UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHRISTINA CASTILLO COMER Plaintiff,	§ §	
v.	§ §	CA No. 1:08CV00511-LY
ROBERT SCOTT, et al., Defendants.	§ §	

DEFENDANTS' OPPOSITION, WITH BRIEF, TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE COURT:

In response to the plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, Etc. ("Mem."), the defendants Robert Scott and the Texas Education Agency ("TEA") respectfully submit the following.

The defendants incorporate by reference their previously submitted Defendants' Motion, with Brief, for Summary Judgment ("MSJ") and Defendants' Motion to Dismiss ("MTD"). The following argument responds to selected contentions in the plaintiff's brief. Concerning the plaintiff's burden on summary judgment, *see* MSJ at 2.

1. The Plaintiff Does not Have a Viable Establishment Clause Claim.

a. The plaintiff's case is largely founded on an erroneous reading of a TEA website entry.

The plaintiff's claims, especially her predominant Establishment Clause claim ("count" I), depend heavily on a legal assertion that the plaintiff presents as an "undisputed fact." Comer repeatedly bases her arguments on the proposition that TEA "oversees the development of the statewide curriculum." Mem. 4, 6, 9, 10, 11, 14, 14-15, 15 (quoting her attached Plaintiff's

Statement of Undisputed Material Facts ¶ 3). This "fact" is based entirely on a single statement appearing on the TEA webpage. *Id.* (quoting www.tea.state.tx.us/tea/agencymissionandroles.html).

The plaintiff then uses the quotation as if it means that TEA is responsible for the *content* of the state public school curriculum. From that premise, Comer attacks the legitimacy of TEA's requirement that staff not take sides on substantive curriculum issues. As a matter of law, the plaintiff's interpretation of the website statement is erroneous. Because a state agency's legal authority and responsibility on any subject are matters of law, the plaintiff can neither establish her construction as an undisputed fact nor create a fact issue concerning it.

In the relevant legal context, the website statement can mean only that TEA oversees the *process* of developing the curriculum and TEKS, not the *content* that results from the development process. The manner in which TEA staff "oversee" the process – *e.g.*, setting up meetings, summarizing recommendations, putting Board-adopted measures into proper written form – is described, without controverting evidence by the plaintiff, in the affidavit testimony of Dr. Jackson. *See* MSJ at 3-4.

State law specifying the division of curriculum-related responsibilities between TEA and the State Board of Education is outlined in the MTD at 4-7. The same TEA website relied on by Comer accurately describes the State Board's control of the content of the curriculum.

> As part of its efforts to provide the best possible education to public school students, the Board designates and mandates instruction in the knowledge and skills that are essential to a well-balanced curriculum.

www.tea.state.tx.us/sboe/sboe_history-duties.html.

> The State Board of Education (SBOE) has legislative authority to adopt the Texas Essential Knowledge and Skills (TEKS) for each subject of the required curriculum.

www.tea.state.tx.us/teks/scienceTEKS.html.

Even if the anonymous author of the website could be said to have asserted TEA authority to determine the content of the state curriculum, it would be legally inconsequential. "Agencies are creatures of statute and their powers are limited by their enabling statutes." *Freightliner Corp. v. Motor Vehicle Bd. of Tex. Dept. of Transp.*, 255 S.W.3d 356, 365 (Tex. App. – Austin 2008, pet. for rev. filed) (citing *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137 (Tex. App. – Austin 1986, writ ref. n.r.e.)).

Consequently, "[a] state agency's powers are limited to (1) powers expressly conferred by the Legislature, and (2) implied powers that are reasonably necessary to carry out the express responsibilities given to it by the Legislature." *Centerpoint Energy Houston Elec., LLC v. Gulf Coast Coalition of Cities*, ___ S.W.3D ____, 2008 WL 2852336, *9 (Tex. App. – Austin 2008, n.p.h.) (internal quotation marks omitted) (quoting *Tex. Mun. Power Agency v. Public Utility Com'n of Tex.*, 253 S.W.3d 184, 192-93 (Tex. 2007)). "But an agency may not, in the guise of 'implied powers,' 'exercise what is effectively a new power, or a power contradictory to the statute . . .'" *Centerpoint Energy*, 2008 WL 2852336, *9 (quoting *Public Util. Com'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001)).

It follows from the foregoing that an entry on the agency's website, which does not have the status of law, could not alter the statutory arrangement described in the MSJ and MTD. As if more were necessary, the proper distribution of authority and responsibility on curriculum matters was made known to Ms. Comer well before the controversy leading to this suit. She was provided with a document entitled "TEA and Statutory Authority – a Refresher," which had been distributed to staff at a curriculum division meeting held in July of 2005. Attached Affidavit of Monica Martinez.

That "refresher" explained to TEA curriculum staff:

> TEA's statutory authority is laid out in TEC [Texas Education Code] Chapter 7. ***Everyone is expected to be pretty familiar with what it says.*** . . . Section 7.003, Limitation on Authority, essentially says that if TEC doesn't specifically grant authority for a particular action to TEA, then we don't have it.[1] Such authority is granted in legislation in three ways: by giving rulemaking authority to the Agency, to the Commissioner, or the SBOE. If the TEC or a piece of new legislation doesn't contain one of these key phrases, authority cannot simply be assumed. The opposite assumption, that TEA does not have authority in such cases, is the correct one.

Id. (emphasis added).

The memo went on to tell Ms. Comer that "Section 28.002c gives the SBOE authority to designate the essential knowledge and skills for each subject of the required curriculum."[2] *Id.* Once the notion that TEA substantively "oversees" the curriculum is removed from the debate, the rationale for insisting on staff "neutrality" as to substantive curriculum issues becomes apparent and the fragile edifice of Comer's claims collapses.

b. The plaintiff's case also depends on the erroneous premise that she had a duty to advise local school personnel on constitutional law.

Another significant flaw in the plaintiff's case is the unwarranted conclusion she draws from the fact that it was part of her job "to explain law and rule regarding the science . . . TEKS." Mem. 3, 6, 9, 14, 15-16 (based entirely on a line in the "termination memo," Exh. B to the Complaint). From this she asserts that the word "'law' must include the Constitution of the United States and the

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[1] "An educational function not specifically delegated to the agency or the board under this code is reserved to and shall be performed by school districts or open-enrollment charter schools." TEX. EDUC. CODE § 7.003.

[2] "The State Board of Education, with the direct participation of educators, parents, business and industry representatives, and employers shall by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks . . . and addressed on the [required] assessment instruments . . . As a condition of accreditation, the board shall require each district to provide instruction in the essential knowledge and skills at appropriate grade levels." TEX. EDUC. CODE § 28.002(c),

Supreme Court's rulings interpreting and applying it – like *Epperson* and *Aguillard*." Mem. 15-16. As a result, she argues, the "neutrality" policy interfered with Comer's performance of her duties. *Id.* at 14.

The first obvious response is that management's alleged frustration of a state employee's job performance is not a federal constitutional concern. Second, the plaintiff repeatedly ignores the rest of the sentence on which she relies for evidence of her duty to explain "law and rule" regarding science TEKS. The document in question went on to stress that it was ***not*** her job "to cross the line into providing guidance or opinions about instructional methodology or any other matters about which we have no statutory authority." Complaint Exh. B.

If Comer's understanding of "explain law and rule" were correct, one would expect her to introduce her formal job description into evidence as support. The plaintiff's actual job description – which she signed as having received – shows that it was not part of her duties to advise anyone on constitutional law. Instead, this duty was limited to "[p]rovid[ing] clarification of the Texas Education Code (TEC), Texas Administrative Code (TAC), and TEA policies, procedures, and guidelines relating primarily to science education, but also other curriculum areas . . ." Martinez aff. (Attachment). *See also* Jackson aff. (attached to MSJ) at 2. This is consistent with the explanation in the July 2005 "refresher":

> [I]t is appropriate for our division to answer questions about [SBOE] rules. We are authorized to provide some interpretation, as in our FAQs[3] and instructions to our ESC[4] liaisons, or some elaboration on those rules, and sometimes we defer to our

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[3] TEA answers to frequently asked questions in various subject areas. *E.g.*, www.tea.state.tx.us/curriculum/6Ch74QA.pdf.

[4] *See Perez v. Region 20 Educ. Service Center*, 307 F.3d 318, 327 (5th Cir. 2002) ("The Education Service Centers are at the intermediate level of Texas's three-tiered educational system, between the state

> legal division for interpretation. . . . The advice and interpretation that we provide could be called "non-regulatory guidance." . . . Anything that might be construed as technical assistance should be done by the ESCs.

Id. *See also* www.tea.state.tx.us/educationlaw.html (listing the items encompassed by the term "Education Law & Rules" in TEA policy).

If anyone at TEA needs to advise anybody about the constitutionality of including direct or oblique references to "creationism" or "intelligent design" in the public school curriculum, it might be the Commissioner or General Counsel to the State Board of Education – if requested by the latter. But neither the Constitution nor the TEA science curriculum director's official duties would call for Comer, who is not a lawyer and who likely never read *Epperson v. Arkansas* or *Edwards v. Aguillard* until she filed this suit (if then), to advise local school personnel on matters of constitutional law. This would be an appropriate subject on which to "defer to [the TEA] legal division for interpretation," as the "refresher" memo suggests.

A proper understanding of Comer's official responsibilities exposes the absurdity of the hypothetical on which she relies so heavily. Mem. 14. First, it is significant that the matter is put in terms of what "would be" the case. Comer has offered no evidence that in her ten years at TEA any teacher ever asked her how to respond to student questions about the relationship between evolution and creationism. But if she were asked, a truthful answer would be that the statewide curriculum provides only for the teaching of evolutionary theory and not of any alternative.[5] If the

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education agency and the local school districts.").

[5] That is still the case, as of the most recent draft proposal for the revised curriculum. *See* www.tea.state.tx.us/teks/scienceTEKS.html (link to pdf of 9-15-08 draft proposed high school science TEKS). Section 112.43(c)(7) of the proposed high school science TEKS in biology would require that a student "knows evolutionary theory is an explanation for the diversity of life. The student is expected to: (A) identify how evidence of common ancestry among groups is provided by the fossil record, biogeography,

questioner pressed for her opinion beyond that answer, the appropriate response – entirely constitutional – is that this is a subject outside her responsibility and competence; that it is a matter for the State Board of Education to decide. If the questioner persisted, she had the option, noted above, of deferring to the legal division.

What she was not entitled to do was tell the questioner: "To learn more about this, I recommend that you attend a lecture by Dr. Forrest on why intelligent design is wrong for public schools" – or for that matter, a lecture by a proponent of intelligent design. In short, it was simply not her job.

c. The plaintiff's authorities confirm that official neutrality is not only permissible under, but required by, the Establishment Clause.

The plaintiff continues to argue that (1) the public school classroom context of the authorities on which she primarily relies is not material and (2) official neutrality by TEA in the creationism vs. evolution debate violates the Establishment Clause. Mem. 7-9, 11-16. But her own authorities show that (a) it is only in the classroom context that "balanced treatment" (which is not the same thing as passive neutrality) has ever been held to be an endorsement of religion and (b) official neutrality is not only permissible outside the classroom, it is required.

"The touchstone for our analysis is the principle that the 'First Amendment mandates

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and homologies including anatomical, molecular, physiological, behavioral and developmental;
(B) recognize that natural selection produces change in populations, not individuals;
(C) describe the elements of natural selection including inherited variation, the potential of a population to produce more offspring than can survive, and a finite supply of environmental resources resulting in differential reproductive success;
(D) recognize the significance of natural selection to adaptation, and to the diversity of species; and
(E) analyze the results of other evolutionary mechanisms including genetic drift, gene flow, mutation, and recombination."

governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 860, 125 S.Ct. 2722, 2733 (2005) (Mem. 10[6]) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 270 (1968) (Mem. *passim*)). Other principal cases Comer relies on make the same point, and none is to the contrary.

In the *Freiler* case (Mem. 8, 9, 10, 13), the en banc majority explained that the court's decision holds only that the disputed school board resolution "is not sufficiently neutral to prevent it from violating the Establishment Clause." *Freiler v. Tangipahoa Parish Bd. of Educ.*, 201 F.3d 602, 603 (5th Cir. 2000) (en banc) (per curiam). Making it unanimous, the seven-member dissent (from denial of en banc review) acknowledged: "The panel holds the disclaimer unconstitutional for *not* being neutral." *Id.* at 604 (emphasis original).

Similarly, in *Doe* (Mem. 9), the Fifth Circuit declared:

> A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents. . . . Indeed, we conclude that the Program advances religion precisely because it lacks the neutrality that was key to the Court's determination in *Agostini*[7] that [the disputed] remedial education program neither favored nor disfavored religion.

Doe ex rel. Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274, 288 (5th Cir. 1999) (quotation marks omitted) (quoting *Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696, 114 S.Ct. 2481, 2487 (1994) (quoting *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S.

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[6] Although *McCreary* and *Van Orden* (discussed further below in this section) were argued and decided at the same time, they both decided questions under the Establishment Clause, and *Van Orden* originated in Texas, the plaintiff chooses to rely only on *McCreary*.

[7] *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997).

756, 792-93, 93 S.Ct. 2955, 2975 (1973))). In both *Briggs* and *Murray* (Mem. 10), the Fifth Circuit refused to apply the Establishment Clause in a manner that "evinces not neutrality, but instead hostility, to religion." *Briggs v. Mississippi*, 331 F.3d 499, 508 n. 8 (5th Cir. 2003) (quoting *Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991)).

In view of the overwhelming preference expressed in the plaintiff's own authorities, for a policy of official neutrality by public agencies, her insistence that TEA's neutrality somehow violates that admonition is illogical. The plaintiff's position depends entirely on analogizing TEA's requirement that its staff, acting in their official capacity, not express (or appear to express) a position on substantive curriculum issues the State Board of Education must decide, to the "Balanced Treatment Act" struck down in *Aguillard*. Mem. 11 (citing not the majority but the two-justice concurrence in *Edwards v. Aguillard*, 482 U.S. 578, 603-04, 107 S.Ct. 2573, 2587 (1987) (POWELL, J., joined by O'CONNOR, J., concurring)).

The plaintiff's comparison, first, fails to appreciate the difference between active and passive neutrality. *Cf.*, *Van Orden v. Perry*, 545 U.S. 677, 686, 691, 125 S.Ct. 2854, 2861, 2864 (2005) (contrasting "the sort of passive monument that Texas has erected on its Capitol grounds," which did not violate the Establishment Clause, with a case in which the same Ten Commandments "text confronted elementary school students every day"). Under the "balanced treatment" in *Aguillard* and the "disclaimer" in *Freiler*, teachers were required to make an express declaration explicitly or implicitly placing creationism on a par with evolutionary theory. *See* MTD 22-23. By contrast, the TEA "policy" simply requires that staff refrain from appearing to express opinions or positions on curriculum matters that another agency is responsible for deciding.

Second, the plaintiff's authorities show that the public school classroom context matters quite

a lot. Because discussing evolution *is* part of a public school biology teacher's responsibility, so that silence is not an option, it has so far been only in this setting that federal courts have ever held that superficial evenhandedness amounts to "promoting" a religious agenda. *See Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 346 (5th Cir. 1999) ("In assessing the primary effect of the contested disclaimer, we focus on the message conveyed by the disclaimer to the *students* who are its *intended audience*.") (emphasis added). *See also Van Orden*, 545 U.S. at 691, 125 S.Ct. at 2863-64:

> [W]e have "been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." Indeed, *Edwards v. Aguillard* recognized that [prior decisions were] a consequence of the "particular concerns that arise in the context of public elementary and secondary schools."

(Citations omitted).

Third, under Comer's authorities, for an ostensibly neutral position to be considered tantamount to an endorsement of religion, the plaintiff must show an overtly religious motive or intent on the part of the author of the policy. *See Aguillard*, 482 U.S. at 603, 107 S.Ct. at 2587 (POWELL, J., concurring) ("My examination of the language and the legislative history of the Balanced Treatment Act confirms that the intent of the Louisiana Legislature was to promote a particular religious belief."); *Epperson*, 393 U.S. at 103, 89 S.Ct. at 270 ("The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine"). But Comer has done nothing more than make the conclusory and somewhat circular[8] assertion of such intent, without presenting any competent summary judgment proof of it. *See* section **1e** below.

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[8] As shown below, courts have inferred a religious purpose from a religious effect only when no other purpose is supportable and no other effect is evident.

Finally, even if the neutrality-is-partiality reasoning could be imposed outside the public school classroom context in which it was fashioned, it is inapplicable to the TEA policy at issue here. The plaintiff baldly asserts that by disallowing its staff to discuss the issue, as part of their job functions, TEA is effectively conveying the message that it "respects the argument that creationism is science." Mem. 11. Using similar logic, the plaintiff charges that TEA's "'neutrality' on creationism" [*sic*],[9] in the course of "oversee[ing] the development of the statewide curriculum," has the effect of "impermissibly advanc[ing] a 'religious doctrine' . . ." *Id.* at 11-12.

However, each of those conclusions rests on the premise that because TEA is responsible (under Comer's interpretation of the word "oversee" in the agency website) for defining the scope of instruction about the origins of life in the biology curriculum, TEA staff's silence on the subject of creationism implies lack of disapproval, and therefore approval, of the concept. For the reasons examined in **1a** above, that reasoning is insupportable. The only message conveyed by the neutrality is that TEA curriculum staff will advise teachers and other interested parties only as to what is in and meant by the curriculum, not as to what should or should not have been included in the curriculum.[10]

d. The question of whether and how to recognize alternatives to evolution theory is a substantive curriculum issue, regardless of which side of the debate is "right."

Comer argues that because the inclusion of creationism or "intelligent design" in the state-

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[9] The defendants need not belabor the point, made in the MTD at 7-8 and the MSJ at 4-5, without refutation by Comer, that the "neutrality policy" is not exclusive to the creationism vs. evolution controversy.

[10] If the State Board of Education, which *is* responsible for designing the biology curriculum, had refused to include a section on the origins of life, its silence would present a closer question as to whether neutrality equates to endorsement. But that is not the case here.

approved curriculum would be unconstitutional, the debate over whether to do so is not a *legitimate* curriculum issue, so that TEA is not justified in barring her from discussing it with public school science faculty. Mem. 14-15. It is worth noting in response, first, that even if the controversy were not a bona fide curriculum issue, it would not follow necessarily that Comer had any business commenting on it in her official capacity.

More importantly, the plaintiff wilfully misses the point. Even if one side of the debate is wrong, the fact remains that it ***is*** an issue that the State Board of Education, not TEA, must decide. Comer recognizes that, rightly or wrongly, advocates for one alternative view have raised the issue with the Board. Complaint ¶ 28 and Exhibit G thereto. As noted, the Board may seek the Commissioner's advice as to the legality of such a measure, but in the end it is the Board that will decide how to treat evolution in the curriculum, not TEA. If the Board makes the wrong decision, it will have to answer for it.[11] But TEA may legitimately require its curriculum staff not to cross the line into providing guidance or opinions about curriculum matters over which the agency has no statutory authority.

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[11] The defendants will readily agree 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. Further, the defendants do not disagree that in some of the cases cited by the plaintiff, school policies directly or indirectly dealing with creationism were held by courts to be Trojan horses for the insertion of religious doctrine into science curricula. However, it is also fair to note that the Supreme Court has not categorically anathematized all such measures as offensive to the Establishment Clause. *Aguillard*, 482 U.S. at 593-94, 107 S.Ct. at 2583 ("We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught," so that "teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction."). Thus, in *Freiler*, the en banc court "emphasize[d] that we do not decide that a state-mandated statement violates the Constitution simply because it disclaims any intent to communicate to students that the theory of evolution is the only accepted explanation of the origin of life, informs students of their right to follow their religious principles, and encourages students to evaluate all explanations of life's origins, including those taught outside the classroom." *Id.*, 201 F.3d at 603; *see also id.* at 604.

e. TEA's disputed "policy" passes the *Lemon* test.

The plaintiff mischaracterizes the defendants' argument, in their MTD at 22, 26-27, as contending "that *Lemon* and its progeny do not apply to this case, because they are relevant only in the 'public classroom context.'" Mem. 9 (referring to *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971)). She then goes to great lengths to argue that *Lemon* "continues to govern Establishment Clause cases." Mem. 9-10. Thereafter, she attempts to apply the *Lemon* criteria to invalidate the contested "neutrality policy." *Id.* at 10-13.

What defendants said is that *Lemon* does not apply to this case because the agency requirement in contention does not implicate the Establishment Clause. Moreover, the defendants have shown that the specific applications of *Lemon* on which the plaintiff seeks to rely are dependent on the public school classroom context in which the cases arose.

The defendants do not disagree that in a case in which a plaintiff can show a nexus between a challenged policy and religion, a court might use the *Lemon* test to help determine whether the policy runs afoul of the Establishment Clause. *Freiler*, 185 F.3d at 344 ("Although widely criticized and occasionally ignored, the *Lemon* test continues to govern Establishment Clause cases."). *But see Van Orden*, 545 U.S. at 685-86, 125 S.Ct. at 2860-61:

> Over the last 25 years, we have sometimes pointed to *Lemon v. Kurtzman* as providing the governing test in Establishment Clause challenges. Yet, just two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as "no more than helpful signposts." Many of our recent cases simply have not applied the *Lemon* test. Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test. Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.

(Citations and footnotes omitted.)

However, the defendants have gone on to show that, even if *Lemon* applies, the policy at issue satisfies the tests of that ruling. MTD 26-28. The plaintiff's authorities in her brief reinforce all the points made by the defendants.

Under the first criterion, whether the state has "a sincere secular purpose for the contested state action," the court must treat the defendants' articulated rationale "with deference," albeit not "with blind reliance." *Freiler*, 185 F.3d at 344. Consistent with the discussion in **1c** above, "*Lemon*'s 'purpose' requirement aims at preventing government from *abandoning neutrality* and acting with the intent of promoting a particular point of view in religious matters." *McCreary County*, 545 U.S. at 860, 125 S.Ct. at 2733 (emphasis added).

> In undertaking such a "sham" inquiry, we consider whether the [disputed policy] furthers the particular purposes articulated by the [defendants] or whether the [state action] contravenes those avowed purposes. If the [policy] furthers just one of its proffered purposes and if that same purpose proves to be secular, then the [policy] survives scrutiny under *Lemon*'s first prong.

Freiler, 185 F.3d at 344.

As noted in the MTD at 27, the defendants' secular purpose is articulated in the second paragraph of Exhibit B to the Complaint, *i.e.*, to avoid trespassing on "matters about which we have no statutory authority." As a matter of law, as discussed above, the plaintiff has failed to discredit that articulated purpose.

Moreover, even if the "neutrality policy" applied only to the creationism-evolution debate, and even if TEA required that staff avoid the subject because it is controversial in religious circles (neither of which is the case), the purpose would still be sufficiently secular.

> We next consider whether . . . reducing student/parent offense are permissible secular objectives. In conducting this inquiry, we are mindful that a purpose is no less secular simply because it is infused with a religious element. . . . [T]he fact that

> evolution . . . is religiously charged, and the fact that the sensitivities and sensibilities to which the [defendant] sought to reduce offense are religious in nature, does not per se establish that those avowed purposes are religious purposes.

Id. at 345 (citation omitted).

"*Lemon*'s second prong asks whether, irrespective of the [defendant]'s actual purpose, 'the practice under review in fact conveys a message of endorsement or disapproval.'" *Id.* at 346. "The government unconstitutionally endorses religion when it conveys a message that religion is 'favored,' 'preferred,' or 'promoted' over other beliefs." *Id.* at 343. "Neither the endorsement test nor the second prong of *Lemon* is violated where any endorsement of or benefit to religion by the challenged governmental action is merely 'indirect, remote, or incidental.'" *Briggs*, 331 F.3d at 506.

This criterion requires the court to "to gauge the *objective* meaning of the government's statement in the community." *Id.* at 507 (emphasis added; brackets and internal quotation marks omitted). Despite Comer's far-fetched analogies and conclusory assertions, in this case "no realistic danger exists that the community would think that the contested government practice was endorsing religion or any particular creed." *Freiler*, 185 F.3d at 346 (brackets omitted) (quoting *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395, 113 S.Ct. 2141, 2148 (1993)). While "[t]here is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion," TEA's "neutrality policy" is not invalid simply because Comer or an individual inquirer might misperceive its purpose. *Briggs*, 331 F.3d at 507. "In this respect, the applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the collective social judgment.'" *Id.*

Applying this standard to the facts giving rise to this suit shows that a public school science teacher's failure to receive an e-mail from Comer, forwarding the announcement of the presentation on intelligent design, would not convey the message to an objectively reasonable observer that TEA endorses a religious viewpoint. But when the TEA director of science curriculum sends a message to a public school science teacher, informing her of a particular lecture – especially if other presentations relevant to science education have received no mention – the inference is inescapable that the speaker has a message TEA wants science teachers to hear.

With respect to the third *Lemon* element, the plaintiff has not even attempted to show excessive entanglement. *See* MTD 27.

f. The plaintiff lacks standing to raise a facial challenge under the Establishment Clause.

The plaintiff demonstrates a great deal of confusion, discussed further below, as to the boundaries between her "counts" I and II and between "counts" II and III. Nevertheless, unless count II is meant to be completely redundant to count I, the first claim must be viewed as a challenge to the contested "policy" on its face, irrespective of whether it cost Comer her job, while count II is meant to be an as-applied challenge.

Consequently, she has standing to assert the claim in count I only if the disputed "policy" prevents a TEA employee from exercising a right protected by the Establishment Clause. This inquiry is all the more important because the plaintiff goes to such lengths to stress that she is ***not*** claiming that she was prevented from exercising any right protected by the Free Speech Clause. Mem. 22-23.

For the reasons shown in MTD 21-22, Comer cannot claim that the defendants deprived ***her***

of "the right of teachers and students to an education free of state mandated parochialism," *Cole v. Maine School Administrative Dist. No. 1*, 350 F. Supp.2d 143, 150 (D. Me. 2004) (Mem. 23), which was the Establishment Clause right at stake in most of the cases on which she relies.

As explained by one of the plaintiff's authorities, "Broadly speaking, the establishment clause prohibits . . . the states, from compelling an individual to participate in religion or its exercise, or otherwise from taking action that has the purpose or effect of promoting religion or a particular religious faith." *Venters v. City of Delphi*, 123 F.3d 956, 969 (7th Cir. 1997) (Mem. 23). In that case, the plaintiff was able to avoid summary judgment on her Establishment Clause claim by evidence that her supervisor "pressured her to bring her thinking and her conduct into conformity with the principles of his own religious beliefs . . ." *Id.* at 970.

However, by the plaintiff's own account, she was not pressured to conform to a religious belief or practice. Contrast *Warnock v. Archer*, 380 F.3d 1076 (8th Cir. 2004) (Mem. 22-23) (school bus driver required "to go to a local college sponsored by a Christian denomination for in-service training meetings that included a prayer"); *Cole*, 350 F. Supp.2d at 145-48 (Mem. 23) (teacher instructed to stop teaching subjects offensive to parent on religious grounds).

These points distinguish Comer's case from that of the plaintiff in *Larsen v. U.S. Navy*, 486 F. Supp.2d 11 (D.D.C. 2007) (Mem. 21). In *Larson*, the defendant challenged standing only on the argument that "the possibility of future harm is speculative or hypothetical." *Id.* at 20-21. Here, the defendants also contend that, for the reasons shown above, the harm claimed by the plaintiff is not cognizable for purposes of a facial challenge under the Establishment Clause.

2. The Plaintiff Does not Have a Viable First Amendment Retaliation Claim.

Attempting to avoid the consequences of her inability to identify any speech as a private

citizen rather than as a state employee, the plaintiff insists that her claim under count II is not a free speech retaliation claim. Mem. 22. Yet she relies heavily on free speech retaliation case law to support her claim. Mem. 17-20 (citing, quoting, and discussing *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729 (1990); *Fowler v. Smith*, 68 F.3d 124 (5th Cir. 1995); and *Megill v. Board of Regents of State of Fla.*, 541 F.2d 1073 (5th Cir. 1976)). The decisions she offers in support of her putative Establishment Clause retaliation claim in turn rely on free speech retaliation jurisprudence. *Rutan*, 497 U.S. at 69, 110 S.Ct. at 2734 (citing *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694 (1972)); *id.* at 86, 110 S.Ct. at 2743 (STEVENS, J., concurring) (citing *Perry*, *supra*, and *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968)); *Cole*, 350 F. Supp.2d at 151.

Recasting her count II retaliation claim in terms that make it almost indistinguishable from her count I claim, the plaintiff contends that the defendants retaliated against her for her refusal to comply with a policy that violated the Establishment Clause. In support, she first seeks refuge in the broad language from Justice Stevens' concurrence in *Rutan*, that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." Mem. 17 (quoting *Rutan*, 497 U.S. at 86, 110 S.Ct. at 2743). (The next sentence quoted by the plaintiff shows that the decision was concerned with "protected speech or association").

It is worth noting here that the plaintiffs in *Rutan*, in contrast to Comer, alleged that they were penalized for private off-the-job political beliefs, affiliations, and activities, rather than for conduct in their official capacities as state employees. They alleged that the governor and his cronies based the granting of exceptions to an official hiring freeze on "whether the applicant voted in Republican primaries in past election years, whether the applicant has provided financial or other

support to the Republican Party and its candidates, whether the applicant has promised to join and work for the Republican Party in the future, and whether the applicant has the support of Republican Party officials at state or local levels." *Id.* at 62, 110 S.Ct. at 2732.

In any event, because the policy at issue is constitutional under the Establishment Clause, for the reasons shown in part **1**, as well as in the MTD and MSJ, the defendants were entitled to take adverse action against Comer for violating it.

3. The Plaintiff Does not Have a Viable Due Process Claim.

Conceding that she did not have a cognizable property interest in continued state employment, the plaintiff rests her hopes on a 1976 Fifth Circuit decision stating that the state owes an employee notice and a hearing either when he has a property interest or when he "asserts that he has been dismissed for constitutionally impermissible reasons." Mem. 18-19 (citing *Megill*, 541 F.2d at 1078). Because the court held both that the notice and hearing provided to the plaintiff were sufficient and that he was not terminated for the exercise of protected speech, *id.* at 1081, 1085, the statement in the opinion may well be dictum. Since it was decided, *Megill* has never been cited as authority for the proposition on which Comer relies.

Subsequent developments in both due process and First Amendment jurisprudence have effectively negated the *Megill* holding (if that is what it is) on this point. The same case law shows that the plaintiff has confused substantive and procedural due process. In a nutshell, just as a property interest is immaterial to a First Amendment retaliation claim – *i.e.*, an at-will state employee has the same right not to be penalized for exercising rights protected by the First Amendment as a

tenured employee, which is the point of the *Rutan* passages cited by Comer[12] – so notice and the opportunity to be heard are immaterial for a retaliation claim. That is, if the adverse action is for a constitutionally impermissible reason, providing the employee with notice and a hearing will not cure the violation. Thus, if Comer could prevail on her counts I and II, her count III would be inconsequential – it adds nothing to the relief to which she would be entitled. But if she cannot, her count III still fails for the lack of a property interest.

The foregoing conclusions are the result of a proper understanding of substantive due process law. As the Fifth Circuit has repeatedly recognized in post-*Megill* cases, a First Amendment retaliation claim belongs to one species of substantive due process claims.[13] *John Corp. v. City of Houston*, 214 F.3d 573, 577 (5th Cir. 2000); *Breeden v. Univ. of Miss. Medical Ctr.*, 241 F. Supp.2d 668, 675-76 (S.D. Miss. 2001) (citing *Rolf v. City of San Antonio*, 77 F.3d 823, 827 (5th Cir. 1996) (citing *Brennan v. Stewart*, 834 F.2d 1248, 1255 (5th Cir. 1988) (citing *Brown v. Texas A & M University*, 804 F.2d 327, 336 (5th Cir.1986)))).

Because a guarantee of notice and an opportunity to be heard are not elements of *substantive* due process, their alleged omission is irrelevant to such a claim.

> An allegation that a state action has violated an individual's right to procedural due process is thus a condemnation of the procedures that attended the action and not an assessment of the constitutionality of the action itself. . . . In contrast, when a plaintiff

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[12] *See also Rutan*, 497 U.S. at 87, 110 S.Ct. at 2744 (STEVENS) (plaintiff's "lack of a contractual or tenure 'right' to reemployment . . . is immaterial to his free speech claim").

[13] Part of the confusion among some litigants is due to the fact that federal courts use the term "substantive due process" to refer to three distinct kinds of claims: (1) a claim that a state official deprived the plaintiff of a Bill of Rights protection (such as rights guaranteed by the First or Fourth through Eighth Amendments) made binding on the states through the Fourteenth Amendment's due process clause, (2) a claim that a state official deprived the plaintiff of liberty or property by "arbitrary and capricious" conduct, and (3) a claim that a state official injured the plaintiff by conduct that "shocks the conscience." *See Brennan*, 834 F.2d at 1255-56.

> alleges that state action has violated an independent substantive right, he asserts that the action itself is unconstitutional. If so, his rights are violated no matter what process precedes, accompanies, or follows the unconstitutional action.

Augustine v. Doe, 740 F.2d 322, 326-27 (5th Cir. 1984). *See also McClendon v. City of Columbia*, 305 F.3d 314, 322 n. 5 (5th Cir. 2002) (en banc); *Brennan*, 834 F.2d at 1255.

The plaintiff has obviously confused procedural due process with the "oxymoronically labeled 'substantive' due process" (*Brennan*, 834 F.2d at 1255). Her pleadings describe a procedural due process claim. Complaint ¶¶ 46, 62. For the reasons shown in MTD 10-17, the same pleadings conclusively negate a § 1983 cause of action for denial of procedural due process.

To resuscitate her due process claim, the plaintiff attempts to redefine it in substantive due process terms, *i.e.*, that she was terminated in contravention of the First Amendment Establishment Clause. If this amendment by briefing – circumventing FED. R. CIV. P. 15 – is allowed, the only difference between counts II and III will be that in the former Comer contends that the termination was invalid per se while in the latter she asserts that the illegal termination should have been preceded by notice and a hearing. But because a termination in violation of a First Amendment right would be, as a matter of substantive due process, invalid "regardless of the fairness of the procedures used to implement [it]," *McClendon*, 305 F.3d at 322 n. 5 (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665 (1986)), count III is pointless.

Finally, as with her retaliation claim, the failure of Comer's Establishment Clause claim is fatal to her due process claim. *Fowler*, 68 F.3d at 128 (Mem. 20) (a "plaintiff who failed to show that his employer discharged him for exercising his First Amendment rights also failed to establish a substantive due process claim when both were 'based primarily on' [on the same] factual allegation").

4. The Plaintiff's Claims Against the Texas Education Agency are Jurisdictionally Barred by Eleventh Amendment Immunity.

The plaintiff offers nothing in her Mem. to justify retaining TEA, as opposed to Commissioner Scott in his official capacity, as a defendant in this suit. *See* MTD 9-10.

CONCLUSION

In view of all the foregoing, the defendants respectfully urge that the plaintiff's motion for summary judgment be denied and that all of the plaintiff's claims against them be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically submitted for filing, a true and correct copy of the above and foregoing Defendants' Opposition, With Brief, to Plaintiff's Motion for Summary Judgment in accordance with the Electronic Case Files System of the Western District of Texas on this the 17th day of October, 2008, which will send notification to the following:

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and, I hereby certify that I have mailed copies of this document by regular U.S. Mail to the following non-CM/ECF participants:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHRISTINA CASTILLO COMER Plaintiff,	§ § §	
v.	§	CA No. 1:08CV00511-LY
ROBERT SCOTT, Commissioner, Texas Education Agency, in his official capacity and TEXAS EDUCATION AGENCY, Defendants.	§ § § § § §	

ORDER

On this day the Court considered Plaintiff's Motion for Summary Judgment. After due consideration, the Court is of the opinion that the Motion is not meritorious and that it should not be granted. It is accordingly,

ORDERED that:

Plaintiff's Motion for Summary Judgment be and hereby is DENIED, and

Defendants' Motion for Summary Judgment be and hereby is GRANTED, and

The plaintiff's claims against the defendants be and hereby are DISMISSED.

SIGNED this _____ day of _____, 2008.

_____
HON. LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Bell, Arlieen

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Western District of Texas

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