

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

INSTITUTE FOR CREATION  
RESEARCH GRADUATE SCHOOL,  
Plaintiff,

v.

TEXAS HIGHER EDUCATION  
COORDINATING BOARD, a state  
agency; *et al*

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CAUSE NO. A:09 CA 382

**DEFENDANTS' RULE 12(B) PARTIAL MOTION TO DISMISS AND  
MOTION FOR RULE 7(A) REPLY**

TO THE HONORABLE SAM SPARKS:

Defendants, the Texas Higher Education Coordinating Board (“the Board”), Raymund Paredes, Commissioner of the Board, in his official and individual capacities, Board members Lyn Bracewell Philips, Joe B. Hinton, Elaine Mendoza, Laurie Bricker, A.W. “Whit” Riter, III, Robert Shepard, and Brenda Pejovich, in their official and individual capacities, file this motion<sup>1</sup> pursuant to Rule of Civil Procedure 12(b) and ask this Court to dismiss certain of Plaintiff’s claims against them. Alternatively, those Defendants named in their individual capacities ask the Court to order Plaintiff to replead its claims with the specificity necessary to overcome their entitlement to qualified immunity.

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<sup>1</sup> By order dated May 21, 2009, this Court ordered Plaintiff to replead so as to comport with Federal Rule of Civil Procedure 8, which requires that a pleading include a “short and plain statement” describing each claim and demonstrating an entitlement to the relief sought. *See* Docket Entry #6. Plaintiff responded to the Court’s order by filing a 49-page complaint to amend its originally filed 64-page petition. The amended complaint suffers from defects similar to the original petition in that it does not include “short and plain” statements describing the claims Plaintiff seeks to bring against Defendants. Nevertheless, Defendants have attempted herein to respond to the claims Plaintiff appears to assert in its amended complaint. However, to the extent Plaintiff may be permitted to maintain any claims following disposition of the instant motion to dismiss, Defendants would respectfully request that Plaintiff be asked to replead and file an amended complaint that complies with this Court’s May 21, 2009 order.

## INTRODUCTION

In this action, Plaintiff, Institute for Creation Research Graduate School (“ICRGS”) alleges various violations of constitutional rights. The Plaintiff’s claims purportedly arise from the Board’s denial of ICRGS’s application for a Certificate of Authority to offer a Master of Science degree in science education in Texas. *Plaintiff’s Amended Complaint* at ¶ 9 (stating ICRGS’s wishes to offer its program, which awards a Master of Science degree with a major in Science Education, “in and from” Texas).

Among other things, Plaintiff brings a claim pursuant to 42 U.S.C. § 1983, *id.* ¶ 14, and alleges infringement of its “1<sup>st</sup> and 14<sup>th</sup> Amendment-based liberties,” *id.* ¶ 16, and its “freedom of association” rights. *Id.* ¶¶ 32, 50-51. Plaintiff also brings claims against the Defendant directly under the Texas Constitution. *Id.* ¶ 53. Further, Plaintiff asserts that Defendants have violated the Texas Religious Freedom Restoration Act. *Id.* ¶ 33. Finally, Plaintiff alleges that the Board’s actions unconstitutionally restrain legitimate competition in the higher education market. *Id.* ¶ 42.

Plaintiff seeks declaratory and injunctive relief, and asks this Court to declare that “the Texas statutory scheme of accrediting accreditors” is unconstitutional on its face or as applied, and an unlawful restraint on interstate commerce. *Plaintiff’s Amended Complaint* ¶¶ 44, 60 and Part XVI.

## STANDARD OF REVIEW

A party’s motion to dismiss for lack of subject matter jurisdiction is properly made pursuant to Federal Rule of Civil Procedure 12(b)(1). A claim must be dismissed for lack of subject matter jurisdiction “when the court lacks the statutory or constitutional power to adjudicate the case.” *Home Builders Ass’n of Miss., Inc. v. City of Madison*, 143

F.3d 1006, 1010 (5th Cir.1998). The party seeking to invoke the Court's subject matter jurisdiction has the burden of establishing that such jurisdiction exists. *Hartford Ins. Group v. LouCon Inc.*, 293 F.3d 908, 910 (5th Cir.2002).

Dismissal is proper pursuant to Federal Rule of Civil Procedure 12(b)(6) when a party's complaint fails to state a claim upon which relief can be granted. When considering a motion to dismiss under Rule 12(b)(6), the Court accepts all well-pleaded facts in the complaint as true and resolves all doubts in the plaintiffs' favor. *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 387 (5th Cir. 2001). Although the complaint need not contain detailed factual allegations, it must include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007). The allegations must be such that they "raise a right to relief above the speculative level." *Id.*; *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) ("the complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial").

### ARGUMENT & AUTHORITIES

#### A. The Board is Not a "Person" Under 42 U.S.C. § 1983.

Plaintiff brings U.S. constitutional claims against the Board pursuant to 42 U.S.C. § 1983. *Plaintiff's Amended Complaint* ¶ 50. Plaintiffs, however, cannot state a claim under 42 U.S.C. § 1983 against the Board directly because a state agency is not a "person" capable of being sued under section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). The Board is a state agency. *See* TEX. EDUC. CODE

§ 61.021(a) (“The Texas Higher Education Coordinating Board is an agency of the state.”).

Because state agencies are, as a matter of law, not amenable to suit under section 1983, Plaintiff cannot amend its pleadings to state a valid section 1983 cause of action against the Board. Accordingly, the Court should dismiss the section 1983 cause of action against the Board with prejudice.

**B. Plaintiff Has Failed to State a Claim for Relief Against the Board Members in Their Individual Capacities.**

Plaintiffs seek only declaratory and injunctive relief in this suit. *Plaintiff's Amended Complaint* ¶¶ 44, 60 and Part XVI. Claims for prospective declaratory and injunctive relief, however, must necessarily be brought against state officials in their official capacity. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 27-30 (1991) (discussing distinction between personal capacity and official capacity suits); *Edelman v. Jordan*, 415 U. S. 651, 677 (1974); *Ex parte Young*, 209 U.S. 123 (1908). This is true of both federal law and state law claims against the State for declaratory or injunctive relief. *See id.*; *see also City of El Paso v. Heinrich*, No. 06-0778, 2009 Tex. LEXIS 253; 52 Tex. Sup. J. 689 (Tex. May 1, 2009) (*ultra vires* state law claim seeking declaratory relief “must be brought against the state actors in their official capacity”); TEX. CIV. PRAC. & REM. CODE § 110.005(d) (under the Religious Freedom Restoration Act, action must be “brought against an individual acting in the individual’s official capacity as an officer of a government agency”).

Accordingly, the federal and state law claims for declaratory and injunctive relief Plaintiff has brought in this suit can only be maintained, if at all, against state officials in their official capacity. Because Plaintiff has made no claims that may be properly

brought against state officials in their individual capacity, all claims it has made against those Defendants named in their individual capacity—including the THECB Commissioner and the board members named as Defendants—must be dismissed for failure to state a claim upon which relief can be granted. *See id.*

**C. Plaintiff Lacks Standing to Bring Free Exercise of Religion Claims.**

ICRGS lacks standing to bring any claims arising out of an alleged abrogation of a right to the “free exercise” of religion. Any free exercise of religion claims that purportedly arise from the Board’s denial of a Certificate of Authority to ICRGS to award “Master of Science” degrees in Science Education would belong, if at all, to those individuals who wish to obtain such a degree from ICRGS. Because participation of those individuals is necessary to the proper disposition of the free exercise claims made in this suit, ICRGS lacks associational standing to maintain them.

As Plaintiff, ICRGS bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130 (1992). An association like ICRGS may in some instances have standing to assert a constitutional claim when: (a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434 (1977). Three elements must be met in order for an individual to have standing: (1) an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that a favorable decision will redress the injury. *Luian*, 504 U.S. at 561. Because standing is

an “indispensable part of the plaintiff’s case, each element [of the standing test] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561; *see also Cornerstone Christian Schools v. University Interscholastic League*, 563 F.3d 127 (5th Cir. 2009).

The Supreme Court has examined the third element of the *Hunt* associational standing test in the context of a free exercise of religion claim made by an association. *Harris v. McRae*, 448 U.S. 297 (1980). In *Harris*, the Court determined whether a women’s rights organization had standing to attack the constitutionality of a law that limited Medicaid reimbursement for abortions. In determining whether the free exercise claim made by the association in *Harris* required individual participation, the Court held that, “[s]ince ‘it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion,’ the claim asserted here is one that ordinarily requires individual participation,” and “the participation of individual members . . . is essential to a proper understanding and resolution of their free exercise claims.” *Id.* at 321, 100 S.Ct. 2671 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560 (1963)); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 n.22 (1982) (party bringing suit under the First Amendment must allege it has suffered a personal loss of the right).

The Fifth Circuit recently reaffirmed the holding in *Harris* in finding that a school lacked standing to bring a free exercise claim on behalf of its students. *See Cornerstone Christian Schools*, 563 F.3d at 134 (holding that “*Harris* preclude[d] [the school’s]

standing to bring the free exercise claim in this case[, because the] involvement of parents and students . . . [was] essential to the resolution of the individualized element of coercion within [the] free exercise claim”). The *Cornerstone* court also rejected the school’s argument that individuals were not necessary parties to the suit because only declaratory relief was sought, finding specifically that it was the “claim asserted” that controlled the standing question, not the relief sought. *See id.* at n. 5.

In this case, ICRGS lacks standing to maintain claims arising from the alleged infringement of its right to freely exercise its religion, because—as a preliminary matter—it has not even demonstrated that it actually has any individual members who could bring suit in their own right. Even if it could point to such members, it cannot show that the individual participation of those members would not be necessary to proper resolution of its free exercise of religion claims. To the contrary, proper disposition of the Plaintiff’s free exercise claim—to the extent such a claim has even been properly made—requires individual participation in order to determine what “coercive effect,” if any, the Board’s denial of a Certificate of Authority to ICRGS to award “Master of Science” degrees in Science Education had (or is having) on any individual’s ability to freely practice his or her religion.

Therefore, because ICRGS cannot properly bring free exercise of religion claims in its own right, or on behalf of any of its members, those claims should be dismissed for lack of standing.

**D. Plaintiff Has Failed to State a Religious Discrimination Claim for Relief Against the Board as well as its Members in their Individual Capacities.**

Plaintiff has brought claims under Texas Civil Practice and Remedies Code Sections 106.001 alleging religious discrimination. That section prevents “[a]n *officer or*

*employee* of the state or a political subdivision of the state who is acting or purporting to act in an *official capacity*” from refusing to issue a person a license, permit or certificate because of his or her religion. TEX. CIV. PRAC. & REM. CODE § 106.001(a)(1) (emphasis added). By the statute’s plain language, only an employee of the state or a state agency in his or her official capacity is a proper party to a suit under section 106.001. Thus, Plaintiff has failed to state a claim for relief under Section 106.001 against the Board itself or its members in their individual capacities, and those claims must be dismissed for failure to state a claim upon which relief can be granted.

#### **MOTION FOR RULE 7 REPLY**

Alternatively, should the Court find that Plaintiff has stated a claim against the individual Defendants in their individual capacities, the Defendants assert their entitlement to qualified immunity and request the Court to order Plaintiff to replead with the necessary specificity to engage that assertion.

**A. Defendants are entitled to qualified immunity for claims asserted against them in their individual capacities.**

As a matter of law, the individual Defendants in their individual capacities are entitled to qualified immunity for all federal claims asserted under 42 U.S.C. § 1983.

Qualified immunity is a well-settled doctrine that protects governmental employees who are acting within their discretionary authority if their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity permits government officials to exercise their official duties with independence and without fear of personal liability and harassing lawsuits against them. *Elliott v. Perez*, 751 F.2d 1472, 1476 (5th Cir.

1985) (rev'd on other grounds). By providing government officials and employees with the ability to reasonably anticipate when their acts or omissions may give rise to liability, qualified immunity provides "protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity not only protects officials from liability in civil actions, it also protects public officials from having to withstand the burdens of broad ranging discovery and the burdens of trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Once qualified immunity is raised as a defense, the plaintiff has the burden to demonstrate that a state official is not entitled to qualified immunity. *Burns-Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir. 1994).

The individual Defendants in the instant action are all government officials serving on the Texas Higher Education Coordinating Board, a State Agency. Defendants at all times pertinent to this lawsuit acted in good faith in performing their discretionary duties. *See Newton v. Black*, 133 F.3d 301, 306 (5th Cir. 1998) ("a discretionary duty or function involves personal deliberation, decision and judgment") (citation and internal quotation marks omitted). Defendants' actions were objectively reasonable and did not violate a clearly established constitutional or statutory right. Consequently, Defendants are entitled to the defenses of qualified and official immunity.

**B. Plaintiff should be ordered to replead to engage the Defendants' assertion of qualified and official immunity.**

Because Defendants have asserted the defenses of qualified and official immunity, Plaintiff must now plead with specificity to show how its claims overcome the Defendants' immunity defenses. Federal Rule of Civil Procedure 7(a) authorizes this Court to "order a reply to an answer." The Fifth Circuit has held that an individual

defendant who has asserted qualified immunity is entitled to have the plaintiff ordered to reply under Rule 7. *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995) (*en banc*).

Plaintiff's Reply must respond to Defendants' immunity defense "in detail" and must be "tailored to the assertion of qualified immunity and fairly engage its allegations." *Id.* at 1433-1434. Plaintiffs must support their claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of each Defendants' conduct at the time of the alleged acts. *Id.* at 1434. The *Schultea* Court further held that a district court's discretion to deny a defendant's Rule 7 motion "is narrow indeed" when greater detail in the Complaint might be useful. *Id.*

To overcome Defendants' qualified immunity, Plaintiff must show that Defendants violated a protected right and that, at the time of the alleged violation, the right was a matter of "clearly established" law. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991). To divest the Defendants of immunity, the law in question must have been "clearly established" not only in general or abstract terms, but in a highly "particularized" sense that is relevant to the facts of this case. *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987) ("[I]n the light of pre-existing law the unlawfulness must be apparent"); *see also Richardson v. Oldham*, 12 F.3d 1373, 1381 (5th Cir. 1994) ("[T]he plaintiffs must show that the illegality of the alleged conduct was clearly established in factual circumstances closely analogous to those of this case."). "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Sorenson v.*

*Ferrie*, 134 F. 3d 325, 330 (5th Cir. 1998) (quoting *Pierce v. Smith*, 117 F. 3d 866, 882 (5th Cir. 1997)).

In addition, Plaintiff must show that each Defendants' conduct was objectively unreasonable. *Jones v. Collins*, 132 F.3d 1048, 1052 (5th Cir. 1998) (“[E]ven if the official’s conduct violated a clearly established constitutional right, the official is nonetheless entitled to qualified immunity if his conduct was objectively reasonable.”). The Defendants are immune to Plaintiff’s claim so long as a reasonable official in the Defendants’ position could reasonably believe his conduct was legal under the circumstances, or so long as reasonable minds could differ on the issue. *Hunter v. Bryant*, 502 U.S. 224, 228-29 (1991); *Malley v. Briggs*, 475 U.S. at 341.

Plaintiff’s Amended Complaint fails to articulate any specific allegations against each Defendant that would overcome Defendants’ immunity defense. For the most part, the pleadings do not state what specific actions each Defendant took, or what specific right each action violated, or what specific obligation of each Defendant with which each Defendant failed to comply. Consequently, Plaintiff should be required to replead.

Respectfully submitted,

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**Certificate of Service**

I certify that on June 12, 2009 I electronically filed with the Clerk of the Court using the CM/ECF system a copy of Defendant's Motion to Dismiss which will send notification of such filing to the following:

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**ORDER GRANTING DEFENDANTS' RULE 12(b)  
PARTIAL MOTION TO DISMISS**

On this day came on to be considered Defendants' Rule 12(b) Partial Motion to Dismiss. The Court, after considering arguments from both parties, is of the opinion that the motion should be GRANTED. Accordingly, it is hereby

ORDERED that the Defendants' Rule 12(b) Partial Motion to Dismiss is GRANTED in all respects.

SIGNED this the \_\_\_\_\_ day of \_\_\_\_\_, 2009.

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SAM SPARKS  
UNITED STATES DISTRICT JUDGE

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**ORDER ON DEFENDANTS' MOTION FOR RULE 7 REPLY**

On this day came on to be considered Defendants' Motion for Rule 7(A) Reply and the Court, after considering arguments from both parties, is of the opinion it should be GRANTED. Accordingly, it is hereby,

ORDERED that the Defendants' Motion for Rule 7(A) Reply is GRANTED in all respects.

Plaintiff is ORDERED to reply in detail under Fed. R. Civ. P. 7(a) to the qualified and official immunity defenses of the Defendants named in their individual capacity. The reply shall be tailored to the assertion of immunity and fairly engage its allegations. Plaintiff must support each of its claims with sufficient precision and factual specificity to raise a genuine issue as to the illegality of the Defendant's conduct at the time of the alleged acts.

Plaintiff shall file its reply no later than \_\_\_\_\_, 2009.

SIGNED this the \_\_\_\_\_ day of \_\_\_\_\_, 2009.

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SAM SPARKS  
UNITED STATES DISTRICT JUDGE