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

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

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant Robert Scott, Commissioner of the Texas Education Agency (Agency), does not dispute that creationism is religion, not science, and that evolution is science, not religion. Nor does Defendant dispute that creationism may not be taught as science, and that teaching religion as science would unconstitutionally promote religion.

Instead, Defendant's opposition to Plaintiff Comer's motion for summary judgment boils down to an effort to persuade this Court not to worry because, Defendant contends, the "neutrality" policy regarding creationism applies only to the Agency, and the Agency and its Director of Science for the Curriculum Division do not oversee the substance of the science curriculum. In effect, Defendant argues that, although science teachers may say that creationism is not science, Agency employees and the Director of Science may not. Although the Agency is charged with providing "leadership, guidance and resources" to teachers, Director Comer was, and her colleagues can be, fired for sending an email to science teachers and educators announcing a lecture that says creationism is not science.

Defendant's assertion that the Agency and its Director of Science for the Curriculum Division have no *substantive* role in the science curriculum is not merely implausible or counterintuitive – it is conclusively refuted by the undisputed facts in the record established by the Agency's own statements and admissions. The Agency's website states that it "oversees development of the statewide curriculum, "administers the statewide assessment program," and "monitors for compliance with federal guidelines." Defendant now attempts to drain these words of all meaning by claiming that they actually mean nothing more than "setting up meetings, summarizing recommendations, putting Board-adopted measures into proper written form."

Defendant cannot avoid summary judgment on the fiction that the Agency is merely one large clerical service. That fiction cannot change what the law and the record make clear: The "neutrality" policy forbids criticism of creationism, it promotes that religious belief, and it applies to the very Agency that has substantive involvement in the science curriculum.

The "neutrality" policy requires the Director of Science for the Curriculum Division to "pull her punch" regarding creationism – to give it credence by providing something less than a fully truthful and accurate answer to the question "Is creationism science?" That "pulled punch" harms the educational environment in an insidious way. Those who count on the Agency for "leadership" and "guidance" are unlikely to know that they have received an incomplete response about creationism, and thus are unlikely to know that they have been harmed – making the "neutrality" policy all-the-more pernicious.

I. THE AGENCY'S "NEUTRALITY" POLICY IS NOT NEUTRAL BECAUSE IT PROMOTES A RELIGIOUS BELIEF

Director Comer's motion for summary judgment establishes the unconstitutional flaw in the Agency's "neutrality" policy: It is not neutral because it treats creationism, a religious belief, like science, and in so doing impermissibly advances religion. Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. & In Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Mem.") at 11. Defendant's opposition

responds that the Agency's "neutrality" policy is harmless because it applies only to the Agency, not classroom teachers, and the Agency and its Director of Science for the Curriculum Division have no substantive involvement with the science curriculum. Opp'n at 9-10; Defendant's Motion to Dismiss at 21-22; 25; Defendant's Motion for Summary Judgment at 4, 11. In fact the Defendant's own documents establish beyond dispute that the Agency and its Director of Science have substantive involvement in the curriculum, and the "neutrality" policy unconstitutionally affects that curriculum.

A. The Agency Is Involved With The Statewide Curriculum

Director Comer's motion established that the Agency's and her own curricular responsibilities are undisputed and explicit. The Agency touts that it "oversees development of statewide curriculum" and "monitors for compliance with federal guidelines." Pl.'s Statement of Undisputed Material Facts # 3 ("SJ Fact ___"); Pl.'s Mem. at 6, 14-15. Defendant admits that, as Director of Science for the Curriculum Division, Comer directed the K-12 science program including *curricular* issues involving assessment and textbook adoption. Compl. ¶ 10; Answer ¶ 10.

Defendant's admission of that fact alone would suffice to establish that Director Comer's curricular duties were substantive and broad. The Martinez affidavit submitted by Defendant with the Opposition further underscores the same point. The job description of Comer's position, attached to the Martinez affidavit, includes among her "Specific Essential Duties" that Director Comer was responsible for "[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...." Aff. of Monica Martinez. The inclusion of "TEA policies, procedures, and guidelines" particularly undercuts any contention that Comer's duties were narrow or circumscribed in the manner argued by the Opposition. The "Refresher" document, also attached to the Martinez affidavit, makes the same point repeatedly. That document

declares that "our division" may "answer questions about [SBOE] rules," is "authorized to provide some interpretation ... or some elaboration on those rules," and "answer[s] questions about rule and law...." *Id.* Similarly, the Termination Memo said that it was Comer's "job to explain law" regarding the Texas science curriculum. Complaint Ex. B at 1.

Defendant's response to these undisputed facts showing the Agency's and Director Comer's curricular involvement is to set up a straw man, knock it down and then argue for a contradictory proposition that is refuted by the undisputed facts. Defendant asserts that Director Comer's argument – that the "neutrality" policy on creationism impermissibly advances a religious doctrine –

> 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.

Opp'n at 11. Defendant goes on to say that Director Comer's "premise" is incorrect, because the Agency is not responsible for "defining the scope of instruction about the origins of life." Defendant then asks this Court to infer the opposite: the Agency has no substantive involvement in the science curriculum, so the "neutrality" policy is irrelevant. Opp'n at 2.

Defendant's "premise" argument is a straw man. Director Comer never has said that "TEA is responsible...for defining the scope of instruction about the origins of life," and that argument is not a "premise" of Director Comer's attack on the unconstitutional "neutrality" policy. What Director Comer has asserted throughout this lawsuit is what the Agency says on its website (that the Agency is responsible for "oversee[ing] the development of the statewide curriculum") and what Defendant has admitted (that Director Comer "directed the K-12 science program including curricular issues involving assessment and textbook adoption"). Compl. ¶ 10; Answer ¶ 10. SJ Facts 3, 5, 7; Pl.'s Mem. at 6, 14-15.

Thus, Defendant's attempt to de-link the Agency's "neutrality" policy from the science curriculum is refuted by the undisputed facts. Defendant's backtracking from the clear meaning of the Agency's own website language – "oversees development of the statewide curriculum" – is not only transparent but is also beside the point. Opp'n at 1-2. It is the Agency's demonstrated, undisputed *involvement* in the curriculum that is material.

B. The "Neutrality" Policy Unconstitutionally Affects The Curriculum

The Agency is substantively involved with the science curriculum, and so is the Agency's "neutrality" policy. When the Director of Science for the Curriculum Division is required not to respond truthfully and accurately to the question "Is creationism science?," the Director's "silence on the subject of creationism" very much "implies lack of disapproval, and therefore approval." Opp'n at 11.

That required silence unconstitutionally distorts the Agency's role in "oversee[ing] development of the statewide curriculum." There are 1,200 school districts, 12,000 science teachers and four million students within the K-12 science program that was directed by Plaintiff. All must receive the Agency's "leadership, guidance and resources to help schools meet the educational needs of all students" without the Director of Science for the Curriculum Division "pulling her punch" when it comes to creationism.

That "pulled punch" causes real harm. The harm is that a teacher, Board member or legislator with a question about creationism will receive information that is less than fully truthful and accurate. But the questioner is unlikely to recognize that the answer is not fully truthful and accurate. Yet the harm to the teacher, Board member or legislator – and ultimately to the educational environment – is real, albeit difficult to discern. That difficulty makes the unconstitutional policy more dangerous.

"Is creationism science?" is primarily a scientific question, albeit one with legal ramifications.[1] The Director of Science has the professional responsibility to respond truthfully and accurately to this question, just as the Director must respond truthfully and accurately to questions such as "Is astrology science?" and "Is alchemy science?." A "neutrality" policy that requires the Director to hedge on whether the religious belief of creationism is science, or that exalts creationism by placing it beyond criticism, is unconstitutional because it is "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)(citing *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)), *reh'g denied en banc*, 201 F.3d 602 (5th Cir. 2000), *cert. denied*, 530 U.S. 1251 (2000).

The importance of the Agency's ability to provide "leadership, guidance and resources" without hedging on creationism is illustrated by one of Defendant's arguments. In arguing that the Agency has no substantive curricular role, Defendant asserts that, "[e]ven if one side of the [creationism] debate is wrong, the fact remains that it ***is*** an issue that the State Board of Education, not TEA, must decide.... If the Board makes the wrong decision, it will have to answer for it." Opp'n at 12 (emphasis in original).

Defendant follows up with a footnote that is rife with inaccurate or misleading phrases that, when revealed, expose not only the fallacy of Defendant's defense of the Agency's "neutrality" policy but the importance of the Agency providing truthful and accurate analysis to the Board on this issue. The footnote warrants quotation at length:

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[1] Defendant suggests that Director Comer should be prohibited from saying that "creationism is not science" because she is not a lawyer. By the Agency's own description, it was "her job to explain law" regarding the Texas science curriculum. SJ Fact 5. This job responsibility is both undisputed and unremarkable. Many non-lawyer jobs require an understanding of various laws. Human resource professionals, safety and health officials and government contractor executives all must know aspects of applicable law to perform their jobs. Although such people frequently are not lawyers, they could not do their jobs effectively if they were not familiar with applicable law. Advising that "creationism may not be taught as science" is repeating what science educators learn about the state of the applicable law. Compl. Ex. F at 2 ("Creationism...represent[s] nonscientific view[] that [has] no place in the science curriculum"). A Director of Science who could not give both answers would be unfit for the job.

> 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**.").

Opp'n at 12 n.11 (emphases added). The bolded phrases reveal the flaws in Defendant's argument.

* **"alternatives to evolutionary theory."** Wrong. If "alternatives to evolutionary theory" means creationism, what the Board and the Agency will be entering are not "perilous waters," but instead a black hole.

* **"some of the cases."** Wrong. Every reported case involving an attempt to teach creationism as science has found a violation of the Establishment Clause. Defendant has cited no case holding otherwise.

* **"all such measures/scientific critiques/scientific theories/science instruction."** Wrong. If "all such measures" includes teaching creationism as science, the Supreme Court has indeed "anathematized" all attempts to do so. The *Aguillard* language quoted by Defendant contemplates the teaching of scientific critiques of scientific theories to enhance science instruction. But that quoted language did not contemplate the teaching of creationism, because *Aguillard* said that creationism is religion, not science.

These flaws show not only that the "neutrality" policy on creationism is not neutral, but also the importance of not muzzling the Agency with an unconstitutional "neutrality" policy. By preventing the Agency from truthfully and accurately advising and correcting the Board on these

various misstatements and misconceptions, the "neutrality" policy promotes the religious belief of creationism and disserves science.

Neither of the two provisions of the Texas Education Code cited by Defendant (Opp'n at 4) supports the argument that the Agency and its Director of Science for the Curriculum Division were precluded from substantive involvement in the science curriculum. Section 7.003, Limitation on Authority, simply reserves to school districts those functions not delegated to the Board or the Agency. Texas Education Code § 28.002(c) has nothing to do with the Board-Agency relationship. It simply authorizes the Board to enlist outside participation – "educators, parents, business and industry representatives, and employers" – in developing the curriculum. Defendant's argument requires this Court to conclude that, although outside "educators" may participate with the Board in developing the curriculum, the Director of Science for the Curriculum Division of the very Agency that "oversees development of the statewide curriculum" somehow is prohibited from such participation.[2] Defendant's own "Refresher" document refutes Defendant's argument by explaining how the Agency works with the Board under § 28.002(c) – the Board adopts rules providing for the "essential knowledge and skills for each subject of the required curriculum," and the Curriculum Division of the Agency "answer[s] questions about those rules" and is "authorized to provide some interpretation, as in our FAQs and instructions to our ESC liaisons, or some elaboration on those rules...." Martinez Aff.

Defendant tries to minimize the Agency's curricular role with meaningless distinctions. Agency staff can give *non-regulatory*, but not *regulatory*, guidance (Opp'n at 5-6); the Agency's role pertains to *process*, not *content* (Opp'n at 2); and the General Counsel may say that creationism is not

[2] None of the cases cited by Defendant, either in the motion to dismiss or in the opposition, are relevant to the relationship between the TEA and the Board. *See CenterPoint Energy Houston Elec., LLC v. Gulf Coast Coalition of Cities*, 263 S.W.3d 448 (Tex. App. 2008) (authority of Texas Public Utility Commission); *Freightliner Corp. v. Motor Vehicle Bd.* of the Tex. Dep't of Transp., 255 S.W.3d 356 (Tex. App. 2008) (authority of Motor Vehicle Board of the Texas Department of Transportation); *Hill v. Lower Colo. River Auth.*, 568 S.W.2d 473 (Tex. App. 1978) (authority of attorney general to bring suit challenging an order of the Texas Water Rights Commission).

science, but the Director of Science will be fired for saying so. Opp'n at 6. The undisputed facts remain that the Agency and its Director of Science for the Curriculum Division play a substantive role in the science curriculum. The Agency's "neutrality" policy unconstitutionally affects that curriculum.

II. The "Neutrality" Policy Fails The *Lemon* "Purpose or Effect" Test

Director Comer's motion explains that the *Lemon* test governs Establishment Clause cases, and that the "neutrality" policy fails the second prong – "the purpose or effect of advancing religion" test of *Lemon.* Pl.'s Mem. at 8-10. Defendant's argument (Opp'n at 10) that Director Comer has failed to show "an overtly religious motive or intent on the part of the author of the policy" overlooks that Comer has met the second prong of *Lemon.*

Comer satisfies the "purpose or effect" test because creationism is religion, not science. The "neutrality" policy nevertheless treats creationism as science. Because creationism "is not science, the conclusion is inescapable that the only real effect of [introducing creationism in the classroom] is the advancement of religion." *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 764 (M.D. Pa. 2005) (citing *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1272 (E.D. Ark. 1982)). Similarly, the only real effect of the Agency's maintaining "neutrality" on creationism as the Agency "oversees development of the statewide curriculum" and provides "leadership, guidance and resources" to public schools is to impermissibly advance a "religious doctrine" [creationism] using "the symbolic and financial support of government." *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987); *see* Pl.'s Mem. at 11-12.

The conclusion is "inescapable" that the "only real effect" of teaching creationism is "the advancement of religion" because religion has always motivated critics of evolution to promote creationism. *See Kitzmiller*, 400 F. Supp. 2d at 746 (courts are mindful of "the broader context of historical and ongoing religiously driven attempts to advance creationism while denigrating

evolution"). Over the course of the past eight decades, "there has been a lengthy debate between advocates of evolution and proponents of religious theories of origin specifically concerning whether evolution should be taught as a fact or as a theory . . . ." *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1307 (N.D. Ga. 2005), *vacated and remanded on other grounds*, 449 F.3d 1320 (11th Cir. 2006). For example, "[t]he State of Arkansas, like a number of states whose citizens have relatively homogeneous religious beliefs, has a long history of official opposition to evolution which is motivated by adherence to Fundamentalist beliefs in the inerrancy of the Book of Genesis." *McLean*, 529 F. Supp. at 1263.

This phenomenon is not limited to any particular state or region: "Since at least the 1920s, courts throughout the Nation have been struggling to determine the constitutional limitations that should be placed on public school curriculum concerning the origin of the human species and to delineate clearly the line that separates church and state." *Selman*, 390 F. Supp. 2d at 1288. Indeed, the Supreme Court recognizes the "historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution." *Aguillard*, 482 U.S. at 591.

This religiously-motivated opposition is not a thing of the past. *See Kitzmiller*, 400 F. Supp. 2d at 746 (noting the "ongoing religiously driven attempts to advance creationism while denigrating evolution."). Consequently, citizens are "keenly aware" of the motivations behind any policy promoting creationism or demoting evolution, and naturally perceive that any governmental body enacting such a policy "ha[s] sided with the proponents of religious theories of origin in violation of the Establishment Clause." *Selman*, 390 F. Supp. 2d at 1307.

In adopting a "neutrality" policy that treats creationism as science and by firing Director Comer for violating that policy, Defendant "appears to have sided with proponents of religious theories of origin in violation of the Establishment Clause." *Id.* For the same reason, Defendant's

policy has the purpose or effect of advancing a religious belief. As such, it violates the Establishment Clause.

Defendant suggests that the Agency's "neutrality" policy is justified by a secular purpose – to stay away from matters on which the Agency has no statutory authority. Opp'n at 14. But the Agency's substantive involvement in curriculum is established. *Supra* at 2-4. Elsewhere, Defendant has tried to justify the "neutrality" policy based on the importance of Agency employees not discussing Board matters that are "under deliberation" (Defendant Motion for Summary Judgment at 4), but that would not explain firing Director Comer for forwarding ("FYI") an email to science teachers and educators announcing a lecture.[3]

III. DEFENDANT MISSTATES THE CONSTITUTIONAL REQUIREMENT OF NEUTRALITY

"The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968). In *Epperson*, the Court overturned a law that prohibited teaching evolution in public schools because the prohibition was intended to advance the religious belief that "the Book of Genesis must be the exclusive source of doctrine as to the origin of man." *Id.* at 107. Similarly, the Fifth Circuit held that an oral disclaimer regarding the theory of evolution was "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) (*per curiam*) (denying defendant-appellants' motion for rehearing en banc). In these cases, neutrality

[3] According to the job description attached to the Martinez affidavit submitted by Defendant, another of Director Comer's "Specific Essential Duties" is "Maintains responsibility for bill analyses on proposed legislation; coordinates implementation of legislation related to science, and responds to legislative requests for program information and data[.]" This duty runs counter to one rationale previously suggested by Defendant for the "neutrality" policy – that Agency staff should not "communicate with anyone outside the Agency . . . on a subject that was expected to be debated by the Board in the upcoming TEKS revision process." Defs.' Mot., with Br. For Summ. J. at 7. Such subjects surely find their way into proposed or enacted legislation.

was violated because the governmental policy advanced a particular religious belief.[4] Laws prohibiting the teaching of evolution or requiring disclaimers regarding evolution violate the Establishment Clause because they promote a particular religious belief (creationism), and thus are not neutral as between one religion and another, or between religion and non-religion. *See Epperson,* 393 U.S. at 107; *Freiler*, 201 F.3d at 603.

Defendant attempts to piggyback on *Epperson* to say that the Agency's "neutrality" policy is also required. But Defendant's "neutrality" policy regarding creationism bears no resemblance to the neutrality required by *Epperson.* The Agency's "neutrality" policy promotes religion by treating creationism as science. Promoting religion is precisely what *Epperson* neutrality is meant to avoid. *Epperson* neutrality prohibits treating creationism as science; the Agency's "neutrality" policy violates that prohibition. In sum, evolution is science, and a state may promote it.[5] Creationism is religion, and a state may not promote it.[6]

Defendant has not cited any case to support the proposition that a state must be neutral on whether creationism is science or whether creationism may be taught in school. To the contrary, the creationism jurisprudence all goes the other way, prohibiting the teaching of creationism and prohibiting any creationist-motivated attempt to impede the teaching of evolution. "Neutrality"

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[4] Defendants' novel theory of "active and passive neutrality" is not found in any of the cases cited by Defendants.

[5] *See, e.g., Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (rejecting plaintiff-high school biology teacher's argument that teaching "evolutionism" in public schools violates the Establishment Clause); *Crowley v. Smithsonian Inst.*, 636 F.2d 738 (D.C. Cir. 1980) (publicly-funded evolution exhibit at the Smithsonian's Museum of Natural History did not violate the Establishment Clause); *Wright v. Houston Indep. Sch. Dist.*, 366 F. Supp. 1208 (S.D. Tex. 1972) (teaching evolution in public schools does not violate the Establishment Clause).

[6] Evolution is not antithetical to religion. Evolution "assumes the existence of life and is directed to an explanation of how life evolved. Evolution does not presuppose the absence of a creator or God...." *McLean*, 529 F. Supp. at 1266. *See also Peloza*, 37 F.3d at 521 (Evolution "define[s] a biological concept: higher life forms evolve from lower ones. The concept has nothing to do with *how* the universe was created; it has nothing to do with whether or not there is a divine Creator (who did or did not create the universe or did or did not plan evolution as part of a divine scheme).").

between creationism and evolution not only is not constitutionally required; it is constitutionally forbidden.

IV. COMER HAS STANDING TO SEEK DECLARATORY AND INJUNCTIVE RELIEF UNDER COUNT ONE

Defendant is challenging Plaintiff's standing only as to Count One, in which Director Comer seeks a declaration that the "neutrality" policy is unconstitutional. Opp'n at 16. Previously, Defendant argued that Comer had not shown a substantial likelihood that she will suffer the same injury in the future. Defs.' Mot. to Dismiss at 21. But Defendant apparently has dropped that argument. Defendant does not contest that Comer is seeking an offer of reinstatement, while acknowledging that under *Larsen* v. *U.S. Navy*, 486 F. Supp. 2d 11 (D.D.C. 2007), *remanded*, 525 F.3d 1 (D.C. Cir. 2008), *reh'g denied en banc* (July 18, 2008), a plaintiff's readiness to apply for reemployment satisfies the standing requirement for declaratory and injunctive relief. *See* Opp'n at 17.

Now Defendant argues (Opp'n at 16) that Comer lacks standing under Count I because the "neutrality policy" does not prevent an Agency employee from exercising a right protected by the Establishment Clause. But the "neutrality" policy does precisely that. That right is to carry out the duties of Director of Science for the Curriculum Division free of a state policy that has the purpose or effect of promoting religion. Plaintiff has shown that the "neutrality" policy unconstitutionally promotes religion. *Supra* at 2-8.

Defendant argues only that Comer lacks standing because she does not allege that she was pressured to conform to a religious belief or practice. Opp'n at 16. But *Venters v. City of Delphi*, 123 F.3d 956, 959 (7th Cir. 1997), in language quoted by Defendant, holds that the Establishment Clause's protection is not so narrow. In addition to prohibiting pressure by the state to participate in religion or subscribe to a particular religious belief, the Establishment Clause prohibits a state

from "taking action that has the purpose or effect of promoting religion or a particular religious faith." Opp'n at 16 (quoting *Venters* at 959).

Defendant's effort to limit Establishment Clause rights in educational settings to only parents, teachers and students is similarly unsupportable. Defendant assumes that the sole Establishment Clause concern in educational settings is the coercion of students to participate in state-sponsored religion. But *Warnock v. Archer*, 380 F.3d 1076 (8th Cir. 2004) – cited by defendant in his Opposition (at 17) – proves otherwise. There, the Eighth Circuit rejected the proposition that the root of the constitutional injury was the possibility of religious coercion. Instead, it identified the cause of the Establishment Clause violation as the government's endorsement of a particular religious message in the prayers offered at the meetings and trainings the plaintiff was forced to attend by virtue of his job as a teacher and part-time school bus driver. *Warnock*, 380 F.3d at 1081. Similarly, Director Comer was fired for supposedly violating the "neutrality" policy that forbade criticism of creationism and thereby unconstitutionally promoted that religious belief.

V. DEFENDANT VIOLATED COMER'S RIGHT TO PROCEDURAL DUE PROCESS

Director Comer's motion establishes that she was entitled to procedural due process, including the right to notice and a hearing, because she was a public employee who was terminated for a "constitutionally impermissible reason." *Megill v. Bd. of Regents*, 541 F.2d 1073, 1078 (5th Cir. 1976); *see* Pl.'s Mem. at 18-20. Defendant does not dispute that Comer was not provided any such notice or hearing. Defendant does not contend that *Megill* has been overruled (it has not), and Defendant cites no case disputing or criticizing *Megill*. To the contrary, courts have cited *Megill* for the proposition that an individual is entitled to procedural due process if the government acts for a "constitutionally impermissible reason." See *Drummond v. Fulton County Dep't of Family and Children's Servs.*, 547 F.2d 835, 854-55 (5th Cir. 1977) (noting that under *Megill*, "an allegation that the basis of

the defendants' action was the impermissible basis of race may be equated with the assertion in *Megill* of 'constitutionally impermissible reasons'" and that therefore the plaintiffs were entitled to a procedural due process hearing); *see also Wells v. Doland*, 711 F.2d 670, 675 (5th Cir. 1983) (relying on *Megill*, but finding that plaintiff failed to cite any constitutionally impermissible reasons for termination.).[7]

Trying to sidestep *Megill*, Defendant mischaracterizes Director Comer's procedural due process claim as a substantive due process claim.[8] Opp'n at 20-21. Defendant's discussion of substantive due process versus procedural due process is both confusing and of no consequence. Defendant's quote from *Augustine v. Doe*, 740 F.2d 322, 326-27 (5th Cir. 1984) is helpful, but Defendant does not go far enough. It is true that a violation of substantive due process is not avoided or cured by any procedural due process, whether it occurs before or after the violation. But Defendant fails to note that, as in *Augustine*, a plaintiff may bring claims for violation of both procedural and substantive due process, depending upon the facts. Comer is suing for violation of procedural due process (Count Three), because she was denied notice and an opportunity to be heard prior to termination, and for violation of the Establishment Clause under 42 U.S.C. § 1983 (Count Two) because she was terminated pursuant to a policy that violates the Establishment Clause.[9]

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[7] *See also Siu v. Johnson*, 748 F.2d 238, 243 (4th Cir. 1984) (citing *Megill* for the proposition that "so far as federal due process is concerned, state could deny tenure for any reason except constitutionally impermissible one"); *Monroe-Lord v. Hytche*, 668 F. Supp. 979, 992 (D.Md. 1987) (relying on *Megill* to set the standard that "the Court must determine whether the decision to deny tenure was based on impermissible reasons," but finding that plaintiff was not denied tenure for constitutionally impermissible reason.).

[8] Defendant mischaracterizes Plaintiff's Count Three as a "First Amendment retaliation claim." Opp'n at 20. Comer repeatedly has made clear that she is not suing under the First Amendment's free speech provision and does not claim that the Agency retaliated against her for exercising a protected right. Rather, Director Comer is suing because she was terminated for violating an unconstitutional policy, entitling her to procedural due process that the Agency failed to provide. Pl.'s Mem. at 22-23.

[9] Defendant comments that "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." That is correct. If this Court orders that Comer be reinstated because she was terminated for violating an unconstitutional policy, that would moot her claim for

CONCLUSION

For the foregoing reasons, and for the reasons previously set forth in Plaintiff's Memorandum of Points and Authorities In Support Of Motion For Summary Judgment, Plaintiff Christina Castillo Comer requests that this Court grant Plaintiff's motion for summary judgment, with costs.

Respectfully submitted,

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November 14, 2008

notice and an opportunity to be heard under Count Three. But if Comer does not prevail entirely on Count Two – if the Court finds that the "neutrality" policy was unconstitutional but, for whatever reason, does not reinstate her -- the Court could order that she is entitled to notice and a hearing under Count Three.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2008, I served the foregoing PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT via email and the Court's electronic system to Defendants' counsel, as follows:

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/s/
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