

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
AUSTIN DIVISION

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

**Plaintiff's Reply to Defendants' Response  
to Plaintiff's Motion for Judgment on the Pleadings**

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

Now comes the Institute for Creation Research Graduate School ("ICRGS"), plaintiff, and replies to defendants' Response (of 6/29/2009) to plaintiff's motion for judgment on the pleadings, as follows:

I. Defendants' Summary of this Lawsuit Omits Tex. Educ. Code Exemption

1. As before, ICRGS points out that defendants' summary of plaintiffs' claim glaringly omits plaintiff's request that Texas Education Code § 1.001(a) be declaratorily applied to plaintiff's situation, with ancillary injunctive relief to enforce the THECB's (and the other defendants') recognition of ICRGS's exemption from all Texas Education Code-based powers of the THECB.
2. Only after ICRGS filed this motion for judgment (whether it be construed as for "judgment on the pleadings" or for "summary judgment"), did defendants even hint that defendants "disputed" ICRGS's historic practice of not accepting Texas state funding for ICRGS's operations. This is, under the *Federal Rules of*

*Evidence*, a “recent fabrication” (as defined by **Evidence Rule 801(d)(1)** ), -- as well as a “admission by [a] party-opponent” (as defined by **Evidence Rule 801(d)(2)** ), -- especially when the Court considers the import of the *attached Exhibit #A*, a set of judicial-estoppel-triggering “stipulations” agreed to earlier by the THECB, in the State Office of Administrative Hearings, saying:

**At the time ICR’s Application was denied, THECB did not contest (nor does it now contests) ICR’s representation that ICR had not accepted any direct funding from the Texas state government or any direct federal funding administered by the Texas state government.**

*Quoting from Stipulation # 12*, on page 4 of the “Agreed Stipulations” FedEx’d to the State Office of Administrative Hearings on June 24<sup>th</sup> of 2009 (as shown by attached Exhibit “A”), for filing in SOAH Docket # 781-09-2910.

3. Accordingly, ICRGS disputes the accuracy and the reliability of defendants’ Response where defendants now say that ICRGS’s non-acceptance of Texas state funding “is a question of fact, which at this point, Defendants contend is in dispute” (*quoting* defendants’ Response, page 3, ¶ 2). Because of the judicial estoppel of TEHCB’s **Stipulation # 12** (shown on this Reply’s attached Exhibit “A”), it is not true that THECB disputes that material fact. Thus, although the “Standard of Review” portion of the Response does provide helpful analysis (and case law), its last sentence clashes with Stipulation # 12 (shown by attached Stipulation # 12, on page 4 of the “Agreed Stipulations”

FedEx'd to the State Office of Administrative Hearings on June 24<sup>th</sup> of 2009 (as shown by attached Exhibit "A"), for filing in SOAH Docket # 781-09-2910.

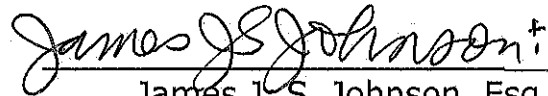
I. Defendants have Failed to Use "Duty-to-Save" Statutory Construction

4. Also, defendants' argument (on pages 4-6 of its Response) is flawed because it fails to appreciate how Texas Education Code's chapter 61 does not require a contradiction the plain-language "applicability" parameters of Texas Education Code § 1.001(a). Defendants strain to include a governmental regulation that permits a "prior restraint" of ICRGS's academic speech. Quite rightfully, the Texas Legislature does not condition the issuance of a driver's licenses (or a license to practice medicine, or a CPA license) on *how* any Texan uses his or her academic freedom (or free speech, or free press, or religious liberty) regarding creation-versus-evolution viewpoints, -- and there would be a 1<sup>st</sup> Amendment-related wrong if it did. Because of the "power of the purse", it is not disputed that the Texas Legislature may condition government funding on an institution's willingness to somewhat restrain its Constitution-guaranteed liberties. Accordingly, if the Texas government's "purse" is involved, the Texas Legislature may be allowed more of an "entanglement" with academic freedoms to ensure that its tax dollars are applied as entrusted. But not in this case. Accordingly, the "entanglement" risks dominate this case, and defendants have failed to factor in the "duty-to-save" constitutional interpretation doctrine -- that courts observe (as described on ICRGS's Motion at pages 5-7), -- when alternate interpretations are available, so as to

avoid First Amendment-conflicting unconstitutionality problems. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 99 S.Ct. 1313 (1979) (Court has *duty to* interpretively *save* a statute from unconstitutional outcomes, so interpreting a delegation statute to avoid interfering with or “entangling” religious liberty is preferable to construing that statute otherwise).

WHEREFORE, premises considered, ICRGS respectfully request favorable relief from this honorable Court, as a matter of law.

Respectfully submitted,



James J. S. Johnson, Esq.

Texas Bar # 10741520

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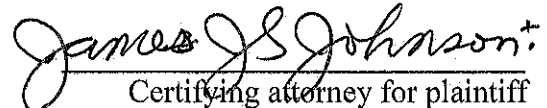
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#### CERTIFICATE REGARDING SERVICE

I hereby certify that on the 30<sup>th</sup> day of June, A.D. 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following attorney (and thereby to the Texas Attorney General’s Office):

**Shelley Dahlberg, Esq.**, Assistant Attorney General, General Litigation Division  
P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548



Certifying attorney for plaintiff

[ The following page shows **Stipulation # 12**, of the “Agreed Stipulations”; with the Adams, Lynch & Loftin, P.C. law firm representing the THECB, in SOAH.]

11. The Second Supplement to ICRGS's Petition for Contested Case Status ("Second Supplement"), submitted by ICR on or about February 4, 2009, that is attached hereto and Bates-stamped 550 thru 554, is a true and correct copy of said Second Supplement.

12. At the time ICR's Application was denied, THECB did not contest (nor does it now contest) ICR's representation that ICR had not accepted any direct funding from the Texas state government or any direct federal funding administered by the Texas state government.

AGREED AND STIPULATED this 23<sup>rd</sup> day of June, 2009.

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when appropriate, refer to the page number pre-printed on the document referenced therein.

Exhibit "A"