

The Institute for Creation Research Graduate School ("ICRGS"), petitioner herein (before the Texas Higher Education Coordinating Board), hereby qualifiedly **supplements** its "Petition for Contested Case Status" and that petition's "First Supplement", with this its **Second Supplement**, and accordingly hereby provides notice as required under the *Texas Religious Freedom Restoration Act of 1999* ("Texas RFRA"), as follows:

1. In ICRGS's "First Supplement to ICRGS's Petition for Contested Case Status", **Footnote # 2 on page 2** (with emphasis added), ICRGS notes:

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 24th of 2008, unless the "75th day" rule of § 110.007(b) would otherwise affect the timing for filing any such civil action under the Texas RFRA of 1999.

Thus, for technical compliance with the **"certified mail, return receipt requested"** prerequisite to a civil action under the Texas RFRA of 1999, an additional copy of said Petition, as well as its First Supplement and this Second Supplement, is being served on the THECB, via service by "certified mail, return receipt requested" (as more specifically shown below in the Certificate regarding Service).

2. Also, ICRGS continues to try to "exhaust its administrative remedies", as indicated in an email (dated 2-2-AD2009) unto THECB's attorneys, which illustrates additional efforts (on both sides), since the SOAH-conducted mediation, to resolve this controversy prior to litigation. However, due to the preemptive requirements of the applicable Statute of Limitations (i.e., Texas Civil Practice & Remedies Code §§ 110.006 and 110.007), this notice is nonetheless now provided, out of an "abundance of caution".
3. Besides the administrative remedies available (via SOAH proceedings), there are some remedies available under the Texas RFRA that are not available via SOAH proceedings, so it would be futile to miss a Statute of Limitations (for seeking Texas RFRA relief) while waiting for the SOAH proceeding to fully proceed. For example, Texas RFRA remedies include

the availability of injunctive and declaratory relief, as well as a recovery for attorneys fees (against a state government agency):

(a) Any person, other than a government agency, who successfully asserts a claim or defense under this chapter is entitled to recover:

- (1) declaratory relief under Chapter 37;
- (2) injunctive relief to prevent the threatened violation or continued violation . . . and
- (4) reasonable attorney's fees, court costs, and other reasonable expenses incurred in bringing the action.

(Quoting Section 110.005, Tex. Civ. Prac. & Rems. Code.)

4. Accordingly, it would be improper for ICRGS to wait beyond one year to seek Texas RFRA-specific relief, since SOAH cannot provide Texas RFRA-specific relief anyway. For example, ICRGS could receive some statutory relief (under Texas RFRA) in the form of *declaratory relief* may be appropriate, e.g., against THECB board members and the Commissioner, acting in their official and/or individual capacities. *Accord, for illustrative purposes, 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*).
5. With respect to ICRGS’s protest about interference with interstate commerce, ICRGS specifically relies upon the **U.S. Constitution’s “Contracts Clause”** as it applies to any impairment with any “obligation of contracts”. Specifically, said Contracts Clause is found in Article I, section 10 of the United States Constitution, a provision logically related to the Takings Clause of the U.S. Constitution’s 14th Amendment. In pertinent part, Article I, section 10 provides that “[n]o State shall ... pass any ... Law impairing the Obligation of Contracts.” U.S. Constttn. Art. I, §10, clause 1.) The constitutionality of a trial court's interpretation of a statute, whether interpreted as an issue of *federal* or *state* constitutionality,

is a question of law. See **Griggs v. State**, 99 S.W.3d 718, 721 (Tex. App.-Houston [1st Dist.] 2003, pet. ref'd). Consequently, to the extent that Texas law (and/or agency regulation), if any, impairs any interstate contract ICRGS has with any of its graduate students, that Texas particular law (and/or THECB regulation), it does so unconstitutionally.

6. Likewise, ICRGS protests any impairment of its contractual obligations (with ICRGS students) under **Texas Constitution Article 1, §16** ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.") That constitutional ban, case law informs us, applies "only where parties have entered into a contract and thereafter a statute is passed that unlawfully impairs their contractual obligations." **Cessna Fin. Corp. v. Morrison**, 667 S.W.2d 580, 584 (Tex.App.-Houston [1st Dist.] 1984, no writ). Also, if any THECB regulations have so "impaired" any such pre-existing contracts, any such "impairing" regulations should likewise be deemed invalid. Consequently, to the extent that Texas law (and/or THECB regulation), if any, impairs any interstate contract ICRGS has with any of its graduate students, that Texas particular law (and/or agency regulation), it does so unconstitutionally.

7. The two above-noted *federal* and *state* constitutional protests are asserted *provisionally*, on the qualification that those protests only apply to any changes of law (legislative or quasi-legislative) that have occurred or will occur *after* the contracting of any student with ICRGS to undertake an educational program validly offered by ICRGS, i.e., so long as any such contract was formed at a time *prior* to it becoming "impaired" by a new Texas "law".

Respectfully submitted,

this 4th day of February, A.D. 2009, by:


James J. Scofield Johnson, Esq.
Texas Bar # 10741520

Special Counsel for the
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CERTIFICATE REGARDING SERVICE

This 2nd Supplement will have been served upon the THECB, together with an extra copy of the above-denoted Petition and its First Supplement, via **certified mail**,¹ with **return receipt requested**, unto:

Texas Higher Education Coordinating Board
attn: **Commissioner of Higher Education Raymund Paredes**
1200 East Anderson Lane
Austin, Texas 78752 - 1743.

*Additional copy of the Second Supplement will also be provided, via FAX (c/o 512-427-6127), and/or via email (**william.franz@theeb.state.tx.us**) unto THECB's General Counsel, William M. Franz, Esq., --- as well as unto THECB's outside counsel, Neal W. Adams, Esq. via FAX (c/o 817-571-2947) and/or via email (**nwa@all-lawfirm.com**), -- on this the 4th day of February, A.D. 2009, to which service the below signature attests. (Both of said attorneys for THECB have already been provided with copies of the Petition and its First Supplement; and the Petition itself , including its Appendices A through Z (i.e., all 755 pages) is now posted on the THECB's website.)*


Texas Bar # 10741520

¹ 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. 15th Street, Austin, Texas 78701.

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Sent to
Texas Higher Educ'n Coord'g Board
 Street, Apt. No. or PO Box No. **attn: Comm'r of Higher Education Raymond Paredes**
1200 East Anderson Lane
 City, State, Zip+4 **AUSTIN, TX 78752-1743**

PS Form 3800, June 2002 See Reverse for Instructions

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