

INSTITUTE FOR CREATION RESEARCH GRADUATE SCHOOL

v.

TEXAS HIGHER EDUCATION COORDINATING BOARD,  
Commissioner Raymund Paredes, et al.

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**PETITION FOR CONTESTED CASE STATUS**

Submitted May 24<sup>th</sup>, A.D. 2008

By:

**INSTITUTE FOR CREATION RESEARCH  
GRADUATE SCHOOL**

**EXHIBIT #1**

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[ Appendices "A" through "Z" then follow, identified by alphabetic index tabs. ]

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**PETITION FOR CONTESTED CASE STATUS**

Submitted May 24<sup>th</sup>, A.D. 2008

This controversy is now ripe for procedural processing as a “contested case”.

Pursuant to Title 19, Texas Administrative Code, Part 1, Chapter 1, Subchapter B, **Rule § 1.23** (“Deadlines for Filing a Petition for Contested Case Status”), -- 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”), -- your petitioner, Institute for Creation Research Graduate School (“ICRGS”), respectfully petitions for recognition of “contested case status”, as follows:

**I. REQUIRED INFORMATION FOR CONTESTED CASE PETITION**

§ **1.24(b)(1)** (“**description of the determination, decision, order, ruling, or failure to act that is being complained of**”).

The THECB Board, on recommendation of the THECB Commissioner (as well as the unanimous joint recommendation of its Academic Excellence & Research Committee and its Participation & Success Committee), in reliance on the advice of two advisory “panel” committees, **denied** and rejected the amended application of ICRGS, for a Certificate of Authority to grant graduate degrees in Texas.

Specifically, as ICRGS has already been doing already in California (where its graduate school was established some 25+ years ago), ICRGS seeks to offer its mostly-online program 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 request for such a Certificate of Authority was procedurally submitted 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 Rule § 7.8).

Said amended application is primarily represented by the ICRGS's Progress Report<sup>1</sup> of March 2008, which is too voluminous to append to this petition, but several copies of that Progress Report were already submitted to the THECB, in a timely manner, on or about March 26<sup>th</sup> of 2008. (However, on request therefore, ICRGS will gladly provide additional copies of said "Progress Report", on request.)

§ **1.24(b)(2)** ("the date of the determination, decision, order, ruling, or failure to act").

The decision that is being complained of was formally voted on and announced publicly on **Thursday, April 24<sup>th</sup> 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 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, the composition of both failing the "balanced representation" requirement of a state agency advisory committee (as mandated by the Texas Government Code).

§ **1.24(b)(3)** ("a statement of the facts of which petitioner is aware and which he or she believes to be true, that would lead to a reasonable conclusion that petitioner is entitled to the relief sought").

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:

- 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;

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<sup>1</sup> The March 2008-submitted Progress Report, itself, is an indexed and voluminous large 3-ring notebook captioned "THECB Progress Report". Herein this document (and any supplements thereto) will be called "ICRGS's Progress Report" or simply "the Progress Report".

- 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 THECB committee members raised superficial concerns, in April 2008, about the qualifications of ICRGS's faculty;*<sup>2</sup>
- 10) Faculty Size: modified to address THECB's criticism (see ICRGS's Progress Report's tab "Standards 9 & 10: Faculty Qualifications and Size");<sup>3</sup>
- 11) Academic Freedom & Faculty Security: THECB never expressed a serious concern about this, *except* that it appeared to bother some of the THECB committee members, in April 2008, that ICRGS faculty used their academic freedom (in conjunction with their religious liberty) 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 *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"), as shown by Appendix "A", *yet THECB continued to disapprove ICRGS's Science Education curriculum, and THECB continues to deny that ICRGS's curriculum non-deceptively provides learners with a master's-level program of "science education";*<sup>4</sup>

<sup>2</sup> 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 this Petition.)

<sup>3</sup> 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 this Petition.)

<sup>4</sup> This concern is especially addressed in **Appendix "A"**, which comparatively documents, analyzes, and charts how ICRGS's *Master of Science* curriculum, especially curricular content "breadth" coverage, satisfies relevant national/Texas educational "standards" for teaching "science education" at the master's

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

level. For example, of the 295 American Academy for the Advancement of Science "Benchmarks" (i.e., AAAS norms for teaching "science" to 9<sup>th</sup> through 12<sup>th</sup> 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 rights under the 1<sup>st</sup> and 14<sup>th</sup> 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 the geologic history of the Genesis Flood. In effect, the THECB advisory committees discount ICRGS's curriculum whenever ICRGS uses its academic freedom, in curriculum design and textbook selections, to employ usage of creationist textbooks and 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 IRC'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 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 Joneses" are not wearing that fashion much nowadays.

- 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,<sup>5</sup> and these inconsistencies have been reconciled;
- 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 limited to:
    - (a) regulating public institutions of higher education; 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

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<sup>5</sup> This concern is adequately addressed in ICRGS's March 2008 Progress Report in the pages tabbed "Information Agreement".

statutory mission 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”;<sup>6</sup>
- (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;

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 Free Amendment (free speech/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 and describing its graduate-level science education programs,
- (b) especially in light of relevant Texas case law<sup>7</sup> including the Texas Supreme Court’s 2007 ruling in HEB Ministries, Inc. v. THECB, 235 S.W.3d 627, 226 Educ. Law Repr. 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”);

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<sup>6</sup> 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.

<sup>7</sup> 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).

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 First Amendment-secured 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) THECB's joint committees, THECB's Commissioner (and his advisory committees), and THECB's board itself, publicly disapproved, disfavored, and discriminated against ICRGS's institutional academic freedom,<sup>8</sup>
- (b) revealingly and religiously relying (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".<sup>9</sup>

**§ 1.24(b)(4)** ("the specific statute or rule which the petitioner believes entitles him or her to request a contested case status").

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").

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**".

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.

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<sup>8</sup> "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.

<sup>9</sup> As a point of clarification, THECB Commissioner Paredes's unquestioned faith in a "Big Bang" of "14 billion years ago" should not be confused with the "great noise" alluded to in 2<sup>nd</sup> Peter 3:10.

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”).

§ **1.24(b)(5)** (“a description of the action that the petitioner wants the Board to take on the petitioner's behalf”).

- (A) ICRGS seeks and requests that the THECB 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) ICRGS also seeks 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).
- (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 THECB has no constitutional right to hinder ICRGS from offering, educating for, and/or granting master's and doctor's degrees (so long as such is done in good faith, and not as a “diploma mill” sham<sup>10</sup>); and
  - (2) that, based upon ICRGS's own constitutionally protected viewpoint distinctives and academic freedom, THECB has no constitutional right to hinder ICRGS from conferring any higher education degrees which ICRGS opines (in good faith) are fair recognitions of the respective educational achievements of its individual students, including any such postsecondary degrees<sup>11</sup> denominated as “master's” or “doctor's” degrees.
- (D) ICRGS also seeks a declarative statement that, in conjunction with the THECB board's expressed disapproval of ICRGS's viewpoint-integrated approach to

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<sup>10</sup> 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).

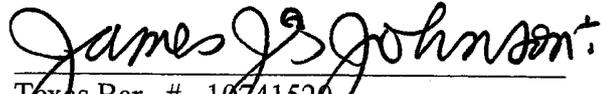
<sup>11</sup> By the same logic, ICRGS, if it were to “add on” an adjunct college of undergraduates studies, should have no similar unconstitutional interference with its offering and conferring (in good faith and not as a “sham”) of such earned undergraduate degrees, such as “associate's” or “bachelor's” degrees.

teaching Science Education (via its M.S. program), the THECB has rejected ICRGS's application in a manner that involved THECB failing to provide THECB 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.

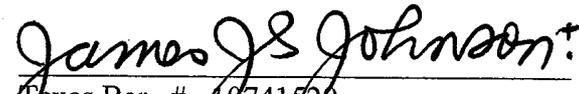
§ 1.24(b)(6) ("the signature of the petitioner, or the petitioner's authorized representative").

This Petition is hereby submitted on behalf of ICRGS by its special counsel of record, James J. S. Johnson, a Texas attorney:

  
Texas Bar # 10741520.

§ 1.25(2) ("Petitions for contested case status shall be served upon the officer stated herein, by personal delivery or by certified mail, with return receipt requested, or by other verifiable delivery service. . . . For all types of contested cases other than contract disputes, the petition shall be served upon the Commissioner").

This Petition, with its appendices, will have been served, in accordance with THECB Rule § 1.25 (quoted above), via certified mail,<sup>12</sup> with return receipt requested, or by other verifiable delivery service (e.g., FedEx), on this the 24<sup>th</sup> day of May, A.D. 2008, to which service the below signature attests.

  
Texas Bar # 10741520.

## II. TEXAS EDUCATION STANDARDS & ICRGS'S CURRICULUM

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. Appendix "B" was

<sup>12</sup> Service of this petition uses the following physical address: **Hon. Raymund Paredes**, Commissioner of Higher Education, c/o Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752 - 1743. Also, a copy of this petition is to be provided, contemporaneously, to the Texas Attorney General's Office, at the following address: **Hon. Greg Abbott**, in his official capacity as the Attorney General of Texas, c/o Office of the Attorney General, 300 W. 15<sup>th</sup> Street, Austin, Texas 78701.

prepared by Dr. Patricia Nason (*M.Ed.; Ph.D., Texas A&M University, in Curriculum & Instruction*).

Appendix "C" charts how ICRGS fits the AAAS Benchmarks, for 9<sup>th</sup>-12<sup>th</sup> grade science. Appendix "C" was prepared by Dr. Patricia Nason (*M.Ed.; Ph.D., Texas A&M University, in Curriculum & Instruction*).

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 9<sup>th</sup>-12<sup>th</sup> grade science literacy "Benchmarks". (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.)

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 9<sup>th</sup>-12<sup>th</sup> grade science topics), a percentage greater than 99% !

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.

In other words, 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 learning "at least 80%", ICRGS goes easily above and beyond facilitating that criterion.

Bottom line: ICRGS will be scientifically "literate" enough to teach 9<sup>th</sup>-12<sup>th</sup> grade science topics, as the AAAS defines "scientific literacy". Appendix "C" was also prepared by Dr. Patricia Nason (*M.Ed.; Ph.D., Texas A&M University, in Curriculum & Instruction*).

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". Appendix "D" was also prepared by Dr. Patricia Nason (*M.Ed.; Ph.D., Texas A&M University, in Curriculum & Instruction*).

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. Appendix "E" was also prepared by Dr. Patricia Nason (*M.Ed.; Ph.D., Texas A&M University, in Curriculum & Instruction*).

On information and belief, it appears that the Commissioner, according to his own admission, directly relied upon two ad hoc 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 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 "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.

More troubling, however, from a Due Process perspective,<sup>13</sup> is the fact that said advisory committee was not composed by a "balanced representation" (of science educator providers and representative science education "consumers") as mandated by **Texas Government Code § 2110.002**.

In the presence of Dr. Henry M. Morris III (and his team of ICRGS representatives, on April 23<sup>rd</sup>, 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 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 treated (by the THECB and Commissioner Paredes) as if it were irrelevant.

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<sup>13</sup> Due Process, guaranteed by the 14<sup>th</sup> 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 Repr. 697 (5<sup>th</sup> 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 evidentially 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)*.

Thus, the members of the Commissioner's ad hoc advisory committee<sup>14</sup> became the *de facto* decision-makers who rejected ICRGS's application. This delegation of a delegation was, procedurally speaking, improper, because the ad hoc 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 Administrative Code §2110.002). In other words, the administrative decision which ICRGS now complains of, as legally improper, was a doubly "rubber-stamped" rejection of ICRGS's application, by an improperly composed advisory committee.

This improper composition of the Commissioner's ad hoc advisory committee, as a combination of unelected private individuals (effectively wielding governmental powers), all appear to be evolutionist educators at public universities. Consequently, the adequacy of the "representation" of this "review panel" is procedurally flawed for a combination of reasons: no consumers of ICRGS's science education services served on as "panel" advisors, no private university educators served as "panel" advisors, only self-affirmed evolutionists were selected to serve on the "panel", none of the "panel" advisors demonstrated any expertise regarding the creationism-affirming private education

Appendix "F" illustrates science education, teaching evolution, and "conceptual change". This educational dynamic is directly relevant to unreasonable fault-finding by the Commissioner's advisory committee. Leading up to the Commissioner's decision to reject ICRGS's application, Dr. Skoog criticized a portion of ICRGS's catalog for indicating that one learning objective, in a science education course, was to contemplate the consequences "of using the power of inquiry to mess with someone's mind".<sup>15</sup> This clear implication of Skoog's criticism is the assumption that science education graduate students should not be learning about how "conceptual change strategies" are being used, in practical effect, to mess with the minds of students.

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<sup>14</sup> 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 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 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 a "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".

<sup>15</sup> SC 501 ("The History and Nature of Science"), briefly discussed, with an allusion to Jean Piaget, on page 16 of Gerald Skoog's "Review of the proposal of the Institute for Creation Research for a Master's Degree in Science Education", posted on the THECB's website.

In fact, the professional education literature, on that very topic, clearly shows that many science educators consciously try to do what many non-evolutionists would interpret as “mess[ing] with someone’s mind” (although, when doing so, that phrase is certainly not used!). See, accord, “**Learning about Evolution and Rejecting a Belief in Special Creation: Effects of Reflective Reasoning Skill, Prior Knowledge, Prior Belief and Religious Commitment**”, *Journal of Research in Science Teaching*, 29(2):143-166 (1992); Murray S. Jensen & Fred N. Finley, “Teaching Evolution Using Historical Arguments in a Conceptual Change Strategy”, *Science Education*, 79(2):147-166 (1995); Beth A. Bishop & Charles W. Anderson, “Student Conceptions of Natural Selection and its Role in Evolution”, *Journal of Research in Science Teaching*, 27(5):415-427 (1990); Cathleen C. Loving & Andrea Foster, “Seeking Graduate Student Conceptual Change”, *Science Education*, 84:445—468 (2000); Ronald L. Johnson & E. Edward Peeples, “The Role of Scientific Understanding in College: Student Acceptance of Evolution”, *The American Biology Teacher*, 49(2):93-96 (February 1987); etc. For example, consider how this article abstract summarizes such “conceptual change”:

Pretests and posttests on the topic of evolution by natural selection were administered to students in a college nonmajors’ biology course. . . . **Student thinking differed from accepted biological theory** in that (a) changes in traits were attributed to a need-driven adaptive process rather than random genetic mutation and sexual recombination, (b) no role was assigned to variation on traits within a population or differences in reproductive success, and (c) traits were seen as gradually changing in all members of a population. Although students had taken an average of 1.9 years of previous biology courses, performance on pretest was uniformly low. There was no relationship between the amount of previous biology taken and either pretest or posttest performance. **Belief in the truthfulness of evolutionary theory was also unrelated to either pretest or posttest performance.** Course instruction using specifically designed materials was moderately successful in improving students’ understanding of the evolutionary process. [*emphasis added*]

Quoting Bishop & Anderson, “Students Conceptions of Natural Selection and its Role in Evolution”, *supra*, at page 415.

Obviously, the way that students are taught, in the name of “science” (or “scientific theory”) can be used to strategically change their views about non-empirical topics, such as how the world was made. In other words, in the world of science education it is a very real concern, to science educators:

whether the teaching of science (and scientific theories) is informative, combined with critical thinking skills, or

whether the teaching of science (and scientific theories) is sophistic brain-washing based on strategic conversion of the student’s belief system, buttressed by authoritative pressure to believe that the “emperor’s news clothes” are so sophisticated that only ignorant and vulgar eyes “can’t see” them.

### III. SOME FEDERAL LAWS APPLICABLE TO THIS CONTESTED CASE

Appendix "G" 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 "H" 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. Constitutional issues permeate this administrative appeal, justifying injunctive and/or declaratory relief (including a federal discrimination statute-based remedy) if THECB's *ultra vires* actions are not timely cured by an administrative remedy.

Under the U.S. Constitution's 1<sup>st</sup> & 14<sup>th</sup> Amendments:

- (a) any regulation/chilling of "academic speech"<sup>16</sup> must be strictly and constitutionally justified (to avoid "viewpoint discrimination"), and
- (b) any regulation/chilling of "commercial speech"<sup>17</sup> must be constitutionally justified (under case law governing "commercial speech"), and
- (c) any regulation/chilling of hybrid "religious speech" must be constitutionally justified (under case law governing "religious speech" / "hybrid speech"<sup>18</sup>); and

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<sup>16</sup> 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 Repr. 32 (1<sup>st</sup> Cir. 2007).

<sup>17</sup> 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).

<sup>18</sup> 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 (5<sup>th</sup> Cir. 1991) (accommodation provided for Robin Murray-O'Hair, an atheist, based on "hybrid" civil rights, free speech and religious liberty).

- (d) any regulation/chilling of “religious” speech<sup>19</sup> must be constitutionally justified (to avoid violation of Free Speech and/or Free Exercise religious liberties<sup>20</sup>); and
- (e) any “prior restraint”<sup>21</sup> of ICRGS’s academic “speech” or “press” (catalogs, brochures, website) must be constitutionally justified, avoiding “excessive entanglements”,<sup>22</sup> under case law governing “prior restraint” of printed or electronic publications;<sup>23</sup> and
- (f) any regulation/chilling of “academic speech” must also avoid running afoul the Equal Protection and Due Process clauses of the 14<sup>th</sup> Amendment<sup>24</sup> (with the concept of Due Process being informed by the 5<sup>th</sup> 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 1<sup>st</sup> & 14<sup>th</sup> Amendment—protected rights<sup>25</sup> should be recognized as an unjustified

<sup>19</sup> 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.).

<sup>20</sup> Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 122 S.Ct. 2080 (2002).

<sup>21</sup> 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).

<sup>22</sup> *Cf., accord, id.*; Locke v. Davey, 540 U.S. 712, 124 S.Ct. 1307, 185 Educ. Law Repr. 30 (2004).

<sup>23</sup> 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).

<sup>24</sup> 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 14<sup>th</sup> 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) (14<sup>th</sup> Amendment—guaranteed Due Process rights of private sector school 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).

<sup>25</sup> 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).

violation of Due Process (and/or as an uncompensated “taking” of ICRGS’s property and/or liberty interests); and

- (h) when interpreting ICRGS’s 14<sup>th</sup> 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.

Moreover, it appears that if an administrative remedy is not provided unto ICRGS (after a Due Process-based request therefore), for rightful treatment of ICRGS’s application, ICRGS’s federal rights to pursue a federal litigation remedy will then become ripe, e.g., various civil rights remedies available under the Civil Rights Act of 1871,<sup>26</sup> codified at **42 U.S.C. § 1983.**<sup>27</sup>

**Clarification:** During the administrative law-governed “contested case” phase of this controversy, it does not seem procedurally “ripe” to add the voting THECB board members and/or the improperly composed “panel” advisory committee members (Dr. Gerald Skoog<sup>28</sup> of Texas Tech University; Dr. Barbara Curry of The University of Texas at Austin; Dr. David Hillis of The University of Texas at Austin; and Dr. C.O. “Pat” Patterson of Texas A&M University) as defending parties.<sup>29</sup>

<sup>26</sup> Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970 (1984) (government official’s usual immunity is not a bar to a lawsuit for prospective injunctive relief against official in her official state-actor capacity; moreover, attorney’s fees are potentially available under 42 U.S.C. § 1988 for a prevailing plaintiff), quoting William Blackstone, 3 *Commentaries on the Laws of England*, \*112--\*113 (discussing the practical limits of judicial immunity, to deter contempt and to enforce an official’s compliance with injunctive decrees).

<sup>27</sup> Regarding potential liability of private defendants *acting under color of state law*, to deprive a plaintiff of Constitution-protected property or liberty rights, see Wyatt v. Cole, 504 U.S. 158, 112 S.Ct. 1827 (1992) (no qualified immunity allowed for private defendants who acted under color of state law; purpose of 42 U.S.C. §1983 is to deter state actors from using badge of their “authority” to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails).

<sup>28</sup> “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 (with emphasis added), are like an evidentiary ‘*smoking gun*’ or ‘*poster child*’ of viewpoint discrimination, mismatched to the non-theistic secularism that federal courts now mandate for public schools. Similarly, the advisory committee markings (e.g., underlinings) on ICRGS academic materials, and/or quotations by the Commissioner in his written recommendation, reveal and highlight viewpoint-distinctive words and phrases used against ICRGS (like “Biblical”, “biblical creation”, “biblical miracles”, “Christian worldview”, “biblical record of creation”, “God himself”, “committed to young earth creation and the Bible”, “study, teach and communicate the works of God’s creation”, “created and made by God in the six literal days of the Creation Week described in Genesis”, “the creator”, “all genuine facts of science support the Bible”, the Bible’s inspired words being “infallible and completely authoritative on all matters with which they deal, free from error of any sort, scientific” and historical, as well as moral and theological, “all theories of origins or development that involve evolution in any form are false”, etc.) demonstrate viewpoint discrimination.

<sup>29</sup> Discovery may justify additionally adding, as defendants in future civil right litigation, in their official and/or individual capacities, an **earlier** (and, according to the Texas Government Code, an “unbalanced” and thus improperly composed) advisory committee’s members: Dr. Eugene Chiapetta of the University of

However, it does appear, in light of applicable civil rights laws (regarding *injunctive relief*, declaratory relief, civil rights, and the limits of “qualified immunity”), that a civil action under **42 U.S.C. § 1983** could provide ICRGS with statutory relief against those THECB board members, THECB Commissioner Raymund Paredes, THECB Assistant Commissioner Joe Stafford, THECB AE&R Committee chair Lyn Phillips, and the various advisory “panel” committee members in their official and/or individual capacities (especially advisors Skoog, Curry, Hillis, and Patterson).<sup>30</sup>

Buttressing such potential statutory relief, ancillary *declaratory relief* may be appropriate, *e.g.*, against THECB board members and the Commissioner, acting in their official and/or individual capacities. *E.g.*, see **ICR Graduate School v. Honig**, 758 F.Supp. 1350, 1356, 66 Educ. Law Repr. 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*).

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Houston; Dr. Sandra West-Moody of Texas State University at San Marcos; Mercedes Guzman of El Paso I.S.D.; Dr. James Kinsey of Rice University; Dr. Andrew Ellington of The University of Texas at Austin; Daniel Foster of UT’s Southwestern Medical Center; plus those four advisors who again served on both the January-convened and the April-convened advisory “panel” committees (i.e., advisors Skoog, Hillis, Curry, and Patterson).

<sup>30</sup> In ICRGS’s case, THECB’s denial of a Certificate of Authority, 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 Eleventh Amendment 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] complaint alleges an ongoing violation of federal law and seeks relief properly characterized 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), *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).

#### IV. SOME TEXAS LAWS APPLICABLE TO THIS CONTESTED CASE

Appendix "F" 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" 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.

Under the **Texas Constitution**, especially its Article 1, sections 1, 3, 3a, 6, 8, 13, 19, 29:

- (a) any regulation/chilling of "academic speech" must be strictly and constitutionally justified (to avoid "viewpoint discrimination"), especially in light of Art. 1, § 8 ("liberty to speak, write or publish his opinions on any subject"), and
- (b) any regulation/chilling of "commercial speech" must be constitutionally justified (under case law governing "commercial speech"), especially in light of Art. 1, § 8 ("no law shall be passed curtailing the liberty of speech or of the press"), and
- (c) any regulation/chilling of "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 regulation/chilling of "religious" speech must be constitutionally justified, to avoid violation of the Equality Under the Law clause protecting "creed" liberties (Art. 1, § 3a), and to avoid violation of the prohibition not to "control or interfere with the 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, in light of 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 regulation/chilling of 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 procedural norms should include complying with the “balanced representation” mandate of **Texas Government Code § 2110.002**, whenever composing an ad hoc advisory committee to advise the 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 should include proper consideration of the historical importance and relevance of the Texas Constitution’s Public Emoluments and Equal Rights clauses (Art. 1, § 3),<sup>31</sup> and/or the anti-monopoly<sup>32</sup> policy of Art. 1, § 26.

Moreover, it appears that if an administrative remedy is sought, but not provided, to provide ICRGS with rightful treatment of its application, ICRGS’s Texas state law rights to pursue injunctive relief, and/or a declaratory judgment-oriented remedy, will then become ripe, e.g., various remedies available under the Uniform Declaratory Judgment Act, codified at **Tex. Civ. Prac. & Rems. Code § 37.001 et seq.**, as applied in Texas Education Agency v. Leeper, 893 S.W.2d 432, 98 Educ. Law Repr. 491 (Tex. 1994, *reh’g denied* 1995).

And, if declaratory relief becomes needful, the relief granted may exceed that narrower relief available under the Administrative Procedure Act. *See* Texas Municipal Power Agency v. Public Utilities Commission of Texas, 2007 WL 4357538 (Tex. 2007), contrasting the *general* jurisdiction-interpreting relief available under the UDJA relief, with the *particular* administrative-order-only relief available under Texas Government Code § 2001.174(2)(A).

Also, another form of statutory relief, which appears relevant for redressing ICRGS’s rights, is the Texas Religious Freedom Restoration Act of 1999, codified at **Texas Civil Practice & Remedies Code, Chapter 110**.<sup>33</sup>

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<sup>31</sup> *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 necessary to consider whether section 23.56(3) violates the United States Constitution or other provisions of the Texas Constitution”).

<sup>32</sup> 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 First Amendment-protected academic freedom rights by asserting a regulatory shield of “state action doctrine”, because federal law always trumps contrary state law.

<sup>33</sup> *See, accord*, In the Interest of R.M., 90 S.W.3d 909, 912 (Tex. App. – San Antonio 2002, *no petition*).

## V. THECB'S DENIAL OF 1<sup>ST</sup> TIMOTHY 6:20-BASED FREE SPEECH

As a matter of institutional viewpoint, ICRGS has 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, **1<sup>st</sup> 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.

This Bible-informed viewpoint is not an exotic or recently invented tenet which ICRGS affirms.<sup>34</sup> 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”.<sup>35</sup>

THEBC has publicly disagreed with 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 is the Commissioner’s “Big Bang” opinion 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”?*

Similarly, does THECB 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 to endorse the Commissioner’s personal beliefs about evolutionary processes, and his personal belief in a “Big Bang” cosmogony?

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 particular religious opinion.<sup>36</sup> The historic fact that the triune God of the Bible, acting through Christ, created the cosmos

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<sup>34</sup> 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.

<sup>35</sup> 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.)

<sup>36</sup> *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*).

slightly more than 6,000 years ago, is a religious belief.<sup>37</sup> That religious belief is a sincerely-held institutional viewpoint of ICRGS, qualifying how ICRGS teaches science and science education. As such, the State of Texas (via THECB's board or its Commissioner), according to the Texas Supreme Court, should not be pronouncing an epistemological judgment on whether ICRGS's institutional viewpoint is "true" or "false", "legitimate" or "fraudulent".

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<sup>37</sup> 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.

Similar religious-viewpoint-hostile reactions were publicly echoed in Assistant Commissioner Joe Stafford's remarks on April 23<sup>rd</sup>, 2008 (as he read Biblical creationist tenets from ICRGS's catalog), and were publicly re-echoed by Commissioner Raymund Paredes that day. The next day (April 24<sup>th</sup>, 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).

In short, it is not the constitutional role of the THECB to restrict ICRGS's academic freedom, as a private non-government-funded institution.

Neither is it the constitutional role of THECB to *ban* ICRGS's graduate degrees as "fraudulent or substandard" just because ICRGS rejects the Commissioner's opinion about whether earth originated from an un-witnessed evolutionary "Big Bang" or whether the earth is about 14 billion years old, rather than about 6½ thousand years old.

Why is ICRGS's legal right to provide a science education-focused M.S. degree program being rejected if ICRGS disagrees, on both Biblical and scientific grounds, with Commissioner Paredes' opinion that the earth is not derived from primeval events which occurred, without human eye-witnesses, some "14 billion years" ago? When Earth began, Commissioner Paredes was not there; he is not an eye-witness to Earth's origin.<sup>38</sup> Consequently, Commissioner Paredes' opinion about the age of the earth is not based on *empirical* observations; rather, that opinion is a blend of assumptions, *forensic* analysis principles, and Commissioner Paredes' own epistemological presuppositions,<sup>39</sup> -- plus the Commissioner's reliance on the "expert" advice of his *ad hoc* advisory committee.

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

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 Repr. 552 (1995) (*portions of which are quoted later within this petition*).

Despite the U.S. Supreme Court's disapproval of government-announced viewpoint discrimination, the THECB has thus publicly rejected ICRGS's institutional viewpoint regarding the origin and age of the earth. In theological effect, THECB, by

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<sup>38</sup> 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.

<sup>39</sup> 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*).

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 1<sup>st</sup> Timothy 6:20) -- "science falsely so-called".

Although educational liberty (a/k/a "academic freedom") does not include or justify a "sham"<sup>40</sup> (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.

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).

Institutional academic freedom, the hallmark of Anglo-American university traditions, largely charts out the above-mentioned objective criteria: the college's chosen curriculum (for a specific degree program).

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.<sup>41</sup>

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

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<sup>40</sup> Texas Education Agency v. Leeper, 893 S.W.2d 432, 443—444 (Tex. 1994, rehearing denied 1995).

<sup>41</sup> See, accord, Asociación de Educación Privada de Puerto Rico, Inc. v. Garcia-Padilla, 490 F.3d 1, 222 Educ. Law Repr. 32 (1<sup>st</sup> Cir. 2007).

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.<sup>42</sup>)

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 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. (In fact, if THECB truly cares about regulating “fraud” in higher education, a good place to start would be more careful monitoring of misappropriated millions of higher education-earmarked dollars.<sup>43</sup>)

## VI. COMPARABLE EXAMPLES OF INSTITUTIONAL VIEWPOINTS

As a matter of institutional academic freedom, a *private* higher education institution has a legal right to endorse and express itself by *institutional viewpoint* distinctive, regardless of whether those institutional viewpoints be religious, political, or scientific viewpoints.<sup>44</sup>

### 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

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<sup>42</sup> 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).

<sup>43</sup> Tilton v. Marshall, supra, 925 S.W.3d at 678—679 (ruling that the state government is not permitted to define a religious viewpoint as “fraud”).

<sup>44</sup> *E.g.*, see Asociación de Educación Privada de Puerto Rico, Inc. v. Garcia-Padilla, 490 F.3d 1, 222 Educ. Law Repr. 32 (1<sup>st</sup> Cir. 2007).

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 Jewish 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 2<sup>nd</sup> 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.<sup>45</sup> Accordingly, it is to be expected that Seventh 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)

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<sup>45</sup> 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 (9<sup>th</sup> 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, 465 F.Supp. 602 (S.D. Tex. – Houston 1979) (employer failed to offer reasonable accommodation to Seventh Day Adventist employee).

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).<sup>46</sup>

But, under the academic freedom-restricting regulations of the THECB, how can that be?

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 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.<sup>47</sup>

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<sup>46</sup> See <http://www.swau.edu/spirituality/beliefs.asp> (last viewed 5-12-AD2008).

<sup>47</sup> *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 21<sup>st</sup> 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.

### 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. Inexorably, 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).<sup>48</sup>

In other words, to wrongfully interfere with institutional academic freedom can constitute an encroachment on “freedom of association” rights.<sup>49</sup> 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.

But, 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:

Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. But apart from narrow exceptions not relevant here, ..., it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. Sermons are as much a part of a religious service as prayers. They cover a wide range and have as great a diversity as the Bible or other Holy Book from which they commonly take their texts. To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of

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<sup>48</sup> 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”).

<sup>49</sup> “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.

another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another. That would be precisely the effect here if we affirmed this conviction in the face of the concession made during oral argument. Baptist, Methodist, Presbyterian, or Episcopal ministers, Catholic priests, Moslem mullahs, Buddhist monks could all preach to their congregations in Pawtucket's parks with impunity. But the hand of the law would be laid on the shoulder of a minister of this unpopular group for performing the same function.

*Quoting from* Fowler v. Rhode Island, 345 U.S. 67, 69-70, 73 S.Ct. 526, 527 (1953).

THECB makes 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.

Obviously, THECB has a low regard for 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.)

Likewise, THECB fails to grapple with its constitutional obligation 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.<sup>50</sup> *See, accord, Sherbert v. Verner, supra*, 374 U.S. 398, 83 S.Ct. 1790 (1963).

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.<sup>51</sup>

#### Example # 7: An Unlicensed Texas Seminary, Calling itself a “Seminary”

Importantly, this “new” statute was not applied in the HEB Ministries, Inc. v. THECB case,<sup>52</sup> due to the timing of its enactment, due to the Texas Supreme Court’s conclusion that its enactment post-dated the THECB’s challenged actions against Tyndale Theological Seminary. In that case, an “unlicensed” Protestant seminary was fined by the THECB, for granting unlicensed “degrees”, and for calling itself a

<sup>50</sup> *See* Part VIII of this petition, *infra*.

<sup>51</sup> *See* Part VII of this petition, *infra*.

<sup>52</sup> HEB Ministries, Inc. v. Texas Higher Education Coordinating Board & Commissioner Paredes, 235 S.W.3d 627, 226 Educ. Law Repr. 348 (2007), *substantively reversing* 114 S.W.3d 117 (Tex. App. – Austin 2003).

“seminary”, without a THECB license to do so. Because it deemed the Texas RFRA law unripe for application, the Texas Supreme Court struck down THECB’s (and the Commissioner’s) unconstitutional behavior in the HEB Ministries case (cited elsewhere herein), *without* reaching the civil-libertarian breadth of the Texas Religious Freedom Restoration Act of 1999 (“Texas RFRA”).<sup>53</sup>

However, such is not the case with ICRGS’s application. Accordingly, THECB must now comply with the “enhanced” statutory burdens and limitations of the Texas RFRA, in addition to burdens and limitations otherwise already mandated by the U.S. and Texas Constitutions.

Appendix “I” defines the legal duty to accommodate religious liberty in Texas.

Specifically, 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”).

The legally required duty of the THECB to accommodate ICRGS’s religious viewpoint 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 THECB goes 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.

## **VII. STATUTORY NOTICE OF SUBSTANTIAL BURDEN**

Accordingly, ICRGS (in its capacity as a Biblical Christianity-informed graduate school which sincerely and conspicuously holds Biblical and scientific creationism

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<sup>53</sup> See HEB Ministries, Inc. v. THECB, *supra*, 235 S.W.3d at 630—631.

views) **hereby** provides notice to the THECB, and to its Commissioner, and to its board members, -- pursuant to **Tex. Civ. Prac & Rems. Code § 110.006**, -- that:

the THECB Commissioner's recommendation of April 23<sup>rd</sup>, 2008 (which relied upon an advisory committee composed without "balanced representation" as required by the Texas Government Code), as well as

the THECB's decision of April 24<sup>th</sup>, 2008,

collectively **disapproving and rejecting ICRGS's application** for a THECB-issued Certificate of Authority (to offer and grant *Master of Science* degrees in Science Education, with alternative minors in Geology, Biology, Astro-geophysics, and General Science), have caused and continue to constitute an **undue and substantial burden** on ICRGS's right and equal opportunity, consistent with applicable law, to offer such a graduate science education degree program, in Texas (and unto Texans), without being conditionally required to abandon or compromise ICRGS's "integrated" (or "embedded") Biblical/scientific creationism tenets.

ICRGS's sincere belief that its religious viewpoint is substantially burdened, in this case, relies upon (*inter alia*) the U.S. Supreme Court's ruling in Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963), and also upon the Texas Supreme Court's ruling in HEB Ministries, Inc. v. THECB, 235 S.W.3d 627 (Tex. 2007).

This **NOTICE** is hereby provided, in hopes that THECB will provide a legally sufficient "accommodation" to ICRGS's Biblical/scientific creationism viewpoint, so that seeking a further federal and/or state law-based remedy<sup>54</sup> against THECB's conduct will not become necessary.

Appendix "J" shows the Holy Trinity Church ruling for construing ambiguous statutes, and the above-referenced Sherbert ruling (requiring religious liberty accommodation).

The U.S. Supreme Court, long ago, recognized that a statute can be passed by a legislature, with words and phrases that appear to be unconstitutional in their application, -- yet the same statute may also be capable of a fair interpretation which does *not* violate the Constitution. In such situations, the Constitution-friendly interpretation is to be judicially preferred. (A review of that ruling is helpful toward resolving ICRGS's case.)

In the Holy Trinity Church case,<sup>55</sup> Congress had passed legislation restricting immigrant labor, in order to protect American jobs. However, notwithstanding the new anti-immigrant-labor law, an American church sought to engage a foreign clergyman, to serve as a pastor for its denomination church. The federal government, acting to enforce its new anti-immigrant-labor law, opposed the church's efforts to hire the non-American clergyman. Because the federal statute banned immigrant "labor", the federal

<sup>54</sup> *E.g.*, see Tex. Civ. & Rems. Code § 110.005; 42 U.S.C. § 1983; etc.

<sup>55</sup> Rector, etc., of Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892).

government opposed the hiring of the non-American pastor, whose employment contract required him, in effect, to “labor” as a minister of the Gospel.

How should the U.S. Supreme Court rule on such a labor law problem? Of course, one interpretation of the anti-immigrant-labor statute would be to read it “broadly”, interpreting the word “labor” to mean literally all forms of labor, including the ministerial labors of a church’s pastor. If so, the federal statute would necessarily interfere with the church’s ability to hire a pastor of its own choosing, because its freedom to select its own pastor would then be restricted by a federal labor law.

The church in question was an Episcopal church, tracing its ideological heritage to the established Church of England. Unsurprisingly, Episcopal churches in America respect ministers trained at seminaries and/or churches in England, so the American church’s desire to hire a British clergymen did not appear to be a false claim of religious viewpoint. So the conflict, in essence, focused on a federal labor law, regulating interstate and foreign commerce, conflicted with the church’s *religious freedom* to select a pastor of its choosing, by limiting its choices to American ministers.

But, another interpretation of the federal statute was available. The U.S. Supreme Court, acting unanimously, recognized a solution to the conflict which did not necessitate striking the anti-immigrant-labor law as a violation of the church’s First Amendment-guaranteed “free exercise of religion” rights. The alternative interpretation of the federal a statute was to view it as a law which carried a “narrower” meaning for the word “labor”. A “narrow” view of the statutory word “labor” would limit its intended application to unskilled “labor”, what some today would call “blue collar” labor.<sup>56</sup> Using a “narrow” interpretation of the statute, at least as it applied to the church’s controversy, would “save” the statute from being struck as “unconstitutional”.

Why did the high court so generously presume that the “narrow” interpretation truly reflected Congress’s actual intent, when legislating that anti-immigrant-labor law? Because America’s cultural history, without a doubt, was that of a Christianity-friendly nation.<sup>57</sup> (The historical evidences of that Christianity-friendly history were voluminous, so the Court listed several pages of examples, discontinuing only after having comprehensively proved its historical point.<sup>58</sup>)

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<sup>56</sup> (The high court could have opined that a clergyman’s duties involve no “labor”, but that would be an unfair indictment on those ministers who are *not* lazy.)

<sup>57</sup> See Holy Trinity Church, 143 U.S. at 465, 12 S.Ct. at 514 (legal history proofs of America’s heritage).

<sup>58</sup> See especially Holy Trinity Church, 143 U.S. at 471—472, 12 S.Ct. 516—517 (“It is a case where there was a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil; and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against”). The Holy Trinity Church ruling accords with the words in the U.S. Constitution itself, opposing any anti-creationist meaning of the word “science” in Article I, § 8 (“Progress of Science”). This is shown by the historical fact, amply documented by Dr. John Eidsmoe’s legal history scholarship, that the same co-authors of the U.S. Constitution who used the word “science” were, almost to

It is hard to honestly read all of the U.S. Supreme Court's ruling in the Holy Trinity Church case *without* recognizing that American civilization is embedded with, if not grounded on, Christian culture principles -- surely to conclude otherwise would betray a "fraudulent or substandard" understanding of American civilization.

Prudentially, the Holy Trinity Church precedent has been followed as a cautionary approach to avoiding the unnecessary striking of statutes as unconstitutional. Case following this common-sense approach include United States v. Matassini, 565 F.2d 1297, 1311 note 28 (5<sup>th</sup> Cir. 1978); State of Texas v. McDonald, 642 S.W.2d 492, 495 (Tex. Crim. App. 1982); Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown, 875 453, 465 (5<sup>th</sup> Cir. 1989) (calling "the celebrated" Holy Trinity Church case "the seminal case approving judicial avoidance of absurd but literal statutory constructions"); Welsh v. United States, 398 U.S. 333, 347, 90 S.Ct. 1792, 1800 (1970) (general law saved by interpretively recognizing a religion-based exemption).

In ICRGS's case, there several problems with unconstitutional applications of the Texas Education Code statutes, as well as with unconstitutional applications of Texas Administrative Code regulations. The less on Holy Trinity Church is simple: this tribunal should select any available interpretations of those statutes which do not produce unconstitutional results. And, because the Texas Religious Freedom Act of 1999 must be balanced, interpretively speaking, with any applicable parts of the Texas Education Code, there is sufficient "maneuvering room" for interpreting these law in a way that avoids the need to strike down state laws as unconstitutionally violative of ICRGS's civil rights.

#### VIII. PRIOR RESTRAINT CENSORS & CHILLING ACADEMIC SPEECH

Ruling that ICRGS may not offer or grant a verbalized academic degree title, specifically, a "**Master of Science in Science Education**", is a form of "prior restraint" censorship.<sup>59</sup>

Ironically, hard-core pornography is usually spared governmental "prior restraint" censorship,<sup>60</sup> so it appears that the granting of creationism-informed science education degrees, in legal effect, is deemed a greater evil than hard-core pornography publications. However, it has been recognized for centuries, that, in a free society that genuinely cares about civil liberties, the enterprise of governmental censorship itself needs prior

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a man, Christians, choosing (unless the French Revolutionaries a few years later) to date their Constitution "in the year of our Lord" 1787, an obvious sign of reverence for the Lord Jesus Christ.

<sup>59</sup> *Accord, see generally* Mayton, "Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of Prior Restraint", 67 *Cornell Law Review* 245, 248 (1982), cited in Thomas v. Chicago Park District, 534 U.S. 316, 320—322, 122 S.Ct. 775, 776—779 (2002), citing and clarifying Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734 (1965).

<sup>60</sup> *See* Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734 (1965).

restraints, to avoid the ever-present tendencies toward political corruption and special interest-influenced abuses.<sup>61</sup> (ICRGS's case is an example of such abuse.)

If ICRGS's granting of a *Master of Science* degree (in Science Education) was, *per se*, misleading, it could be banned under case law governing "commercial speech" (assuming that only "commercial speech" was involved, a questionable assumption).

Also, if granting such a 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 Repr. 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).

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" science education programs, 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 Repr. 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).

## IX. STATE-AIDED MONOPOLY & UNFAIR RESTRAINT OF TRADE

The Texas Constitution,<sup>62</sup> directly, and the U.S. Constitution,<sup>63</sup> indirectly, both oppose the kind of monopoly power which the evolutionary establishment has in Texas

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<sup>61</sup> Sir William Blackstone, **Commentaries on the Laws of England**, 4:152 (1769 ed.), cited as authoritative in Thomas v. Chicago Park District, 534 U.S. 316, 320—322, 122 S.Ct. 775, 776—779 (2002).

<sup>62</sup> Texas Constitution, Article 1, § 26 ("perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . .").

<sup>63</sup> U.S. Constitution, Article I, § 9 ("No Title of Nobility shall be granted by the United States. . .")

(and elsewhere), over science education. Freedom to believe and teach evolution is one thing; monopoly control over the educational market is another. It is monopoly control over the science education market that is the problem in ICRGS's case.

But how can a college, use its “free speech” rights (to use a phrase from the First Amendment), best express its “opinions on any subject” (to use a phrase from the Texas Constitution), regarding the specific academic subject that a particular student has satisfied a two-year, or three-year, graduate-level course of study in science education?

Is the THECB itself 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”)?

No, *private* colleges are the issuers of 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, *not* an academic opinion 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).

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), does the State of Texas have *de facto* “gate-keeping” *veto-power* over science degree conferrals? No, again, *private* colleges confer graduate degrees, because it is 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).

On similar logic, the State of Texas should *not* lend its governmental powers to a *private special-interest group*, such as SACS, 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). Why not? Because using government powers, to restrain legitimate competition in the educational market, runs afoul the “rule of reason” norm for recognizing unfair trade restraints, such as those prohibits under federal antitrust laws.

For an example of a monopolistic alliance to restrict information, in a context where the restricted information facilitated a reduction in market competitiveness, see *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009 (1986), illustrating a “horizontal” form of improper restraint of trade. Comparatively speaking, this legal concept of conspiratorial restraint on the competitiveness of the science education “market” is relevant to understanding the problem of bias on the Commissioner's ad hoc advisory committee, which was not composed according with the “balanced representation” required by the Texas Government Code.

The logic of “vertical” trade restraints, such as illegal “tie-in” restrictions, can fit the science education market, to the extent that special-interest-driven “gate-keeping” of science education degrees is manipulated to achieve a frustration of market alternatives. For an illustration of a “tie-in”-related “vertical” trade restraint, see Eastman Kodak Company v. Image Technical Services, 504 U.S. 451, 112 S.Ct. 2072 (1992). Kodak used its market power, as an equipment manufacturer, to manipulate the related market for equipment repair services.

Complicating the “vertical” form of trade restraint analysis, of course, is the THECB role as a “state actor”. However, even “state action” is *not* a defense to state agency violations of the federal Constitution, such as 1<sup>st</sup> and/or 14<sup>th</sup> Amendment violations. This would specifically apply to the “state action” of labeling a graduate science education program as “fraudulent or substandard” simply because it presented geology, biology, physics, and general science from a Biblical creationist viewpoint.<sup>64</sup>

Obviously, the THECB’s historic usage of SACS as its “agent” supports the idea that SACS has “monopoly power” in the State of Texas higher education market.

In other words, a governmental graduate degree “gate-keeper” (such as THECB) could intentionally combine forces (and share regulatory powers) with a *favored* special-interest-affiliated associate (such as a favored regional accrediting associations, e.g., SACS), to monopolistically “tilt” the educational market for graduate science education market opportunities. If so, and if enough government power was used to control which private sector players can dominate the educational “market”, such state-aided manipulations of that market might be a “vertical” form of improper trade restraint.

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). The THECB’s unconstitutional behavior in the HEB Ministries controversy included unconstitutional *academic-vocabulary-censoring* actions under color of the Texas Education Code and Texas Administrative Code. Of special relevance to ICRGS’s case, therefore, is that THECB publicly neither provided any *meaningful legal analysis* nor publicly demonstrated any “balanced representation” care, with respect to risking potential injuries to ICRGS from any unconstitutional “prior restraint” censorship resulting from THECB’s processing of ICRGS’s application. It may be too early, evidentiarily speaking, to determine *if* these “tiltings” (i.e., the irregular interferences with ICRGS’s ability to enter the Texas market of graduate science education) of the science education market actually constitute technical violations of federal antitrust/trade restraint laws, but the competition-inhibition

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<sup>64</sup> 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*).

comparisons appear to fit closely enough to show that the “tilted” market consequences do clash with the Texas Constitution’s policy against monopolistic practices. Gate-keeping semantics do not negate the fact of accrediting association monopoly power. (E.g., THECB disallows TRACS the same rights as SACS.)

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, and that real-world science did *not* originate with Charles Darwin.<sup>65</sup>

And, as the joint committees of the THECB were reminded, on April 23<sup>rd</sup> of 2008, 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.)

In sum, the semantic redefinition of “science”, to shut out all creation science-informed science education programs, constitutes the promotion of an educational monopoly, and such misuse of government power “shall never be allowed” in Texas, according to the Texas Constitution’s Bill of Rights.<sup>66</sup> Yet, if the THECB’s decision is not actively annulled by this or a higher tribunal, a *de facto* monopoly in the science education market is facilitated by the THECB’s action. (And, as indicated below, said monopolistic restraint on trade, in science education, interferes with interstate commerce, another unconstitutional result.)

Appendix “K”, *q.v.*, illustrates THECB’s interference with interstate commerce. Unless and until the THECB’s action 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.

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<sup>65</sup> 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/](http://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.

<sup>66</sup> Texas Constitution, Article 1, § 26 (“perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . .”).

ICRGS's concern that THECB would pursue an unconstitutional course of conduct, in violation of the First Amendment, is not unfounded. Rather, ICRGS's concern is reasonable, based upon the THECB's demonstrated willingness to engage in unconstitutional prosecution of private educational institutions which value their First Amendment liberties, as is illustrated in the recent litigation described in HEB Ministries, Inc. v. THECB, 235 S.W.3d 627 (Tex. 2007), *q.v.*

Moreso, while citing the same statutes and regulations THECB acted on unconstitutionally last year, THECB's Commissioner and its 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 Tyndale Theological Seminary, Southern Bible Institute, and Hispanic Bible Institute.

Also relevant, in this comparison, is the fact that both Tyndale Theological Seminary (the primary plaintiff in the HEB Ministries case) and ICRGS do not seek or accept government funding; this fact alone challenges the subject-matter jurisdiction of the THECB over both of those private higher education institutions, as noted elsewhere in this petition.<sup>67</sup>

#### X. TEXAS CONSTITUTION PREAMBLE & SCIENCE EDUCATION

The THECB's anti-creationist view of "science education" flies in the historic face of the Texas Constitution. That Constitution, in its 1845 version, reverently begins with an attitude of creaturely gratitude:

**We, the people of the Republic of Texas, acknowledging, with gratitude, the grace and beneficence of God, . . . .**

(Texas Constitution's Preamble, A.D. 1845.) Why cannot ICRGS teach its science, and also its science education, with a creaturely attitude of creationist gratitude? Surely it requires constitutional *illiteracy* to prohibit such a constitutional attitude of gratitude!

In addition to the Biblical-creationism-friendly allusion to Jesus, as the necessarily implied Divider of human history, as indicated by the U.S. Constitution (i.e., in its Article VII "*our Lord*" clause), this tribunal should also notice the "**God**" clause, "**Creator**" clause, "**created**" clause, "**Supreme Judge of the World**" clause, and the "**Divine Providence**" clause, in the 1776 American Declaration of Independence.

Constitutionally speaking, *how* can a Texas state agency, consistent with the U.S. and American Constitutions, require that a college either abandon its conspicuous viewpoints (on Biblical creationism and scientific creationism, including institutional

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<sup>67</sup> It appears that THECB is unrepentant of its preexisting operational custom of unconstitutional behavior toward private schools affirming an institutional viewpoint of Biblical Christianity -- a relevant concern for 42 U.S.C. § 1983 issues. Anti-evangelical discrimination is THECB's established customary practice.

affirmance of a young earth and a global flood) as a mandatory condition for receiving a government license to offer and grant *bona fide* graduate degrees in science education?

Such government approval is truly treated as a “license”, because THECB claims and has acted to enforce, under color of statutory law, its “police powers” to fine and to otherwise punish unlicensed *private* higher education institutions (as is illustrated in HEB Ministries) even if those institutions do not participate in government funding programs.

Appendix “L” provides some analytical studies of the distinctions between empirical science and forensic science methodologies. (Some of the materials in this petition’s Appendix “L” were included within Appendix “T” of ICRGS’s March 2008 Progress Report, captioned “Exploring the Limitations of the Scientific Method”.)

Appendix “M” illustrates the importance, from a *social responsibility* perspective, of allowing the evolutionary establishment to be critiqued and criticized, as part of ICRGS’s institutional viewpoint advocacy (as an aspect of its institutional academic freedom), demonstrating the importance of critical-thinking-friendly curriculum.

Institutional viewpoint advocacy freedom increases diversity in the educational “forum”, consistent with the values stressed in 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 Repr. 552 (1995).

For an example of such social responsibility-sensitive viewpoint advocacy, the ICRGS course description of the syllabus for **SE 501** (*Advanced Educational Psychology*) it says:

Topics include the importance of developmentalism; intellectual, social, moral, emotional, and spiritual development; **ethnicity** and cultures; individual uniqueness; cognitive psychology: constructing knowledge, thinking skills; behavioral approaches to learning; motivation; brain research and multiple intelligence.

(The above-quoted course description was provided to THECB prior to April 2008.) In the SE 501 syllabus the course topics, sequenced as “modules”, include the following topic modules:

Module 3      Grouping People by Their Differences

Module 4      Man’s Uniqueness

These modules show how ICRGS plans to teach its graduate students Bible-informed concepts about language-facilitated ethnicity (“race”) differences, and about how those ethnic differences have historically become the basis of various social groupings.

Such ethnicity/ethnology-related topics are taught, at ICRGS, using a two-model approach, i.e., evolutionary and creationist perspectives are provided regarding those topics. In one of the learning modules, the ICRGS student is taught issues in “multiculturalism” and “ethnic groups”, and is provided with the following assignment:

For further understanding of how groups are different from a biblical perspective, view the videos *One Race* and/or *Racism, Is There an Answer?* Use the information to help you answer the inquiry questions.

Also, in Module 4, “Man's Uniqueness”, there are several links to show **racism** — promoting “social Darwinism” and its historic link to **IQ tests**, including:

<http://www.allaboutscience.org/what-is-social-darwinism-faq.htm>

Graduate students can benefit from a critical-thinking analysis of how evolutionary “science” thinking has been used, historically (and with massive consequences), such as in America’s “**eugenics**” movement (working scientifically to purge the “gene pool” by government-facilitated sterilization of society’s “unfit”), as well as in Nazi Germany’s **Holocaust** application of Darwinian “struggle” to catalyze human evolution by forcibly reducing the world’s population of “lesser evolved” humans (Jews).<sup>68</sup>

Will this kind of exposure of how “evolutionary science” was harnessed for genocide (and other inhumane atrocities), be taught at the graduate level, apart from ICRGS’s graduate program in “science education”? Should this *unpopular* ethnology-relevant information be stifled by regulatory censorship of ICRGS’s evolution-critical viewpoint?

## XI. ADMINISTRATIVE LAW & DELEGATION DOCTRINE PROBLEMS

**THECB’s delegated authority**, in this matter, is derived from legislative directives and powers codified in the Texas Education Code, Chapter 61 (“*Texas Higher Education Coordinating Board*”), to the extent that that specific chapter is neither unconstitutional nor unconstitutionally applied (in conjunction with Title 19 of the Texas Administrative Code, Chapter 7, captioned “*Private and Out-of-State Postsecondary Educational Institutions Operating in Texas*”).

Said legislature-issued enabling statutes (i.e., **Tex. Educ. Code § 61**) and its implementing regulations (in **Title 19 of the Tex. Admin. Code**), themselves, are ultimately rooted in and limited by the Texas and U.S. Constitutions. Of course, those constitutional limitations have been judicially analyzed and interpretively defined by the U.S. Supreme Court and the Texas Supreme Court.

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<sup>68</sup> This historic fact of “evolutionary [anthropology] science”, applied to genocidal politics, is illustrated in Ben Stein’s recent documentary movie, “**Expelled**”.

Accordingly, *if* the THECB used “delegated” powers to regulate ICRGS, in a manner that applicationally acts *ultra vires* to THECB’s powers (as legislatively delegated and limited), such action by THECB, against ICRGS, would be applicationally invalid and thus illegitimate, as an arbitrary abuse of regulatory discretion.

THECB improperly used delegated powers to the extent that THECB itself improperly delegated its delegated powers, by the THECB board and its Commissioner “rubber-stamping”<sup>69</sup> the recommendation of the Commissioner’s improperly composed advisory committee, under circumstances where that unbalanced advisory committee functioned as a team of “private interested parties” -- in contravention of 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).

Likewise, if the regulatory powers THECB tries to use against ICRGS were, at law, never actually delegated to THECB, THECB’s actions against ICRGS, asserted under color of law, would constitute *facially* invalid and illegitimate actions.

Also, whenever THECB (or its Commissioner, or its Assistant Commissioner) used “advisory committees” (dubbed “panels” of scientists and/or science educators) as that term is defined statutorily in the Texas Government Code, those usages of advisory committees were improper delegations of government power (if relied upon, which they were) and/or arbitrary abuses of discretion (if relief upon, which they were), and thus violations of 14<sup>th</sup> Amendment-required Due Process, according to the standard indicated in Coggins v. Longview I.S.D., 289 F.3d 326, 164 Educ. Law Repr. 697 (5<sup>th</sup> Cir. 2002).

Moreover, *if* the Texas Constitution never actually authorized the Texas legislature to regulate unsubsidized *private* higher education (including offering and conferring *earned* academic degrees), the Texas legislature could not constitutionally “delegate” authority to THECB. (It is axiomatic that one must first have authority before one can “delegate” it to an inferior.)

As noted elsewhere in this petition, such *delegation-of-powers* problems sometimes involve *separation-of-powers problems*, specifically those which are governed by the Texas Constitution’s Article 2, § 1, which mandates “three distinct departments”. In other words, should this information be “expelled” from higher education?

## XII. THECB “EXPELLED” T.E.A. RULE § 112.43(c)(3)(A)

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<sup>69</sup> “Rubber-stamping” a “predetermined” quasi-judicative 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).

Science educators, as well as THECB decision-makers, should be aware of Texas Education Agency Rule § 112.43(c)(3)(A), which mandates analysis of evolutionary science's evidentiary/logical strengths and weaknesses:

c) Knowledge and skills. . . .

(3) Scientific processes. The student uses critical thinking and scientific problem solving to make informed decisions. The student is expected to:

(A) analyze, review, and critique scientific explanations, including hypotheses and theories, as to their strengths and weaknesses using scientific evidence and information;

*Quoting Texas Education Agency Rule § 112.43(c)(3)(A), codified at Title 19 of the Tex. Administrative Code, Part 2, Chapter 112, Subchapter C, section 112.43(c)(3)(A).*

The March 2008 "Progress Report", buttressed by the showing ICRS provided during April 2008 (at the HECB building in Austin), provided THECB with sufficient evidence that ICRGS qualified as a science education-providing institution aptly equipped for educating science teachers to address the science education issues denoted in TEA Rule § 112.43(c)(3)(A). While the evolutionist establishment vacillates in its attempts to match "survival of the fittest" to the real world of nature, evolutionists still have neither empirical data nor forensic logic to biogenetically account for the "arrival of the fittest" (without which arrival<sup>70</sup> there is no "fittest" to biogenetically "survive"). This glaring flaw in evolutionary theory is dismissively ignored and/or strategically concealed as the evolutionists' "trade secret",<sup>71</sup> in most graduate science education programs, a practice ill-fit for preparing science teachers to critique evolutionary theory).

But the THECB, acting through its voting board members, its Commissioner, its Assistant Commissioner, its joint committees (which met publicly on April 23<sup>rd</sup> of 2008), and its improperly composed advisory "panel" committees, has prevented ICRGS from an educational opportunity to serve the special portion of the educational market which appreciates (and often prefers) a scientific creationism-informed perspective.

Ironically, in doing so, the THECB's anti-creation science animus clashed with the historic import of the 2<sup>nd</sup> Sentence of U.S. Constitution's Article VII.

That under-appreciated sentence, near the end of the text of the U.S. Constitution (co-authored in A.D. 1787), noticeably contrasts with the Revolutionary French constitution's non-theistic counterpart of the same generation.

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<sup>70</sup> Jerry Bergman, "Ernst Chain: Antibiotics Pioneer", *Acts & Facts* (April 2008), page 11 (noting "Chain recognized that the problem was not the **survival of the fittest** but the **arrival of the fittest**") (emphasis added), provided in **Appendix T** of ICRGS's March 2008 Progress Report.

<sup>71</sup> John Baumgardner, "Exploring the Limitations of the Scientific Method", *Acts & Facts* (March 2008), page 5 (noting this "trade secret"), provided in **Appendix T** of ICRGS's March 2008 Progress Report.

In other words, while there is some logic to promoting a government-imposed *non-theistic monopoly on science education degrees* in a country with an officially atheistic politic (such as Communist China, Cuba, or the formerly atheistic Soviet Union), there is no comparable logic for legitimizing such governmental conduct by the THECB, as if it “fit” the U.S. Constitution, which was written according to its own text:

Done in Convention by the Unanimous Consent of the States present the Seventh Day of September in the Year of **our Lord** one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth .... [*emphasis added; simple math shows that “our Lord” here means Jesus*]

(Quoting from the second sentence of Article VII of the U.S. Constitution.)

### XIII. HISTORIC PIONEERS IN SCIENCE & SCIENCE TECHNOLOGY

The real history of science, in general, as well as specific history of creationist science-advocating scientists (and science educators) is directly relevant to this petition, to highlight the societal value of safeguarding ICRGS’s academic freedom in Texas.<sup>72</sup>

For example, many of the most notable pioneers in the “real-world” (i.e., empirical) sciences were creationists, e.g., Johann Kepler,<sup>73</sup> John Ambrose Fleming, Francis Bacon, Robert Boyle,<sup>74</sup> Isaac Newton,<sup>75</sup> Douglas Dewar, Henry Rogers, John Ray (also spelled “Wray”), Karl Linné (a/k/a “Linnaeus”), Michael Faraday, Sir William Herschel and son (John Herschel), James Joule, James Simpson, Gregory Mendel, Richard Owen, Matthew Maury, Pasteur, William Thompson (a/k/a “Lord Kelvin”), Joseph Lister, Joseph Clerk Maxwell, Jedidiah Morse and son (Samuel F. B. Morse), George Washington Carver, Alexander MacAlister, Konrad Gessner, Ernst Chain,<sup>76</sup> A.E. Wilder-Smith,<sup>77</sup> -- because all were *creationist* scientists, of one stripe or another.

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<sup>72</sup> Henry M. Morris, “The Biblical Origins of Modern Science”, *Acts & Facts* (February 2008), p. 9, adapted from his *Men of Science, Men of God* (Green Forest, Ark.: Master Books, 2000), pp. 1-3.

<sup>73</sup> See, accord, Christine Dao, “Johann Kepler”, *Acts & Facts* (March 2008), page 8.

<sup>74</sup> See, accord, Christine Dao, “Robert Boyle”, *Acts & Facts* (April 2008), page 8.

<sup>75</sup> See, accord, Christine Dao, “Isaac Newton”, *Acts & Facts* (May 2008), pages 8-9.

<sup>76</sup> Jerry Bergman, “Ernst Chain: Antibiotics Pioneer”, *Acts & Facts* (April 2008), pages 10-11.

<sup>77</sup> Dr. A.E. Wilder-Smith was a 20<sup>th</sup>-century creationist who earned 3 doctorates in the life sciences, taught medical students, registered patents for pharmacology-related inventions, served the military (addressing the military’s drug abuse problems), engaged in human rights advocacy behind the Iron Curtain, authored books and a video series on the informational coding/decoding character of deoxyribonucleic acid, etc.

Dr. Wilder-Smith was better educated in real-world science than any of the evolutionist “panel” scientists (or science educators) who advised Commissioner Paredes to reject ICRGS’s application. Yet it seems, ironically, that the voting board members of the THECB, as well as Commissioner Paredes and

Therefore, if using the “only-evolution-is-‘science’” definition, anyone who seriously studies and trains in the above-listed men’s discoveries/developments would be studying (and training for) “religion”.

Furthermore, by that semantic “logic” (when considered in light of the Texas Supreme Court’s ruling in the 2007 *HEB Ministries* case), the THECB might become jurisdictionally disqualified to regulate ICRGS’s degree programs altogether, and ICRGS could (on that semantic “logic”) invent its own doctorate programs, overnight, without needing any “visits” or approvals from the THECB. (This thought is provided only to show the logical results of such semantic illogic.)

In other words, if the word “science” *does not* include the above-listed creationists’ scientific works (i.e., those of **Newton, Boyle, Maxwell, Carver, Maury**, et al.), every state university that teaches and/or otherwise uses their scientific contributions is guilty of teaching “religion” – and thus all state universities in Texas should be disqualified from granting any degrees with the word “science”.

For example, if Sir William Herschel’s creationism somehow turns his astronomical research work into “religion”, by that definition of “science” (versus “religion”), no state-supported evolutionist university should be allowed to include his discovery of the planet **Uranus** in their astronomy courses, because that planet’s discovery, and even any research built on that discovery, is just the study of “religion” or “creation studies”. (On similar logic, no state-supported evolutionist university would be allowed to teach on the 500+ new nebulae astronomically discovered by his son John.)

Appendix “N” documents modern science’s epistemological debt to creation science.<sup>78</sup>  
There is no adequate excuse for labeling such creation science as “fraudulent or substandard” just because it has a Biblical creationist viewpoint “integrated” or “embedded” in its systematic thinking.

Modern science and technology have been dishonestly deprived of a most valuable asset, a truthful acknowledgment that biblical Christianity is the bedrock of modern science’s greatest advances — and for technology as well, because the foundation of modern science is, ultimately, the foundation for science-based technology, as Appendix “N” illustrates.

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Assistant Commissioner Stafford, plus their “review panel” advisors, would all relegate Dr. Wilder-Smith’s young-earth-creationism (and DNA information science) to mere “religion”.

<sup>78</sup> Appendix “N” includes an excerpt, “Science”, pages 46—49 from John Eidsmoe’s authoritative classic on the historic (and ideological) connection between Bible-revering Christianity and America’s political foundations, *Christianity and the Constitution: The Faith of our Founding Fathers* (Grand Rapids: Baker Books, 1995). One of Dr. Eidsmoe’s most authoritative research legal history sources is Donald S. Lutz’s quantitative analysis-aided research, “The Relative Influence of European Writers on Late Eighteenth Century American Political Thought”, *American Political Science Review* 78:189 (March 1984 issue), pages 189—197.

In short, the post-Reformation science-and-technology enterprise, as a social movement within Western civilization, was built upon the theological logic of biblical Christianity, with its creationist worldview (acknowledging that the Creator of the universe and its components is the God Who is described in the Bible). The science-and-technology enterprise not only depended upon the universe having an intelligent Creator—*science and technology also depended upon the universe's Creator being One Who "looked a lot like" the Creator Who is described throughout the pages of the Holy Bible.*

Thousands of scientists of the past and of the present have been and are Bible-believing Christians. As a matter of fact, the most discerning historians and philosophers of science have recognized that the very existence of modern science had its origins in a culture at least nominally committed to a Biblical basis, and at a time in history marked by a great return to Biblical faith. As a matter of fact, authorization for the development of science and technology was specifically commissioned in God's primeval mandate to Adam and Eve (Genesis 1:26—28), and many early scientists, especially in England and America, viewed it in just this way. The study of the world and its processes is really, as Kepler and other great scientists have maintained, "**thinking God's thoughts after Him,**" and should be approached reverently and humbly . . . In other words, there have been leading scientists in every field of science who have studied both their Bible and their own scientific disciplines in depth, and are firmly convinced the two are fully compatible.

*Quoting Henry M. Morris, "The Biblical Origins of Modern Science," Men of Science, Men of God: Great Scientists who Believed the Bible (Green Forest, Ark.: Master Books, 16<sup>th</sup> printing, 2000), pages 2—3.*

Understanding the Creator's character traits is immeasurably advantageous in gaining an understanding of that same Creator's workmanship in nature. Consequently, to a creationist scientist (or a creationist science educator), a solid appreciation for these theological realities about the universe's Creator will influence the attitude of one who investigates the Creator's creation.

Accordingly, a Biblical/scientific creationist is reasonably *optimistic* when seeking to discover the "logic" of the universe, and the orderliness of the human body's physiology, and the intelligibility of morphological arrangements of follicle cells that envelope the oöcytes of a *Xenopus laevis* strange-footed frog. Why? Because the creationist expects an intelligent Creator to use intelligence in ordering His creation. By way of contrast, someone who assumes that the universe is an unintelligent combination of random "accidents" has no such right to be optimistic, as a scientist. In fact, as a matter of logic, the "it's-all-an-accident" proponent has no reasonable basis for even trusting his or her own thoughts about cosmic accidents!

C.S. Lewis critiqued this very problem when he traced the logical implications of evolutionary “big bang” theories, which are theories argued from evolutionists’ brains—brains with bio-technology that the evolutionists themselves posit are merely, and ultimately, nonsensical atoms. Why should anyone trust any such brain-technology-processed “thoughts” and “logic”?

If the solar system was brought about by an accidental collision, then the appearance of organic life on this planet was also an accident, and the whole evolution of Man was an accident too. *If so, then all our present thoughts are mere accidents—the accidental by-product of the movement of atoms.* And this holds for the thoughts of the materialists and astronomers as well as for anyone else’s. But if *their* thoughts—i.e., of materialism and astronomy—are merely accidental by-products, why should we believe them to be true? I see no reason for believing that one accident should be able to give me a correct account of all the other accidents. It’s like expecting that the accidental shape taken by the splash when you upset a milk-jug should give you a correct account of how the jug was made and why it was upset.

*Quoting C.S. Lewis, The Business of Heaven: Daily Readings from C. S. Lewis* (San Diego, CA: Harcourt Brace Jovanovich, 1984), 97, quoted in *Creation Ex Nihilo*, volume 21, issue 2 (March-May 1999), 47, emphasis added.

Moreover, C. S. Lewis has been woefully vindicated on his criticisms about the deplorable state of “science” education in public schools, with “big bang” mythology being invoked by secularist scientists as an accidental “hopeful monster” that provided the universe with all of the life and complexity we now empirically observe — microscopically, visually, and telescopically — as if it were all producible by something *less* intelligent than a watchmaker.

Men became scientific because they expected Law in Nature, and they expected Law in Nature because they believed in a [divine] Legislator. In most modern scientists this belief has died: it will be interesting to see how long their confidence in uniformity survives it. Two significant developments have already appeared—the hypothesis of a lawless sub-nature, and the surrender of the claim that science is true. We may be living nearer than we suppose to the end of the Scientific Age.<sup>79</sup>

With logic and foresight, C. S. Lewis feared the loss of integrity for science and technology. The sound foundation science and technology were built on, culturally speaking, has been abandoned to a large degree, and the foundational problems are glaring. (Now THECB has added yet another fulfillment to C.S. Lewis’ prediction.)

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<sup>79</sup> C.S. Lewis, *Miracles: A Preliminary Study* (New York: Macmillan Co., 1947), page 140.

ICRGS claims the legal right to affirm and advocate its Biblical/scientific creationism viewpoint, without being politically punished for affirming and advocating that institutional viewpoint.

In effect, THECB now requires ICRGS (and, presumably, any similar school, if one exists) to abandon its viewpoint if it wants to have a legal opportunity to provide graduate degrees in science education. Instead of being told to "go to the back of the [Master of Science] bus", ICRGS has been ordered to stay off "the bus", so long as the "bus" is on Texas soil. This is academic (and religious) bigotry masquerading as Texas Education Code "enforcement".

Yet what is so unscientific about affirming a core-belief that presupposes an intelligent design in the universe, and in the human body's anatomy and physiology? (Tornadoes are not intelligent entities; burglars, although bad, utilize intelligence. Consequently, one investigates a scene of tornado destruction differently than one investigates the crime scene of a burglar break-in.) The fact that Biblical creationism produces the Scientific Revolution has been analyzed by the late Dr. Francis Schaeffer, a true expert on Western (including American) civilization:

Certainly, Renaissance [*humanism*] elements and those of the Greek intellectual traditions were involved in the scientific awakening [that followed on the heels of the Protestant Reformation]. But to say theoretically that the Greek tradition would have in itself been a sufficient stimulus for the Scientific Revolution [*that "coincidentally" begins at about the same time, in 1517, that a theological revolution begins with a Saxon theology doctor hammering 95 Theses on the Wittenberg church door*] comes up against the fact that it was not. It was the Christian factor that made the difference. [*Alfred North*] Whitehead and [*J. Robert*] Oppenheimer were right [*in observing that*] Christianity is the mother of modern science because it insists that the God Who created the universe has revealed Himself in the Bible to be the kind of God He is. Consequently, there is a sufficient base for science to study the universe. Later, when the Christian base was lost, a tradition and momentum had been set in motion, and the pragmatic necessity of technology, and even control by the state, drives science on, but, as we shall see, with a subtle yet important change in emphasis.

Francis Bacon (1561–1626), who has been called the major prophet of the Scientific Revolution, took the Bible seriously, including the historic Fall, the revolt of man in history. He said in *Novum Organum Scientiarum* (1620 [*the year that the Pilgrims landed at Plymouth*]), "Man by the Fall fell at the same time from his state of innocence and from his dominion over creation. Both of these losses, however, can even in this life be in some parts repaired; the former by [*revealed*] religion and faith, the latter by the arts and sciences." Notice that

Bacon did not see science as autonomous. Man, including science, is not autonomous. He [*i.e., mankind*] is to take seriously what the Bible teaches about history and about that which it teaches has occurred in the cosmos. Yet, upon the base of the Bible's teaching, science and art are intrinsically valuable before both men and God. This gave a strong impetus for the creative stirrings of science to continue rather than to be spasmodic.

To continue with the founders of modern science: Johannes Kepler, a German astronomer, lived between 1571 and 1630, the same time as Galileo....Sir Isaac Newton (1642-1727), while a young professor in his twenties at Cambridge University, came to the conclusion that there is a universal force of attraction between every body in the universe and that it must be calculable [*i.e., quantifiable*]. That force he called gravity....By experimenting in Neville's Court in Trinity College at Cambridge University, he was also able to work out the speed of sound by timing the interval between the sound of an object which he dropped, and the echo coming back to him from a known distance.

Throughout his lifetime, Newton tried to be loyal to what he believed the Bible teaches. It has been said that seventeenth-century scientists limited themselves to the **how** without interest in the **why**. This is not true. Newton, like other early scientists, had no problem with the why because he began with the existence of a personal God Who created the universe.

In his later years, Newton wrote more about the Bible than about science, though little was published. Humanists have said that they wish he had spent all of his time on his science. They think he wasted the hours he expended on biblical study, but they really are a bit blind when they say this. **As Whitehead and Oppenheimer stressed, if Newton and others had not had a biblical base, they would have had no base for their science at all.** That is not to say that one must agree with all of Newton's speculations on either metaphysics or [*Bible*] doctrine. But the point is that Newton's intense interest in the Bible came out of his view that the same God Who had created the universe had given people truth in the Bible. And his view was that the Bible contained the same sort of truth [*i.e., logical, understandable truth*] as could be learned from a study of the universe. Newton and these other scientists would have been astonished at a science obsessed with *how* the universe functions, but professionally failing to ask the question "Why?"...

In the early days of the Royal Society of London for Improving Natural Knowledge, founded in 1662, most of its members were professing

Christians. George M. Trevelyan (1876–1962) in *English Social History* (1942) writes,

Robert Boyle, Isaac Newton and the early members of the Royal Society were religious men, who repudiated the skeptical doctrines of Hobbes. But they familiarized the minds of their countrymen *with the idea of law in the Universe* and with scientific methods of enquiry to discover *truth*. It was believed that these methods would never lead to any conclusions inconsistent with biblical history and miraculous religion; Newton lived and died in that faith.

***We must never think that the Christian base hindered science. Rather, the Christian base made modern science possible.*** The tradition of Bacon and Newton and the early days of the Royal Society was strongly maintained right through the nineteenth century [*with the likes of Maxwell, etc.*].<sup>80</sup>

In sum, those trail-blazing scientists, *who operated from a Biblical creationist viewpoint*, expected to find (and to rationally analyze) the governing logic of the universe, the “laws of nature” that the Creator had rationally designed and intelligently applied to the universe and its components. That confidence motivated and guided scientific inquiry, the quest for knowable, logical knowledge. That confidence would never have arisen from a belief that the universe, when the dust of details from the “big bang” settled, was just one big “lucky” accident.

ICRGS teaches from a viewpoint similar to the Biblical creationism viewpoint that was sincerely held by those pioneer scientists, whose breakthrough scientific achievements are the scientific foundation on which modern science and technology rests. There is no valid reason why THECB, as a matter of law, should promote or practice governmental prejudice (i.e., governmental “viewpoint discrimination”, to use the U.S. Supreme Court’s phrase) against ICRGS’s “scientific creationism” academic viewpoint.

Appendix “O” demonstrates how many major pioneers in science, science education, and technology were creationists. The notion that conscientious creationism-informed science is somehow inferior to evolutionism-based science is simply *untrue*, no matter how politically popular that notion may presently be.

Appendix “O” illustrates, in effect, that what the U.S. Constitution (in Article I, § 8) calls “the Progress of Science” has been immeasurably advanced by scientists holding creationist (and, in many cases, Biblical creationist) viewpoints.

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<sup>80</sup> Francis A. Schaeffer, How Should we Then Live? The Rise and Decline of Western Thought and Culture (Wheaton: Good News Publishers/Crossway, 1976), pages 134—138 (emphases in original).

Appendix "P" refutes the erroneous notion that Biblical scholarship is somehow inconsistent with serious respect for scientific experiments and the "scientific method". As Appendix "P" shows, the prophet Daniel experimentally used the scientific method.

Appendix "Q" briefly describes ICRGS's well-qualified graduate faculty, showing the abuses of discretion committed during April 2008, when the THECB joint committees, while admitting their own incompetence to decide serious science education issues, dismissively discounted the competence/qualifications of ICRGS's graduate faculty. (Sufficient professional competence and academic qualifications of ICRGS's graduate faculty was already documented, for the THECB's review, in Appendices "C" and "D" of the March 2008 "Progress Report", as well as in that report's pages behind the tab "Standards 9 and 10: Faculty Qualifications and Size".)

Moreover, the scientific quality of education provided by the Institute for Creation Research's website ([www.icr.org](http://www.icr.org)), and its affiliated ICRGS education website ([www.icr.edu](http://www.icr.edu)), should be officially noticed in this proceeding (especially since the THECB based some of its earlier criticisms on details of the website information not perfectly mirroring details of the ICRGS catalog). And, as many of this petition's appendices show, ICRGS faculty practice "real science", at a professional level, as well as serious scientific scholarship (some examples of which are posted for the public, and THECB, to review -- for anyone willing to fairly review such scientific scholarship).<sup>81</sup>

Appendix "R" documents *Historic Milestones in the Founding & Growth of ICRGS*, according to the man who knows that history best, ICRGS's founder, Dr. Henry H. Morris (now with the Lord).

In one of his chronicles about the history of the Institute for Creation Research Graduate School's history, Dr. Morris recalled:

All of this points up the urgent need for somehow winning the natural sciences themselves back to God and creation. The founding fathers of modern science (Newton, Pascal, Boyle, Ray, et al.) were men who believed in God, the Bible, and primeval special creation, and they did their science with the motive of glorifying God through understanding and describing His creation. We desperately need scientists of that stature and attitude today, but our present science graduate schools are leading them away from God instead.

To some extent, of course, we can win individual scientists back to God and creation through books, seminars, and other such "salvaging" methods. In fact,

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<sup>81</sup> See generally [www.icr.org/research/index/researchhp\\_papers/](http://www.icr.org/research/index/researchhp_papers/) (index of posted scientific research papers, typically authored or co-authored by ICRGS faculty).

that is how most of the active creationist scientists today (including myself and the other ICR scientists) were reached.

But a better way, and more Biblical, would be to train them in the truth to begin with. That is the purpose and the goal of the ICR Graduate School. God willing, our graduates may then eventually play a key role in winning "science" to Christ. Many already are doing just this in various ministries to which God has called them.

The immediate incentive to form the Graduate School came when the regional accrediting association (WASC) made it clear that Christian Heritage College (I was president of the college at that time) could not try to add any graduate programs in the foreseeable future if we hoped to achieve and retain accreditation. Our B.S. graduates in biology and geophysics from Christian Heritage College had been doing well after graduation, and so were those in education, so it seemed that it would soon be feasible to start M.S. programs in some of these key fields.

This was the main reason for separating ICR from the college in 1980 and establishing the ICR Graduate School in 1981. I resigned as president of the college and we quickly organized ICR's new structure, deciding to start with four M.S. degree programs, the ones most essential in restoring creationism to its rightful place in science—that is biology, geology, astro/geophysics, and science education.

We knew it would be futile to pursue WASC accreditation (in fact, this was confirmed on direct inquiry to WASC headquarters). We did need state approval for our degree programs, however, and the state's visitation committee was very pleased with our programs when they came to the campus, so quickly gave us full "Approval" status to grant M.S. degrees in the four selected fields. This was in 1981.

We did not have access to government grants like other science graduate schools do, however, and we could not impose large tuition and fee charges on our students, so it has been a real challenge to develop the facilities and high-calibre faculty required for a successful graduate program in science. Nevertheless, in spite of the difficulties, the Lord has enabled us to provide highly qualified Christian professors for all classes, fully committed to the Scriptures and true creationism, as well as a good library and educational building. The degree programs have been at least comparable in educational quality to those in secular schools and far superior in spiritual values.

I have been very thankful for our fine science staff. Some of our people are widely known because of their seminars and publications. Among these are **Duane Gish**, with a Ph.D. in biochemistry from the University of California at Berkeley, and **John Morris**, whose doctorate in geological engineering is from the University of Oklahoma. My own Ph.D. was from the University of Minnesota in hydraulics.

Our present dean is **Ken Cumming**, who received his doctorate from Harvard University in genetics and ecology. **Larry Vardiman** (Ph.D. in atmospheric physics, Colorado State University) is head of the Astro/Geophysics Department, and **Steve Austin** (Ph.D. in geology, Penn State) is head of the Geology Department. All the others likewise have terminal degrees and good experience in their respective fields of science. Our faculty is fully comparable to those at most other schools offering M.S. programs in science. A catalog listing all our full-time and adjunct professors, as well as courses, curricula, and other information is available free on request.

*Quoting from* Henry M. Morris, "A Unique Creationist School of Science (V: ICR, For Such a Time as This)", posted by ICR as <http://www.icr.org/article/794/>.<sup>82</sup>

Appendix "S" particularly illustrates critical thinking applied to the scientific scholarship, demonstrating that ICRGS faculty are quite capable of exercising their individual "academic freedom"—based critical-thinking skills to challenge **popular evangelical views** of what the Bible appears to teach about certain scientific matters.

Appendix "T" illustrates **hypothesis-critiquing analysis** in scientific theory scholarship, by ICRGS's faculty, demonstrating the quality of scientific hypothesis analysis (and quantitatively rigorous research) students can expect to learn about from ICRGS faculty.

Appendix "U" illustrates the scientific scholarship of ICRGS's faculty, demonstrating the ability of ICRGS scientists/faculty to engage in "self-critical analysis", i.e., in scrutinizing problems with the "**vapor canopy theory**", notwithstanding that theory's popularity within young-earth-creationism circles.

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<sup>82</sup> This article, as well as the scientific articles (and research papers) which are shown in the subsequent appendices (to this petition) were either provided to THECB during January-through-March 2008, or were part of ICRGS's website, mentioned above (or its linked ICR website, also mentioned above), or both.

Appendix "V" illustrates *pro bono publico* scientific education, in conjunction with a published **scientific debate**, illustrating an ICRGS faculty member's appreciation for employing scholarly dialogue as a method for educating the public.

Appendix "W" illustrates the scientific scholarship of ICRGS's faculty relevant to the **age-of-the-earth controversy**. This scientific controversy involves a lot more than reading what the Bible says about earth history, as Appendix "W" illustrates.

Accordingly, Dr. Hillis's suggestion, -- that ICRGS's young-earth-creationism viewpoint is merely "religious instruction",<sup>83</sup> and not simultaneously "scientific", -- flies in the face of reality, whenever both hard **facts** (such as empirically observable helium diffusion rates, researched by ICRGS's faculty) and qualitative/quantitative analysis (such as the stereotypical geo-chronometry **assumptions**) are scientifically analyzed.

Appendix "X" illustrates scientific creationism applied to the life sciences, such as how to understand "life" works at small scales (proteins, DNA, polysaccharides, etc.) and at the large scales (populations, migrations, etc. The studies included within Appendix "X" occasionally display the Biblical creationist viewpoint (and, constitutionally speaking, that is not a "bad" thing), yet that viewpoint in no way detracts from the inherently scientific substance and analysis of those studies.

Yet the THECB would discount it all as "religion", or "creations studies"; but nothing with the word "science" in it. That is an inaccurate conclusion, and it is tainted by viewpoint discrimination. Because that tainted conclusion now prevents ICRGS from freely exercising its institutional civil rights, that tainted conclusion should be remedied, either administratively or judicially.

## XII. "COMMERCIAL SPEECH" LIMITS ON ACADEMIC FREEDOM

As a matter of constitutional law, who has a right to regulate free speech as it pertains to opinions about the word "science" (or the phrase "science education")? A graduate degree in "science" or "science education", ultimately, is a spoken opinion --- an institutional opinion by academic faculty assessing academic achievements of a particular

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<sup>83</sup> Hillis opined in an email (dated 4-22-2008) "Science education emphasizes that science is learning about the unknown from a neutral perspective, relying on observable evidence and experimentation. In contrast, this program [the email's caption line says "ICR proposal review"] relies on religious authorities and authoritative religious writings (The Bible) to inform the students about the natural world, and the literal word of this religious text is accepted even when it conflicts [*sic*] with overwhelming empirical evidence. Clearly, that describes a religious, not a scientific, perspective and course of study. Obviously religious institutions can offer programs in religious instruction, but they certainly should NOT be called programs in 'science education.' . . . . David Hillis"

learner. Constitutionally speaking, is it the valid role of a government agency, specifically the THECB, to regulate the academic opinions of ICRGS's graduate faculty?

"There's glory for you!" [said Humpty Dumpty].

"I don't know what you mean by 'glory,' Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't -- till I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean a 'nice knock-down argument for you!'"

"When I use a word," Humpty said, in a rather scornful tone, "it means just what I choose it to mean -- neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master -- that's all."

Lewis Carroll, Through the Looking Glass, as quoted by Jeffrey A. Aman & H. Wayne House, "Constitutional Interpretation and the Question of Lawful Authority", on page 193 of Restoring the Constitution 1787-1978, Essays in Celebration of the Bicentennial, by H. Wayne House, ed. (Dallas: Probe Books, 1987) (emphasis added).

**In essence, who owns the English language?** Can THECB dictate that the academic phrase "science education" must mean "*naturalistic* science education"? Jurisdictionally, who owns the academic phrase "science education", to exclusively license its use, like a franchise or title-of-nobility for the "evolutionism-only" monopoly?

Vital First Amendment speech principles are at stake here. ***The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them.*** The second, and corollary, danger is to speech from the **chilling** of individual thought and expression. **That danger is especially real in the University setting**, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. See *Healy v. James*, 408 U.S. 169, 180-181, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266 (1972); \*836 *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603, 87 S.Ct. 675, 683-684, 17 L.Ed.2d 629 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211-1212, 1 L.Ed.2d 1311 (1957). In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, **universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn.** See generally R. Palmer & J. Colton, *A History of the Modern World* 39 (7th ed. 1992). The quality and creative power of

student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

\* \* \*

**To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint.** The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. **The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief.** That course of action was a denial of the right of free speech and would risk **fostering a pervasive bias or hostility to religion**, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.

The judgment of the Court of Appeals must be, and is, reversed.

*Quoting Rosenberger, 515 U.S. at 835—836, 845—846, 115 S.Ct. at 2520, 2524—2525 (emphasis added).* In ICRGS's case, it is the State of Texas (acting through its agency, the THECB) "cast[ing] disapproval" on a particular viewpoint, Biblical/scientific creationism, with the foreseeable (if not assured) consequence being a "chilling" of the creationist viewpoint in the world of **private** graduate-level science education in Texas.

Constitutionally speaking, who has the legal right to act as censor or gate-keeper of what a **private** graduate school calls "science education"? This is *not* a case of ICRGS teaching basket-weaving, or tax law, or Biblical Aramaic, -- and then wanting to label it as "science education". As the appendices of this petition show, this case is all about SCIENCE EDUCATION, provided from a Biblical creationist viewpoint.

Rather, ICRGS seeks to institutionally opine whether and when its faculty are, based on pre-written educational criteria, satisfied that a given graduate student has learned "science education", as a result on taken a sufficient number of courses selected (to allow a minor emphasis) from the following 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

(The specific curriculum for those above-listed courses was timely provided to THECB during March 2008. Yet the THECB, in essence, has ruled those courses are “*religion*”.)

Is it a constitutionally valid power of THECB to disallow ICRGS to offer and grant a graduate degree in “science education”, *primarily* because the education provided is conspicuously creationist in perspective? Is “science education” *segregated* in Texas?

Yet THECB alleges that its censorship-producing decision is simply “consumer protection”, to be viewed as a discretionary exercise of “commercial speech” regulation.

Recent examples of relevant “consumer protection” rulings, which addressed such “commercial speech” interferences, include HEB Ministries, Inc. v. THECB and Commissioner Raymund Paredes, 235 S.W.3d 627, 630—631, 226 Educ. Law Repr. 348 (Tex. 2007); 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); Ibanez v. Fla. Dep’t of Business & Professional Regulation, Board of Accountancy, 512 U.S. 136, 114 S.Ct. 2084 (1994); Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y., 447 U.S. 557, 100 S.Ct. 2343 (1980).

Moreover, the constitutional dynamics of a “limited forum”, which has relevance to ICRGS’s case, are authoritatively explained<sup>84</sup> by the U.S. Supreme Court in

<sup>84</sup> In Rosenberger, the U.S. Supreme Court ruled: “It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . In the realm of private speech or expression, government regulation may not favor one speaker over another. . . . These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based upon the content of their expression. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination. The

Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 101 Educ. Law Repr. 552 (1995) (ruling that although an academically oriented “forum” was a forum more in a “metaphysical” than a spatial/geographic sense, the same constitutional principles governing restriction of “free speech” in that “forum” apply to both types of “forums”), in conjunction with the historical perspective of Rector, etc., of Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511 (1892).

Of special relevance to ICRGS’s case, in the Rosenberger decision, is the clarification that the U.S. Supreme Court made between “excluding religion” and “disfavoring religion”, in the “metaphysical forum” provided by the University of Virginia’s government-funded program. In essence, the Court said that merely “allowing” a religious group to ride *in the back of the bus* was not sufficient; those who espouse a religious viewpoint must be treated with equal dignity with other bus passengers. In other words, both “excluding” and “disfavoring” violate the First Amendment, if government-sponsored “viewpoint discrimination” is involved. SO, in light of how ICRGS was “expelled” from graduate science education, in April 2008, by the THECB, read the U.S. Supreme Court’s thoughts on state-sponsored viewpoint discrimination:

As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. See, e.g., *R.A.V., supra*, at 391, 112 S.Ct., at 2146. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. **We conclude, nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to *Wide Awake*. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.**

The dissent’s assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the

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government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the decision. . . . These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation.” Rosenberger, 515 U.S. at 828—829, , 115 S.Ct. at 2516.

complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. **It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.** The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

***The University's denial of WAP's request for third-party payments in the present case is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in Lamb's Chapel and that we found invalid. The church group in Lamb's Chapel would have been qualified as a social or civic organization, save for its religious purposes.*** Furthermore, just as the school district in *Lamb's Chapel* pointed to nothing but the religious views of the group as the rationale for excluding its message, so in this case the University justifies its denial of SAF participation to WAP on the ground that the contents of Wide Awake reveal an avowed religious perspective. See *supra*, at 2515.

*Quoting from* Rosenberger, 515 U.S. at 830—831, 115 S.Ct. at 2517. In ICRGS's case the "lion's-share" of the criticisms against ICRGS's *Master of Science* degree program attach to ICRGS's creationist viewpoint. If all such viewpoint discrimination were prevented (including pretense criticisms, such as faulting its "online" medium, which is supplemented by field studies and lab exercises), the remaining criticisms fail to justify a denial of ICRGS's application.

In this regard, 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 Repr. 32 (1<sup>st</sup> Cir. 2007) (discussing institutional academic freedom among private educational institutions, and noticing that academic freedom permits a *private institution* to favor or disfavor a creationism-friendly viewpoint, but the *government* should not).

Clarity is needed when analyzing case law involving creationism (or even secularized "intelligent design" substitutes for creation science) as a proposal for public school curricula and/or disclaimers. ICRGS, as a *private* graduate school, seeks the right to offer, teach, and grant graduate science education degrees using a Bible-informed *creationist* viewpoint. Some other *private* institutions may wish to offer secularized "intelligent design movement"—oriented science degrees. Other *private* educational institutions may wish to offer evolution—based science education degrees, either from an academic viewpoint affirming the "Big Bang" or from a bang-less "steady—state" cosmogonical viewpoint. (Evolutionary cosmogony is not itself limited to one theoretical opinion.) The civil liberty values at stake are primarily academic freedoms, not just "speech" but "free speech" (and even "religious speech").

ICRGS is not seeking to impose its creationist viewpoint distinctives on any public school or college. Rather, ICRGS 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, with alternative emphases in biology, geology, astro-geophysics, and general science. (Imagine: sincerely religious people may *privately* teach "science education", even in graduate programs, just like the Constitution allowed in James Madison's day ! )

### XIII. DISTINGUISHING WHAT THIS PETITION IS NOT ABOUT

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"!

ICRGS is not seeking to impose its creationist viewpoint distinctives on any public school or college. (Contrast that thought 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.<sup>85</sup>

Although one of the THECB's advisory committee members strains 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 the THECB's improperly composed advisory committee, and all who thereafter relied on those advisors'

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<sup>85</sup> 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 -- demonstrating the lack of a "rational basis" for THECB's regulatory action. THECB, acting through its board, Commissioner, Assistant Commissioner, and its improperly composed advisory "panel" committees, has demonstrated its 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*. Why? Because at ICRGS it is sincerely believed, based on Biblical revelation, that to practice or teach 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 renewed after the Genesis Flood. (See, accord, 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 the simple study of the Pinyon Jay's mutual symbiosis relationship with the Pinyon Pine is a scientific opportunity to "think God's thoughts after Him", and to intellectually honor Him as the Creator of birds and trees. (See, accord, 1<sup>st</sup> Corinthians 10:31.)

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.

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.

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".<sup>86</sup>

It is true that the U.S. Supreme Court has struck various statutes perceived as vehicles for "restoring-Biblical-creation-to-the-public-schools",<sup>87</sup> but ICRGS is neither a public school nor 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 has 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 Repr. 29 (5<sup>th</sup> 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

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<sup>86</sup> This would be like saying that a husband ceases to be a husband when he becomes a father, or like saying that a wife ceases to be a wife 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 should not be deemed to forfeit their identities as scientists just because they recognize God's handiwork in nature. THECB should recognize its duty to accommodate such beliefs.

<sup>87</sup> 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.

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.

In the final analysis creation science involves scientific interpretations, -- about mankind, earth, and the universe, -- opinions about how to best explain scientific observation-related data.

Some approach such explanations from a theistic perspective; some from an atheistic perspective. Some approach such explanations from a young-earth perspective, some from an old-earth perspective. Some interpret the dominant patterns of earth's geology as bearing forensic evidence of a worldwide flood, others as showing long ages of uniformitarian processes. Some have no problem recognizing design and information processes (e.g., coding and decoding biogenetic information at the level of DNA, RNA, and ribosomes) in microscopic cells, others seek unintelligent explanations for such informational "transcriptions" and the like. (As Appendix "Z" shows, the relevance of atheism to this controversy is nothing new.)

This is Texas. Every scientist (or 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 Texas Constitution Article 1, §8, "**his opinions on any subject**".

And, commensurate with a demonstration of good faith, academic freedom should likewise guide any inquiry about which schools should be free from a "prior restraint" regarding offering graduate science education programs.

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.

It should suffice that 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. ICRGS, for 25+ years 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 all from a Biblical and scientific creationism viewpoint.

Yes, legally speaking, that should suffice in Texas, regardless of the uncomfortable fact that ICRGS affirms and teaches a *minority* viewpoint. Constitutionally speaking, THECB ongoing denial of ICRGS remains (until it is cured) an unconstitutional and prejudicial burden against ICRGS's academic freedom and religious liberties.

#### XIV. HOW SHOULD WE THEN SOLVE THIS PROBLEM?

Therefore, THECB should promptly **grant** 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*.

Additionally (or, at the very least, alternatively), THECB should declare that it has **no** regulatory jurisdiction over private higher educational institutions, including ICRGS, unless those institutions accept state government funding or state government-administered funding. 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.

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”). Accordingly, pursuant to Texas Gov’t Code § 2001.039, ICRGS hereby also requests rule reviews of all relevant rules.

And ICRGS should have such other and further relief to which it may be justly entitled, statutorily or otherwise.

Respectfully submitted,  
this 24<sup>th</sup> day of May, A.D. 2008, by:

  
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IN THE MATTER OF  
THE  
INSTITUTE FOR CREATION RESEARCH GRADUATE SCHOOL

before the  
TEXAS HIGHER EDUCATION COORDINATING BOARD

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**FIRST SUPPLEMENT TO ICRGS's**  
**PETITION FOR CONTESTED CASE STATUS**

Submitted June 12<sup>th</sup>, A.D. 2008

By:  
INSTITUTE FOR CREATION RESEARCH  
GRADUATE SCHOOL

  
EXHIBIT #2

The Institute for Creation Research Graduate School (“**ICRGS**”), petitioner herein, replies to Texas Higher Education Coordinating Board (“**THECB**”)’s letter response<sup>1</sup> of June 11<sup>th</sup> of 2008, as follows:

1. ICRGS **concurs** that its Petition’s primary request, designated as requested action “**A**” (on Petition page 9) is ICRGS’s primary and focal request for this phase of this administrative remedy proceeding.
2. Regarding the timing and venue issues related to ICRGS’s notice of “**substantial burden**”, under the *Texas Religious Freedom Restoration Act of 1999* (“Texas RFRA”), ICRGS suggests that this administrative process could potentially provide timely “administrative remedies” to satisfactorily relieve that burden.<sup>2</sup>
3. ICRGS concurs that the procedural and jurisdictional limitations of THECB and SOAH, as an administrative law-governed entities, cause ICRGS’s other proposed remedy issues (i.e., those remedies other than the aforesaid request “**A**”, such as requests “**B**”, “**C**”, “**D**”, noted on Petition pages 9—10, as well as some unresolved issues raised on Petition page 62), to be potentially addressable via **PFD<sup>3</sup> findings of fact and/or conclusions of law**, until such time as this matter may become a matter of judicial review and/or some other kind of parallel litigation (e.g., a declaratory judgment/injunctive relief action commenced pursuant to the Texas RFRA).
4. ICRGS further concurs that the style of this controversy, viewed (and processed) as an administrative matter under 19 T.A.C. § 7.7, especially § 7.7(d)(6)(D)(7), should be expressed, in formal protocol, as “***In the Matter of the Institute for Creation Research Graduate***

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<sup>1</sup> Letter of 6-11-2008, from the THECB’s General Counsel, William M. Franz, Esq., unto ICRGS’s special counsel.

<sup>2</sup> Accordingly, ICRGS requests THECB’s suggestions (e.g., perhaps a tolling agreement, if that option is statutorily available) on how to apply timing-and-venue issues raised by Tex. Civ. Prac. & Rems. Code § 110.005(c), § 110.007(a), and § 110.007(b). Although Tex. Civ. Prac. & Rems. Code § 110.006 contemplates service of ICRGS’s pre-litigation “notice” via “certified mail, return receipt requested”, ICRGS’s Petition was sent to THECB via FedEx (not certified mail). Thus, if necessary, an additional re-mailing of relevant portions of the Petition (with cross-reference to the entirety of the Petition) should be timely provided, via certified mail, return receipt requested. In the previous sentence the word “timely”, according to Tex. Civ. Prac. & Rems. Code § 110.007, would be within “one year” of April 24<sup>th</sup> of 2008, unless the “75<sup>th</sup> day” rule of § 110.007(b) would otherwise affect the timing for filing any such civil action under the Texas RFRA of 1999.

<sup>3</sup> “PFD” = “Proposal for Decision” by a SOAH-appointed Administrative Law Judge.

**School**". Also, if and when an adversary proceeding form is needed (at the SOAH phase), this controversy can there be styled "*In the Matter of the Institute for Creation Research Graduate School (Institute for Creation Research Graduate School v. Texas Higher Education Coordinating Board)*".

5. ICRGS hereby gives notice of 2 *nunc-pro-tunc* corrections<sup>4</sup> now provided to correct the text of its **Petition**, neither of which involves any substantive "unfair surprise" or any "unfair prejudice" to THECB:
  - (a) on Petition **page 33**, in footnote # 58, the phrase "Christians, choosing (**unless** the French Revolutionaries a few years later) to date their Constitution" should read "Christians, choosing (**unlike** the French Revolutionaries a few years later) to date their Constitution". . . .; and
  - (b) in Petition **Appendix "H"**, on its second page,<sup>5</sup> the content should not be obscured as it is; accordingly, a complete version of that page is provided within a substitute Appendix "H" (notice: a full copy of said appendix, originally titled "*Supplement*" to Appendix "R" to ICRGS's Progress Report) was distributed to THECB committees on April 23<sup>rd</sup> of 2008).
  
6. ICRGS hereby also gives notice of 1 *nunc-pro-tunc* correction now provided to correct the text of one part of the Petition's **Appendix "N"**, specifically, within the article captioned "Kepler Discovered God's Natural Laws" (reprinted within said Appendix "N").<sup>6</sup> In the second

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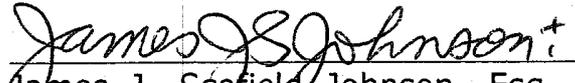
<sup>4</sup> Other typos exist in ICRGS's Petition (e.g., unclosed parentheses) but should be self-evident.

<sup>5</sup> On the THECB-posted version of ICRGS's Petition, this obscured page is numbered as # 181 of 755. The contents of the yellow notes denote topics which ICRGS's special counsel was prohibited from mentioning, in support of academic freedom, on 4-24-2008, relative to ICRGS's request for a Certificate of Authority.

<sup>6</sup> The Johannes Kepler article is one component of a larger lesson, titled "Thinking God's Thoughts After Him". The Kepler article illustrates how ICR's Biblical/scientific creationism "tenets" are, institutionally speaking, sincerely held religious/academic viewpoints which logically accord with those of real-world science pioneers. Creationist scientists, like Kepler, who anticipate finding divine logic (including "intelligent design") in the universe are **unlikely** to err by promoting (the now falsified) theories of so-called "**vestigial organs**" or so-called "**junk DNA**". Master's-level students should be taught that evolutionary theory has, historically, misled evolutionary scientists to anticipate "left-over junk" from (presupposed) genetic transmogrification "accidents", such as "vestigial organs" (useless organs supposedly illustrating left-over anatomy or genes from evolutionary ancestors of a different kind/species), yet real-world science proves that there are **no** such useless "vestigial organs" (e.g., appendix, tonsils, adnoids, coccyx, etc.). Likewise, real-world science is now proving that the evolutionists "jumped the gun" when labeling portions of human DNA as "junk DNA", because the purpose and function of those "non-coding"

non-indented sentence of that article, alluding to King Josiah, the last phrase is "God's **natural** law" but should read "God's **Biblical** law". (This correction involves no substantive "unfair surprise" or any "unfair prejudice" to THECB).

Respectfully submitted,  
This 12<sup>th</sup> day of June, A.D. 2008, by:

  
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DNA portions is now being learned, and it's not useless "junk". See, *accord*, **David Demick**, "Glimpses of Christ the Creator" **Acts & Facts** (January 2003) (posted on ICR's website as <http://www.icr.org/article/131/>) ("Another small part of the brain, the pineal gland, needs mention at this point as an important component of what physiologists were beginning to call the "photo-neuroendocrine system." . . . . Understanding the function of the pineal organ took a step backward for a century after 1859, when Darwinian wisdom decided that it was no more than a largely useless 'vestigial organ'. However, modern insight into the importance of the pineal began with the discovery in 1958 that it secreted a hormone called melatonin, which has several important positive physiologic effects. With regard to the light-brain-body interaction, melatonin has a circadian (daily) rhythm of secretion which affects the daily sleep-wake cycle. Studies have shown a functional link between the pineal gland and the suprachiasmatic nucleus, or "clock" center of the hypothalamus, and it has been demonstrated that their daily rhythms of activity are closely tied together. Thus, through the hypothalamus, pituitary, and pineal glands, light impulses conducted through the ocular retinae have far-reaching effects on the entire body, quite independent of the sense of sight."). See *also, accord*, **Frank Sherwin**, "Revealing Purpose in 'Junk' DNA", **Acts & Facts** (August 2007) (posted on ICR's website as <http://www.icr.org/article3396/>) ("Creation scientists countered--as they did with other alleged vestigial organs and tissues--that just because we don't know the function at the present, that doesn't mean the DNA doesn't have some important function. One need only look at the tonsils and appendix that were once taught by Darwinists to be vestigial but are now known, thanks to good scientific research, to serve important functions in the human body.")

CERTIFICATE REGARDING SERVICE

This Supplement, with its attached replacement copy of its Petition's Appendix "H" (which reproduces the 4-23-2008-distributed "Supplement to Appendix 'R' to ICR Graduate School's "THECB Progress Report" of March 2008), will have been served upon the THECB's attorney of record, via certified mail,<sup>7</sup> with return receipt requested, or by other verifiable delivery service (e.g., FedEx), at:

**William M. Franz, Esq.**, General Counsel  
*Texas Higher Education Coordinating Board*  
1200 East Anderson Lane  
Austin, Texas 78752 - 1743.

and/or via FAX (c/o 512-427-6127), and/or via email (unto [william.franz@theqb.state.tx.us](mailto:william.franz@theqb.state.tx.us) ), on this the 12<sup>th</sup> day of June, A.D. 2008, to which service the below signature attests.

  
Texas Bar # 10741520

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<sup>7</sup> Also, a copy of this Supplement is to be provided, contemporaneously, to the Texas Attorney General's Office, at the following address: **Hon. Greg Abbott**, in his official capacity as the Attorney General of Texas, c/o Office of the Attorney General, 300 W. 15<sup>th</sup> Street, Austin, Texas 78701.

IN THE MATTER OF  
THE  
INSTITUTE FOR CREATION RESEARCH GRADUATE SCHOOL  
  
before the  
TEXAS HIGHER EDUCATION COORDINATING BOARD

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**SECOND SUPPLEMENT TO ICRGS's**  
**PETITION FOR CONTESTED CASE STATUS**

Submitted February 4<sup>th</sup>, A.D. 2009

By:  
**INSTITUTE FOR CREATION RESEARCH**  
**GRADUATE SCHOOL**