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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

CHRISTINA CASTILLO COMER )

VS. )

ROBERT SCOTT )  
TEXAS EDUCATION AGENCY )

AU-08-CV-00511 LY

AUSTIN, TEXAS  
DECEMBER 17, 2008

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TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE LEE YAEKEL  
UNITED STATES DISTRICT JUDGE

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Proceedings reported by stenotype, transcript produced by Julie  
A. Goodwin, CSR, RPR.

A P P E A R A N C E S

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1 (DECEMBER 17, 2008, 10:26 A.M., OPEN COURT.)

2 THE COURT: Please be seated. Good morning, ladies  
3 and gentlemen. We are here today for arguments on the pending  
4 motions in *Comer versus Scott and the Texas Education Agency*.

5 Can we have announcements by the lawyers, please.

6 MR. MISHKIN: Good morning, Your Honor. Douglas  
7 Mishkin for the plaintiff Christina Comer, and with me at  
8 counsel table is my associate Pamela Richardson.

9 MR. TODD: James Todd for the defendant.

10 THE COURT: Very good.

11 We have motions from both parties, and I have  
12 allocated 30 minutes to the side for total argument.

13 Have y'all had any discussions between yourselves  
14 as to how you might want to divide that up or how you might  
15 want to proceed?

16 Well, how do you want to divide it up and how do  
17 you want to proceed?

18 MR. MISHKIN: I'm happy to proceed as the plaintiff  
19 and begin with the argument on our motion for summary judgment.

20 THE COURT: All right. And I will allow both of you,  
21 if you want to retain any of your time to respond to the other  
22 one, you can. You'll have 30 minutes total to decide.

23 So with that, we'll proceed with the plaintiff's  
24 argument, Mr. Mishkin.

25 MR. MISHKIN: Thank you, Your Honor. May it please

1 the Court. First, I want to express our appreciation for the  
2 privilege of appearing before you *pro hac*, and I particularly  
3 appreciate Mr. Todd's consent when we filed that motion.

4 Subject to Your Honor's questions on --

5 THE COURT: Well, we charged you for it, and the money  
6 went into our nonbudgeted funds account that we use to have  
7 parties with lawyers, so maybe you can come back.

8 MR. MISHKIN: Happy to join you.

9 I'd like to reserve ten of my 30 minutes for  
10 rebuttal, and with the 20 minutes I'll speak briefly about some  
11 key points of law and undisputed facts and then address some of  
12 the, what I think may be the key points of the agency's  
13 opposition.

14 The issue in this case we say boils down to this.  
15 Can the Texas Education Agency require so-called neutrality on  
16 whether creationism may be taught as science, despite the fact  
17 that the Supreme Court has ruled that teaching creationism as  
18 science violates the establishment clause because creationism  
19 is a religious belief?

20 THE COURT: Now, why is that the issue here? Why is  
21 not the issue simply the question of whether Ms. Comer was an  
22 employee at will and whether the State could just summarily  
23 dismiss her for any reason it so desired?

24 MR. MISHKIN: Even an employee at will, Your Honor,  
25 cannot be dismissed by the State for a reason which violates

1 the Constitution, and that's central to this case. The *Rutan*  
2 case makes reference to that, that even a State employee who  
3 could be fired with or without cause, with or without notice,  
4 the classic definition of an at-will employee, even such an  
5 employee cannot be fired for a reason that violates the  
6 Constitution.

7           In this case, Ms. Comer was fired because she  
8 supposedly violated this so-called neutrality policy. That  
9 policy is unconstitutional. That makes her termination  
10 unconstitutional.

11           THE COURT: Well, that seems like it has a good ring  
12 to it, but is that not a bit of a stretch to say there was a  
13 policy out there that -- I presume your allegations are that  
14 it's facially unconstitutional?

15           MR. MISHKIN: Yes.

16           THE COURT: She sends an e-mail that alerts the  
17 recipients of that e-mail to the fact that there's going to be  
18 a lecture on something that touches on that. She is fired for  
19 sending the e-mail, therefore, because the original policy was  
20 unconstitutional. Therefore, her firing is unconstitutional.

21           MR. MISHKIN: That's correct. Even as an at-will  
22 employee, she cannot be fired for a reason that's  
23 unconstitutional.

24           THE COURT: All right. You may proceed.

25           MR. MISHKIN: So we believe the issue is, as I stated,

1 and the answer is no, that the agency cannot require neutrality  
2 on whether creationism may be taught because that policy in  
3 fact is not neutral. It promotes the religious belief of  
4 creationism and requires the director of science and other  
5 agency employees to do their job with, in effect, one hand tied  
6 behind their back, and that hand is tied behind their back out  
7 of deference to a religious belief.

8 I'd like to set the table by making clear what's  
9 not disputed in this case. Very simply, creationism is not  
10 science. It is a religious belief. The defendant doesn't  
11 disagree with either of those statements. The Supreme Court  
12 has said both of those things. The *Aguillard* court said that  
13 creationism may not be taught as science in public schools  
14 because doing so, quote, seeks to employ the symbolic and  
15 financial support of the Government to achieve a religious  
16 purpose. That violates the establishment clause.

17 Then the point from *Epperson*, the case that struck  
18 down the statute prohibiting the teaching of evolution,  
19 *Epperson* makes a point that is central to this case. The First  
20 Amendment does not permit the State to require that teaching  
21 and learning must be tailored to the principles or prohibitions  
22 of any religious sect or dogma. That's the  
23 hand-behind-the-back problem.

24 It's a fact that the agency did fire its director  
25 of science because she forwarded an e-mail announcing a lecture

1 by someone who opposes teaching creationism as science. It's a  
2 fact that the agency did this because teaching creationism in  
3 public education is, in the agency's own words, a subject on  
4 which the agency must remain neutral. Those are the agency's  
5 words. Those words are in the termination memo that they gave  
6 to Ms. Comer.

7           Those points of law and those undisputed facts lead  
8 to one conclusion: That the policy of so-called neutrality is  
9 unconstitutional. Not only is the agency wrong in saying that  
10 it must remain neutral, under *Aguillard* and *Epperson*, it must  
11 not remain neutral.

12           And for that reason, we seek summary judgment under  
13 Count One for a declaration that the policy is unconstitutional  
14 as violating the establishment clause, and under Count Two  
15 because her firing under that unconstitutional policy also  
16 violates the establishment clause.

17           Let me note, Judge, that with judgment in  
18 plaintiff's favor under Count Two, Count Three, the due process  
19 claim, would become moot.

20           THE COURT: And what specific relief do you want if  
21 the Court were to agree with you?

22           MR. MISHKIN: A declaration that the neutrality policy  
23 is unconstitutional; an injunction prohibiting further use of  
24 that policy in any way, shape, or form; and an order of an  
25 offer of reinstatement for the plaintiff into the job of

1 director of science for the curriculum division. That's the  
2 job from which she was fired.

3 THE COURT: Go ahead.

4 MR. MISHKIN: So I'd like to address the central point  
5 here, which is the agency in effect asks, how can being neutral  
6 violate the establishment clause? And it is because this is  
7 not neutrality at all. The policy treats a religious belief,  
8 creationism, as if it were science. And the agency under that  
9 policy requires employees who aid in teaching and learning to,  
10 quote, tailor their work to the preferences or prohibitions of  
11 religious belief. That's the *Epperson* hand-behind-the-back  
12 problem.

13 Ms. Comer's job as director of science and indeed  
14 the job of the agency requires that creationism not be treated  
15 as science. In the agency's own words, it says that it  
16 provides leadership, guidance, and resources to help schools  
17 meet the educational needs of its students. It must do that  
18 without allowing the impression that it believes creationism is  
19 science or thinks that it might be science because as a matter  
20 of science as well as a matter of law, creationism is not  
21 science.

22 But that's only half of the problem. It's not only  
23 that creationism is not science. The problem is what  
24 creationism is, which is a religious belief. And that's why  
25 the *Aguillard* court said that teaching creationism was teaching

1 that was tailored to the principles of a particular religious  
2 sect, and that's the problem under the establishment clause.

3           We've tried to boil it down in our briefs to some  
4 concrete scenarios. So the scenario is that Ms. Comer, in the  
5 process of doing her job explaining law regarding the science  
6 curriculum, those are the words of the agency, and helping the  
7 agency fulfill its mission to provide leadership and guidance,  
8 gets a phone call. It could be a phone call from a teacher or  
9 from a member of the Board of Education or a legislator, all of  
10 whom would have had occasion to deal with Ms. Comer in her  
11 capacity as the director of science. So one of those people  
12 calls and asks the question, is creationism science?

13           What must the director of science respond? She  
14 must respond, the answer is no. So says the science community.

15           And as Exhibit P to our complaint, we attached a  
16 letter of December 10th, 2007, from 121 Ph.D.-holding  
17 professors of biology at various Texas universities, and they  
18 said in their letter, quote, It's inappropriate to expect the  
19 agency's director of science curriculum to, quote, remain  
20 neutral on this subject any more than astronomy teachers should  
21 remain neutral about whether the Earth goes around the sun.

22           So the answer to the question, is creationism  
23 science, must be no. That's the scientific answer, and that's  
24 the answer under *Aguillard* and *Epperson* as well.

25           Now, in contrast, what does the agency say that the

1 director should say? According to the agency, the director of  
2 science is supposed to respond to the question, is creationism  
3 science, by saying creationism is not in the curriculum.

4           What's the problem with that response? First  
5 problem is it's nonresponsive. There are a lot of things that  
6 are not in the curriculum.

7           THE COURT: But why can't the agency instruct an  
8 employee to be nonresponsive? Just because she has this job,  
9 how does it then leap into this constitutional right of hers to  
10 be candid as opposed to doing what the agency directs her to  
11 do?

12           MR. MISHKIN: I wouldn't frame it, Your Honor, as a  
13 constitutional right to be candid. What it is is a right to be  
14 able to do her job without restriction that violates the  
15 establishment clause. So she has an obligation to do her job,  
16 and the State may not tie one hand behind her back by saying,  
17 If this question happens to come up, you can't answer it  
18 because your question -- your answer may offend people of a  
19 certain religious belief. That's the problem.

20           THE COURT: And what is your best case that says the  
21 State can't instruct her to so do that?

22           MR. MISHKIN: Well, the *Epperson* case states that  
23 theme --

24           THE COURT: All right.

25           MR. MISHKIN: -- which is -- which is that you

1 can't -- that the First Amendment doesn't permit the State to  
2 require that teaching and learning must be tailored to the  
3 principles or prohibitions of any religious sect or dogma.

4           So the State could not tell a teacher, You may not  
5 respond by saying creationism -- they can't tell the teacher,  
6 You must not say creationism is not science. The agency  
7 concedes that, by the way, and says, Well, our neutrality  
8 policy has nothing to do with the teacher. It's just about the  
9 agency employee.

10           Well, for the same reason that the State cannot  
11 tell a teacher to say, Put your hand behind your back when  
12 you're answering whether creationism is science, they cannot  
13 tell an agency employee whose task is to provide leadership and  
14 guidance to that teacher.

15           The -- and the constitutional problem with it is  
16 it's pulling your punch. It's flinching. It's putting your  
17 hand behind your back for the purpose of not offending  
18 someone's religious belief. And when learning and teaching are  
19 being tailored to the principles or prohibitions of a religious  
20 sect or dogma, that's what violates the establishment clause,  
21 so says *Epperson*.

22           THE COURT: Well, I can see a difference between  
23 someone in a managerial position and someone who is a teacher.  
24 Why can't the State policy that says, We're not going to offend  
25 anybody's belief; therefore, people in managerial positions are

1 to take a neutral position, and why is that not different than  
2 someone who is actually teaching?

3 MR. MISHKIN: Because the State cannot do indirectly  
4 what the State cannot do directly, Your Honor. They could not  
5 say directly to the teacher, You may not say this in class  
6 because you'll offend someone's religious belief. And they  
7 can't accomplish that indirectly by saying to someone like the  
8 director of science, who is tasked with providing guidance to  
9 classroom teachers, among others, You may not say that to the  
10 teacher. That would be accomplishing indirectly what the State  
11 could not do directly.

12 The answer "creationism is not in the curriculum"  
13 is not only nonresponsive, but the question requires a response  
14 because distinguishing what is science from what's not science  
15 is at the essence of science education, and because we need our  
16 teachers and legislators and board members who have such  
17 questions, particularly when these are sensitive subjects and  
18 receiving attention in the press. When students and parents  
19 and the public are wondering about this, the answer must be  
20 truthful and accurate and not tailored simply to avoid  
21 offending people with a particular religious belief.

22 Requiring an employee to say -- or I'm sorry --  
23 requiring an employee not to say creationism is not science is  
24 requiring the State employee to give a response tailored to the  
25 principles or prohibitions of a religious belief.

1           Excuse me.

2           At the risk of repeating myself on the same point,  
3 let me say the director of science taints the science education  
4 environment when she does not respond truthfully and accurately  
5 to the question, is creationism science? That -- the lack of a  
6 truthful response taints the science education environment, and  
7 the taint is the taint of a religious belief.

8           That's why I say it's not simply that creationism  
9 is not science. That's half the problem. The other half is  
10 what it is, and what it is is a religious belief that cannot be  
11 used to tailor learning or teaching conducted by the State.

12           THE COURT: Well, the State could solve this problem  
13 by doing away with the position altogether.

14           MR. MISHKIN: If the State did away with the position  
15 under a set of facts which showed that it was motivated by a  
16 desire to tailor its program to avoid the religious protests of  
17 a particular religious belief, I think that would be a  
18 different kind of establishment clause problem. In the same  
19 way --

20           THE COURT: Well, I think that's getting way out there  
21 to say if the State establishes a position and then runs the  
22 position in such a manner that it appears to be in violation of  
23 the establishment clause, and the State's hand is called on it,  
24 the State then just couldn't do away with the position for any  
25 reason.

1 MR. MISHKIN: Well, the State could do away with the  
2 Texas Education Agency, theoretically could do away with the  
3 agency or any sub-part of it.

4 As a matter of fact, when it gets down to being  
5 able to show that what was done was done to tailor the State's  
6 program of education in a way that avoids offending a  
7 particular religious belief, I believe that would give rise to  
8 an establishment clause problem, perhaps a more attenuated  
9 problem of proof in that situation than we have here because  
10 here, we have it out of the State's own words as to what they  
11 did and why they did it.

12 THE COURT: Well, I thought as a general rule, taking  
13 everything about religion out of the classroom, including all  
14 of the litigation that's come about over prayers in the  
15 classrooms, that the basis for all of that and the bottom line  
16 was to not offend anybody's religious beliefs. So therefore,  
17 you didn't have anything about any religion.

18 MR. MISHKIN: Well, government neutrality with respect  
19 to religion is appropriate when the -- when the effect of the  
20 neutrality is not to be favoring one religious belief as to  
21 another or even religion as opposed to nonreligion. That is  
22 legitimate government neutrality. That's at the core of  
23 establishment clause jurisprudence.

24 Here, this -- the term neutrality is being in  
25 effect turned on its head to promote a religious belief by

1 deferring to it.

2           With the legal points and the core facts not in  
3 dispute, I'd like to take a few minutes to address the agency's  
4 opposition to our motion for summary judgment which I believe  
5 in effect boils down largely to two points.

6           First, the agency says the question of whether  
7 creationism should be taught in school is a question for the  
8 Board of Education to decide, not the agency. And their second  
9 point is the agency has nothing to do with the curriculum,  
10 nothing of substance to do with the curriculum.

11           Both of those arguments are wrong. Neither serves  
12 to defeat summary judgment, and I'd like to elaborate a bit.

13           Point number one, the agency says whether  
14 creationism should be taught in school is a matter for the  
15 board to decide. They say this in several places in their  
16 motion to dismiss. The agency must not take positions on  
17 contested curriculum issues that the board will be called upon  
18 to resolve. Elsewhere, they say the only message with the  
19 neutrality policy is that the agency doesn't take sides on  
20 matters that are the province of the State Board of Education.

21           The agency is fundamentally wrong with both of  
22 those statements. Whether creationism is science is not  
23 something that the Board of Education is called upon to  
24 resolve. That is not a matter within the province of the  
25 board. That question has been answered definitively by the

1 Supreme Court. The Supreme Court said so in *Aguillard*. The  
2 Board of Education cannot decide to teach creationism as  
3 science and it cannot decide that creationism is science.

4 Now, the agency makes the point about matters that  
5 wind up on the board's agenda. If the question of whether to  
6 teach creationism as science is on the board's agenda, it's  
7 there because creationists are pushing it. And again, the  
8 State cannot constrain the director of science from doing her  
9 job because people with a religious belief would be offended by  
10 what she does.

11 The second point in the agency's opposition, they  
12 say, well, the agency really has nothing to do with curriculum.  
13 They say it's not being taught. Creationism is not being  
14 taught. Classroom teachers are not subject to this constraint  
15 of neutrality so that a teacher can tell a student creationism  
16 is not science, but the director of science for the curriculum  
17 division cannot say that.

18 Why does the agency -- why is the agency employee  
19 prohibited from saying what the teacher is permitted to say?  
20 The agency's answer is because the agency has no substantive  
21 input into the curriculum. According to the agency, it only  
22 oversees the process of developing the curriculum, and in  
23 quotes, setting up meetings, putting board-adopted measures  
24 into proper form.

25 The problem with that argument by the agency in

1 opposing our motion is that's not what the agency has said  
2 before. It's not what the agency says on its website where the  
3 agency does say that it oversees development of the statewide  
4 curriculum, administers the statewide assessment program,  
5 monitors for compliance with federal guidelines, and provides  
6 leadership, guidance and --

7 THE COURT: I just want to let you know you've used  
8 20 minutes. You can continue to go as far as you want to, but  
9 I wanted you -- I wanted to give you that.

10 MR. MISHKIN: I appreciate that, Your Honor.

11 Let me -- let me take a couple of more minutes just  
12 to finish on this point because this is key when they try to  
13 say what they do or don't do with the curriculum. They've been  
14 very clear, not only on their website; in their termination  
15 memo, they said it was Ms. Comer's job to explain law.

16 They said -- in responding to our complaint in this  
17 case, they admitted that Comer directed the K through 12  
18 science program, including curricular issues. It's not what  
19 Monica Martinez said in her affidavit that they submitted,  
20 Monica Martinez being Comer's direct supervisor. It's even  
21 contrary to what's clearly suggested by Ms. Comer's title, the  
22 director of science for the curriculum division.

23 The agency's opposition turns her and the education  
24 agency into phantoms, as if the director of science for the  
25 curriculum division has nothing to do with science or the

1 curriculum and as if the Texas Education Agency has nothing to  
2 do with education.

3           They say the board makes the final decision about  
4 curriculum. We don't dispute that, but that doesn't mean the  
5 board has no -- that the agency has no substantive role to play  
6 in the process. They clearly do.

7           With that, Your Honor, I'll reserve the remainder  
8 of my time.

9           THE COURT: All right. Very good.

10          MR. MISHKIN: Thank you.

11          MR. TODD: May it please the Court.

12          THE COURT: How would you like to divide your time, if  
13 at all, Mr. Todd?

14          MR. TODD: I'm going to try to say whatever I have to  
15 say within this 30 minutes here. I don't think I'll use  
16 30 minutes.

17          THE COURT: All right.

18          MR. TODD: So if I have some time left over, and  
19 there's something that they say in the last six minutes that  
20 they have reserved that I want to say something about -- but  
21 I'm going to try to resist that temptation --

22          THE COURT: All right.

23          MR. TODD: -- and just -- obviously, the -- this case  
24 comes down to an attack on the practice of the Texas Education  
25 Agency of not allowing its employees, particularly in the

1 curriculum field, to give the appearance that the Texas  
2 Education Agency is taking a position on a substantive issue  
3 that the State Board of Education must decide. This is a  
4 legitimate secular purpose for that policy, quote-unquote.

5           The first -- and I'd like to discuss that.

6           The first thing to realize, it's well established  
7 that when a TEA employee is speaking as an employee, that's the  
8 agency speaking. It's not Christine Comer as a private citizen  
9 talking to friends of hers. In this case, we're talking about  
10 Christine Comer sending a message as the director of science  
11 curriculum on a TEA computer to a list of addressees that she  
12 only has access to because of her position. So it's the Texas  
13 Education Agency speaking. Therefore, it's well settled that  
14 the agency can put restrictions on what people say as employees  
15 that they couldn't put on what someone says as a citizen.

16           THE COURT: And what's your strongest case there,  
17 *Garcetti*?

18           MR. TODD: Yes, Your Honor.

19           THE COURT: And *Garcetti* didn't address, I don't  
20 believe, religious restraint.

21           MR. TODD: No, it didn't.

22           THE COURT: All right.

23           MR. TODD: It talked about what are the boundaries of  
24 First Amendment protection for State employees as opposed to  
25 private citizens.

1 I don't think it's really in dispute that when  
2 Ms. Comer sent the e-mail message that's at issue in this case,  
3 she was doing so as a TEA official, and that legally, that was  
4 the Texas Education Agency speaking.

5 And the way to illustrate that is I would ask you  
6 to imagine the converse. Suppose what she had done is with the  
7 heading "For Your Information" had forwarded to public school  
8 science teachers an announcement for a presentation by someone  
9 who was going to speak on the subject of why creationism is a  
10 science and why it ought to be taught in the public schools.  
11 They would be right back here in this court attacking TEA for  
12 letting her do that because they would say because she's  
13 speaking for the agency, this in effect is endorsing the  
14 message.

15 An objective observer, and that's the criteria for  
16 the second prong of the lemon test is what would an objective  
17 observer think, is entitled to ask, when the director of  
18 science curriculum makes public schoolteachers aware of a  
19 presentation, what other reason would she do that except for  
20 the fact that TEA wants people to hear that message?

21 So when she forwarded that message, she is saying  
22 the Texas Education Agency wants you to go hear this particular  
23 speaker and approves of this message.

24 TEA has a very practical secular purpose in having  
25 its employees stay out of that sort of discussion, and it's

1 undisputed in this case. This is not limited to creationism  
2 versus evolution. There is no evidence that this approach was  
3 adopted in order to avoid offending people with religious  
4 sensibilities, although I want to be sure and remember to come  
5 back. The Fifth Circuit said even if it is, that's okay. But  
6 in this case --

7 THE COURT: So this is not going to be *Scopes 2*. Is  
8 that right?

9 MR. TODD: That's right. This is not -- there is no  
10 evidence that any part of the purpose of this was to avoid  
11 people -- offending people with religious views because this  
12 prohibition applies regardless of the issue.

13 And the curriculum -- if it's a curriculum matter  
14 that's debated before the State Board of Education, and the  
15 State Board of Education is going to have to make a decision on  
16 it, TEA curriculum personnel must not give the appearance that  
17 the agency has a position. They're to illustrate.

18 And it isn't just this one that has constitutional  
19 implications. I'm in front of your colleague Judge Justice  
20 right now on the issue of language remedial education, and that  
21 has constitutional implications in the curriculum issue of  
22 whether it would be better to have total immersion in English,  
23 or to have a pure bilingual program where someone is instructed  
24 only in his native language, or to have what we have, which is  
25 a mixture of bilingual and English as a second language. That

1 has constitutional implications.

2           So it's not whether or not the curriculum issue has  
3 constitutional implications. It's the fact that it's a  
4 contested curriculum issue.

5           Now, why does that matter? It's because of how  
6 Texas uniquely has divided responsibilities between the State  
7 Board and the Texas Education Agency, and it is unique. I --  
8 in looking at laws of other states, it appears that in most  
9 places, the State Board of Education and the state's education  
10 agency are one entity. Texas, going back to the '80s and the  
11 education reform under the Perot committee, chose to split them  
12 up, and the State Board of Education decides what's going to be  
13 in the curriculum.

14           Now, why does it matter what kind of positions it  
15 appears Texas Education Agency takes? Because the State Board  
16 has no staff of its own. And this is in the record undisputed.  
17 It relies on the Texas Education Agency for staffing.

18           So as Mr. Mishkin was repeating from us, they set  
19 up the meetings where the board gets public input on public  
20 opinion, they keep notes in the meetings, keep track of what  
21 the board has decided, and they -- when the board has passed a  
22 measure, they put it in proper rule form.

23           If the Texas Education Agency has taken the  
24 position or appears to have taken a position on an issue that  
25 the board hasn't decided, the suspicion arises -- indeed, the

1 board could very well lack confidence on this -- that that  
2 process could be rigged. You can set up these public input  
3 meetings so that the opinion favored by the agency is the one  
4 that gets favorable presentation. The measures passed by the  
5 board can be rewritten into a rule so that it tilts toward the  
6 position the agency would rather take. It is legitimate for an  
7 agency such as TEA to take the position, we will be above  
8 suspicion, and that means our employees speaking as TEA  
9 employees simply are not going to talk about these issues.

10 Does it mean that there's no avenue for the Texas  
11 Education Agency to make the State Board of Education aware of  
12 some of these issues? Certainly not. There's nothing in this  
13 record that indicates that the commissioner of education or the  
14 general counsel could not advise the State Board of Education  
15 if -- on legal matters. It just means that at Ms. Comer's  
16 level, she is to stick to just telling people -- explaining  
17 what's in the curriculum and not get off onto these other  
18 issues.

19 THE COURT: How do you -- how do you address the  
20 plaintiff's argument that the neutrality policy itself is  
21 violative of the establishment clause, and therefore,  
22 everything flows from that?

23 MR. TODD: Well, it could only violate the  
24 establishment clause if, by their legal argument, it fails the  
25 lemon test.

1           And so the three prongs of lemon are, number one,  
2 is there a legitimate secular purpose to whatever it is that's  
3 in dispute? Number two, regardless of its purpose, does it  
4 objectively convey an endorsement -- a message of endorsing  
5 religion? And third, does it entangle the State in religious  
6 affairs?

7           They haven't even made an attempt on the third  
8 prong, so we can forget about that. But parts one and two,  
9 we -- the courts have said, both the Supreme Court and the  
10 Fifth Circuit in cases I've cited, you defer -- on determining  
11 whether it has a legitimate secular purpose, you -- we defer to  
12 what the State has articulated unless it can be shown to be a  
13 sham.

14           The explanation that we've provided is a rational  
15 secular purpose, and that is to keep the agency above suspicion  
16 so that the State Board can have confidence in the TEA  
17 staffing. It's not endorsing religion. It's just saying -- or  
18 the dispute on what alternatives ought to be to the current  
19 bilingual education curriculum or any other curriculum dispute,  
20 even if it has constitutional overtones, it just says you stay  
21 out of those debate. That's all it's saying. Just stay out of  
22 it. Somebody else -- if there's somebody within the agency who  
23 legally ought to take the position, it isn't you, Ms. Comer.

24           The second thing is does it objectively convey a  
25 message? And as I've explained, silence gives consent only if

1 the speaker is expected to take a position.

2           If a teacher is silent about whether evolution or  
3 creation accounts for the origin of life, a science -- a  
4 biology teacher in public school, that does give -- that does  
5 implicitly treat them as equals because a teacher is expected  
6 to take a position.

7           The agency has said and has made it clear whatever  
8 someone might read -- some outsider might read the word  
9 director of science curriculum or oversee the curriculum  
10 process to mean, it's been made very clear to Ms. Comer this  
11 agency doesn't include within that you taking a position on an  
12 issue that the State Board has to decide.

13           Now, does that undermine her ability to do her job  
14 to the fullest? Well, whether it does or doesn't, that's not a  
15 federal court issue. The question is, is the agency  
16 constitutionally required to authorize Ms. Comer to take a  
17 position and to explain to people why constitutionally,  
18 creationism is not a science?

19           And let me as an aside here just point out an  
20 inordinate amount of time in the plaintiff's case, with space  
21 in their brief and time in Mr. Mishkin's remarks, are devoted  
22 to a hypothetical that, so far as this record shows, has never  
23 arisen.

24           The plaintiffs have had two opportunities in this  
25 briefing schedule that we agreed to in which they could have

1 presented an affidavit from Ms. Comer saying either all the  
2 time someone calls and asks me, is creationism a science, or  
3 says, I can remember specific occasions when someone has asked  
4 me, is creationism a science. But there's nothing. We  
5 have -- there is no reason to believe she's ever been asked  
6 that question. So all this speculation about what should she  
7 answer if it's asked is really side -- is beside the point.

8           What she was disciplined for was -- and that's  
9 after having been undisputedly previously warned. On a  
10 previous occasion, she helped one -- it's undisputed. It  
11 was -- it was in her termination memo. She helped one member  
12 of the State Board of Education advocate his position on what  
13 ought to be a measure for the board to adopt. And she was  
14 warned, you stay out of that. The board decides, and we stay  
15 out of that.

16           The -- so given the reality of how the  
17 responsibilities divide up between TEA and the State Board on  
18 all these curriculum issues, not just science, not just the  
19 teaching of science, an objectively reasonable observer could  
20 not conclude that the agency takes the position supporting  
21 creationism.

22           Now, the plaintiff has made the assertion, well,  
23 this was done so as not to offend people with religious  
24 beliefs. There's no evidence that it was, and there's plenty  
25 of good explanation for why it was done.

1           But the *Freiler* case, F-R-E-I-L-E-R, en banc Fifth  
2 Circuit, when they were -- or actually, it was the panel  
3 decision that was affirmed by the en banc -- when they were  
4 invalidating a local school board's measure that did tend to  
5 favor creationism or disfavor evolution, they specifically  
6 said, the mere fact that this policy was adopted so as not to  
7 offend people with religious beliefs, that's not an  
8 illegitimate purpose. And if that's all we were talking about,  
9 then that would pass the lemon test. They went on to say there  
10 are other things wrong with that policy.

11           So even if it were shown that TEA said, okay, we  
12 don't want our officials saying anything one way or another  
13 about creationism or evolution because those are such highly  
14 charged words. It's so controversial. We're going to get in a  
15 lot of trouble. We just don't -- just stay out of it. Don't  
16 endorse it, but just stay out of it. Tell them it's somebody  
17 else's job.

18           Under that scenario, saying when someone asks, is  
19 creationism a science, that's not -- despite the title director  
20 of science curriculum, it's not her job to tell them whether it  
21 is or it isn't. It's her job to give them guidance on what the  
22 curriculum is because that's what public school people need to  
23 know. They need to know, what does state law require you to  
24 teach, and you stay within that.

25           Now, if there are some -- if you look at the

1 curriculum -- and I've -- I have reproduced in one of my briefs  
2 verbatim what the current curriculum says about the teaching of  
3 the origins of life, and it doesn't say anything about  
4 creationism.

5           If there is some term in that, she's free to tell  
6 them, this is how that's used. She's free to tell them what  
7 the Texas Education Code says about what's to be taught and  
8 what TEA rule says. She's not -- it's not illegitimate for TEA  
9 to say she doesn't get to be a constitutional scholar. If  
10 someone has a question that raises constitutional issues, one  
11 of the policy guidance things she receives says, we've got a  
12 general counsel's office. Consult them.

13           Well, I think that -- I think beyond this, the rest  
14 of what I've had to say I think is well covered in the briefs.

15           I agree with Mr. Mishkin on one thing. Were there  
16 a ruling in his favor on the establishment clause claim, there  
17 would be no reason to go to the due process claim. That part I  
18 agree with.

19           Now, the implication is, what if you rule against  
20 them on establishment clause? Do they still have a due process  
21 claim?

22           Well, as it's turned down -- turned out, due to  
23 what I think is a misreading on their part of the *McGill versus*  
24 *Board of Regents* decision from way back, the old Fifth Circuit  
25 when it used to include Florida, their due process case is that

1 if you're -- whenever you're going to -- you propose to  
2 violate -- terminate or take adverse action against a State  
3 employee on grounds that are unconstitutional, you owe them a  
4 hearing.

5 Well, if you rule -- if the ruling on Count One is  
6 this is not unconstitutional, that would also moot the due  
7 process claim. I mean, the due process is just superfluous,  
8 and one wonders what kind of notice would you send someone.  
9 Take note, we propose to terminate you in violation of your  
10 First Amendment rights. You have a right to a hearing.

11 It's undisputed that she -- I will -- I will say  
12 this just in case there's any remaining question on this. In  
13 *McGill* and all the cases that have relied on *McGill*, the duty  
14 to provide a hearing was triggered when the employee himself,  
15 or in the case of the, I think, *Duncan* case -- *Drummond* case  
16 that they cited in their last brief, that with parents whose  
17 children were removed from the home, it's when the affected  
18 person made the assertion, this violates my First Amendment  
19 rights. At that point, a duty to provide a hearing arises.

20 Ms. Comer never made that assertion. When they  
21 gave her the choice of -- told her that she was going to --  
22 they were proposing her termination, but they'd give her a  
23 chance if she wanted to to resign, she did not at that point  
24 say, I'm -- my constitutional rights are being violated. They  
25 say that's because we didn't tell her she had a right to a

1 hearing. She's a ten-year supervisory employee of TEA.  
2 There's nothing in the Constitution that says constitutionally,  
3 we have to tell her.

4 Well, to summarize, the policy at issue, which is a  
5 matter of prudence on the part of the agency, has a legitimate  
6 secular purpose, based on the division of responsibility  
7 between TEA and the State Board of Education. There is --  
8 someone can say, well, TEA is being too strict about this, but  
9 that's not a constitutional matter.

10 It could not -- secondly, under Lemon, it could not  
11 reasonably convey to any objective observer who looks at the  
12 facts that this is in any way by TEA an endorsement of  
13 creationism any more than it's an endorsement of some disputed  
14 type of language remediation or any other curriculum issue.  
15 It's just a statement that our employees are not going to take  
16 a position on behalf of TEA. You'll have to go to someone else  
17 to find a position.

18 And there is no suggestion that this has somehow  
19 entangled the State with religion, and so for that reason, it's  
20 constitutional under the establishment clause. The rest of the  
21 plaintiff's case falls when that falls.

22 And I don't know what time I have, but I'm done.

23 THE COURT: You've got some time left.

24 MR. TODD: Okay.

25 THE COURT: Mr. Mishkin.

1           MR. MISHKIN: The agency's position comes back to a  
2 fundamental misconception on a key question. Whether  
3 creationism is science and whether it can be taught in the  
4 schools is not an issue for the board to decide. And  
5 everything that flows from the premise that they can restrict  
6 Ms. Comer or other employees from participating in an issue  
7 where the board is going to decide it, everything that flows  
8 from that premise falls with it. And telling her to stay away  
9 from an issue out of deference to a religious objection --

10           THE COURT: Well, now, Mr. Todd says they did not tell  
11 her to stay away from an issue out of deference to a religious  
12 objection. Mr. Todd says they told her to stay away from all  
13 issues that might come before the board.

14           MR. MISHKIN: And an issue that can legitimately come  
15 before the board is different from this issue which cannot  
16 legitimately come before the board. It's not for the board to  
17 decide whether creationism is science. It's not for the board  
18 to decide whether creationism can be taught in school. If that  
19 issue is before the board, it's because people with the  
20 religious belief of creationism have put it there.

21                     And that puts us into the category of any  
22 restriction upon an agency employee based upon that motivation  
23 is a deference to a religious belief. And that's the *Epperson*  
24 problem of tying a State employee's hand behind her back to do  
25 her job.

1           Mr. Todd made the comment about Ms. Comer has no  
2 constitutional obligation to answer the question, is  
3 creationism science. That's not the point. The point is the  
4 agency has a constitutional obligation not to tie her hand  
5 behind her back from answering that question when the agency is  
6 doing so in order to defer to someone's religious belief or  
7 some prohibition of a religious group. We know this comes from  
8 a religiously based objection whether the agency says it out  
9 loud or not.

10           I want to speak quickly about the lemon test. I  
11 think Mr. Todd may have inadvertently jumbled the various  
12 prongs to the test because whether it has a secular purpose is  
13 the first prong, and whether there is an excessive entanglement  
14 by the State is the third prong. But it's the second prong  
15 that we've proceeded under, namely that this policy has the  
16 purpose or effect of promoting a religious belief. That's what  
17 we've set out in the briefs, and we believe we've shown it by  
18 reference to the cases and the facts that we've cited.

19           Quickly, with respect to *Garcetti*, if I understand  
20 the implication in Your Honor's question, we agree that  
21 *Garcetti* does not overrule or subsume the establishment clause.  
22 *Garcetti* -- which does not apply here, and this is not a free  
23 speech case, and Ms. Comer has not pled it as that. *Garcetti*  
24 doesn't mean the State can take action against an employee  
25 based on a policy that violates the establishment clause.

1           In sum, Your Honor, everything about the neutrality  
2 policy violates the statement in *Epperson* that I began with.  
3 This is about tailoring agency policy to the preferences of a  
4 religious group. And for that reason, it violates the  
5 establishment clause and her termination does as well.

6           THE COURT: Thank you.

7           Mr. Todd, do you want to take a couple of minutes?  
8 You've got a little time.

9           MR. TODD: Yes, Your Honor. Just first of all, as I  
10 understand it, what they're saying is the agency can require  
11 the employee to stay out of only those issues that can  
12 legitimately come before the State Board. But if it's --

13          THE COURT: I believe that's what Mr. Mishkin said.

14          MR. TODD: Right. Okay. My point is this: That  
15 means they're saying the agency must empower each individual  
16 employee to make a judgment about what issues are legitimately  
17 before the board and what issues are not.

18          The safest position any agency can take is say,  
19 that's going to be decided at a higher level. So if the Texas  
20 Education Agency is going to take the position that it's not  
21 legitimate for the State -- its sister agency, the State Board  
22 of Education, to even debate some question, that's something  
23 for the commissioner or the general counsel to say to the  
24 public. It would -- it is not -- they can -- there's nothing  
25 unconstitutional about the agency saying, that's not a call for

1 an individual employee to make. For the employee, it's a --  
2 it's a bright line. If it's an issue before the State Board of  
3 Education, don't give the appearance that TEA is taking a  
4 position on it.

5           Finally, the second prong. Yes, I -- he said I had  
6 gotten them jumbled. The way he articulated them I believe is  
7 the same way I did. The second prong, though, is an objective  
8 test. It's not what -- does somebody happen to interpret this  
9 message as being from the agency. It's what would a reasonably  
10 objective person believe was the message. And on that we rely.

11           Thank you.

12           THE COURT: Very good. Thank you both. The case has  
13 been well argued and well presented. I think with the motions  
14 that I have before me, the case is perhaps capable of  
15 resolution on the motions, although experience has taught me  
16 that often when I get into these things, I have a little bit  
17 greater problem determining that it's as black and white as  
18 either side says and therefore is capable of resolution by  
19 summary judgment.

20           So my first inquiry is going to see if I think this  
21 case is capable of that. It may be once I analyze the summary  
22 judgment proof on both sides in more detail than I have now  
23 because I wanted to hear your argument, then I find I will want  
24 some more evidentiary development on exactly what occurred. I  
25 don't know.



1 UNITED STATES DISTRICT COURT )  
2 WESTERN DISTRICT OF TEXAS )

3

4 I, JULIE A. GOODWIN, Official Court Reporter for  
5 the United States District Court, Western District of Texas, do  
6 hereby certify that the foregoing is a correct transcript from  
7 the record of proceedings in the above matter, to the best of  
8 my ability.

9 I further certify that I am neither counsel for,  
10 related to, nor employed by any of the parties to the action in  
11 which this proceeding was taken, and further that I am not  
12 financially nor otherwise interested in the outcome of the  
13 action.

14 Certified to by me this 23RD day of DECEMBER, 2008.

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