UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AUSTIN DIVISION

INSTITUTE FOR CREATION RESEARCH GRADUATE SCHOOL, etc.,, *Plaintiff,*	§	**CIVIL ACTION NO.**
v.	§	**1:09-CV-382 SS**
TEXAS HIGHER EDUCATION COORDINATING BOARD, et al., Defendants.	§	(a/k/a A:09-CA 382)

Plaintiff's Response in Objection to Defendants' Motions under Rules 12(b)(1), 12(b)(6), & 7(a)

TO THE HONORABLE SAM SPARKS, U.S. DISTRICT JUDGE PRESIDING:

Now comes the Institute for Creation Research Graduate School ("ICRGS"), and responds in opposition to defendants' **Rule 12(b) Partial Motion to Dismiss**, as follows:

I. Critical Relevance of Texas Education Code § 1.001(a)

1. Defendants, in their **Rule 12(b) Partial Motion to Dismiss**, herein called "12(b) Motion"), in its section captioned "*Introduction*", accurately begins the second sentence with: "Among other things, Plaintiff brings a claim . . .". To begin with, ICRGS's claims should be considered in light of the important fact that ICRGS has received and still receives ***no*** Texas government funding (a critical point which is now the subject of a Motion for Judgment on the Pleadings). Moreover, it is further noteworthy that defendants' 12(b) Motion never mentions ICRGS's Tex. Educ. Code § 1.001(a), *at all,* even though all of defendants' arguments presuppose the THECB's right to regulate ICRGS.

2. However, the applicability (or, more accurately, the ***non***-applicability) of the Texas Education Code was clearly put in issue by ICRGS's pleadings, e.g.:

> *See, accord,* Texas Education Code, **§ 1.001(a)** ("This code applies to all educational institutions supported in whole or in part by state tax funds unless specifically excluded by this code"). This qualification shows that the Texas Education Code, including all powers the THECB's Commissioner derives from that code, do not apply to ICRGS (or any other ministry unit or activity of ICR).

Quoting Footnote # 43 on page 45 of *ICRGS'S 1st Amended Complaint.* (The pleadings in this case show that THECB claims regulatory jurisdiction, over ICRGS, by virtue of the *Texas Education Code*, specifically its Chapter 61.)

3. Thus, all of defendants' 12(b) Motion, as well as this procedural objection thereto, should be weighed in light of that critical statute-applicability qualification. If this Court prefers to **avoid** making an *Erie v. Tompkins* guess[1] at how the Texas Supreme Court would interpret (or apply) Teas Education Code § 1.001(a) to this controversy, it would be advisable to remand this case back to Travis County district court for adjudication.

4. Also, some of the case law cited by defendants antedates the U.S. Supreme Court's change-of-mind, in 2002, regarding "waiver" of state sovereign immunity, in Lapides v. Board of Regents of the Univ. System of Colorado, 535 U.S. 613 (2002), which is cited in ¶ 2 of ICRGS's *1st Amended Complaint.*

[1] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938).

II. Objections to Rule 12(b)(1) & 12(B)(6) motions

5. It was the defendants who sought this Court's jurisdiction and venue (which ICRGS protested[2] in its 1st Amended Complaint, ¶ 1), by virtue of their voluntary removal -- so if any Rule 12(b)(1) subject-matter jurisdiction problem exists, it should be fixed by a **remand** of this case, back to the 126th district court of Travis County, wherein this lawsuit was commenced. Those when defendants' 12(b) Motion (on its page 3) speaks of the "burden of establishing that ... jurisdiction exists", it should be remembered that it was the defendants who originally "invoke[d] the Court's subject matter jurisdiction".

6. Ironically, ICRGS could not directly sue the **THECB** itself in federal district court, though it could (and did, in Dallas federal court) sue the THECB *officials* via *Ex parte Young* doctrine. There would have been a constitutional problem with the THECB-as-a-defendant claims being adjudicated herein, if ICRGS had commenced this suit in this venue. But it did not. Rather, the defendants jointly chose to remove this action here, and in doing so THECB (a Texas state agency) **waived** its sovereign immunity, as is clarified by Lapides v. Board of Regents of the University System of Colorado, 535 U.S. 613 (2002). So the voluntary removal, by THECB, negates any jurisdiction problems with this action. Moreover, ICRGS does *not* sue THECB under 42 U.S.C. § 1983.

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[2]As noted in ¶ 2 of ICRGS's 1st Amended Complaint, this case involves state statute questions of first impression, but one has now been addressed by the Texas Supreme Court, last Friday, in Barr v. City of Sinton, ___ S.W.3d ___ (Tex. 2009) (6-19-2009, re Texas Religious Freedom Restoration Act of 1999).

7. Since the alleged errors of in the 12(b) Motion are identified alphabetically (A, B, C, etc.), this Response uses that same A-B-C sequence.

A. *Response to challenge based on 28 U.S.C. § 1983's applicability*

ICRGS asserts no claim under 42 U.S.C. § 1983 against the THECB itself, so there is no need to "dismiss" a claim that ICRGS did not actually plead. See **page 44** of *ICRGS's 1st Amended Complaint*, at **Footnote # 42**, which says: "remedial relief under 42 U.S.C. § 1983 is only requested as to the defendants who are statutorily deemed 'persons' ".

B. *Response to challenge about board member individual capacities*

Defendants dispute that ICRGS can obtain injunctive or declaratory relief against the human defendants *in their individual capacities*. When ICRGS filed this litigation, Texas case law provided (arguable) support for such relief:

> Furthermore, the individuals named in this suit do not have official immunity. As Mrs. Heinrich's pleadings reveal, the allegations against the individuals named are for alleged "illegal, unlawful, unauthorized, ultra vires, and unconstitutional acts...." Mrs. Heinrich alleges that these individuals acted outside the scope of their authority when they arbitrarily and without the consent of the voting membership, reduced her pension benefits.

Quoting City of El Paso v. Heinrich, 198 S.W.3d 400, 407 (Tex. App. – El Paso 2006, writ pending). However, on **May 1st of 2009**, only a few weeks after ICRGS filed this litigation, the Texas Supreme Court, in a partial-reversal

decision, City of El Paso v. Heinrich, ___ S.W.3d ___, 2009 WL 1165306, 52 Tex. Sup. Ct. J. 689 (Tex. 2009), clarified that the above-quoted Texas appellate court had erred. In Heinrich, Texas' high court (saying: "We have been less than clear regarding the permissible use of a declaratory remedy in this type of *ultra vires* suit"), in that case rejected the such relief against officials *as individuals.* Unless ICRGS amends its pleadings to assert a claim for money damages against the defendants *as individuals,* it seems that the 5-1-2009 ruling may bar injunctive relief (if based on Texas law) in this case. Although ICRGS could show damages that would justify a *money recovery,* against the human defendants *in their individual capacities,* ICRGS prefers to ignore the money damages issue, so as not to detract or distract from higher values at stake. Therefore, ICRGS hereby drops its individual capacity claims except for declaratory and/or injunctive relief to remedy reputational injuries to ICRGS.

C. *Response to challenge on ICRGS's Free Exercise claim standing*

Defendants' 12(b) Motion, on its pages 4-5, mischaracterizes the kind of relief that ICRGS seeks, as a matter of its 1st Amendment-related "Free Exercise of Religion" rights. ICRGS has a "free association" right to attract students who endorse ICR's creationist Tenets. Also, ICRGS has 1st Amendment-focused "Free Exercise" (and "Free Speech") rights to both advertize and to operate its non-evolutionist *Master of Science* program, and to institutionally confer its ultimate *opinion* in the form of an academic assessment (i.e., the verbalized publication of a "*Master of Science*" degree

being earned), applied to selected ICRGS students, namely, those students who fully complete the objective requirements of ICRGS's non-evolutionist *Master of Science* program. It is ICRGS's institutional right to offer such a program. It is ICRG's "hybrid speech" (i.e., an institutional blend of religious viewpoint and academic viewpoint) that the 1st Amendment protects from governmental censorship (or other "viewpoint discrimination" disfavor). The idea of an institutional viewpoint (and the right to express it freely) is not an exotic idea invented by ICRGS. *See, e.g.,* Asociación de Educación Privada de Puerto Rico, Inc. v. Garcia-Padilla, 490 F.3d 1, 19, 222 Educ. Law Reptr. 32 (1st Cir. 2007) (recognizing that 1st Amendment-protected *institutional academic freedom* is infringed if the government's intrusion restricts a private school's freedom to determine "what shall be taught and how it shall be taught", noting that governmental control of *private* school textbook editions can block the institutional viewpoint of a *private* school, because "inclusion or exclusion of even two words, such as **'intelligent design'** in a new edition of a science textbook may substantially burden the schools' ability to convey deeply held values to their students") (emphasis added). *Cf., accord,* Peel v. Attorney Registration & Disciplinary Commission of Illinois, 496 U.S. 91, 103-104, 110 S.Ct. 2281, 2289 (1990) (noticing "the consuming public understands that licenses ... to convey an educational degree ... are issued by private organizations" and do not "misleadingly" imply state endorsement").

D. Response to challenge on Texas Religious Discrimination statute

In addition to suing under the *Texas Religious Freedom Restoration Act of 1999* (which is codified under Tex. Civ. Prac. & Rem. Code chapter **110**), ICRGS has sued under the Texas anti-discrimination statute[3] (a state counterpart to the federal 42 U.S.C. § 1983), which is codified under Tex. Civ. Prac. & Rem. Code chapter **106**. (It is this latter statute that defendants argue about in their 12(b) Motion.) Although the statute does refer to the actions of state officers or employees who "is acting or purporting to act in an official capacity", the Texas statute's plain language of the anti-discrimination statute does ***not*** specifically limit lawsuits (brought thereunder) to state officials "in their official capacity". Obviously, an individual can "purport" to act in an official capacity, but (using *Ex parte Young* logic) may actually be acting in an individual capacity while doing so discriminatorily. In fact, the penalties described in § 106.003 obviously apply on the individual level. *See, accord,* Ntreh v. University of Texas at Dallas, 936 S.W.2d 649, 652 (Tex. App. -- Dallas 1996), *affirmed with modification*, 947 S.W.2d 202 (Tex. 1997).

For instance, an individual (who is an officer of employee of THECB) may claim to exercise power (supposedly) "authorized" by the Texas Education Code, against a private school which receives no Texas government funding, even though the Texas Education Code itself says (in its first sentence) that it is a Code that applies to schools funded by Texas government funds. If the Texas law provides no such regulatory power for that THECB officer (or

[3] "Discrimination Because of Race, Religion, Color, Sex, or National Origin."

employee) to so act, is not the *ultra vires* action "individual" action? This scenario is distinguishable from one where the state actor is merely abusing government power assigned to him or her, because ICRGS's case involves "state actors" claiming to use power that the Texas Education Code never provided.

III. Defendants' alternative "Motion for Rule 7 Reply"

8. Since the alleged errors of subject-matter jurisdiction and claim pleading are specified in defendants' Motion for Rule 7 Motion, identified alphabetically (A, B, C, etc.), this Response will use that same identification sequence.

A. Response to defendants' qualified and official immunity issues

Defendants' motion mostly focuses on immunity issues that are relevant only if ICRGS were seeking a money damages award against the individual defendants (as individuals), which ICRGS is not. ICRGS would seek a declaratory judgment that applies to the individual defendants in both their official and individual capacities, if such relief is available. Since ICRGS has alleged reputation injury in this litigation, a proper declaratory judgment against the individual defendants (in both capacities) could vindicate ICRGS's reputation, as a matter of First Amendment-related law, and could be buttressed by injunctive relief that deters future reputation injuries.

Importantly, in a summary judgment motion context, ICRGS's fact allegations (e.g., viewpoint discrimination by defendants) are treated as if true. Then the defendants' misconduct (i.e., accepting ICRGS's allegations as if true) are measured against the law as it then was recognized, which would include

the objective ("reasonable") text of ***Tex. Educ. Code § 1.001(a)*** -- [*now the subject of a pending motion by ICRGS*]. Immunity defenses, with plaintiff's fact allegations treated as is true, are then mostly an "as–a-matter-of-law" call for the trial judge, yet some level of relevant facts is necessary, too, to provide a context of circumstances for exercising that matter-of-law decision-making.

> Because the official's actions are measured against a standard of objective legal reasonableness, the official's subjective belief that his conduct was lawful is irrelevant to the analysis. *Id.* at 641, 107 S.Ct. at 3040.
>
> In analyzing whether **qualified immunity** applies, we first determine if the facts, taken in the light most favorable to the party asserting injury, showed that the official's conduct violated a constitutional right. *See* *Scott v. Harris*, 550 U.S. 372, 377-78, 127 S.Ct. 1769, 1774-75, 167 L.Ed.2d 686 (2007) (noting that, when reviewing ruling on an official's motion for summary judgment claiming **qualified immunity**, the court usually adopts the plaintiff's version of the facts). If the facts as alleged constitute such a violation, we consider whether the right was clearly established in light of the specific context of the case . . . .

Quoting Turner v. Perry, 278 S.W.3d 806, 814-815 (Tex. App. – Houston 2009, petition for review pending).

B. Defendants' request for more repleading regarding immunities

If the Court desires repleading on immunity issues, ICRGS will replead. In particular, ICRGS seeks prospective relief against defendants as individuals,

that would help remedy reputational harms ICRGS is suffering. This might include declaratory relief plus Court-mandated "diversity training" education.

WHEREFORE, ICRGS respectfully requests favorable relief from this honorable Court, including a *denial* of defendants' motions to dismiss (under Rule 12(b)(1) and under Rule 12(b)(6)), and for other appropriate relief.

Respectfully submitted,

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CERTIFICATE REGARDING SERVICE

I hereby certify that on the 24th 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):

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