UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

PLAINTIFF'S RESPONSE & OBJECTION
IN OPPOSITION TO DEFENDANTS' 12(b)(3) MOTION,
WITH
DECLARATION AND RELATED SUPPORTING PAPERS

Now comes plaintiff, INSTITUTE FOR CREATION RESEARCH GRADUATE SCHOOL ("**ICRGS**" or "plaintiff"), and hereby responds and objects in opposition to the *Defendants' Rule 12(b)(3) Motion to Dismiss* (herein called "12(b)(3) Motion" or "Motion"), as follows:

A. INTRODUCTORY SUMMARY OF PLAINTIFF'S OBJECTION

In effect, the 12(b)(3) Motion forces this Court to address three legal points:

(a) did plaintiff properly file in Dallas federal court, according to 28 U.S.C. § 1391(b)(1)? -- the answer is yes, because one of the defendants resides in Dallas;

(b) will the removed case in Austin (i.e., Civil Action 1:09-CV-382-SS) be a reliable vehicle for procedurally adjudicating this controversy in federal district court? -- the answer is no, because the Austin litigation will likely be adjudicated in Austin state court (ultimately), for reasons provided below; and

(c) should this Dallas federal case (i.e., Civil Action 3:09-CV-0693-B) be transferred to Austin, as a matter of venue transfer convenience principles under 28 U.S.C. § 1404(a)? -- that question is involves an analysis of several factors (convenience of the parties and witnesses, etc.), the blend of which weighs in favor of retaining venue in Dallas.

B. DEFENDANTS ARGUE 28 U.S.C. § 1391(b)(2), YET § 1391(b)(1) APPLIES.

1. Defendants correctly cite, but did not quote, the general (non-diversity) venue statute for federal courts: that general venue statute is 28 U.S.C. § 1391(b), which specifically provides:

> **(b)** A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in
>
> > **(1) a judicial district where any defendant resides, if all defendants reside in the same State,**
> >
> > **(2)** a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or
> >
> > **(3)** a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Quoting 28 U.S.C. § 1391(b), with emphasis added. Movant focuses on § 1391(b)(**2**).

2. However, the two statutory conditions of § 1391(b)(**1**) were and are satisfied:

(a) "**a judicial district where any defendant resides**" == defendant Brenda Pejovich is a ***Dallas resident***,[1] and she is listed as such in the Original Complaint, and she was served (by the process server, as appears in the record pursuant to a Return of Service proof of service filing) at her Dallas residence.

(b) "**if all defendants reside in the same State**" == the other defendants herein are all residents of the State of Texas, as indicated in the Original Complaint, and all of them were served within the State of Texas.

3. Accordingly, because both of the conditions of § 1391(b)(1) were factually satisfied when this civil action was commenced, it is beyond genuine dispute that this case was commenced in a court of proper venue. (As noted below, this indisputable fact is dispositive of whether a 28 U.S.C. § 1406 "cure" is needed.)

4. Although defendants' citation to case law appears to support their venue challenge motion, that case law does ***not*** properly inform this Court regarding a multiple-defendants

[1] This critical venue fact clearly distinguished this case's *multi-defendants scenario* from the supposedly comparable case (mentioned by defendants) that involved only one governmental defendant, Premier Network Services, Inc. v. PUC of Texas, 2005 WL 1421404 (N.D. Tex. 2005).

scenario. Yet the general venue statute itself *does* inform this Court regarding a multiple-defendants scenario, and it is the venue statute's "plain language" that governs.

C. DEFENDANTS ERRED IN ANALYZING IF 28 U.S.C. § 1406 APPLIES.

5. A statutory prerequisite for reaching the choice of "transfer" to another federal district, or to "dismiss" a civil action, is the conditional premise that the challenged case was "laying venue in the wrong division or district" to start with.

6. But that statutory condition is not satisfied in this case, because both of the essential requirements of 28 U.S.C. § 1391(b)(1) were satisfied at this case's commencement, and thus there are no venue "defects" to be either "cured" or "waived" (or used as a rationale for dismissing the case). This is shown by the text of 28 U.S.C. § 1406(a), which says:

> The district court of ***a district in which is filed a case laying venue in the wrong division or district*** shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it ***could have been brought.***

Quoting 28 U.S.C. § 1406(a) (emphasis added). Before a case is eligible for a curative transfer, to a district where it "could have been brought", that case should be recognized as "laying venue in the wrong division or district", which it cannot be if the plaintiff-chosen venue already satisfies both requirements of 28 U.S.C. § 1391(b)(1).

7. In short, venue should be diagnosed as "sick" before any "cure" under § 1406 is warranted.[2] This principle should be dispositive of the 12(b)(3) Motion *as such*.

D. CONTINGENT ARGUMENTS, BEYOND JUST APPLYING § 1391(b)(1)

8. The remainder of this objection is provided, contingently (i.e., alternatively), only if:

(a) this honorable Court finds that this case's venue was "improper" at the start; **or**

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[2] **"Defendants filed a Motion to Dismiss Pursuant to Rule 12(b)(3).** Defendants argue that 28 U.S.C. § 1391(b)(1) and (2) mandate that this case be venued in the Western District of Texas-San Antonio Division. However, the Court cannot agree with Defendants' reading of the statute. . . . . **[B]ecause transfer pursuant to § 1406(a) is only permitted if venue is improper, Defendants' request that the Court transfer the case pursuant to 28 U.S.C. § 1406(a) must be denied."** *Quoting* Oilfield Equipment Marketing, Inc. v. New Tech Systems, Inc., 2006 WL 897738 (W.D. Tex. 2006) (emphasis added).

(b) the Court construes the 12(b)(3) Motion as a motion to transfer venue "for the convenience of parties and witnesses" pursuant to 28 U.S.C. § 1404(a).[3]

9. Even if this Court treats the 12(b)(3) Motion as a venue "convenience" transfer motion, the Court is encouraged to respect the plaintiff's choice of forum. *See* United Sonics, Inc. v. Shock, 661 F. Supp. 681, 683 (W.D. Tex. 1986) (**plaintiff's choice of forum** is "most influential and should rarely be disturbed unless the balance is strongly in defendant's favor"). *See also* Smith v. Colonial Penn Insurance Co., 943 F. Supp. 782, 785 (S.D. Tex.) (citing *United Sonics, Inc. v. Shock* as illustrating how a **plaintiff's choice of forum** is "most influential and should rarely be disturbed unless the balance is strongly in defendant's favor").

10. However, before looking at "convenience" factors, it is important to clarify that the supposedly "identical" parallel case (removed from Austin state court to Austin federal court) is not actually an "identical" case.

E. DEFENDANTS ERRED IN DESCRIBING THE AUSTIN "REMOVAL" FACTS.

11. Defendants' 12(b)(3) Motion paints an impression of an "identical" lawsuit, recently removed to the Austin federal district court, but that impression is flawed. Specifically, defendants' 12(b)(3) Motion asserts this falsely characterized caption: "**Because an Identical** [*sic*] **Lawsuit Is Already Pending in the Western District of Texas, the Court Should Dismiss Plaintiff's Claims.**" Yet the Austin litigation is not "identical" -- because that Austin litigation includes a state government agency defendant (i.e., the THECB), in addition to the human officials who are also sued as defendants in this litigation.

12. THECB is itself a defendant in Austin (i.e., D-1-GN-09-001239 in the 126th District Court of Travis County, litigation now removed to Austin federal district court as 1:09-CV382-SS), but is not a defendant in this Dallas litigation, so the two lawsuits are not "identical".

13. Ironically, until all Austin defendants (including the THECB itself) jointly removed the state court litigation to Austin federal district court, the THECB had "sovereign immunity", under the *Hans v. Louisiana*[4] federalism case-law extension of the 11th Amendment. Even so,

[3] Specifically, 28 U.S.C. § 1404(a) permits a district court to transfer a civil action "to any other district or division where it might have been brought" if to do so is appropriate "[f]or the convenience of parties and witnesses, [and] in the interest of justice." Thus, if this Court chooses to process the 12(b)(3) Motion as if it were a venue transfer motion (under § 1404(a)), further factual discussion is justified.

[4] 134 U.S. 1, 10 S.Ct. 504 (1890).

because that Austin litigation may yet be remanded back to Austin state court,[5] this federal court should be cautious about presuming that: (1) the cases are "identical", because they are not; and (2) the Austin litigation will be fully litigated in Austin federal court, because it might not.

> [T]he State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity -- though, as we have said, **the [federal] District Court may well find that this case, now raising only state-law issues, should nonetheless be remanded to the state court for determination.**

Quoting from Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613, 122 S.Ct. 1640 (2002) (emphasis added), *citing* 28 U.S.C. § 1367(c)(3).

14. There are good reasons for why the Austin federal district court may **remand** the removed litigation (in Austin) to Austin state court, such as the importance of having critical first-impression Texas statutes interpreted within the Texas state court system, especially:

(a) a Texas statute issue of **first impression,**[6] how to apply the "Texas Religious Freedom Restoration Act" of 1999 (codified at Texas Civil Practice & Remedies Code chapter 110); and

(b) another Texas statute issue of **first impression**, how, in a religious liberty case, to apply the Texas statute regarding "Discrimination Because of Race, Religion, Color, Sex, or National Origin" (codified at Texas Civil Practice & Remedies Code chapter 106);

(c) another Texas statute issue of **first impression**, how to apply Section 1.001(a) of the Texas Education Code, to a private graduate school that is not "supported in whole or in part by state tax funds" seeks to offer and provide a Science Education program leading to a "Master of Science" degree.

With those multiple "first impression" issues at stake, in the litigation that includes the Texas state agency itself as a named defendant, it is likely (and proper) that the Austin litigation will be remanded back to the Texas state court system for processing. *See, accord,* State Farm Mutual Automobile Ins. Co. v. Travelers Indemnity Co., 272 F. Supp. 803, 805 (D. Colo.

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[5] Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613, 122 S.Ct. 1640 (2002) ("the State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity"), ***overruling,*** *to the extent inconsistent,* Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459, 65 S.Ct. 347 (1945) (state attorney general deemed not to have forfeited the state government's 11th Amendment immunity when he removed case from state court to federal court).

[6] Due to legislative applicability/timing concerns, the Texas Supreme Court (in its 2007 ruling) chose not to apply the Texas Religious Freedom Restoration Act of 1999 to the THECB's unconstitutional treatment of Tyndale Theological Seminary, Hispanic Bible Institute, and Southern Bible Institute. *See* HEB Ministries, Inc. v. THECB, 235 S.W.3d 627, 684 at footnote 10 (Tex. 2007).

1967) ("Colorado law applies, but, admittedly, there is no case or statutory law in the State of Colorado which is applicable to the question here involved. To determine the question here involved, this Court would be required to declare the law of Colorado in a case of first impression. **Under our dual judicial systems it is preferable that cases of first impression be decided by the highest tribunal of the State.**").

15. Of course, a federal court can make *Erie v. Tompkins* "guesses" at such first impressions, but three such "guesses" is quite a strain on constitutional federalism dynamics. It is likely, therefore, that the Austin federal court will remand its removal-based action to state court, due to the multiple "first impression" issues in this controversy, -- especially as that case includes the THECB itself *as a named defendant* (i.e., as a state agency that has waived sovereign immunity in Austin). So the recent removal taken by defendants, in Austin, appears to be a likely candidate for an abstention-like remand to the Austin state court.

16. Consequently, this would mean that this federal litigation, in Dallas, would *not* be duplicative of *any* federal litigation in Austin (because it is quite likely that soon there will be no federal litigation in Austin). In short, because there is no reason to expect that the federal district court in Austin will adjudicate the merits of the *removed* case, this Dallas court should not dismiss this federal litigation due to an anticipatory reliance on the (unreliable) assumption that a ***federal*** lawsuit will be finally and fully adjudicated on the merits in Austin.

17. Thus, if plaintiff is to assured of a *federal* "day in court", that "day" should occur in this case, i.e., 3:09-CV-0693-B. Furthermore, the only plausible scenario whereby plaintiff has a full and final *federal* "day in Court" in Austin would be if this Court chooses to transfer this civil action (i.e., 3:09-CV-0693-B) to Austin, on the basis of venue transfer convenience principles.

F. DEFENDANTS' OTHER VENUE CONVENIENCE ARGUMENTS FAIL.

18. As noted above, the weightiest factor in a "convenience of the parties and witnesses" analysis, for purposes of applying 28 U.S.C. § 1404(a), is the **plaintiff's preference**:

> The convenience of the witnesses and the parties is generally a primary concern of this Court when considering [venue] transfer motions. However, vague statements about the convenience of unknown and unnamed witnesses is insufficient to convince this Court that the convenience of the witnesses and the parties would best be served by transferring venue. *See* ***Dupre***, 810 F. Supp. At 823 (to support a transfer of venue, the moving party cannot merely allege that certain key witnesses are not available or are inconveniently located, but must specifically identify the key witnesses and outline the substance of their testimony). . . . . Thus, the Court declines to disturb the forum chosen by the Plaintiff and introduce the likelihood of delay inherent in any transfer simply to avoid the

insignificant inconvenience that Defendant may suffer by litigating this matter in Galveston rather than Houston.

Quoting Smith v. Colonial Penn Insurance Co., 943 F. Supp. 782, 784-785 (S.D. Tex. 1996), *quoting from* United Sonics, Inc. v. Shock, 661 F. Supp. 681, 683 (W.D. Tex. 1986) (plaintiff's choice of forum is "most influential and should rarely be disturbed unless the balance is strongly in defendant's favor").

19. Convenience of "the parties" is a factor in § 1404(a) decisions. Austin is more convenient to some, but not all, of the defendants. (Defendant Brenda Pejovich is a Dallas resident, as the process server-filed Proof of Service indicates.) Dallas is more convenient to plaintiff, because plaintiff's administrative offices are in Dallas.

20. Convenience of the witnesses is a factor in § 1404(a) decisions. Presumably all of the defense witnesses would prefer Austin over Dallas, for convenience purposes. For plaintiff's witnesses, Dallas is preferable -- e.g., more convenient for plaintiff's out-of-state witnesses, e.g., ICR Graduate School's dean (Dr. Eddy Miller, who resides in California) as well as ICR Graduate School's West Coast-based faculty (e.g., Dr. Larry Vardiman). However, because ICR Graduate School's faculty provide mostly online education services, many of them would need to fly to Texas for hearings and/or trial on the merits, anyway, and the relative difference (to them) is not great, but Dallas is preferable, because it would allows them to visit (and work from) ICR's Texas headquarters during their time in Texas.

21. Convenience of counsel should be a factor in § 1404(a) decisions. While the Texas Attorney General's Office has a Dallas regional office (apparently located at 1412 Main Street, Suite 810, Dallas, Texas 75202, plaintiff's attorneys have no Austin office.

22. The location of relevant documents should be a factor in § 1404(a) decisions. Defendants' documents are presumably located in Austin. Plaintiff's documents are mostly located in Dallas, except those located in California (or elsewhere on the West Coast). Documents located in California should be reviewed by Dallas counsel prior to production or other usage in this litigation, so Dallas is "more convenient" as applied to plaintiff's documents.

23. The "operative facts" of this lawsuit involve a mix of Austin and Dallas. The Texas Education Code-required college campus "site visits" (conducted by THECB representatives) occurred in Dallas. Yet the THECB decision-making (including the ***ex parte*** advisory committee meetings) occurred in Austin. Plaintiff's ongoing Free Speech/Free Press-related injuries arose in Austin yet those injuries continue recur with time, impacting civil rights and liberties in Dallas moreso than Austin (as noted on Complaint **page 8**), -- a highly relevant factor in venue decisions. *Consider* Liban v. Churchey Group II, L.L.C., 305 F. Supp.2d

136, 143 (D.D.C. 2004) ("the discrimination charged in this case is a controversy local to Maryland and is a case in which Maryland residents have a greater interest than do the residents of the District of Columbia"). Though case law discussing fine points of this venue factor may be discussed further in a Brief, for now plaintiff would suggest that the "plaintiff's preference" rule (noted above, citing *Colonial Penn Insurance* and *United Sonics, Inc.)* should outweigh the venue relevance of the THECB activities that occurred in Austin during 2007-2009.

24. Supporting the locality-relevant considerations of Dallas venue, see the attached "1st Declaration of Lawrence Ford, relevant to Venue Challenge", showing that ICR's Dallas-based operations (and Free Speech/Free Press-related liberties are interfered with in the Dallas area.

25. Relative economic resources of the parties should be a factor in § 1404(a) decisions. Plaintiff's economic resources are quite modest compared to those of the THECB and the Texas Attorney General's Office. It would be no hardship to require defendants (and the Texas Attorney General's Office lawyers handling this litigation) to occasionally visit Dallas.

WHEREFORE, plaintiff respectfully requests that defendants' 12(b)(3) Motion be **DENIED.**

Also, with such a denial, it would be prudent to include a fact-finding directly relevant to 28 U.S.C. § 1391(b)(1), that defendant Brenda Pejovich was served with process, in *her **individual capacity**, at her Dallas residence* (located within this judicial district).

Alternatively, if this honorable Court chooses to grant any part of defendants' Motion, it should only be a venue transfer to Austin federal district court, ***not*** a case dismissal.

Also, unless this Court chooses to wholly DENY the 12(b)(3) Motion, plaintiff respectfully requests an **oral argument hearing** on the Motion.

Respectfully submitted,

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CERTIFICATE REGARDING SERVICE

This is to certify that a true and correct copy of the foregoing document (with its attached exhibits and/or proposed order, if any) has been or will have been served on opposing counsel of record (i.e., the Texas Attorney General's Office, via Shelley Dahlberg, Esq.), this 27th day of May, A.D. 2009, via electronic filing service.

James J. S. Johnson
Certifying attorney for plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

1st DECLARATION OF LAWRENCE FORD, RELEVANT TO VENUE CHALLENGE

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

1. **Background summary regarding ICR's publication operations in Dallas**

The Institute for Creation Research (ICR), founded in 1970, has published the periodical *ACTS & FACTS* continuously since June 1972.

In June 2007, I began the relocation of all publication activities from Santee, California to Dallas, Texas.

In July 2007, the August edition of the newly redesigned *ACTS & FACTS* periodical was produced from the offices of ICR at 1806 Royal Lane in Dallas, Texas.

In my capacity as Director of Communications, which includes my role as Executive Editor, all decisions for the publication of *ACTS & FACTS* since the August 2007 issue, including all advertising, were made from my ICR office in Dallas.

2. **Identification of declarant's relationship to information in this declaration (i.e., regarding ACTS & FACTS and also regarding content put on both www.icr.org and www.icr.edu)**

I serve as Director of Communications at the Institute for Creation Research. In that capacity, I oversee the following departments: Editorial/Publications, Events, Broadcast Media, and Advertising/Public Relations. In these various roles, I serve as Executive Editor, Executive Producer, and chief spokesperson for ICR.

Advertising of any ICR activity, including the ICR Graduate School, involves my staff and requires my approval. Advertising of these activities involves the monthly periodical *ACTS & FACTS*, the daily devotional guide (published quarterly) *DAYS OF PRAISE*, the ICR websites (www.icr.org and www.icr.edu), all external advertisements on the Internet, in broadcast media, and in print publications, whether books, DVDs, magazines, newspapers, conferences, etc.

3. How *ACTS & FACTS* is the primary paper publication organ of ICR and ICRGS

Since 1972, *ACTS & FACTS* monthly periodical has been the primary communication organ of all ICR activities to the public. Its content has kept constituents and the public up-to-date on the scientific research at ICR laboratories, the development and offerings of the ICR Graduate School, and the extent of ICR's influence through other activities, such as radio programs, book publishing, conference speaking, media events, etc.

Currently, more than 160,000 *ACTS & FACTS* periodicals are published and distributed internationally each month (**from Dallas, Texas**). For many years ICR successfully advertised the educational offerings of the Graduate School only through *ACTS & FACTS*, and continued to use *ACTS & FACTS* as the primary advertising venue for the Graduate School until April 2008, at which time the THECB imposed its agency's authority to ban our mention of the ICR's California-based Graduate School to Texas residents.

4. How www.icr.org and www.icr.edu are Internet-facilitated e-publication organs of ICR and thus also of ICRGS

ICR's primary websites, www.icr.org and www.icr.edu, contain both current and archival information published by the Institute for Creation Research, including articles published in *ACTS & FACTS* and *DAYS OF PRAISE*, technical science articles by ICR faculty and researchers, announcements about ICR's radio broadcasts, science tours, and product offerings, as well as details regarding ICR's educational offerings to the public.

5. How ICR's "freedom of the press" rights (as to whether and how *ACTS & FACTS* can advertise the ICRGS program in Texas, especially regarding the ban on inviting Texas residents to apply for ICRGS's *M.S.* program)

Until late April of 2008, ICRGS advertised its graduate school program primarily through ACTS & FACTS monthly periodical, which is **published in Dallas, Texas**, and continually on the ICR websites, www.icr.org and www.icr.edu, which websites are also

managed and operated from Dallas, Texas. (Thus, to the extent that ICR is "censored" in its otherwise-free press activities, that censorship occurs primarily in Dallas, Texas.)

In late April of 2008, after THECB imposed a ban on ICRGS from moving its degree-granting M.S. program to Texas, the print advertisements for ICRGS were promptly halted, the banner ads on the www.icr.org website were promptly halted, and the www.icr.edu website was promptly (and substantially) altered to included a "disclaimer" indicating that Texas residents are not allowed to apply for admission to our California-based graduate school.

ACTS & FACTS occasionally mentions this ongoing regulatory interference with ICRGS's academic and religious freedom rights, in publications, e.g., Dr. Henry M. Morris, III's **"Where has Academic Freedom Gone in Texas?"** (now posted at www.icr.org/article/where-has-academic-freedom-gone-texas), as well as other *ACTS & FACTS* articles (such as those articles posted at www.icr.org/article/4598 and at www.icr.org/article/4556).

6. How ICRGS was advertized in *ACTS & FACTS* before and after April AD2008

ICRGS was promoted with full-page ads in *ACTS & FACTS* monthly magazine up through April 2008. It has not been advertised in *ACTS & FACTS* since that time.

7. How ICRGS advertized its M.S. program via www.icr.org and www.icr.edu before and after April AD2008

ICRGS was promoted with rotating banner ads on www.icr.org up through April 2008. It has not been advertised in this manner since that time.

The official school website, www.icr.edu, continues to house the internet presence of ICRGS, but with a "disclaimer" that informs readers that Texas residents cannot apply to our California-based science education (M.S.) program.

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 27th day of May, A.D. 2009.

Declarant: Lawrence Ford
Director of Communications, ICR
and Executive Editor, *ACTS* & FACTS