the Problem," and videos with similar content. *Id.* at 11a, 21a.

Freshwater's supervisors repeatedly advised him to stop distributing these materials, and he repeatedly disregarded their orders. Pet. App. 7a. When the Board pointedly rejected his 2003 proposal to teach creationism, Freshwater – ignoring his employer once again – taught it anyway. *Id.* at 10a.

In December 2007, Freshwater used a Tesla coil, a type of electrostatic machine, to brand a cross shape onto a student's arm. Pet. App. 13a. The child's angry parents met with the school, and described additional classroom concerns. Specifically, the parents related that Freshwater: (1) displayed religious items in class; (2) taught personal beliefs instead of science; and (3) participated directly in the student-led FCA – even conducting healing sessions at the club's events. *Id.* at 14a, 17a, 18a. The family ultimately sued the District for Freshwater's constitutional violations. *Id.* at 14a.

Understandably, the District could no longer tolerate this conduct. Principal White ended the Tesla coil exercises, and then directed Freshwater to place all religious materials out of sight, including various Bibles,¹ handwritten verses, DVDs, posters, and a Ten Commandments collage. Pet. App. 13a-16a, 23a. Freshwater ignored the directive. In April 2008, Principal White met with Freshwater again and again, instructing him each time to clear out all religious symbols and decorations. *Id.* at 15a-16a, 24a. Eventually Freshwater removed several items, but kept a poster depicting a Biblical verse above a photo of officials in prayer. *Id.* at 16a, fn. 2. And then – brazenly flouting Principal White’s orders – Freshwater added theology texts, *The Oxford Bible* and *Jesus of Nazareth*, to his classroom display. *Id.* at 16a, 24a.

The above events were confirmed by an independent investigator, and prompted the Board to consider terminating Freshwater’s teaching contract. Pet. App. 18a-19a. A protracted hearing ensued, dragging out this termination for more than two years. *Id.* at 20a.

The referee’s report, issued in January 2011, addressed the Tesla coil incident and FCA supervision issues, as well as Freshwater’s insubordination and his failure to adhere to the established curriculum.

¹ The Ohio Supreme Court ultimately found that Freshwater should have been permitted to keep his personal Bible at his desk. Pet. App. 40a.

Although the referee discounted the Tesla coil incident, he found that Freshwater injected personal religious beliefs into his instruction, violating all relevant Board policies and bylaws. Pet. App. 21a; see, e.g., Pet. App. 143a, 147a (Administrative Guideline 2270 *Religion in the Curriculum*; Administrative Guideline 8800B *Religious Expression in the District*).

Not only did Freshwater use handouts and videos to teach Christian principles of creationism and intelligent design, but he also discredited science and scientists generally. Pet. App. 22a. For example, Freshwater taught his students that because homosexuality is a sin, any scientific claims about a genetic predisposition to sexual orientation must be wrong, and serve only to illustrate the flaws and limitations of the discipline as a whole. *Id.*

Next, the referee considered Freshwater’s supervision of the FCA student group. Instead of simply monitoring the group, Freshwater organized guest speakers, instituted prayers, and participated in ceremonies to heal the sick. Pet. App. 14a, 23a. These activities, the referee found, violated FCA policies and guidelines. *Id.* at 23a, 118a-119a; Respondent’s Appendix (“Resp. App.”) A, at 1a-2a.

At the end of his report, the referee addressed the dispositive issue in this case: Freshwater’s insubordination when asked to remove religious displays from his classroom. Pet. App. 24a. In refusing to comply and in adding *The Oxford Bible* and *Jesus of Nazareth*, Freshwater was not merely confused by the

directives or inspired by the books he chose. He was, the referee emphasized, deliberately defiant, acting out of resistance and disregard. *Id.*

The referee concluded that Freshwater's conduct – insubordination and teaching religion instead of science – was good and just cause for dismissal. Freshwater repeatedly defied direct instructions; this conduct independently sufficed as grounds to terminate his contract. Pet. App. 26a. But his offenses did not end there. Freshwater, the report stressed, also used his classroom to teach science from a Christian perspective, “sowing seeds of doubt and confusion in the minds of impressionable students.” *Id.* at 25a. Because advancing and endorsing religious views violated the Establishment Clause, this behavior also independently justified Freshwater's dismissal. The Board adopted the referee's conclusions in January 2011, and terminated Freshwater's contract later that month.

The Knox County Common Pleas Court affirmed the termination, and so did Ohio's Fifth District Court of Appeals. Pet. App. 27a-30a. At one point, Freshwater demanded additional hearings to vindicate himself, but the appellate court, in light of the referee's extensive proceedings spanning two years, denied his request. *Id.* at 29a.

On July 5, 2012, Ohio's Supreme Court accepted Freshwater's appeal for review. Although the court initially intended to address First Amendment and academic freedom issues, the facts led the court down

a different path. Freshwater was blatantly insubordinate, the court found, and this alone justified dismissing him. Pet. App. 41a, 43a. Teaching creationism is generally disfavored, the court noted, but because independent state-law grounds supported the Board's decision, constitutional analyses were simply unnecessary. *Id.* at 43a.

REASONS FOR DENYING THE PETITION

Explicitly declining to address constitutional issues, the Ohio Supreme Court determined that state law allowed the District to terminate Freshwater's contract for insubordination. Under 28 U.S.C. § 1257(a), this Court, therefore, lacks jurisdiction to review Freshwater's appeal.

Moreover, this appeal fails to meet any Rule 10 criteria for granting certiorari. Specifically, there is no circuit split or conflict among state courts of last resort. Confronted with similar claims, these courts always hold in favor of the school district. And because state law proved dispositive here, this appeal does not present any important question of federal law, much less one that merits this Court's attention. Finally, Freshwater's fact-bound Petition whitewashes the record, omitting the ample unfavorable evidence the Ohio Supreme Court relied upon in its holding.

At each stage, Ohio's courts reached the correct result. Not only did Freshwater defy direct orders,

but he also exposed his employer to considerable legal risk. The Constitution does not protect anything and everything a state employee chooses to display in an office or classroom – especially against a supervisor’s reasonable orders. Likewise, academic freedom, a concept applied in higher education only, does not permit grade-school teachers to choose what subjects they would like to teach – math or French, science or Bible. By hiring Freshwater to teach eighth grade science, the District hired his classroom speech and lesson content. And when that speech and content impermissibly morphed into theology, the District justifiably sought to mitigate legal risk and control the speech it hired. Freshwater, in turn, disregarded his employer’s directives and paid the usual price. His dismissal comported with all applicable laws, and this Court, accordingly, should not disturb the outcome.

I. Federal law bars this Court from taking jurisdiction over Freshwater’s appeal.

This Court’s jurisdiction does not reach state-court decisions resting exclusively – or even independently – on state-law grounds. 28 U.S.C. § 1257(a); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (abrogated in part on other grounds); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Crossley v. New Orleans*, 108 U.S. 105 (1883). In fact, if independent and adequate state grounds support a lower court’s judgment, this Court’s federal question analysis would amount to a mere advisory opinion. *Herb v. Pitcairn*,

324 U.S. 117, 126 (1945) (superannuated on other grounds).

Freshwater contends that because the orders he defied were unreasonable, he was not insubordinate, and state law, therefore, cannot support his termination. Petition, pp. 12-13. But the Ohio Supreme Court reviewed the extensive record, and found there was “ample evidence” of insubordination to justify the District’s response. Pet. App. 3a, 41a (“Freshwater’s willful disobedience . . . demonstrates blatant insubordination”). Freshwater’s factual dispute is precisely the type this Court rejects on appeal; his fact-bound arguments cannot convert a state-law holding into a constitutional controversy.

Because O.R.C. § 3319.16 allows school boards to fire employees for good and just cause, including insubordination, the court resolved this conflict exclusively on state-law grounds. Even though it touched upon constitutional concerns, the state court still held that insubordination remained an independent and adequate justification for dismissal. This Court, accordingly, lacks jurisdiction to review Freshwater’s appeal and must deny his Petition.

II. Freshwater fails to meet any Rule 10 criteria for granting certiorari, and hinges his appeal on factual disputes.

Rule 10 outlines criteria for granting certiorari: a conflict among the circuits or the states, an important federal question decided incorrectly, or an important

issue of federal law this Court should address. SUP. CT. R. 10. The Rule also specifies that the Court rejects appeals based on alleged factual errors or misapplications of law. *Id.* Freshwater's Petition falls into this last category, and fails to meet any criteria for granting certiorari. Finally, Freshwater's appeal is not an effective vehicle for the questions he asks this Court to consider.

A. There is no conflict among circuit or state courts.

Freshwater's Petition does not cite any circuit split or state-court conflict – because none exists.

Every circuit court presented with similar claims found in favor of the school district, holding that the First Amendment does not protect teachers' religious discourse or their curricular preferences. *See, e.g., Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469 (2d Cir. 1999) (First Amendment does not protect grade-school teacher's religious comments to parents); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007) (First Amendment does not protect Spanish teacher's religious displays); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 795 (5th Cir. 1989) (First Amendment does not protect history teacher's supplemental reading list); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999) (disclaimer read before teaching evolution to elementary and secondary students offends the First Amendment); *Daniel v. Waters*, 515 F.2d 485, 487 (6th Cir. 1975) (state law

violates the First Amendment by mandating equal teaching time for evolution and creationism in public schools); *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332 (6th Cir. 2010) (First Amendment does not protect curricular and pedagogical choices of primary and secondary teachers); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990) (prohibiting social studies instructor from teaching creationism did not violate First Amendment); *Ahern v. Bd. of Educ.*, 456 F.2d 399 (8th Cir. 1972) (First Amendment does not protect an economic teacher's attempts to teach politics); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 961 (9th Cir. 2011) (math teacher's classroom religious banners not protected by the First Amendment); *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (requiring biology instructor to teach evolution does not violate his First Amendment rights) (overruled in part on other grounds); *Cary v. Bd. of Educ.*, 598 F.2d 535 (10th Cir. 1979) (district's book selections did not violate teacher's First Amendment rights).

State courts also concur: Teachers are hired for their speech; they cannot disregard their job duties and still expect to remain employed. *Fisher v. Fairbanks N. Star Borough Sch. Dist.*, 704 P.2d 213 (Alaska 1985) (dismissing a teacher who used unapproved texts did not offend First Amendment); *Solmitz v. Maine Sch. Admin. Dist.*, 495 A.2d 812, 817 (Me. 1985) (school board did not violate First Amendment in cancelling teacher-organized Tolerance Day); *Bd. of*

Educ. v. Wilder, 960 P.2d 695 (Colo. 1998) (school districts not required to abdicate curricular control to the unfettered discretion of individual teachers); *Saunders v. Reorganized Sch. Dist.*, 520 S.W.2d 29, 32 (Mo. 1975) (district did not violate a teacher's First Amendment rights in firing him for refusing to teach the prescribed curriculum). Because both state and circuit courts agree on the questions Freshwater presents, this Court has no need to address them.

B. Freshwater's displeasure with the state court's factual findings does not offer a valid reason for review.

Freshwater seeks to disguise his fact-based disputes as constitutional questions of national import. His defiance, he explains, was really a good-faith effort to comply with confusing directions. Petition, p. 25. He added *The Oxford Bible* and *Jesus of Nazareth* to his display to mitigate the District's invalid orders, not to make a point. *Id.* at 13, fn. 8. He possessed these books passively and inconspicuously, subsequent to internal conflicts and a struggle of conscience. *Id.* at 5. He taught creationism not as an extraneous topic or a religious viewpoint, but rather to engage naturally inquisitive minds and encourage critical thinking. *Id.* at 23-24. Freshwater even contends he fulfilled the teaching requirements set by the Board, and complied with all relevant rules, policies, and directives. *Id.* at 22-23.

But the Ohio Supreme Court disagreed. It found that Freshwater defiantly displayed *The Oxford Bible* and *Jesus of Nazareth* specifically to make a point. Pet. App. 32a, 41a. His disregard for the District's orders was blatant and willful. *Id.* at 41a. The hearing referee also determined that Freshwater injected his personal religious beliefs into the curriculum, violating not only Board policies but also the Establishment Clause. *Id.* at 112a-113a, 123a.

Moreover, this Petition omits many unfavorable facts established by the Ohio Supreme Court or the hearing referee. For example, the court found that Freshwater discredited science by telling his students that homosexuality is sinful and that any evidence for relevant genetic links must be wrong. Pet. App. 22a, fn. 5. Similarly, the referee found that Freshwater distributed religious handouts and then collected them covertly when class ended. *Id.* at 11a, 21a. Time after time, the referee noted, Freshwater violated Board policy, disregarded direct orders, infused his Christian faith into science instruction, and even disparaged science as a discipline. *Id.* at 113a-118a.

Unsurprisingly, Freshwater disputes this version of events, trying to depict himself as a thoughtful instructor who carefully balanced his students' constitutional rights with a rigorous academic curriculum. This Court, however, does not address idiosyncratic factual disputes and fact-based correction requests; it should deny Freshwater's Petition. *See* SUP. CT. R. 10.

C. Freshwater's appeal fails to present a useful vehicle to address either issue he asks this Court to consider.

Freshwater's appeal conflates religion with free speech, academic freedom with insubordination. Should this Court wish to address academic freedom in primary and secondary schools, it may opt to wait for a petitioner who does not expose his employer to constitutional violations by virtue of this purported freedom. Likewise, should this Court wish to address creationism in public schools, it may opt to wait for a petitioner who was not dismissed for insubordination. The unique facts of this case pit multiple legal concepts against each other, cluttering the necessary analysis.

Aside from this hodgepodge, Freshwater's claims present a teacher whose story changes with every new appeal. At first Freshwater categorically denied questioning evolution or teaching creationism. Resp. App. B at 4a ("John Freshwater categorically denies that he taught either Creationism or Intelligent Design by declaring 'Absolutely not'"). Now he tells this Court he engaged "the naturally inquisitive minds of students," allowed them to "think critically" about biological evolution, and simply taught his subject more thoroughly than the Board preferred. Petition, p. 23. Likewise, Freshwater initially insisted that he failed to remove the poster and added *Jesus of Nazareth* and *The Oxford Bible* only because he was confused about the principal's vague directions. Resp. App. C at 6a. Now he claims he tried to mitigate

invalid orders, or even sought to make a point, but only if the Constitution protects him, of course. Petition, pp. 13-14.

Because of Freshwater's inconsistent testimony and the tangled legal issues he offers, this appeal is not a suitable vehicle to address either creationism or academic freedom in the classroom. This Court should deny his Petition.

III. Ohio courts properly upheld Freshwater's termination.

The First Amendment protects neither Freshwater's classroom displays nor his religion-infused instruction. Employers, including state and local governments, have the right to manage their operations and control their employees' job-related speech. *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). In *Garcetti*, this Court held that the state did not violate an employee's First Amendment rights in transferring him after he criticized work-related documents. *Id.* at 426. Employees enjoy constitutional protections when they contribute to civic discourse as public citizens. They have no right, however, to decide how and when to do their jobs. *Id.*

A. The First Amendment does not authorize teachers to decorate schools as they see fit.

The government is entitled to control the displays and decorations that adorn its property, even if

such displays are arranged initially by private citizens. *Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009). In *Pleasant Grove*, this Court held in favor of a city that declined to erect a Gnostic Christian monument in its park. *Id.* Because the city carefully selected which private displays it would allow, any park monuments reflected the city's own speech, not the donor's. *Id.* A government entity's expression, in turn, is not regulated by the Free Speech Clause; the city could choose freely which monuments to accept or reject. *Id.* at 467-68. See also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (Schools, not courts, determine what speech is appropriate in a classroom setting).

If the government is entitled to select the gifts it accepts, *a fortiori*, it is entitled to select speech it actually hires. *Garcetti*, 547 U.S. at 422. A state entity, in other words, can regulate its employees' job-related expression. The First Amendment protects only employees who speak as public citizens, not those who speak pursuant to their official duties. *Id.* at 421.

In deciding claims similar to Freshwater's, appellate courts follow the above jurisprudence, and routinely uphold school districts' rights to control their classroom displays, decorations, and general appearance. See, e.g., *Johnson*, 658 F.3d at 961; *Lee*, 484 F.3d at 698; *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000); *Roberts v. Madigan*, 921 F.2d 1047, 1057 (10th Cir. 1990).

In *Johnson*, for example, the Ninth Circuit upheld a school district's order asking a math teacher to remove religious banners from his classroom. *Johnson*, 658 F.3d at 975. Aside from citing *Pleasant Grove*, the *Johnson* court noted that avoiding a possible Establishment Clause violation also justified the school's directives. *Id.* at 973, fn. 24. Likewise, the *Lee* court ruled in favor of a high school principal who removed religious posters from a Spanish teacher's bulletin board. *Lee*, 484 F.3d at 700. The posters, the court noted, were curricular in nature, and unprotected by the First Amendment. *Id.* at 698. The *Roberts* court similarly found that a school district did not violate a teacher's rights when it removed *The Bible in Pictures* and *The Story of Jesus* from his desk. *Roberts*, 921 F.2d at 1059. Because these texts reflected the teacher's endorsement of religion, they did not belong in the classroom.

Ignoring the above case law, Freshwater brandishes the First Amendment against the District's efforts to manage its own public image and appearance. He expressed himself in displaying religious posters and texts, and this speech, he contends, deserves constitutional protection. Petition, pp. 14-17. But *Pleasant Grove* controls: The displays a government allows on its property reflect its own expression, not that of the creator or donor. Under *Garcetti*, the analysis remains the same: Because the District hired Freshwater for his pedagogical speech, it had the right to control it. If Freshwater expressed himself through classroom posters, *The Oxford Bible*, and *Jesus of*

Nazareth,² the District lawfully controlled that speech because it hired and owned it. In short, the District did not violate the Free Speech Clause, either in managing the displays it permitted or in controlling the speech it commissioned.

B. The First Amendment does not entitle teachers to choose the content or manner of their lessons.

Freshwater fundamentally misunderstands academic freedom. First, academic freedom applies to colleges and universities, not primary and secondary schools. Next, this concept pertains only to the institutions themselves, not to individual employees. Finally, academic freedom does not allow instructors to decide what to teach and how to do it.

1. Academic freedom applies only to higher education institutions, not primary or secondary schools.

Courts address academic freedom only at the university level; no case law extends this concept to

² Freshwater emphasizes that he borrowed these books from the school library, presumably suggesting that this gives his conduct additional protection. But the analysis is the same: Freshwater cannot force the District to accept his displays, regardless of their origin. The *Pleasant Grove* decision, for example, would remain unchanged had the church constructed its monument out of city-provided materials or those available in the park itself.

primary and secondary teachers. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011); *Edwards v. California Univ.*, 156 F.3d 488, 491 (3d Cir. 1998); *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991). Selecting curricula and pedagogical methods remains within the public school boards' exclusive purview. *Evans-Marshall*, 624 F.3d at 344; *Borden v. Sch. Dist.*, 523 F.3d 153 (3d Cir. 2008); *Kirkland*, 890 F.2d at 795; *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007).

In *Evans-Marshall*, for example, the Sixth Circuit held that the First Amendment did not insulate a high school teacher from discipline for her curricular selections. *Evans-Marshall*, 624 F.3d at 643-44. Distinguishing case law relating to universities, the court explained that professors enjoy some degree of academic freedom by virtue of their scholarship and research activities. In contrast, primary and secondary teachers teach the basics to a captive audience. *Id.*; see also, *Mayer*, 474 F.3d at 480.

Likewise, this Court's *Garcetti* holding, cited prominently in Freshwater's Petition, mentioned academic freedom only in response to Justice Souter's concerns about colleges and universities. *Garcetti*, 547 U.S. at 425. Specifically, Justice Souter noted that universities enjoy "expansive freedoms of speech and thought," thus occupying a "special niche in our constitutional tradition." *Id.* at 438-39. The majority

declined to address this very particular point: whether college and university instructors enjoy some degree of academic freedom. Neither Justice Souter nor the majority suggested this concept might apply to primary or secondary school teachers.

Freshwater did not teach at a university, conduct research, or publish on scholarly matters. The District hired him to teach eighth grade science to public-school students who had no choice but to attend his class. And as all circuit courts hold, the academic freedom doctrine does not protect Freshwater's dereliction of duty.

2. Academic freedom applies to institutions, not individual employees.

In defining academic freedom, this Court explained that universities have the right to determine on academic grounds, "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). *See also Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) (academic freedom applies not to individual professors, but to universities seeking respite from invasive state laws); *Borden*, 523 F.3d at 153 ("It is the educational institution that has a right to academic freedom, not the individual teacher."); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671 (7th Cir. 2006). In other words, academic freedom allows educational institutions to

manage their own affairs, the very opposite of Freshwater's proposition.

The case law Freshwater cites further illustrates his confusion. Petition, p. 17. For example, Freshwater cites *Wieman v. Updegraff* to show that this Court protects primary school teachers' academic freedom. *Id.* But *Wieman* is wholly unrelated to classroom expression. Instead, this Court invalidated – on Due Process grounds – a state law requiring loyalty oaths as a condition of employment. 344 U.S. 183, 191 (1952). Likewise, *Shelton v. Tucker* rejected – on freedom of association grounds – a state law requiring teachers to list every organization in which they participate. 364 U.S. 479, 490 (1960). This Court has never repealed a statute, regulation, or policy based on a primary or secondary school teacher's individual right to academic freedom. *See Urofsky*, 216 F.3d at 412 (historical jurisprudence analysis). Academic freedom protects universities and colleges, not their employees, and certainly not elementary or middle school teachers.

In addition, the remaining cases Freshwater cites as support do not relate to teachers' curricular speech in primary and secondary schools. Federal courts allow both teachers and students to wear black armbands to protest wars. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *James v. Bd. of Educ.*, 461 F.2d 566 (2d Cir. 1972). Likewise, this Court permits religious groups to use school grounds when class is not in session. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

These holdings, however, are irrelevant, because they address non-curricular speech by a plaintiff speaking as a community member on a matter of public concern. In contrast, the expression at issue here is curricular, in-class speech hired by the District.

Although many circuit courts apply the *Regents* definition of academic freedom to dismiss professors' in-class speech claims, other courts prefer the *Garcetti* approach. See, e.g., *Savage v. Gee*, 665 F.3d 732, 739 (6th Cir. 2012); *Adams*, 640 F.3d at 563; *Gorum v. Sessoms*, 561 F.3d 179, 186 (3d Cir. 2009). Cf. *Demers v. Austin*, No. 11-35558, 2014 U.S. App. LEXIS 1811 (9th Cir. Jan. 29, 2014) (*Garcetti* analysis does not apply in university setting). The *Adams* court, for example, held that, under *Garcetti*, the First Amendment protected a professor's religious writings and radio appearances, because these were unrelated to his teaching responsibilities. *Adams*, 640 F.3d at 564. Similarly, the Sixth Circuit applied *Garcetti* to determine that a university librarian's job-related speech remained unprotected by the First Amendment. *Savage*, 665 F.3d at 739.

Freshwater's claims wilt under both *Regents* and *Garcetti*. The academic freedom Freshwater tries to appropriate belongs to the District, not to him. And because Freshwater, as he admits, spoke in his professional capacity, the Constitution does not shield his choice to teach creationism in a public school science class. Petition, p. 22. The classroom, contrary to Freshwater's warnings, has not become a "First Amendment-free zone." *Id.* at 19. It is, however, a

place where parents send their impressionable children, conditioning their trust "on the understanding that the classroom will not purposely be used to advance religious views." See *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

3. Academic freedom does not entitle teachers to expose their employers to legal risk.

School boards have not only a right, but also an obligation to ensure the speech they hire does not offend the Constitution. *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) ("[T]he State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination."); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) (compliance with Establishment Clause justifies imposing speech restrictions).

In *Aguillard*, for example, this Court cautioned schools, in particular, to guard against Establishment Clause violations. 482 U.S. at 584. A state law violated the Constitution, the *Aguillard* Court found, because it forced schools to teach creationism alongside evolution. *Id.* at 596-97. Families entrust public schools with their impressionable children, expecting that the classroom will not be used to purposely advance religious views that may conflict with their own. *Id.* at 584. And creationism, explained this Court, advances the religious belief that a supernatural

being created mankind. *Id.* at 591. In short, teaching creationism – although not forbidden if done with a clear secular intent – risks violating the Establishment Clause. *See also, Webster*, 917 F.2d 1004; *Peloza*, 37 F.3d at 522.

The District was obligated to end Freshwater's Establishment Clause violations. As the referee found, Freshwater did not teach creationism with a clear secular intent. Instead, he injected his "fervent and deep-seated Christian beliefs" into his science instruction, advancing religion and violating all applicable District policies. Pet. App. 113a-119a. Freshwater taught his students the Bible's view on homosexuality and invited them to religious seminars. *Id.* at 7a, 117a. He distributed creationism handouts and offered extra credit to students who watched intelligent design videos. *Id.* at 114a. Instead of teaching science – and despite multiple written and verbal warnings – Freshwater taught his students to doubt science. *Id.* at 118a. The District fired Freshwater because it had no other choice: he ignored requests and directives, even devising covert teaching methods to avoid discovery. Pet. App. 114a. Overturning this termination would essentially force the District to teach creationism alongside evolution, a mandate this Court explicitly rejected as unconstitutional. *Aguillard*, 482 U.S. at 596-97.

C. The First Amendment does not protect insubordination.

Employee disobedience is not a form of expression the Constitution honors. *See, e.g., Connick v. Myers*, 461 U.S. 138, 154 (1983). In particular, the First Amendment does not require employers to tolerate challenges to their authority or threats to the agency's function and efficacy. *Id.* at 152-53. In *Connick*, this Court upheld an employee's termination after she refused to accept a transfer and disrupted the office environment with questionnaires. *Id.* at 154. Rejecting a First Amendment challenge, this Court affirmed the employer's right to enforce internal office policies, and refused to constitutionalize run-of-the-mill employee grievances. *Id.*

In recasting his defiance as an important constitutional concern, Freshwater posits that the First Amendment shields employees who disobey orders to make a point. Initially, Freshwater maintained that he displayed *The Oxford Bible* and *Jesus of Nazareth* to mitigate the administration's invalid orders, not necessarily to make a point. Petition, p. 13, fn. 8. But if he did make any such point, Freshwater next argues, it amounted to a "communicative act" deserving of constitutional protection. *Id.* at 13-14. Freshwater further claims that this expressive conduct did not violate any rules or policies, disrupt the school's orderly functioning, or expose the District to credible legal risk. *Id.* at 16.

These, of course, are just additional allegations repudiated by the record. Following an extensive two-year proceeding, the hearing referee found that Freshwater's conduct resulted in a pervasively tense atmosphere at the middle school and board offices. Pet. App. 119a. One student's parents filed a lawsuit against the District, alleging Freshwater physically harmed their son, and also violated his constitutional rights. *Id.* at 14a, 119a. To forestall the lawsuit, Principal White sought to implement a plan of corrective action, and directed Freshwater to remove the handwritten Bible verses, posters, videos, and other displays. *Id.* at 119a-120a. But Freshwater ignored Principal White's multiple verbal and written orders, eventually removing some items from his religious display, but adding others to prove a point. Despite the tension and litigation his defiance engendered, Freshwater continues to claim he did nothing wrong.

These spurious assertions are not only of no interest to this Court, they are also legally irrelevant. Freshwater's misperceptions about his conduct and its harmful effects make no difference – he defied orders and challenged his supervisor's authority. This Court's jurisprudence, as well as that of the circuit courts, has long established that employees have no First Amendment right to disregard orders. Math teachers are not academically free to teach history, science teachers are not academically free to teach Genesis, and the Constitution does not sanction employee disobedience.

CONCLUSION

For the foregoing reasons, this Court should deny Freshwater's Petition.

Respectfully submitted,

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No. 13-1311

In The
Supreme Court of the United States

JOHN FRESHWATER,

Petitioner,

v.

MOUNT VERNON CITY SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

APPENDIX

APPENDIX A

FELLOWSHIP OF CHRISTIAN ATHLETES ("FCA")
HANDBOOK FOR PUBLIC SCHOOLS

* * *

Excerpt from p. 9:

Huddle Leaders**Q Who can be a Huddle leader?**

A The Act specifies that the clubs must be "voluntary and student initiated, . . . there [can be] no sponsorship of the meeting by the school, . . . [and] employees or agents of the school or government [may be] present at religious meetings *only in a non-participatory capacity* (emphasis added)."³⁶ Therefore, students as Huddle leaders will always be allowed to participate without restriction. If a teacher or a coach is a Huddle leader, then he or she can attend meetings only to monitor, facilitate, and/or supervise. Many schools require that each recognized club have a faculty sponsor, so it is appropriate for FCA to have one as well. However, the activities of the meetings must be primarily led by students. It is up to school officials, not the students, to make it clear that the club is student-led.³⁷

³⁶ § 4071(c)(1)-(3).

³⁷ See *Mergens*, 496 U.S. at 251 (noting that any fear of mistaken inference of endorsement by school officials is "largely self-imposed, because the school itself has control over any

(Continued on following page)

* * *

Excerpt from p. 16:

Q How much involvement can faculty sponsors have in FCA Huddle meetings?

A Many schools require each recognized student club to have a faculty sponsor. It is fine for a teacher or coach to fulfill this role, but it must be done in a way that is "nonparticipatory," according to the Equal Access Act.⁶² This means that all of the activities that students participate in as part of the meeting are led by students, and the teacher or coach is only there to supervise. As a faculty sponsor, the teacher or coach is still acting in his or her official capacity as a school employee, and therefore cannot participate in religious speech with students. The fact that the teacher or coach is only there to supervise should be made clear by school officials, so students will not misunderstand or think that the school in any way endorses FCA's mission because of the presence of the teacher or coach.

* * *

impressions it gives students."); *see also* *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981).

* * *

⁶² 20 U.S.C. § 4071(c)(3) (2005).

APPENDIX B

ADMINISTRATIVE HEARING

JOHN FRESHWATER'S
CLOSING STATEMENT BRIEF

IN THE MATTER OF
JOHN FRESHWATER

Mount Vernon City School District
Board of Education, Employer,

AND

John Freshwater, Teacher.

Dated: August 13, 2010

REFEREE: R. Lee Shepherd

* * *

Excerpt from p. 110:

17. (2)(b) John Freshwater Did Not Teach Creationism

John Freshwater categorically denies that he taught either Creationism or Intelligent Design by declaring "Absolutely not".⁴²⁸ The Board failed to prove that John Freshwater taught these subjects.

* * *

⁴²⁸ Transcript 4670

APPENDIX C

IN THE
OHIO SUPREME COURT

Case No. 2012-0613

JOHN FRESHWATER,

Appellant,

v.

MOUNT VERNON CITY SCHOOL
DISTRICT BOARD OF EDUCATION,

Appellee.

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

**APPELLANT'S MOTION
FOR RECONSIDERATION**

(Filed Nov. 26, 2013)

* * *

Excerpt from p. 7:

To the extent that Mr. White's orders could be interpreted to prohibit Freshwater's possession of religious school library books, Freshwater did not understand them to do so and thus cannot be said to have "willfully" disobeyed them, because this intention was not to create the type of religious display that the administration sought to eliminate, but to quietly retain his source of inspiration in his personal work area.

* * *

Excerpt from pp. 11-12:

Regardless of whether Freshwater's misunderstanding was occasioned by a lack of clarity in the instructions themselves or a failure on Freshwater's part to accurately comprehend or remember them, the very existence of the misunderstanding concerning whether or not Mr. White expected the George W. Bush poster to be removed serves as an absolute bar to the determination that the alleged "disobedience" was "willful."

* * *
