

No. 09-50401

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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CHRISTINA CASTILLO COMER,

*Plaintiff – Appellant,*

v.

ROBERT SCOTT, COMMISSIONER, TEXAS EDUCATION AGENCY, IN HIS  
OFFICIAL CAPACITY; TEXAS EDUCATION AGENCY,

*Defendants – Appellees.*

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On Appeal From The United States District Court  
for the Western District of Texas

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**BRIEF FOR APPELLANT**

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## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following list of people have an interest in the outcome of this case. These representations are made in order so that the judges of this Court may evaluate possible disqualification of recusal:

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Christina Castillo Comer.

### **Defendants-Appellees:**

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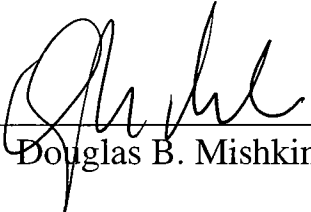
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## **STATEMENT REGARDING ORAL ARGUMENT**

This case presents issues under the Establishment Clause of the United States Constitution. The action challenged as unconstitutional is the Texas Education Agency's termination of its Director of Science for the Curriculum Division for the violation of the Agency's policy equating creationism with science in the public school science curriculum.

Because of the importance of these issues, Plaintiff-Appellant respectfully requests oral argument.

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## **JURISDICTIONAL STATEMENT**

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 & 2202.

The district court granted defendants summary judgment and dismissed the complaint on March 31, 2009. Plaintiff filed a timely notice of appeal on April 30, 2009. *See* Appellant’s Record Excerpts (“R.E.”), Tab 4. Because this appeal arises from a final judgment, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the Texas Education Agency’s unwritten policy equating creationism with science supports religion in violation of the Establishment Clause of the First Amendment to the United States Constitution.

2. Whether the Texas Education Agency’s termination of its Director of Science for the Curriculum Division for violating the Agency’s creationism policy by forwarding an email announcing a public lecture critical of including creationism in the public school science curriculum violates the Establishment Clause.

3. Whether the district court erroneously granted Defendants’ motion for summary judgment by excluding material facts favorable to Plaintiff, failing to consider evidence in the record favorable to her, and failing to draw inferences

favorable to her, all resulting in incorrect findings about Plaintiff's curricular responsibilities and the scope of the Agency's creationism policy.

### **STATEMENT OF THE CASE**

On June 30, 2008, Christina Comer ("Plaintiff" or "Director Comer"), former Director of Science for the Curriculum Division of the Texas Education Agency ("TEA" or "the Agency"), filed a complaint in the United States District Court for the Western District in Austin, Texas. She sought declaratory and injunctive relief for TEA's termination of her employment because she had forwarded an email announcing a public lecture that would be critical of including creationism in the public school science curriculum. Director Comer contended that her termination and the TEA policy underlying it violate the Establishment and Due Process Clauses of the United States Constitution.

The original defendants were the TEA<sup>1</sup> and Robert Scott, the Texas Commissioner of Education, who was sued in his official capacity as head of the Agency.<sup>2</sup> *See* USCA5 at 253 (SJ Fact ¶ 1).

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<sup>1</sup> The TEA is a state agency, the operational costs of which come from state and federal funds. *See, e.g.*, <http://www.tea.state.tx.us/index4.aspx?id=5200> (last accessed Aug. 4, 2009).

<sup>2</sup> According to state law, the Agency operates under his leadership. *See* USCA5 at 253 (SJ Fact ¶ 2). Comer proceeded solely against Defendant Scott in his official capacity as the Commissioner who heads the Agency, and is not appealing the dismissal of the claims against TEA. Because Scott was sued in his official capacity, the district court referred to him in its decision as the Agency or the TEA, and Comer does so in this brief.

With extensive briefing, both parties filed motions for summary judgment and corresponding oppositions and replies. TEA also filed a motion to dismiss, and an answer. Neither party conducted discovery.

The court heard oral argument on the motions on December 17, 2008, and issued its decision on March 31, 2009. *See* R.E., Tab 2. It found that plaintiff had standing, granted the Agency's motion for summary judgment in substantial part,<sup>3</sup> denied its motion to dismiss, denied Comer's motion for summary judgment, and dismissed Comer's claims with prejudice.

Comer timely appealed from the district court's denial of her motion for summary judgment and the granting of that of the Agency. *See* R.E., Tab 4 (notice of appeal).

## **STATEMENT OF FACTS**

### **A. The History of Promoting Religion Through Creationism.**

The firing of Director Comer is one of the more recent events in “the broader context of historical and ongoing religiously driven attempts to advance creationism while denigrating evolution.” *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 746 (M.D. Pa. 2005).<sup>4</sup> This history began in the 1920s, when religiously motivated groups lobbied state legislatures to adopt the first anti-

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<sup>3</sup> The district court denied defendants' motion for summary judgment only to the extent that it sought dismissal of plaintiff's count one for lack of standing.

<sup>4</sup> That opinion thoroughly details this history. *See* 400 F. Supp. 2d at 716-18.

evolution laws, leading to the *Scopes* “monkey trial” of 1925. *See* USCA5 at 16-17 (Compl. ¶ 26). In 1968 the Supreme Court struck down an Arkansas anti-evolution law modeled on the Tennessee statute at issue in *Scopes*. *See id.* Subsequently, religious opponents of evolution began to advocate so-called “balanced treatment” statutes requiring that creationism be taught along with evolution. When this tactic was rejected as religiously-based, opponents of evolution tried unsuccessfully to give creationism a scientific gloss by re-labeling it “creation science” or “scientific creationism.” *See, e.g.,* USCA5 at 15-17 (Compl. ¶¶ 23-26). In its 1987 decision in *Edwards v. Aguillard*, the Supreme Court ruled that the requirement to teach both “creation science” and evolution, or neither of them, pursuant to Louisiana’s “balanced-treatment law” violates the Establishment Clause. 482 U.S. 578 (1987).

With courts rejecting anti-evolution and “balanced treatment” statutes, creationists tried more subtle tactics. In 2005, a Georgia federal court rejected a school district’s placement of stickers relating to evolution inside the front cover of some science textbooks as a violation of the Establishment Clause. *See Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1292 (N.D. Ga. 2005), *vacated and remanded on other grounds*, 449 F.2d 1320 (11th Cir. 2006). *See* USCA5 at 15 (Compl. ¶ 19). Also in 2005, a district court in Pennsylvania rejected a school board policy requiring the reading of a disclaimer about evolution that improperly

treated “intelligent design” (another form of creationism) as an alternative scientific theory, concluding that it is a “theological argument,” and that “the Board’s real purpose...was to promote religion in the public school classroom, in violation of the Establishment Clause.” *Kitzmiller*, 400 F. Supp. 2d at 746, 763; *see also* USCA5 at 14-15 (Compl. ¶ 18).

**B. The Texas Scientific Community’s Rejection of Equating Creationism with Science.**

Efforts in Texas to promote creationism or denigrate evolution have been condemned by the Texas scientific community. The Texas Academy of Science issued a position paper opposing the inclusion of creationism and intelligent design concepts in the science curriculum in Texas schools. *See* USCA5 at 40-42 (Compl. Ex. E). It identified eight other national scientific organizations which have formulated similar positions, and stated that it “is the overwhelming consensus of the scientific community that creationism and intelligent design are faith-based concepts that have no scientific merit.” USCA5 at 41. A 2006 position statement of the Science Teachers Association of Texas noted the intimidation of science teachers and the pressure to teach creationism and include it in the science curriculum.

Too often, evolution has not been emphasized in science curricula and classrooms in a manner commensurate with its importance because of official policies, intimidation of science teachers, and the general public’s misunderstanding of the term “theory.” Teachers are also being pressured to introduce nonscientific views,

including “creationism,” “intelligent design,” “initial complexity,” and “abrupt appearance,” which are not supported by evidence and have no legitimate place in the science curriculum.

USCA5 at 44 (Compl. Ex. F).

**C. Director Comer’s and the Agency’s Responsibilities for the Science Curriculum.**

The TEA’s substantial curricular responsibilities include “oversee[ing] development of the statewide curriculum,” “monitor[ing] for compliance with federal guidelines” and “manag[ing] the textbook adoption process.”<sup>5</sup> To fulfill those responsibilities, the Agency tasked its Director of Science for the Curriculum Division with providing “statewide leadership for science education Grades K-12.” USCA5 at 300 (Monica Martinez Aff. at 3). On curricular issues, that leadership included “Specific Essential Duties,” such as “coordination for revisions, implementation and maintenance of the science Texas Essential Knowledge and Skills (TEKS) including dissemination of information on matters pertaining to the science TEKS.” *Id.* She also assembled and participated in “review panel meetings to provide content area support and expertise to ensure instructional materials are TEKS-based.” *Id.*

In furtherance of her leadership role, Director Comer provided oral and written science presentations at the national, state, and regional levels, and managed various programs for the state, including the Presidential Awardees for

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<sup>5</sup> See <http://www.tea.state.tx.us/tea/agencymissionandroles.html> (last accessed Aug. 4, 2009).

Excellence in Mathematics and Science Teaching program and the National Youth Science Camp program for outstanding science seniors. *Compare* USCA5 at 10-11 (Compl. ¶ 10), *with* USCA5 at 167 (Answer ¶ 10).<sup>6</sup>

The TEA assigned Director Comer another duty: “to explain law and rule regarding the science Texas Essential Knowledge and Skills (TEKS).” USCA5 at 254 (SJ Fact ¶ 5).

#### **D. TEA’s Unwritten Policy Treating Creationism as Science.**

In October 2007, the Agency terminated Plaintiff Comer. The purported offense by this life-long, multi-award-winning science educator was her forwarding of an email announcing a public lecture in Austin by Dr. Barbara Forrest. The topic of the lecture was creationism and “intelligent design,” and specifically the *Kitzmiller* case. Dr. Forrest had presented expert testimony for the

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<sup>6</sup> The Director of Science had responsibilities beyond immediate curricular issues. According to the TEA, the Director was responsible for:

\* [B]ill analyses on proposed legislation; coordinates implementation of legislation related to science, and responds to legislative requests for program information and data[;]

\* Participat[ion] in state initiatives related to science by providing content area support and expertise and assisting with oversight and implementation of initiatives[; and]

\* [L]iaison between TEA and various national and state organizations, such as the Science Teachers Association of Texas, the Texas Science Education Leadership Association, the Texas Regional Collaboratives, the Science Education Specialists Network, and the National Science Teachers Association.

*See* USCA5 at 301 (Martinez Aff. at 3-4).

prevailing plaintiffs in that case, and her work and testimony had been commended by the judge.<sup>7</sup> Director Comer’s sole comment on her forwarding email was “FYI.”

Shortly after TEA learned of Director Comer’s forwarding of the email, it gave her a memorandum on Agency letterhead, bearing the name of Commissioner Scott (the “Termination Memo”). *See* USCA5 at 255-56 (SJ Fact ¶¶ 10-11). The Termination Memo linked creationism directly to science education in public schools. Specifically, it said that Director Comer’s forwarding of the email about the lecture “compromises the agency’s role in the TEKS revision process by creating the perception that [the Agency] has a biased position on a subject directly related to the science education TEKS” – “teaching creationism in public education.” *See* USCA5 at 256 (SJ Fact ¶ 12).

The actual text of the Termination Memo is, in part:

On October 26, 2007, Ms. Comer forwarded an email from her TEA email account to a group of people, including two external email groups, that announced a presentation on creationism and intelligent design entitled “Inside Creationism’s Trojan Horse.” The email states that the speaker [Barbara Forrest] is a board member of a science education organization, and the email clearly **indicates that the group opposes teaching creationism in public education.**

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<sup>7</sup> Judge Jones in *Kitzmiller* described Dr. Forrest as follows: “She has thoroughly and exhaustively chronicled the history of ID [Intelligent Design] in her book and other writings for her testimony in this case. Her testimony, and the exhibits which were admitted with it, provide a wealth of statements by ID leaders that reveal ID’s religious, philosophical, and cultural content.” 400 F. Supp. 2d at 719.

USCA5 at 31 (Compl. Ex. B) (emphasis added).

Continuing, the Termination Memo charged that:

the forwarding of this event announcement by Ms. Comer, as the Director of Science, from her TEA email account constitutes much more than just sharing information. Ms. Comer's email implies endorsement of the speaker and **implies that TEA endorses the speaker's position on a subject on which the agency must remain neutral.** Thus, sending this email compromises the agency's role in the TEKS revision process by **creating the perception that TEA has a biased position on a subject directly related to the science education TEKS.**

*Id.* (emphases added).

The Termination Memo was the first – *and only* – document in which the Agency said that it must remain neutral on creationism. *See* R.E., Tab. 2, at 4 n.2 (“The Court refers to the Agency’s policy of remaining neutral on the teaching of creationism in public schools, as reflected in the termination memo, as the ‘neutrality policy.’”). No other director or employee of TEA has been warned, reprimanded or fired for not remaining neutral on any other issue.

Creationism was not being considered by the Agency or the State Board of Education when Director Comer forwarded the email, or thereafter. *See* USCA5 at 353 (Supp. to SJ Facts ¶ 17). Specifically, creationism was not on the agenda for any of the seven meetings of the various committees of the State Board of Education from November 14-16, 2007 (the first such meeting after Comer forwarded the email) to September 2008 (the date of Plaintiff’s summary judgment

motion), Ex. Q. *See id.*; *see also* USCA5 at 354-487 (archived schedules and agendas of Texas State Board of Education).

The Agency's termination of Director Comer for failing to be neutral on creationism provoked a letter of protest from 135 biology faculty members at Texas universities, USCA5 at 72-77 (Compl. Ex. P). They wrote:

It is inappropriate to expect the TEA's director of science curriculum to "remain neutral" on this subject, any more than astronomy teachers should "remain neutral" about whether the Earth goes around the sun. In the world of science, evolution is equally well-supported and accepted as heliocentrism. Far from remaining neutral, it is the clear duty of the science staff at TEA and all other Texas educators to speak out unequivocally: evolution is a central pillar in any modern science education, while [creationism and] "intelligent design" is a religious idea that deserves no place in the science classroom at all.

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There can be no neutrality on an issue that is scientifically and legally clear-cut: evolution should be taught at the K-12 level in the same fashion that we teach it in universities, an accepted and rigorous science, not juxtaposed with a religious idea however politically popular.

USCA5 at 72.

#### **E. The Termination of Director Comer.**

After the Agency gave Director Comer the Termination Memo, it told her to "quit or be fired." USCA5 at 256 (SJ Fact ¶ 13). Without having been told of her right to appeal, Director Comer resigned from the position in which she had served

for almost ten years in a letter dated November 8, 2007. USCA5 at 255, 256 (SJ Facts ¶¶ 6 & 14); R.E., Tab 2, at 4.

This lawsuit followed.

### **SUMMARY OF THE ARGUMENT**

Like prohibiting the teaching of evolution (*Epperson*), or requiring the teaching of creationism (*Aguillard*), or placing stickers on textbooks (*Selman*) or reading disclaimers in class (*Kitzmiller*), the TEA’s policy of equating creationism with science violates the Establishment Clause because it endorses a religious belief. Equating creationism with science violates the Establishment Clause under the Supreme Court’s decision in *Aguillard* (forbidding “balancing” creationism and evolution) and this Court’s decision in *Freiler* (forbidding “tailoring” of teaching and learning “to the principles or prohibitions of [a] religious sect or dogma”).

The district court erred in approving the Agency’s desire to enforce employee neutrality, “regardless of [the] constitutionality” of treating creationism as science. Under *Aguillard*, there is no constitutional room for dispute about whether to teach creationism, and the Agency has no legally protected interest in requiring neutrality on that issue. Granting the Agency license to enforce neutrality “regardless of constitutionality” impermissibly empowers the TEA to discipline employees for unconstitutional reasons.

The creationism policy fails to pass Establishment Clause muster under *Lemon*. Specifically, a “reasonable observer” who knew the history reflected in *Epperson*, *Aguillard*, *Selman*, and *Kitzmiller* and the record in this case would conclude that the Agency’s creationism policy impermissibly endorsed a religious belief, and had no other effect. This was the conclusion of the 135 Texas biology professors who protested Director Comer’s firing to the Agency, noting that creationism could not be “anything other than an inherently religious proposition.” The Agency’s firing of Director Comer for violating the unconstitutional creationism policy was itself unconstitutional, because the Agency may not condition employment on adherence to an unconstitutional policy.

For these reasons, the court’s denial of Director Comer’s motion for summary judgment was erroneous. Furthermore, the court erred in granting the Agency’s motion for summary judgment based, in large part, upon its misapplication of the standards of Rule 56 in disregarding evidence in the record and failing to draw inferences in favor of Comer, the non-moving party. These violations of the principles of summary judgment led the court to err in, among other things, determining that Director Comer’s role was “attenuated from the classroom,” that the policy on creationism had an effect on issues other than creationism, and that a “reasonable observer” would conclude otherwise – all errors that were outcome determinative. At a minimum, construing the record

properly as to the non-moving party yields factual disputes precluding the entry of summary judgment for the Agency.

This Court should reverse the decision below, and in so doing confirm that the TEA's policy of equating creationism with science violates the Establishment Clause and that the Agency's employees – especially its Director of Science for the Curriculum Division – may perform their jobs free of this unconstitutional policy.

## **ARGUMENT**

### **I. STANDARD OF REVIEW.**

This Court “review[s] a district court’s summary judgment ruling *de novo*, applying the same standard as the district court.” *Stanley v. Trinchar*, 500 F.3d 411, 418 (5th Cir. 2007); *Texas v. United States*, 497 F.3d 491, 495 (5th Cir. 2007).

### **II. THE AGENCY’S POLICY OF EQUATING CREATIONISM WITH SCIENCE VIOLATES THE ESTABLISHMENT CLAUSE.**

The TEA has a policy of equating creationism with science. It does so by requiring “neutrality” on the topic of “teaching creationism in public education.” This creationism policy violates the Establishment Clause under the Supreme Court’s clear pronouncements in *Epperson* and *Aguillard* by treating a religious belief as science. It also violates the Establishment Clause under this Court’s decision in *Freiler*, because under the policy “teaching and learning [are] tailored to the principles or prohibitions of [a] religious sect or dogma.” *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999). In so doing,

the policy endorses religion, and thus violates the “purpose or effect” test under *Lemon*.

**A. Creationism Is Religion, Not Science.**

Creationism is religion, not science. The Supreme Court twice has so held. *Aguillard*, 482 U.S. at 593 (describing creationism as a “religious belief”); *Epperson v. Arkansas*, 393 U.S. 97, 102 (1968) (describing creationism as a “religious doctrine”). This Circuit has done so as well. *Freiler*, 185 F.3d at 346 (creationism is a “religious viewpoint”).<sup>8</sup> No court has held otherwise.

The Agency did not dispute this below, (*see* USCA5 at 144-48 (Defs.’ Mot. to Dismiss at 22-26)), and the district court correctly recognized these holdings.

**B. The Agency’s Policy Equates Creationism with Science.**

The Agency’s creationism policy equates creationism with science. The court acknowledges that the Agency’s policy “treats creationism as science.” R.E., Tab 2, at 16. Specifically, the policy treats “teaching creationism in public education” as a “subject directly related to the science education TEKS.” USCA5 at 31 (Compl. Ex. B). There is no room in a science curriculum for creationism. In its 2006 Position Statement on Evolution, the Science Teachers Association of

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<sup>8</sup> *See also McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1272 (E.D. Ark. 1982) (“Since creation science is not science, the conclusion is inescapable that the only real effect of [Arkansas’ ‘Balanced Treatment for Creation-Science and Evolution-Science Act] is the advancement of religion.”).

Texas declared: “‘Creationism’ [and similar views] represent nonscientific views that have no place in the science curriculum.” USCA5 at 45 (Compl., Ex. F).

**C. The Agency’s Creationism Policy Violates *Aguillard* and Fails the *Lemon* Test.**

Whether a state action violates the Establishment Clause<sup>9</sup> is determined under the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).<sup>10</sup> In *Aguillard*, the Supreme Court held that treating creationism as science in public school failed the *Lemon* test and violated the Establishment Clause. 482 U.S. at 585-94. The TEA’s creationism policy also fails the *Lemon* test, and violates *Aguillard* because equating creationism with science, like “balancing” evolution and creationism, impermissibly endorses a religious belief.

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<sup>9</sup> The First Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, prohibits the “establishment of religion.” U.S. Const. amend. I. *See Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947) (incorporating the Establishment Clause into the Fourteenth Amendment). “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American [public] schools.” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

<sup>10</sup> This Circuit recognizes that *Lemon* “continues to govern Establishment Clause cases,” explaining that “[i]n *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court... acknowledged the continued viability of the general *Lemon* principles used to evaluate whether government action violates the Establishment Clause and noted in particular that the nature of the inquiry under *Lemon*’s purpose prong has ‘remained largely unchanged.’” *Freiler*, 185 F.3d at 344; *see also* R.E., Tab 2, at 13.

**1. The Agency’s Policy of Equating Creationism with Science Has the “Purpose or Effect” of Advancing Religion.**

To be constitutional under *Lemon*,<sup>11</sup> the “principal or primary effect [of the Agency’s policy] must be one that neither advances nor inhibits religion.” 403 U.S. at 612. This Circuit has applied *Lemon* to ask whether the policy “in fact conveys a message of endorsement or disapproval.” *Freiler*, 185 F.3d at 346.

The Agency’s policy of equating creationism with science, and thereby endorsing religion, shares the fatal flaw of the Louisiana statute struck down in *Aguillard*. Under Louisiana’s “Balanced Treatment for Creation-Science and Evolution-Science Act,” evolution could be taught only if creationism were taught, and vice-versa. Justice Powell explained that “balancing” creationism and evolution meant impermissibly treating creationism, a religious belief, like science, and declared the statute unconstitutional as promoting religion. *Aguillard*, 482 U.S. at 603-04.

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<sup>11</sup> The *Lemon* test has three parts. To be constitutional, “[f]irst, the [Agency’s policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Lemon*, 403 U.S. at 612-13 (citations omitted). “As the *Lemon* Test is disjunctive, a statute or policy that fails to satisfy any one of this test’s three prongs must be struck as violative of the Establishment Clause.” *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 285 (5th Cir. 1999). Comer relied on the Agency’s violation of the second prong in the court below, and does so on appeal.

After *Aguillard*, creationism cannot be equated with science. In purporting to be “neutral” about creationism,<sup>12</sup> the Agency confers upon it a status – science – that it has been adjudicated not to have. Equating creationism with science under the Agency’s creationism policy unconstitutionally promotes religion, as did the Louisiana statute’s “balancing” of creationism and evolution in *Aguillard*, because the policy, like the statute, impermissibly preserves the option of “teaching creationism.” In short, the Agency’s professed “neutrality” actually promotes a religious belief, and thus is a sham.

*Aguillard* was preceded by efforts to promote creationism that courts rejected as unconstitutional endorsements of religion. *Epperson* struck down a prohibition against teaching evolution on that basis. 393 U.S. at 108. Calling creationism “creation science” simply was another impermissible means of promoting religion. *McLean*, 529 F. Supp. at 1272. After *Aguillard* came *Selman* (rejecting evolution-disparaging stickers on textbooks) and *Kitzmiller* (rejecting statements about creationism), which explained that because creationism “is not

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<sup>12</sup> The Agency treats creationism as “a subject on which the agency must remain neutral.” *Supra* at 7-10; R.E., Tab 2, at 4 n.2. The court acknowledged that the Agency’s policy “treats creationism as science.”

The district court attempted to justify the creationism policy because it “only treats creationism as science to the extent that Agency staff may not take a public position on it.” R.E., Tab 2, at 16. Nothing in the record supports the district court’s “to the extent” gloss on the creationism policy. The Termination Memo, which is the only description of the unwritten creationism policy in the record, says nothing about its being limited to forbidding employees to take a public position.

science, the conclusion is inescapable that the only real effect of the [policy] is the advancement of religion.” *Kitzmiller*, 400 F. Supp. 2d at 764.

The Agency’s unwritten creationism policy is no less unconstitutional than these earlier endorsements of religion. A policy that equates creationism with something that it is not (science) leads to the “inescapable” conclusion “that the only real effect” of the policy is promoting what creationism is (religion). *Id.* When the Agency, which provides “leadership, guidance and resources” to public schools, equates creationism with science as it “oversees development of the statewide curriculum,” it is impermissibly “advanc[ing] a religious doctrine,” using “the symbolic and financial support of government.” *Aguillard*, 482 U.S. at 596-97. It also is unconstitutionally “tailor[ing]” its curricular responsibilities “to the principles or prohibitions of [a] religious sect or dogma,” thereby unconstitutionally endorsing religion. *Freiler*, 185 F.3d at 343.

**2. *Lemon*’s “Reasonable Observer” Would Conclude that the Creationism Policy had the Primary Effect of Advancing Religion.**

“Effect” under *Lemon* is assessed through the hypothetical construct of a “reasonable, objective observer.” *Kitzmiller*, 400 F. Supp. 2d at 715; *see also Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J. concurring). The Supreme Court repeatedly has held that a “reasonable observer” must be aware of the policy itself, the policy’s history, including prior application of the policy, and

the context in which it arose. *See, e.g., McCreary County, Ky. v. ACLU*, 545 U.S. 844, 866 (2005) (objective observer “presumed to be familiar with the history of the government’s actions” and “cannot turn a blind eye to the context in which [the] policy arose”); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (objective observer familiar with “implementation of” policy); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part and concurring in judgment) (A “reasonable observer . . . must be deemed aware of the history and context of the” policy).

*Kitzmiller* also contains a helpful, extended discussion of the reasonable observer. *See* 400 F. Supp. 2d at 715-23. A reasonable observer

is an informed citizen who is more knowledgeable than the average passerby. Moreover, in addition to knowing the challenged conduct’s history, the observer is deemed able to glean other relevant facts from the face of the policy in light of its context. Knowing the challenged policy’s legislative history, the community’s history, **and the broader social and historical context in which the policy arose**, the objective observer thus considers the publicly available evidence relevant to the purpose inquiry, but notably does not do so to ascertain, strictly speaking, what the governmental purpose actually was. Instead, the observer looks to that evidence to ascertain whether the policy in fact conveys a message of endorsement or disapproval of religion, irrespective of what the government might have intended by it.

*Id.* at 715 (emphasis added; internal quotation marks and citations omitted).

In *Kitzmiller*, the district court credited the reasonable observer with knowledge not only of the record in that case, but of the “extensive and

complicated federal jurisprudential legal landscape” that includes *McLean*, *Epperson*, and *Aguillard*. *See id.* at 716.

With respect to the TEA’s policy, the reasonable observer would know that creationism is religion, not science. That observer would be aware of “the broader context of historical and ongoing religiously driven attempts to advance creationism while denigrating evolution.” *Id.* at 746. The reasonable observer also would know the record in this case: that the policy applies only to creationism, and that creationism was not a “contested curriculum issue” before the Board. The reasonable observer also would know that 135 Texas biology professors wrote to TEA Commissioner Scott that “there can be no neutrality” on whether creationism is science, because it is “scientifically . . . clear-cut” that it is not. USCA5 at 72 (Compl. Ex. P); *supra* at 10.

Armed with such knowledge, an Agency staff employee-reasonable observer would recognize that the requirement to treat creationism as science has no scientific basis and could only have the effect of promoting a religious belief. That Agency staff employee, tasked with helping the Agency to “oversee development of the statewide curriculum,” would recognize that she was being impermissibly required to “tailor” her efforts to do so to the “principles or prohibitions” of creationism. *Freiler*, 185 F.3d at 343.

Similarly, a science teacher-reasonable observer who was told that the Agency to which she looked for “leadership, guidance, and resources to help schools meet the educational needs of all students” had an unwritten policy equating creationism with science would be justifiably concerned about relying upon guidance on how to answer student questions about the relationship between creationism and evolution. She would know that the response required by the policy – “I cannot help you, and the Agency cannot help you, because we are neutral about creationism” – was entirely without scientific merit and was simply an endorsement of religion. She would know she was experiencing what the Science Teachers Association of Texas reported with alarm in its 2006 statement, that teachers are “being pressured to introduce nonscientific views, including creationism.” USCA5 at 44 (Compl. Ex. F).

A school administrator-reasonable observer, similarly informed, would know that the Agency had terminated its Director of Science for violating a policy equating creationism with science, and would know that the Director’s duties include providing leadership in “revisions, implementation and maintenance of the science [TEKS],” USCA5 at 300 (Martinez Aff. at 3), and participation in “review panel meetings to provide content area support and expertise and working to ensure instructional materials are TEKS-based,” *id.* That reasonable observer

would conclude that the Agency was advancing or endorsing the religious belief of creationism.

Any reasonable observer would observe a bitter irony: the Agency that tasked its Director of Science for the Curriculum Division with the job to “explain law...regarding the science Texas Essential Knowledge and Skills” fired that director pursuant to a policy that violates the clear, unequivocal ruling in *Aguillard*.

### **III. DIRECTOR COMER’S TERMINATION FOR ALLEGEDLY VIOLATING THE CREATIONISM POLICY WAS UNCONSTITUTIONAL.**

The TEA admits that it fired Director Comer for supposedly violating its creationism policy. USCA5 at 9-10 (Compl. ¶ 3), 165-66 (Answer ¶ 3).<sup>13</sup> It said as much in the Termination Memo. USCA5 at 31-33 (Compl. Ex. B). Firing the Director of Science for supposedly violating an unconstitutional policy was itself unconstitutional, and thus in violation of 42 U.S.C. § 1983.<sup>14</sup>

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<sup>13</sup> Although the district court declined to decide whether Director Comer’s resignation in response to being told “quit or be fired” (USCA5 at 256 (SJ Fact ¶ 13)) was a termination, Decision at 7, n.6, under Texas law “quit or be fired” is a constructive discharge. *See Findeisen v. NE Ind. Sch. Dist.*, 749 F.2d 234, 237-40 (5th Cir. 1984) (summary judgment on behalf of school district vacated where teacher resigned in response to “quit or be fired” threat); *see also Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001) (“To prove a constructive discharge, a ‘plaintiff must establish that working conditions were so intolerable that a reasonable employee would feel compelled to resign.’”) (citation omitted)).

<sup>14</sup> Because the district court erred in finding the creationism policy was constitutional, it did not reach the issue of the unconstitutionality of the Agency’s termination of Director Comer.

In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), Justice Stevens

explained in a concurring opinion that:

even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which [it] could not command directly.’ Such interference with constitutional rights is impermissible.

*Id.* at 86-87 (Stevens, J. concurring) (citations omitted). Justice Stevens then noted that the Supreme Court “most often [had] applied the principle to denials of public employment,” and has “applied the principle regardless of the public employee’s contractual or other claim to a job.” *Id.* at 87 (Stevens, J. concurring) (citations to numerous Supreme Court decisions omitted).

The Agency’s termination of Director Comer violated the constitutional prohibition against conditioning employment by the state upon compliance with an unconstitutional policy. As discussed, *infra* at 25-27, the district court’s approval of the action of the Agency – firing employees like Comer for failure to remain neutral on curriculum issues “regardless of constitutionality” – is contradicted by the undisputed facts in the record and is legally unfounded. Accordingly, when the

Agency terminated Director Comer, it did so in clear violation of the Establishment Clause, and Director Comer is entitled to summary judgment.

#### **IV. THE DISTRICT COURT ERRED IN FINDING THE CREATIONISM POLICY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.**

The district court properly acknowledged, as required by *Aguillard*,<sup>15</sup> that “state action promoting creationism or deriding evolution in the classroom violates the Establishment Clause.” R.E., Tab 2, at 14. The court also acknowledged that the Agency’s policy “treats creationism as science.” R.E., Tab 2, at 16; *supra* at n.12.

These two acknowledgements doom the Agency’s creationism policy. The district court nevertheless pulled back from that conclusion because it –

- \* incorrectly concluded the Agency could enforce its policy of “neutrality” on creationism “regardless of constitutionality”;
- \* disregarded Director Comer’s and the Agency’s substantial involvement in the science curriculum, concluding instead that there was a “gap” between their activities, and the curriculum and classroom;

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<sup>15</sup> In distinguishing *Aguillard*, the district court stated, without citation to the record, that “[t]he Agency’s neutrality policy has different origins and effects from the balanced-treatment approach struck down in *Aguillard*.” R.E., Tab 2, at 15. But there is nothing in the record about either the “origins” or the “effects” of the TEA’s creationism policy. Nor could any such “origins and effects” justify a policy equating creationism with science or save such a policy from *Aguillard*’s holding: striking the policy down as a violation of the Establishment Clause.

- \* wrongly concluded that the challenged policy has a broader scope than the equation of creationism and evolution; and
- \* minimized the effect of the creationism policy as an endorsement of religion.

**A. The Agency May Not Require Neutrality “Regardless of Constitutionality.”**

Perhaps the most troubling part of the district court’s opinion is its conclusion that the Agency could enforce “neutrality” on an issue, “regardless of a particular position’s merit or constitutionality.” R.E., Tab 2, at 16. That breathtaking assertion is not found in this Court’s jurisprudence, or that of the Supreme Court. This independently warrants reversal.

The court’s license that the Agency may enforce neutrality “regardless of constitutionality” is legally unsupportable. The purported “regardless of constitutionality” standard empowers the Agency to discipline employees for unconstitutional reasons. *See* R.E., Tab 2, at 16. No government agency has such power.

There is a constitutional consequence when a government agency restricts the behavior of its employees for unconstitutional reasons. *See* Section III *infra*; *Rutan*, 497 U.S. at 86 (Stevens, J., concurring). An agency that disciplines an employee for violating a policy “regardless of [the policy’s] constitutionality” stands in the shoes of a government official who violates another person’s

constitutional rights when “*all* reasonable officials in the defendant’s circumstances would have then known that the defendant’s conduct violated the United States Constitution.” *Hampton v. Oktibbeha County Sheriff Dep’t*, 480 F.3d 358, 363 (5th Cir. 2007). Qualified immunity protects government actors only “insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known.” *Flores v. City of Palacios*, 381 F.3d 391, 393-94 (5th Cir. 2004) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A right is clearly established when its contours are “sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Wooley v. City of Baton Rouge*, 211 F.3d 913, 919 (5th Cir. 2000) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

“All reasonable officials” at the Agency knew (or should have known) that, under *Aguillard*, “teaching creationism in public education” is unconstitutional because creationism is religion, not science. Mistakenly thinking that teaching creationism is permissible is not a reasonable mistake for a government official to make. *Cf. Lytle v. Bexar County*, 560 F.3d 404, 410 (5th Cir. 2009) (governmental actors have qualified immunity “to make reasonable mistakes about whether their conduct violates the law”); *see also Saucier v. Katz*, 533 U.S. 194, 205 (2001) (“If the officer’s mistake as to what the law requires is reasonable, [ ] the officer is entitled to the immunity defense.”).

Whatever the Agency’s interest may be in requiring employees to remain neutral on contested curricular issues that are or may come before the Board of Education, the Agency has no legally protected interest in requiring employees to remain “neutral” on “teaching creationism.” Rather than standing “regardless of its constitutionality”, TEA’s pro-creationism policy falls because of its unconstitutionality.

**B. The Inside/Outside the Classroom Distinction Fails Factually and Legally.**

According to the district court, “even taking as true Comer’s assertions that Agency staff develops the substantive curriculum and that her position involves explaining law regarding TEKS, Comer’s role as Director of Curriculum is attenuated from the classroom.” R.E., Tab 2, at 15. However, “Comer’s assertions” are more than that – they are facts contained in the Agency’s own statements, documented in the record. *See* USCA5 at 255-56 (SJ Fact ¶¶ 6-7, 12); *supra* at 8. The court’s contrary inference – that her role was “attenuated from the classroom” – is factually and legally unsupportable. As previously set forth, *supra* 6-7, Director Comer was a statewide leader for science education. *See, e.g.*, USCA5 at 12-13 (Compl. ¶ 12). She was responsible for revising, implementing and maintaining the science TEKS and disseminating relevant information. She also participated in the adoption of science textbooks for Texas’ public schools.

See USCA5 at 10-11 (Compl. ¶ 10), 167 (Answer ¶ 10); see also USCA5 at 300 (Martinez Aff. at 3) (job description “Specific Essential Duties”).

Nevertheless, the district court perceived a “gap” between Director Comer’s curricular responsibilities and the classroom, and on that basis distinguished the creationism policy from *Aguillard*. But in the Agency’s statement “What We Mean By ‘Curriculum,’” the Agency connects its (and Comer’s) curricular activities directly to the classroom and in so doing refutes any such “gap.”

Since the reorganization in 2003, when we have said **“curriculum”** we meant “state standards” or “TEKS and graduation requirements” or “the knowledge and skills required by the SBOE that **link assessment and materials used in the classroom.**” As many of us are former teachers, we recognize that “curriculum” is far more than a set of standards – it also includes **teacher’s plans student outcomes, and also the unintended learning that takes place in schools through the school day.** So when we say the word “curriculum” in the context of our work at TEA, what we really mean is **curriculum in the most generic sense of the word.**

USCA5 at 303 (Martinez Aff. at 6) (emphases added). This Agency description of curriculum as including teaching and learning refutes the notion of any “gap” between them. This description also contradicts the district court’s assertion, unsupported in the record, that the unwritten creationism policy affects only Agency staff. R.E., Tab 2, at 14-15. The muzzle of the creationism policy affects the teachers, referenced in “What We Mean By ‘Curriculum,’” who are among the beneficiaries of the “statewide leadership for science education” to be provided by

Director Comer. *See* USCA5 at 303 (Martinez Aff. at 6) . Based on the record in this case, there is no “gap,” and no such basis for distinguishing the creationism policy from *Aguillard*.

Furthermore, whether the Director of Science herself was physically inside a classroom is legally irrelevant under *Aguillard*. Whether inside or outside the classroom, a state “may not require that teaching and learning be tailored to the principles or prohibitions of any religious sect or dogma.” *Freiler*, 185 F.3d at 343. The Agency’s statement of its mission – “to provide leadership, guidance, and resources to help schools meet the educational needs of all students” – neither recognizes nor permits this “inside versus outside” the classroom distinction. Nor does the Agency’s statement of its “Roles & Responsibilities,” which include to “oversee development of the statewide curriculum” and to “monitor for compliance with federal guidelines.” USCA5 at 253-54 (SJ Facts ¶¶ 1-3).

**C. The District Court Erred in Not Crediting the “Reasonable Observer” with Knowledge of the History of Prior Efforts to Inject Creationism into Public Education.**

The district court failed to credit the *Lemon* “reasonable observer” with the knowledge, described *supra* at Section II.C.2., of the history of evolution/creationism disputes and court decisions, and of the record in this case. A “reasonable observer...must be deemed aware of the history and context of the” policy. *Capitol Square*, 515 U.S. at 7890 (O’Connor, J. concurring).

**D. The Challenged Policy is TEA’s Equation of Creationism and Evolution. Nothing in the Record Supports the Court’s Conclusion that it has a Broader Scope.**

Key to the court’s decision is its conclusion that “Agency staff must remain neutral on contested curriculum issues, not only creationism and evolution.” R.E., Tab 2, at 15; *see also* R.E., Tab 2, at 16. The court’s conclusion is erroneous, factually and legally. Because creationism was not a “contested curriculum issue,”<sup>16</sup> and constitutionally could not be, *supra* 15, nothing in the record supports the court’s conclusion about the scope of the policy actually at issue here.

The policy of equating creationism and evolution is articulated in only one document – the Termination Memo delivered to Comer when she was fired because of her email about a speech critical of creationism.<sup>17</sup> *See* R.E., Tab 2, at 4

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<sup>16</sup> The court gave great weight to the representation that this topic was disputed (*see* R.E., Tab 2, at 16) before the School Board when Comer sent the objected to email, but the record shows just the opposite. *See* USCA5 AT 353 (SJ Fact ¶ 17) (“[c]reationism was not under consideration by the State Board of Education on October 26, 2007, when Plaintiff Comer forwarded the email at issue in this case, or at any time thereafter.”), or meetings subsequent at least up until September 2008, the date of Plaintiff’s summary judgment motion. *See* USCA5 at 354-487

<sup>17</sup> The statement of Sharon Jackson, the TEA’s Associate Commission for Standards and Programs, in her affidavit that Agency staff were “not to advocate a particular position on issues under deliberation, or participate in a way that could compromise the agency’s ability to fairly and accurately implement the policy choices made by the Board” does not pertain to the creationism policy, because it is undisputed that creationism was not “under deliberation.” USCA5 at 205 (Jackson Aff. at 2). Similarly, the examples provided by Monica Martinez, former Policy Director in the Curriculum Division, of issues on which staff members had to remain neutral – rules for graduation requirements concerning math and science, and the status of the Integrated Physics and Chemistry class *See* USCA5 at 210-11 (Martinez Aff. at 3-4) – are distinguishable from creationism. Unlike creationism, these questions (1) were under deliberation by the Board of Education, (2) do not pose a constitutional issue, and (3) have not been answered in a Supreme Court decision, as the question of teaching creationism was answered in *Aguillard*.

n.2. The Termination Memo leaves no question about its application to creationism/evolution: “[T]he email states that the group opposes teaching creationism in public education...Ms. Comer’s email implies endorsement of the speaker and implies that TEA endorses the speaker’s position on a subject on which the agency must remain neutral.” USCA5 at 31 (Compl. Ex. B).

Consequently, the court should have found that the challenged policy applies only to the creationism/evolution issue.

This unsustainable factual finding was a foundation of the court’s decision, serving as the predicate for its findings under the *Lemon* case about what a “reasonable observer” would conclude about the policy. According to the court, the reasonable observer “would be aware of the neutrality’s policy’s context ... and understand that the policy applies beyond the creationism-evolution debate.” R.E., Tab 2, at 17. From that the court made its ultimate conclusion: “In such context, a reasonable observer would not believe the policy advances or endorses creationism and its associated religion.” *Id.* Its unsubstantiated view that the policy had broad application was a central basis for its distinguishing and dismissing the application of *Aguillard* and its progeny to TEA’s creationism policy. The court justified its distinction on the ground that the TEA policy “has different origins and effects from the balanced-treatment approach struck down in *Aguillard*.” R.E., Tab 2, at 15; *supra* at 24 n.16.

This error appears throughout the district court’s decision (R.E., Tab 2, at 15-17), and leads to an incorrect juxtaposition of the creationism policy, which is limited to being “neutral” on “teaching creationism” and has nothing to do with any “contested curriculum issue,” with the Agency’s apparent policy of requiring employee neutrality on actually contested curricular issues.

As explained above, under *Aguillard*, a state cannot include creationism in its science curriculum. Even had creationism been on the Board’s agenda, as a matter of law, it could not have been a legitimately “contested curriculum issue,” and could not have justified the Agency’s requirement of neutrality.

Had the court been faithful to the record in its selection of the policy at which the “reasonable observer” actually would look, the court could not have granted summary judgment for defendants. Rather, it would have conducted a different analysis. The district court’s error on this point is sufficient to warrant reversal.

**E. The District Court Erred in Finding that the Creationism Policy Only Incidentally Benefited Creationism.**

The district court concluded (R.E., Tab 2, at 16) that, even “if the policy benefits religion at all, any such benefit is at best incidental.” That conclusion was premised on the district court’s finding, without citation to the record, that there is an “array of curricular disputes ‘benefited’ by the Agency’s neutrality policy.” *Id.* As explained in Section IV.D., *supra*, the creationism policy does not involve any

curricular dispute. The creationism policy “benefits” only creationism. That singular benefit is the primary, not incidental, effect of the policy, and violates *Lemon*.

The district court incorrectly analogized the creationism policy to the “array of benefitted student groups in *Widmar [v. Vincent]*.” R.E., Tab 2, at 16. *Widmar* held that a policy prohibiting religious organizations from using university facilities generally available for all registered student groups violates the First Amendment. 454 U.S. 263, 276-77 (1981). Because the use of facilities was available to a broad class of organizations – both religious and nonreligious – the Court concluded that the benefit was incidental. *Id.* Here, the creationism policy – which addresses only creationism, no other issues – benefits only religion. Similar policies have been held unconstitutional, as should the Agency’s creationism policy. *See, e.g., Kitzmiller*, 400 F. Supp. 2d at 764 (“the only real effect of the [policy] is the advancement of religion”); *Freiler*, 185 F.3d at 348 (reading of a disclaimer “serves only to promote a religious alternative to evolution”).

**V. THE DISTRICT COURT ERRED IN GRANTING THE AGENCY SUMMARY JUDGMENT BASED ON ITS MISAPPLICATION OF RULE 56.**

At a minimum, this Court should reverse and vacate the district court’s decision to *grant* the Agency’s motion for summary judgment. By misapplying Federal Rule 56 standards and the summary judgment principles it recited (R.E.,

Tab 2, at 10-11), the court made critical errors that “could [and did] affect the outcome of the action” (R.E., Tab 2, at 10 (citing *Commerce & Indus. Ins. Co. v. Grinnell Corp.*, 280 F. 3d 566, 570 (5th Cir. 2002))). These errors were the district court’s failure to “view the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party,” its failure to “consider all of the evidence in the record,” and its exclusion of record evidence favoring Comer.

The court’s failure to consider particular facts on a summary judgment motion requires vacating the lower court’s grant of summary judgment to defendant. *See Lee v. E.I. DuPont De Nemours & Co.*, 249 F.3d 362, 365-66 (5th Cir. 2001). This is especially so in Establishment Clause cases. *See Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320, 1322 (11th Cir. 2006) (“The difficulty of an uncertain record and missing evidence is especially vexing in an Establishment Clause case because in this area of the law the devil is in the details. Facts and context are crucial and they, of course, must be determined from the evidence, which presupposes that a court knows what the evidence is.”).

These violations of the principles of summary judgment led to three errors by the district court that were outcome determinative. The court misapplied the *Lemon* “reasonable observer” test by denying that observer knowledge of, among other things, the “the broader historical and ongoing religiously driven attempts to

advance creationism while denigrating evolution”<sup>18</sup> which form the context for the challenged policy. *Id.* The court mistakenly concluded that the Director of Science for the Curriculum Division had no connection to the curriculum or the classroom. And the court mistakenly expanded the Agency’s creationism policy to include all curriculum issues before the Board.<sup>19</sup>

**A. The Court Erroneously Concluded that Comer’s Role was “Attenuated from the Classroom” by Disregarding Record Evidence and Failing to Draw Proper Inferences Favoring Comer.**

The court concluded that Comer’s “role as Director of Curriculum is attenuated from the classroom.” R.E., Tab 2, at 15. The court used that finding as one basis to distinguish *Aguillard*, and to conclude that the *Lemon* “reasonable observer” would not believe the Agency’s creationism policy advanced or endorsed religion. R.E., Tab 2, at 17.

In reaching its “attenuated from the classroom” conclusion, the district court ignored the plain meaning of the title of Comer’s job (Director of Science for the Curriculum Division); her job description; the Agency’s statement on its website that it has the responsibility to oversee development of the statewide curriculum;

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<sup>18</sup> *Kitzmiller*, 400 F. Supp. 2d at 716-718.

<sup>19</sup>In contradiction to its justification of the Agency’s policy on the ground that “teaching creationism” could come before the Board, the court noted that, “The State ‘readily agree[s] that if the Board chooses to consider including some kind of recognition of alternatives to evolutionary theory in the biology curriculum, it will be entering perilous waters.’” R.E., Tab 2, at 16.

and its “What We Mean By ‘Curriculum’” statement. *See* Section IV.B., *supra*.

All show the Director’s connection to the classroom and the curriculum.

At a minimum, the court should have drawn an inference in Comer’s favor and declared there to be a factual dispute about that connection. Instead, the court rejected evidence of Comer’s connection to the classroom by saying the connection was “not obvious.”<sup>20</sup> R.E., Tab 2, at 17.

**B. The Court Erroneously Denied the Hypothetical “Reasonable Observer” Knowledge of the Historical Efforts to Promote Creationism and of Comer’s Hypothetical Facts.**

The starting point for *Lemon*’s “reasonable observer” is the historical context in which the question is considered. *See* Section II.C.2., *supra*. The district court erroneously omitted consideration of this history, recorded in court decisions, from the crucial facts and context of what a “reasonable observer” of the Agency’s creationism policy would know. *See Selman*, 449 F.3d at 1322.

The court also erred in its definition of what the “reasonable observer” would know by rejecting Comer’s use of hypotheticals rather than “summary-judgment proof.” The “reasonable observer” is itself a hypothetical construct. *See Kitzmiller*, 400 F. Supp. 2d at 715. The hypothetical “reasonable observer” would be aware of Comer’s duty to “explain law and rule regarding the science Texas Essential Knowledge and Skills” (*see* USCA5 at 254-55 (SJ Fact ¶ 5)), and the

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<sup>20</sup> No case which the court cited applies, or even mentions, a “not obvious” test. Research has not revealed a single case in this Circuit applying such a test in the summary judgment context.

Agency’s commitment to “help teachers and administrators understand how to use state standards.” *See* USCA5 at 303 (Martinez Aff. at 6). With that knowledge, which the court omitted from its “reasonable observer” analysis, the reasonable observer would conclude that Comer’s hypothetical about the classroom teacher asking for guidance about responding to a student question about the relationship between evolution and creationism (“I cannot answer your question because I am required to be neutral about creationism”) exposes the religion-promoting effect of the Agency’s creationism policy.

This and other Comer hypotheticals about creationism-related inquiries to her from teachers draw from the sound foundation in the record of her job description and the agency’s responsibilities.<sup>21</sup> They are more compelling indicators of what the “reasonable” TEA professional or “reasonable” teacher would know when they considered the question than the court’s erroneous view – which it reached only by failing to draw inferences in Comer’s favor and disregarding the record evidence. Consequently, the court was wrong in stating that the Director had offered only hypotheticals to establish her connection to the classroom, and thus had put forth no material facts. R.E., Tab 2, at 15.

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<sup>21</sup> *See* R.E., Tab 2, at 15 n.8. In belittling these hypotheticals as “imagined,” the district court ignored that, based upon the Director of Science’s job responsibilities as described in the record, they are reasonable scenarios for any Director of Science for the Curriculum Division to encounter, whether or not Director Comer actually did.

Furthermore, the court’s rejection of Comer’s hypotheticals in the “reasonable observer” context is inconsistent with the court’s own use of them in the same context. The court first hypothesized what a “reasonable observer” would be aware of, what a “reasonable observer” would believe about the policy, and the degree to which the “reasonable observer” would be informed about the policy. R.E., Tab 2, at 17. Then, it hypothesized about the ultimate question – concluding with no record evidence – that the observer “would find it difficult to believe” that the policy<sup>22</sup> advanced or endorsed creationism, a religion. *Id.*

Had the court properly applied summary judgment principles to the evidence before it, it could not have granted defendants summary judgment. No reasonable TEA professional staff member or teacher could conclude that a TEA policy which equates creationism and evolution in the science curriculum, and forbids distribution of an announcement of an anti-creationism lecture, does not advance or endorse creationism.

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<sup>22</sup> The court was applying its definition of the scope of the policy’s application, which, as noted, has no basis in the record.

## CONCLUSION

For these reasons, the Court should review the record *de novo* and reverse and vacate the district's court's decision.<sup>23</sup> Specifically, it should grant Comer's motion for summary judgment and vacate the grant of summary judgment for defendants, as well as the dismissal of plaintiff's complaint.<sup>24</sup> At a minimum, this Court should vacate the grant of summary judgment to defendants, plus the order dismissing the complaint, and remand for further proceedings.

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<sup>23</sup> See, e.g., *Aubris Res. LP v. St. Paul Fire & Marine Ins. Co.*, No. 07-41272, 2009 WL 1089434, \*6 (5th Cir. Apr. 23, 2009).

<sup>24</sup> In count three, plaintiff sued under 42 U.S.C. § 1983 for violation of her due process rights under the Fourteenth Amendment because the Agency fired her without affording her the rights to which she was entitled under Texas Operating Procedures 07-08(2). The district court did not reach this issue. Should this Court reverse the judgment of the district court, enter judgment for Comer and grant the declaratory and injunctive relief she has requested, relief under count three would be unnecessary.

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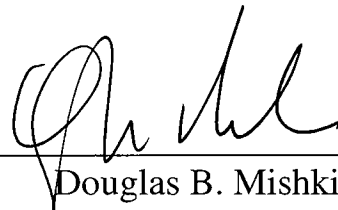
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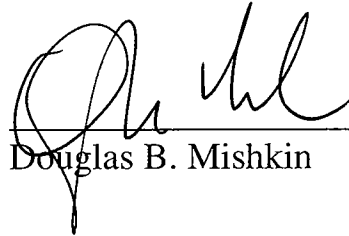
  
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I certify that two copies of the foregoing BRIEF FOR APPELLANT was served on the following counsel of record by FedEx, and electronically on compact diskette in PDF format this 5th day of August 2009:

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