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

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**CHRISTINA CASTILLO COMER,** )

Plaintiff, )

v. )

**ROBERT SCOTT, Commissioner, et al,** )

Defendants. )

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**CA No. 1:08CV00511-LY**

**PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

**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.<sup>1</sup> 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 (5<sup>th</sup> Cir. 1999)(citing *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)), *reh’g denied en banc*, 201 F.3d 602 (5<sup>th</sup> 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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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> 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

