

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

INSTITUTE FOR CREATION RESEARCH §  
GRADUATE SCHOOL §  
An unincorporated educational ministry §  
Unit for the Institute for Creation §  
Research, Inc., a California not-for-profit §  
Corporation §  
*Plaintiff,* §

V. §

CIVIL ACTION NO. 3:09-CV-00693-B

RAYMUND PAREDES, Commissioner §  
of the Texas Higher Education Coordinating §  
Board in his official and individual capacities; §  
LYN BRACEWELL PHILLIPS, §  
in her official and individual capacities; §  
JOE B. HINTON, in his official and individual §  
capacities; §  
ELAINE MENDOZA, in her official and §  
individual capacities; §  
LAURIE BRICKER, in her official and §  
individual capacities; §  
A.W. "WHIT" RITER, III, in his official and §  
individual capacities; §  
BRENDA PEJOVICH, in her official and §  
individual capacities and §  
ROBERT SHEPARD, in his official and §  
individual capacities §  
*Defendants.* §

**DEFENDANTS' RULE 12(B)(3) MOTION TO DISMISS**

TO THE HONORABLE JANE J. BOYLE:

Defendants, Texas Higher Education Coordinating Board Commissioner Raymund Paredes, and Board Members Lyn Bracewell Phillips, Joe B. Hinton, Elaine Mendoza, Laurie Bricker, A.W. "Whit" Riter, III, Brenda Pejovich, and Robert Shepard file this motion to dismiss pursuant to

Federal Rule of Civil Procedure Rule 12(b)(3) asking the Court to dismiss this case for improper venue.

**I.  
INTRODUCTION**

Plaintiff, Institute for Creation Research Graduate School brought this action and another identical action in state district court in Travis County, Texas against Defendants pursuant to 42 U.S.C. § 1983. In both lawsuits, Plaintiff alleges various violations of its constitutional rights. Its claims stem from the Board's denial of its application for a Certificate of Authority to offer graduate degrees in science education in Texas. *Plaintiff's Orig. Complaint* at 16. Because venue is clearly proper in the Western District of Texas, Austin Division and because an identical lawsuit to this one is already pending there, the Court should dismiss Plaintiff's complaint for improper venue.

**II.  
STANDARD**

Federal Rule of Civil Procedure 12(b)(3) permits dismissal of a case for improper venue. The movant "bears the burden of demonstrating that the plaintiff filed the lawsuit in an improper venue." *Premiere Network Servs. Inc., v. Pub. Util. Comm'n of Tex.*, No. 3:04-CV-1555-M, 2005 WL 1421404 (N.D. Tex. June 16, 2005); *Middlebrook v. Anderson*, No. 3:04-CV-2294-D, 2005 WL 350578 (N.D. Tex. Feb. 11, 2005) (citing *Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724-25 (3<sup>rd</sup> Cir. 1982). "[V]enue is proper only in (1) a district where the defendant resides, (2) a district in which a substantial part of the events giving rise to the claim occurred, or (3) a district in which any defendant may be found, if there is no other district in which the action may be brought." *Premiere Network Servs., Inc.*, 2005 WL 1421404, \*5. In determining whether venue is proper, a court looks to the *defendant's conduct*, and to *where that conduct occurred*. *Bigham v. Envirocare of Utah, Inc.*,

123 F.Supp.2d 1046, 1048 (S.D. Tex. 2000). “[T]he fact that a plaintiff residing in a given judicial district *feels the effects* of a defendant’s conduct in that district does not mean that the events or omissions occurred in that district” for purposes of establishing venue. *Premier Network Servs., Inc.*, 2005 WL 1421404, \*5 (citing *Bigham*, 123 F.Supp.2d at 1048).

### III. ARGUMENT AND AUTHORITY

#### A. Venue is Proper in the Western District of Texas.

In the Travis County case, which has been removed to the Western District of Texas, Austin Division, Plaintiff contends that venue is proper there because “‘all or a substantial part of the events or omissions giving rise to [ICRGS’s claims herein] occurred’ in Travis County, and most of the harms caused thereby occurred and/or continue to occur in California and in Dallas County, Texas.” Ex. 1 (*Plaintiff’s Orig. Petition* at 8). The Plaintiff’s position regarding proper venue in the Western District case contradicts its position regarding proper venue in this suit, even though both suits are based on the very same alleged conduct of the Defendants. More specifically, in its original complaint, Plaintiff relies only on the effects of the denial of its application to establish venue in the Northern District of Texas, Dallas Division, *Plaintiff’s Orig. Complaint* at 8, although it later points the Court to the “decision that is now being complained of [that] was formally voted on and announced publicly (by the defendants) on Thursday, April 24, 2008” as the basis for its complaint. *Id.* at 16. Plaintiff conveniently omits in its federal lawsuit that this decision was made and announced at a Board meeting in Austin, Travis County, Texas. Ex. 2 (Paredes Affidavit).

The Court, in *Premier Network Services, Inc.* determined that the defendant had established that venue was improper based on facts very similar to those present in this case. 2005 WL 1421404 \*5. The Texas Public Utility Commission’s (the defendant) proceedings that were the actions about

which the plaintiff complained all took place in the Western District of Texas; the Commission had only one office which was located in Austin, Texas within the Western District; and the Commission had “handed down the decision at issue during an open meeting in Austin.” *Id.* Similarly, in this case, the Board’s offices are located on Anderson Lane in Austin, Texas which is in the Western District of Texas, and where the Board routinely holds its formal meetings. Ex. 2, ¶ 3. The April 24, 2008 meeting during which the Board voted not to grant a Certificate of Authority for the Plaintiff’s proposed program occurred in the Board Room in the Anderson Lane office building. *Id.* It is from this decision, which occurred in the Western District of Texas, that all of Plaintiff’s claims stem.

To establish venue in this Court, Plaintiff ignores the Defendants alleged actions and instead relies on the purported effects of the decision to deny the Certificate of Authority. Plaintiff relies on alleged “ongoing censorship to [its] Free Press rights, namely [its] freedom-of-the-press rights which are now being censored in Dallas County, Texas, because Dallas is where [its] publication facilities are located...through which monthly publication [Institute for Creation Research] advertises its [graduate school]-offered ‘Master of Science’ program.” *Plaintiff’s Complaint* at 8. That Plaintiff cannot advertise a program that it is not permitted to offer in Texas is *an effect* of the Defendants’ decision to deny the Certificate of Authority, which is the event giving rise to Plaintiff’s claim. *Premier Network Servs., Inc.*, 2005 WL 1421404, \*5. By looking to the Defendants’ actions (the denial of the certificate) and where they took place (Austin, Texas) it is clear that venue is improper in the Northern District of Texas’s federal courts. Accordingly, Defendants have established that venue is improper under 28 U.S.C. § 1391(b).

**B. Because an Identical Lawsuit Is Already Pending in the Western District of Texas, the Court Should Dismiss Plaintiff's Claims.**

The Court is vested with wide discretion in determining whether to dismiss or transfer a case for improper venue. *Premiere Network Serv's, Inc.*, 2005 WL 1421404 \*6. The Court must dismiss the case, or in the interests of justice, transfer it to any district in which it could have been originally brought if venue is improper. *Id.* (citing 28 U.S.C. § 1406(a)). Here, the Court should simply dismiss the case rather than transfer it.

On the same day Plaintiff filed this lawsuit, Plaintiff also filed an identical lawsuit, against the same Defendants, making the very same legal claims, in Travis County district court, in Austin, Texas. On March 13, 2009, Defendants filed their answer to Plaintiff's claims and removed the action to the United States District Court for the Western District of Texas, Austin Division. Through the Western District lawsuit, should Plaintiff prevail, it would be entitled to the very same relief it seeks from this Court. Thus, Plaintiff has no need to re-file the lawsuit in the Western District, incurring additional costs or other expenses, nor would it experience any delay in prosecuting its claim as a result of a dismissal. For these reasons, the interests of justice do not demand that this case be transferred and the Court must dismiss the suit. 28 U.S.C. § 1406(a).

**IV.  
CONCLUSION**

For the foregoing reasons, Defendants respectfully request the Court to dismiss Plaintiff's suit for improper venue and for any other such relief as they may be entitled.

Respectfully Submitted

GREG ABBOTT  
Attorney General of Texas

C. ANDREW WEBER  
First Assistant Attorney General

DAVID S. MORALES  
Deputy Attorney General for Civil Litigation

ROBERT B. O'KEEFE  
Chief, General Litigation Division

/s/ Shelley Dahlberg  
SHELLEY DAHLBERG  
Texas State Bar No. 24012491  
Assistant Attorney General  
General Litigation Division  
P. O. Box 12548, Capitol Station  
Austin, Texas 78711  
Phone No. (512) 463-2120  
Fax No. (512) 320-0667

**ATTORNEYS FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been sent certified mail return receipt requested on this the 13th day of May, 2009, to:

James J S Johnson  
Law Office of James J S Johnson  
1806 Royal Lane  
Dallas, TX 75229

*/s/ Shelley Dahlberg*

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SHELLEY DAHLBERG  
Assistant Attorney General