

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

INSTITUTE FOR CREATION §
RESEARCH GRADUATE SCHOOL §
An unincorporated educational ministry §
Unit for the Institute for Creation §
Research, Inc., a California not-for-profit §
Corporation, §
Plaintiff §
§
v. §
TEXAS HIGHER EDUCATION §
COORDINATING BOARD, a state §
Agency; *et al*, §
Defendants §

CAUSE NO. A-09-CA-382SS

DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE SAM SPARKS, UNITED STATES DISTRICT COURT JUDGE:

Defendants, the Texas Higher Education Coordinating Board (“the Board”), Raymund Paredes, Commissioner of the Board, in his official capacity, 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 capacities, file this Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56.

**I.
INTRODUCTION**

Plaintiff, Institute for Creation Research Graduate School (“ICRGS”) alleges various violations of constitutional rights and Texas statutes. Its claims arise from the Board’s denial of ICRGS’s application for a Certificate of Authority to offer a Master of Science in Science Education degree in Texas. *Plaintiff’s Amended Complaint* at ¶ 8. As best Defendants can discern from ICRGS’s Second Amended Complaint, it brings the following claims: (1) ICRGS

“viewpoint discrimination” in violation of their free speech, free press, and equal protections rights; pg. 15-16, ¶ 40(a)-(c)(United States Constitutional Provisions); pg. 16, ¶¶41(a)(-d)(Texas Constitutional Provisions); (2) denial of due process by unjustly and arbitrarily applying the Board’s certification rules, pg. 16, ¶ 40(c); (3) violation of the Texas Religious Freedom Restoration Act, pg. 17, ¶ 41(e); and (4) violation of the Texas Civil Practices and Remedies Code, section 106.001.

II. INCORPORATION OF EVIDENCE

Defendants incorporate by reference the exhibits filed contemporaneously with this motion as evidentiary support for this motion.

III. STATEMENT OF FACTS

A. The Certificate of Authority Application Process

The Texas Legislature established the state’s interest in “prevent[ing] deception of the public resulting from the conferring and use of fraudulent or substandard college and university degrees,” “regulation by law of the evidences of college and university education attainment”, and “protection of legitimate institutions and of those holding degrees from them”. TEX. EDUC. CODE § 61.301. To those ends, the Legislature requires a private postsecondary educational institution to obtain a certificate of authority from the Board. *Id.* § 61.304(a). The Legislature has exempted from this requirement “an institution which is fully accredited by a recognized accrediting agency,” *Id.* § 61.303(a); as well as those that offer only religious degrees, 19 Tex. Admin. Code § 7.4(a)-(g).¹ Otherwise, all institutions of postsecondary education are required to meet the Board’s standards, set out in their administrative rules. “These standards represent

¹ Chapter 7 of the Board’s rules has been amended and reorganized during the course of this controversy, but the relevant rules - although in some cases renumbered - remain in effect.

generally accepted administrative and academic practices and principles of accredited postsecondary institutions in Texas. Such practices and principles are generally set forth by institutional and specialized accrediting bodies and the academic professional organizations.” *Id.*

§ 7.5. The standards by which an applicant institution is reviewed include qualifications governing (1) the institutional officers, *id.* § 7.5(2); (2) the upkeep of its financial records, *id.* § 7.5(5)-(6); (3) the faculty, *id.* § 7.5(11)-(13); and (4) the offered curriculum, *id.* § 7.5(14). At issue in this case is section 7.4(14)(A) (formerly section 7.7(12)(A)), related to the applicant institutions’ curriculum. That section provides in relevant part:

[t]he quality, content, and sequence of each course, curriculum, or program of instruction, training or study shall be appropriate to the purpose of the institution and shall be such that the institution may reasonably and adequately achieve the stated objective of the course or program. Each program shall adequately cover the breadth of knowledge of the discipline taught and the coursework must build on the knowledge of the previous courses to increase the rigor of instruction and the leaning of students in the discipline. . . .

An institution is prohibited from “grant[ing], award[ing], or offer[ing] to award a degree on behalf of a non-exempt institution unless the institution has been issued a certificate of authority. . .to grant the degree by the Board. . . .” 19 Tex. Admin. Code § 7.17(a)(1).

B. ICRGS’s Application for a Certificate of Authority

In July 2007, ICRGS applied for a Certificate of Authority to offer a program of instruction in Texas leading to a Master of Science in Science Education degree. Ex. 1. According to ICRGS, its mission is “to study, teach, and communicate the works of God’s creation.” Ex. 10 at 1. ICRGS’s graduate school is the “educational arm of [Institute for Creation Research] and an integral part of the Institute’s broader mission.” *Id.* at 4. “ICR bases its educational philosophy on the foundational truth of a personal Creator-God and His authoritative and unique revelation of truth in the Bible.” *Id.*

In its application for a Certificate of Authority, ICRGS included statements presumably intended to satisfy the Board's standards representing "generally accepted administrative and academic practices and principles of accredited postsecondary institutions in Texas" by which the Board would evaluate ICRGS's proposed graduate program. Appdx 1; 10 Tex. Admin. Code § 7.5 (2009). The application set forth ICRGS's science education program. Ex. 1.

C. Staff Review and Site Visit.

Board staff reviewed the application and requested an on-site evaluation of ICRGS in Irving, Texas. Appdx 2 at 1; 6 at 1. Ordinarily, such a site visit involves a Board staff member and a team of expert consultants engaged for that purpose, including a person with subject matter expertise in the discipline of the proposed program. 19 Texas Admin. Code § 7.7(d)(1); *see* Ex. 13 at 19; 6 at 2 (determining "inadequate review" because "no expert in science education as part of the site visit team."). In this instance, however, the only science educator on the team, Cathy Loving, Ph.D., Associate Professor of Science Education at Texas A&M University, had to cancel her participation for personal reasons. Ex. 6 at 2. The team was asked to consider ICRGS's program without regard to its Creationist point of view, as if it "had been presented by any institution [of higher education]" and to determine whether it "would [] meet the 21 standards set forth in Chapter Seven of C[oordinating] B[oard] rules." *Id.*

The Board's site visit team prepared a report, which found ICRGS's "proposed master's degree in science education, while carrying an embedded component of creationist perspectives/views, [to] nevertheless [be] a plausible program. The proposed degree would be generally comparable to an initial master's degree in science education from one of the smaller, regional universities in the state." Ex. 2 at 8.

The Certification Advisory Council, which advises the Coordinating Board, recommended conditional approval of ICRGS's proposed program at its December 14, 2007, meeting. TEX. EDUC. CODE § 61.314; 19 Tex. Admin. Code § 7.7(b), (d); Ex. 6 at 2. The Commissioner of Higher Education, Dr. Raymund A. Paredes noted that the site visit report was drafted without the participation of an expert in science or science education (the academic discipline under review) and realized that the report's conclusion that the ICRGS program was comparable to similar programs at other institutions of higher education in Texas might not be accurate. Ex. 13 at 19. Commissioner Paredes asked that a group of scientists and science educators evaluate the proposed degree program's curriculum to confirm the report's conclusion in this regard. *Id.* at 20-21, 22; Ex. 2 at 8. This group of experts, a cross-section of science educators from around the state, compared syllabi and course descriptions of the science education programs of their institutions to the proposed syllabus of the ICRGS program. Exs. 10, 11, 12, 14, 15.

D. Plaintiff's Proposed Curriculum is Religion, Not Science.

The science and science educator group expressed a wide variety of concerns about the proposed program and disagreed with the original report's conclusion. Exs. 10, 11, 12, 15 Commissioner Paredes and board staff met with ICRGS staff to inform them of the questions raised about the proposed Master's program. *Id.*; Ex. 4 at SOAH 0299. After the meeting, ICRGS asked for and was granted a postponement of the scheduled review of its application to more fully respond to the raised concerns. *Id.*

ICRGS submitted revised materials to the Board in an attempt to show that the proposed program was legitimate science. *Id.* But the materials submitted showed only that the proposed program was founded upon fundamentalist religious, rather than scientific, principles. For

example, ICRGS's overall mission "is to study, teach, and communicate the works of God's creation." Ex. 10 at 1. The purposes and goals of the graduate school are:

(1) to prepare science teachers and other individuals to understand the universe within the integrating framework of a biblical perspective using proven science data; and (2) to prepare students for leadership in science education. . . . *The programs and curricula of the Graduate school, while similar in factual content to those of other graduate colleges, are distinctive in one major respect. ICR bases its educational philosophy on the foundational truth of a person Creator-God and His authoritative and unique revelation of truth in the Bible.*

Ex. 4A at 9 (emphasis added). And in its "Foundational Principles" the graduate school's proposed Master's of Science in Science Education begins with the assumptions that:

- The physical universe of space, time, matter and energy has not always existed, but was supernaturally created by a transcendent personal Creator who alone has existed for eternity. Ex. 4A at 52.
- The phenomenon of biological life did not develop by natural processes from inanimate systems, but was specially and supernaturally created by the Creator. *Id.*
- All things in the universe were created and made by God in the six lateral days of the Creation Week described in Genesis 1:1-2:3, and confirmed in Exodus 20:8-11. *The creation record is factual, historical, and perspicuous; thus all theories of origins or development that involve evolution in any form are false. Id. at 53 (emphasis added).*

ICRGS's extensive application was reviewed by a set of experts in science education. Exs. 10, 11, 12, 14, 15. Dr. Skoog wrote a lengthy report, explaining that the program was insufficient to meet State standards. Ex. 12. Dr. Skoog concluded that much of the course content described in the ICRGS proposal was outside the realm of science and lacked the potential to help students understand the nature of science and the history and nature of the natural world. Ex. 12, Ex. 2 at 20. Furthermore, he determined that the program and courses had limited or no potential to increase the readiness of students enrolled in the program to pursue science-related careers in the state, nation, or world. Thus, Dr. Skoog recommended that

ICRGS's application for authorization by the Board for a Master of Science in Science Education degree be rejected. *Id.* The panel agreed with Dr. Skoog's conclusion. Exs. 10, 11, 14, 15.

E. Staff Recommendation to Commissioner.

Based upon the panel's report, Dr. Joseph Stafford, Assistant Commissioner for Academic Affairs and Research recommended to Commissioner Paredes that the ICRGS application for a Certificate of Authority to offer a Master of Science in Science Education degree be rejected because: "[t]he designation of the major course of study as science education is inappropriate. The fundamental principle of the ICR rejects what scientists do. Any program with a major in science education must prepare teachers to accurately and comprehensively describe what scientists do" Ex. 6 at 6. Dr. Stafford continued, noting that:

Scientists remain open to all facts and all observations of natural phenomena in order to refine and improve their comprehensive explanations of how natural processes appear to work. Scientists seek to understand how the world works naturally. They do not rely upon supernatural interventions to explain the observations found in nature, but rather, seek to refine their natural explanation of the observed data.

Id. at 5- 6.

F. Commissioner's Recommendation to the Board and the Board's Decision.

On April 23, 2008, Commissioner Paredes recommended that the Board reject ICRGS's proposed program. He did so based on two considerations,

the first of which is that ICR failed to demonstrate that the proposed program meets acceptable standards of science and science education.... Furthermore, the proposed ICR program is inconsistent not only with the conventions of science but with the Coordinating Board's rules. For example, Standard 12, Chapter 7 of the Board rules requires that proposed programs "shall adequately cover the breadth of knowledge of the discipline taught' and that 'degree level, degree designation, and the designation of the major course of study should be appropriate to curriculum offered" As our consultants on science education emphasized, the proposed ICR program in insisting on a literal interpretation of biblical creation, gives insufficient coverage to conventional science and does not "adequately prepare students in the field of science education."

Ex. 7 at 3. The committee also heard from the representatives of ICRGS and the general public. On April 24, 2008, the Board denied ICRGS's application for a certificate of authority. Ex. 8.

IV. SUMMARY JUDGMENT STANDARD

A party is entitled to summary judgment when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). On a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 325 (5th Cir. 2004).

V. ARGUMENT

A. DEFENDANTS' DENIAL OF PLAINTIFF'S APPLICATION FOR A CERTIFICATE OF AUTHORITY DOES NOT AMOUNT TO “VIEWPOINT DISCRIMINATION” IN VIOLATION OF ICRGS'S FREE EXERCISE, FREE PRESS OR EQUAL PROTECTION RIGHTS

Plaintiff's lengthy Second Amended Complaint is little more than argument sprinkled with various assertions of fact, many of which are irrelevant to its claims. And while the bases of the complaints are not entirely clear, it appears that ICRGS contends that the Board engaged in “viewpoint discrimination” thus violating ICRGS's rights to free speech, free exercise of religion, and equal protection. Doc. 26 at 15-16, ¶¶ 40(a), (b). 41(a)(b).² Additionally, with respect to these claims, it appears that Plaintiff has made only as-applied challenges to the Defendants' denial of their application for a Certificate of Authority. *See, e.g.*, Doc. 26 at 3, ¶ 11; 7, ¶ 21; 10, ¶ 28.

² The Court twice ordered Plaintiff to amend its complaint to comply with Federal Rule of Civil Procedure 8. Even after those amendments, some causes of action in the complaint are difficult to discern.

1. Courts routinely have held that program similar to ICRG's are not science but instead religion.

The Supreme Court and other courts have determined that teachings like ICRGS's are not science, but instead are religion. For example, in *Edwards v. Aguillard*, the Supreme Court analyzed a Louisiana statute which required "creation science" to be taught in public schools whenever evolutionary theory was taught. 482 U.S. 578 (1987). In determining that the statute violated the Establishment Clause of the First Amendment, the Supreme Court held that there was no secular purpose for this Act, and its actual intent was "to discredit evolution by counterbalancing its teaching at every turn with the readings of *creationism, a religious belief.*" *Id.* at 582 (emphasis added). In reaching its conclusion, the Court relied on the fact that "the term 'creation science,' as contemplated by the legislature that adopted this Act, embodies the religious belief that a supernatural creator was responsible for the creation of mankind." *Id.* at 591-92. "The legislature . . . sought to alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution." *Id.*, 482 U.S. at 593.³

One case cited by the *Edwards* court was *McLean v. Arkansas Bd. of Ed.*, 529 F.Supp. 1255 (E.D. Ark. 1982). In *McLean*, the district court held that the notion that life stems from a supernatural creator removes creationism from the scientific area and is a religious proposition. *Id.* at 1265-66. Likewise, in *Kitzmiller v. Dover Area School Dist.*, the district court determined that Intelligent Design—which the court characterized as "creationism re-labeled"—was not science, because in part, it relied on supernatural causation. 400 F.Supp.2d 707, 722, 735 (M.D. Penn. 2005). Like the statutes challenged in these cases, ICRGS's proposed program relies in part on a Biblically based supernatural creator. *See, e.g.*, 4A at 52. Because it starts with this

³ Justice Powell, in his concurrence, took particular note of the fact that the intellectual authors of the Louisiana legislation included the Institute for Creation Research. He noted that: "The Institute was established to address the 'urgent need for our nation to return to belief in a personal, omnipotent Creator, who has a purpose for this creation and to whom all people must eventually give account.'... A goal of the Institute is 'a revival of belief in special creation as the explanation of the origin of the world.'" *Edwards*, 482 U.S. at 602 (Powell, J., concurring).

Biblically-based assumption and never seeks to disprove it, the program can not be considered as scientifically based. *See* Ex. 15.

2. The Board’s Denial of Plaintiff’s Application for a Certificate of Authority is Rationally Related to a Legitimate Governmental Interest and thus Does Not Violate the First Amendment.

The First Amendment’s free exercise of religion clause provides unwavering protection to religious belief. *Employment Div. Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). In its application for a Certificate of Authority, ICRGS characterized its proposed master’s degree program as science. Ex. 1. Yet, now before the Court, it characterizes its program as founded in religious belief, attempting to shield itself from any scrutiny by the Board. *2nd Amend. Compl.* at 7. ¶¶ 20-21. However, the United States Supreme Court has made clear the protections afforded by the First Amendment do not automatically extend to entitle the Plaintiff to unilaterally fix the terms and conditions of its dealings with the government. *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

a. Rational Basis Review.

Striking a balance between freedom of religion and the government’s regulatory authority, the Supreme Court has held that facially neutral, generally applicable laws which incidentally burden religious conduct are not subject to strict scrutiny analysis. *Smith*, 494 U.S. at 885. Such a law will withstand a free exercise challenge when it is reasonably related to a legitimate state interest. *Diaz v. Collins*, 114 F.3d 69, 71 (5th Cir. 1997) (acknowledging that *Smith* lowered the level of scrutiny to rational basis). Rationality review “is not a license for courts to judge the wisdom, fairness, or logic of government regulation.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). “The burden is on the one attacking the [regulation] to negative every conceivable basis which might support it.” *Lehnhausen v. Lake Shore Auto*

Parts Co., 410 U.S. 356, 364 (1973); see *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 84 (2000) (“When conducting rational basis review the court will not overturn. . .government action unless [it] is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government’s actions were irrational.”).

The rules at issue here are facially neutral, and Plaintiff has not argued to the contrary. With the exception of some institutions including those granting only religious degrees, all postsecondary institutions, whether secular or religious, private or public, are required to submit to the State’s standards to grant college or graduate degrees. TEX. EDUC. CODE §§ 61.0512, 61.304; 19 Tex. Admin. Code § 7.7(13). Thus, the rules and the Board’s actions consistent with them withstand First Amendment scrutiny if they are rationally related to a legitimate state interest.

b. Legitimate State Interest.

In requiring private institutions of higher education to seek certificates of authority, the Texas Legislature determined

It is the policy and purpose of the State of Texas to prevent deception of the public resulting from the conferring and use of fraudulent or substandard college and university degrees; it is also the purpose of this subchapter to regulate the use of academic terminology in naming or otherwise designating educational institutions, Because degrees and equivalent indicators of educational attainment are used by employers in judging the training of prospective employees, by public and private professional groups in determining qualifications for admission to and continuance of practice, and by the general public in assessing the competence of persons engaged in a wide range of activities necessary to the general welfare, *regulation by law of the evidences of college and university educational attainment is in the public interest. To the same end the protection of legitimate institutions and of those holding degrees from them is also in the public interest.*

TEX. EDUC. CODE § 61.301 (emphasis added).⁴

⁴ ICRGS seeks a declaration that pursuant to section 1.001 of the Texas Education Code, the Board lacked any regulatory authority over it as a privately funded institution. This argument however ignores Chapter 61 of the Education Code—The

The United States Supreme Court has acknowledged that the similar purpose of the federal Higher Education Act (assisting colleges to ensure that large numbers of youth obtain an education) was a “legitimate secular objective entirely appropriate for governmental action.” *Tilton v. Richardson*, 403 U.S. 672, 679 (1971). The Court has further held that “[t]here can be no doubt as to the power of the State, having high responsibility for education for its citizens, to impose reasonable regulations for the control” of education.” *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). And in *Brown v. Topeka Bd. of Ed.*, the Court emphasized the importance of the State’s interest: “Today, education is perhaps the most important function of state and local governments.” 347 U.S. 483, 493 (1954) (compulsory attendance laws). Finally, in *Central Dist. No. 1 Bd. of Educ. v. Allen*, the Court extended these principles to education in private schools. 392 U.S. 236, 245-47 (1968).⁵ The state’s interest in education, while not boundless, may nevertheless be compelling even when balanced against certain religious freedoms.

In light of this authority, there can be no doubt that the State has a legitimate, compelling interest in education generally, and more specifically to ensure that any degree offered in Texas is meaningful and based upon well-established curricular and instructional standards, guaranteeing that those people or entities who rely on a post-secondary degree can assume the degree holder has a certain level of qualifications and competence in his or her field. The State is further interested in “increase[ing] significantly the number of high school graduates who have mastered basic science and are prepared to pursue careers in science in our colleges and

Higher Education Coordinating Act of 1985—which grants the Board the express authority to regulate private postsecondary institutions of higher education. TEX. EDUC. CODE §§ 61.031 *et seq.* To accept ICRGS construction of the statute would require the Court to ignore principles of statutory construction. TEX. GOV’T CODE §§ 311.021(2)-(5) (it is presumed that “(2) the entire statute is intended to be effective; (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; and (5) public interest is favored over any private interest.” Accordingly, the Court should deny ICRGS’s requested relief.

⁵ At least one state supreme court has held that granting academic degrees as evidence of academic achievement is “very intimately related to the public welfare, and is unquestionably subject to regulation by the State.” *Shelton Coll. v. State Bd. of Educ.*, 226 A.2d 612, 618 (1967).

universities.” Ex. 7 at 3-4. Teachers who have received substandard degrees in science, “will not move [the State] toward that goal.” *Id.* at 4. Finally, “Standard 12 protects the Texas public by requiring that the degree level, degree designation and the designation of the major course of study accurately describe the curriculum offered in order for the institution to be granted a Certificate of Authority to operate in Texas.” Ex. 6 at 6. Thus, to have designated ICRGS’s proposed degree as a Master of Science in Science Education “would [have] be[en] misleading to the public.” *Id.* These interests are compelling and thus necessarily rationally related to a legitimate state interest.

c. Review was in furtherance of legitimate state interest.

Based on the State’s policy, statutes, and Board rule, the Board’s inquiry into Plaintiff’s degree program evaluated whether it would adequately prepare its future students to be science educators in Texas. *See id.*; Ex. 6 at 6 (“Standard 12 [now Standard 14] protects the Texas public by requiring that the degree level, degree designation and the designation of the major course of study accurately describe the curriculum offered in order for the institution to be granted a Certificate of Authority to operate in Texas.”). The Board’s review, in furtherance of State policy, determined that it would not because the degree program failed to satisfy Standard 12 (now section 7.4, 14(D)) related to the breadth and rigor of ICRGS’s curriculum. Ex. 8.⁶

The United States District Court for the Central District of California in *Association of Christian Schools International v. Stearns*, No. CV 05-6242 SJO (MANx), 2008 WL 7396967 (C.D. Cal. March 28, 2008) (“*Stearns I*”), decided a case markedly similar to this one, which the Ninth Circuit Court of Appeals recently affirmed. *Ass’n of Christian Schools Int’l*, No. 08-

⁶ ICRGS has brought a claim under the Texas Civil Practices and Remedies Code section 106.001 which prohibits officers of the State from refusing to issue to a certificate to a person because of his religion. ICR however can point to no evidence in to show that the Board’s decision to deny its application was motivated by animus or discriminatory intent toward ICRGS’s religious position. Instead, as articulated in the body of the motion and based on the undisputed evidence, the Board denied the application because it failed to satisfy curriculum standards. Ex. 7, 8.

56320, 2010 WL 107035 (9th Cir. Jan. 12, 2010). There, a group of private schools sued to have the University of California's admissions process declared unconstitutional under Free Speech, Free Exercise, Establishment, and Equal Protection clauses of the U.S. Constitution. Under the University's policy, it considered for student admission only approved high school courses to ensure that its students had the knowledge and skills to succeed in their studies at UC. The private schools claimed the University engaged in viewpoint discrimination when it refused to approve their courses for admission purposes. *Id.* at *3.

The district court noted that UC necessarily facilitate some viewpoints over others in judging the excellence of those students applying to UC. *Id.* at *8-9. Therefore, the decision to reject a course is constitutional as long as: (1) UC did not reject the course because of animus and (2) UC had a rational basis for rejecting the course." *Id.* at *9. To demonstrate animus, the court ruled Plaintiffs would have to show that Defendants rejected the challenged courses to punish religious viewpoints rather than out of rational concern about the academic merits of those religious viewpoints." *Id.* at *16. Further, any analysis of the proffered rational basis of an academic decision should show respect for the professional judgment of the decision-makers and does not give a court license "to judge the wisdom, fairness, or logic of government regulation." *Id.* at *11 (citing *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 224 (1985) and *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

Of particular significance here is the district court's discussion of two biology texts used by some schools, and the court's acceptance of the content analysis of those texts provided by the University's expert witnesses. One expert noted that a creationist biology text "characterized religious doctrine as scientific evidence, included scientific inaccuracies, failed to encourage critical thinking, and took an 'overall un-scientific approach to the subject matter,'" *Id.* at *25.

The expert's "judgment was based not on the fact that the textbooks contained religious references and viewpoints, but on [her] conclusion that [the texts] would not adequately teach students the scientific principle, methods, and knowledge necessary for them to successfully study those subjects at UC." *Id.* Two other University experts opined that "by teaching students to reject scientific evidence and methodology whenever they might be inconsistent with the Bible. . . both texts fail to encourage critical thinking and the skills required for careful scientific analysis" and "reject the methodology generally accepted in science, which relies on observation and experimentation and on the formulation of laws and theories that need to be tested rather than accepted on the basis of the Bible or any other authority." *Id.* at *26. The experts ultimately determined that "the problem is not . . . that the creationist view is taught as an alternative to scientific explanations, but that the nature of science, the theory of evolution, and critical thinking are not taught adequately." *Id.*

The district court's reasoning in *Stearns* is applicable here. Like the University, the Board evaluated whether ICRGS's proposed curriculum was likely to prepare students adequately in the principles and methods of scientific education. *See* Ex. 6 at 6 ("Students do not cover any field of science with breadth at the graduate the level."). Plaintiff's stated purpose in offering the program is two-fold: to teach students to (1) understand the universe within through biblical perspective; and (2) be leaders in science education. Ex. 6 at 6. The board was charged with reviewing ICRGS's application pursuant to Standard 12 (now 14(A) which provides in relevant part:

The quality, content, and sequence of each course, curriculum, or program of instruction, training or study shall be appropriate to the purpose of the institution and shall be such that the institution may reasonably and adequately achieve the stated objectives of the course or program. Each program shall adequately cover the breadth of knowledge of the discipline taught. . . .

19 Tex. Admin. Code § 7.5(14)(A). Compliance with former Standard 12 requires that Plaintiff's proposed program achieve both of its stated objectives and adequately cover the breadth of knowledge in the subject area. *Id.*; Ex. 6 at 4.

The panel of experts compared Plaintiff's syllabi to their home institution's science and science education syllabi and course descriptions. *See, e.g.*, Ex. 10 at 2, ¶ 10; 11 at 2, ¶ 10. Gerald Skoog, Ph. D., a science and science education professional at both public schools and at the University level for the past 50 years, reviewed the ICRGS's application and concluded with respect to Plaintiff's stated purpose of teaching students to understand the universe that:

The science courses and their embedded content and the overall mission of the Institute for Creation Research (ICR) reject the underlying principle that science works by providing "explanation through natural law." Rather, the courses, course content, and ICR mission are designed to circumvent and/or corrupt this underlying principle of science by persistently advocating and working to have science curricula emphasize that the natural world has been shaped by supernatural decisions and actions. In advocating and advancing this content and mission plus relying on methodology that is characterized by the derivation of deductions from philosophical and dogmatic axioms and the search for evidence to support literal interpretations of Genesis, much of the course content described in the ICR proposal is outside the realm of science and lacks the potential to help students understand the nature of science and the history and nature of the natural world. Furthermore, the program and courses have limited or no potential to increase the readiness of students enrolled in the program to pursue science-related careers in the state, nation, or world.

Ex. 12, Ex. 2 at 20.

Another reviewer, David Hillis, Ph. D., Professor in Natural Sciences at the University of Texas at Austin, agreed that Dr. Skoog's report is "thorough and accurate."

Ex. 11 at 3, ¶ 11. He went on to add however

. . . that the evidence in this application clearly indicates that this proposed program is not about science education. Science education emphasizes that science is learning about the unknown from a neutral perspective, relying on observable evidence and experimentation. In contrast, this program is about religion, not science. . . .The ICR program clearly does not meet the standards of the TCHEB. In particular, the proposed course of study in no way "adequately

cover[s] the breadth of knowledge of the discipline taught.” The vast majority of the proposed science courses do not resemble any offered for graduate credit by other Texas colleges and universities in breadth, depth or content, and they would not be acceptable for transfer of credit as a result. The proposed programs of study in no way would adequately prepare students in the field of science education, at any level, and certainly not at the graduate level.

Id. Ex. 1.

Likewise, C.O. Patterson, Professor of Biology at Texas A&M University, agreed with Dr. Skoog’s and Dr. Hillis’s assessment of Plaintiff’s proposed program. Ex. 10, Ex. 1. He noted, additionally, that a textbook offered in ICRGS’s “BI 501 Biological Origins” class was an introductory-level book used at Texas A&M University in its freshman biology courses. *Id.* He had similar criticisms of other textbooks used by ICRGS in its proposed Master of Science in Science Education program which ultimately lead him to conclude that “[u]se of outmoded or inapplicable textbooks, or books intended for lower-level undergraduate courses, would cause us to be very uneasy about accepting transfer credit toward a graduate degree.” *Id.*

Based upon the panel’s recommendations, Assistant Commissioner Stafford recommended to Commissioner Paredes that the Certificate of Authority be denied. Ex. 6. The Commissioner based his recommendation to the Board on his own inquiry, Stafford’s recommendation, as well as the evaluation of the scientists and science educators who reviewed the Plaintiff’s curriculum for compliance with the Standards. Ex. 7 at 3; 13 at 157, 159-160. In his recommendation, Commissioner Paredes concluded: “The key point here is this: the proposed Master of Science in Science Education program inadequately covers key areas of science and their methodologies and rejects one of the foundational theories of modern science; hence, the program cannot be properly designated as either ‘science’ or ‘science education.’” Ex. 7 at 5.

Plaintiff has not alleged that either the experts, Assistant Commissioner Stafford, Commissioner Paredes or any Board member was motivated by animus in reaching their conclusions. And there is no material credible evidence upon which any such claim could be made. While Plaintiff does assert that the expert review panel was somehow biased,⁷ that is a baseless, conclusory assertion for which Plaintiff can offer no evidentiary support.

Ultimately, the Board's decision to accept Commissioner Paredes's recommendation, based in part on the expertise of science educators, is an academic decision, made in good faith as an exercise of his professional judgment and due a substantial measure of discretion. *See Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). Like the private schools in *Stearns*, Plaintiff can come forward with no evidence to support its assertion that the Board rejected its program because it is a religious one, and the undisputed, conclusive evidence shows that the Board denied the certificate because Plaintiff failed to demonstrate that the proposed degree program met acceptable standards of science and science education. Moreover, without any evidence of bias or animus, Plaintiff cannot demonstrate that the Board's actions were anything other than in furtherance of the State's compelling interests in education and preserving the integrity of educational degrees. *See supra*. Accordingly, Defendants respectfully request the Court to grant summary judgment in their favor on Plaintiff's "viewpoint discrimination" claims based in the First and Fourteenth Amendments of the United States and Texas Constitutions.⁸

⁷ ICRGS argues that the panel was not balanced according to Texas Government Code, section 2110.002, which requires that the composition of an advisory committee used by a state agency must have industry and consumer of the service provided by the industry. *Plaintiff's 2nd Amend. Comp.* at 3, ¶ 9. Plaintiff ignores the previous section, which provides that a state agency establishes an advisory committee for purposes of section 2110.002 only when: "1) state or federal law has specifically created the committee to advise the agency; or (2) the agency has, under state or federal law, created the committee to advise the agency." TEX. GOV'T CODE § 2110.001. ICRGS has not pointed to a single state or federal law creating the panel or under which the science and science education experts were appointed. Neither state nor federal law created the panel nor was it created or established by the Board under any state or federal law.

⁸ Plaintiff also generally asserts that its free speech, free association and equal protection rights were violated when the Board denied its application for a Certificate of Authority. As best Defendants can discern, these claims are based on the same facts as those supporting its religious discrimination claim. The analysis for each claim is the same. *See Locke v. Davey*, 540 U.S. 712,

B. EVEN THOUGH ICRGS HAS NEITHER A PROTECTED PROPERTY INTEREST IN A CERTIFICATE OF AUTHORITY NOR A FUNDAMENTAL RIGHT TO ONE, THE BOARD DID NOT VIOLATE ITS DUE PROCESS RIGHTS IN DENYING ITS APPLICATION.

ICRGS contends that the Board used arbitrary norms and procedures to unjustly applied its certification rules in denying it a Certificate of Authority. *Second Am. Complaint* at 16, ¶ 40(c). It further asserts that by disapproving its “academic viewpoint,” the Board denied it due course of law. *Id.* at ¶ 41(d). It is unclear whether ICRGS is making a procedural or substantive due process claim. Either way, ICRGS’s claims are without any merit.

1. Procedural Due Process.

”Procedural due process requires notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). To bring a procedural due process claim, a plaintiff must first identify a protected life, liberty or property interest and then prove that the governmental action resulted in a deprivation of that interest. *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 700 (5th Cir. 1991). Plaintiff has not pointed to any authority whatsoever that shows it has a protected property interest in obtaining a Certificate of Authority to offer a Master’s of Science in Science Education in Texas. Moreover, “[p]rivileges, licenses, certificates, and franchises now do qualify as property interests for purposes of procedural due process. But due process only becomes relevant where such property is “deprived” *e.g.*, where welfare benefits are terminated, where public employees are discharged, or where licenses are revoked.” *Wells Fargo Armored Serv. Corp. v. Georgia Public Servs. Comm’n*, 547 F.2d 938, 941 (1977) (internal citations omitted). Because ICRGS never had a Certificate of Authority in

721 n.3 (2004) (“Because we hold that the program is not a violation of the Free Exercise Clause. . .we apply rational-basis scrutiny to his equal protection claims. For the reasons stated herein, the program passes such review.”); *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 491 (8th Cir. 1987) (“the state’s interest in compulsory education which is served by the reporting requirements justifies any alleged burden on the plaintiffs’ freedom of association.”) Accordingly, for the reasons stated in Part V, subpart A, at 9-18, the Board is entitled to summary judgment on these claims.

the first place, it has not established that it has a protected property interest deserving of due process protections.

Furthermore, even assuming ICRGS could establish a protected property interest in obtaining a Certificate of Authority, the evidence conclusively establishes that it received process in excess of any constitutional minimum. *See* Part III, *supra*. The Court should therefore enter summary judgment in the Defendants' favor on ICRGS's procedural due process/due course of law claims.

2. Substantive Due Process.

In what appears to be a substantive due process claim ICRGS asserts that the Board acted arbitrarily in denying it a Certificate of Authority. *2nd Amend. Compl.* at 16, ¶40(c). ICRGS, however, has no fundamental right to a Certificate of authority and when, as here, no fundamental right is implicated, substantive due process concerns are satisfied if the state action complained of is "supportable by some legitimate goal and . . . the means chosen for its achievement [is] rational." *Martin v. Memorial Hosp.*, 130 F.3d 1143, 1149-50 (5th Cir. 1997) ("it is of no consequence that the state's method is over-inclusive or under-inclusive, so long as its legitimate goal may be attained by the means chosen"); *Brennan v. Stewart*, 834 F.2d 1248, 1256 (5th Cir. 1988); see also *De Fuentes v. Gonzales*, 462 F.3d 498, 505 (5th Cir. 2006) ("To establish a substantive due process violation, a plaintiff must first . . . carefully describe that right . . . If the right . . . is fundamental-we subject it to more exacting standards of review. If it is not, we review only for a rational basis."). Here, the procedure challenged is rationally related to the state's compelling interest in education, and preserving the integrity of educational degrees, and protecting the public. *See* Part V, subpart A(2)(b) *supra*.

C. AS A MATTER OF LAW, ICRGS CANNOT ESTABLISH A VIOLATION OF THE TEXAS RELIGIOUS FREEDOM RESTORATION ACT.

The Texas Religious Freedom Restoration Act provides, in part, that the government “may not substantially burden a person’s free exercise of religion [unless it] demonstrates that the application of the burden to the person . . . is in furtherance of a compelling governmental interest; and, . . . is the least restrictive means of furthering that interest.” TEX. CIV. PRAC. & REM. CODE § 110.003. Application of the TRFRA involves “four questions, each succeeding question contingent on an affirmative answer to the one preceding: Does the [governmental action] burden [the plaintiff’s] free exercise of religion as defined by the TRFRA? Is the burden substantial? Does the [governmental action] further a compelling governmental interest? Is the [action] the least restrictive means of furthering that interest?” *Barr v. City of Sinton*, 295 S.W.3d 287, 299 (Tex. 2009).

1. Plaintiff has not plead a burden on the free exercise of its religion.

There is no “bright line rule” for determining whether a plaintiff has alleged that the free exercise of its religion has been burdened and such an inquiry is a fact-specific one. *Barr*, 295 S.W.3d at 302. The Court, however, noted with approval that the Fifth Circuit’s holding under the Religious Land Use and Institutionalized Persons Act, “a government action or regulation creates a ‘substantial burden’ on religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.” *Id.* (citing *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)). “The burden must be measured, of course, from the person’s perspective, not the governments.” *Id.*

In *Merced*, the Fifth Circuit overturned the district court’s conclusion that the City’s ban on animal sacrifice within its limits did not burden Merced’s free exercise of religion because he never testified that religious leaders told him to sacrifice at his Eules home. *Merced v. Kasson*,

577 F.3d 578, 591 (2009). It based its conclusion in part on the fact that the undisputed evidence shows that animal sacrifice was essential to Merced's religion, and that Merced testified "he ceased to perform Santeria rituals outlawed by the Eules ordinance. . . ." *Id.*

Here, ICRGS contends the denial of a certificate of authority to offer a Master of Science in Science Education degree "constitute[s] an undue and substantial burden on ICRGS's right and equal opportunity...to offer such a graduate science education degree program, in Texas. . .without being conditionally required to abandon or compromise ICRGS's 'integrated' Biblical/scientific creationism tenets." However, to conduct the type of fact-intensive analysis the Texas Supreme Court requires to determine whether a person's religious beliefs were substantially burdened, a TRFRA plaintiff must allege that its particular religious beliefs mandate the burdened religious action. *Harris County Medical Examiner Luis Arturo Sanchez, M.D. v. Saghian*, No. 01-07-00951-CV, 2009 Tex. App. Lexis 7944, * 26 (Tex. App.—Houston October 8, 2009). ICRGS has not alleged that its unspecified religion requires that "creationism" be labeled "science" or that it be taught as "science." Without such an allegation or supporting proof, Plaintiff can not further credibly argue it would either have to change, halt, or violate its religious practice to obtain the governmental benefit it seeks (a certificate of authority to offer a Master's of Science in Science Education). *See Merced*, 577 F.3d at 591 ("Merced cannot perform the ceremonies dictated by his religion. This is a burden, and it is substantial."). Accordingly, Plaintiff has failed to state a claim under the TRFRA upon which the Court could grant it relief, and Defendants request the Court to dismiss this claim. FED. R. CIV. P. 12(c).

2. Assuming Plaintiff has properly plead a burden on its free exercise rights, any such burden is not substantial.

The Texas Supreme Court and the Fifth Circuit applying state law define a burden as substantial when it is “real” and “significant.” *Merced*, 577 F.3d at 588; *Barr*, 295 S.W.3d at 301. “A restriction need not be completely prohibitive to be substantial; it is enough that alternatives for the religious exercise are severely restricted.” *Barr*, 295 S.W.3d at 305.

The Board in denying ICRGS’s application for a certificate of authority did not impose a substantial burden on ICRGS’s free exercise of its religion. Assuming ICRGS’s religion requires it to teach Biblical creationism as a religious-based program, ICR could have applied for a certificate of authority to teach its view of creationism through, for example, a Master of Arts program in Creation Studies. *See* Ex. 12, Ex. 2 at 19 (recognizing alternatives available to ICRGS).⁹ The Board has not stopped ICR from completely operating in Texas. It has simply refused to permit ICRGS to label its program of religious instruction as “science.” *See Elijah Group, Inc. v. City of Leon Valley, Tex.*, No. SA-08-CV-0907 OG, 2009 WL 3247996 (W.D. Tex. Oct. 2, 2009) (basing holding that burden not substantial because record showed other locations where church could hold services). Moreover, ICRGS, as a religious institution *offering only a religious degree*, would be exempt from the requirement that it obtain a Certificate of Authority to offer those degrees in Texas. 19 Tex. Admin. Code § 7.4(a)-(g). Should ICRGS exercise either option, any alleged burden on its ability to freely exercise its religion would be lifted and it would be likely permitted to deliver its religious message in an educational forum.

⁹ Of course nothing prevents ICRGS from teaching any of its viewpoints—it is merely the state’s decision not to imbue ICRGS’s program with the State’s Master of Science in Science Education degree at issue here.

3. Compelling Governmental Interest.

“TRFRA places on the government the burden of proving that the burden it created both advances a compelling governmental interest and is the least restrictive means of doing so.” *Merced*, 577 F.3d at 591-92. More than “general platitudes” are required to justify the governmental burden; the government must show by specific evidence that the Plaintiff’s religious practices jeopardize its stated interests. *Id.* at 592.

The State certainly has a general, compelling interest in educating its citizens and in preserving the integrity of degrees offered at institutions of higher education. *See* Part V, subpart A(2)(b) *supra*. Moreover, specifically with respect to ICRGS’s and its proposed program, were it permitted to go forward in offering its religious degree relabeled as a Master’s of Science in Science Education, a prospective student might be misled to understand that upon receiving such a degree from ICRGS he would have a proficiency in Science and Science Education that, in reality, he would not. *Id.*

4. Least Restrictive Means.

“[E]ven when the government acts in furtherance of a compelling interest, it must show that it used the least restrictive means of furthering that interest.” *Barr*, 295 S.W.3d at 308. Although the Board refused to grant ICRGS a certificate of authority to offer its religious educational program as a Masters of Science in Science Education, had ICRGS instead submitted its application for a Master of Arts in Creation Studies, such a program may well have been approved. Further, to the extent that ICRGS were to offer its degree as a purely religious one, it would be exempt from this requirement. 19 Tex. Admin. Code § 7.4(a)-(g).

In *Merced*, the Fifth Circuit held that the city could create a permit system allowed “Santeria adherents [to] comply with conditions designed to safeguard the city’s interest. . .and

in return are allowed to sacrifice animals as dictated by their religion.” 577 F.3d at 595. Here, the Board has done just what the Fifth Circuit suggested the City of Euless should do. By excluding purely religious institutions’ religious degree programs from the certification process, the Board has (in ICRGS’s terms) “accommodated” the religious beliefs of such institutions. Similarly, the potential availability of another certification that better corresponds with the actual proposed degree plan is a less restrictive means on ICRGS religious exercise. The Board has clearly made available religious neutral alternatives that satisfy the State’s interests but also “accommodate” those of ICRGS.

D. TEXAS HIGHER EDUCATION COORDINATING BOARD RULE 7.7(12)(D) IS NOT UNCONSTITUTIONALLY VAGUE.

Plaintiff additionally asserts that Rule 7.5(14)(a) (formerly rule 7(12)(D)) is unconstitutionally vague. Although its argument is muddled, rambling, and confusing, a broad construction of Plaintiff’s argument reveals that its vagueness challenges are both facial and as applied.

1. Facial Challenge Standards.

Plaintiff contends that the Board’s rules are facially void-for-vagueness.¹⁰ “In a facial challenge to the overbreadth and vagueness of a law, a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.” *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982). “In evaluating a facial challenge to a state law, a federal court must. . . consider any limiting construction that a state court or enforcement agency has proffered.” *Id.* at 494 n.5. If the conduct does not reach a

¹⁰ Plaintiff has attempted to challenge the rules and statues at issue here on the grounds that, as applied to it, they are unconstitutionally vague. However, because it has not offered a Master of Science in Science Education degree without a Certificate of Authority from the Board, the penalties to which it may have been subjected had it chosen to offer that degree in Texas have not been imposed. Thus, ICRGS’s as-applied challenge is inappropriate. *See United States v. Gaudreau*, 860 F.2d 357, 360-61 (10th Cir. 1989)(holding that a plaintiff must allege that it has been subjected to some penalty for violating the law at issue in order to bring an “as applied” challenge)(cited with approval in *Roark v. Hardee LP v. City of Austin*, 522 F.3d 533, 546 (5th Cir. 2008)).

substantial amount of constitutionally protected conduct, then the challenge fails automatically. *Id.* However, the inquiry does not end there. The court should then examine the facial vagueness challenge and uphold it “only if the enactment is impermissibly vague *in all its applications.*” *Id.* at 494-95 (emphasis added). The void-for-vagueness doctrine requires that a statute define the prohibited conduct “in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). “Although the doctrine focuses on both actual notice to citizens and arbitrary enforcement, [the United States Supreme Court] has recognised [] that the more important aspect of the vagueness doctrine ‘is not actual notice, but the other principal element of the doctrine—the requirement that the legislature establish minimal guidelines to govern law enforcement.’” *Id.* at 358 (citing *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

2. Plaintiff Has Failed to Establish that the Rules and Statutes at Issue Here Are Void-for-Vagueness.

Plaintiff in this case has failed to meet its burden to show that the rules and statutes in this case are void-for-vagueness. First, Plaintiff conclusorily asserts that its freedom of speech, association, and religion are infringed by the statutes and rules.¹¹ Even assuming that its assertion is true, however, Plaintiff has made no contention that the rules and statutes implicate any other constitutionally protected conduct other than their own. In fact, the rule on its face makes clear that it is not unconstitutional in every single application by exempting the certificate of authority requirement an institution offering only religious degrees. 19 Tex. Admin. Code § 7. (9)(1)(2009). By exempting institutions that offer only religious degrees, the section avoids any entanglement whatsoever with otherwise constitutionally protected conduct. Because Plaintiff has failed in its burden of proof to show that the rules are vague in every single instance, and

¹¹ Defendant wholly denies the assertion that the rules violate the Plaintiff’s rights in any way. *See* 19 Tex. Admin. Code § 7.4 (g) (2009).

because the statute exempts institutions that offer only religious degrees from its scope, the Plaintiff's facial challenge must fail.

i. Plaintiff Has Failed to Show that the Statutes and Rules Reach Constitutionally Protected Speech.

Plaintiff asserts that without a Certificate of Authority it is unable to communicate its religious convictions and is prohibited from practicing its religion in violation of the First Amendment. The Plaintiff's argument however, misconstrues the requirements of the statute. The rules do not regulate speech; they regulate conduct, *i.e.* the offering of a degree without a certificate of authority. Under the rules, an applicant is still free to express whatever views they have on religion. *See Roark & Hardee LP*, 522 F.3d at 550 (ordinance requiring person to take necessary steps to stop another person from smoking regulates conduct) (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 60 (2006)). Accordingly, no constitutionally protected speech is implicated by the rules and statutes at issue here, and Plaintiff has failed to establish its vagueness challenge.

ii. The Board's Rules Give Ample Notice of the Requirements for a Certificate of Authority.

Although the rules and statutes do not threaten constitutionally protected speech, the Court must still consider whether they are impermissibly vague in all their applications, "keeping in mind that [the Court] must first apply the statute to the Plaintiff['s] conduct before considering hypothetical scenarios. *Id.* at 551. "In evaluating vagueness, a reviewing court should consider: (1) whether the law 'give[s] the person of ordinary intelligence a reasonable opportunity to know what is [required or] prohibited;' and (2) whether the law provides explicit standards for those applying them to avoid arbitrary and discriminatory applications." *Id.*

The rules here meet both requirements. Specifically, the rules make clear that the standards by which an institution's curriculum is judged must cover the breadth of knowledge of the discipline taught. 19 Tex. Admin. Code § 7.4(14)(A). Plaintiff focuses solely on that language contained in section 7.5(14)(A) for its contention that it is unable to determine what its Master of Science curriculum must look like to meet this standard while completely, conveniently, ignoring the remainder of that section. A review of the entire section shows that the Board's standards measure an applicant's curriculum against the "generally accepted administrative and academic practices of accredited postsecondary institutions in Texas." *Id.* § 7.5. The rules go on to notify an applicant that those standards "are generally set forth by institutional and specialized accrediting bodies and the academic and professional organizations." *Id.* This might include Science Education syllabi and course descriptions from other postsecondary educational institutions, as well as advice from the Board itself.¹²

The United States Supreme Court has consistently held that statutes are sufficiently certain when they employ words or phrases that point to a well-settled common meaning. *See, e.g. Rose v. Locke*, 423 U.S. 48, 50 (1975) ("crimes against nature" sufficiently defined to include conduct of defendant in light of prior state court decisions). The Rules' reference curriculum of other institutions of higher education and the requirements of accrediting institutions pointed ICRG and other applicants to the common understanding of various curriculum in Texas. These curriculum and standards are publicly available. Moreover, for the Board's rules to articulate the standards for every single academic subject that is taught in institutions of higher education

¹² ICRGS claims that it could not know what's required of it to receive a Certificate of Authority. This contention is completely disingenuous and self-serving given the facts in this case. It is undisputed that the Board, in reviewing ICRGS's application, assembled a team of scientists to "review in depth the proposed curriculum and its compliance with the standards, especially Standard 12 (relating to curriculum)." Appdx 6 at 2. When that team expressed to ICRGS its concerns about its proposed curriculum, "ICR was given an opportunity to respond to those concerns." *Id.* ICR temporarily withdrew its application and provided new materials which included a renewed set of course syllabi. Thus, there can be no doubt that ICRGS was given guidance on how to meet the curriculum requirements by the very people who were evaluating them.

would wholly unreasonable, a near impossible feat. In addition, any danger of arbitrary or discriminatory enforcement is unfounded. The rules and statute leave no doubt of what behavior is prohibited: offering a degree without a certificate of authority may subject to the postsecondary educational institution to civil and criminal penalties. 19 Tex. Admin. Code § 7.5. Indeed, throughout its pleadings, ICRGS claims that it will be punished should it go forward and offer the degree without the proper certification. Thus, ICRGS has more than adequate notice to not engage in the prohibited conduct. And only upon a determination that a postsecondary educational institution has violated the rule, might the statutory penalties be assessed. Thus the penalties will be not assessed in an arbitrary or discriminatory manner.

VII. CONCLUSION

According to ICRGS, “because [it] has set forth relevant curriculum and qualified instructors, prepared to transmit educational content to qualified students who voluntarily seek to master that educational content from a conspicuously creationist graduate school, that should suffice in Texas, regardless of the uncomfortable fact that ICRGS affirms and teachers a minority viewpoint about cosmic and human origins and the worldwide Flood.” *2nd Amend. Compl.* at 12, ¶ 32. This statement in ICRGS’s complaint makes clear that it seeks to use its religious viewpoint as a sword and a shield, effectively coercing the State to allow it to teach its religiously-based “science” program, even though the program fails to meet Board curriculum standards. However,

government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities--from social welfare programs to foreign aid to conservation projects--will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all

citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (U.S. 1988)

ICRGS can point to no evidence that the Board denied its application for a Certificate of Authority to offer a Master of Science in Science Education degree in Texas based on any animosity or bias toward its religious principles. The evidence conclusively demonstrates that the Board, in exercise of its statutorily-granted gatekeeping authority and based on the recommendations of a team of experts in the field, determined that the program failed to satisfy its curriculum standards. For these reasons, as well as the others articulated in this motion, Defendants respectfully request the Court should decline ICRGS's request that it second-guess this determination and grant summary judgment in their favor.

Respectfully submitted,

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Certificate of Service

I certify that on the 7th day of May, 2010 I electronically filed with the Clerk of the Court using the CM/ECF system a copy of Defendants' Motion for Summary Judgment which will send notification of such filing to the following:

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And by U.S. Certified Mail, Return Receipt Requested to:

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