CAUSE NO. D-1-GN-09-001239

INSTITUTE FOR CREATION RESEARCH GRADUATE SCHOOL, an unincorporated educational ministry unit of The Institute for Creation Research, Inc., a California not-for-profit corporation, *Plaintiff,*	§	**IN THE DISTRICT COURT**
v.	§	
TEXAS HIGHER EDUCATION COORDINATING BOARD, a state agency;	§	
COMMISSIONER RAYMUND PAREDES, in his official and individual capacities;	§	**TRAVIS COUNTY, TEXAS**
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;	§	**126th** JUDICIAL DISTRICT
A. W. "WHIT" RITER, III, in his official and individual capacities;	§	
BRENDA PEJOVICH, in her official and individual capacities;	§	
ROBERT SHEPARD, in his official and individual capacities;	§	
Defendants.	§	

Filed in The District Court of Travis County, Texas
APR 16 2009 PR
At 11:00 A.M.
Amalia Rodriguez-Mendoza, Clerk

PLAINTIFF'S ORIGINAL PETITION FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF, AND OTHER FORMS OF RELIEF

Comes now plaintiff, the INSTITUTE FOR CREATION RESEARCH GRADUATE SCHOOL ("**ICRGS**"), an unincorporated educational ministry unit of **The Institute for Creation Research, Inc.**, a California not-for-profit corporation, complaining of continuing violations of its federal rights by the **TEXAS HIGHER EDUCATION COORDINATING BOARD ("THECB"),** and by the TEXAS COMMISSIONER OF HIGHER EDUCATION, **RAYMUND PAREDES** ("**PAREDES**"), who has been acting under color of state law, individually and through his official capacity as the chief executive officer of the TEXAS HIGHER EDUCATION COORDINATING BOARD ("**THECB**"), using his "discretion" to perpetrate viewpoint discrimination and censorship, *inter alia*, in violation of the **Equal Protection** and **Due Process** clauses of the 14th Amendment (and in violation other laws),

especially as the 14th Amendment is recognized as applying to constitutional rights of **free speech** (including **academic speech** and **religious speech**), **freedom of the press** (including freedom from "prior restraint" censorship of academic speech associated with freedom of the press), **freedom from viewpoint discrimination** (as well as content discrimination), **free exercise of religion**, **freedom of association**, freedom from hostility toward religious viewpoints), freedom from arbitrary and abusive governmental discretion, freedom from **anti-accommodational** evolution-only-science enforcement policy practices, freedom from **unequal protection** (especially in academic "evolution-only-science-credentialing" politics that act like a government-controlled "titles of nobility" monopoly scheme in postsecondary Science Education), and **reputation injuries**, etc.

Also, ICRGS now complains of the other defendants, all of whom, by their past and continuing Constitution-violating actions under color of state law as voting officers of the THECB and as individuals, have caused (and continue to cause) ongoing injuries to ICRGS, as follows:

I. PARTIES & SERVICE OF PROCESS

1. Plaintiff, **INSTITUTE FOR CREATION RESEARCH GRADUATE SCHOOL** ("**ICRGS**"[1]), is an unincorporated educational ministry activity unit of ***The Institute for Creation Research, Inc.*** ("**ICR**"), a California not-for-profit corporation.[2] While ICR itself is almost 40 years old, ICRGS has been in service as a graduate school for 27+ years, variously providing both classroom education (in California) and online education (via the Internet), consistently offering science education programs from an institutional viewpoint of Biblical and scientific creationism.

2. The **TEXAS HIGHER EDUCATION COORDINATING BOARD ("THECB")** is a state regulatory agency, originated invented by the Texas Legislature (with a slightly different name) for the administrative coordination of public universities and colleges in the State of Texas. Later, due to the growing trend of providing state funding to assist private higher education, the Texas Legislature expanded the THECB's jurisdiction and accountability to apply to regulating private sector universities and colleges which accept and use state government funding (**see Texas Education Code § 1.001(a)**). The THECB may be served with process via

[1] See ICR Graduate School v. Honig, 758 F.Supp. 1350, 1356, 66 Educ. Law Reptr. 655 (S.D. Cal. 1991).

[2] As is illustrated by ICR Graduate School v. Honig, 758 F.Supp. 1350, 1356, 66 Educ. Law Reptr. 655 (S.D. Cal. 1991). it is proper for ICRGS, as opposed to **ICR** itself as a corporation, to appear as the named plaintiff herein. In the ***alternative***, however, please deem the substance of this "notice pleading" as if it had identified **ICR** (in its corporate capacity) as the named plaintiff, i.e., as ICR appearing on behalf of its own legal interests in its graduate school, and thus also appearing on behalf of its graduate school, which is operated as part of ICR's overall Creator-honoring not-for-profit corporate mission.

its CEO, Commissioner Paredes (the same Commissioner Paredes who is mentioned in the next paragraph), as follows, in conjunction with a copy of this petition being served on the Attorney General of Texas (as indicated in a later paragraph):

TEXAS HIGHER EDUCATION COORDINATING BOARD
c/o its CEO, the Commissioner of Higher Education
1200 East Anderson Lane, Austin, Texas 78752 – 1743.

3. Defendant **COMMISSIONER RAYMUND ARTHUR PAREDES** ("Paredes" or "the Commissioner" or "Commissioner Paredes"), who is herein sued *in* both *his official and individual capacities*, is acting and has acted under color of his office, as the chief executive officer of the Texas Higher Education Coordinating Board. Because the THECB's office building is where Commissioner Paredes' primary place of business is, where he acts under color of state law (as THECB's CEO), Commissioner Paredes may be served with process as follows:

Dr. Raymund Paredes, Commissioner of Higher Education
c/o TEXAS HIGHER EDUCATION COORDINATING BOARD
1200 East Anderson Lane, Austin, Texas 78752 – 1743.

Paredes may also be served at his residence, which is believed to be as follows:

Dr. Raymund A. Paredes
4902 Westview Drive, Austin, Texas 78731.

4. Defendant **LYN BRACEWELL PHILLIPS** ("Committee Chair Phillips" or "Phillips"), who is herein sued *in her official and individual capacities*, has acted under color of her office as a voting member of THECB and as a Committee Chair for the THECB's Academic Excellence and Research Committee (including her actions as such while presiding as such on April 23rd of 2008, as well as her actions on April 24th of 2008 when she functionally presided over the THECB vote to deny ICRGS a license to grant **M.S.** degrees with a major in "Science Education" due to its programmatic inclusion of a creationist viewpoint which dared to disagree with the popular "evolution-is-true" viewpoint). Because the THECB's office building is where Committee Chair Phillips acts under color of state law, she may be served as follows:

Dr. Lyn Bracewell Phillips, THECB Board Member and
Chair of the Committee on Academic Excellence & Research
TEXAS HIGHER EDUCATION COORDINATING BOARD
1200 East Anderson Lane, Austin, Texas 78752 – 1743.

Phillips may also be served at her residence, which is believed to be as follows:

Dr. Lyn Bracewell Phillips
1403 Main Street, Bastrop, TX 78602.

5. Defendant **JOE B. HINTON** ("Hinton"), who is herein sued *in his official and individual capacities*, has acted under color of his office as a voting member of THECB (including his motion on April 24th of 2008, to deny ICRGS's right to grant M.S. degrees in Texas), Because the THECB's office building is where Hinton acts under color of state law, he may be served with process as follows:

Joe B. Hinton, Board Member
TEXAS HIGHER EDUCATION COORDINATING BOARD
1200 East Anderson Lane, Austin, Texas 78752 – 1743.

Hinton may also be served at his residence, which is believed to be as follows:

Joe B. Hinton
4001 Bosque Ridge Road, Crawford, Texas 76638.

6. Defendant **LAURIE LUPER BRICKER** ("Bricker"), who is herein sued *in her official and individual capacities*, has acted under color of her office as a voting member of THECB (including her motion on April 23rd of 2008, to accept the Commissioner's recommendation to deny ICRGS's right to grant M.S. degrees in Texas), Because the THECB's office building is where Bricker acts under color of state law, she may be served as follows:

Laurie Bricker, Board Member
TEXAS HIGHER EDUCATION COORDINATING BOARD
1200 East Anderson Lane, Austin, Texas 78752 - 1743.

Bricker may also be served at her residence, which is believed to be as follows:

Laurie Bricker
8006 Candle Lane, Houston, Texas 77071.

7. Defendant **ELAINE MENDOZA** ("Mendoza"), who is herein sued *in her official and individual capacities*, has acted under color of her office as a voting member of THECB, Because the THECB's office building is where Mendoza acts under color of state law, she may be served as follows:

Dr. Elaine Mendoza, Board Member
TEXAS HIGHER EDUCATION COORDINATING BOARD
1200 East Anderson Lane, Austin, Texas 78752 – 1743.

Mendoza may also be served at her primary place of business, which is believed to be as follows:

Dr. Elaine Mendoza
Conceptual MindWorks, Inc.
9830 Colonnade Boulevard, Suite # 377, San Antonio, TX 78230 .

8. Defendant **A.W. "WHIT" RITER, III** ("Riter"), who is herein sued *in his official and individual capacities*, has acted under color of his office as a voting member of THECB, Because the THECB's office building is where Riter acts under color of state law, he may be served as follows:

A. W. "Whit" Riter, III, Board Member
TEXAS HIGHER EDUCATION COORDINATING BOARD
1200 East Anderson Lane, Austin, Texas 78752 – 1743.

Riter may also be served at his primary place of business, which is believed to be as follows:

A. W. "Whit" Riter, III
Riter Management Co., LC
110 N. College Avenue, Suite # 1406, Tyler, Texas 75702.

9. Defendant **BRENDA PEJOVICH** ("Pejovich"), who is herein sued *in her official and individual capacities*, has acted under color of her office as voting member of THECB, Because the THECB's office building is where Pejovich acts under color of state law, she may be served as follows:

Brenda Pejovich, Board Member
TEXAS HIGHER EDUCATION COORDINATING BOARD
1200 East Anderson Lane, Austin, Texas 78752 – 1743.

Pejovich may also be served at her residence, which is believed to be as follows:

Brenda Pejovich
6922 Forest Glen Drive, Dallas, Texas 75230.

10. Defendant **ROBERT SHEPARD** ("Shepard"), who is herein sued *in his official and individual capacities*, has acted under color of his office as a voting member of THECB, Because the THECB's office building is where Shepard acts under color of state law, he may be served as follows:

Robert Shepard, Board Member
TEXAS HIGHER EDUCATION COORDINATING BOARD
1200 East Anderson Lane, Austin, Texas 78752 - 1743.

Shepard may also be served at his residence, which is believed to be as follows:

Robert W. Shephard
5348 Papaya Circle, Harlingen, Texas 78552.

11. Other than the THECB itself, the above-named defendants are sued in their **individual** capacities so that any injunctive and/or declaratory relief which may be granted herein will legally obligate and bind their compliance therewith *individually.* Also, the above-named defendants are sued in their respective **official capacities** so that their successors-in-office, if any there may be in the future, will likewise be legally obligated and bound to comply in their respective *official capacities* with any **injunctive** and/or declaratory relief granted herein.

12. The federal and state rights of your plaintiff have been violated, and continue to be violated, by the official acts of said defendants (i.e., THECB itself, plus Commissioner Paredes and the above-named voting members of THECB) all of whom who undertook "discretionary" actions (or viewpoint discrimination) against ICRGS under color of state law and office, on April 23rd and 24th of 2008 (and likely also during the days if not also months prior thereto). Moreover, defendants have continually failed (since April 24th of 2008) to correct or even mitigate their ongoing violations of ICRGS's civil rights, despite having the discretionary power and legal obligation to do so.

13. In other words, said defendants, by acting in concert, have caused and are continuing to cause these continuing violations (of ICRGS's federal rights) under color of defendants' respective offices and official "discretionary" capacities, and **all of said defendants continue to refuse to act in a way to undo or otherwise remedy their own respective 14th Amendment-violating wrongdoings**, despite ongoing opportunities to do so. Thus, by acting contrary to governing federal (and state) laws, the THECB itself, as well as the other defendants (under color of state law) are acting without valid authority of state law, since state law cannot validly violate preemptive federal law.[3] Furthermore, defendants have committed this continuing violation of ICRGS's federal and state rights done in concert with one another, and in concert with others, including THECB's Assistant Commissioner (Dr. Joe Stafford), and members of an improperly composed advisory committee of the THECB, i.e., members of the second (i.e., final) *ex parte* "science educator" advisory committee composed of Dr. Gerald Skoog, Dr. Barbara Curry, Dr. David Hillis, and Dr. C.O. "Pat" Patterson. Present information suggests that those five evolutionists just specifically named (in the previous sentence) may ***not*** qualify under Texas state law as being "officers" for purposes of Ex parte Young / Pulliam v. Allen doctrine[4], so they are ***not*** named as co-defendants to this civil action.[5]

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[3] U.S. Constitution (AD1787, ratified AD1789), Article VI, ¶ 2 (the "Supremacy Clause").

[4] See Ex parte Young, 209 U.S. 123, 28 S.Ct. 441 (1908); Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970 (1984). See, accord, MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129, 127 S.Ct. 764, 772

14. Because a Texas state agency is a defendant in this litigation (i.e., THECB is being sued in its official capacity as a Texas state government agency), and especially because the contitutionality of a law or regulation or policy practice of the State of Texas is herein challenged, the Attorney General of Texas (*in his official capacity only)* is to be served with a copy of this petition, pursuant to **Tex. Civ. Prac. & Rems. Code § 37.006(b),** as follows:

Hon. Greg Abbott,
in his official capacity as
Attorney General for the State of Texas
(attention: Barbara B. Deane, Esq.)
c/o Office of the Attorney General of Texas
300 W. 15th Street, Austin, Texas 78701.

(In other words, the Texas Attorney general is not a defendant herein, but he is to be formally served with a copy of the petition, although not with a "defendant" citation.)

15. As to individual defendants named above, who are all officers of the THECB, service of process (i.e., Citation and Petition) *may* be attempted pursuant to Tex.R.Civ.P. **Rule 103** (regarding who may serve civil process) *or* **Rule 119** (regarding waiving citation and service of process). If Rule 119 is used to request a defendant's waiver, and if service of process is not thus waived under Rule 119, plaintiff may follow **Rule 106**'s requirements for that defendant.

II. JURISDICTION AND VENUE

Subject-matter jurisdiction in general.

16. This honorable Court has subject-matter jurisdiction over this civil action because this case fits within the "general jurisdiction" of this honorable Court.

(2007), recognizing that a suit for declaratory judgment relief fits Ex parte Young-type dilemma scenarios. Although this case law directly applies to suing state government officials in *federal* district court, the same logic largely applies to suing state government officials in *state* district court, because plaintiff (in this case) is not suing for damages. However, *unlike* the *federal* context, in *this* action plaintiff seeks injunctive relief against the government officials ***and the state agency itself.***

[5] In addition to asking for **injunctive** relief, to remedy the continuing violations of ICRGS's **federal** rights, ICRGS asks for ancillary **declaratory** relief, pursuant to the federal **Declaratory Judgment Act** codified at **28 U.S.C. § 2201(a),** to have certain parts of the Texas Education Code declared unconstitutional, and to have certain THECB-promulgated administrative regulations declared unconstitutional.

Venue Statutes, in particular.

17. As is indicated more particularly below, a substantial part of this suit is an attempt to gain injunctive relief that would mandate the THECB and its Commissioner (and its culpable board members) to effectively ***undo the harm*** they have caused unto ICRGS, as a proximate result of the THECB's actions on April 24th of 2008. Accordingly, it appears that this controversy is governed by Tex. Civ. Prac. & Rems. Code's **§ 15.014,** which requires that an "action for mandate against the head of a department of the state government shall be brought in Travis County".

18. For venue purposes it may also be recognized, in relation to Tex. Civ. Prac. & Rems. Code's **§ 15.002(1),** that "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. For example, one of the continuing harms, to ICRGS in California (and to ICR in Dallas), is the ongoing censorship consequence of THECB's April 24th, 2008 decision, which prohibits ICR from presently using its monthly publication (*Acts & Facts*) to invite Texas residents to apply for admission into ICRGS's graduate program in "Science Education". In effect, THECB (acting through the Commissioner and the board members who are listed as co-defendants herein) has banned ICRGS's *M.S.* program in Texas, as purportedly "fraudulent or substandard" --- simply because ICRGS promotes the viewpoint that ***Darwin was wrong.***

Primary Relief Sought.

19. This civil action primarily seeks injunctive relief under the federal Civil Rights Act codified at **42 U.S.C. § 1983** (for violation of Equal Protection, substantive Due Process, etc.), as well as related injunctive relief under Tex. Civ. Prac. & Rems. Code 106.002 and 110.005(a)(1), buttressed by appropriate declaratory relief under the Texas Declaratory Judgment Act, codified at Tex. Civ. Prac. & Rems. Code **§ 37**. Alternatively, this civil action seeks declaratory relief buttressed by appropriate injunctive relief, against the THECB itself, as well as its above-named voting THECB board members and its Commissioner, acting in their respective official and/or individual capacities.[6]

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[6] In ICRGS's case, THECB's denial of a Certificate of Authority (due to defendants' ongoing actions under color of state law, including ongoing failures to mitigate their prior wrongdoings under color of state law), within the context of its regulatory jurisdictional claims to regulate virtually all degree-granting private higher education inside Texas, is an ongoing violation of federal constitutional law, triggering (as regards injunctive relief to which ICRGS is entitled) the ***Ex parte Young*** doctrine's "exemption" from (i.e., non-applicability regarding) Eleventh Amendment-related immunity:

> In determining whether the doctrine of ***Ex parte Young*** avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry into whether [the] Petition alleges an ongoing violation of federal law and seeks relief properly characterized

Jurisdictional Facts Occurring in the Dallas area.

20. Some of the important jurisdictional facts, upon which this Petition is based, include transactions and/or occurrences, of an ongoing nature, which are occurring in Dallas County, Texas, --- including ongoing legal injuries resulting from:

(a) unconstitutional infringements of and interferences with plaintiff's **Free Speech (including academic speech** [that does ***not*** propose a commercial transaction]**, religious speech, and commercial speech**[7]);

(b) unconstitutional infringements of and interferences with plaintiff's **Free Exercise of Religion**; and/or

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as prospective." ***Idaho v. Coeur d'Alene Tribe of Idaho***, 521 U.S. 261, 296, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (O'CONNOR, J., joined by SCALIA and THOMAS, JJ., concurring in part and concurring in judgment); see also *id.*, at 298-299, 117 S.Ct. 2028 (SOUTER, J., joined by STEVENS, GINSBURG, and BREYER, JJ., dissenting). . . .

We have approved injunction suits against state regulatory commissioners in like contexts. . . . . [citations omitted] . . .

Indeed, ***Ex parte Young*** itself was a suit against state officials (including state utility commissioners, though only the state attorney general appealed) to enjoin enforcement of a railroad commission's order requiring a reduction in rates. 209 U.S., at 129, 28 S.Ct. 441. As for Verizon's prayer for declaratory relief: That, to be sure, seeks a declaration of the *past,* as well as the *future,* ineffectiveness of the Commission's action, so that the past financial liability of private parties may be affected.

But no past liability of the State, or of any of its commissioners, is at issue. It does not impose *upon the State* "a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." ***Edelman v. Jordan***, 415 U.S. 651, 668, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Quoting Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 646, 122 S.Ct. 1753, 1760 (2002) (emphasis added), *applying* Ex parte Young, 209 U.S. 123, 28 S.Ct. 441 (1908). *Cf. also*, Central Virginia Community College v. Katz, 546 U.S. 356, 126 S.Ct. 990 (2006) (reevaluating sovereign immunity issues).

[7] See the constitutional analysis in **Strang v. Satz**, 884 F.Supp. 504, 510, 100 Educ. Law Reptr. 182, 23 Media Law Reptr. 2333 (S.D. Fla. 1995) (construing the U.S. Constitution's 1st and 14th Amendments as **prohibiting a state statute that censored communication of an earned academic degree if that degree was not issued by an educational institution recognized by the state government as "accredited",** because the statute was "not narrowly tailored to serve the governmental purpose" for such censorship), *citing and following* Central Hudson Gas & Electric Corp., 447 U.S. 557, 566, 100 S.Ct. 2343, 2351 (1980).

(c) unconstitutional infringements of and otherwise improper interferences with plaintiff's **Interstate Commerce**, have occurred in Dallas County, Texas, --

such that venue appears to be proper in the North District of Texas, Dallas Division.

21. Defendants Paredes and the other THECB officers have acted in concert, under color of state law, to produce an ongoing violation of ICRGS's constitutional and statutory rights and to thus produce an ongoing injury as a direct and foreseeable result.

22. This ongoing legal injury (as well as the ongoing viewpoint discrimination controversy that underlies ICRGS's ongoing legal injury) focuses on a *bona fide* dispute about various "color-of-state-law"-based powers, laws, rules, regulations, interpretive decisions and/or customary practices of the THECB, **as that state governmental agency is headed**, in whole or in part, **by Commissioner Paredes and the other defendants,** under color of Texas state law.

23. In other words, this civil rights/discrimination-grounded controversy arises from the unconstitutional *manner* in which defendants have used their "color-of-state-law"-based THECB powers, in concert with each other, in violation of ICRGS's civil rights. That abuse of "color-of-state-law" powers, by defendants, has foreseeably and actually produced ongoing discrimination injuries to ICRGS as a private educational institution. (That ongoing discrimination specifically includes academic "viewpoint discrimination".) Of course, as in the case of HEB Ministries, Inc. v. THECB, 235 S.W.3d 627 (Tex. 2007), plaintiff herein also seeks injunctive and declaratory relief against the THECB itself,[8] since that state agency has directly violated (and continues to violate) ICRGS's academic freedom and religious liberties.

24. After service upon said defendants, and after a summary disposition or trial on the merits of this controversy, this honorable Court may resolve this ongoing controversy, in whole or in part, by specifically making a determination as to whether the color-of-state-law norms, which have been repeatedly asserted by the defendants, clash with federal laws (and thus violate the U.S. Constitution's Supremacy Clause). Assuming that this honorable Court so determines, that clash with federal and state law can and should be rectified by this honorable Court granting additional appropriate injunctive relief, to be buttressed by appropriate declaratory relief. However, it may well be that the substance of this controversy can be resolved, completely, using an approach that circumvents confronting the federal constitutional issues, like the interpretive approach illustrated in the time-honored case of Rector, etc., of Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511 (1892) (resolving a First Amendment-violating regulation by presuming a statutory interpretation that avoided violating the First Amendment).

[8] Also, some of the relief requested herein is available due to the qualified waiver of sovereign immunity denoted in Tex. Civ. Prac. & Rems. Code § 110.008(a).

ICRGS faces the threat of penal sanctions, if it acts apart from THECB's approval.

25. Due to adverse actions of the THECB (as THECB is led by defendants under color of state law), during and after April 2008, ICRGS is faced with a legal dilemma, with both choices requiring ICRGS to experience unjustly discriminatory consequences:

> (a) ICRGS could **actively stand** on its First Amendment rights and continue to offer its academic programs to Texas residents, and then be (unjustly) prosecuted for offering what the THECB and defendants (acting under color of state law) unjustly characterize as a "fraudulent or substandard" degree program, via legal process that potential implicates Texas Deceptive Trade Practices – Consumer Protection Act jeopardies (including prosecution-of-crime jeopardies); or
>
> (b) *alternatively,* ICRGS could **passively surrender** its First Amendment rights and permanently discontinue offer its academic programs to Texas residents, in order to avoid being (unjustly) prosecuted for offering what the THECB and defendants (acting under color of state law) characterize as a "fraudulent or substandard" degree program, via legal proceedings that potentially implicate Texas Deceptive Trade Practices – Consumer Protection Act jeopardies.

26. In particular, ICRGS has been told,[9] by representatives of THECB (i.e., by the Commissioner, individually and/or via his representatives, under color of state law), that its Texas-based publication, ***ACTS & FACTS***, may ***not*** institutionally advertize ICRGS's "Master of Science in Science Education" program unto Texas residents, if the advertisement indicates any willingness (on ICRGS's part) to admit Texas residents into its ***M.S.*** program, even though ICRGS's ***M.S.*** program has been (and continues to be) offered under California state law via an online (interstate telecommunications-based) format.

27. In light of the Commissioner's (and thus THECB's) prior willingness to persecute ***Tyndale Theological Seminary, Southern Bible Institute,*** and ***Hispanic Bible Institute*** (all of which are Bible-based Protestant evangelical educational institutions), ICRGS reasonably concludes that the Commissioner is **also** likely to use color of state law to prosecute ICRGS, if ICRGS offers its ***M.S.*** degree program to Texas residents. (For clarification, ICRGS recognizes that it does not appear that defendants would prosecute a theological apologetics program that offers a "Master of Christian Education" degree, but ICRGS herein seeks to vindicate its ***M.S.*** degree.)

28. Accordingly, due to the adverse actions of the THECB during April 2008, ICRGS has thereafter ceased admitting Texas residents into its ***M.S.*** program. Likewise, due to the adverse

[9] THECB's position on this was clarified shortly after a SOAH-conducted mediation in October 2008.

actions of the THECB during April 2008, ICRGS has thereafter ceased advertizing (from Texas) that it is willing to admit Texas residents into its 27+-year-old ***M.S.*** program.

III. CONDITIONS PRECEDENT

Conditions Precedent in General.

29. As noted below, ICRGS has tried to exhaust its administrative remedies (to the limited extent that such exist), which efforts have including participation in an ALJ-conducted mediation in Austin, during October of 2008, at the offices of the Texas State Office of Administrative Hearings ("**SOAH**").

30. At the present, the State Office of Administrative Hearings ("SOAH") process is slowly proceeding, as SOAH case # 781-09-2910. Meanwhile ongoing injury accrues to the First Amendment-frustrated rights of ICRGS, of ICR's communications department (which now is muzzled from advertizing the offering of ICRGS's ***M.S.*** program to Texas residents), of ICRGS's faculty (including its adjunct faculty), of ICRGS's students, and of ICRGS's prospective students. Due to ongoing civil rights injuries, ICRGS's academic reputation[10] has suffered, and it continues to suffer.

31. This unjust deprivation and encroachment of their respective civil liberty interests is ***not*** a trivial injury. Prior restraint censorship (imposed upon a college catalog) is ***not*** trivial. Governmental disfavor of an academic viewpoint regarding evolution (i.e., ICRGs' academic viewpoint that ***Darwin was wrong***, that origins-by-accidents is false, etc.), to the extreme of denying a government-issued license[11] to operate an academic program, is not a trivial civil liberties infringement.[12] Rather, the respective injuries to those respective civil liberties (i.e., those of ICRGS, of ICRGS's faculty, and of ICRGS's students) are serious enough to justify at least some form of preliminary injunctive relief pending the complete adjudication (or quasi-adjudication) of the legal issues involved in this overall controversy.

32. Preliminary injunctive and/or declaratory relief is especially appropriate in this case, prior to a full processing of the limited administrative remedies available, because the SOAH process cannot provide full or even adequate relief to the ongoing injuries ICRGS accrues (as a result of

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[10] See **Texas Constitution, Article I, section 13,** regarding the importance of injury to reputation.

[11] Regarding discriminatory practices of a government agency (as led by its officials), in conjunction with issuing government licenses and/or government program benefits, see Tex. Civ. Prac. & Rems. Code, **§ 106 ("Discrimination Because of Race, Religion, Color, Sex, or National Origin").**

[12] See Tex. Civ. Prac. & Rems. Code §§ 106(1), 106(4), 106(5), & 106(6), as well as § 110.002(b).

the ongoing violations of ICRGS's civil liberties). For example, ICRGS should receive preliminary injunctive relief protecting ICRGS's First-and-Fourteenth-Amendments-secured liberties to safely publish and advertize, in and from Texas, via its monthly Dallas-based publication, ***Acts & Facts*** (and via brochures distributed at educational conventions, and otherwise), its *Master of Science* degree program (in Science Education), unto Texas residents. et Texas's State Office of Administrative Hearings ("SOAH") has no statutorily delegated authority to provide *preliminary injunctive relief*, or even formal declaratory relief regarding constitutional controversies (other that the obvious authority to provide a quasi-adjudicatory decision supported by an ALJ's analytical opinion).

33. But, as noted below, the Statute of Limitations forces ICRGS to file this civil action now, **before** all potential administrative remedy processes can be "exhausted".[13] Moreover, some of the federal claims (in this Petition) cannot be addressed via the administrative remedies route due to the limited subject-matter jurisdiction of Texas's SOAH.

Exhaustion of Administrative Remedies and Applicable Statutory Limitations.

34. In particular, ICRGS has been attempting (and continues to attempt) to exhaust its administrative remedies (via SOAH quasi-judicial review) regarding this overall controversy. However, three problems with that approach remain:

(a) there exists an applicable Statute of Limitation[14] which must be observed regardless of how far the "exhaustion of administrative remedies" process has progressed; and

(b) THECB has clearly indicated that the State Office of Administrative Hearings ("SOAH") process, due to its statutorily defined jurisdiction, cannot adjudicate all of the important legal issues in this controversy, much less do so in a meaningfully timely manner; moreover, neither does the SOAH have the jurisdictional authority to provide all of the important remedies (e.g., injunctive relief and power to declare Texas statutes unconstitutional) which appear necessary for justly resolving this controversy; and

(c) under the U.S. Supreme Court's ruling in MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128-129, 127 S.Ct. 764, 772-773 (2007), **it is not required that a plaintiff risk liability or criminal prosecution before that plaintiff uses a statutory**

[13] See Tex. Civ. Prac. & Rems. Code § 110.007, regarding ICRGS's one-year deadline.

[14] For civil rights violations governed by **42 U.S.C. § 1983,** both federal courts and state courts look to comparable state law statutes for limitations timeframes. In Texas, the most comparable civil rights statute, relevant to this case's civil rights claim (under **42 U.S.C. § 1983**) is the **"Texas Religious Freedom Restoration Act"** of 1999, codified at Tex. Civ. Prac. & Rems. Code, **Chapter 110** ("Religious Freedom"). Said act has a Statute of Limitation of "one year" from the date the religious freedom injury occurred. *See* id., **§ 110.007** ("One-Year Limitations Period").

declaratory judgment remedy (as ancillary relief to injunctive relief, or otherwise) to seek to have an unconstitutional state law or regulation declared unconstitutional, in order to protect and vindicate federal rights that are being *continually* violated.[15]

35. Accordingly, it is needful that this civil action be filed herein, now, because (a) waiting a couple months to do so would miss the Statute of Limitations deadline; and (b) SOAH has insufficient jurisdiction to remedy or otherwise resolve all of the serious legal problems involved.

IV. PROCEDURAL HISTORY & BACKGROUND FACTS

Facts generally applicable to all claims for relief.

36. This case's collection of interrelated legal controversies (including the ongoing civil liberty deprivation-caused injuries at the core of this controversy) is now ripe for procedural processing as a federal civil rights action. This case began as a controversy within an administrative law-regulated context. Specifically, Plaintiff has protested various deprivations and violations of federal Due Process and Equal Protection, *inter alia*, pursuant to Title 19, Texas Administrative Code, Part 1, Chapter 1, Subchapter B, **Rule § 1.23**, as such is became procedurally applicable via Title 19, Texas Administrative Code, Part 1, Chapter 7, Subchapter A, **Rule § 7.6(d)(7)** ("Administrative Procedures related to Certification of Nonexempt Institutions"), as will now be generally described.

37. Specifically, as ICRGS has already been doing already in California (where its graduate school was established in 1981), ICRGS seeks to offer its (now mostly-online) programs leading to a **Master of Science** degree in **Science Education**, with such degrees to include the following optional minor tracks: Biology, Geology, Astro-Geophysics, and General Science. ICRGS's

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[15] It is noteworthy that the THECB and defendants were repeatedly cautioned that ICRGS's federal rights were threatened and jeopardized by the THECB's **academic speech—disfavoring** actions. For example, Appendix "G" of Exhibit # 1 was a copy of ICRGS's Progress Report's Appendix "R", shows ICRGS's concern, as of late March of 2008, that the THECB's actions appeared to indicate a willingness to avoid compliance with various federal laws applicable to this situation. Those concerns were justified. Likewise, Appendix "H" of Exhibit # 1 was a copy of the Supplement to ICRGS's Progress Report's Appendix "R", provided to the THECB committees on April 23 of 2008, showed supplemental expressions of ICRGS's concerns about THECB's apparent willingness to under-estimate the relevance and importance of channeling its administrative discretion within the boundaries of applicable federal law standards. Those supplemental expressions of concern were likewise justified. Constitutional issues and problems permeate ICRGS's administrative appeal, so ICRGS's civil litigation seeks injunctive and/or declaratory relief (including a federal discrimination statute-based remedy), because THECB's *ultra vires* actions (in conjunction with ongoing failures to act), as led by defendants, have not meaningfully cured those constitutional problems by any administrative remedy.

request for such a Certificate of Authority was procedurally submitted unto THECB (and thereby unto defendants) pursuant to what is now codified as Title 19, Texas Administrative Code, Part 1, Chapter 7, especially that chapter's Rule § 7.6 (and related THECB Rule § 7.8).

38. ICRGS's request for a Certificate of Authority eventually took the form of an amended application (primarily represented by the ICRGS's Progress Report[16] of March 2008) which is too voluminous to append to this pleading, but several copies of that Progress Report were already submitted unto the THECB (and thus to defendants), in a timely manner, on or about March 26th of 2008. (The contents of that March 2008 Progress Report are hereby incorporated herein by reference.)

39. The THECB Board defendants (i.e., the defendants who voted against ICRGS), -- on recommendation of the THECB Commissioner (i.e., defendant Raymund Paredes, as Texas Commissioner of Higher Education) and the Assistant Commissioner (as well as the unanimous joint recommendation of the THECB's Academic Excellence & Research Committee and the THECB's Participation & Success Committee), -- in reliance on the advice of two improperly composed and improperly operating advisory *ex parte* "panel" committees, -- unjustly disapproved and illegally **denied** ICRGS's amended application of ICRGS, for a Certificate of Authority to grant graduate degrees in Texas.

40. In particular, the THECB decision that is now being complained of was formally voted on and announced publicly (by the defendants) on **Thursday, April 24th of 2008.** The decision was itself an endorsement of the Commissioner's recommendation which was formally read into the record *on the previous day*, during a joint meeting (headed by defendant Phillips) of the THECB's Academic Excellence & Research Committee and the THECB's Participation & Success Committee. The Commissioner's recommendation, in turn, predominantly relied upon advice from two advisory "panel" committees (of "scientists and science educators"), the composition of both failing the "balanced representation" requirement of a state agency advisory committee (as mandated by the Texas Government Code).

41. In ICRGS's application, as amended (by its Progress Report of March 2008), for a Certificate of Authority (under what is now codified as THECB Rule § 7.6) to grant a Master of Science degree in Science Education, ICRGS demonstrated, by documentation (and otherwise), that **ICRGS met or exceeded the "Standards of Certificates of Authority"** (which are now codified as THECB Rule § 7.8), which standards previously were promulgated as "twenty-one standards". Specifically, ICRGS showed that it met the following 21 standards:

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[16] The March 2008-submitted Progress Report, itself, is an indexed and voluminous large 3-ring notebook captioned "THECB Progress Report" (herein called "ICRGS's Progress Report" or simply "the Progress Report").

1) Legal Compliance: THECB never expressed a serious concern about this;

2) Qualifications of Institutional Officers: THECB never expressed a serious concern about this;

3) Governing Board: THECB never expressed a serious concern about this;

4) Distinction of Roles: modified to address THECB's criticism (see ICRGS's Progress Report's tab "Standard 4: Distinction of Roles") ;

5) Financial Resources & Stability: THECB never expressed a serious concern about this;

6) Financial Records: THECB never expressed a serious concern about this;

7) Institutional Assessment: modified, now using the Nicholas paradigm, to address THECB's criticism (see ICRGS's Progress Report's tab "Standard 7: Institutional Effectiveness");

8) Student Admission & Remediation: THECB never expressed a serious concern about this;

9) Faculty Qualifications: modified to address THECB's criticism (see ICRGS's Progress Report's tab "Standards 9 & 10: Faculty Qualifications and Size"), ***yet some of the defendants raised superficial concerns, in April 2008, about the qualifications of ICRGS's faculty;*** [17]

10) Faculty Size: modified to address THECB's criticism (see ICRGS's Progress Report's tab "Standards 9 & 10: Faculty Qualifications and Size");[18]

11) Academic Freedom & Faculty Security: THECB never expressed a serious concern about this, *except* that it appeared to bother some of defendants, in April 2008, that ICRGS faculty used their academic freedom (in conjunction with their religious liberty) to believe Darwin was wrong, and to disbelieve the "Big Bang" theory, and/or other popular doctrines of evolutionary theory (such that ICRGS professors teach evolutionary theory assumptions and interpretations, as a matter of ICRGS instruction, yet they consistently do so in a manner that shows that ICRGS professors

[17] This "concern" is adequately addressed in ICRGS's March 2008 Progress Report, in the pages tabbed "Standards 9 and 10: Faculty Qualifications and Size". (*See, accord,* **Appendix "Q"** of Exhibit #1.) On April 23rd of 2008 the defendants effectively admitted that this supposed concern was really insignificant.

[18] This "concern" is adequately addressed in ICRGS's March 2008 Progress Report, in the pages tabbed "Standards 9 and 10: Faculty Qualifications and Size". (*See, accord,* **Appendix "Q"** of Exhibit #1.)

reject popular evolutionary scenarios because those scenarios are neither empirically observable nor forensically sound);

12) Curriculum: modified to address THECB's criticism (see ICRGS's Progress Report's tab "Curriculum"), yet ***THECB (and defendants) continued to disapprove ICRGS's Science Education curriculum, and THECB (as still led by defendants,*** *under color of state law)* ***continues to deny that ICRGS's curriculum non-deceptively provides learners with a master's-level program of*** **"science education";**[19]

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[19] This concern is especially addressed in Exhibit #1's **Appendix "A",** which comparatively documents, analyzes, and charts how ICRGS's *Master of Science* curriculum, especially curricular content "breadth" coverage, satisfies relevant national and Texas educational "standards" for teaching "science education" at the master's level. For example, of the 295 American Academy for the Advancement of Science "Benchmarks" (i.e., AAAS norms for teaching "science" to 9th through 12th grade students), ICRGS teaches its grad students all of those 295 educational content topics/concepts, -- yet only 19 of those 295 pertain to educational coverage of the evolution-versus-creation controversy. Said Appendix "A" was prepared by Dr. Patricia Nason (*M.Ed.; Ph.D., Texas A&M University, in Curriculum & Instruction*). A related (and invalid) criticism is the selection of textbooks and textbook-supplements described in the ICRGS curriculum materials, either because:

(a) the sources were "creationist" in perspective; and/or

(b) the sources are sometimes used for teaching "undergraduate" science courses at one or more colleges.

The former criticism is blatant **viewpoint discrimination**, offending ICRGS's institutional academic freedom rights under the 1st and 14th Amendments. ICRGS, which conspicuously affirms its Biblical creationist viewpoint as an institutional distinctive, should not be required to academically "shut its mouth" or "go to the back of the [postsecondary science education] bus" just because it affirms the truth of **Genesis 1:1**, or because ICRGS corroborates the Biblical account of the Genesis Flood (the historicity of which has been repeatedly corroborated). In effect, the THECB's *ex parte* advisory committees (which were improperly composed by defendant Paredes) often discounted ICRGS's curriculum when ICRGS used its academic freedom, in curriculum design and textbook selections, to employ academic usage of **creationist textbooks and creationist textbook-supplements**. It is obvious that the unbalanced (and thus improperly composed) advisory "panel" committees, appointed by the Commissioner, were uncomfortable and disapproving whenever creation science materials were incorporated into ICRGS's curriculum.

The latter criticism misses the pedagogical mark for two reasons, mostly by confusing the educational purposes of teaching science majors (***themselves***) to learn their science content, as contrasted with teaching science education majors to effectively ***teach others*** about science. First, a textbook can be used for didactic purposes with undergrads and also could be used for critical-thinking skills analysis with grad students. Second, a textbook used to teach undergrad science majors could easily be useful in teaching graduate "science education majors", because the purpose for using the textbook is completely different. In other words, a science textbook can be used for an undergraduate "learner", to simply learn the science content, -- whereas the same textbook can be used as a "train-the-teacher-to-teach" tool (for teaching graduate students how to efficiently serve as science educators, who mostly likely will teach Christian high school students and/or Christian college undergrad students). For a science ***education*** graduate student (whose anticipated role is that of "*science teacher*"), the science textbook is used **as a**

13) General Education: THECB never expressed a serious concern about this;

14) Credit for Work Completed Outside a Collegiate Setting: THECB never expressed a serious concern about this;

15) Learning Resources: modified to address THECB's criticism (see ICRGS's Progress Report's tab "Library";

16) Facilities: THECB never expressed a serious concern about this;

17) Academic Records: THECB never expressed a serious concern about this;

18) Accurate & Fair Representation in Publication, Advertising, & Promotion: modified to address THECB's criticism (see ICRGS's Progress Report's tab "Access to Information Items[,] Agreement between Information Sources" -- this concern basically faulted ICRGS's website information as conflicting with some parts of its catalog,[20] and these inconsistencies have been reconciled;

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tool for teaching others; this is quite different from the learning objective of an undergrad science major (whose anticipated role is "*practicing scientist*"). Failing to appreciate this difference ("textbook used to teach science" versus "textbook used to teach teacher to teach science") is repeatedly made by the (obviously biased) advisory committee member Gerald Skoog. Dr. Skoog also appears to ignore the academic reality that, in many Texas colleges, program electives (and/or courses in a chosen minor) are allowed to include upper-level undergraduate coursework. (Paleontology would typically be such a subject.)

A similar "dig" is Dr. Skoog's remark, when critiquing ICRGS's *Advanced Ecology with Lab* course: "The ten modules for this course cover topics usually studied in an undergraduate ecology course", implying that ecology topics such as "how organisms interact with each other and their environment" are somehow valid topics for undergrads *only*. (One wonders how graduate level ecology can be taught in a way apart from analyzing as **"how organisms interact with each other and their environment"**.)

Legally relevant, to ICRGS's institutional academic freedom, is another theme recurring in Dr. Skoog's criticisms of ICRGS's M.S. curriculum, science fads. The necessarily implied criticism is that ICRGS doesn't try to be "fashionable" by mimicking whatever its evolutionist counterparts are now doing, thematically speaking. For example, Dr. Skoog remarks: "The anatomy of these organisms ["the jawless, cartilaginous, and bony fishes, amphibians (mudpuppy & frog), reptiles (turtle), birds (pigeon), mammals (fetal pig and rat), humans and other unusual mammals"] has traditionally been emphasized in high school and introductory college biology courses. However, this emphasis has been decreasing dramatically in recent decades as emphasis is placed on molecular and cellular biology." In other words, ICRGS's curriculum is faulted, in Skoog's opinion, if ICRGS continues to scientifically investigate and analyze *Comparative Vertebrate Anatomy*, because "the (evolutionary) Joneses" are not wearing that fashion much nowadays.

[20] This concern is adequately addressed in ICRGS's March 2008 Progress Report in the pages tabbed "Information Agreement".

19) Academic Advising & Counseling: THECB never expressed a serious concern about this;

20) Student Rights & Responsibilities: THECB never expressed a serious concern about this;

21) Health & Safety: THECB never expressed a serious concern about this.

22) Moreover, the documents (and other evidence) provided by ICRGS, in conjunction with its applying for a THECB-issued Certificate of Authority, also documented and satisfied the following relevant standards of private postsecondary educational institution performance, to the extent those standards apply to ICRGS:

22-A) ICRGS has satisfied, by its Progress Report (and also otherwise), all applicable standards of educational quality, *if any*, that apply to THECB's statutory mission as described in Texas Education Code **§ 61.002** ("Purpose"), which "purpose" is constitutionally and/or statutorily limited to:

(a) regulating public institutions of higher education;[21] and

(b) providing government-conditioned funding for higher education in public and/or private institutions of higher education, -- especially because ICRGS does ***not*** accept any State of Texas or federal government funding;

22-B) ICRGS has demonstrated, by its Progress Report (and also otherwise), all applicable standards of educational quality, *if any*, that apply to THECB's statutory objective as described in Texas Education Code **§ 61.301** ("Purpose"), which "purpose", *allegedly*, includes censorial regulation of "commercial speech" description and marketing of private higher education institutions (and programs thereof):

(a) in order to prevent any such institutions from operating in Texas as a "diploma mill";[22]

(b) especially because ICRGS provides the very kind of creation science-promoting education that ICRGS conspicuously describes and advertises in its catalog, in its other literature, and on its website;

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[21] See, accord, **Texas Education Code § 1.001(a).**

[22] In other words, ICRGS is not "deceiving the market" by offering or issuing any supposedly "fraudulent or substandard college or university degrees" (regardless of whether ICRGS's degrees are pre-approved by a "recognized" accreditation monopoly). Unlike "diploma mills", ICRGS graduates must earn their degrees.

22-C) ICRGS has shown by its academic rigor, curriculum, and graduate faculty, especially as documented by ICRGS's Progress Report (and also otherwise), consistent with First and Fourteenth Amendments-protected rights (including free speech and academic freedom rights), that ICRGS uses no "academic terminology" (as that term is used in Texas Education Code **§ 61.301**):

(a) that runs afoul any constitutional power of the THECB to prohibit ICRGS from using such "academic terminology" for assessing its students and/or for describing its graduate-level science education programs,

(b) especially in light of relevant Texas case law including the Texas Supreme Court's 2007 ruling in HEB Ministries, Inc. v. THECB, 235 S.W.3d 627, 226 Educ. Law Reptr. 348 (Tex. 2007);

22-D) although ICRGS teaches typical topics of evolutionary science (albeit analyzed in comparison with creationist thinking, analyzing empirical science evidence by forensic science principles), ICRGS has itself deceived no prospective students or employers into thinking that ICRGS is a *proponent* of evolutionary science, because ICRGS publicly and conspicuously identifies itself as the creation science-promoting "Institute for **Creation** Research" (and ***not*** as the "Institute for ***Evolution*** Research");

22-E) a private institution (such as ICRGS), self-characterized by religious-viewpoint distinctives, have the constitutional right to express a form of institutional academic freedom, and that constitutional right is not supposed to be violated by a federal, state, territorial, or local government, -- yet the record in ICRGS's case easily demonstrates that:

(a) defendants (acting under color of state law) publicly disapproved, officially disfavored, and discriminated against ICRGS's institutional academic freedom,[23]

(b) defendants revealingly and religiously relied (in part) on the non-empirical idea of a cosmic "Big Bang" which supposedly exploded some 14,000,000,000 years ago, -- while simultaneously conceding that "science has no answer to the question of how life on earth began or how [*as Commissioner Paredes religiously assumed on 4-23-2008*] the Big Bang was initiated some 14 billion years ago".[24]

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[23] "Two of the three required textbooks for this course are published by Master Books and reflect the creationist tenet that the earth is young. Neither of these textbooks or the five aforementioned objectives would be a part of a graduate cosmology course in any public university in Texas or the nation" (Gerald Skoog, rejecting academic freedom for private colleges with a creationist viewpoint). Dr. Skoog's own words, just quoted, are like a '*poster child*' of **viewpoint discrimination**, mismatched to the non-theistic secularism that federal courts now mandate for public schools.

[24] As a point of clarification, THECB Commissioner Paredes' unquestioned faith in a "Big Bang" of "14 billion years ago" (which he may believe in by faith, but he has no eye-witness knowledge of such) should not be confused with the "great noise" mentioned in 2nd Peter 3:10. The *evolution-only* viewpoint

42. As indicated herein, a denial of ICRGS's application for a Certificate of Authority is procedurally addressed in Title 19, Texas Administrative Code, Part 1, Chapter 7, Subchapter A, **Rule § 7.6(d)(7)** ("Administrative Procedures related to Certification of Nonexempt Institutions").

ICRGS's Prompt and Timely Request for, and Pursuit of, Administrative Remedies.

43. In particular, said THECB Rule 7.6(d)(7) indicates that such a denial should procedurally be followed by application of the "hearings and appeals" process defined in to Title 19, Texas Administrative Code, Part 1, Chapter 1, Subchapter B, which subchapter is currently captioned as "Education, Texas Higher Education Coordinating Board, Agency Administration, **Dispute Resolution**".

44. Said Subchapter B (of Chapter 1) includes a procedural deadline provision, namely, Title 19, Texas Administrative Code, Part 1, Chapter 1, Subchapter B, **Rule § 1.23** ("Deadlines for Filing a Petition for Contested Case Status"); that deadline is 45 days from the date of the adverse agency decision.

45. Because such a "petition for contested case status" was sent by ICRGS (via FedEx) on May 24th of A.D.2008, ICRGS timely complied with this protest timing requirement toward "exhausting its administrative remedies".

46. Also, said Subchapter B (of said Chapter 1) includes a provision defining what contents should be provided in a petition such as this. Specifically, the provision listing required petition contents is Title 19, Texas Administrative Code, Part 1, Chapter 1, Subchapter B, **Rule § 1.23** ("Deadlines for Filing a Petition for Contested Case Status").

47. Because ICRG's "petition for contested case status" (of May 24th, A.D.2008) carefully tracked the categories listed in said Rule § 1.23, the petition contents of ICRGS's Petition complied with this content pleading requirement toward "exhausting its administrative remedies".

48. Specifically, ICRGS timely sought administrative relief, including its requests for:

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discrimination is further illustrated in Commissioner Paredes' opinion (on 4-23-2008) that evolutionary thinking as "foundational" to "modern science".

(A) THECB to reconsider and reverse its denial decision, by issuing unto ICRGS a Certificate of Authority approving ICRGS's right to offer its above-described M.S. degrees in Science Education, with optional minors in Biology, Geology, Astro-geophysics, and General Science.

(B) a declarative statement of what jurisdictional authority (if any), both constitutionally and legislatively speaking, THECB has (or can have) to regulate higher education degrees offered and/or issued by a private educational institution that accepts no government funding (either from Texas state monies or from Texas state-administered monies).[25]

(C) **if** THECB has no valid authority to regulate higher education degrees offered and/or issued by a private educational institution that accepts no government funding (either from Texas state monies or from Texas state-administered monies), ICRGS seeks a declarative statement:

(1) that defendants have no constitutional right to hinder ICRGS's academic freedom to offer, educate for, educationally assess, and/or grant master's and doctor's degrees (so long as such is done in good faith, and not as a "diploma mill" sham[26]); and

(2) that, based upon ICRGS's own constitutionally protected viewpoint distinctives and academic freedom, defendants have no constitutional right to hinder ICRGS from conferring any higher education degrees in "Science Education" which ICRGS opines (in good faith) are fair recognitions of the respective educational achievements of its individual students, including any such postsecondary degrees[27] denominated as "master's" or "doctor's" degrees.

(D) a declarative statement that, as demonstrated by the THECB board's expressed disapproval of ICRGS's viewpoint-integrated approach to teaching Science Education (via its M.S. program), the THECB has rejected ICRGS's application in a manner that

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[25] This regulation of the private sector's First Amendment-protected activities also improperly interferes with interstate commerce. This interference with "interstate commerce", because it fails federal norms regarding the regulation of First-and-Fourteenth-Amendments-protected activities, should be recognized as an improper interference with interstate commerce that accompanies First Amendment-protected "speech". See Texas Education Code § 1.001(a).

[26] A "sham" is quite different from providing a *bona fide* education, as the Texas Supreme Court observed in Texas Education Agency v. Leeper, 893 S.W.2d 432, 443—444 (Tex. 1994, rehearing denied 1995).

[27] By the same logic, ICRGS, if it were to "add on" an adjunct college of undergraduates studies, should have no similar unconstitutional interference with its offering and conferring (in good faith and not as a "sham") of such earned undergraduate degrees, such as "associate's" or "bachelor's" degrees.

involved defendants (while acting under color of THECB authority) failing to provide ICRGS with due "accommodations":

(1) as required by applicable federal law(s); and/or

(2) as required by Texas law, including but not limited to the accommodations required by the Texas Religious Freedom Restoration Act of 1999, and/or as required by Section 106 of the Texas Civil Practice & Remedies Code (which prohibits "discrimination because of race, religion, color, sex or national origin").

ICRGS's administrative protest-lodging Petition (shown without its appendices by Exhibit #1 attached to this Petition), was, in accordance with THECB Rule § 1.25 (quoted above), via FedEx, on the 24th day of May, A.D. 2008.

THECB's Response to ICRGS's Petition for Contested Case Status.

49. As noted above, Commissioner Paredes, acting in the name of the THECB, has indicated that some of the ICRGS-requested relief (denoted above) is outside of THECB's delegated jurisdictional power to provide. Also, defendant Paredes (again acting under color of THECB authority) has indicated that some of the ICRGS-requested relief (denoted above) is outside of the jurisdictional powers of the Texas State Office of Administrative Hearings. It is likely that defendant Paredes is correct regarding some aspects of THECB's jurisdictional limitations, as well as some aspects of SOAH's jurisdictional limitations.

50. However, it is also likely that a "big-picture" application of applicable laws will allow ICRGS more relief (from THECB itself, or from SOAH's review process) than defendant Paredes has suggested thus far. In particular, ICRGS's current and ongoing injuries are in large measure proximately caused by THECB's failure to use its delegated powers in a manner that complies with the applicable constitutional and statutory laws, both federal and state.

51. Accordingly, ICRGS herein pleads for such relief, which THECB itself and/or SOAH cannot (arguably) or will not provide, especially appropriate relief that is based upon the provisions of the U.S. Constitution, as amended, and/or upon provisions of U.S. statutory laws, e.g., 42 U.S.C. §§ 1983 et seq. (including 42 U.S.C. § 1988), and 28 U.S.C. § 2201(a). In particular, ICRGS requests federal law-based relief as is described herein.

Opportunity, without Prejudice, for Continued Pursuit of SOAH Process Remedies

52. The applicable Statute of Limitations has forced ICRGS to file this Petition prior to the absolute exhaustion of potential SOAH-process-based "administrative remedies" **as to some, *but not all*, of the remedies now needed to make ICRGS "whole".**

53. Even so, it might be nonetheless prudent to permit the SOAH process to proceed while **temporarily abating** (as opposed to dismissing) this civil action, in order to ***reduce*** the triable issues that must otherwise be litigated by this honorable Court, on the merits, in this forum,[28] -- so long as that quasi-judicial forum can and will exercise its limited adjudicatory jurisdiction to meaningfully process a meaningful part of this controversy dispute.

Factual Basis for ICRGS Seeking Injunctive and Declaratory Relief in this Forum

54. Defendants arbitrarily and willfully ignored the evidentiary record before them, as they used their color of state office to deny ICRGS a deserved license ("Certificate of Authority"), as is shown by defendants' willful failure to appreciate the evidentiary meaning and value of Exhibit # 1's Appendix "B", -- which Appendix "B" shows a THECB criticism linked to the science education standards of the American Association for the Advancement of Science (*AAAS*)'s Project 2061, followed by an explanatory response to that erroneous criticism. Said Appendix "B" was prepared by ICRGS's Dr. Patricia Nason (*M.Ed.; Ph.D., Texas A&M University, in Curriculum & Instruction*).

55. Defendants arbitrarily and willfully ignored the evidentiary record before them, as they used their color of state office to deny ICRGS a deserved license ("Certificate of Authority"), as is shown by defendants' willful failure to appreciate the evidentiary meaning and value of Exhibit # 1's Appendix "C", -- which Appendix "C" charts how ICRGS fits the AAAS Benchmarks, for 9th-12th grade science. Appendix "C" was also prepared by ICRGS's Dr. Patricia Nason. Said Appendix "C" was provided to the THECB committees on April 23 of 2008. This appendix charts the "AAAS Benchmarks for (Teaching) Science Literacy: Project 2061". This chart covers the 295 9th-12th grade science literacy "Benchmarks".[29] Of those 295 total Benchmarks, 275 (93%) fit both the creation and evolution perspectives; 19 of the 20 (highlighted in green) incorporate evolutionary assumptions, yet are also taught by ICRGS, in its two-models approach to teaching such science topics. Many of the Benchmarks support the pedagogical position that a variety of perspectives should be taught in the classroom, especially those in the topics of the "Nature of Science", "Technology", "Mathematics", and "Biology". Because 275 + 19 = 294, this means that ICRGS teaches 294 out of the 295 AAAS Benchmarks (for teaching 9th-12th grade science topics), a percentage greater than 99% !

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[28] This may be analogous to a federal bankruptcy court lifting the automatic stay of 11 U.S.C. § 362(a), in order to permit a pre-petition lawsuit (against the debtor) to be completely litigated in **state court,** subject to the continuing jurisdiction of the U.S. Bankruptcy Court, so that the litigated outcome in state court is "brought back" to the bankruptcy court, for applicational processing in accordance with applicable bankruptcy law.

[29] High school science literacy standards are meaningful norms to consider, since most of the content which ICRGS's students will eventually teach, in Christian schools, will match those science literacy Benchmarks.

56. In fact, even the sole exception (on page 1) does not appear to be a true exception, because ICRGS actually teaches that modern science was largely founded by (mostly) European pioneers of the 1500s, and has since been expanded upon by contributors from cultures located all over the globe.

57. In other words, defendants willfully ignored the relevant fact that ICRGS actually teaches all of the 295 "Benchmark" standards, even though 19 of them ICRGS faculty would consciously teach from a two-model approach. Consequently, if "scientific literacy" is defined as teaching and learning "at least 80%", ICRGS goes easily above and beyond facilitating that criterion. Thus, regarding the Benchmarks, the "bottom line" is that ICRGS graduates should be scientifically "literate" enough to teach 9^{th}-12^{th} grade science topics, as the AAAS defines "scientific literacy".

58. Defendants (including the THECB itself) arbitrarily and willfully ignored the evidentiary record before them, as they used their color of state office to deny ICRGS a deserved license ("Certificate of Authority"), as is shown by defendants' willful failure to appreciate the evidentiary meaning and value of Exhibit # 1's Appendix "**D**", -- which Appendix "D" is copy of ICRGS's rebuttal to the criticism that "there is nothing in the [M.S.] program that reflects national standards in science education or state TEKS", with an explanation regarding the interrelatedness of the TEKS, National Science Education Standards, AAAS Benchmarks, and Appendix Q to ICRGS's "Progress Report". Said Appendix "D" was also prepared by ICRGS's Dr. Patricia Nason.

59. Defendants arbitrarily and willfully ignored the evidentiary record before them, as they used their color of state office to deny ICRGS a deserved license ("Certificate of Authority"), as is shown by defendants' willful failure to appreciate the evidentiary meaning and value of Exhibit # 1's Appendix "**E**", -- which Appendix "E" charts a favorable comparison of ICRGS's offering of Psychology, Curriculum, Instruction/Methods, Research, Implementation & Assessment, with similar offerings by the following "comparable" schools: Baylor University, Rice University, Texas A&M at Commerce, Texas Christian University, Texas State University, Texas Tech University, University of Houston, University of Texas at Dallas, and Wayland Baptist University. These colleges were suggested as "comparables" by the Commissioner, prior to March 2008, to be used for comparing ICRGS's science education program to other colleges providing "similar" master's degrees. Said Appendix "E" was also prepared by Dr. Patricia Nason (*M.Ed.; Ph.D., Texas A&M University, in Curriculum & Instruction*).

60. On information and belief, it appears that the Commissioner (individually and in his official capacity, acting under color of state law), according to his own admission, directly relied upon two ad hoc *ex parte* advisory committees (and especially on the latter such committee composed of four members of the earlier committee), for choosing to oppose ICRGS's

application, and that said *ex parte* advisory committee included agents of several of those above-named "comparable" colleges. Thus, it seems that the Commissioner's advisory committee(s) wanted ICRGS to do a comparison of supposedly "similar" programs at Texas colleges which the advisory committee(s) would be seriously challenged to be *objective* about, another indication that the advisory committee composition process lacked Due Process-friendly neutrality.

61. More troubling, however, from a Due Process perspective,[30] is the fact that said *ex parte* advisory committee was not composed by a "balanced representation" (of representative science education "industry" providers and representative science education "consumers", -- much less of creationist Protestant Christian education "industry" providers and representative creationist Protestant education "consumers") as mandated by **Texas Government Code § 2110.002.**

62. On April 23rd, 2008, at a joint committee meeting which was videotaped and has been posted on the THECB website, Commissioner Paredes frankly admitted that he himself was no expert in "science" or "science education", so he (basically) relied upon the advice of his ad hoc *ex parte* advisory committee to reject ICRGS's application, and the Commissioner's recommendation was basically adopted, without meaningful discussion, by the voting members of the THECB. Amazingly, the obviously relevant ruling of the Texas Supreme Court, HEB Ministries, ***supra*** (v. THECB and Commissioner Paredes), was then treated by the defendants as if it were irrelevant.

63. Thus, the members of the Commissioner's *ex parte* ad hoc advisory committee[31] became the *de facto* decision-shapers who, with unchecked bigotry and arbitrariness, recommended a

[30] Due Process, guaranteed by the 14th Amendment, includes the procedural propriety required of a state government agency, that it follow its own procedural rules and laws, prior to depriving any private party of life, liberty, or property interests. *See, accord,* Coggins v. Longview I.S.D., 289 F.3d 326, 164 Educ. Law Reptr. 697 (5th Cir. 2002). In ICRGS's case, the THECB relied (like a "rubber-stamp") on Commissioner Paredes' recommendation, which in turn relied (like a "rubber-stamp") on the biased recommendation of an improperly composed ad hoc advisory committee: four state university evolutionist educators, without any representative "consumers" to provide a Texas Government Code-mandated "balanced representation". It was and is clear that the ad hoc advisory committee's disapproval of ICRGS's science education program was predominantly motivated by prejudice and disapproval of ICRGS's creationist viewpoint distinctives, as well as on THECB's reliance upon an evidentiarily disputed naturalistic theory of earth history. *See, accord,* James J. S. Johnson, "The Evidence of Nothing", *Acts & Facts* (April 2008), pages 4-5, *citing and explaining the logical relevance of* Federal Evidence Rules 803(7) and 803(10).

[31] According to documents electronically posted on the THECB website, particularly one captioned "Staff Recommendation to the Commissioner", the members of the Commissioner's ad hoc advisory committee (also called the "review panel"), who were entrusted with reviewing and analyzing ICRGS's Progress Report (of March 2008), were four evolutionist educators: Dr. Gerald Skoog (an evolutionist educator of

rejection ICRGS's application, predominantly on viewpoint-discriminatory grounds! --- because the THECB and defendants immediately acted under color of state law, with unchecked and arbitrary "discretion", by serial rubber-stampings of the analysis and recommendations of the improperly composed *ex parte* "panel" advisory committee.[32]

64. In other words, the administrative decision which ICRGS now complains of, as legally improper, was a repeatedly "rubber-stamped" rejection of ICRGS's application, based on an improperly composed *ex parte* advisory committee. Stated in sequential phases, the administrative decision-making process of the THECB included these serial rubber-stamping phases:

(1) the improperly composed and otherwise arbitrary *ex parte* advisory committee's operations and recommendation, all occurring in violation of Texas Government Code § 2110.002;

(2) the rubber-stamped and otherwise arbitrary recommendation of the Assistant Commissioner (Dr. Joe Stafford);

(3) the rubber-stamped and otherwise arbitrary recommendation of the Commissioner (defendant Paredes), who indicated that ICRG's institutional disagreement with the "fundamental" assumption of Evolution was itself sufficiently to disqualify ICRGS from being allowed to characterize ICRGS's M.S. program as a "science education" program;

(4) the rubber-stamped and otherwise arbitrary recommendation of the defendants on the joint committees on April 23rd of AD2008; and

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Texas Tech University); Dr. Barbara Curry (an evolutionist educator of University of Texas at Dallas); Dr. David Hillis (an evolutionist educator of The University of Texas at Austin); and Dr. C.O. "Pat" Patterson (an evolutionist educator of Texas A&M University). The composition of this "review panel" had no representative "consumers" (to "balance" the review of ICRGS's higher education services, despite the Commissioner's written claim to have composed a "balanced" group of a "second-stage review" (on January 7, 2008). Yet that *ex parte* advisory committee of nine had no true "consumers" who could plausibly represent those who potentially would "consume" ICRGS's educational services), much less any young-earth-creationist viewpoint-affirming "consumers". Again, Commissioner Paredes convened an *ex parte* "group of [four] science educators" on "April 7" (2008), to review ICRGS's Progress Report, yet that "group" (what Texas Government Code § 2110.002 calls an "advisory committee") had no "balanced representation".

[32] This delegation-of-delegations was, procedurally speaking, improper, because the *ex parte* ad hoc "panel" advisory committee was itself improperly composed, due to that advisory committee's composition lacking a "balanced representation" (as that composition requirement is defined in the Texas Government Code § 2110.002).

(5) the rubber-stamped and otherwise arbitrary vote of the THECB quorum on April 24th of AD2008.

65. Importantly, this improper composition of the Commissioner's *ex parte* ad hoc "panel" advisory committee, as a combination of unelected and heavily biased private individuals (effectively wielding governmental decision-shaping powers), all appear to be evolutionist educators who serve at (and likely are employed at) public universities.

66. Consequently, the adequacy of the "representation" of this *ex parte* "review panel" is procedurally flawed for a combination of reasons:

(a) no consumers of ICRGS's science education services (much less any private Christian education market-niche-appropriate consumers), served on the *ex parte* advisory committee as "panel" advisors;

(b) no Biblical creationism-affirming (or even Biblical creationism-sympathetic) ***private*** university educators[33] served on the last committee of *ex parte* advisors;

(c) only self-avowed evolutionists were selected to serve on the ultimate committee of *ex parte* "panel" advisors; and

(d) none of the ultimate committee's composition of *ex parte* "panel" advisors demonstrated any expertise regarding the Biblical creationism-affirming (or even Biblical creationism-sympathetic) private Christian education.

THECB's Restraint of ICRGS's Free Speech and Free Press regarding **1st Timothy 6:20**

67. As a matter of institutional viewpoint, ICRGS has sincerely taught its students that the theory of evolution, and the proposed notion of billion-of-years-old "geologic time", is **"science falsely so-called".** *See, accord,* **1st Timothy 6:20**, cited in Footnote 9 of "The Evidence of Nothing", *ACTS & FACTS*, volume 37 (April 2008 issue), page 5, a copy of which was included within Appendix "T" of ICRGS's Progress Report. And, as a matter of institutional academic viewpoint, the THECB's actions have confronted ICRGS with a **repeat** of what ICRGS in 1989 called "a fight for its academic life" (quoting from ICR's Prepared Statement for the News Conference of August 31, 1989), which led to the judicial decision in ICR Graduate School v. Honig, 758 F.Supp. 1350, 1356, 66 Educ. Law Reptr. 655 (S.D. Cal. 1991).

[33] This exclusion of the most relevant group of potential occupational "advisors" is itself evidence of the Commissioner's (and THECB's) pre-judged outcome and viewpoint discrimination. *See, accord,* "The Graffiti of Judgment", ***ACTS & FACTS***, volume 38, issue 4 (April 2009), pages 4-5, now posted on ICR's website (at www.icr.org/article/4556), providing a historical perspective on such **ostracism.**

68. This Bible-informed viewpoint is not an exotic or recently invented tenet which ICRGS affirms.[34] ICRGS simply agrees with, and thus adopts, the Bible-transmitted view of the apostle Paul, who wrote that the natural creation so effectively displays proof of God's creatorship that anyone who rejects that evidence is "without excuse".[35]

69. Defendant THECB and the other defendants, acting in their official capacities (and under color of state law and office), have publicly disagreed with and rejected ICRGS's viewpoint, by endorsing the Commissioner's opinion that the earth's origin is traceable to a cosmic "Big Bang" some "14 billion years" ago. But the Commissioner's "Big Bang" opinion is not a matter of education law in Texas, to be authoritatively and coercively imposed on any private institution that seeks to teach graduate-level "science education".

70. Also, the Commissioner's "Big Bang" opinion does not become scientific,[36] much less settled Texas state law, simply because four or five *ex parte* advisors share that opinion and/or teach it at non-Protestant Texas state universities.

71. Similarly, defendants (in their official capacities as officers of THECB) do **not** have the legal right -- constitutionally speaking -- to brand, as if with a "scarlet letter", ICRGS's creation science viewpoint as "fraudulent", when doing so requires the THECB (as a state agency regulating government spending on higher education) to publicly and officially endorse the Commissioner's personal beliefs about evolutionary processes, and to publicly and officially endorse his personal belief in a "Big Bang" cosmogony. Moreover, the Texas Supreme Court has ruled, in a case much less sympathetic than ICRGS's, that no governmental claim of "fraud" can be made, if that value-judgment depends upon evaluating the ***truth*** or legitimacy of a

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[34] Compare the U.S. Supreme Court's respect for the Seventh Day Adventists' "free exercise" of their Creation Week-based Sabbath, a traditional and long-established religious teaching.

[35] See Romans 1:18—21, especially 1:20 ("For the invisible things of Him from the creation of the world are clearly seen, being understood by the things that are made, even His eternal power and Godhead; so that they are without excuse"). ICRGS's founder, Dr. Henry M. Morris, provides this footnote commentary to **Romans 1:20**, in his annotated ***Defender's Study Bible***: "The phrase 'without excuse' is, literally, 'without an apologetic' or 'without a defense.' I Peter 3:15 instructs Christians to 'be ready always to give an answer,' where the word 'answer' is practically the same in both cases (Greek *apologia*). In other words, Christians do have an apologetic and ought to be ready to give it whenever someone attacks or questions their faith. Those who do not see the eternal power and nature of God in the creation, on the other hand, have no apologetic. They are 'without excuse' (*anapologetos*) if they do not believe in our Creator God. The evidence is all around them." (*Quoting from* page 1231, 1995 edition.)

[36] See Dr. Randy Guliuzza's article on "Consensus Science: The Rise of a Scientific Elite", in ***ACTS & FACTS***, volume 38, issue 5 (May 2009), pages 4-6.

particular religious opinion.[37] The historic fact that the triune God of the Bible, acting through Christ, created the cosmos slightly more than 6,000 years ago, is a religious belief.[38] That

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[37] Tilton v. Marshall, 925 S.W.3d 672, 678—679 (Tex. 1996) (**no legal claim of "fraud" can be made, by the State of Texas government, if that claim depends upon the government evaluating the truth or legitimacy of a particular *religious opinion***).

[38] This religious belief, which is part of ICRGS's conspicuously affirmed Biblical creationism viewpoint "tenets" is the real reason why ICRGS's application was disapproved, rejected, and denied. On papers used by the Commissioner's improperly composed advisory "review panel" committee, "smoking gun" markings repeatedly show that such viewpoint distinctives were adverse reaction-triggering problems for that advisory "panel" committee.

Examples of such "smoking gun" indicators of anti-creationist and viewpoint-discriminatory prejudices include quoting "objectionable" aspects of ICRGS's viewpoint, as well as providing editorial remarks against creationist perspectives applied to science education: "from the Christian worldview" (Skoog), "with Biblical theories" (Skoog), "defend a creationist worldview" (Skoog); "Appraise problems science educators encounter in teaching creation and demonstrate how to overcome them" (Skoog); "biblical creation" (Skoog); "Organic evolution of God's building blocks?" (Skoog); "Man and monkey: Is there a monkey in your family tree?" (Skoog, disapprovingly adding the comment: "Based on the title of module 1 and the overall thrust of the program, the creation of life through a divine act appeared to be emphasized"); "Acquire a broad biology knowledge base fundamental to the origins debate" (Skoog); "Identify and use laboratory exercises applicable to the origins debate" (Skoog); "Compare and contrast evolution and creation using the major stages of embryology and the accompanying histology" (Skoog); "Evaluate flaws in the theory of biological evolution" (Skoog); "Assemble support for creation as a scientific theory using scientific information" (Skoog); "A research paper with 'a minimum of 5 pages on a topic relating anatomy to the evolution/creation debate' " (Skoog); "framework of Biblical creationism" (Skoog); "Evaluate creationist vs. evolutionist explanations for the 'Cambrian explosion,' mass extinction, 'mammalian adaptive radiation,' convergence, 'living fossils,' and stasis"(Skoog); "Relate the 'Ice Age:' to post-flood catastrophism and to Florida fossils" (Skoog); " 'numerous paleontological contradictions to the evolutionary model . . . fossil evidence . . . the nearly simultaneous creation of separate complex kinds, subject to struggle and death . . . fossilized rapidly and recently worldwide in Noah's flood, preserved to repopulate the earth with new life" (Skoog rejects these Paleontology topics as "conclusions" which "have no legitimate place in paleontology and other science courses", noting that the Paleontology course has [the nerve to use] two creationist resources, the book *Creation: Facts of Life* [authored by Dr. Gary Parker, who formerly taught evolution] and the DVD *From Evolution to Creation*); "Develop hypothesis explaining the immutability of biochemical systems from the current literature" (Skoog); "Compare and contrast the old-earth and young-earth models of earth history" (Skoog, apparently bothered that ICRGS likes to "teach the controversy"); "Analyze radioisotope dating methods to discover their critical problems and assumptions in order to argue coherently for a young-earth model" (Skoog); "Three of the five required textbooks for the course are creationist publications that emphasize that the earth is quite young" (Skoog); "to prepare science teachers and other individuals to understand the universe within the integrating framework of a biblical perspective using proven scientific data" (Skoog); "Two of the three required textbooks for this course are published by Master Books and reflect the creationist tenet that the earth is young. Neither of these textbooks or the five aforementioned objectives would be a part of a graduate cosmology course in any public university in Texas or the nation" (Skoog, rejecting academic freedom for private colleges with a creationist viewpoint); etc. Dr. Skoog's own words, just quoted, are like a '*poster child*' of viewpoint discrimination, mismatched to the non-theistic secularism federal courts now mandate for **public** schools.

religious belief is a sincerely-held institutional viewpoint of ICRGS, qualifying how ICRGS teaches science and science education. As such, defendants, when acting in their official capacities as officers of the State of Texas (via offices at its THECB), according to the Texas Supreme Court, should ***not*** be pronouncing an epistemological judgment on whether ICRGS's institutional viewpoint (regarding the universe's origins, regarding mankind's origin, etc.) is "true" or "false", "legitimate" or "fraudulent".

72. In short, defendants have no valid constitutional role, when acting as a state agency or as THECB officials (under color of state law), to restrict ICRGS's academic freedom as a private non-government-funded higher education-providing institution. Neither is it a constitutionally permissible role of the THECB, or its officials, to use their official powers to *ban* ICRGS's graduate degrees as being supposedly "fraudulent or substandard" just because ICRGS rejects the Commissioner's opinion about whether planet Earth originated from an un-witnessed evolutionary "Big Bang" (about 14,000,000,000 years ago), as opposed to planet Earth having originated in an orderly and intelligently designed manner (a bit more than 6,000 years ago).

73. Notwithstanding Commissioner Paredes personal view of the universe's origins, ICRGS has a legal right to provide a science education-focused M.S. degree program (as a matter of academic viewpoint freedom), because ICRGS holds the institutional academic viewpoint (on both Biblical and scientific grounds) that clashes with Commissioner Paredes' personal opinion that the earth was derived from primeval events which occurred, without human eye-witnesses, some "14 billion years" ago. When Earth began, Commissioner Paredes was not there, so he was an eye-witness to Earth's origin.[39] Consequently, Commissioner Paredes' opinion about the age of the earth is not based on ***empirical*** observations; rather, that opinion is a blend of assumptions, with some ***forensic*** analysis principles, and Commissioner Paredes' own epistemological presuppositions,[40] -- buttressed by the Commissioner's reliance on the "expert" advice of his *ex parte* ad hoc advisory committee.

Similar religious-viewpoint-hostile reactions were publicly echoed in Assistant Commissioner Joe Stafford's remarks on April 23rd, 2008 (as he read Biblical creationist tenets from ICRGS's catalog), and were publicly endorsed and re-echoed by Commissioner Raymund Paredes that day. The next day (April 24th, 2008), at the THECB board meeting, the same viewpoint discrimination was unmitigated, with a "rubber-stamp" ratification of that viewpoint discrimination voiced by the voting THECB board members (during which time ICRGS's representatives were explicitly muzzled, an act of comparatively unequal treatment).

[39] Public records indicate that defendant Paredes was not born until 1942. Ironically, even among non-creationist scientists, the "Big Bang" is not above reproach, nor is the uniformitarian ideal concept of the so-called "geologic column" deemed sacrosanct by all evolutionists.

[40] Tilton v. Marshall, *supra*, 925 S.W.3d at 678—679 (Tex. 1996) (no governmental claim of "fraud" can be made, by the State of Texas, if that claim depends upon the state evaluating the truth or legitimacy of a particular *religious opinion*).

74. Furthermore, merely "passing the buck" from Commissioner Paredes to a few evolutionist scientists (on Commissioner Paredes' *ex parte* ad hoc advisory committee) likewise fails to convert the age-of-the-earth controversy into an eye-witness prove-up.

75. Although evolutionist scientists (or creationist scientists, for that matter) can discuss the origin of life on Earth, and of Earth itself, such observation-lacking discussions do *not* become "*empirical* science" simply because those discussions emit from the oral cavities of "scientists" who often use empirical science methodologies when observationally investigating present-day phenomena. The main problem, here, is **viewpoint discrimination:** using the power of government, including government gate-keeping of the academic market's "forum", to disfavor creation science as an academic viewpoint, in violation of the "open forum" principles explained (and enforced) by the U.S. Supreme Court, e.g., in Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 101 Educ. Law Reptr. 552 (1995).

76. Despite the U.S. Supreme Court's disapproval of government-announced viewpoint discrimination, the THECB and defendants have thus publicly rejected ICRGS's institutional viewpoint regarding the origin and age of the earth. In theological effect, THECB, as represented publicly by endorsing Commissioner Paredes' cosmogonical opinion, has rejected ICRGS's viewpoint that the "Big Bang" theory is -- to use the apostle Paul's words (as recorded in ***1st Timothy 6:20***) -- **"science falsely so-called".**

77. Although educational liberty (a/k/a "academic freedom") does not include or justify a "sham"[41] (such as a "diploma mill"), it does include the basic idea that a formal education is mostly a defined and documented program of teaching, and an integral part of any such formal teaching (especially a higher education program of study) is the teacher's assessment of the individual learner's mastery of the program-defined teachings. In other words, the process of "teaching" is not complete without meaningful "assessment" of the learner's learning.

78. Unsurprisingly, the college faculty's *ultimate* educational role in educational **"assessment"** is the college faculty's decision to award an academic degree, to denote a very specific and satisfactory completion of an educational program of study. Ultimately, therefore, the awarding of an earned academic degree is a blending of **objective** educational achievement criteria (i.e., the listed or otherwise pre-defined objectives of a college degree program's curriculum) with the **subjective** opinions of the relevant college faculty, -- about whether John Doe or Jane Roe has satisfied those specific educational criteria, sufficiently, to merit being recognized as having earned a "Master of Science in Science Education" (or some other degree).

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[41] Texas Educ. Agency v. Leeper, 893 S.W.2d 432, 443—444 (Tex. 1994, reh'g denied 1995).

79. Institutional academic freedom, the hallmark of Anglo-American university traditions, relies upon a college's chosen curriculum (for a specific degree program). In ICRGS's case, the science education curriculum—grounded legal question was/is:

> whether, as a matter of **academic freedom** (including the "add-on" **institutional viewpoint** component within a science education program), ICRGS may institutionally opine (as a matter of institutional academic speech), -- in the form of a ***M.S.*** in Science Education, -- that a given graduate student is ***worthy*** to be recognized as having earned a "Master of Science" in "Science Education",

--- in academic situations where and when ICRGS's faculty are, based on pre-written and extensive[42] educational criteria, satisfied that the graduate student has adequately learned "science education", as a result of having successfully completed a sufficient number of courses selected (in conjunction with an elective Minor) from this course list:

AG 501	Planetary & Stellar Astronomy
AG 501L	Planetary & Stellar Astronomy **LAB**
AG 502	Geochronology with **LAB**
AG 503	Paleoclimatology with **LAB**
AG 504	Creation Cosmology & the Big Bang Theory
BI 501	Biological Origins
BI 501L	Biological Origins **LAB**
BI 502	Comparative Vertebrate Anatomy
BI 502L	Comparative Vertebrate Anatomy **LAB**
BI 503	Principles & Patterns in Paleontology
BI 504	Advanced Ecology with **LAB**
BI 505	Advanced Cell & Molecular Biology
GE 501	Physics & Geology of Natural Disasters
GE 502	Geochronology with **LAB** (same as AG 502)
GE 503	Principles & Patterns in Paleontology
GE 503F	Principles & Patterns in Paleontology **FIELD STUDY**
GE 504	Interpreting Earth History
GE 505	Field Geology
SC 501	The History & Nature of Science
SE 501	Advanced Educational Psychology
SE 502	The Science Curriculum
SE 503	Planning Science Instruction: Methods
SE 504	Research in Science Education
SE 505	Implementing & Assessing Science Teaching

[42] "Extensive" here means 1 or 2 academic "years" worth of master's-level science education.

(The specific curriculum for those above-listed courses was timely provided to THECB during March 2008. Yet the defendants (i.e., the THECB itself , plus the defendants who are acting as officials of THECB) have effectively treated this curriculum as a non-"science"/non-"science education" curriculum.

80. Faculty academic freedom, which allows for flexibility in instructional details and teaching styles, within "due process" guidelines, largely navigates those charted-out criteria, guided by determinations relying on the somewhat ***subjective*** opinions of the relevant college faculty: conclusions about whether an individual learner has or has not achieved the pre-defined educational objectives of a degree program. Thus, it is not (nor has it ever been) the proper role of the government to substitute its own preferential academic ***opinions*** for the academic freedoms traditionally exercised at the private institutional and private faculty levels.[43]

81. Of course, a state government, exercising its conditional "consumer" rights under a constitutional or statutory *Spending Clause* provision, may condition or otherwise influence private institutions' academic freedoms, as any educational consumer may, by choosing to buy (i.e., approve for government grants and/or loan-based funding) one type of academic program over another. (*Example:* "Faith-based Initiative" spending.[44]) However, ***any such government-funding influence*** (which economic realities may suggest is "coercive") ***has no legal relevance in an educational context where government funding is neither sought nor accepted.*** In such a context, where a private college neither seeks nor accepts government funding, the state government (including THECB and its officers) has no constitutional "business" interfering with the "academic speech" of that private institution, -- unless there really is a harmful "sham" on the educational market, based upon clear and convincing ***objective*** criteria.

Comparable Academic Viewpoint Scenarios, to Show What Viewpoint Discrimination Is

82. As a matter of institutional academic freedom, ICRGS would show that a *private* higher education institution has a legal right to endorse and express itself by ***institutional viewpoint*** distinctive, regardless of whether such institutional viewpoints be religious, political, or scientific viewpoints.[45]

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[43] *See, accord,* Asociación de Educación Privada de Puerto Rico, Inc. v. Garcia-Padilla, 490 F.3d 1, 222 Educ. Law Reptr. 32 (1st Cir. 2007). *See also* Peel v. Attorney Registration & Disciplinary Commission of Illinois, 496 U.S. 91, 103-104, 110 S.Ct. 2281, 2289 (1990).

[44] Hein v. Freedom from Religion Foundation, __ U.S. __, 127 S.Ct. 2553 (2007) ("faith-based initiative" was justified, within the Executive branch of government operations, under the First Amendment).

[45] *E.g., see* Asociación de Educación Privada de Puerto Rico, Inc. v. Garcia-Padilla, 490 F.3d 1, 222 Educ. Law Reptr. 32 (1st Cir. 2007).

Example # 1: Science Education Degrees at a Roman Catholic college.

For example, a Roman Catholic college may religiously define and distinguish itself as a Roman Catholic college. It might offer "science education" degrees regardless of its theological tenets about sacramental trans-substantiation, even if non-Catholic science educators say they cannot reconcile that "sacrament" with empirical "science".

Could a THECB dominated by Protestants, who personally reject trans-substantiation doctrine as "false religion", constitutionally reject the Catholic college's legal right to offer such a "Science Education" degree program? What if the THECB did so on the recommendation of a non-Catholic Commissioner, who himself or herself relied upon the "science expertise" of a "panel" of Protestant science educators (all of whom disbelieved the Catholic doctrine of trans-substantiation)? Would a substantially burdensome action of the THECB, in such a scenario, be a violation of the Texas Religious Freedom Restoration Act of 1999? (What if the Catholic college required all of its science education faculty to respect its institutional "Eucharist viewpoint"?)

Example # 2: World History Degrees at a Jewish college.

Likewise, a Jewish college may accurately define and distinguish itself as a ewish college, offering a world history program, -- without being required to sacrifice its institutional viewpoint that world history should *not* be dichotomized by the arrival of Jesus Christ, historically, the B.C./A.D. division of human history. This institutional viewpoint, arguably, clashes with the 2nd Sentence of U.S. Constitution Article VII, -- but any such institutional viewpoint is nonetheless protected by that same Constitution's First Amendment, as a "hybrid" matter of academic speech and free exercise of religion.

Could a THECB dominated by Christians, who personally affirm that Jesus dichotomized human history, by coming to Earth as the Jews' promised Messiah, constitutionally reject the Jewish college's legal right to offer such a "World History" degree program? Would a substantially burdensome action of the THECB, in such a scenario, be a violation of the Texas Religious Freedom Restoration Act of 1999? (What if the Jewish college required each of its world history faculty to respect its institutional viewpoint that "Jesus was ***not*** the Jews' promised Messiah"?)

Example # 3: American History Degrees at an African-American college.

Similarly, a government-funded college may emphasize its distinguished African-American tradition, as a matter of historical and/or ethnic heritage.

But can it offer a degree program in "American history", and weight the emphasis of such history studies with "Black History" (i.e., the cultural contributions of notable African-Americans, such as the *creationist* scientist George Washington Carver)? Or would doing so put the college at risk of being governmentally threatened with loss of its

degree-granting powers, by the THECB, under the colorable charge that its emphasis was a *de facto* "racist" minimization of the "white" contributions to "American Civilization"? Could a THECB dominated by non-black Americans, who personally prefer to avoid ethnocentric emphases in social studies (such as "Black History" studies), constitutionally reject the African-American college's legal right to offer a "American History" degree program, -- if the African-American college required all of its world history faculty to respect its institutional viewpoint that "Black History" would dominate its curriculum? What if the college promoted its right to emphasize "Black History" as inextricably intertwined with *religious* appreciation for their ethnocentric identity, *as a matter of creaturely gratitude for being created* with their specific ethnic heritage?

Example # 4: Business Degrees at a Protestant Evangelical college.

Likewise, LeTourneau University, a Protestant Christian liberal arts university, is historically known for its engineering school, its missionary aviation program, and its night-college business program for working adults.

Could a THECB dominated by Bible-rejecting non-Christians, who personally prefer to avoid entangling Biblical principles with business practices, constitutionally disqualify LeTourneau University's business degree program (for working adults), -- due to a LeTourneau instructor repeatedly identifying *Amos 3:3* as a partnership principle, -- or *Exodus 21:28-29* as a foreseeable tort injury principle, -- or *Deuteronomy 22:6-7* as a wildlife protection/sustainability principle, -- or *Deuteronomy 20:19-20* as a deforestation prevention/environmental protection principle? What if LeTourneau University requires its business faculty to sign an agreement to respect the official doctrinal statement of the university, and to role-model Biblical Christian principles *and teachings* in the classroom, while teaching business courses to business degree students? Can the THECB deny LeTourneau University's degree-granting authority if LeTourneau's Protestant institutional viewpoint distinctives are personally repulsive to a majority of the THECB board (or to the Commissioner)?

Example # 5: Science/Education Degrees at a Seventh Day Adventist College

Constitutional law—mandated "accommodation" of Seventh Day Adventist viewpoints is nothing new to American jurisprudence.[46] Accordingly, it is to be expected that Seventh

[46] *See, e.g.,* Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963) (state-government-imposed condition of receiving state benefits interfered directly with, and effectively punished, the free exercise of a traditional and long-established teaching of the Seventh Day Adventist church, producing an unconstitutional result). *See also, e.g.,* Tooley v. Martin-Marietta Corporation, 648 F.2d 1239 (9th Cir. 1981) (accommodation requested by Seventh Day Adventist was "reasonable"; also, providing a reasonable accommodation for a sincerely held religious conviction does not violate the First Amendment's Establishment Clause, because such accommodations are just that, "accommodations", and were not governmental endorsements of the accommodated religious tents or practices); Padon v. White,

Day Adventist viewpoints are "accommodated" in Seventh Day Adventist education, including Seventh Day Adventist higher education programs. One example of such higher education, in Texas, is Southwestern Adventist University, which provides a variety of undergraduate and graduate programs. In particular, Southwestern Adventist University provides the following programs relevant to ICRGS's case:

Master of Education (M.Ed.) in Educational Leadership
Master of Education (M.Ed.) in Curriculum & Instruction
with Reading Emphasis
B.A. Life Science (Secondary Education Certification only)
B.S. Life Science (Secondary Education Certification only)

In addition to the above-listed Education department degree programs, Southwestern Adventist University offers undergraduate degree programs in Biology (BS, BA), Biochemistry (BS), Chemistry (BA, BS), Clinical Laboratory Sciences (BS), Exercise Science (BS), Mathematical Physics (BS), Physical Science (BS, secondary certification). Of special relevance to ICRGS's case is the fact that the institutional viewpoint of Southwestern Adventist University, as a faith-integrated institution of higher education, includes a foundational tent of Bible-informed creationism:

> **6. Creation:** God is the Creator of all things, and has revealed in Scripture the authentic account of His creative activity. In six days the Lord made "the heaven and the earth" and all living things upon the earth, and rested on the seventh day of that first week. Thus He established the Sabbath as a perpetual memorial of His completed creative work. The first man and woman were made in the image of God as the crowning work of Creation, given dominion over the world, and charged with responsibility to care for it. When the world was finished it was "very good," declaring the glory of God. (Gen. 1; 2; Ex. 20:8-1; Ps. 19:1-6; 33:6, 9; 104; Heb. 11:3).[47]

It should be noticed that Southwestern Adventist University conspicuously posits its religious viewpoint, regarding creation, as an institutional viewpoint distinctive of its higher education mission -- so there can be no "deception" to prospective students or prospective employers who use due diligence to learn about "science" and "science education" as taught by Southwestern Adventist University. In a society which prides itself, historically at least, on civil liberties, there is no reason why the THECB, or any other arm of Texas state government, should penalize Southwestern Adventist University, or any other Seventh Day Adventist college, for "integrating" its faith distinctives with its teaching of "science" and/or "science education". Likewise, neither should ICRGS be

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465 F.Supp. 602 (S.D. Tex. – Houston 1979) (employer failed to offer reasonable accommodation to Seventh Day Adventist employee).

[47] See http://www.swau.edu/spirituality/beliefs.asp (last viewed 5-12-AD2008).

deprived of any government-issued benefits, such as any required license to offer graduate programs, solely because ICRGS chooses to retain and exercise some of its civil rights as an American institution espousing youth-earth-creationist-informed Christianity.[48]

Example # 6: Relating Freedom of Association to Academic Freedom

Likewise, a private college may choose to emphasize **Native American** or **Hispanic-American** or **Asian-Pacific** or **Arab-Muslim** heritage features, as a matter of institutional academic freedom. Moreover, safeguarding institutional academic freedom provides an academic opportunity for exercising "freedom of association" rights (which are inextricably intertwined with "free speech" and "free press" rights).[49]

83. Likewise, the defendants' actions, under color of state law, have wrongfully interfered with ICRGS's institutional academic freedoms in a manner that encroaches on ICRGS's **"freedom of association"** rights.[50] In ICRGS's case, the monopolistic realities of the science education market, in Texas (and in America generally) would limit creationist learners to science education opportunities from evolutionist graduate schools, because ICRGS is the only graduate school which specializes in creationism-informed science education. Therefore, "freedom of association", at the graduate school level, is effectively curtailed if ICRGS is banished from the graduate science education market. The defendants' actions (under color of state law)

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[48] *Accord, see* Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963) (coercive conditions for receiving state government-mediated benefits were unconstitutionally interfering with the free exercise of a traditional and long-established religious teaching of the Seventh Day Adventist church). Perhaps 21st century Americans are desensitized to the phrase "free exercise of religion"; the Bill of Rights does not stand to protect the legal right to merely "exercise" one's religion; rather, it is the legal right to "freely" exercise one's religious views and practices, that the First Amendment was ratified to safeguard.

[49] *See* NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163 (1958), *with* Fowler v. Rhode Island, 345 U.S. 67, 73 S.Ct. 526 (1953), *cited in* John Eidsmoe, The Christian Legal Advisor, rev. ed. (Grand Rapids: Mott Media/Baker Book House, 1987), page 170. *See also, accord, Texas cases citing* NAACP v. Alabama, e.g., In re CFWC Religious Ministries, Inc., 143 S.W.3d 891, 892 (Tex. App. – Beaumont 2004, no writ); Tilton v. Moyé, 869 S.W.2d 955, 956 (Tex. 1994). Regarding impermissible state-sponsored viewpoint discrimination in an academic context, see Tinker v. Des Moines I.C.S.D., 393 U.S. 503, 509, 89 S.Ct. 733, 738 (1969) ("In order for the State ... to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

[50] "Two of the three required textbooks for this course are published by Master Books and reflect the creationist tenet that the earth is young. Neither of these textbooks or the five aforementioned objectives would be a part of a graduate cosmology course in any public university in Texas or the nation" (Skoog, rejecting academic freedom for private colleges with a creationist viewpoint). Dr. Skoog's own words, just quoted, are like a '*poster child*' of viewpoint discrimination, mismatched to the non-theistic secularism that federal courts now mandate for public schools.

notwithstanding, unpopular viewpoints, and associations based thereupon, are *not* to be discriminated against by a governmental agency, even if that government agency is led by a board and a commissioner which unanimously dislike an "unpopular" viewpoint. *See, accord,* Fowler v. Rhode Island, 345 U.S. 67, 69-70, 73 S.Ct. 526, 527 (1953). However, during the THECB proceedings (in April 2008 especially), defendants made much of the fact that ICRGS has, as part of its core-values-based mission, conspicuously expressed "tenets" of Biblical (and scientific) creationism, which are "integrated" (or "embedded") into its curriculum and instruction of science education, -- as if that was a bad thing.

85. By doing so, defendants used their state offices to injure ICRGS's **"freedom of association"** rights, to the extent that those rights hinge to ICRGS's institutional academic freedom rights to offer a creationist-viewpoint-affirming graduate degree program in "science education". (Also, such freedom of association has *interstate commerce* implications.)

86. Likewise, defendants (when using color of their state offices) failed to respect their constitutional obligations to reasonably accommodate ICRGS's private-sector religious rights, including the federally protected right to have ICRGS's religious viewpoint "reasonably accommodated" whenever THECB regulatory activities would coercively interfere with or disfavor ICRGS rights to receive the benefits of state government-administered program benefits. *See, accord,* Sherbert v. Verner, *supra,* 374 U.S. 398, 83 S.Ct. 1790 (1963).

87. Obligatory "accommodation", to religious viewpoint liberties, is also mandated by Texas statutory law, specifically, the *Texas Religious Freedom Restoration Act of 1999*, codified at Texas Civil Practice & Remedies Code, Chapter 110, -- so defendants' *ultra vires* actions, under color of state law, were committed without legal justification from either a federal law perspective or a state law perspective. Appendix "I" to Exhibit # 1 defines the legal duty to accommodate religious liberty in Texas. Specifically, said Appendix "I" reprints the text of the ***Texas Religious Freedom Restoration Act of 1999***, which requires government agencies, such as THECB, to avoid substantially burdening free exercise of religion, unless and only when the following conditions are satisfied:

(a) the government-imposed burden on religious liberty "is in furtherance of a compelling governmental interest"; and

(b) the government-imposed burden on religious liberty "is the least restrictive means of furthering that interest".

Quoting from Texas RFRA, specifically the provisions codified at Tex. Civ. Prac. & Rems. Code § 110.003 ("Religious Freedom Protected"). Yet defendants (under color of state law), by their actions during AD2008, and by their ongoing failure to act remedially thereafter, are violating the Texas RFRA.

88. It is ***not*** true that THECB has a "compelling governmental interest" to defend Darwin's errors (or the idea that all material existence derives from an accidental "Big Bang" which occurred 14,000,000,000 years ago), so there is ***no*** excuse for the government-imposed burdens that defendants (acting under color of state law) have imposed upon ICRGS as a provider of graduate-level science education from a Biblical creationist viewpoint.

89. Defendants (both the THECB itself, and its officials acting under color of THECB authority) are obligated to accommodate ICRGS's religious viewpoint and thus should properly factor in the jurisprudence of the Texas Supreme Court's ruling in Tilton v. Marshall, 925 S.W.3d 672, 678—679 (Tex. 1996) (**no legal claim of "fraud" can be made, by the State of Texas government, if that claim depends upon the government evaluating the truth or legitimacy of a particular *religious opinion***). Any such mandated accommodation should specific regulate limit and qualify how defendants (as they act under color of state law) go about labeling graduate science education programs (and the degrees granted thereby) as "fraudulent or misleading", especially when the conferring institution has openly defined itself as providing education from a Biblical creationist viewpoint.

Unfair Restraint of Trade, Favored Monopoly, & Interstate Commerce Hindrance

90. The Texas Constitution,[51] directly, and the U.S. Constitution,[52] indirectly, both oppose the kind of monopoly power which the evolutionary establishment has in Texas (and elsewhere), over science education. Freedom to believe and teach evolution is one thing; monopoly control over the entire public **and private** higher education "market" is another. Yet it is monopoly control (facilitated by defendants' action under color of state law, over the private sector's graduate-level science education market) that causes ICRGS's ongoing academic speech injury.

91. Despite defendants' oppositions to the contrary, ICRGS is entitled to academically use its **"free speech"** rights (to use a phrase from the First Amendment), and to academically express its **"opinions on any subject"** (to use a phrase from the Texas Constitution), to teach and to assess the learning of its Science Education students (as they pursue years of graduate-level course of study in science education. Yet defendants have misused their state government powers and offices, to rule as if THECB itself was the monopolistically ***exclusive*** **issuer of science degrees** (similar to how the English king or queen, historically, was the monopolistically *exclusive issuer of knighthoods* and other merit-or-favor-based "**titles of nobility**").

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[51] Texas Constitution, Article 1, § 26 ("perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . . . ").

[52] U.S. Consttn., Article I, § 9 ("No Title of Nobility shall be granted by the United States...")

92. Defendants have chilled ICRGS's academic speech despite the time-honored American tradition that ***private*** colleges may issue such graduate degrees, because the academic opinion inherent in a degree conferral, if conferred in good faith (and not as a "sham"), is an academic *opinion* of that educational institution's faculty, because such graduate degrees are ***not*** academic opinions of the State of Texas. *See* Peel, *supra*, 496 U.S. at 103-104; 110 S.Ct. at 2289 (noticing **"the consuming public understands that licenses ... to convey an educational degree ... are issued by private organizations"** and do not **"misleadingly"** imply state endorsement) (emphasis added).

93. Likewise, in academic contexts where reasonable persons could differ, about a student's entitlement to a graduate science degree (as opposed to the very different situation where a "sham" or "diploma mill" program is involved), the First and Fourteenth Amendments do not allow the State of Texas have *de facto* "gate-keeping" veto-power over *all* science degree conferrals in the State of Texas. The reason why this is so is because, as Peel indicates, ***private*** colleges confer graduate degrees, because doing so involves a private institution's academic ***opinion*** inherent in a degree conferral, assuming that the degree is conferred in good faith (and not as a "sham", as clarified in Peel, *supra*, 496 U.S. at 109; 110 S.Ct. at 2292).

94. However, defendants have gone further, as is shown by their involvement in issuing a "press release" that favoritistically promotes SACS's academic monopoly in Texas, as is described below. This action by the defendants further injures ICRGS's academic freedoms, because it further confirms that defendants would condition ICRGS's academic speech exercise on ICRGS's willingness to seek accreditation from the **Southern Association of Colleges and Schools** ("SACS"[53]), -- as opposed to Transnational Association of Christian Colleges and

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[53] It THECB's official website the following appears as part of the "Media Advisory" for April 23, 2008, on a page titled "Institute for Creation Research Process Update to Grant a Certificate of Authority":

> **What happens if the recommendation is to approve ICR's request for a COA** [certificate of authority to grant M.S. degrees in Science Education] **?**
>
> If the Commissioner's recommendation is to approve ICR's request for a Certificate of Authority, and the Board votes to affirm, then ICR will have gained the legal authority to begin offering the proposed Masters of Science Education [*sic*] degree to their students. **The ICR must then begin the process of obtaining accreditation from the Southern Association of Colleges and Schools.** The ICR must apply to renew their COA every 2 years for a maximum of 8 years from the original date of issuance and must show continuous progress in achieving accreditation during that time. [*emphasis added*]

This THECB-mandated favoritism of **SACS**, at the expense of TRACS, DETC, and ABHE, or no accreditation at all, is an ***improper delegation of governmental power to a private entity.*** *See generally, accord,* Texas Boll Weevil Eradication Foundation v. Lewellyn, 952 S.W.2d 454, 470—472 (Tex. 1997), *as clarified in* FM Properties Operating Co. v. City of Austin, 22 S.W.3d 868, 873—874, 887—888 (Tex. 2000). *See also* THECB's unchecked discretion, under Texas

Schools ("TRACS", see www.tracs.org), or Distance Education Training Council ("DETC", see www.detc.org), or Association for Biblical Higher Education ("ABHE", see www.abhe.org , f/k/a the "AABC"), or no private sector accreditation at all. Although Texas statutes permit THECB to recognize accrediting associations besides SACS, THECB has only authorized SACS to offer graduate-level science education degrees in Texas, which provides SACS-affiliated colleges and universities with a market monopoly that clashes with federal and Texas constitutional principles.

95. In short, as a matter of free speech liberty law, the State of Texas should *not* lend its governmental powers to a ***private special-interest group***, such as SACS,[54] *to reduce competition within the science education "market",* as a governmental "favor" to the popular science community (i.e., the evolutionary establishment), just because evolutionary theory is currently the most popular theory within the overall scientific community (and within SACS). The reason for this is because using government powers, to restrain legitimate competition in the higher education market, runs afoul the "rule of reason" norm for recognizing unfair trade restraints, such as those prohibits under federal antitrust laws.

96. Yet here in Texas, due to the manner in which defendants use their color of THECB authority, THECB has produced a *de* facto governmental delegation of monopolistic **"accrediting-of-the-accreditors"** power, as is shown by the THECB's website-posted "press release" of April 23rd of 2008 shown how THECB has chosen to limit accreditation to the **Southern Association of Colleges and Schools ("SACS"),** producing an accreditation gate-keeping condition that arguably runs afoul federal and/or Texas law. The customary policy and practice of the THECB, under color of Texas law, involves the THECB accrediting accreditors in such as way that bona fide accrediting agencies are shut out of Texas, even if an accrediting agency is listed as "recognized' or "approved" by the U.S. Department of Education.

97. Accordingly, ICRGS now seeks a declaratory judgment (and injunctive relief to effectuate same, binding on defendants **and their successors in office**) that the Texas statutory scheme of accrediting accreditors is facially and/or applicationally unconstitutional, as a **monopoly-promoting interference with and restraint on interstate commerce.** There is no constitutionally legitimate reason why THECB insists that **only SACS** can "accredit" a Science Education program offered and operated in Texas by a private postsecondary educational institution. Unlike the unique markets for legal and medical education, there is no rationale for

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Education Code § **61.003(13),** regarding THECB's regulatory "recognition" (i.e., licensing-like approval) of college accrediting agencies.

[54] See, e.g., postsecondary education "market"-favoring reference to **SACS** in the following Texas laws: Texas Education Code **§ 61.003(13) & § 61.003(15).**

THECB rejecting the accrediting services of DETC or TRACS or ABHE,[55] in light of the U.S. Department of Education's approval of DETC, TRACS, and DETC. Constitutionally speaking, approval by a "accrediting association" should not be required for any school to assess its students as having earned academic degrees, so long as those degrees as not a "sham" resulting from "degree mill" operations.

98. Even "state action" should ***not*** be recognized as an affirmative defense to state agency officers (like defendants) who *violate* the federal Constitution, by misusing state offices and governmental licensing powers to commit violations of the 1st and/or 14th Amendments. This should apply to defendants' actions as individuals (and as state officers), under color of state law, labeling a graduate science education program as "fraudulent or substandard" simply because it accused Darwin (and Darwinists) of being "wrong" and by presenting the sciences of geology, biology, physics, and general science from a Biblical creationist viewpoint.[56]

99. THECB, under the control of the other defendants' concerted actions at THECB (under color of state law), has historically used SACS as its "agent", in a manner that deputizes **SACS** with THECB-approved-and-facilitated "monopoly power" in the segment of the Texas higher education "market" that provides Science Education degree programs. In other words, as a governmental (licensor) "gate-keeper", THECB can intentionally combine forces (and share regulatory powers) with a *favored* special-interest-affiliated associate (**such as the local "regional accrediting association", i.e., SACS**), to monopolistically "tilt" the educational market for graduate science education market opportunities. This has occurred in ICRGS's case, at least in two aspects of the THECB license-denial process:

(1) Commissioner Paredes chose to select *ex parte* advisory committee panelists who belong to SACS-accredited schools, despite the statutory requirement that government agencies only compose "advisory committees" which are "balanced" in composition, including advisors from the relevant provider "industry" and advisors from the relevant "consumer" market; and

(2) the THECB's own website indicates that ICRGS would be required to pursue SACS accreditation *just to keep its degree-granting license* even if THECB had granted ICRGS initial authority to grant M.S. degrees in Texas.

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[55] Transnational Association of Christian Colleges and Schools ("TRACS", see www.tracs.org), or Distance Education Training Council ("DETC", see www.detc.org), or Association for Biblical Higher Education ("ABHE", see www.abhe.org).

[56] Tilton v. Marshall, 925 S.W.3d 672, 678—679 (Tex. 1996) (no legal claim of "fraud" can be made, by the State of Texas government, if that claim depends upon the state evaluating the truth or legitimacy of a particular *religious opinion*).

Accordingly, THECB's government-power-enabled favoritism of SACS was used **in 2008**, and continues to be used **today**, to manipulate a SACS-favored governmental licensing of the postsecondary science education market in Texas (including the private sector portion of that market), -- all in a manner that resembles a "vertical" form of improper trade restraint.

100. This favoritistic arrangement is a realistic concern for ICRGS, when analyzing the overall restraint-of-trade situation (applicable to the Texas market for providing graduate science education programs), due to the THECB's behavior in the HEB Ministries controversy (cited elsewhere in this petition). Commissioner Paredes' prior misuse of his state office (as THECB's CEO), as reflected in THECB's unconstitutional behavior in the HEB Ministries controversy, included his unconstitutional *academic-vocabulary-censoring* actions under color of state laws (e.g., under color of the Texas Education Code and/or Texas Administrative Code.)

101. Of special relevance to ICRGS's case, therefore, is that THECB (as led by defendants, under color of state law) publicly provided no *meaningful legal analysis* with respect to causing potential injuries to ICRGS from any unconstitutional **"prior restraint"** censorship resulting from THECB's processing of ICRGS's application for a Certificate of Authority. Likewise, THECB (as led by defendants, under color of state law) publicly provided no concern or care about "balanced representation" with respect to causing potential injuries to ICRGS from any unconstitutional **"prior restraint"** censorship resulting from THECB's processing of ICRGS's application for a Certificate of Authority.

102. In any case, the action used by defendants, to use the machinery of state government, to deny ICRGS a degree-granting license, did involve defendants' improper acceptance and repeated "rubber-stampings"[57] of the *ex parte* "panel" advisors' intolerant anti-creationist discrimination, which discrimination was accepted, adopted, and practiced by the defendants, as they acted under color of state law. In particular, Commissioner Paredes constituted the ultimate *ex parte* "panel" advisors in the form of an improperly composed advisory committee, under circumstances where that unbalanced advisory committee functioned as a team of "private interested parties. [58]

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[57] "Rubber-stamping" a "predetermined" quasi-adjudicative agency board's outcome is ***not*** "Due Process". *See, accord,* Wilmer-Hutchins I.S.D. v. Brown, 912 S.W.2d 848, 850-851 (Tex. App. – Austin 1995, writ denied). Also, arbitrary processing of an administrative appeal fails constitutional **Due Process** standards. *E.g., see* Flores v. Employees Retirement System of Texas, 74 S.W.3d 532, 538—540 (Tex. App. – Austin 2002, *petition denied*).

[58] Delegating governmental regulatory power to competitors, whose self-interested conduct is tainted by the conflicts of interests of "private interested parties", contravenes the Texas Supreme Court's ruling in Texas Boll Weevil Eradication Foundation v. Lewellyn, 952 S.W.2d 454, 470—472 (Tex. 1997), *as clarified in* FM Properties Operating Co. v. City of Austin, 22 S.W.3d 868, 873—874, 887—888 (Tex. 2000).

103. Furthermore, as a matter of procedural Due Process, whenever Commissioner Paredes used his powers at THECB to implement the will of the improperly composed "panel" advisors, Commissioner Paredes did so as an improper delegations of government power (to the extent that improperly composed advisors committee was relied upon, which Commissioner Paredes indicated t was) and as a breach of procedural Due Process, thus violating the 14th Amendment's Due Process clause, according to the standard indicated in Coggins v. Longview I.S.D., 289 F.3d 326, 164 Educ. Law Reptr. 697 (5th Cir. 2002).

104. Behind the gate-keeping and ostracism semantics, used publicly by defendants prior to and during April 2008, the fact remains that defendants have actively facilitated **SACS** as the only "approved" (i.e., licensed in Texas) accrediting association with monopoly power over graduate-level **science education** degrees. Revealingly, THECB (as it is operated by defendants under color of state law) disallows the same privileges to TRACS, a creationist college accrediting association which is approved by the U.S. Department of Education. This further shows defendants' anti-creationist discrimination, under color of state law, as embodied in official THECB policy and practice.

105. Creationist colleges receive adversely disparate **treatment** (as well as adversely disparate **impact**) in Texas, due to THECB's ongoing institutional custom of discriminating against colleges with a Biblical creationist viewpoint. Just because the politically influential evolutionary establishment, using THECB-aided monopoly tactics, attempts to redefine creationist scientists as "non-scientists" (and/or as "religionists" *per se*, simply because most creationists have specific religious viewpoints), does not negate the "elephant-in-the-room" reality that creationists routinely teach and practice real-world science,[59] and that real-world science did *not* originate with Charles Darwin.[60]

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[59] Once again showing the arbitrary and discriminatory bias of defendants, the joint committees of the THECB were reminded, on April 23rd of 2008, -- but willfully ignored, -- that even American astronauts take **Genesis 1:1** seriously, yet such creaturely reverence does not *per se* magically transmogrify a science-trained astronaut into a science-deprived religionist! (Neither does a creaturely reverence for the Creator magically convert an F-16 pilot into a science-deprived ignoramus.)

[60] Documented observations of the world of nature antedate the 1800s, obviously, yet many of those eye-witness-based observations clash with the imagined world that evolutionist theorists anticipate. *See, e.g.,* Steve Austin, "Ten Misconceptions about the Geologic Column" (**www.icr.org/article/242/**), orig. publ. as ICR *Impact* (11-1-1984); Bill Cooper, "Living Dinosaurs from Anglo-Saxon and Other Early Records", *Creation Ex Nihilo Technical Journal* 6(1):49—66 (1992), *reprinted within* Bill Cooper, *After the Flood* (Chichester, England: New Wine Press, 1995), pages 130—161, *cited in* **Progress Report's Appendix T.**

106. In sum, the semantic redefinition of "science", to shut out all creation science-informed science education programs, constitutes the promotion of a higher education monopoly, and such misuse of government power "shall never be allowed" in Texas, according to the Texas Constitution's Bill of Rights.[61] Yet, if the defendants' actions, under color of state law (including THECB's decisions), is not actively annulled by this or a higher tribunal, a *de facto* monopoly in the science education market is facilitated by the defendants' favoritistic (and discriminatory) actions. (And, as indicated below, said monopolistic restraint on trade, in science education, interferes with interstate commerce, yet another unconstitutional result.)

107. Appendix "K" to Exhibit # 1 briefly illustrates a representative sample of the ongoing injuries which ICRGS now suffers, due to defendants' misuse of THECB powers, causing ongoing **interferences with interstate commerce.** Unless and until the defendants' misuse of THECB powers is reversed or annulled, ICRGS is now less able to serve the Internet-enabled educational marketplace, as far as Texas residents are concerned, because the THECB coercively claims the right to banish ICRGS's online program from Texas soil.

108. ICRGS's claims for federal relief, herein, are warranted. At the hands of defendants, THECB would (and will, if unchecked) pursue an unconstitutional course of conduct, in violation of the First and Fourteenth Amendments. Defendants' willingness to engage in unconstitutional prosecution of private educational institutions, which value their First Amendment liberties (e.g., advocating a minority religious viewpoint), is illustrated in the recent litigation described in HEB Ministries, Inc. v. THECB, 235 S.W.3d 627 (Tex. 2007). Moreso, while citing the same statutes and regulations THECB acted on unconstitutionally last year, THECB's Commissioner and the other defendants (as THECB voting board members) made no meaningful effort to publicly demonstrate that the THECB, during April 2008, intended to act constitutionally toward ICRGS, in contradistinction from the THECB's multi-year pattern of unconstitutional action against other Bible-based Protestant evangelical institutions of higher education, namely: ***Tyndale Theological Seminary,***
Southern Bible Institute, and
Hispanic Bible Institute.[62]

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[61] Texas Constitution, Article 1, § 26 ("perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . . .").

[62] In the HEB Ministries case, the Texas Supreme Court summarized its ruling as follows: "The State of Texas requires a private post-secondary school to meet prescribed standards before it may call itself a "seminary" or use words like "degree", "associate", "bachelor", "master", and "doctor" -- or their equivalents -- to recognize attainment in religious education and training. **We must decide whether this requirement impermissibly intrudes upon religious freedom protected by the United States and Texas Constitutions. We hold it does and therefore reverse the judgment of the [Austin] court of appeals** and remand the case to the trial court for further proceedings." HEB Ministries, Inc. v. THECB, 235 S.W.3d at 630—631 (emphases added).

Incorporation by Reference of All Identified Exhibits.

109. This Petition's **Exhibit #1** is the main text of Plaintiff's "Petition for Contested Case Status" (originally dated May 24th, A.D. 2008), the duplicate originals of which include components exhibits ("A" through "Z"). Plaintiff hereby incorporates by reference the information and allegations within said "Petition for Contested Case Status" (dated May 24th, A.D. 2008), both as to the main text thereof (which is attached hereto as Exhibit #1) and as to its component appendices "A" through "Z" thereof (which are not attached hereto, because doing so would make this Petition too voluminous – as the entire Petition for Contested Case Status with all of its attached appendices comprises 755 pages! However, ICRGS requests that this honorable Court take ***judicial notice*** of said "Petition for Contested Case Status", including its component attached appendices A through Z, all of which appears (at least at present) at:

http://www.thecb.state.tx.us/AAR/PrivateInstitutions/ICRPetition_contestedcasestatus.pdf

(which the character between the words "ICRPetition" and "contestedcasestatus.pdf" being one underlining character, as opposed to one empty space).

110. This Petition's **Exhibit #2** is the main text of Plaintiff's "First Supplement" (originally dated June 12th, A.D. 2008), the duplicate originals of which include components exhibits ("H" and "N"). Plaintiff hereby incorporates by reference the information and allegations within said "First Supplement" (dated June 12th, A.D. 2008), both as to the main text thereof (which is attached hereto as Exhibit #2) and as to its appendices "H" and "N" thereof (which are not attached hereto).

111. This Petition's **Exhibit # 3** is the "Second Supplement" (originally dated February 4th, A.D. 2009), showing compliance with Tex. Civ. Prac. & Rems. Code § 110.006 (regarding using certified mail for service of a protest under the Texas Religious Freedom Restoration Act of 1999).

112. The three attached exhibits should be deemed incorporated herein by reference, as well as those which they identify (but which are not physically attached hereto, because doing so would be too voluminous for filing herein as one document).

V. SUBSTANTIVE LEGAL THEORIES & CLAIMS FOR RELIEF

113. Pursuant to federal statutory laws which provide remedies for civil rights violations committed under color of state law, e.g., the federal Civil Rights Act codified at 42 U.S.C. § 1983 (which civil rights violations are part and parcel with the Federal Question-based claims of

this controversy), in conjunction with the federal Declaratory Judgment Act, ICR (acting through ICRGS) hereby requests relief, under various **federal** law-based grounds, which defendants have willfully failed to comply with,[63] producing ongoing injuries to ICRGS's civil rights, as is indicated specifically below.

114. Under the **U.S. Constitution**'s 1st & 14th Amendments (including the parts and applications therefrom regarding ICRGS's academic speech, freedom of the press, free exercise of religion, Due Process, Equal Protection, etc.), ICRGS's civil rights should have been be recognized and respected by defendants (but were not), including:

(a) any regulation/chilling of ICRGS's "academic speech"[64] must be strictly and constitutionally justified (to avoid "viewpoint discrimination"), and

(b) any regulation/chilling of ICRGS's "commercial speech"[65] must be constitutionally justified (under applicable case law), and

(c) any regulation/chilling of ICRGS's hybrid "religious speech"[66] must be constitutionally justified (under case law governing "religious speech" / "hybrid speech"[67]); and

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[63] Appendix "F" to Exhibit # 1 is a copy of ICRGS's Progress Report's Appendix "R", shows ICRGS's concern, as of late March of 2008, that the THECB's actions appeared to indicate a willingness to avoid compliance with various **federal** laws applicable to this situation. Those concerns were justified. Appendix "G" to Exhibit # 1 is a copy of the Supplement to ICRGS's Progress Report's Appendix "R", provided to the THECB committees on April 23 of 2008, showed supplemental expressions of ICRGS's concerns about THECB's apparent willingness to under-estimate the relevance and importance of channeling its administrative discretion within the boundaries of applicable **federal** law standards. Those supplemental expressions of concern were likewise justified.

[64] Recent federal court case law (from another jurisdiction), pertinent to regular of institutional "academic freedom", may be insightful, e.g., Asociación de Educación Privada de Puerto Rico, Inc. v. Garcia-Padilla, 490 F.3d 1, 222 Educ. Law Reptr. 32 (1st Cir. 2007).

[65] See Ibanez v. Florida Department of Business & Professional Regulation, Board of Accountancy, 512 U.S. 136, 114 S.Ct. 2084 (1994); Edenfield v. Fane, 507 U.S. 761, 766—777, 113 S.Ct. 1792, 1798—1804 (1993); In re R.M.J., 455 U.S. 191, 102 S.Ct. 929 (1982); Peel v. Attorney Registration & Disciplinary Commission of Illinois, 496 U.S. 91, 110 S.Ct. 2281 (1990). See especially, regarding state actions which attempt to regulate "commercial speech", Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343 (1980).

[66] Regarding the propriety of relief to ICRGS (especially since defendants used color of THECB authority to label ICRGS's Science Education program as "fraudulent or substandard"), *see* ICR Graduate School v. Honig, 758 F.Supp. 1350, 1356, 66 Educ. Law Reptr. 655 (S.D. Cal. 1991), *in conjunction with* Tilton v. Marshall, 925 S.W.3d 672, 678—679 (Tex. 1996) (no legal claim of "fraud" can be made, by the State of Texas government, if that claim depends upon the government evaluating the truth or legitimacy of a particular *religious opinion*).

(d) any regulation/chilling of ICRGS's "religious" speech[68] must be constitutionally justified (to avoid violation of Free Speech and/or Free Exercise religious liberties[69]); and

(e) any "prior restraint"[70] of ICRGS's academic "speech" or "press" (catalogs, brochures, website) must be constitutionally justified, avoiding "excessive entanglements",[71] under case law governing "**prior restraint**" of printed or electronic publications;[72] and

(f) any regulation/chilling of "academic speech" must also avoid running afoul the Equal Protection and Due Process clauses of the 14th Amendment[73] (with the

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[67] It is this "hybrid" of "religious speech" (which it must be, in light of the U.S. Supreme Court ruling in Locke v. Davey, 540 U.S. 712, 124 S.Ct. 1307 (2004), which causes petitioners (and not THECB) to be supported by Scott v. State of Texas, 80 S.W.3d 184, 197 (Tex. App. – Waco 2002, *petition refused*), *citing* Society of Separationists, Inc. v. Herman, 939 F.2d 1207 (5th Cir. 1991) (accommodation provided for Robin Murray-O'Hair, an atheist, based on "hybrid" civil rights, free speech and religious liberty).

[68] NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 495—498, 501--502, 99 S.Ct. 1313, 1316—1318, 1319 (1979). Even assuming "good intentions" of the THECB, in regulating the educational applications of the ultimately religious (creationist) mission of ICRGS, such "good intentions" do not excuse "excessive entanglements". NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, at 501—502, 99 S.Ct. 1313, at 1319 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708—709, 96 S.Ct. 2372, 2380 (1976), *followed in* Dean v. Alford, 994 S.W.2d 392, 395 (Tex. App. – Fort Worth 1999, no pet.).

[69] Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 122 S.Ct. 2080 (2002).

[70] Freedman v. Maryland, 380 U.S. 51, 58, 85 S.Ct. 734 (1965) (mandating limits on "prior restraint" regulation on public speech, while recognizing dangers of a licensing process that could operate as a censorship system), *quoted in and clarified by* Thomas v. Chicago Park District, 534 U.S. 316, 320—322, 122 S.Ct. 775, 776—779 (2002).

[71] *Cf., accord*, id.; Locke v. Davey, 540 U.S. 712, 124 S.Ct. 1307, 185 Educ. Law Reptr. 30 (2004).

[72] See Ibanez v. Florida Dep't of Business & Professional Regulation, Bd. of Accountancy, 512 U.S. 136, 114 S.Ct. 2084 (1994); Edenfield v. Fane, 507 U.S. 761, 766—777, 113 S.Ct. 1792, 1798—1804 (1993).

[73] Pierce v. Society of Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 532, 45 S.Ct. 571, 572-573 (1925) (religious school's 14th Amendment—guaranteed Due Process rights were violated by state's unconstitutional statute which interfered with free exercise of traditional private education programs of a private religious school and of a private military academy; also, recognizing that the state's interference with private education violated "the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void"); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923) (14th Amendment—guaranteed Due Process rights of private sector school

concept of Due Process being informed by the 5th Amendment), and these procedural norms should accompany any/all quasi-judicial processes for ICRGS's application for a license to grant its proposed M.S. degrees; and

(g) any state regulation which requires ICRGS to relinquish its federal 1st & 14th Amendment—protected rights[74] should be recognized as an unjustified violation of Due Process (and/or as an uncompensated "taking" of ICRGS's property and/or liberty interests); and

(h) when interpreting ICRGS's 14th Amendment-protected liberty interests, the historical importance and anti-monopolistic policy of the U.S. Constitution's Titles of Nobility clause (Art. 1, § 9) should not be ignored.[75]

Claims for Relief under Texas State Laws.

115. Pursuant to federal laws which allow for "pendent" (or "supplemental") state law-based claims, ICR (acting through ICRGS) hereby requests relief under various state law-based grounds, which defendants have willfully failed to comply with,[76] producing ongoing injuries to ICRGS's civil rights, as indicated specifically below.

116. Under the **Texas Constitution**, especially its Article 1, sections 1, 3, 3a, 6, 8, 13, 19, 29, ICRGS's civil rights should be recognized and respected by defendants (but were not), including the following:

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were violated by Oregon's unconstitutional statute which interfered with free exercise of traditional private education program and with the school's teachers' vocational right to freely teach); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972).

[74] See Dolan v. City of Tigard, 512 U.S. 374, 385—386, 114 S.Ct. 2309, 2316—2317 (1994), *citing and following* Nolan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987).

[75] This point has special relevance to the THECB's simplistic view of an earned graduate degree as a an academic recognition which merely communicates on the level of "commercial speech", as if the only purpose for holding and publicizing such an earned academic degree was to propose a commercial transaction (as opposed to communicating that an ICRGS graduate's opinions merit respect due to the academic training that presumably underlies and supports those opinions).

[76] Appendix "F" to Exhibit # 1 is a copy of ICRGS's Progress Report's Appendix "R", shows ICRGS's concern, as of late March of 2008, that the THECB's actions appeared to indicate a willingness to avoid compliance with various Texas **state** laws applicable to this situation. Those concerns were justified. Appendix "G" to Exhibit # 1 is a copy of the Supplement to ICRGS's Progress Report's Appendix "R", provided to the THECB committees on April 23 of 2008, showed supplemental expressions of ICRGS's concerns about THECB's apparent willingness to under-estimate the relevance and importance of channeling its administrative discretion within the boundaries of applicable Texas **state** law standards. Those supplemental expressions of concern were likewise justified.

(a) any hindrance or chilling of ICRGS's "academic speech" must be strictly and constitutionally justified (to avoid "viewpoint discrimination"), due to Art. 1, § 8 ("**liberty to speak, write or publish** his opinions on any subject"), and

(b) any hindrance or chilling of ICRGS's "commercial speech" must be constitutionally justified (under applicable case law), due to Art. 1, § 8 ("no law shall be passed curtailing **the liberty of speech or of the press**"), and

(c) any hindrance or chilling of ICRGS's "**hybrid speech**" must be constitutionally justified (under case law governing "hybrid speech") especially in light of Art. 1, § 6 in conjunction with § 8; and

(d) any hindrance/chilling of ICRGS's "religious" speech must be constitutionally justified, to avoid violating the Equality Under the Law clause protecting "creed" liberties (Art. 1, § 3a), and to avoid governmental acts that "control or interfere with **rights of conscience in matters of religion**" (Art. 1, § 6); and

(e) any **"prior restraint"** of ICRGS's "press" (catalogs, brochures, website) must be constitutionally justified, under case law governing "prior restraint" of printed or electronic publications, due to Art. 1, § 8 ("**liberty to speak, write or publish his opinions on any subject**", and ("**no law shall be passed curtailing the liberty of speech or of the press**"); and

(f) any hindrance or chilling of ICRGS's academic speech should also avoid running afoul the **Due Course of Law** provisions of Art. 1, § 13 & Art. 1, § 19, and also in light of the **Equality** provisions of Article 1, § 3 & Art. 1, § 3a, -- and these procedural norms (which norms should include complying with the "balanced representation" mandate of **Texas Government Code § 2110.002**, when composing an advisory committee to advise THECB and/or its Commissioner) should accompany all quasi-judicial processes for ICRGS's application for a license to grant its proposed *M.S.* degrees in "Science Education"; and

(g) interpreting and protecting ICRGS's **"Due Course of Law"** rights[77] should included proper consideration of the historical importance and relevant policy of the Texas Constitution's expressed concern for **reputational injury** (Art. 1, § 13), as well as the **Public Emoluments and Equal Rights** clauses (Art. 1, § 3),[78] and/or the **anti-monopoly**[79] **policy** of Art. 1, § 26.

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[77] Texas courts shall be **"open"**, to provide remedies, unto "every person for an injury done him, in his lands, goods, person or **reputation**, shall have remedy by **due course of law". Texas Contttn., Article I, § 13.**

[78] *E.g., see* HL Farm Corporation v. Self, 877 S.W.2d 288, 292, at Footnote 6 (Tex. 1994) ("Because we have determined that section 23.56(3) violates section 3 of Article I of the Texas Constitution, it is not

117. Special attention is warranted regarding the "prior restraint" and "censorship" dynamics of the THECB's licensure approval-or-denial processes, which defendants have misused under color of state law to disfavor ICRGS from its academic freedom rights to avoid viewpoint discrimination when ICRGS teaches that Darwin was wrong. [80]

118. Also, another form of statutory relief, which is relevant for redressing ICRGS's rights, is the **Texas Religious Freedom Restoration Act of 1999** ("Texas RFRA of 1999"), codified at

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necessary to consider whether section 23.56(3) violates the United States Constitution or other provisions of the Texas Constitution").

[79] In contravention of Texas Constitution Article 1, § 3 and § 3a, in conjunction with Article 1, § 26, there appear to be two types of monopolistic higher education market manipulations, facilitated by the THECB's "evolutionary-science-only" actions in this case: **"horizontal"** restraint of trade, as illustrated in FTC v. Indiana Federation of Dentists, 476 U.S. 447, 106 S.Ct. 2009 (1986) (conspiracy to restrict information); and **"vertical"** restraint of trade, as illustrated in Eastman Kodak v. Image Technical Services, 504 U.S. 451, 112 S.Ct. 2072 (1992) (illegal "tie-in" arrangement). Legally speaking, it does not appear that a state legislature, much less a state regulatory agency with legislature-delegated powers (like THECB), can defeat 1st-and-14th-Amendment-protected academic freedom rights by asserting a regulatory shield of "state action doctrine", because federal constitutional law always trumps contrary state law.

[80] Offering graduate programs in science education is generally legally in Texas, an unsurprising state of affairs in light of the First Amendment and the Texas Constitution. By inventing a THECB program of "certifying" (i.e., licensing) science education programs, however, Texas has effectively provided the private sector with what the U.S. Supreme Court calls a **"metaphysical forum"** -- that should not be ruled, governmentally, in a manner that fosters **"viewpoint discrimination"**. The academic/intellectual "metaphysical forum" aspect, of this case, is informed by the U.S. Supreme Court's ruling in Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 101 Educ. Law Reptr. 552 (1995), in light of the historical religious freedom perspective of Rector, etc., of Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511 (1892).

Also, if granting an academic degree was "potentially misleading", the state government could potentially justify regulating such "commercial speech", so long as the state's regulations of that speech fit within the narrow constitutional boundaries recognized by the U.S. Supreme Court (and by the Texas Supreme Court). Of course, those constitutional limitations have been repeatedly analyzed and interpretively defined by the U.S. Supreme Court and the Texas Supreme Court. Recent examples of such rulings include HEB Ministries, Inc. v. THECB, 235 S.W.3d 627, 226 Educ. Law Reptr. 348 (Tex. 2007) (ruling against THECB's unconstitutional attempt to regulate the usage of the word "seminary", etc.); In re R.M.J., 455 U.S. 191, 102 S.Ct. 929 (1982) (ads); Peel v. Attorney Registration & Disciplinary Commission of Illinois, 496 U.S. 91, 110 S.Ct. 2281 (1990) (NBTA "trial specialist" designation); Ibanez v. Fla. Dep't of Business & Professional Regulation, Board of Accountancy, 512 U.S. 136, 114 S.Ct. 2084 (1994) ("CPA" and "CFP" designations); Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y., 447 U.S. 557, 100 S.Ct. 2343 (1980).

Texas Civil Practice & Remedies Code, §§ **110.001** *et seq.*[81] To the extent that the phrase "district court", as the phrase "district court" used in Tex. Civ. Prac. & Rems. Code § **110.005(c),** may include this federal district court, ICRGS requests relief herein under the Texas RFRA of 1999.

119. Also, another form of statutory relief ICRGS deserves, under Texas law, is relief from being subjected to religious discrimination, under color of state law (by defendants misusing their THECB offices and powers) under Tex. Civ. Prac. & Rems. Code, § 106 **("Discrimination Because of Race, Religion, Color, Sex, or National Origin"),** which lists various "prohibited acts", including:

(a) in § 106.001(1), as including a refusal "to issue to the person a license, permit, or certificate", and

(b) in § 106.001(4), as including a refusal "to permit the person to participate in a program owned, operated, or managed by or on behalf of the state or a political subdivision of the state"; and

(c) in § 106.001(5), as including a refusal "to grant a benefit to the person"; and

(d) in § 106.001(6), as including a refusal "to impose an unreasonable burden on the person".

The remedies for such discrimination-caused civil rights violations include:

(a) under § 106.002(a), "preventive relief, including a permanent or temporary injunction, a restraining order, or any other order"; and

(b) under § 106.002(b), "reasonable attorney's fees as a part of the costs".

120. Accordingly, if applicable to (and available in) this forum, ICRGS would show this honorable Court that ICRGS has satisfied the pre-litigation "notice" requirements[82] for relief under the Texas RFRA of 1999, as shown by this Petition's **Exhibit # 1** (at Petition pages 19 & 30-31), and **Exhibit # 2** (First Supplement's page 2), and **Exhibit # 3** (Second Supplement's pages 2-3).

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[81] *See, accord,* In the Interest of R.M., 90 S.W.3d 909, 912 (Tex. App. – San Antonio 2002, *no petition*).

[82] See Tex. Civ. Prac. & Rems. Code § **110.006** ("Notice; Right to Accommodate").

121. Furthermore, if so, that same Texas law (i.e., the Texas RFRA of 1999) incorporates by reference, via its **§ 110.005(a)(1),** whatever declaratory relief remedies as are potentially available under the **Texas Declaratory Judgment Act** ("**Texas DJA**", codified at Tex. Civ. Prac. & Rems. Code **§§ 37.001** *et seq.*). If so, it is noteworthy that the Texas DJA (which is incorporated by reference into the Texas RFRA of 1999) allows suit against Texas state agencies, as well as attorneys fees to prevailing private sector plaintiffs.[83]

Clarifying What ICRGS's Civil Rights Controversy is Not About

122. Clarity is needed when considering the potential relevance of federal case law involving the promotion of creationism (or secularized "intelligent design" science) as content for public school curricula and/or in public school textbook disclaimers. ICRGS's case is **not** a controversy involving any public school "entanglements"!

123. ICRGS is not seeking to impose its creationist viewpoint distinctives on any ***public*** school or college. (This point contrasts with Dr. Skoog's fault-finding that ICRGS's curriculum would be unacceptable for any Texas **public** university.) Rather, ICRGS presently seeks only to offer and grant M.S. degrees in and from its own private educational institution, in conjunction with using its institutional academic freedom to teach postsecondary level courses in (or directly related to) science education, biology, geology, and astro-geophysics.[84]

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[83] *See* Texas Education Agency v. Leeper, 893 S.W.2d 432, 98 Educ. Law Reptr. 491 (Tex. 1994, *reh'g denied* 1995).

[84] The **viewpoint discrimination** which ICRGS has suffered, and continues to suffer (as a "substantial burden" on ICRGS's religious/academic liberties, and on those of ICRGS's faculty), is not only illegal, it is unreasonable and demonstrates the lack of any "rational basis" for THECB's regulatory action. Defendants (acting in concert with the THECB's Assistant Commissioner, and the Commissioner's improperly composed *ex parte* advisory "panel" committees) have demonstrated their flawed understanding of ICRGS's curriculum, acting as though most of the course content is simply a checklist of how to impeach evolution and/or evolutionists, *in order to proselytize "converts" to Biblical creationism.* This misreads the actual application of ICRGS's Biblical creationism tenets, by assuming that the only useful purpose for "science" is to disprove evolution. Most of the actual content of ICRGS's curriculum involves teaching scientific data, scientific principles, scientific laws (e.g., the Laws of Thermodynamics), scientific analysis, science research techniques and resources, etc. -- not the origins controversy *per se*. This is because at ICRGS it is sincerely believed, based on Biblical revelation, that the exercise of teaching real-world science (whether that be Biology, Geology, Physics, or Ecology), with accuracy and excellence, is itself a legitimate way to honor God, as part of the Dominion Mandate which God renewed after the Genesis Flood. (*See, accord,* **Exhibit # 1's Appendix "Y",** showing examples of how science education can be applied to simply *appreciating* what a glorious Creator God has shown Himself to be.) Therefore, even a simple ecology study on the Pinyon Jay's mutual symbiosis relationship with the Pinyon Pine can be a scientific opportunity to "think God's thoughts after Him", and to intellectually honor Him as the Creator of the birds and the trees. (*See, accord,* 1st Corinthians 10:31.)

124. In short, to the extent permitted under Texas state laws adjudicated by this honorable Court, ICRGS respectfully requests appropriate injunctive relief (including preliminary injunctive relief, whether with or without a "structured" injunction), declaratory relief, Texas Public Information Act-based relief, attorneys fees, and costs of court.

Constitutional Relief is Needed, to Effectuate the Respect for *Private* Sector Civil Liberties

125. Although one THECB's *ex parte* advisory committee member strained to infer that ICRGS's application is an evasive maneuver to introduce creation science into the *public* schools, that erroneous inference demonstrates, once again, that THECB's improperly composed *ex parte* advisory committee, and all who thereafter relied on those advisors' conclusions, continue to ignore the quintessential purpose of ICRGS's application, namely, to be recognized as legally entitled to provide ICRGS's young-earth-creationist education services unto the *private* Christian school market in (and from) Texas.

126. ICRGS's application, which the THECB arbitrarily denied, was not an application to "teach creation science in the **public** schools". To say otherwise is to base the decision on "straw-man" arguments and "red-herring" distractions.

127. Likewise, despite remarks to the contrary during THECB proceedings in April 2008, it is error to say that the U.S. Supreme Court has dispositively ruled that "creation science" is not real "science" because it is (or simultaneously involves) "religion".[85] It is true that the U.S. Supreme Court has struck various statutes perceived as vehicles for "restoring-Biblical-creation-

[85] This would be like saying that a husband ceases to be a husband if and when he becomes a father, or like saying that a wife ceases to be a wife if and when she becomes a mother. ICRGS does not cease being a competent and qualified provider of graduate-level science education *ipso facto* when ICRGS demonstrates that it has a Biblical creationist viewpoint. ICRGS is simultaneously a graduate-level science education provider, and a Biblical creationism viewpoint advocate. The U.S. and Texas Constitution allow scientists to hold religious viewpoints; scientists (and science educators) should not be deemed to **forfeit** their identities (or their **vocational callings**) as scientists (and science educators) just because they recognize God's handiwork in nature. Defendants should recognize its duty to accommodate such beliefs.

Also, the rights of the ICRGS faculty, to teach apart from governmental persecution of their religious viewpoints, likely involves the "Privileges and Immunities" and/or "Equal Protection" clauses of the 14th Amendment, since those clauses often applies to liberty and equity regarding vocational opportunities. *See, accord,* Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10 (1915) (saying, after noting that no public funding was involved: "[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure").

to-the-public-schools",[86] but ICRGS is neither a public school not a private school seeking government money! Accordingly, all precedents that deal with mandating or prohibiting creation science (or even "intelligent design" science) in the "**public** schools" are inapposite to this petition's legal concerns. Furthermore, it is wrong to say that the federal courts have dispositively defined "creation science" as non-science. (And, public media "scholarship" aside, popular dictionaries are not authoritative sources for defining what "creation science" really is.) It is correct, however, to say that federal courts have recognized that creation science presupposes a religious belief in a Creator God, but the existence of that religious belief does not *ipso facto* disqualify (or exterminate) the underlying scientific model, methodologies, and practices of "creation-science" as a legitimate form of real science:

> Nothing in our opinion today [in 1985] should be taken to reflect adversely upon **creation-science *either* as a *religious* belief *or* a *scientific* theory.**

Quoting from Aguillard v. Edwards, 765 F.2d 1251, 1257, 26 Educ. Law Reptr. 29 (5th Cir. 1985) (emphasis added). *See also, accord,* Justice Scalia's dissent in Aguillard v. Edwards, 482 U.S. 578, 611, 107 S.Ct. 2573, 2592 (1987), recognizing a statutory definition of "creation-science" as "the *scientific evidences* for creation and inferences from those *scientific evidences*" (emphasis in original). Justice Scalia further described creation-science as "essentially a collection of scientific data supporting the theory that the physical universe and life within it appeared suddenly and have not changed substantially since appearing". *Quoting* id., 482 U.S. at 612, 107 S.Ct. at 2592.

128. This case pivots on **viewpoint discrimination**, specifically governmental disfavor of a private sector school's academic (and religious) viewpoint. (See James J. S. Johnson, "Censorship in Texas: Fighting Academic and Religious Discrimination", ***ACTS & FACTS***, volume 38, issue 5 (May 2009), pages 18-19.) In the final analysis creation science involves many scientific **interpretations**, -- about mankind and the animals, about the heavens and the earth, about the origins of life and of death, -- and opinions about how to best explain scientific observation-related data:

(a) some individuals approach such explanations from a *theistic* perspective; while others embrace and advocate an *atheistic* perspective;

(b) some approach such explanations from a "young-earth" perspective, while others embrace and advocate an "old-earth" perspective;

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[86] Public schools, especially those which enforce compulsory attendance laws, are not a convenient vehicle for mandating Biblical creationism teachings, taught to public school students (who are legally compelled to attend school) by public school-teachers, many of whom disagree with Biblical teachings. *See, accord,* Edwards v. Aguillard, 482 U.S. 578, 584, 107 S.Ct. 2573, 2578 (1987), *citing* Widmar v. Vincent, 454 U.S. 263, 271, 102 S.Ct. 269, 275 (1981). But private schools have no such "Establishment" entanglements.

(c) some interpret the dominant patterns of earth's geology as bearing forensic evidence of a worldwide flood, while others embrace and advocate an interpretation relying on long ages of uniformitarian processes;

(d) some have no problem recognizing design and information processes (e.g., coding and decoding biogenetic information at the level of right-handed DNA and RNA, ribosomes, and left-handed amino acids) in microscopic cells, while others seek unintelligent explanations for such informational "transcriptions" and the like, ad while still others seek "exobiological" explanations, such as life-"seeded" crystals or aliens from outer space.

It is viewpoint discrimination for defendants to use their state offices, under color of state law, to withhold a government license (or other benefit), such as a THECB-issued Certificate of Authority, essentially because ICRGS has an unpopular institutional viewpoint (i.e., its Biblical creationist "Tenets") that guides and informs its approach to teaching Science Education programs.

129. This suit requests declaratory relief that would answer the following civil rights-oriented questions, as such are applicable to ICRGS's situation:

(a) Are Biblical creationists (like ICRGS) really allowed to "freely" exercise their religious viewpoints in their graduate programs, -- or may defendants use their THECB powers to ban (or otherwise punish) such viewpoints?

(b) Are young-earth creationists (like ICRGS) really allowed to teach an academic viewpoint of recent creation and a global Flood some 4½ thousand years ago, -- or may defendants use their THECB powers to ban (or otherwise punish) such viewpoints?

(c) Are Biblical creationists (like ICRGS) allowed to offer Master of Science degree programs (in a manner that includes the "free speech" of ICRGS's faculty expressing the ultimate educational assessment ***opinion*** that a particular graduate student has earned a "Master of Science" degree "in Science Education", -- or may Biblical creationists (like ICRGS) be **"expelled"** from the academic **"bus"** by defendants (because there is "no intelligence allowed" in science education)?

(d) Or, if Biblical creationists (like ICRGS) are allowed to teach science education from a creationist viewpoint (via online courses, labs, and field studies), -- must they do so from **"the back of the** (academic) **bus",** as defendant Paredes has proposed, by calling such graduate degrees a "Master of Creation Studies" or a "Master of Creation Research", using a **"separate but equal"** rationalization?

130. Even in Texas every scientist (and every science educator) -- whether he or she be an evolutionist, a creationist, or an "intelligent design" proponent, -- should be recognized as

legally entitled to express, in the words of Article 1, § 8, of the Texas Constitution, **"his opinions on any subject".** And, commensurate with a demonstration of good faith, academic freedom should likewise guide any inquiry, in Texas, about which schools should be free from a "prior restraint" regarding offering graduate science education programs (which is provided from a Biblical creationist viewpoint), -- including the academic right to express good faith "opinions on any subject" (to quote from the Texas Constitution's Article 1, § 8), including the academic right to express ultimate educational assessment opinions about whether and when a given graduate student has (or has not yet) satisfactorily completed a Master of Science degree in Science Education.

131. This case is *not* about granting master's degrees to *undergraduate* students who only study low-level, memorization-based science courses for a year or two. This is not a "*degree mill*" for "fraudulent or substandard" degrees, unless that phrase is deemed to apply to anyone who fails to "believe in their heart" that naturalistic evolution is true.[87]

132. It should suffice that ICRGS has set forth relevant curriculum and qualified instructors, who are prepared to transmit educational content in good faith unto qualified students who voluntarily seek to master that educational content from a conspicuously creationist graduate school. ICRGS, since 1981, has practiced educational quality, academic rigor, quantitative analysis, empirical research (including field studies, controlled experiments, and "high-tech" investigation of nature, e.g. scanning electron microscopy, helicopter investigations of Mount St. Helens, etc.), forensic logic and analysis, within good-faith academic freedom parameters, and has done so all from a Biblical and scientific creationism viewpoint.

133. Because ICRGS has set forth relevant curriculum and qualified instructors, prepared to transmit educational content to qualified students who voluntarily seek to master that educational content from a conspicuously creationist graduate school, that should suffice, in Texas, regardless of the uncomfortable fact that ICRGS affirms and teaches a *minority* viewpoint about cosmic and human origins and the worldwide Flood.

134. In particular, ICR's minority viewpoint, which is sincerely and institutionally held by ICR (and thus also by ICRGS), impacts ICR's ability to "freely exercise" its religious and scientific viewpoints, which include its sincerely held beliefs that:

(a) the Great Commission of Matthew chapter 28 is obligatory;

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[87] The official utterances of defendants, especially on April 23rd (and 24th) of 2008, demonstrate the defendants' adamant opinion, expressed as government officials, that any private institution (even one that receives no state government funding) may not have a license to offer a Master of Science degree in Science Education if that private institution expresses the viewpoint that "Darwin was wrong" and the earth is "young".

(b) Genesis 1:1 is foundational truth about God, and its truth is thus foundational for honoring Him as such, as opposed to failing to do so "without excuse";

(c) "science" should not be taught from an "atheistic-evolution-only" perspective (because that perspective is false and should be avoided, according to **1st Timothy 6:20**);

(d) the supposedly "foundational" notion that an evolutionary "Big Bang" occurred "14 billion years ago", which notion Commissioner Paredes officially endorsed (on April 23rd or 2008), is a false notion that is "science falsely so-called"; and

(e) science education should emphasize the geologic importance of the Genesis Flood, due to its unique worldwide impact on earth's history.

135. The preceding sentence's five points specially relate to this litigation, as is indicated by the following expansion of those four points:

(a) **ICRGS is defending its academic freedom to obey the Great Commission by academically teaching and assessing the learning of its viewpoint.** ICRGS seeks to protect its academic freedom rights to teach in a way that obeys the Great Commission. (Part of ***teaching*** is ***assessing*** the learning of the learners, and that is ultimately what an academic degree is, an ***opinion*** of educational assessment.) ICRGS sincerely believes that the core of the Great Commission is ***teaching*** the teachable how to honor and obey our Creator and Redeemer, the Lord Jesus Christ. That is what ICRGS has been doing since 1981. ICRGS's dispute with the THECB is not a about a mere "cheek-slap" insult. It is about a serious violation of ICRGS's constitutional rights to "freely exercise" its academic freedom and its religious viewpoint to teach in a way that obeys the Great Commission.

(b) **ICRGS is defending its academic freedom to intelligently and privately teach what Genesis 1:1 is all about.** ICRGS sincerely believes that God has chosen to define Himself, foundationally, as our Creator: the very first verse in the Bible reveals God as our Creator. God's Creatorship is foundational to every other truth we will ever learn. ICR's Graduate School has been intelligently and privately teaching what that verse means since 1981. It is unconstitutional for THECB to ban or even disfavor ICRGS teaching that truth in a private education context, unsubsidized by government funding. (All of the "public school" legal controversies about mixing "church and state" are *irrelevant* to what ICRGS teaches *privately*.)

(c) **ICR is defending its civil rights to teach a non-atheistic view of "science".** ICRGS seeks to protect its academic freedom rights to teach in a way that obeys the Dominion Mandate, which teaching necessarily includes ICR's teaching its sincerely held (non-atheistic) religious belief that God mandated various stewardship responsibilities to

humans (via the Dominion Mandate and otherwise). ICR, for ~ 40 years has produced real SCIENCE. To not resist the THECB would appear to concede that what ICR has been doing, all these years, was not real "science". THECB claims the regulatory power and right to define "science" as limited to **evolution-only** views of science. Also, THECB wrongs ICR's reputation by saying that its graduate program is "fraudulent or substandard". This is not a problem limited to ICR: current federal court litigation includes the case of ACSI-credentialed Christian schools across America suffering "***EXPELLED***"-style discrimination by the California state college and university system, yet another example of the growing trend of ***evolution-only*** gate-keeping segregating Bible-believing Christians to the "back of the bus" or excluding Christians from the academic "bus" altogether.

(d) **ICR is protesting the Texas government agency's "established" partiality regarding religious viewpoints that clash with the Bible.** Under our American system of checks-and-balances, and the "rule of law" (as opposed to cronyistic favoritism and "establishment"-like favoritism of an incumbent official's religious viewpoints), state government agencies have an obligation not to use government power to favor or disfavor a religious viewpoint when performing government functions. Yet Commissioner Paredes specifically justified his denial of rights to ICRGS on Commissioner Paredes' belief that the cosmos began with a "Big Bang" 14 billion years ago, and that evolution is "foundational" to "modern science" and "science education". ICRGS sincerely believes that Commissioner Paredes' viewpoint regarding a "Big Bang" is wrong. Commissioner Paredes has the political right to reject the Holy Bible's description of creation, but he does not have the right to impose his religious views (or the views of an *ex* parte committee of evolutionist "advisors") upon ICR or upon its educational constituents, nor does Commissioner Paredes have the right ***to condition ICR's right to receive a government license*** on whether ICR accepts his religious viewpoint. (The same juristic logic also applies to the other defendants.)

Therefore, constitutionally speaking, THECB's ongoing denial of ICRGS remains (until it is cured) an unconstitutional and prejudicial burden against ICRGS's academic freedom and religious liberties.

V. RELIEF REQUESTED

WHEREFORE, your plaintiff hereby respectfully requests the following forms of relief, to be entered against the THECB, and also other defendants in their individual and official capacities, consistent with anti-discrimination civil rights law (applied according to the jurisprudential doctrine of *Ex parte Young*), in conjunction with issuance of appropriate citations:

A. Injunctive Relief, including preliminary and permanent injunctive relief, including a structured injunction if just and proper, with said injunctive relief including both mandatory and prohibitory relief components.

Such injunctive relief should include provisions that require THECB's Commissioner, individually and in his individual capacity as the CEO of the THECB, to mitigate and undo the defendants' discriminatory actions by promptly ***approving and granting*** ICRGS a Certificate of Authority to grant ***Master of Science*** degrees in *Science Education*, with optional minors in *Biology*, *Geology, Astro-geophysics,* and *General Science.*

B. Declaratory Relief ancillary to the Injunctive Relief, pursuant to the Texas Declaratory Judgment Act (codified at chapter 37 of the Texas Civil Practice & Remedies Code), including a declaration that Subchapter G of Chapter 61 of the Texas Education Code is unconstitutionally restrictive and/or overbroad, and is thus null and void, or, alternatively, that said Subchapter G of Chapter 61 has been unconstitutionally applied to ICRGS (in a manner violative of the First and Fourteenth Amendments to the U.S. Constitution, as well as violative of similar provisions of the Texas Constitution), -- insofar as said Chapter 61 of the Texas Education Code purports to exercise jurisdiction over academic degree-granting or other operations of private sector postsecondary educational institutions, including ICRGS (or any other postsecondary educational unit of ICR).

In particular, provisions of the declaratory relief to be granted should include a judicial declaration that the THECB has **no** regulatory jurisdiction over private higher educational institutions, including ICRGS, unless those institutions accept state government funding or state government-administered funding.[88] (This declaration could, but need not be based on a declaration that Texas enabling statutes are unconstitutional if they permit the THECB to interfere with academic freedom of educational institutions which do not receive government subsidy funding.)

Moreover, in light of the "catch—all" regulatory power colorably provided by Texas Education Code § 61.3021, THECB's regulatory limitations (as well as any Texas statutes which attempt to delegate unto THECB regulatory powers via constitutionally improper delegations) should be quasi-judicially and/or judicially delineated, in order to quash the "chilling effect" of *ultra vires* regulatory activities (such as those which were the subject of the above-noted HEB Ministries litigation).

[88] *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").

Furthermore, this need for jurisdictional clarification regarding "academic speech" (subject to constitutional law requirements) is particularly important in light of Texas statutes that cross-reference the THECB's enforcement powers to "deceptive trade practices" statutes. *See, e.g.,* Texas Education Code § 61.320 ("**Application of Deceptive Trade Practices Act**") and Texas Education Code § 61.321 ("**Information Provided to Protect Public from Fraudulent, Substandard, or Fictitious Degrees**").

C. Declaratory Relief ancillary to the Injunctive Relief, pursuant to the Texas Declaratory Judgment Act (codified at chapter 37 of the Texas Civil Practice & Remedies Code), including a declaration that the Subchapter G of Chapter 61 of the Texas Education Code is unconstitutionally restrictive and/or overbroad, and is thus null and void, or, alternatively, that said Chapter 61 has been unconstitutionally applied to ICRGS (in a manner violative of the First and Fourteenth Amendments to the U.S. Constitution, as well as violative of similar provisions of the Texas Constitution), -- insofar as said Subchapter G of Chapter 61 of the Texas Education Code purports to exercise jurisdiction over academic degree-program-**accrediting** or other operations of private sector postsecondary educational institution **accreditors**, including but not limited to TRACS, ABHE, and DETC.[89]

In particular, provisions of the declaratory relief to be granted should include a judicial declaration that the THECB has **no** regulatory jurisdiction over **private sector accreditors** (i.e., "accrediting associations" or "accrediting agencies", including but not limited to TRACS, DETC, and ABHE) of any private higher educational institutions, (including ICRGS), unless those accreditors accept state government funding or state government-administered.[90] (This declaration could, but need not be based on a declaration that Texas enabling statutes are unconstitutional if they permit the THECB to interfere with academic freedom of educational institutions which do not receive government subsidy funding.)

Moreover, in light of the "catch—all" regulatory power colorably provided by Texas Education Code § 61.3021, THECB's regulatory limitations (as well as any Texas statutes which attempt to delegate unto THECB regulatory powers via constitutionally improper delegations) should be quasi-judicially and/or judicially delineated, in order to quash the "chilling effect" of *ultra vires* regulatory activities (such as those which were the subject of the above-noted HEB Ministries litigation).

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[89] Transnational Association of Christian Colleges and Schools ("TRACS", see www.tracs.org), or Distance Education Training Council ("DETC", see www.detc.org), or Association for Biblical Higher Education ("ABHE", see www.abhe.org).

[90] *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").

Furthermore, this need for jurisdictional clarification regarding "academic speech" (subject to constitutional law requirements) is particularly important in light of Texas statutes that cross-reference the THECB's enforcement powers to "deceptive trade practices" statutes. *See, e.g.,* Texas Education Code § 61.320 ("**Application of Deceptive Trade Practices Act**") and Texas Education Code § 61.321 ("**Information Provided to Protect Public from Fraudulent, Substandard, or Fictitious Degrees**").

D. As part of the declaratory relief[91] which ICRGS seeks, herein, whether under federal or state law, ICRGS requests a judicial declaration that:

> "Notwithstanding Subsection 61.303(d) or any other part of the Texas Education Code, a private educational institution (including a non-profit entity's separate degree-granting program "school" or "unit" or "college" or "institute") is exempt from Texas Higher Education Coordinating Board oversight if it:
>
> (1) accepts no state government funding;
>
> (2) accepts no state government-administered federal funding;
>
> (3) is formed as or is part of a not-for-profit entity, whether incorporated or otherwise; and
>
> (4) is not operated as a degree mill."

E. Additional relief based upon Texas statutes, e.g., under Tex. Civ. Prac. & Rems. Code, § 106 **("Discrimination Because of Race, Religion, Color, Sex, or National Origin"),** and/or under the **Texas Religious Freedom Restoration Act of 1999,** codified at Tex. Civ. Prac. & Rems. Code, § 110.001 *et seq.,* and/or § **1.001(a)** of the **Texas Education Code** (including its incorporated-by-reference remedies under the Texas Declaratory Judgment Act), benefitting ICRGS, including but not necessarily limited to an injunction ordering the defendants to issue ICRGS appropriate approval and licensing (i.e., a Certificate of Authority), or else issue a letter ruling from THECB, pursuant to Texas Education Code § 1.001(a) and/or recently amended THECB Rule § 7.4(g), indicating that THECB has no jurisdictional oversight over ICRGS's degree programs.

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[91] E.g., declaratory relief could include construing § **1.001(a)** of the **Texas Education Code**, which says: "This code applies to all educational institutions supported in whole or in part by state tax funds unless specifically excluded by this code."

F. Costs of Court, as allowed in conjunction with the injunctive relief-related statutes mentioned above (e.g., 42 U.S.C. § 1983).

G. Other Forms of Relief, including a reasonable Attorney's Fee recovery, as allowed under 42 U.S.C. § 1988 and/or in conjunction with declaratory relief awarded under the Texas Declaratory Judgment Act (codified in chapter 37 of the Texas Civil Practice & Remedies Code), as to which this plaintiff may be justly entitled, at law or in equity or otherwise.

Respectfully submitted,

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