**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
DALLAS DIVISION

| | | |
|---|---|---|
| **INSTITUTE FOR CREATION RESEARCH GRADUATE SCHOOL**, etc.,, | § | **CIVIL ACTION NO.** |
| *Plaintiff,* | § | |
| **v.** | § | **3:09-CV-0693-B** |
| **RAYMUND PAREDES,** etc., et al., | § | |
| Defendants. | § | |

# Plaintiff's Motion for Summary Judgment,

with Brief in Support,
for Recognition of ICRGS's Exemption
under Texas Education Code § 1.001(a)

TO THE HONORABLE JANE J. BOYLE, U.S. DISTRICT JUDGE PRESIDING:

Now comes the Institute for Creation Research Graduate School ("ICRGS"), plaintiff, and moves for summary judgment (or, for partial summary judgment), under Fed.R.Civ.P. **Rule 56(a),** as follows:

1. On page 66, in its Footnote # 86, of ICRGS's *Original Complaint*, ICRGS requests that favorable declaratory relief include an interpretation of Texas Education Code, § 1.001(a), which says:

> "This code [*i.e., the Texas Education Code*] applies to all educational institutions supported in whole or in part by state tax funds unless [*any of those state tax-funded educational institutions are*] specifically excluded by this code".

2. The Texas Higher Education Board ("THECB"), to the extent that it claims any jurisdictional or regulatory authority over ICRGS's academic liberties *under the Texas Education Code* (e.g., under its chapter 61 or otherwise), does so improperly, because ICRGS is statutorily exempt from the Texas Education Code's application, as the fairly simple text of said § 1.001(a) clearly shows.

3. Likewise, the exercises of color of state government authority previously exercised by the other defendants (which continue without mitigation to past harms set in motion by the defendants' actions), over ICRGS's academic liberties, are statutorily *ultra* vires, under the same § 1.001(a).

4. There has been no genuine challenge raised by any of the defendants regarding this matter of funding-triggered THECB jurisdiction, so defendants have had (and still have) *no legally valid reason* for trying to apply any Texas Education Code-authorized powers to the THECB, as applied against ICRGS. Moreover, this critical fact is now buttressed by the attached Declaration of Eileen Turner Spragins, ICR's Acting CFO. In particular, there has never been any genuine debate about ICRGS's lack of acceptance of any Texas state funds, in California, in Texas, or elsewhere.

5. As the administrative record in SOAH shows (including ICRGS's 755-page Petition cited on the 1st Amended Complaint, page 5, ¶ 13, which is posted on THECB's own website), there has never been a genuine challenge by

THECB (or any of the defendants herein) regarding the nature of ICRGS as a not-for-profit Christian education ministry which avoids government funding.

6. Consequently, there was never any valid statutory basis of THECB to assert authoritative jurisdiction over ICRGS, yet the THECB's conduct shows that it intends to regulate ICRGS nonetheless[1] (and ICRGS has a reasonable fear that THECB would enforce its claim of regulatory jurisdiction as it did with Tyndale Theological Seminary,[2] another private not-for-profit school that did not accept Texas state government funding).

7. As the (attached) Declaration of ICR's Acting CFO shows, it has been the habitual practice of ICR to keep financial records of its income sources, and to have its financial records audited on a periodic basis; those financial records are routinely made at or near the time of income reception, by (or from information transmitted by) a person with knowledge of the income reception, and those records of income reception have been (and are) kept in the ordinary course of regular business activities, and it is the regular practice of ICR to record such information in ICR's financial records, so they are kept and used as ICR's accounting office's official records of ICR's financial matters.

---

[1] ICRGS timely provided all of the defendants with legal authorities including the Texas Supreme Court's ruling in HEB Ministries, Inc. v. THECB, 235 S.W.3d 627 (Tex. 2007), -- as well as highly relevant federal case law regarding these types of academic freedom issues, e.g., ICR Graduate School v. Honig, 758 F.Supp. 1350, 1356 (S.D. Calif. 1991); Strang v. Satz, 884 F.Supp. 504, 510 (S.D. Fla. 1995); Asociación de Educación Privada de Puerto Rico, Inc. v. Garcia-Padilla, 490 F.3d 1 (1st Cir. 2007).

[2] HEB Ministries, Inc. v. THECB, 235 S.W.3d 627 (Tex. 2007).

8. Moreover, in the financial history of the Institute for Creation Research ("ICR") in general, and in the financial history of ICR's Graduate School ("ICRGS") in particular, there has been an institutional consistency regarding ICR's (and ICRGS's) financial policy and practices:

(1) historically, neither ICR nor ICRGS has accepted any direct funding from any part of the Texas state government; and

(2) currently, neither ICR nor ICRGS accepts any direct funding from any part of the Texas state government; and

(3) historically, neither ICR nor ICRGS has accepted any direct funding from Texas state government-administered federal funds; and

(4) currently, neither ICR nor ICRGS accepts any direct funding from Texas state government-administered federal funds.

9. It has been the consistent policy and practice of ICR as a Christian ministry, and thus also of ICRGS as one "arm" of that ministry, to avoid the restrictions and complications that routinely attend acceptance of federal or state government money, by simply avoiding the acceptance of any such government money.

10. With respect to the State of Texas, ICR's financial records (as well as all other information available to me), which have been diligently researched, specifically indicates the following financial situation:

(a) ICR is an educational institution that has <u>not</u> historically been supported in whole or in part by state tax funds; and

(b) ICR is an educational institution that is not currently supported in whole or in part by state tax funds; and

(c) ICRGS is an educational institution that has not historically been supported in whole or in part by state tax funds; and

(d) ICRGS is an educational institution that is not currently supported in whole or in part by state tax funds.

(*See* Acting CFO Eileen Turner Spragins' attached Declaration, pages 1-3.)

BRIEF IN SUPPORT

11. Moreover, because the defendant's color-of-state-law action against ICRGS was grounded in (i.e., seriously infected by) religious viewpoint discrimination, it is especially advisable to utilize a religious liberty-favoring interpretation of Texas Education Code § 1.001(a), in order to achieve an judicial outcome in harmony with the Texas Religious Freedom Restoration Act of 1999, codified at Texas Civil Practice & Remedies Code § 110.001 *et seq.*

12. Any interpretation of Texas Education Code § 1.001(a) that would present **un**constitutionality problems (as this litigation repeatedly illustrates), should be rejected in favor of an interpretation that recognizes 1st Amendment-respecting academic freedoms.[3] *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 99 S.Ct. 1313 (1979) (Court has *duty to* interpretively *save* a statute from an unconstitutional outcome, so interpreting a delegation statute to avoid

[3] *See also, accord*, Rector, etc., of Holy Trinity Church, v. United States, 143 U.S. 457, 12 S.Ct. 511 (1892) (requiring a statute be construed to avoid violating the 1st Amendment, in a religious liberty case, and reciting highlights from America's Christianity-friendly legal history).

interfering with religious liberty is preferable to interpreting that same statute in a way that results in a government agency infringing religious freedoms).

13. In effect, the defendants have acted, against ICRGS, as if the Texas Education Code has statutorily clothed defendants with power to ***veto*** ICRGS's *Master of Science* degree program. But, that must presuppose that Texas Education Code § 1.001(a) be interpreted to allow Texas Education Code-delegated regulatory powers to "apply" to ICRGS. However, this Court should recognize, in granting ICRGS declaratory relief, that ICRGS is ***exempt*** from any such regulatory "application" -- because:

(1) all THECB powers are Texas Education Code-derived; and

(2) the Texas Education Code has no application to ICRGS's academic activities, because ICRGS receives not Texas state funding.

14. Thus, ICRGS needs declaratory relief, -- specifically, declaratory relief (implemented by injunctive relief) that is binding on (and against) all of the defendants, in order to cure the ongoing harm ICRGS now suffers, -- because the defendants' claimed Texas Education Code-authorized powers (by that Code's own introductory terms) does not "apply" to an "educational institution" like ICRGS.

15. As the U.S. Supreme Court has ruled, it is not needful to undertake the entire constitutional-versus-unconstitutional-(due-to-"entanglement") analysis when deciding a "duty to save" question: "Rather , we make the narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that

the First Amendment will be infringed." (*Quoting from* NLRB v. Catholic Bishop of Chicago, 440 U.S. at 502, 99 S.Ct. at 1319.) That risk, itself, is enough to reach the interpretive solution that avoids an unconstitutional entanglement.

16. In this controversy, as the foundational pleadings show, the legal stakes in this case include overcoming a color-of-state-law ***veto*** by a regulatory body that willingly faulted a private non-profit Christian educational institution for teaching "science education" from a Bible-harmonized, young-earth-creationist viewpoint.[4]

17. Consequently, the "duty-to-save" doctrine should apply to construing Texas Education Code § 1.001(a), to exempt ICRGS's non-government-funded science education program (that is operated from an institutional academic viewpoint that includes a Biblical creationist approach to "origins" issues.

WHEREFORE, premises considered, ICRGS respectfully request favorable relief from this honorable Court, including a judgment of the pleadings (or a partial judgment on the pleadings), or, if the Court construes this motion as a summary judgment motion, for a favorable judgment as a matter of law.

---

[4] *See, e.g., accord*, Footnote # 38 on page 30 of the *Original Petition* filed in state court (which state court lawsuit filing was removed by defendants to this Court), noting that the *ex parte* advisory committee's chief critic (of ICRGS's ***M.S.*** program) disapproved of the inclusion of ICRGS's words and phrases like "Christian worldview", "Biblical theories", "creationist worldview", "biblical creation", "flaws in the theory of biological evolution", "evolution/creation debate", "creationist vs. evolutionist explanations", "textbooks for this course are published by Master Books and reflect the creationist tenet that the earth is young", etc.

**Respectfully submitted,**

James J. S. Johnson, Esq.
Texas Bar # 10741520
Special counsel, ICR Graduate School,
an unincorporated educational ministry unit of
**THE INSTITUTE FOR CREATION RESEARCH**
1806 Royal Lane, Dallas, Texas 75229
214-615-8314 telephone; 214-615-8299 FAX
Email: jjohnson@icr.org

Co-Counsel
John A. Eidsmoe, Esq.
Iowa Bar # AT0002315
**FOUNDATION FOR MORAL LAW**
One Dexter Avenue, Montgomery, Alabama 36014
334-324-1245 telephone; 334-262-1708 FAX
Email: eidsmoeja@juno.com

**CERTIFICATE REGARDING SERVICE**

I hereby certify that on the 22nd day of June, A.D. 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following attorney (and thereby to the Texas Attorney General's Office):

**Shelley Dahlberg, Esq.**
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
***Attorney of record for Defendants***

Certifying attorney for plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| **INSTITUTE FOR CREATION RESEARCH GRADUATE SCHOOL**, etc.,, | § | **CIVIL ACTION NO.** |
| *Plaintiff,* | § | |
| **v.** | § | |
| **RAYMUND A. PAREDES,** etc., et al., | § | **3:09-CV-0693-B** |
| Defendants. | § | |

# 1st DECLARATION OF EILEEN TURNER SPRAGINS, RELEVANT TO TEX. EDUC. CODE § 1.001(a)

Now comes EILEEN TURNER SPRAGINS, on behalf of plaintiff, and provides the following declaration, pursuant to 28 U.S.C. § 1746:

"My name is Eileen Turner Spragins, I am of sound mind, capable of making this Declaration, and personally acquainted with the facts herein stated. This Declaration primarily concerns my official duties (and related personal knowledge) as the Corporate Secretary and acting Chief Financial Officer of the Institute for Creation Research ("ICR").

1. I am the custodian of the records of the **Institute for Creation Research**'s financial matters, including the records of **Institute for Creation Research Graduate School**'s financial matters (with the latter category of financial records being a subset of the former category of financial records). Those financial records record all income received by ICR as a 501(c)(3) non-profit corporation, and ICRGS (as an "arm" of ICR) is financed only from income given to ICR.

2. During the entire timeframe in which ICR has been actively involved in trying to acquire a THECB-issued license ("Certificate of Authority") to grant ***Master of Science*** degrees in Texas (which timeframe involves 2007, 2008, and 2009), I have served ICR as its acting Chief Financial Officer ("CFO"). As a result of my official duties, as ICR's acting CFO (as well as due to my service as ICR's Corporate

Secretary), I have become quite familiar with the financial records, financial policies, and financial practices of ICR, including but not limited to ICR's financial policies and practices during the years of 2007, 2008, and 2009.

3. It has been the habitual practice of ICR to keep financial records of its income sources, and to have its financial records audited on a periodic basis. Those financial records are routinely made at or near the time of income reception, by (or from information transmitted by) a person with knowledge of the income reception, and those records of income reception have been (and are) kept in the ordinary course of regular business activities, and it is the regular practice of ICR to record such information in ICR's financial records, so that they can be kept and used as ICR's accounting office's official records of ICR's financial matters.

4. Having diligently inquired into the financial records that record the financial history of the Institute for Creation Research ("ICR") in general, and that record the financial history of ICR's Graduate School ("ICRGS") in particular, I have found the following institutional consistency throughout the years regarding ICR's (and ICRGS's) financial policy and practices:

(a) historically, neither ICR nor ICRGS has accepted any direct funding from any part of the Texas state government; and

(b) currently, neither ICR nor ICRGS accepts any direct funding from any part of the Texas state government; and

(c) historically, neither ICR nor ICRGS has accepted any direct funding from Texas state government-administered federal funds; and

(d) currently, neither ICR nor ICRGS accepts any direct funding from Texas state government-administered federal funds.

5. It has been the consistent intention (and practice) of ICR as a Christian ministry, and thus also of ICRGS as one "arm" of that ministry, to avoid the restrictions and complications that routinely attend acceptance of federal or state government money, by simply avoiding the acceptance of any such government money.

6. With respect to the State of Texas, my review and analysis and knowledge of ICR's financial records (as well as all other information available to me), which I have diligently researched, specifically indicates the following financial situation:

(a) ICR is an educational institution that has not historically been supported in whole or in part by state tax funds; and

(b) ICR is an educational institution that is not currently supported in whole or in part by state tax funds; and

(c) ICRGS is an educational institution that has not historically been supported in whole or in part by state tax funds; and

(d) ICRGS is an educational institution that is not currently supported in whole or in part by state tax funds."

I hereby DECLARE and VERIFY, under penalty of perjury, that the foregoing is true and correct, and I so indicate by my signature on this 19th day of June, A.D. 2009.

Eileen Turner Spragins

Declarant: **Eileen Turner Spragins**
ICR's Acting Chief Executive Officer
and ICR's Corporate Secretary

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
DALLAS DIVISION

| | | |
|---|---|---|
| **INSTITUTE FOR CREATION RESEARCH GRADUATE SCHOOL**, etc., , | § | **CIVIL ACTION NO.** |
| *Plaintiff,* | § | |
| **v.** | § | **3:09-CV-693-BS** |
| **RAYMUND PAREDES,** etc., et al., | § | |
| Defendants. | § | |

## Order Granting Plaintiff's Motion for Judgment

On this day came to be considered Plaintiff's Motion for Summary Judgment, and, after considering the record and any other arguments of the parties, if any, the Court is of the opinion that said motion should be GRANTED.

It is ordered, therefore, that plaintiff's *Motion for Summary Judgment* be (and the same hereby is) GRANTED, such that: (1) pursuant to Texas Education Code § 1.001(a), plaintiff is hereby declared to be exempt from any and all Texas Education Code-related regulatory jurisdiction of the Texas Higher Education Coordinating Board ("THECB") or of the Texas Education Code itself; and (2) this declaration of statutory law is binding on all of the defendants herein, as to their official and individual capacities; and (3) any and all harms suffered by plaintiff, as a result of the THECB having asserted a colorable veto against plaintiff offering a ***Master of Science*** degree program, in Texas, should be remedied by further proceedings to be conducted by this Court, including a show-cause hearing to address what can be done to remedy the past and ongoing harms thus far suffered by plaintiff.

SIGNED this __ day of July, 2009.

HON. JANE J. BOYLE, U.S. DISTRICT JUDGE