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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LARRY CALDWELL,

Plaintiff,

vs.

ROSEVILLE JOINT UNION HIGH SCHOOL DISTRICT; JAMES JOINER and R. JAN PINNEY, in their official capacities as members of the Board of Education; TONY MONETTI, in his official capacity as Superintendent; STEVEN LAWRENCE in his official capacity as Assistant Superintendent for Curriculum and Instruction; DONALD GENASCI, in his official capacity as Deputy Superintendent for Personnel and Chief Compliance Officer; RONALD SEVERSON, in his official capacity as Principal of Granite Bay High School; and DOES 1-10,

Defendants.
_____/

No. 2:05-CV-00061-FCD-JFM

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION; FOR FAILURE TO STATE A CLAIM; FOR FAILURE TO STATE A SHORT AND PLAIN STATEMENT FOR RELIEF; AND FOR FAILURE TO COMPLY WITH RULE 10(a)

[Rule 12(b)(1); Rule 12(b)(6); and Rule 8(a); and Rule 10(a)]

DATE:	**September 23, 2005**
TIME:	**10:00 a.m.**
COURTROOM:	**2**
TRIAL:	**None Set**

I.

STATEMENT OF THE CASE

A. Procedural Background.

The Plaintiff, LARRY CALDWELL (hereafter "Caldwell"), has filed a Third Amended Complaint (hereafter "TAC") in this action, pursuant to the order of this Court entered on June 30,

2005. The Court has ordered Mr. Caldwell to comply with the requirements of Rule 8(a). The defendant's prior motion to dismiss was vacated as moot, with permission to renew said motion after the filing of the plaintiff's TAC. [See: Order, June 30, 2005.]

The TAC alleges (asserts) various deprivations of United States Constitutional Rights, as well as a California pendent state law claim, under California Code of Civil Procedure § 526a, which is commonly referred to as a "taxpayer's claim," all pursuant to and based upon 42 U.S.C. § 1983. (See: Claims for Relief, Nos. One-Six) In addition, Mr. Caldwell is asserting California Constitutional rights and California statutory claims, under the purview of 42 U.S.C. § 1983 . (See: Claims for Relief, Nos. One-Six). Mr. Caldwell is seeking damages, declaratory relief, and injunctive relief for the alleged violations of his federal Constitution Rights under the First Amendment and the Fourteenth Amendment, as well as violations of various provisions of the California State Constitution and various California state statutes. [See: Prayer for Relief, Paras. Nos. 1-25.]

In addition, the plaintiff has now changed the caption of the TAC, without prior leave to amend from the Court, to design the individually named defendants as being named in their "official capacities as member of the Board of Education," and to also add Doe Defendants, 1 through 10, wherein in the Original and Second Amended Complaints, the individually named defendants were only named as "individuals" and there were no "Doe" defendants included. These allegations of the "official capacity" of the individual defendants are now alleged and included in the specific allegation contained in the TAC. [See: TAC, Paras. Nos. 5-11] The District believes that this addition of "new parties" (doe defendants) and changes in the capacity in which the parties were originally named in this action, makes the TAC procedurally defective and requests that the Court order the TAC stricken, pursuant to Rule 10(a).

B. Factual Background.

Mr. Caldwell has alleged that he is an individual and a resident of Placer County, California. [TAC, Para. 3.] He further alleges that he is liable to pay a "tax" (although it is not specifically identified) for the support of the Roseville Joint Union High School District (hereinafter "District" and/or "Defendants"), which is a California public school district entity. [TAC, Para. 4.] He further alleges that

he is the parent of a child (unidentified and not a party to this action), who is enrolled in the District. [TAC, Para. 3.] Mr. Caldwell is also a licensed attorney with the State Bar of California, Bar No. 88867, which is not alleged in the TAC, but which is reflected by the inclusion of his California State Bar No. 88867 in the title of the TAC. (See: TAC, Page 1.) Mr. Caldwell, appeared originally in this matter in pro se, but who he now had associate counsel, Kevin T. Snider and Mathew McReynolds, both of the Pacific Justice Institute. The TAC is signed by attorney Kevin T. Snider. (See: TAC, Pages 1 and 31.)

The Defendant, Roseville Joint Union High School District, is a public school district organized and existing under the laws of the State of California. [See: TAC, Para. No. 4.] The six individually named defendants, JAMES JOINER, R. JAN PINNEY, TONY MONETTI, STEVEN LAWRENCE, DONALD GENASCI, and RONALD SEVERSON, are either members of the District's School Board, Superintendent of the District, Assistant or Deputy Superintendents, and/or are Principals of District High Schools. They are all officials and/or high level management employees of the District. They are now all being sued only in their "official capacities" and not in their "individual capacities." [See: TAC, Paras. Nos. 5-10, inclusive.] Please note that in the prior Second Amended Complaint these individually named parties were also being sued in their "individual capacities." The Court is requested to take Judicial Notice of the prior Second Amended Complaint. [Federal Rules of Evidence, Rule 201.]

The events giving rise to the TAC are now alleged to have occurred between June 3, 2003 and June 1, 2004. [TAC, Para. 14.] Mr. Caldwell alleges that he sought to exercises his rights as a citizen, parent and taxpayer in an "effort to improve science education at RJUHSD." [TAC, Para. No. 14.] He sought to have the District adopt his "Quality Science Education Policy" (hereafter "QSE Policy"), which would "change how Darwin's theory of evolution is taught in biology classes, to include presentation of some of the scientific weaknesses of evolution along with the scientific strengths." [TAC, Para. No. 14.]

Mr. Caldwell further alleges that: "Caldwell's science education proposal was strictly secular in content with the strictly secular goal of providing students a more thorough understanding of the theory of evolution, and to enhance student's critical thinking skills in the process." [TAC, Para. 14.]

He further wanted the District to adopt his proposed "supplementary instructional materials" (hereafter "QSE Instructional Materials") that were "designed to cover some of the scientific evidence relevant to the theory of evolution that was not covered in the District's biology textbook." He alleges that these materials are "strictly secular" in content, without reference to religious beliefs, tenets or sacred texts. [TAC, Para. 15.]

Thereafter, the TAC describes the various steps that Mr. Caldwell pursued with the District to have his QSE Policy placed on a regular agenda of the School Board, starting on or about August 5, 2003. [TAC, Para. Nos. 16-28, Inclusive.] He admits in the TAC that his QSE Instructional Materials were in fact placed on the September 2, 2003 board meeting agenda. [See: TAC, Para. No. 18.] He further admits that his QSE Policy was placed on the May 4, 2004 regular school board meeting. [TAC, Para. No. 25.]

Mr. Caldwell then sets forth allegations that he was not allowed to participate in and/or to have his QSE Instructional Materials at various "curriculum instruction team" meetings at Granite Bay High and at other District sites. [TAC, Para. Nos. 29-37.] However, again he admits that the topic was in fact placed on the December 3, 2003, curriculum instruction team meeting. [TAC, Para. No. 35.] He is alleging the District was "hostile to Caldwell's viewpoint on how evolution should be taught in biology," as expressed in his proposed QSE Policy and his accompanying QSE Instructional Materials. [TAC, Para. No. 36.]

Next, Mr. Caldwell alleges that he was not permitted to engage in a "instructional materials challenge," which is a procedure available to parents and other citizens in the District. This is a form of "internal administrative procedure (remedy)" available to Mr. Caldwell to redress his grievances about the materials in the Biology and Science Curriculum in the District. [See: TAC, Para. No. 38.] However, please note that he admits that he did, in fact, engage in this administrative procedure (remedy), commencing on or about "September 2003," wherein he challenged the District's Holt Biology Textbook, on the grounds that "its presentation of evolution was not accurate, objective and current in compliance with the California Education Code." His proposed solution was to adopt his QSE Instructional Materials to be used with the Holt Biology Textbook. [TAC, Para. Nos. 39-40.]

Mr. Caldwell further alleges that his administrative materials and instructional challenge was

allowed to proceed on October 29, 2003. [TAC, Para. No. 41.] He alleges that he was in fact allowed to present power point presentations and that one of his "science experts" was allowed to also make a power-point presentation at the October 29, 2003 District Science Teachers Meeting. [TAC, Para. No 41.] He also alleges that during this meeting that many of the participants asked questions and made comments to the effect that his proposed instructional materials advanced and advocated "Christian religious beliefs" and were in fact affiliated with the "religious science views" of another of his alleged experts, Dr. Hunter, and of the Discovery Institute, and that materials from that organization were included in Caldwell's presentations and in his QSE Policy and QSE Instructional Materials. [TAC, Para. No. 42.]

Mr. Caldwell then alleges that On December 15, 2003, the nineteen science teachers from the District Science Teachers Meeting had issued a written statement rejecting his challenge to Holt Biology Textbook. Thereafter, Mr. Caldwell alleges that the District did not, or would not, accord him any further "administrative levels of review" related to his Holt Biology Textbook challenge. [TAC, Para. Nos. 43-47, Inclusive.] Also, he alleges that between December 30, 2003 and April 9, 2004, that the District did not respond or change any "administrative" decisions and that on April 9, 2004, the District denied each of Caldwell's "administrative complaints." [TAC, Para. No. 47.]

It should be noted that Mr. Caldwell has not alleged that he sought any judicial review of this "administrative proceeding and decision" in Placer County Superior Court by way a Writ of Mandate," nor that he sought any relief from the California State Department of Education. This is because he did not exhaust his administrative or state law judicial remedies. This is an admission on his part (that he has failed to exhaust his administrative remedies). He has not properly alleged any legal excuse for failing to seek relief in Placer County Superior Court, and/or with the California State Department of Education. [TAC, Para. Nos. 51-53.]

Mr. Caldwell then alleges that there is a "disagreement" between the parties regarding what Caldwell alleges is the District's practices and policy of taking into consideration the actual or perceived religious beliefs, affiliations, and motivations, and "religious and political viewpoints of private citizens, such as Caldwell, it making public policy decisions regarding curriculum and instructional materials used in classrooms." [TAC, Para. No. 48.] He further alleges that the District

has interfered with his rights, and the rights of "other members of the public" to participate in "public debates and processes" in the District regarding "curriculum decisions and instructional materials," without suffering violation of the free exercise of their religions as guaranteed by the United States and "California Constitutions." [TAC, Para. No. 48.]

Lastly, Mr. Caldwell alleges, based upon information and belief, that the conduct of the District's employees (apparently acting in their "official capacities") was "performed pursuant to established policies, practice or customs of RJUHSD." [TAC, Para. No. 49.] Please note that no specific policy, practice or custom is actually alleged by the Caldwell. [TAC, Para. No. 49.] He then alleges that he had been "harmed, intimidated, distressed and harassed and seek nominal damages of $100.00 for the violation of his "United States Constitution" right to equal protection of the law. [TAC, Para. No. 49.] He further claims that he has suffered, and will suffer irreparable harm, for violations of the "equal protection clause" of the United States Constitution and the California Constitution, and that he is entitled to declaratory and injunctive relief to prevent such future violations. Please note that the does not allege any facts that set forth any alleged future violations of any of his constitutional rights. [TAC, Para. Nos. 49-50.]

C. Caldwell's Claims/Contentions.

1. First Claim for Relief.

This claim states that the individual defendants, Joiner, Pinney, Monetti, Lawrence, Genasci and Severson, are being sued in their official capacities under 42 USC § 1983, and that the District if being sued for the "official" conduct of the individual defendants. [TAC, Para. Nos. 55-56.] This claim alleges a deprivation of Free Speech based on First Amendment, and also based on Free Speech provisions of California Constitution. [TAC, Para. Nos. 57.]

2. Second Claim for Relief.

Caldwell is claiming a deprivation of his First Amendment right to petition the government, and also "parallel rights" of petition, instruction and access to government information under Art. 1, Sec. 3, of California Constitution. All defendants are alleged to be acting in their official capacities. [TAC, Para. Nos. 59-62, Inclusive.]

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3. Third Claim for Relief.

In this claim, the plaintiff is again alleging official conduct by all defendants, under 42 USC § 1983, that deprived him of his rights under the Establishment and Free Exercise Clauses of the First Amendment, through the Fourteenth Amendment, and "under the religious freedom provisions of the California Constitution." [TAC, Para. Nos. 63-66, Inclusive.]

4. Fourth Claim for Relief.

All defendants are sued in their official capacities in this claim, and Caldwell is alleging that his right to "equal protection under the law" guaranteed by fourteenth Amendment of the United States Constitution, the California Constitution, the California Education Code, and"various board policies, staff rules and procedures of the District" in the course of Caldwell's "year-long" effort to persuade the District to adopt this science education proposals. [TAC, Para. Nos. 67-71, Inclusive.]

Also, Caldwell is claiming that the denial of equal protection was "motivated" by the defendants' hostility to and disapproval of Caldwell's Christian religious beliefs and viewpoints, also based on hostility to and discrimination against Caldwell's political viewpoint on science education. [TAC, Para. No. 71.]

5. Fifth Claim for Relief.

Caldwell is alleging the "official capacities" of all defendants, and that he was deprived of his rights to procedural due process under the Fourteenth Amendment to United States Constitution. [TAC, Para. Nos. 72-75, Inclusive.]

6. Sixth Claim for Relief.

Mr. Caldwell is again alleging the "official capacity" of the defendants in this Sixth Claim for Relief. [TAC, Para. No. 77.] The essence of the allegations are that "tax dollars" have been spent by the Defendants to "engage" in unlawful activities, as described in the TAC, and that this is an illegal expenditure of , waste of , or injury to the estate, funds or other property of the District. [TAC, Para. Nos 78-80, Inclusive.]

The plaintiffs seeks a judgment to restrain and prevent the illegal expenditure of said funds, pursuant to California Code of Civil Procedure § 526a, and Caldwell claims that the constitutional rights of "citizens" (federal and state) will be violated, and he incorporates and references the

"constitutional right" set forth in his First-Fifth Claims for Relief. [TAC, Para. Nos. 80-81.]

Thereafter, Mr. Caldwell alleges a "disagreement" over the proper interpretation of the "rights of the members of the public to place an item on the school board agenda," under California Education Code § 35145.5. [TAC, Para. No. 82.] He also alleges a "disagreement" as to the interpretation of the "rights of parents and members of the community to have the opportunity to have involvement in the selection of instructional materials," under California Education Code § 60002. [TAC, Para. No. 83.] He also asserts that there is a similar "disagreement" about the rights or parents and members of the public to set agendas for and to participate in "public debates" at the curriculum instructional team meeting at Grant Bay High School and other parent-teacher advisory councils at other high schools in the District. [TAC, Para. No. 84.]

Mr. Caldwell alleges that he and "members of the public" will continue to suffer irreparable harm due to a deprivation of federal and state constitutional rights; that as a taxpayer he has "standing" to bring and seek this relief under California Code of Civil Procedure § 526a; and that the Court should grant injunctive relief to prevent any such "illegal" expenditure of District funds, until the District permits unrestricted public participation in the setting of school board agenda items, unrestricted political and religious debate at school board meetings, as well as unrestricted public participation (debate) in the selection of instructional materials for the District high school curriculum, unrestricted public participation (debate) in the curriculum instructional team meetings and unrestricted public debate in parent advisory council meetings. [TAC, Para. Nos. 87-90, Inclusive.]

He is predicating his California Taxpayer's Claim on both the United States Constitution and on the California State Constitution, claiming violations of Free Speech, "Religious Freedom," Equal Protection and "Due Process." [TAC, Para. No. 89.] Apparently, the import of his allegations is that he (and the general public and all parents) should have the right to unlimited debate on these issues, as well as to being able to advance a particular religious belief, and to impose this religious belief on the District by converting the School Board agenda, meetings, curriculum meetings, parent advisory meeting and the selection of the District's biology and science curriculum, into an unlimited public forum for unlimited political and religious debate, relating to the infusion of "creation-science" (a particular religious viewpoint) into the California public school curriculum to counter the scientific

theory of evolution. [TAC, Paras. Nos. 89-90.]

Mr. Caldwell is seeking to have this Court inject itself into this religious and political debate by requesting that this Court enjoin the expenditure of any public school funds by the District, under the guise of a California State taxpayer's suit, pursuant to California Code of Civil Procedure § 526, until the District makes all public schools in the District unlimited public fora for the advancement of his particular religious and political viewpoints and adopts his QSE Policy into its biology and science curriculums. [TAC, Para. Nos. 76-90, Inclusive.]

D. The District's Contentions.

The District's (and all named defendants) contentions are summarized as follows:

1. The Court is Without Jurisdiction.

(a) State Sovereign Immunity and Eleventh Amendment Sovereign Immunity apply to bar this action in federal court.

(b) Traditional Article III subject matter jurisdiction is lacking, because the relief sought by the plaintiff cannot be granted by the Court.

(c) The issues presented are political questions, which do not raise a justifiable controversy.

(d) The plaintiff lacks prudential standing to bring this suit for the general public and/or other unnamed parents residing in the District.

(e) These are claims of generalized grievances, which are more appropriately addressed by other branches of government.

(f) These claims raise another person's legal rights, who are not parties to the litigation.

(g) The claims are outside the zone of interests protected by the laws that have been invoked by the plaintiff.

(h) The plaintiff's children are necessary parties and have not been properly joined in this action.

(i) There is no basis for a next-friend suit by the plaintiff.

(j) The Court has no statutory authority to adjudicate California State

Constitutional and/or California State Statutory claims, pursuant to 42 USC § 1983.

2. The Third Amended Complaint Fails to State a Claim.

(a) There is no direct entity liability under 42 USC § 1983.

(b) There is no basis for vicarious liability under 42 USC § 1983.

(c) There is federal qualified immunity for all individually named defendants.

(d) There is state agent immunity under the laws of California, pursuant to Venegas v. County of Los Angeles (2004) 32 Cal. 4th 820, 828-829.

(e) There is absolute discretionary immunity for the actions of the District under the California Government Code § 820.2.

(f) There is absolute privilege for all communications and derivative tort actions pursuant to California Civil Code § 47(a) and § 47(b).

(g) There is no claim for relief for violation of the Establishment Clause of the First Amendment, as a matter of law.

(h) There is no claim for relief for violation of the Free Exercise Clause of the First Amendment, as a matter of law.

(i) There is no claim for relief for violation of the Freedom of Speech under the First Amendment, as a matter of law.

(j) There is no claim for relief for violation of the Right to Petition under the First Amendment, as a matter of law.

(k) There is no claim for relief is for violation of the Equal Protection clause of the Fourteenth Amendment, as a matter of law.

(l) There is no claim for relief for any violation of Procedural Due process under the Fourteenth Amendment, as a matter of law.

(m) There is no claim under the California Taxpayers statute that can be legally maintained under 42 USC § 1983, because of the Tax Injunction Act, 28 USC § 1341, and principles of federal-state comity.

(n) There is no claim under the California State Constitution and/or any

other California State Statutes that can be legally raised by a 42 USC § 1983 claim filed in federal court.

(o) There is no claim that can be maintained for any common law torts under the umbrella of a 42 USC § 1983 claim.

(q) No claim for relief is stated, because the prospective relief sought by Mr. Caldwell cannot be granted by this Court, as a matter of law.

3. Procedural Defects.

(a) The Third Amended Complaint still fails to meet the requirements of short, plain and concise statement, pursuant to Rule 8(a).

(b) The plaintiff has amended his Third Amended Complaint, without permission or leave of Court, to add Doe Defendants Nos. 1-10, and to change the caption of the action as to the capacity of the individual defendants, in violation of Rule 10(a).

II.

LEGAL ARGUMENT

A. The Court Lacks Jurisdiction and/or Should Voluntarily Decline Jurisdiction.

It is the District's contentions that the Court lacks subject matter jurisdiction to hear this case, and/or that it should voluntarily decline to exercise subject matter jurisdiction, and that the Court should dismiss this action pursuant to Federal Rules of Civil Procedure, Rule 12(b)(1), for the following reasons:

1. The Relief Sought Cannot be Granted by the Court Because There is No Traditional Article III Subject Matter Jurisdiction.

The "relief" being sought by Mr. Caldwell in the TAC cannot be granted by the Court, because it would require the Court to interject itself into the "political and religious debate" over the teaching of evolution in the public schools of California and the inclusion of faith-based creationist science into the curriculum of public schools in California.

In California, the establishment of high school biology and science curriculums are vested in the California State Department of Education and local school boards and officials. This Court cannot order the District to adopt Mr. Caldwell's "QSE Policy" or his "QSE Instructional Materials"

into the District's biology and/or science curriculums. Thus, the Court lacks "tradition Article III" subject matter jurisdiction to hear this case, because it "cannot grant the relief" that is being requested in the TAC. [Elk Grove Unified School District v. Newdow, 124 S. Ct. 2301, 2308 (2004).]

In every federal case, the party bringing the suit must establish standing to prosecute the action in order to entitle the litigant to have the Court decide the merits of the dispute. [Warth v. Seldin, 422 U.S. 490, 498 (1975); Elk Grove Unified School District v. Newdow, supra at 2308.] Exercising jurisdiction under "Article III" of the Constitution is balanced against the deeply rooted commitment not to pass on questions of constitutionality unless adjudication is absolutely necessary. [Ashwander v. TVA, 297 U.S. 288, 346 (1936); Elk Grove v. Newdow, supra at 2308.]

Article III standing enforces the Constitution's case or controversy requirement, whereas "prudential standing" embodies the judicially self-imposed limits on the exercise of federal jurisdiction. [Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-562 (1992); Allen v. Wright, 486 U.S. 737, 750-751 (1984).] Pursuant to Article III, the plaintiff must show that the conduct of which he complains has caused him suffer an "injury in fact" that a favorable judgment will redress. [Lujan, supra at 560-561; Elk Grove v. Newdow, supra at 2308.]

Mr. Caldwell cannot meet these requirements, because the District Court does not have the power to grant the prospective injunctive and declaratory relief that Caldwell is seeking from this Court, which is to order the District to adopt, or to reject, any particular materials for its High School science and biology curriculum. As will be discussed infra, this federal Court cannot intervene to order the District to adopt a high school curriculum, which is determined under state law by the California State Department of Education and which is in the discretion of the District's Governing Board of Education.

The education of the Nations' youth is primarily the responsibility of parents, teachers and state and local school officials, and not federal judges. [Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 267, 273 (1988).] The District's refusal to adopt the QSE Policy advocated by Caldwell was not a violation of any constitutional right, because under Hazelwood, supra, the District had the right to make view-point based determinations, when dealing with the curriculum. [Arkansas v. Forbes, 233 U.S. 666, 675 (1998).]

The Supreme Court has held that: "a public institution selecting a speaker for a lecture series, or a *public school prescribing its curriculum*, by its nature will facilitate the expression of some viewpoints instead of others." This is pure government speech and/or imprimatur speech, both of which are treated differently that "private speech." [Ibid. 675] Decisions as to how to allocate scarce educational resources, as well as what curriculum to offer or require, are uniquely committed to the discretion of local school authorities, and a parent has no "fundamental constitutional right" to tell the School Board what his or her child will be taught or not taught, or to pick an choose from the courses offered in the curriculum. [Leebaert v. Harrington and FairField Board of Education, 332 F.3d 134, 141 (2nd Circuit, 2003).]

Consequently, Caldwell cannot show that he has suffered any injury in fact or that he can recover a favorable judgment against the District. Therefore, the District Court should decline to exercise traditional Article III subject matter jurisdiction, and order the TAC dismissed without leave to leave to amend, for lack of subject matter jurisdiction.

2. The Issues Presented are Political Questions.

The Court should decline to exercise jurisdiction, because the issues presented in the SAC are "political questions," which do not raise justiciable controversies. [Hazelwood School District v. Kuhlmeier, 484 U. S. 260, 267, 273 (1988).] Questions which are in their nature "political" should never be submitted to the Court. Prudence, as well as separation-of-powers concerns, counsels the Court to decline to hear "political questions." [Marbury v Madison, 5 U.S. (1 Cranch) 137, 164-166, 170 (1803); Baker v. Carr, 369 U.S. 186, 211 (1962).]

The issues raised by Mr. Caldwell in the TAC are in fact "political questions." The Supreme Court's analytical holdings regarding this doctrine are well known:

> "Prominent on the surface of any held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issues to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for revolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to apolitical decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." [Baker v. Carr, supra at 211.]

The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches of the government. [Schroder v. Bush, 263 F.3d 1169, 1171-1174-1175 (10th Circuit, 2001).] Dismissal for lack of subject matter jurisdiction is appropriate if the claims for relief fall within an established category of a political question, and each case must be decided on a case-by-case basis. [Ibid. 1173-1174.]

Clearly, the Caldwell mantra of complaints set forth in the TAC are "political" questions (including his advocacy of certain religious viewpoints and his anti-evolutionary theories), which are not capable of resolution by the Court, which lack manageable standards for resolution, which involve initial policy determinations clearly for nonjudicial discretion, and which have been, by state statute and by the California State Constitution, mandated to the legislative and executive branches of state government. [Baker v. Carr, supra at 211; Peter W. San Francisco Unified School District (1976) 60 Cal. App. 3d 814, 824-825; Wilson v. Board of Education (1999) 75 Cal. App. 4th 1125, 1134-1141.]

Therefore, this Court should decline to exercise subject matter jurisdiction, because the issue of the adoption and/or rejection of Mr. Caldwell's QSE Policy and QSE Instructional Materials as part of the District's biology and science curriculum, is a "political question." This is an issue that this Court is not capable of resolving by a judicial decision. Also, Mr. Caldwell still has legislative, administrative and political remedies that he can pursue to attempt to rectify what "matters" are put into the California State Department of Education prescribed curriculums and what the District may adopt into its High School curriculum. [Hazelwood School District v. Kuhlmeier, 484 U. S. 260, 267, 273 (1988); Cal Education Code § 51050, §51054, § 51057, § 51102, § 51200 , § 51220(e), § 51224, § 51225.3(1)(c), and § 51226.3.]

Mr. Caldwell can go to his state legislators (his State Assemblyman and his State Senator) to advocate that they propose legislation to include his QSE Policy into the State of California prescribed high school curriculums. Also, he could lobby within the State Department of Education for the inclusion of creationist science in high school curriculums.

Further, he had internal "administrative" remedies within the District to lobby to have his QSE

Policy made part of the District's curriculum or optional reading list, which he admits that he started, but did follow through to a conclusion, and which he dropped. He did not pursue his administrative remedies, nor did he seek proper judicial review of that decision through a writ of mandate with the Placer County Superior Court. He has failed to exhaust his administrative remedies.

The TAC spends many paragraphs detailing the "political" things Caldwell did do to attempt to have the District adopt his QSE Policy into the High School curriculum; however, when these "political" efforts failed, and his QSE Policy was rejected by the District Governing Board, he did not have a constitutional right to invoke this Court into this "political" dispute.

Likewise, Caldwell always had the option of sending his children to a private religious school that would teach the religious doctrines and alternative theories to the scientific theory of evolution contained in the state mandated public education curriculum. A private school's curriculum is not dictated by the Cal. Education Code. [Jackson v. Gourley (2003) 105 Cal. App. 4th 966, 974-975.]

Consequently, there is no violation of any of Caldwell's constitutional rights by the District or its officials and employees, and the Court should decline to exercise "jurisdiction," because the issues and relief that Caldwell is seeking to have the Court litigate are not the type of issues that the Court should involve itself with, because they are classic (textbook) examples of "political questions." [Baker v. Carr, supra at 211; Schroder v. Bush, 263 F.3d 1169, 1171-1174 (10th Circuit 2001).] The issue of the District's high school curriculum policies should left to the state legislature, the State Department of Education, the local school board, and to the impute of parents, which is authorized by State law, and in which Caldwell vigorously participated, by his own judicial admissions contained in his TAC.

3. Caldwell Lacks Prudential Standing.

The Court should decline jurisdiction, because Mr. Caldwell also lacks "prudential standing" to raise the issues presented to the Court by the TAC for the following reasons:

(a) General Grievances.

The plaintiff is presenting issues that are more appropriately addressed to the representative branches of government, and the rule against the "adjudication of generalized grievances" should be applied by the Court. The TAC is in reality a series of generalized "complaints" (grievances) about

how the District conducted its parent involvement in relationship to the adoption of its science and biology curriculum, and individual "complaints" by Caldwell, because he did not get his way with his proposed inclusion of the QSE Policy into the curriculum. [Elk Grove Unified School District v. Newdow, supra at 2308-2309.]

(b) Raising Another Person's Rights.

The plaintiff is "raising other person's legal rights," who are not parties to the litigation, and the Court should decline jurisdiction. He is attempting to bring this suit alleged on behalf of all of the parents, students, citizens and taxpayers who reside in the District. These other persons have not joined themselves as parties to this action, and Mr. Caldwell has no standing to assert their rights. [Elk Grove Unified School District v. Newdow, supra at 2308-2309.]

(c) No Zone of Interest.

The plaintiff's TAC falls does not fall within the "zone of interests protected" by the laws invoked. [Elk Grove Unified School District v. Newdow, 124 S. Ct. 2301, 2308-2309 (2004).] The District has the discretion and legal right, under California statutes, California case law and federal case law to decide what is placed into the District's high school science and biology curriculum, and the Constitutional rights that Caldwell is attempting to invoke in the TAC do not offer him any protected interests. [Hazelwood School District v.Kuhlmeier, 484 U.S. 260, 267, 273 (1988); Arkansas v. Forbes, supra 675; Cal Education Code § 51050, §51054, § 51057, § 51102, § 51200 , § 51220(e), § 51224, § 51225.3(1)(c), § 51226.3; Leebaert v. Harrington and FairField Board of Education, 332 F.3d 134, 141 (2nd Circuit, 2003); Chiras v. Miller, 2004 U.S. LEXIS 14177 , *13-14, * 23-24 (NDTX, 2004); Downs v. Los Angeles Unified School District, 228 F. 3d 1003, 1012 (9th. Circuit, 2000).]

(d) Necessary Parties Have not Been Joined.

Mr. Caldwell alleges that he has one child in the District; however, she was not made a plaintiff in this action, nor was any guardian ad litem appointed to represent her, and it would appear that he is raising her rights related to the high school curriculum, since Mr. Caldwell is not a student himself. He actually lacks standing to bring this action, and his child is a necessary party, who has not been joined to the action .[Elk Grove Unified School District v. Newdow, supra at 2308-2309.]

Likewise, there is no basis for a "next-friend suit" by the plaintiff. [Elk Grove Unified School District v. Newdow, supra at 2308-2309.] Thus, the Court should rule that Caldwell lacks "prudential standing" and order the matter dismissed without leave to amend.

4. The Court can Only Adjudicate Federal Constitutional and/or Federal Statutes Under 42 USC § 1983.

Mr. Caldwell is apparently seeking to have this Court adjudicate, construe and interpret California Constitutional Rights and to also construe, interpret and adjudicate various California Government Code and Educational Code statutes, pursuant to his 42 USC § 1983 claims for relief. The Court does not have this power under 42 USC § 1983. Therefore, it has no jurisdiction to act, and it should decline to exercise federal jurisdiction over these California Constitutional Rights and California Statutory issues.

In addition the Court has no jurisdiction over Mr. Caldwell's state law claim as alleged in the Sixth Claim for Relief. A claim based upon the California Taxpayers statute, California Code of Civil Procedure § 526a cannot be asserted or maintained under 42 USC § 1983 , because of the Tax Injunction Act (28 USC § 1341), and the principles of federal-state comity. Mr. Caldwell had a plain, speedy and available state law remedies to bring any such action in Placer County Superior Court, and free access to lobby his positions on the teaching of evolution and creationist science in the California public schools to his state legislatures and/or to the California State Department of Education. Thus, there is no jurisdiction over the Sixth Claim for Relief in the TAC, and the Court should order it dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(1).

5. Failure to Exhaust Administrative and Judicial Remedies.

Mr. Caldwell is seeking to have this Court enforce his prematurely abandoned internal administrative appeal (challenge to the curriculum materials) as a violation of his federal constitutional rights; however, this is a "judicial admission" that he failed to exhaust his administrative and judicial remedies in regard to curriculum challenge. [TAC, Para. Nos. 38-47, Inclusive.] This constitutes a failure to exhaust administrative remedies. It is a waiver of his claims. As such, a necessary prerequisite to jurisdiction is lacking from the TAC.

Mr. Caldwell's complaints about the lack of inclusion of the QSE Policy into the District's

high school biology and science curriculum were presented to the District in the form of an internal administrative challenge to the curriculum materials, by a challenge to the use of the Holt Biology Textbook. He did not complete his administrative challenge (remedies). [TAC, Para. Nos. 38-47, Inclusive.] This is a prerequisite to the bringing of this action, especially in regard to the bring of the pendent lite California statutory claim, under Code of Civil Procedure § 526a ("taxpayers claim") contained in the Sixth Claim for Relief in the TAC. [University of Tennessee v. Elliott, 478 U.S. 788 (1986); Johnson v. City of Loma Linda (2000) 24 Cal.4th 61, 70-71; Westlake Community Hospital v. Superior Court (1976) 17 Cal.3d 465; Miller v. County of Santa Cruz, 39 F.2d 1030 (9th Circuit, 1994).]

B. The Third Amended Complaint Fails to State any Claims for Relief.

The District's position is that the TAC fails to state facts sufficient to state any claim for relief, pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), and that the TAC should be dismissed, for the following reasons**:**

1. There is no Violation of the First Amendment Establishment Clause.

(a) Evolutionary Scientific Theory.

The TAC fails to state a claim for relief for any "violation of the Establishment Clause" of the First Amendment, because the teaching of evolutionary scientific theory is not the establishment of a religion, nor the teaching of religion, in the public schools. [Edwards v. Aguillard, 482 U.S. 578, 587-597 (1987); Lemon v. Krutzman, 403 U.S. 602, 612-613 (1971); Peloza v. Capistrano Unified School District, 37 F. 3d 517, 521 (Ninth Circuit 1994).]

Caldwell's allegations that the District was violating the Establishment Clause of the First Amendment by the allowance of the scientific theory of evolution , and the corollary of the District's refusal to adopt Caldwell's proposed QSE Policy (religious alternative science), is totally without merit. [Locke v. Davey, 540 U.S. 712, 718-719, 723-725 (2004).]

The United State Supreme Court has unequivocally held that while the belief in a divine creator of the universe is a religious belief, the scientific theory of evolution is not a religion, nor the teaching of religion. [Edwards v. Aguillard, supra 596-597.] The Ninth Circuit has also similarly held that the inclusion of the scientific theory of evolution in a California school curriculum is not a

religion, and requiring an instructor to teach this theory in his biology class is not a violation of the Established Clause of the First Amendment. [Peloza v. Capistrano Unified School District, 37 F. 3d 517, 521-522 (9th Circuit, 1994).] The teacher in that District sued claiming that the District's actions established a state-supported religion of evolutionism, or more generally of "secular humanism." This constitutional attack was clearly rejected by the Ninth Circuit. [Peloza, supra at 521-522.]

Mr. Caldwell's requests for relief in the TAC are analogous to state action that has been previously declared unconstitutional as a violation of the Establishment Clause of the First Amendment in Edwards v. Aguillard, supra 596-597. In that case, United States Supreme Court found that the Louisiana Creationism Act, which included the "Balance Treatment for Creation-Science and Evolution-Science" in the Public School Instruction Act, violated the Establishment Clause of the First Amendment. The Supreme Court expressly found that the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. [Edwards, supra 593.] It further found that this alternative religious science program severed no secular purpose, but was specifically enacted to provide persuasive advantage to a particular religious doctrine. [Edwards, supra at 592.]

It is patently clear that existing United States Supreme Court precedent, as articulated in Edwards v. Aguillard, supra 596-597, shows that Mr. Caldwell's TAC cannot state a claim for any violation of the Establishment Clause of the First Amendment, as a matter of law. It is further clear from the allegations contained in the TAC that Mr. Caldwell sought (and continues to seek through the means of prospect injunctive relief) to have the District include a particular religious viewpoint into the District's High School curriculum by his advocation of the adoption of his "QSE Policy" by the School Board. The very relief that he is asking this Court to grant in the TAC would be itself a violation of the First Amendment Establishment Clause, and the Board's rejection of this proposal was objectively reasonable and in accordance with existing law.

(b) Excessive Governmental Entanglement.

Mr. Caldwell's TAC fails the "Lemon Test" as established in Lemon v. Krutzman, 403 U.S. 602, 612-613 (1971). This three-ponged test must be utilized by the District Court to determine if the actions of the District were an "unconstitutional" establishment of religion. When there is no valid

"secular purpose," the "Lemon Test" is violated. [Edwards, supra at 597.] The Board's (District's) rejection of the proposed QSE Policy relating to the alternative creationist science anti-evolutionary theory (regardless of the name of the policy, book or type of materials, as an alternative religious science textbook) was entirely constitutional. It was within the State of California statutory discretion provided to the District regarding the selection of public school curriculums. The proposed adoption of "QSE Policy" and the "QSE Instructional Materials" for inclusion as part of the District's High School science and biology curriculum would have been a violation of the Establishment Clause, and would have constituted excess entanglement of the government with a particular religious viewpoint. [Lemon v. Krutzman, 403 U.S. 602, 612-613 (1971).]

The placing of an "anti-evolutionary sticker" on all public science textbooks in Georgia (by the State of Georgia) was found to be a violation of the Establishment Clause, and it created excessive governmental entanglement with religious concerns. [Selman v. Cobb County School District/Cobb County Board of Education, 2005 U.S. Dist. LEXIS 432 (NDGA, 2005).]

In Brown v. Woodland Joint Unified School District, 27 F. 3d 1373 (9th Circuit, 1994), the Ninth Circuit Court affirmed the summary judgment entered by Judge William B. Shubb (EDCA) dismissing a 42 U.S.C. § 1983 claim against the Woodland School District, wherein the plaintiff claimed that the use of certain materials in the classroom activities related to witches, involved the teaching of witchcraft, and that the District was promoting the religion of witchcraft as part of the School District's curriculum. The Ninth Circuit applied the "Lemon Test," and it determined that there was no endorsement of witchcraft as a religion and no violation of the First Amendment Establishment Clause. Also, it found expressly found that the California State Constitution, Article IX, § 8, provides that no sectarian or denominational doctrine shall be taught, or instruction thereon be permitted, directly or indirectly, in the common schools of the state. [Brown, supra at 1385.]

Mr. Caldwell's Establishment Clause claims are based upon the same premises as were advanced in the "witchcraft" and "secular humanism" cases, discussed supra. Therefore, Caldwell's Establishment Clause claim should be dismissed without out leave to amend, because he cannot state a claim, as a matter of law. [Federal Rules of Civil Procedure, Rule 12(b)(6).] It is clear that the District has not established a religion, or adopted a religious viewpoint, by continuing to teach the

scientific evolutionary theory in the District's High School curriculum, nor has it established a religion by refusing to adopt the Caldwell QSE Policy, which would in fact be the adoption of a religious viewpoint and involve excessive entanglement with a religious viewpoint, in violate the "Lemon Test." The adoption of the QSE Policy would have violated the California Constitution, Article IX, § 8., which strictly prohibits the infusion and/or adoption of any religious viewpoints or beliefs into the public school system of the State of California. [Lemon v. Krutzman, supra at 612-613; Edwards v. Aguillard, supra; Brown, supra at 1385; Peloza, supra at 517, 520-521.]

2. There was no Violation of the Free Exercise Clause of the First Amendment.

(a) Mr. Caldwell was not Prevented From Exercising his Religion.

The TAC fails to state a claim for any violation of the Free Exercise Clause of the First Amendment, because the District has not prohibited Mr. Caldwell from practicing his religion, attending his church, or believing in the tenets of his religion. In addition, he was not prevented from expressing his religious and/or political viewpoints at the school board meetings, in the curriculum instruction team meetings, at the District Science Teachers meeting, in submitting his QSE Policies and QSE Instructional Materials to the District for consideration of inclusion of said materials in the biology and science curriculum for the Roseville Joint Union High School District. [TAC, Para. Nos. 17-19; Nos. 24-25; Nos. 29-37; Nos. 38-47.] His "QSE Policy" was in fact placed on the District's May 4, 2004 board meeting. [TAC, Para. Nos. 24-25.] Mr. Caldwell has expressly alleged in the TAC that his QSE Policy and his supplemental QSE Instructional Materials were "strictly secular" in content. [TAC, Para. Nos. 14-15.] This is a judicial admission that they were not based upon "religion" and that they contained no reference to "religious beliefs, tenets or sacred texts." [TAC, Para. No. 14.] Therefore, no claim relating to a violation of the Free Exercise Clause of the First Amendment can be stated, since according to the plaintiff own admissions, the QSE Policy and QSE Instructional Materials were not "religious" or "religious materials."

(b) There was Pure Government Speech.

There is no violation of the Free Exercise Clause of the First Amendment, because the District's selection of its biology and science high school curriculum is (was) pure government speech

and/or bears the imprimatur of the government. In addition, the District had the total discretion under California law to determine the selection of the instructional materials for the biology and science curriculum for the Roseville Joint Union High School District. Likewise, the school board meeting are not public fora, wherein unlimited political and/or religious speech is permitted under the First Amendment. [Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 267 (1988); Perry Education Assn. v. Perry Local Educators Assn., 460 U.S. 37, 47 (1983); Arkansas v. Forbes, 523 U.S. 666, 669, 675 (1998); Downs v. Los Angeles Unified School District, 223 F. 3d 1003, 1012 (Ninth Circuit, 2000); Edwards v. California University of Pennsylvania, 156 F. 2d 488, 491 (1998).]

Public schools are not "public forms" for the purpose of unlimited free speech, as a matter of law. Consequently, the District's public school board meetings, the curriculum team meetings, and the science teachers meetings are not "public forums" for the purpose of unlimited free speech. [Perry Education Assn. v. Perry Local Educators Assn, at 41.] [Compare: Capital Square Review And Advisory Board v. Knights Of The Ku Klux Klan, 515 U.S. 753, 760-763 (1995), where the "religious and political free speech" was being exercised in a full-fledged traditional public forum.] Public schools do not possess all of the attributes of streets, parks, and other traditional public forums. [Hague v. CIO, 307 U.S. 496, 515 (1939).] California law is of the same accord. Public schools are "non-public forums" for purposes of the First Amendment. [Reeves v. Rocklin Unified School Districts (3DCA, 2003) 109 Cal. App. 4th 652, 662-663.] Mr. Caldwell does not have the unlimited right to "free speech," as he has alleged, regardless of his status as a parent, an individual, and/or taxpayer.

Neither the District's school board meetings, its curriculum instruction team meetings, its science teachers district meetings, and/or the District itself are "public forums" as a matter of law, and the District did not violate Mr. Caldwell's Freedom of Speech rights under the First Amendment, either as "religious speech" and/or as "political speech." [Hazelwood, supra at 267; Arkansas v. Forbes, supra at 669, 675; Downs, supra at 1012.] A Texas school board's active role in adopting or rejecting textbooks did not open the board meetings for "indiscriminate use" by the general public and was found to be a "non-public form." [Chiras v. Miller, 2004 U.S. LEXIS 14177 (NDTX, 2004) *13-14.]

In Arkansas v. Forbes, supra , the Supreme Court held that a public school prescribing its curriculum by its nature will facilitate the expression of some viewpoints instead of other and that curriculum selection is "pure government speech," and it also implies that "pure government speech" and "imprimatur speech" are treated differently from "private speech." [Ibid. 669, 675.] Likewise, in Downs v. Los Angeles Unified School District, 228 F. 3d 1003, 1012 (9th Circuit, 2000), the high school principal had a right to remove "anti-gay materials" from a bulletin board that had been created by a teacher (and posted as his own competing bulletin board) at the High School during Gay & Lesbian Awareness Month. The removal of the anti-gay materials (which were entitled "Testing Tolerance") by the High School Principal was directly traceable to the School District and its Board; however, the acceptance or rejection of the posted materials was equivalent to "pure governmental speech" by the School District. [Ibid. 1012.]

The "anti-gay" teacher could not compel the Board (School District) to accept (embrace) his particular viewpoint, just as the Board could not force the teacher to accept its position . [Ibid. 1015.] The Ninth Circuit found that there was no violation of the teacher's First Amendment Freedom of Speech rights by the School District. The District's procedures for the adoption of textbooks for use in classrooms did not constitute a public forum for Mr. Caldwell's and/or the public's indiscriminate use of free speech. [Hazelwood, supra 267.] The District acted totally reasonably in regard to Mr. Caldwell's exercise of his free speech rights at these non-public forums.

(c) Caldwell has no Fundamental Constitutional Right.

Decisions as to how to allocate scarce resources, as well as what curriculum to offer or require, are uniquely committed to the discretion of local school authorities. [Leebaert v. Harrington and FairField Board of education, 332 F. 3d 134, 141 (2nd Circuit 2003). The Second Circuit also expressly held that "a parent has no fundamental constitutional right" to tell the School Board what his or her child will be taught, or not taught, or to pick and chose from the courses offered in the curriculum. [Ibid. 141.]

School boards have broad discretion in the management of school affairs. [Board of Education v. Pico, 457 U.S. 853, 863 (1982).] Also, school boards are precluded from imposing a "pall of orthodoxy" on classroom instruction, which implicates the state in the "propagation of a particular

religious or ideological viewpoint." [Pratt v. Ind. Sch. Dist. No. 831, Forest Lake, 670 F. 2d 771, 776 (8th Circuit , 1982.) Thus, Mr. Caldwell had no fundamental constitution right under the Free Speech Clause of the First Amendment to require the District to convert its board meetings and other procedures for determining curriculum for the District's high schools into traditional unlimited public forums for the articulation and debate of his particular religious, political or "strictly non-secular" views on evolution and/or creation science for inclusion or exclusion into the biology and science curriculums.

(d) The District Board had Discretion to Decide the Curriculum.

Local school boards, such as the District, are afforded considerable discretion in operating public schools. [Edwards v. Aguillard, supra at 583; Epperson v. Arkansas, 393 U.S. 97 (1968).] The policy of the Supreme Court is that federal courts should usually refrain from interfering with the educational policy decisions of local school boards and school administrators. [San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 42 (1973); Selman v. Cobb County School District, 2005 U.S. LEXIS 432 * 30-31 (January 13, 2005).]

Likewise, the Texas District Court in Chiras, supra, found that under Hazelwood, supra, educators are afforded discretion to engage in viewpoint discrimination as long as the discrimination is reasonably related to legitimate pedagogical concerns. [Chiras, supra *38-40.] The local school board has "editorial control" to accept or reject various portions of textbooks, which that court equated to the control of the high school principal in Downs, supra. Universities can make content-based choices restricting a professor's syllabus, and the professor has no First Amendment Free Speech right to use the restricted materials in his classroom. [Edwards v. California University of Pennsylvania, 156 F. 3d 488, 491-492 (Third Circuit, 1998); Downs, supra at 1012.]

(e) The District had a California Constitutional and Statutory Duty to Select the Curriculum.

Article IX, sec. 7, of the California Constitution (adopted in 1879) provides in pertinent part that the Local Boards of Education shall adopt a series of textbooks for the use of the common schools within their respective jurisdictions. [People v. Board of Education of Oakland (1880) 55 Cal. 331, 333-334; Engelmann v. State Board of Education (1991) 2 Cal. App. 4th 47, 53-54.] In addition, the

California State Legislature gives the District the authority, duty and discretion to adopt its high school biology and science curriculum in conformity with state law and the approval of the State Department of Education.

California Education Code § 51050, provides that the governing board of every school district shall enforce in its schools the courses of study and the use of textbooks and other instructional materials prescribed and adopted by the proper authority. This is a mandatory duty which the Board Members (including several of the individually named defendants) were required to follow. [Cal. Government Code § 815.6.] They were *a fortiori* acting with a "reasonable belief," under 42 U.S.C. § 1983, in exercising their statutory discretion in deciding not to adopt Mr. Caldwell's QSE Policy.

California Education Code § 51054, provides that except as provided in § 51053, the course of study for grades 7-12 shall be prepared under the direction of the governing board having control thereof and shall be subject to approval as may be required by the state board. This is a mandatory duty which the Board Members were required to follow. [Cal. Government Code § 815.6.] Again, they were exercising their discretion as provided by California law.

It is true that California Education Code § 51100, § 51102 and § 51120, do provide for parent involvement and participation in the public schools, including involvement in activities and programs and collaboration, in order to improve public educational institutions; however, this statutory language is not mandatory, nor does it give parents (including Mr. Caldwell) "veto power" over the selection of the Roseville Joint Union High School District's science and biology curriculum. These California statutes do not repeal, either expressly or by implication, the mandatory duties (and the discretion) given to the District's governing board and to its officials and employees. These parent participation statutes do not limit the District's discretion, regarding selection of the District's high school science and biology curriculum, as provided by Cal. Education Code § § 51050 and § 51054.

3. There Were no Violation's of Caldwell's Political Free Speech Rights Or of his Right to Petition the Government Under the First Amendment.

There is (was) no violation (either past or prospective) of Mr. Caldwell's political free speech rights and/or his right to petition the government, under the First Amendment. The facts alleged in the TAC belie this contention, because Mr. Caldwell, in fact, got his say as is established by his own

allegations (and judicial admissions) contained in the TAC. He admits that he participated in the school board meetings; participated in the curriculum instruction team meetings; participated in the science teachers district wide meeting, where he in fact presented his QSE Policy and QSE Instructional Material along with presenting power-point presentations by his "experts" on his alternative creation science beliefs; and participated in an internal administrative grievance (challenge) to the Holt Biology Textbook. [TAC. Para. Nos. 17-26; Nos. 29-36; Nos. 38-47.]

Mr. Caldwell was not prohibited from participation in the advocation of the adoption of his QSE Policy and the QSE Instructional Materials. What is his true complaint is that the District did not adopt his QSE Policy and the related materials into the high school biology and science curriculum! This is not a denial or violation of any constitutional rights under the United States Constitution and/or the California Constitution. This is not a form of relief that can be granted by the Court. This Court does not have the power (by law or in equity) to order the District to adopt the QSE Policy into the high school curriculum. Mr. Caldwell made an argument to the District, and he lost. It voted not to adopt his QSE Policy! This is not a violation of the First Amendment to the United States Constitution, actionable through a 42 USC § 1983 claim. [Karam v. City of Burbank, 352 F.3d 1188, 1194-1195 (9th Circuit, 2003).]

As indicated supra, the public schools of California are not "public forums" where unlimited political (or religious) speech and/or the right to petition the government is allowed. Mr. Caldwell is in truth and in fact asking this Court to convert the public schools into an unlimited political (and religious) forum for the advocation of his own personal beliefs in creation science and his anti-evolutionist viewpoints. This position is being advocated by Mr. Caldwell in contradiction to established United States Supreme Court precedents, established Ninth Circuit precedents, and established California precedents, as well as in contradiction to the Establishment Clause of the First Amendment and in direct contradiction of Article IX, Sec. 8, of the California State Constitution, regarding the strict separation of church and state. [Selman v. Cobb County School District (2005 US LEXIS 432* 30-31; Lemon v. Krutzman, supra 612-613; Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 267 (1988); Perry Education Assn. v. Perry Local Educators Assn., supra 47 (1983); Arkansas v. Forbes, supra 669, 675 ; Downs v. Los Angeles Unified School District, supra 1012 ;

Peloza v. Capistrano, supra at 521; Edwards v. California University of Pennsylvania, supra 491; Brown v. Woodland Joint Unified School District, supra at 1385.]

Mr. Caldwell did not have a right to unlimited political (or religious) debate at the District's Board Meetings, because they not public forums. [Cornelius v. NCAAP Legal Defense & Education Fund, Ins, 473 U.S. 788, 802 (1985).] Even if the public sessions of the School board Meeting are considered "limited public forums," the Board had the right to limit debate to only school board business. [City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Comm., 429 U.S. 167 (1976).]

It is true that parents are afforded the opportunity to speak on the topics on the Board Agenda and also during time for open public comment. However, Mr. Caldwell alleges that he had an unlimited right to place any item that he wanted on the School Board Meeting Agenda and then to have unlimited political (and religious) debate on that agenda item. He is advancing these claims under the California Brown Act and the California Education Code, both of which are state statutes, which are not constitutional rights claims under the United States Constitution.

Mr. Caldwell's position (claims) are in contradiction to the laws of California, and the Court should defer to the decisions of California Appellate Courts. The Court's attention is directed to a very recent decision of the California Second District Court of Appeal, Division Six, entitled Coalition of Labor, Agriculture &Business, et al. v. County of Santa Barbara Board of Supervisors (May 10, 2005) 129 Cal. App. 4th 205, 208-209, wherein the Court of Appeal held that although California Government Code § 54954.3(a) requires the Board to allow members of the public to address it before or during consideration of an agenda item, this law does not require the Board to allow members of the public to address it on *"whether to place an item on the agenda."* The Court found that there is simply nothing in the Brown Act that requires such public comment. [Ibid. 209.] The Court must defer to state law on this issue.

Thus, as a matter of law, Mr. Caldwell has no "constitutional free speech right and/or right to petition the government" to determine what items are to be placed on the District's School Board Meetings. The regulations imposed by the District, pursuant to the Brown Act and the Education Code, relating to school board agendas and the placing of items thereon, and to the public comment

and discussion, that were followed by the District were reasonable in light of the purpose served by the nature of the forum. They were viewpoint neutral, and Mr. Caldwell has alleged in the TAC that his QSE Policy and QSE Instructional Materials were strictly non-secular, and not religious and did not advance any particular religious beliefs or tenets. [TAC, Para. Nos. 14-15.] Thus, there is no free speech violation (either political or religious).

The regulations imposed by the District (pursuant to the Brown Act and the Education Code) relating to how the School Board agendas and public discussion and comments session were conduced were reasonable in light of the purpose served by the nature of the forum, and they were all viewpoint neutral. [Lamb's chapel v. Center Moriches Union Free School District, 508 U.S. 384, 392-393 (1993).]

The California Third District Court of Appeal, in Reeves v. Rocklin Unified School District (2003) 109 Cal. App. 4th 652, recently ruled, related to the claims of outsiders that they be given "unlimited free access to high school campuses to distribute literature" (which is an equivalent First Amendment free speech right), that California high school campuses are not public forms. [Ibid . 661.] The courts have found public schools to be "nonpublic forums." [Grattan v. Board of School Comm'rs of Baltimore City, 805 F. 2d 1160 (4th cir. 1986).] The California Court of Appeal in DiLoreto v. Board of Education (1999) 74 Cal. App. 4th 267, 281, stated that Downey High School was a "nonpublic forum," as a matter of law, and concluded that the Board of Education retained the right to regulate access and content. [See: Perry Ed. Assn. v. Perry Local Ed. Assn., supra 44; International Soc'y for Kristna Consciousness v. Lee, 505 U. S. 672, 679-680 (1992); Cornelius, supra at 802-804.]

Therefore, the public session meetings of the Roseville High School Board are *"nonpublic"* forums, and/or at the most, *"limited public fora,"* where there is no constitutional right to exercise *"unlimited free speech"* as to any topic, as is contended by Caldwell. The California Brown Act and appropriate Education Code statutory provisions are not "unconstitutional," and they allow "reasonable" regulation (restrictions) of the School Board's agenda items to school business items. The members of the public do not have an unlimited right to determine the school board agenda items, which is determined in the discretion of the School Board, pursuant to state law. [Coalition of

Labor, Agriculture &Business, et al. v. County of Santa Barra Board of Supervisors, supra 209.]

Likewise, the public Board Meetings allow only "selective access" to members of the public to speak on school board business, not for "unlimited political or religious' free speech. [Arkansas Educational Television Commission v. Forbes, 523 U.S. 666, 679-680 (1998).] Thus, Caldwell cannot state any claims for any violation of any First Amendment Free Speech claims, or any claim of viewpoint discrimination, or prior restraint, because he did not have a fundamental constitutional right to unlimited political or religious free speech at the District's public Board Meetings, relating to public comment on the adoption of the District's science and biology curriculum.

In addition, the Court should decline to consider Caldwell's state law claims relating to the Brown Act, since Mr. Caldwell would have to ask this Court to declare the Brown Act unconstitutional in other to make a determination that the reasonable regulations allowed by the Brown Act, as determined by state law, were an unconstitutional prior restraint on Mr. Caldwell's free speech rights under the First Amendment. Since Mr. Caldwell is seeking *"prospective"* injunctive relief against a state entity and state officials, predicated on the Brown Act, then the Court should apply the *"avoidance doctrine"* and decline to hear Caldwell's state law claims regarding the Brown Act. The Supreme Court has held that the Eleventh Amendment bars federal courts from granting injunctive relief against state officials for violations of state law. [Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984); Ashker v. California Dept. of Corrections, 112 F. 3d 392, 394 (9th Cir. 1997).]

Thus, the Courts lacks jurisdiction to hear Caldwell's state law claims for any injunctive or declaratory relief related to the Brown Act. This would also be applicable to any of Caldwell's injunctive or declaratory that may be predicated upon the Cal. Education Code. As indicated above, Caldwell was in fact able to presented his views to the School Board on the QSE Policy and to advance his anti-evolution viewpoints. He has not properly alleged that there is any continuing restriction on his Freedom of Speech. This is because he continues to freely present his views to District by the presentation of written statements to the Board, and by participating in public discussions at School Board meetings. Therefore, there is no continuing, or present violation of any constitutional rights, or any California statutory laws, that would be subject to prospective injunctive

relief or requiring any declaratory relief by this Court.

4. There was no Violation of Equal Protection Under the Fourteenth Amendment.

The TAC fails to state a claim for relief for any violation of the Equal Protection Clause of the Fourteenth Amendment, because the Caldwell must allege that the "classification" of individuals is "arbitrary, capricious and lacks a reasonably related governmental purpose." [Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 81-84 (1988).] The TAC fails this test. It does not properly allege, or show, any "suspect classifications" necessary for the stating of a claim for violation of the Equal Protection under the Fourteenth Amendment.

Because Caldwell is not a member of a *"protected class,"* and his claims do not involve a *"fundamental right,"* his federal equal protection claims are subject to *"rational basis review."* Under this review, a court must reject an equal protection challenge to a statutory classification "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." [Carter v. State of Arkansas, 392 F. 3d 965, 967-969 (8th Circuit 2004).]

A legislative choice, such as the adoption of the District's science and biology curriculum, pursuant to the statutory discretion of the District's Governing Board, may be based on rational speculation unsupported by evidence or empirical data." [FCC v. Beach Communications, Inc., 508 U.S. 307, 313 -315 (1993).] Thus, all that needs to be shown is any reasonable conceivable state of facts that could provide a rational basis for the classification, and it is not necessary to wait for further factual development, as a District Court may conduct a *"rational basis review"* on a motion to dismiss. [Ibid. 313.] Caldwell's Equal Protection Claim cannot survive this *"rational basis review"* test. [Carter v. State of Arkansas, supra at 968.]

Also, the alleged violation of the California Brown Act "open meeting" statute (Cal. Government Code § 54950, et seq.) does not rise to the level of a federal Constitutional right, enforceable under § 1983. Any such alleged violations by the District do not constitute a violation of the Equal Protection Clause of the Fourteenth Amendment. Neither do the alleged violations of California Education Code § 35145.5, regarding the placing of an item on the school board agenda. [Coalition of Labor, Agriculture & Business, et al. v. County of Santa Barra Board of Supervisors,

supra 205, 208-209.]

The intent of the California State Legislature is that local School Boards should adopt "reasonable regulations" relating to the placing of items, which are directly related to school business, on the Board Meeting Agendas and to insure that parents and members of the public have the right to address items on the agenda as they are taken up. [Cal. Government Code § 35145.5] Such regulations may specify reasonable procedures to insure the functioning of governing board meetings. [Cal. Government Code § 35145.5.]

As discussed supra, this does not transform the school board meetings into unlimited public forums for general debate and/or the advocation of secular beliefs or unlimited political agendas. [Perry Education Assn, supra 41; Capital Square Review And Advisory Board, supra 760-763; Reeves v. Rocklin Unified School District, supra 662-663.]

The District's adoption of "reasonable regulations" for conducting the School Board Meetings, and other District wide instructional and/or team meetings, did not constituted a classification of individuals that was "arbitrary, capricious and lacking a reasonably related governmental purpose." The classifications were permitted by State law, and there was no violation of equal protection under the Fourteenth Amendment.

In addition, Mr. Caldwell has an expressly authorized State law remedy prescribed by statute, wherein he could have commenced an action by mandamus or injunction for the purpose of obtaining a judicial determination that any of the District's action s violated Cal. Education Code § 72121 and were null and void. [Cal. Education Code § 72121(b).] He made an election not to pursue that state law remedy, and he cannot now maintain a § 1983 claim seeking to enforce those California statutory rights, as an equal protection violation, because where there is a comprehensive remedial scheme prescribed by state law, no § 1983 claim can be maintained by Mr. Caldwell for said statutory violations. [Sherwin-Williams Company, 334 F. Supp. 2d 187, 196 (NDNY, 2004).]

5. There is no Violation of the Due Process Clause of the Fourteenth Amendment.

The TAC fails to state a claim for relief for violation of the Procedural Due Process, under the Fourteenth Amendment, because Caldwell must allege a deprivation of "life, liberty or a property

interest" within the meaning of the Fourteenth Amendment's Due Process Clause. [Board of Regents v. Roth, 408 U.S. 564, 571 (1972).] The TAC does not do this, and there is also no valid claim for any substantive due process claims, because the challenged state action survives a "rational basis scrutiny." [Klein v. McGowan, 198 F. 3d 705, 710 (8th Cir. 1999); Carter v. State of Arkansas, supra at 968-969.]

Caldwell's allegations that the District, and the individually named defendants, made "defamatory statements" about the plaintiff and/or negative comments about his religious beliefs, and that as a result his reputation was damaged, does not deprive him of any interest in "life, liberty or a property interest." [Peloza, supra at 523.] There are insufficient allegations in the TAC to state any other deprivations, coming within the ambit of the Fourteenth Amendment. [Siegert v. Gilley, 500 U.S. 226 (1991); Peloza, supra at 523-524.]

The allegations contained in the TAC that the defendants violated the California Brown Act open meeting statute, and/or various provisions of the California Education Code, do not state any violations of Due Process Clause under the Fourteenth Amendment. This claim for relief is without merit. [Frazer v. Dixon Unified School District (1993) 18 Cal. App. 4th 781, 799.] There is no legal basis for Caldwell's procedural due process claim absent proof that he was deprived of some protected property interest. [Public Utilities Commission v. United States, 356 F. 2d 236, 240-242 (9th Cir. 1966).]

Allegations of an injury to "reputation" by itself is not the deprivation of a "liberty interest" [Paul v. Davis, 424 U.S. 693, 712 (1976); Peloza, supra at 523.] No fundamental right has been alleged by Caldwell that is protected under the Substantive Due Process Clause or the Procedural Due Process Clause of the Fourteenth Amendment. [Reno v Flores, 507 U.S. 292, 301-302 (1993); Griswold v. Connecticut, 381 U.S. 479, 484-486 (1965); Fields v. Palmdale School District, 271 F. Supp. 2d 1217, 1223-1224 (CDCA, Southern Division, 2003).]

A county's adoption of a noncompulsory family life and sex education curriculum did not violate the parents' or the students' federal substantive due process rights. [Citizens for Parental Rights v. San Mateo County Board of Education (1975) 51 Cal. App. 3d 1, 32-32; Fields, supra at 1222.] In deciding whether to expand the scope of substantive due process rights, the Supreme Court has

cautioned that courts should be reluctant to expand the concept because guideposts for responsible decision making in this unchartered area are scarce and open-ended. [Collins v. Harker Heights, 503 U.S. 115, 125 (1992).]

In Fields, supra 1217, the parents brought suit, pursuant to 42 U.S.C. § 1983 against the school district and individuals based on the district's distribution of sexually-explicit survey to their children at an elementary school. In Fields, supra at 1221, the parents argued that their right to direct the education and upbringing of their children was violated. [Meyer v. Nebraska, 262 U.S. 390 (1923).] The District Court, however, found that the interest asserted in Fields, supra at 1223, was not a fundamental right and not protected under the Fourteenth Amendment. It expressly held that parents do not have a fundamental right to control a public school district's curriculum simply, because they have chosen to send their children to public school. [Fields, supra 1223; Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 533-534(1st Cir. 1995).] The Fields Court held that since the "liberty interest" that was asserted was not fundamental, it was not protected by the Fourteenth Amendment. In that case, no claim for relief could be stated under 42 U.S.C. § 1983, and the action was dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6). [Fields, supra at 1223-1224.] Using the same logic, Caldwell's Due Process Claim should be dismissed without leave to amend.

6. No California Taxpayer's Statutory Cause of Action can be Legally Maintained Pursuant to 42 USC § 1983.

The Sixth Claim for Relief in the TAC fails to properly state any California statutory taxpayers claim, pursuant to Cal. Code of Civil Procedure § 526a, which can be maintained as a 42 U.S.C. § 1983 Civil Rights Claim. The federal **Tax Injunction Act** (28 U.S.C. § 1341) and principles of federal-state comity preclude a federal court from exercising subject matter jurisdiction over challenges to the implementation and assessment of taxes based upon Constitutional principals. [Berry v. Alameda Board of Supervisors, 753 F. Supp. 1508, 1509-1511 (NDCA, 1990).]

When there is a specific statute that excludes liability, it overrides the applicability of § 1983. In addition, the plaintiff is not entitled to enforce a state law statute under § 1983. [Baker v. McCollan, supra 144 n.3.] Thus, as a matter of law, no claim for relief for a California state law

"taxpayer's suit" can be maintained in federal district court in our action.

To the extent that the this claim is predicated upon any California State Constitutional rights, it fails to state a claim, because Mr. Caldwell cannot seek enforcement of California Constitutional rights through a federal § 1983 claim. [Peloza v. Capistrano Unified School District, 37 F. 3d 517, 523 (9th. Cir., 1994)] Thus, there is no valid pendent lite state claim set forth in the Sixth Claim for Relief, as a matter of law, and it should be ordered dismissed, without leave to amend.

Federal courts are expressly prohibited from granting equitable and declaratory relief by the "Tax Injunction Act" (28 U.S.C. § 1341), where there is a plain, speedy and efficient remedy in the state court. [Berry, supra at 1511.] In our case, Caldwell had a "plain and speedy remedy" in the California courts. He could have easily filed his taxpayer's suit in Placer County Superior Court, wherein he could have properly sought injunctive relief against the District.

In addition, the California State Constitution, Article XVI, Sec. 5, and Article IX, sec. 8, prohibit the expenditure of public money for the direct, or indirect, support of any religious sect, church, creed or sectarian purpose or for the teaching of any sectarian or denominational doctrine; therefore, the Caldwell Claim that tax money should be withheld from the District in order to promote his sectarian beliefs relating to his QSE Policy, would itself violate the California Constitution, as well as be the establishment of a religious viewpoint in violation of the United States Constitution First Amendment Establishment Clause. As such, no claim for relief is stated by Caldwell's Sixth Claim for Relief, because it is subordinated to the Establishment Clause of the United States Constitution. [Diloreto v. Board of Education of the Downey Unified School District (1999) 74 Cal. App. 4th 267, at 280-280.]

C. This Action Should be Dismissed for Failure to State a Claim for Relief Under 42 U.S.C. § 1983, Pursuant to Federal Rule 12(b)(6).

The TAC should be dismissed, without leave to amend, because it fails to state a claim for relief under 42 USC § 1983 for any violation of any federal Constitutional Right or federal statute.

1. There is no § 1983 Liability Because There is Federal Qualified Immunity.

Under Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 694-695 (1978), a local governmental entity may not be sued under § 1983 for an injury inflicted solely

by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent office policy, inflicts injury that the government as an entity is responsible under § 1983.

Likewise, a plaintiff seeking to impose liability under 42 U.S.C. § 1983 must identify (plead) an official District *"policy"* or *"custom"* that caused the plaintiff's injury. The District cannot be held liable as an entity under a theory of respondeat superior (*vicarious liability*) for the acts of its officials and/or employees. [Board of County Commissioners of Bryan County v. Jill Brown, 520 U.S. 397, 403-405 (1997).]

The Civil Rights Act of 1971 (42 U.S.C. § 1983) provides a civil remedy against a person who, under color of state law, deprives another of a cognizable "federal constitutional or statutory right." Section 1983 is not itself a source of substantive rights, but it merely provides a method of vindicating federal rights elsewhere conferred. [Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979); Leer v. Murphy, 844 F. 2d 628, 632-633 (9th Circuit, 1988).] A § 1983 civil rights claim cannot be used to seek enforcement of a California Constitutional Right or a state law statute. [Peloza v. Capistrano Unified School District, 37 F.3d 517, 523 (9th Circuit, 1994).]

To prevail under § 1983, a plaintiff must prove that each defendant, acting under the color of state law, committed an act that deprived him of some right, privilege or immunity protected by the United States Constitution or a United States statute. [Leer v Murphy, supra at 632-633.] A pleading is insufficient under the Civil Rights Act, if the allegations are mere conclusions. [Place v. Shepard, 446 F.3d 1239, 1244 (6th Circuit, 1971; Kennedy v. Landing, 529 F. 2d 987, 989 (9th Cir., 1976.] The publishing of a defamatory statement by a defendant does not violate the federal Constitution. [Paul v. Davis, 424 U.S. 693, 694 (1976); Siegert v. Gilley, 500 U.S. 226, 232-233 (1991); WMX Technologies, Inc., et al. v. Miller, 80 F. 3d 1315, 1320 (9th Cir., 1996).]

Likewise, Mr. Caldwell cannot seek enforcement, damages or equitable relief for violation of any California State Constitutional rights or violations of California State Statutes, such as the Education Code and/or the Government Code, through the mechanism of a § 1983 claim. [Peloza, supra at 523.]

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(a) There is No Direct Entity Liability.

In order to hold the District, liable as an entity, the plaintiff must properly plead an official "government policy" or "custom." The TAC fails this pleading requirement, because there is an insufficient pleading of any such policy or custom. [Monell, supra at 690-691; Board of County Commissioners of Bryant County v. Jill Brown, 520 U.S. 397, 403-405 (1997); Gillette v. Delmore, 979 F.2d 1342, 1346-1347 (9th Cir. 1992).] The TAC now pleads that the individually named defendants were acting *only* in their "official capacities." [TAC, Para. Nos. 5-10, Inclusive.] [Monell, supra at 694-695; Board of Bryan County Commissioners v. Brown, supra at 403-405.]

There is "no entity liability" on the part of District, because § 1983 imposes liability on a local government, only when an unconstitutional action of its employees or agents "implements or executed a policy statement, ordinance, regulation or decision officially adopted and promulgated by the body's officers." [Monell, supra at 690.] In order to establish liability against the District under Monell, the plaintiff must plead and prove:

(1) that he had a constitutional right of which he was deprived;

(2) that the local governmental body had a custom created by those who may fairly be said to determine official policy;

(3) the custom amounted to a least deliberate indifference to the plaintiff's rights;

(4) and that the custom was the moving force behind the alleged constitutional violation. [Blair v. City of Pomona, 223 F. 3d 1074, 1079 (9th Cir, 2000).]

The TAC does not meet these tests. Caldwell did not have any constitutional rights to establish a religious view point in the District's high school curriculum; he did not have unlimited free speech right at the board members, because they were not traditional public forums allowing unlimited freedom of speech; he was not treated differently that any other parent seeking to have impute into the District's science and biology curriculum, and he had no "veto" power over the curriculum under either the federal law or state law; there was no "official" custom or policy to keep parents from speaking at board or community meetings; there no "deliberate indifference" to the plaintiff's rights; and to the contrary, the allegations in the TAC clearly belies his claims and actually show that he got his say and more as to the proposed inclusion of his QSE Policy into the science and biology curriculum.

[Monell, supra at 690; Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Blair v. City of Pomona, supra at 1079; Place v. Shepard, supra 1244; Kennedy v Landing, supra 989.]

There is no "official practice, custom or policy" by the District that is properly alleged in the TAC, which shows that Caldwell was "unconstitutionally" excluded from School Board meetings, and/or that his was "unconstitutionally" prohibited from placing and/or presenting his QSE Policy at School Board meetings, at curriculum team meetings, and/or at any school-related community meetings, and/or that he was deprived of his free speech rights. [See: Karam v. City of Burbank, 352 F.3d 1188, 1194-1195 (9th Cir., 2003).] The Karam case involved the plaintiff, a critic of the City Council's policies, who regularly attended city council meetings to express opposition to the expansion of the Burbank City Airport. At one meeting she was asked to leave, but she did not leave, stayed and had her say. She was later charged with trespassing and obstruction of justice, and she thereafter filed a § 1983 civil rights claim against the City, its police officers and other officials.] The Ninth Circuit found that there was no official City policy, practice and/or custom of circulating informal complaints about "gadflies" and "loonies" who regularly attended the City Council Meetings and dismissed the plaintiff's § 1983 First Amendment Claim. [Karam, supra at 1194-1195.]

(b) There is No Individual Liability.

There is *"federal qualified immunity"* from suit for all of the individually named District Officials and employees. [Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-691, 694-695 (1978); Wilson v. Lane, 526 U.S. 603, 609, (1999); Mellen v. Bunting (Virginia Military Institute), 327 F. 3d 355 (Fourth Circuit, 2003).] The TAC alleges five 42 U.S.C.§ 1983 civil rights claims for relief against the District and its officials and employees, who are named individually, but who are sued only in their official capacities. [TAC, Para. Nos. 5-10, Inclusive.] Employees acting in their individual capacities are not liable for § 1983 claims.

2. There is Federal Qualified Immunity.

The "qualified immunity defense" protects government officials performing discretionary governmental functions from civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [Harlow v.

Fitzgerald, supra at 818.] When "qualified immunity" is asserted, the Court undertakes a two-step analysis, as follows:

(1) Was the law governing the official's conduct clearly established; and

(2) Under that law, could a reasonable officer have believed the conduct was lawful?

This issue must be determined at the earliest possible stge of the litigation, [Anderson v. Creighton, 483 U.S. 635, 639 (1987); Collins v. Jordan, 110 F. 3d 1363, 1369 (9th Circuit, 1997); Asgari v. city of Angeles (1997) 15 Cal. 4th 744, 755-756.] Raising this issue on a Motion to Dismiss is a proper means of addressing this issue. [Guzman-Rivera v. Rivera-Cruz, 98 F. 3d 664, 667 (1st Circuit , 1996); Williams v. Alabama State University, 102 F. 3d 1179, 182 (11th Circuit, 1997).]

First, however, the Court must determine whether if true, the plaintiff's allegations even establish a constitutional violation. [Hope v. Pelzer, 536 U. S. 730, 736 (2002).] This is made at the outset in order to promote clarity in the law and to ensure that legal standards may evolve from case to case. [Saucier v. Katz, 533 U.S. 194, 201 (2001).] The Court must then make a second inquiry to determine if the defendant violated a clearly established federal statute or a federal constitutional right. [Harlow v. Fitzgerald, supra at 818.]

3. There Were no Constitutional Violations.

In Arkansas v. Forbes, 523 U.S. 666 (1998), the Supreme Court held that a public school prescribing its curriculum by its nature will facilitate the expression of some viewpoints instead of other and that curriculum selection is "pure government speech," and it also implies that "pure government speech" and "imprimatur speech" are treated differently from "private speech." [Ibid. 669, 675.]

The adoption of textbooks for use in classrooms may be deemed a public forum only if that forum by policy or by practice had been opened "for indiscriminate use by the general public." [Hazelwood School District v. Kuhlmeier, supra.] Public schools are not public forums. [Hague v. CIO, supra , 515; Perry Education Assn, supra, 41; Reeves v. Rocklin Unified School Districts, supra 662-663; Chiras v. Miller, 2004 U.S. LEXIS 14177 (NDTX, 2004).]

In Downs v. Los Angeles Unified School District, 228 F. 3d 1003, 1012 (9th Circuit, 2000), the High School Principal had a right to remove "anti-gay materials" from a Bulletin Board that had

been created by a teacher, and posted as his own competing bulletin Board at the High School, during Gay & Lesbian Awareness Month. The removal of the anti-gay materials ("Testing Tolerance") by the High School Principal was directly traceable to the School District and its Board; however, the acceptance or rejection of the posted materials was equivalent to "pure governmental speech" by the School District. [Ibid. 1012] The anti-gay teacher could not compel the Board (School District) to accept (embrace) his particular viewpoint, just as the Board could not force the teacher to accept its position . [Ibid. 1015.] The teacher's First Amendment rights were not violated by the School District.

In Leebaert v. Harrington and FairField Board of Education, 332 F. 3d 134, 141 (2nd Circuit 2003), the Court held that decisions as to how to allocate scarce resources, as well as what curriculum to offer or require, are uniquely committed to the "discretion" of local school authorities. The Second Circuit also expressly held that "a parent had no fundamental constitutional right" to tell the School Board what his or her child will be taught, or not taught, or to pick and chose from the courses offered in the curriculum. [Leebaret, supra at 141.] Thus, Mr. Caldwell had no constitutional right to tell the District Board what to adopt as its biology and science curriculum, and as such, there is no violation of Mr. Caldwell's free speech rights, nor can he state any claim under 42 USC § 1983.

4. The Defendants Were Acting With Reasonable Belief Under Federal Law.

In our case, it is unquestionably clear that the District's Board Members, its officials and employees, who are named as individual defendants in this case, "were acting reasonably" in their belief that the School Board Meetings were not "unlimited traditional public forums" for purpose of the plaintiff's political and religious Free Speech Rights under the First Amendment; that rejection of the plaintiff's QSE Policy from inclusion in the District's curriculum was not the establishment of religion in violation of the Establishment Clause of the First Amendment; that the teaching of the scientific theory of evolution was not the "establishment of a religion" in violation of the First Amendment's Establishment Clause; that the Board had the ultimate discretion under California state law, as well as under federal case authorities, to establish the District's High School science and biology curriculum; that the defendants and the District had the right, under state law, to determine the items to be place on the School Board Public meetings and to be discussed at community meetings

related to parental impute regarding the school district's curriculum; and that they were not acting arbitrarily, capriciously or lacking a reasonably related governmental purpose in limiting debate in the School Board Meetings, and that they were not making an arbitrary classification of the plaintiff based on his "Christian" religious beliefs (status) in violation of the Equal Protection Clause of the Fourteenth Amendment; and that they were not depriving the plaintiff of any "life, liberty or property interest" within the meaning of the Due Process Clause of the Fourteenth Amendment.

The actions of the individual District Board members, officials and employees were reasonable, as a matter of law. Thus, the actions complained of by Mr. Caldwell were reasonable and are not actionable under 42 USC § 1983, and they are all entitled to federal qualified immunity. Also, please see Edwards v. California University of Pennsylvania, 156 F. 3d 488, 491-492 (1998), where the Third Circuit held that the University could make content-based choices in restricting a professor' syllabus and that the professor did not have a First Amendment right to use restricted materials in the classroom.

Members of the Texas State Board of Education were not liable under 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendments and their Motion to Dismiss was granted, where the Board of Education's rejection of a professor's textbook for inclusion in the Texas State School curriculum was reasonably related to legitimate pedagogical concerns and that viewpoint based discrimination was reasonably related to such pedagogical concerns and was permissible. [Chiras, supra at *36-40.] The Texas District Court further found that the Board of Education's active role in adopting or rejecting textbooks showed that this forum had not been opened for "indiscriminate use" by the general public and was a "nonpublic forum." [Ibid. *13-14.]

That Texas District Court also found that the Texas State Board of Education textbook approval process gave the School Board "editorial control" to accept or reject various portions of textbooks and equated this control to that of the High School Principal to determine what went on school bulletin boards in Downs v. Los Angeles Unified School District, 228 F. 3d 1003, 1012 (9th Circuit, 2000). [Chiras, supra at *23-24.] The Chiras Court found that under Hazelwood, supra, that educators are afforded discretion to engage in viewpoint discrimination as long as the discrimination is reasonably related to legitimate pedagogical concerns. [Chiras, supra at *38-40.]

Furthermore, the United States Supreme Court in Board of Education v. Pico, 457 U.S. 853, 863 (1982) recognized that school boards have broad discretion in the management of school affairs. Also, school boards are precluded from imposing a "pall of orthodoxy" on classroom instruction which implicates the state in the "propagation of a particular religious or ideological viewpoint." [Pratt v. Ind. Sch. Dist. No. 831, Forest Lake, 670 F. 2d 771, 776 (8th Circuit , 1982).] Thus, the defendants in this action did not violate Mr. Caldwell's constitutional rights, and acted reasonably in exercising their discretion to decide what materials were to be included in the high school biology and science curriculum, and are entitled to federal qualified immunity, as a matter of law. [Edwards v. Aguillard, 482 U.S. 578, 583 (1987); Epperson v. Arkansas, 393 U.S. 97 (1968).]

5. The Officials and Employees are Entitled to Qualified Immunity.

In Mellon v Bunting (Virginia Military Institute) 327 F. 3d 355 (4th Cir., 2003), the president of the university, General Josiah Bunting, was found to have "qualified immunity" from liability under a § 1983 claim that was brought relating to a First Amendment Establishment Clause claim which invalidated an "official university prayer." The Court found that the supper prayer violated the cadets' First Amendment rights as an "establishment of religion," but that although the supper prayer conflicted with the First Amendment Establishment Clause, president General Bunting was personally "immune" from damages, because he could have "reasonably believed" that the "supper prayer" was constitutional, due to the fact that the Supreme Court had never invalidated or addressed the constitutionality of state-sponsored prayer in any university setting, much less a military college. [Mellon v. Bunting, supra at 376.]

The same rationale is apropos to our case in that the District and the other named defendants are immune from damages, because they did not violate clearly established statutory or constitution rights of which a reasonable person would have known, and to the contrary, they were all acting with "objectively reasonable beliefs" in caring out their mandatory duties regarding the selection of the District's High School science and biology curriculum. [Harlow, supra at 818; Mellon v Bunting , supra at 376.]

6. The Defendants had Discretion Under State Law.

In addition to acting with reasonable belief under federal law, the District and its officials and

employees had discretion to undertake their actions under California law, and were acting with reasonable belief, pursuant to State Law and the California State Constitution.

California Education Code § 51050, provides that the governing board of every school district shall enforce in its schools the courses of study and the use of textbooks and other instructional materials prescribed and adopted by the proper authority. This is a mandatory duty which the Board Members were required to follow. Also, California Education Code § 51054, provides that except as provided in § 51053, the course of study for grades 7-12 shall be prepared under the direction of the governing board having control thereof and shall be subject to approval as may be required by the state board. Therefore, they were *a fortiori* acting with a "reasonable belief" under 42 U.S.C. § 1983, and they are entitled to federal qualified immunity. [Monell, supra 690-691, 694-695.]

It is true that California Education Code § 51100, § 51102 and § 51120, provides for parent involvement and participation in the public schools, including involvement in activities and programs and collaboration, in order to improve public educational institutions; however, none of this statutory language is mandatory, nor does it give parents (Larry Caldwell) "veto power" over the selection of the High School science and biology curriculum in the Roseville Joint Unified High School District, nor do these statutes repeal, either expressly or by implication, the mandatory duties given to the School Board and its officials and employees, including their discretion, regarding selection of the High School science and biology curriculum as provided by Cal. Education Code § § 51050 and § 51054. In addition, Article IX, sec. 7, of the California Constitution (adopted in 1879) provided in pertinent part that the Local Boards of Education shall adopt a series of textbooks for the use of the common schools within their respective jurisdictions. [People v. Board of Education of Oakland (1880) 55 Cal. 331, 333-334; Engelmann v. State Board of Education (1991) 2 Cal. App. 4th 47, 53-54.]

Thus, the "doctrine of qualified immunity" safeguards all but the plainly incompetent or those who knowingly violate the law. If officers of reasonable competence would disagree on the issue of whether a chosen course of action is constitutional, immunity should be recognized. [Malley v. Briggs, 475 U.S. 335, 341 (1986).] The Court must examine the conduct of the officials in light of the constitutional right that the plaintiff is attempting to assert, and the contours of the right must be

sufficiently clear so that a reasonable official would understand that what he is doing violates that particular constitution right. [Anderson v. Creighton, 483 U.S. 635, 640 (1987); Lytle v. Wondrash, 182 F.3d 1083, 1086-1087 (9th. Cir., 1999).]

Consequently, the individually named defendants in this action were, as a matter of law, acting in an "objectively reasonable manner" in exercising their discretion to select and determine the materials to be included, or excluded, from the District's High School curriculum and in their control over the School Board Meetings and Agendas, and in their beliefs that they were not infringing upon Caldwell's First Amendment Rights of Free Speech, the Establishment Clause, and /or denying him any Due Process Rights or Equal Protection of the Law under the Fourteenth Amendment. A government official is entitled to federal "qualified immunity," even where reasonable officials may disagree as to his or her conduct, as long as the conclusion is "objectively reasonable." [Gasho v. United States,. 39 F. 3d 1420, 1438 (9th Circuit, 1994).]

D. This Action is Also Barred by California Immunities and Privileges.

1. State Agent Immunity (Eleventh Amendment Sovereign Immunity).

Pursuant to California Supreme Court authority, there is "state agent immunity" applicable to all of the individually named defendants. [Venegas v. County of Los Angeles (2004) 32 Cal. 4th 820, 828-829] of sovereign immunity. A suit against a state official in his or her "official capacity" is not a suit against the officer, but rather a suit against the official' office. As such, it is no different from a suit against the State itself. [Venegas, supra at 829.]

Also, whether a public official represents a county or a state when acting in a particular is analyzed under state law, not federal law. [Venegas, supra 831; Pitts v. County of Kern (1998) 17 Cal. 4th 340, 348, 352-353.] As McMillian v. Monroe County, 520 U.S. 781, 784-785 (1997) explains, the rule exempting the state and its officers from liability under § 1983 applies to such officers only if they were acting as state agents with final policymaking authority over the complained-of actions. In our case, the District, its officials and its employees were acting as "state agents" with final policy making authority for the District's High School science and biology curriculum, adoption of which is mandated by the California Education Code.

Since the Ninth Circuit has held that California school districts are state agencies for Eleventh

Amendment purposes [Belanger v. Madera Unified School District, 963 F. 2d 248 (9th Circuit 1992)], then Eleventh Amendment sovereign immunity applies to the case, and there is no subject matter jurisdiction. Caldwell has inappropriately brought this action in federal District Court, and it should be ordered dismissed for lack of jurisdiction.

State immunity extends to state agencies and state officers who act on behalf of the state and, therefore, can assert the state's Eleventh Amendment immunity from suit in federal court. [Natural Resources Defense Council v. California Dept. of Transportation, 96 F. 3d 420, 421 (9th Cir. 1996); Quiroz v. State Board of Education, 1997 U.S. Dist. LEXIS 24154 *3-5 (EDCA 1997, B. Shubb, Judge).] The District is entitled to State Sovereign Immunity [Belanger v. Madera Unified School District, 923 F. 2d 248, 254 (Ninth Circuit, 1992); Butt v. State of California (1992) 2 Cal. App. 4th 668, 685; Los Angeles County v. Kirk (1905) 148 Cal. 385, 387-388; Kichmann v. Lake Elsinore Unified School District (2000) 83 Cal. App. 4th 1098; Wilson v. Board of Education (1999) 75 Cal. App. 4th 1125, 1134-1141.]

There is "state sovereign immunity" from suit for violation of state laws, and/or California State Constitutional rights, in federal court, and state officials and agencies cannot be sued in their "official capacities," when the "state may be financially liable." Since the District is part of the California constitutionally mandated state-wide system of public education, it is part of the sovereign and cannot be sued in a taxpayers suit claim under California Code of Civil Procedure § 526a, because state funds would be used to pay any such judgment, or to pay for the performance of any injunctive relief.

Thus, this action has been inappropriately filed in Federal District Court in violation of the Sovereign Immunity of the State of California and its agents, including the District and its officials, officers and employees named herein, and in violation of the Eleventh Amendment. The District Court must dismiss this action, because it has no subject matter jurisdiction over these defendants. [Venegas, supra 831; Pitts v. County of Kern (1998) 17 Cal. 4th 340, 348, 352-353; Natural Resources Defense Council v. California Dept. of Transportation, 96 F. 3d 420, 421 (9th Cir. 1996); Quiroz v. State Board of Education, 1997 U.S. Dist. LEXIS 24154 *3-5 (EDCA 1997); Sherwin-Williams Company v. Crotty, 334 F. Supp. 2d 187, 195-197.]

2. Absolution Discretionary Immunity.

Under California law, there is "absolute discretionary immunity" for the actions of the District's School Board members. [Cal. Government Code § 820.2; Caldwell v. Montoya (1995) 10 Cal. 4th 972, 985-986; Tenney v. Brandhove, 341 U.S. 367, 377-379 (1951).] Also, if the Board Members are immune, then so is the District. [Cal Government Code § 815.2(b); Kemmerer v. County of Fresno (1988) 200 Cal. App. 3d 1426, 1435-1436; Kayfetz v. State of California (1984) 156 Cal. App. 3d 491, 496.]

3. Absolute Statutory Privileges.

There is "absolute privilege"under California Civil Code § 47(a) and (47)(b) for all "communications" made by Officials and employees of the District, and when there is absolute privilege by the employees, then this is applied to the District. [Government Code § 815(b); § 815.2(b); Kemurrer v. County of Fresno, supra 1435-1436.]

4. There are No Other Properly Alleged State Law Pendent Claims.

The TAC fails to state a claim for relief under any other constitutional and/or state law theories of recovery. There are "no" other properly alleged "pendent California state law statutory, constitutional, or common law torts claims" that are capable of being maintained in federal District Court, because the District had the complete discretion under California state law to decide and choose the curriculum for the Roseville High School District, which is prescribed by the California State Department of Education. [Cal. Education Code § 51050, § 5104, § 51057, and § 51102; Brown v. Woodland Joint Unified School District, 27 F. 3d 1373 (Ninth Circuit, 1994); Leebaret v. Harrington and Fairfield Board of Education, 332 F. 3d 134, 141 (Second Circuit, 2003); Chiras v. Miller, 2004 U.S. LEXIS 14177, (NDTX, 2004).]

In addition, the plaintiff cannot use the 42 U.S.C. § 1983 civil rights statute to vindicate California state statutory rights, and/ California State Constitutional rights. [Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979); Middlesex County Sewerage Authority v. Nat. Sea Clammers Assn, 453 U.S. 1, 20 (1981).]

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E. Violation of Federal Rules of Civil Procedure, Rule 8(a), Failure to File a Concise, Short and Plain Statement.

As an alternative ground of relief, in the event that the District's Motion to Dismiss is not granted, then the District hereby contends that the TAC fails to meet the pleading requirement of a concise, short and plain statement of Caldwell's claims for relief, and that the Court should order him to file a further Amended Complaint that meets the requirements of Rule 8(a). [United States ex rel. Garst v. Lockheed-Martin Corp, 328 F. 3d. 374, 378 (7th Circuit, 2003).]

Even though "notice pleading" is the standard in the District Court, there are not enough "material facts" pled to state any viable claims for the violation of any federal Constitutional rights, nor for relief under the Cal Code of Civil Procedure § 526a state pendent lite statutory claim. Likewise, the plaintiff has not properly pled sufficient grounds for the invocation of the Court's subject matter jurisdiction. The TAC is still vague, ambiguous and confusing because allegations regarding federal Constitutional claims are intermingled with California statutes, which is confusing as to whether the plaintiff has properly stated any claims for relief under 42 U.S.C. § 1983, because such claims cannot be based on state statutes, laws or California constitutional provisions.

It is the District's contention that the TAC still violates Rule 8(a), making it impossible for the District to prepare a responsive pleading, since it cannot determine what the precise nature of the plaintiff's claims are, due the cross-mixing of the Cal Education Code provisions and the California Brown Act (Cal Government Code § 54950, et seq.) relating to "open public meetings" into his allegations, while attempting to state claims for relief under 42 U.S.C. § 1983 for violation of United States Constitutional Rights.

To reiterate, the TAC is not clear and concise as to whether the Plaintiff is basing his claims for relief upon state law (California state statutes) or upon Federal Constitutional rights, or upon California Constitutional rights. [Magluta v. Samples, 256 F. 3d 1282, 1284 (11th Circuit, 2001).] In Kuehl v. Federal Deposit Ins. Corp., 8 F. 3d 905 (1st Circuit, 1993), a 43 page, 358 paragraph complaint did not meet the Rule 8(a) requirements of a "concise" statement.

Likewise, the District is still unable to determine from the TAC, what is the actual nature of the injunctive, equitable and/or declaratory requested being sought by the Plaintiff. A pleading that

is too long and too detailed also violates the Rule 8(a) mandate of a short and plain (concise) statement, as well as the Rule 8(e)(1) requirement that each averment of a pleading shall be simple, concise and direct. [Yamaguchi v. United States Dept. of Air Force, 109 F.3d 1475, 1481 (9th Circuit, 1997); Roe v. Aware Woman Center for Choice, Inc., 252 F. 3d 678, 683-684 (11th Circuit, 2001).] The TAC does not meet these federal pleadings requirements.

F. Other Pleading Defects.

The plaintiff has changed the caption and title of the TAC to include Doe Defendants, Nos. 1-10, Inclusive. This has been done without the approval of the Court or application for leave to amend. The addition of "doe defendants" in a 42 USC § 1983 is not proper under law.

Likewise, the change in the "capacity" against the individually "captioned" defendant has been done in violation of Federal Rules of Civil Procedure, Rule 10(a). Both of these unauthorized changes are prejudicial to the Defendant, since the Plaintiff cannot change the names or capacities of the parties listed in the originally filed complaint and as previously set forth in the Second Amended Complaint.

These actions by the plaintiff makes the TAC vague, confusing and ambiguous, and does not provide the District and the other individually named defendants sufficient notice, or any clue as to who the "doe defendants" are in this action. Therefore, the Court should order the "doe defendants" allegations stricken from the TAC, or in the alternative, the Court should order the plaintiff to file a Fourth Amended Complaint, pursuant to Rule 8(a) and Rule 10(a).

IV.

REQUEST FOR SANCTIONS, ATTORNEYS FEES AND COSTS

The TAC filed by the plaintiff is totally without merit, frivolous, and violates Federal Rules of Federal Civil Procedure, Rule 11, and was only brought to advance a "political" and "religious" agenda against the District, and to harass its Board Members, Officials and employees, in retaliation for its failure to adopt his QSE Policy into the District's High School science and biology curriculum. [Rules of Federal Civil Procedure, Rule 11(b)(1).]

It was filed in "bad faith," and brought in the face of overwhelming contradicting United States Supreme Court authority, overwhelming contradicting Ninth Circuit Court of Appeals case

authority, overwhelming Eastern of California District Court contradicting authority, and in the face of overwhelming California State law authorities and governmental immunities. [Sprewell v. Golden State Warriors , 231 F. 3d 520, 530 (Ninth Circuit, 2000).]

Likewise, the TAC does not meet the tests for advocating changes in the law, because the claims advanced by Caldwell are not "justified by existing law" and are "frivolous" arguments for an alteration in existing law. [Rules of Federal Civil Procedure, Rule 11(b)(2); Brunt v. Service Employees International Union, 284 F. 3d 715, 721 (7th Circuit, 2002).]

The District has expended substantial funds on costs and attorneys fees to defend this case, and to provide a defenses to its officials and its employees, and it is entitled to an award of attorneys fees, costs and sanctions under Federal Rules of Civil Procedure, Rule 11, and also under 42 U.S.C. § 1988. [Peloza v. Capistrano Unified School District, 37 F. 3d 517, 523-524 (9th Circuit, 1994).] Sanctions are properly awarded against in pro se litigants, such as Caldwell, especially since he is also a practicing attorney at law, and against his associate counsel, the Pacific Justice Institute, who has signed the TAC.

The District hereby request leave of Court to file a motion and present supporting Declarations and other evidence to establish the amount of fees and costs expended in the defense of this entirely frivolous and merit less TAC by Caldwell and this associate counsel, Kevin T. Snider and the Pacific Justice Institute, his alter ego, once the Court has granted the District's Motion to Dismiss, without leave to amend. [Federal Rules of Civil Procedure, Rule 11(c)(1)(A) and (B).]

V.

CONCLUSION

For all of the afore-mentioned reasons, the District is entitled to a dismissal of the TAC, pursuant to Rule 12(b)(1), because it fails to properly state subject matter jurisdiction. It is also entitled to a dismissal, pursuant to Rule 12(b)(6) because the TAC does not plead sufficient material facts to state federal claims for relief and/or to sufficiently state any California state law "pendent" claims, pursuant to California law. The TAC should be ordered dismissed without leave to amend.

In the alternative, due to the vagueness, ambiguity and confusion created by the pleading of the TAC, including the apparent violation of Rule 10(a), the District is entitled to an order dismissing

the TAC for failure to plead a "concise, short and plain" statement, under Rule 8(a), and under Rule 10(a), or in the alternative for order requiring the Plaintiff to file a more definite statement by way of a Fourth Amended Complaint.

DATED: August 19, 2005 LAW OFFICE OF MATHEW D. EVANS

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