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HIGH SCHOOL DISTRICT; JAMES JOINER;
6 R. JAN PINNEY; TONY MONETTI; STEVEN
LAWRENCE; DONALD GENASCI; RONALD SEVERSON.
7

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10 LARRY CALDWELL,

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

11 Plaintiff,
12 vs.

13 ROSEVILLE JOINT UNION HIGH SCHOOL
DISTRICT; JAMES JOINER; R. JAN
PINNEY; TONY MONETTI; STEVEN
14 LAWRENCE; DONALD GENASCI;
RONALD SEVERSON.

15 Defendants.
16

**POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION; FOR FAILURE TO
STATE A CLAIM; AND FOR FAILURE
TO STATE A SHORT AND PLAIN
STATEMENT FOR RELIEF
[Rule 12(b)(1); Rule 12(b)(6); and Rule
8(a)]**

DATE: July 8, 2005
TIME: 10:00 a.m.
COURTROOM: 2
TRIAL: None Set

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19
20 **I.**

21 **STATEMENT OF THE CASE**

22 This case has been brought by Plaintiff, LARRY CALDWELL (hereafter "Caldwell"), pursuant to
23 42 U.S. C. § 1983, asserting various deprivations of United States Constitutional rights, as well as a
24 California pendent state law claim , under Code of Civil Procedure § 526a, which is commonly referred to
25 as a "taxpayer's claim." Caldwell is a licensed attorney, who appeared originally in this matter in pro se,
26 but who has now brought in associate counsel, Kevin T. Snider, of the Pacific Justice Institute. Caldwell
27 is a resident of Placer County, California, and he has at least one child attending school in the ROSEVILLE
28 JOINT UNION HIGH SCHOOL DISTRICT. [See: SAC, Paragraph No. 1]

1 Defendant, ROSEVILLE JOINT UNION HIGH SCHOOL DISTRICT, is a public school district
2 organized and existing under the laws of the State of California. The individually named defendants, JAMES
3 JOINER, R. JAN PINNEY, TONY MONETTI, STEVEN LAWRENCE, DONALD GENASCI, and
4 RONALD SEVERSON are either members of the District's School Board, Superintendent of the District,
5 Assistant or Deputy Superintendents, and/or are Principals of District High Schools. They are all officials
6 and/or high level management employees of the ROSEVILLE JOINT UNION HIGH SCHOOL DISTRICT.
7 (They are hereafter collectively referred to as the "DISTRICT") [See: SAC, Paragraphs Nos. 2-8,
8 Inclusive.]

9 The events giving rise to the Second Amended Complaint started in the Spring of 2003, and they
10 relate to the selection of a new biology textbook for use in the Roseville Joint Union High School's
11 curriculum, pursuant to various provisions of the California Education Code. [See: Second Amended
12 Complaint (hereafter "SAC"), Paragraphs Nos. 1, and 11-27, Inclusive.]

13 The SAC is 112 pages in length. It contains 298 Paragraphs in the main body of the SAC, and it
14 has an additional 67 Paragraphs in the Prayer for Relief. It is almost impossible to list all of the "alleged"
15 facts and nearly impossible to summarize these allegations. The Court is requested to take judicial notice
16 of the multiplicity of allegations contained in the SAC. [Federal Rules of Evidence, Rule 201]

17 Its "Common Allegations" (charging allegations) consist of 75 Pages of text that includes the
18 categories of "Introduction and Background," "Definition of Certain Terms," "Caldwell's Efforts to Place
19 His Proposed Quality Science Education Policy on the School Board Agenda," "Caldwell's Efforts to
20 Present His Science Education Proposals on the Agenda of Granite Bay High School's Curriculum
21 Instruction Team Meetings," "Caldwell's Efforts to Persuade the District to Adopt the Proposed Additional
22 Instructional Materials," "The October 2003 Meeting," and "The Biased and Anti-Christian Outside
23 Reviews." [See: SAC, Paras. Nos. 4-79, Inclusive.)

24 Caldwell makes repeated allegations (similar to a "mantra"), which are over inclusive repetitions
25 of his "**religious**" and "**political**" view points, which allegedly give a history of his attempts to have his
26 "Quality Science Education Policy" (hereafter "QSE Policy") placed into the official school curriculum by the
27 District. The QSE Policy is a form of alternative religious science, which seeks to dispute and counter the
28 scientific teaching of evolution in the District's High School curriculum.

1 There are also repeated allegations relating to other publications, including the Holt Biology
2 Textbook, to a scientific experts, to quotes from the expert, to various instructional proposals made by
3 Caldwell to the District, to various school board meetings, to various curriculum meetings, to discussions
4 about various religious and scientific theories and viewpoints, to the presentation of other religious viewpoints
5 in the curriculum, to anti-Christian information and statements, to video tapes, documents and information
6 not attached as exhibits to the SAC, to California Education Code statutes, and to a plethora of other
7 allegations and information, many of which are merely various conclusions of facts, conclusions of law,
8 arguments, religious and political philosophy, and which are all unnecessary to the Rule 8(a) pleading
9 requirement of a "Short and Plain Statement." [See: SAC, Paragraphs Nos. 11-233]

10 Caldwell further makes repeated allegations that the District has prevented him from expressing his
11 religious view points (First Amendment Free Exercise), that it has established a religion (First Amendment
12 Establishment Clause), that he was prevented from placing items on the
13 District's School Board Public Agenda (First Amendment Free Speech and Fourteenth Amendment
14 Equal Protection), that the District made "anti-Christian" remarks about him (First Amendment
15 Establishment Clause), that he was prevented from placing his QSE Policy into discussion at the District's
16 curriculum instruction meeting and prevented from speaking in those meetings (First Amendment Free
17 Speech), that he was denied his right to petition the government and denied access to government
18 information (First Amendment Right to Petition).

19 Caldwell also alleges that he was denied procedural due process by the District (Fourteenth
20 Amendment), and that he, as a California State Taxpayer under California Code of Civil Procedure § 526a,
21 (which is a state law pendent claim) has a right to enjoin, restrain and prevent the expenditures of public
22 tax moneys by the District, until it adopts his QSE Policy for the District's science and biology curriculum,
23 permits him to place whatever item he deems appropriate on the District's school agenda, adopts his religious
24 viewpoints, and allows him to participate in an unlimited manner in the District wide curriculum instruction
25 meetings and/or parent advisory meetings. [See: SAC Paragraphs Nos. 4-79 and Paragraphs Nos. 79-96]

26 Pursuant to his Claims for Relief One--Five contained in the SAC, Caldwell seeks injunctive relief
27 against the District. He is asking the Court to order the District to turn its School Board Meetings into
28 unlimited public forums for free speech activities relating to the airing of political and religious, and in

1 particular the airing of Caldwell's the right-wing evangelical Christian fundamentalist religious viewpoints, and
2 his Christian alternative science (anti-evolutionary) in the guise of the QSE Policy. He further seeks injunctive
3 relief against the District, by asking this Court to order the District to adopt his QSE Policy and other pro-
4 Christian and anti-evolutionary materials into the District's Science and Biology curriculums. He further
5 seeks injunctive relief to have the Court order the District to adopt and establish his "appropriate procedures
6 and policies" in order to allow his proposed instructional materials into the District's High School curriculum.

7
8 In addition, he seeks a declaratory judgment from the Court that the District has violated his Federal
9 Constitutional Right of Free Speech, the Establishment Clause of the First Amendment, and the Equal
10 Protection and Due Process clauses of the Fourteenth Amendment. He he seeks other non-described
11 "equitable relief"; nominal monetary damage of \$1.00; and unlimited general damages for "feelings of harm,
12 intimidation and [emotional] distress for violation of his Federal Constitutional rights. [See: SAC, Prayers
13 for Relief, Paragraphs Nos. 1-48 (Pages 96-108)]

14 Lastly, in his Sixth Claim for Relief, Caldwell seeks a series of declaratory judgments from the Court
15 finding that the District allegedly violated Caldwell's federal Constitutional Rights, including the First
16 Amendment (Freedom of Religion, Establishment Clause, Right to Petition, Free Speech), the Fourteenth
17 Amendment Equal Protection Clause, and Procedural Due Process, and asking that the Court to enjoin and
18 prevent the "*illegal*" expenditure of the estate, funds and/or other property of the District, as a "*taxpayer's*
19 *relief claim*," under a California state statute, Code of Civil Procedure § 526a, until all of his demands
20 for relief are met. [See: SAC, Paragraphs Nos. 92-96, Inclusive, and the Prayer for Relief, Paragraphs
21 Nos. 49-64]

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24 II

25 THE DISTRICT'S CONTENTIONS

26 A. Motion to Dismiss Based on Federal Rules of Civil Procedure, Rule 12(b)(1), for 27 Lack of Jurisdiction.

28 It is the District's contentions that the Court lacks subject matter jurisdiction to hear this case, and/or

1 that it should voluntarily decline to exercise subject matter jurisdiction for the following reasons:

2 1. The Court lacks **tradition Article III** subject matter jurisdiction to hear this case, because
3 it "*cannot grant the relief*" that is being requested in the SAC. [Elk Grove Unified School District v.
4 Newdow, 124 S. Ct. 2301, 2308 (2004)]

5 2. The Court should decline to exercise jurisdiction, because the issues presented in the SAC
6 are "*political questions*," which do not raise a justiciable controversy. [Hazelwood School District v.
7 Kuhlmeier, 484 U. S. 260, 267, 273 (1988)]

8 3. The Court should decline jurisdiction, because the plaintiff lacks "*prudential*
9 *standing*" to raise these issues for the following reasons:

10 (a) The plaintiff is presenting issues that are more appropriately addressed to the
11 representative branches of government, and the rule against the "*adjudication of generalized grievances*"
12 should be applied by the Court.

13 (b) The plaintiff is "*raising another person's legal rights*", who are not parties to
14 he litigation, and the Court should decline jurisdiction.

15 (c) The plaintiff's SAC falls does not fall within the "*zone of interests protected*"
16 by the law invoked. [Elk Grove Unified School District v. Newdow, 124 S. Ct. 2301, 2308-2309 (2004)]

17
18 (d) The plaintiff's children are "*necessary parties*" to this action, and they have
19 not been joined as plaintiffs, and no guardian ad litem has been ordered appointed to represent them, and
20 there is no basis for a "*next-friend suit*" by the plaintiff. [Elk Grove Unified School District v. Newdow,
21 124 S. Ct. 2301, 2308-2309 (2004)]

22 ///

23 **B. Motion to Dismiss For Failure to State a Claim, Based Upon Federal Rules of Civil**
24 **Procedure, Rule 12(b)(6).**

25 The District's contention is that the SAC fails to state facts sufficient to state any claim for relief for
26 the following reasons:

27 1. There is "*federal qualified immunity*" from suit for all of the individually named District
28 Officials and Employees. [Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Monell v. New York City

1 Dept. of Social Services, 436 U.S. 658, 690-691, 694; Wilson v. Lane, 526 U.S. 603, 609, (1999);
2 Mellen v. Bunting (Virginia Military Institute), 327 F. 3d 355 (Fourth Circuit, 2003); Malley v. Briggs, 475
3 U.S. 335, 341 (1986)]

4 2. There is "*state agent immunity*" applicable to all of the individually named
5 defendants. [Venegas v. County of Los Angeles (2004) 32 Cal. 4th 820, 828-829.]

6 3. Under California law, there is "*absolute discretionary immunity*" for the actions of the
7 District's School Board members. [Cal. Government Code § 820.2; Caldwell v. Montoya (1995) 10 Cal.
8 4th 972, 985-986; Tenney v. Brandhove, 341 U.S. 367, 377-379 (1951).] Also, if the Board Members
9 are immune, then so is the District. [Cal Government Code § 815.2(b); Kemmerer v. County of Fresno
10 (1988) 200 Cal. App. 3d 1426, 1435-1436; Kayfetz v. State of California (1984) 156 Cal. App. 3d 491,
11 496.]

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

16 5. There is "*state sovereign immunity*" from suit for violation of state laws, and/or California
17 State Constitutional rights, in federal court, and state officials and agencies cannot be sued in their official
18 capacities, when the "*state may be financially liable.*" Since the District is part of the California
19 constitutionally mandated state-wide system of public education, it is part of the sovereign and cannot be
20 sued in a taxpayers suit claim under California Code of Civil Procedure § 526a, because state funds would
21 be used to pay any such judgment, or to pay for the performance of any injunctive relief. [Quiroz v. State
22 Board of Education, 1997 U.S. District LEXIS 24154, (EDCA 1997, William B. Shubb, Judge); Belanger
23 v. Madera Unified School District, 923 F. 2d 248, 254 (Ninth Circuit, 1992); Butt v. State of California
24 (1992) 2 Cal. App. 4th 668, 685; Los Angeles County v. Kirk (1905) 148 Cal. 385, 387-388; Kichmann
25 v. Lake Elsinore Unified School District (2000) 83 Cal. App. 4th 1098; Wilson v. Board of Education
26 (1999) 75 Cal. App. 4th 1125, 1134-1141]

27 6. The SAC fails to state a claim for relief for "*violation of the Establishment*
28 Clause" of the First Amendment, because the teaching of evolutionary scientific theory is not a is not the

1 establishment of a religion, nor the teaching of religion, in the public schools. [Edwards v. Aguillard, 482
2 U.S. 578, 587-597 (1987); Lemon v. Krutzman, 403 U.S. 602, 612-613 (1971);
3 Peloza v. Capistrano Unified School District, 37 F. 3d 517, 521 (Ninth Circuit 1994)]

4 7. The SAC fails to state a claim for relief for "***violation of the Free Exercise Clause***"
5 of the First Amendment, because the selection of the District's science and biology curriculum is pure
6 government speech and/or bears the imprimatur of the government; because the District had the total
7 discretion under California state law to determine the selection of the instructional materials for the Roseville
8 Joint Union High School District; and because the public schools are not "public forums" for the purpose
9 of unlimited free speech under the First Amendment. [Hazelwood School District v. Kuhlmeier, 484 U.S.
10 260, 267 (1988); Perry Education Assn. v. Perry Local Educators Assn., 460 U.S. 37, 47 (1983);
11 Arkansas v. Forbes, 523 U.S. 666, 669, 675 (1998); Downs v. Los Angeles Unified School District, 223
12 F. 3d 1003, 1012 (Ninth Circuit, 2000); Edwards v. California University of Pennsylvania, 156 F. 2d 488,
13 491 (1998)]

14 8. The SAC fails to state a claim for relief for "***violation of the Equal Protection Clause***"
15 of the Fourteenth Amendment, because the Caldwell must allege that the "classification" of individuals is
16 arbitrary, capricious and lacks a reasonably related governmental purpose. [Bankers Life & Casualty Co.
17 v. Crenshaw, 486 U.S. 71, 81-84 (1988)] The SAC fails this test, and it does not properly allege, or
18 show, any "suspect classifications" for the stating of a claim for violation of the equal protection clause of the
19 Fourteenth Amendment.

20 9. The SAC fails to state a claim for relief for "***violation of the Procedural Due***
21 ***Process***" under the Fourteenth Amendment, because Caldwell must allege a deprivation of "life, liberty or
22 property interest" within the meaning of the Fourteenth Amendment's Due Process Clause. [Board of
23 Regents v. Roth, 408 U.S. 564, 571 (1972)] The SAC fails to do this, because a claim that defamatory
24 statements were made about the plaintiff and/or that his reputation was damaged does not deprive him of any
25 interest in "life, liberty or a property interest," and there insufficient allegation in the SAC to state any other
26 deprivations coming within the ambit of the Fourteenth Amendment.
27 [Siegert v. Gilley, 500 U.S. 226 (1991); Peloza, *supra* at 523-524.]

28 10. The SAC fails to properly state any California statutory taxpayers claim, pursuant to Cal.

1 Code of Civil Procedure § 526a, that can be maintained as a 42 U.S.C. § 1983 Claim
2 in this Court. The federal Tax Injunction Act, 28 U.S.C. § 1341, and principles of federal-state comity
3 preclude a federal court from exercising jurisdiction over challenges to the implementation and assessment
4 of taxes based upon Constitutional principals. [Berry v. Alameda Board of Supervisors, 753 F. Supp.
5 1508, 1509-1511 (1990)]

6 11. The SAC fails to state a claim for relief under any other constitutional and/or state law theories
7 of recovery. There are *"no"* other properly alleged *"pendent California state law statutory,*
8 *constitutional, or common law torts claims"* that are capable of being maintained in federal District
9 Court, because the District had the complete discretion under California state law to decide and choose
10 the curriculum for the Roseville High School District, which is prescribed by the California State Department
11 of Education. [Cal. Education Code § 51050, § 5104, § 51057, and § 51102; Brown v. Woodland
12 Joint Unified School District, 27 F. 3d 1373 (Ninth Circuit, 1994); Leebaret v. Harrington and Fairfield
13 Board of Education, 332 F. 3d 134, 141 (Second Circuit, 2003); Chiras v. Miller, 2004 U.S. LEXIS
14 14177, (NDTX, 2004)]

15 In addition, the plaintiff cannot use the 42 U.S.C. § 1983 civil rights statute to vindicate California
16 state statutory rights, and/ California State Constitutional rights. [Baker v. McCollan, 443 U.S. 137, 144 n.3
17 (1979); Middlesex County Sewerage Authority v. Nat. Sea Clammers Assn, 453 U.S. 1, 20 (1981).]

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

20 As an *alternative ground of relief*, in the event that the District's Motion to Dismiss is not granted,
21 then the District hereby contends that the SAC fails to meet the pleading requirement of a concise, "short
22 and plain" statement of Caldwell's claims for relief, and that the Court should order him to file a further
23 Amended Complaint that meets the requirements of Rule 8(a).

24 To put this contention mildly, the currently pled SAC is the equivalent of many short novels. It is
25 overly inclusive, repetitive and has an over abundance of allegations that are unnecessary to constitute a
26 "Short and Plain Statement for Relief." It is a supreme example of a federal complaint that has too much
27 information in it, and it is certainly not short, nor is it plain. Excessively verbose claims for relief are subject
28 to dismissal. [United States ex rel. Garst v. Lockheed-Martin Corp, 328 F. 3d. 374, 378 (7th Circuit,

1 2003] In that case, a 400 paragraph, 155 page pleading was ordered dismissed by the Court.

2 Even though “notice pleading” is the standard in the District Court, there are not enough "**material**
3 **facts**" pled to state any viable claims for the violation of any federal Constitutional rights, nor for relief under
4 the Cal Code of Civil Procedure § 526a pendent lite statutory claim. Likewise, the plaintiff has not properly
5 pled sufficient grounds for the invocation of the Court’s subject matter jurisdiction. Although, the complaint
6 is 112 pages long, it has been pled in an ambiguous and confusing matter, wherein allegations regarding
7 federal Constitutional claims are intermingled with California statutes, which is confusing as to whether the
8 plaintiff has properly stated any claims for relief under 42 U.S.C. § 1983, because such claims cannot be
9 based on state statutes, laws or constitutional provisions..

10 It is the District's contention that the SAC violates Rule 8(a), making it impossible for the District to
11 prepare a responsive pleading, since it cannot determine what the precise nature of the plaintiff's claims are,
12 especially in light of his endless repetitive allegations, and the cross-mixing of the Cal Education Code §
13 60002, § 60010, § 60045, § 60400, and § 35145.5, and the California Brown Act (Cal Government
14 Code § 54950, et seq.) relating to "open public meetings" into his allegations, while attempting to state
15 claims for relief under 42 U.S.C. § 1983 for violation of United States Constitutional Rights.

16 To reiterate, the SAC is not clear and concise as to whether the Plaintiff is basing his claims for relief
17 upon state law (California state statutes) or upon Federal Constitutional rights. [See: SAC, Paragraphs Nos.
18 11-233, Inclusive] The SAC is a quintessential shotgun pleading where the material facts, if any, are buried
19 beneath innumerable pages of rambling irrelevancies. [Magluta v. Samples, 256 F. 3d 1282, 1284 (11th
20 Circuit, 2001)] In Kuehl v. Federal Deposit Ins. Corp., 8 F. 3d 905 (1st Circuit, 1993), a 43 page , 358
21 paragraph complaint did not meet the Rule 8(a) requirements of a "concise" statement.

22 The SAC also contains irrelevant and allegations of legal argument, and allegations based on hearsay
23 statements of various professors and magazines. [See: SAC, Paragraphs Nos. 36-37, 200-216, Inclusive]

24 Likewise, the District is unable to determine from the SAC, what is the actual nature of the injunctive,
25 equitable and/or declaratory requested being sought by the Plaintiff. A pleading that is too long and too
26 detailed also violates the Rule 8(a) mandate of a short and plain (concise) statement, as well as the Rule
27 8(e)(1) requirement that each averment of a pleading shall be simple, concise and direct. [Yamaguchi v.
28 United States Dept. of Air Force, 109 F.3d 1475, 1481 (9th Circuit, 1997)]; Roe v. Aware Woman Center

1 for Choice, Inc., 252 F. 3d 678, 683-684 (11th Circuit, 2001).] The SAC does not meet these federal
2 pleadings requirements.

3 Therefore, as alternative relief in this Motion, the Court should either dismiss the SAC, without leave
4 to amend, and/or order the plaintiff to file a Third Amended Complaint that complies with Federal Rule of
5 Civil Procedure, Rule 8(a), which requires a properly alleged "Short and Plain Statement" of the claims
6 (with concise, simple and direct averments) and the actual relief sought by the Plaintiff, and which makes
7 clear that it is based upon United States Constitutional rights, which is necessary to the stating of a 42
8 U.S.C. § 1983 claim for relief.

9 IV

10 LEGAL ARGUMENT

11 A. There is no Traditional Article III Subject Matter Jurisdiction.

12 In every federal case, the party bringing the suit must establish standing to prosecute the action in
13 order to entitle the litigant to have the Court decide the merits of the dispute. [Warth v. Seldin, 422 U.S.
14 490, 498 (1975); Elk Grove Unified School District v. Newdow, 124 S. Ct. 2301, 2308 (2004)]
15 Exercising jurisdiction under **Article III** of the Constitution is balanced against the deeply rooted commitment
16 not to pass on questions of constitutionality unless adjudication is absolutely necessary. [Ashwander v. TVA,
17 297 U.S. 288, 346 (1936); Elk Grove v. Newdow, supra at 2308]

18 **Article III** standing enforces the Constitution's case or controversy requirement, whereas
19 "**prudential standing**" embodies the judicially self-imposed limits on the exercise of federal jurisdiction.
20 [Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-562 (1992); Allen v. Wright, 486 U.S. 737, 750-751
21 (1984).] Pursuant to **Article III**, the plaintiff must show that the conduct of which he complains has caused
22 him suffer an "injury in fact" that a favorable judgment will redress. [Lujan, supra at 560-561; Elk Grove
23 v. Newdow, supra at 2308]

24 In the case before this Court, Caldwell cannot meet these requirements, because the District Court
25 does not have the power to grant the injunctive and declaratory relief that Caldwell is seeking from this
26 Court, which is to order the District to adopt, or to reject, any particular materials for its High School
27 science and biology curriculum. As will be discussed infra, this federal Court cannot intervene to order the
28 District to adopt a high school curriculum, which is determined under state law by the California State

1 Department of Education and which is in the discretion of the District's Governing Board of Education.

2 The education of the Nations' youth is primarily the responsibility of parents, teachers and state and
3 local school officials, and not federal judges. [Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 267,
4 273 (1988).] The District's refusal to adopt the QSE Policy advocated by Caldwell was not a violation
5 of any constitutional right, because under Hazelwood, supra, the District had the right to make view-point
6 based determinations, when dealing with the curriculum. [Arkansas v. Forbes, 233 U.S. 666, 675 (1998)]

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

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

18 **B. This is a Political Question.**

19 The matters raised by Caldwell in the SAC are "**political questions**," which do not raise
20 "**justiciable controversies**". [Marbury v Madison, 5 U.S. (1 Cranch) 137, 164-166, 170 (1803)]
21 Questions which are in their nature "**political**" should never be submitted to the Court. Prudence, as well
22 as separation-of-powers concerns, counsels the Court to decline to hear "political questions". [Baker v.
23 Carr, 369 U.S. 186, 211 (1962)] The Supreme Court's analytical holdings regarding this doctrine are well
24 known:

25 "Prominent on the surface of any held to involve a political question is found [1] a textually
26 demonstrable constitutional commitment of the issues to a coordinate political department;
27 or [2] a lack of judicially discoverable and manageable standards for revolving it; or [3] the
28 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 a political decision already made; or [6] the

1 potentiality of embarrassment from multifarious pronouncements by various departments on
2 one question." [Baker v. Carr, supra at 211]

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

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

16 Therefore, this Court should decline to exercise subject matter jurisdiction, because the true issues
17 raised by the SAC are "**political questions**", and because Caldwell still has legislative, administrative and
18 political remedies that he can pursue to attempt to rectify what "matters" are put into the California State
19 Department of Education prescribed curriculums and what the District may adopt into its High School
20 curriculum. Hazelwood School District v. Kuhlmeier, 484 U. S. 260, 267, 273 (1988); Cal Education
21 Code § 51050, §51054, § 51057, § 51102, § 51200 , § 51220(e), § 51224, § 51225.3(1)(C), and §
22 51226.3]

23 Caldwell can go to his state legislators (his State Assemblyman and his State Senator)
24 to advocate that they proposed legislation to include his QSE Policy into the State prescribed curriculums.
25 Also, he could lobby within the State Department of Education. He also had "administrative" remedies
26 within the District to lobby to have his QSE Policy made part of the District's curriculum or optional reading
27 list. The SAC spends many paragraphs detailing the "political" things Caldwell did to have a parental impute
28 into the determination of the High School curriculum; however, when these "political" efforts failed, he did

1 not have a constitutional right to invoke the District Court into this "political" dispute. The some 79 pages
2 of allegations of actions and imputing (lobbying) that Caldwell did do since the Spring of 2003 factually
3 belies his claims that his constitutional rights were violated, or that he was denied any free speech rights.

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

8
9 Consequently, there is no violation of any of Caldwell's constitutional rights by the District or its
10 officials and employees, and the Court should decline to exercise "jurisdiction," because the issues and relief
11 that Caldwell is seeking to have the Court litigate are not the type of issues that the Court should involve
12 itself with, because they are classic (textbook) examples of "political questions." [Baker v. Carr, supra at
13 211; Schroder v. Bush, 263 F.3d 1169, 1171-1174 (10th Circuit 2001)] The issue of the District's high
14 school curriculum policies should left to the state legislature, the State Department of Education, the local
15 school board, and to the impute of parents, which is authorized by State law, and in which Caldwell
16 vigorously participated, by his own judicial admissions contained in his SAC.

17 **C. Lack of Prudential Standing.**

18 The District Court should decline to exercise its jurisdiction, because the plaintiff lacks "*prudential*
19 *standing*" to raise the issues (claims for relief) set forth in the SAC, because these issues are more
20 appropriately addressed to the representative branches of government, and the rule against the
21 "*adjudication of generalized grievances*" should be applied by this Court. The SAC is an overly
22 inclusive mantra of "complaints" about how the District conducted parent involvement in its determination of
23 the new science and biology curriculum, and individual "complaints" by Caldwell because he did not get his
24 way with his proposed inclusion of the QSE Policy into the curriculum. [Elk Grove Unified School District
25 v. Newdow, supra at 2308-2309.]

26 In addition, the plaintiff is attempting to raise another person's legal rights, who are not parties to this
27 litigation. [See: SAC, Paragraphs Nos. 149-152] Also, Caldwell alleges that he has one child in a
28 District high school; however, she was not made a plaintiff in this action, nor was any guardian ad litem

1 appointed to represent her, and it would appear that he is raising her rights related to the high school
2 curriculum, since Mr. Caldwell is not a student himself, and he actually lacks standing to bring this action,
3 and his child as a necessary party is not joined to the action. [Elk Grove Unified School District v. Newdow,
4 supra at 2308-2309; Allen v. Wright, supra at 751] There is no basis for a "*next-friend suit*" by the
5 plaintiff. [Elk Grove Unified School District v. Newdow, supra at 2308-2309.] Thus, the Court should
6 rule that Caldwell lacks "*prudential standing*" and order the matter dismissed without leave to amend.

7 The various matters (claims) raised in the SAC fall outside the "*zone of interests protected*" by
8 the law invoked. [Elk Grove Unified School District v. Newdow, supra, 2308-2309.] As discussed supra,
9 the District has the discretion and legal right, under California statutes, California case law and federal case
10 law to decide what is placed into the District's high school science and biology curriculum, and the
11 Constitutional rights that Caldwell is attempting to invoke in the SAC do not offer him any protected interest.
12 [Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 267, 273 (1988); Arkansas v. Forbes, supra
13 675; Cal Education Code § 51050, §51054, § 51057, § 51102, § 51200 , § 51220(e), § 51224, §
14 51225.3(1)(C), § 51226.3; Leebaert v. Harrington and FairField Board of Education, 332 F.3d 134, 141
15 (2nd Circuit, 2003); Chiras v. Miller, 2004 U.S. LEXIS 14177 , *13-14, * 23-24 (NDTX, 2004); Downs
16 v. Los Angeles Unified School District, 228 F. 3d 1003, 1012 (9th. Circuit, 2000.]

17 **D. The Action Should be Dismissed for Failure to State a Claim for Relief**
18 **Pursuant to 42 U.S.C. § 1983.**

19 The SAC should be ordered dismissed, without leave to amend , because it fails to
20 properly allege sufficient facts to state a claims for relief pursuant to Federal Rules of Civil Procedure, Rule
21 12(b)(6), for the following reasons.

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

23 Under Monell v. Department of Social Services of the City of New York, 436 U.S. 658,
24 694-695 (1978), a local governmental entity may not be sued under § 1983 for an injury inflicted solely by
25 its employees or agents. Instead, it is when execution of a government's policy or custom, whether made
26 by its lawmakers or by those whose edicts or acts may fairly be said to represent office policy, inflicts injury
27 that the government as an entity is responsible under § 1983.

28 Likewise, a plaintiff seeking to impose liability under 42 U.S.C. § 1983 must identify (plead)

1 an official District “**policy**” or “**custom**” that caused the plaintiff’s injury. The District cannot be held
2 liable as an entity under a theory of respondeat superior (*vicarious liability*) for the acts of its officials
3 and/or employees. Board of County Commissioners of Bryan County v. Jill Brown, 520 U.S. 397, 403-405
4 (1997). The SAC herein, as pled, does not state facts sufficient to properly allege any 42 U.S.C. § 1983
5 civil rights claims for either “**direct entity liability**” and/or for “**individual employee liability.**”

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

13 To prevail under § 1983, a plaintiff must prove that each defendant, acting under the color
14 of state law, committed an act that deprived him of some right, privilege or immunity protected by the United
15 States Constitution or a United States statute. [Leer v Murphy, supra at 632-633] A pleading is insufficient
16 under the Civil Rights Act, if the allegations are mere conclusions. [Place v. Shepard, 446 F.3d 1239, 1244
17 (6th Circuit, 1971); Kennedy v. Landing, 529 F. 2d 987, 989 (9th Cir., 1976)] The publishing of a
18 defamatory statement by a defendant does not violate the federal Constitution. [Paul v. Davis, 424 U.S. 693,
19 694 (1976); Siebert v. Gilley, 500 U.S. 226, 232-233 (1991); WMX Technologies, Inc., et al. v. Miller,
20 80 F. 3d 1315, 1320 (9th Cir., 1996)]

21 Likewise, Caldwell cannot seek enforcement, damages or equitable relief for violation of any
22 California State Constitutional rights or violations of California State Statutes, such as the Education Code
23 and/or the Government Code, through the mechanism of a § 1983 claim. [Peloza, supra at 523]
24 Therefore, to the extent that any of Caldwell's claims for relief contained in the SAC are based on the
25 California State Constitution and/or California State Statute, they fail to state a claim, pursuant to Federal
26 Rules of Civil Procedure, Rule 12(b)(6).

27 **a. There is No Direct Entity Liability.**

28 In order to hold the District, liable as an entity, the plaintiff must properly plead an official

1 "government policy" or "custom." The SAC fails this pleading requirement. [Monell, supra at 690-691;
2 Board of County Commissioners of Bryant County v. Jill Brown, 520 U.S. 397, 403-405 (1997); Gillette
3 v. Delmore, 979 F.2d 1342, 1346-1347 (9th Cir. 1992).] The District, as an entity, is not liable based on
4 any theory of "**respondeat superior**" liability to the plaintiff. [Board of Bryant Co. v. Brown, supra 403-
5 405]

6 The SAC appears to inconsistently plead that the individually named defendants were acting
7 both in their "**individual capacities**," and at the same time, in their "**official capacities**." [See: SAC,
8 Paragraphs Nos. 2-8, and 234-236, inclusive.] The plaintiff then attempts to plead that the resultant
9 "**individual capacity**" conduct of the individual defendants somehow constitutes "**official conduct**" that
10 is "**imputed**" to the District. [See: SAC, Paragraphs Nos. 2-8 and 235-236] As indicated above, this
11 is not a proper allegation of § 1983 "**entity liability**" against the District. [Monell, supra at 694-695;
12 Board of Bryan County Commissioners v. Brown, supra at 403-405.]

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

- 18 (1) that he had a constitutional right of which he was deprived;
- 19 (2) that the local governmental body had a custom created by those who may fairly be
20 said to determine official policy;
- 21 (3) the custom amounted to a least deliberate indifference to the plaintiff's rights;
- 22 (4) and that the custom was the moving force behind the alleged constitutional violation.

23 [Blair v. City of Pomona, 223 F. 3d 1074, 1079 (9th Cir, 2000)]

24 The SAC does not meet these tests. Caldwell did not have any constitutional rights to
25 establish a religious view point in the District's high school curriculum; he did not have unlimited free speech
26 right at the board members because they were not traditional public forums allowing unlimited freedom of
27 speech; he was not treated differently that any other parent seeking to have impute into the District's science
28 and biology curriculum and he had no "veto" power over the curriculum under either the federal law or state

1 law; there was no "official" custom or policy to keep parents from speaking at board or community meetings;
2 there no "deliberate indifference" to the plaintiff's rights; and to the contrary, the verbose allegations in the
3 SAC clearly belies his complaints and actually show that he got his say and more as to the proposed inclusion
4 of his QSE Policy into the science and biology curriculum; and there are insufficient material facts in the SAC
5 to show the "customs," if any, of the District was the moving force behind the alleged constitutional violations.

6 The SAC, even though it is 112 Pages in length and contains some 298 paragraphs, plus
7 another 67 paragraphs in the Prayers for Relief, does not properly or sufficiently state any claim for relief for
8 "direct entity liability" under 42 U.S.C. § 1983. [Monell, supra at 690; Conley v. Gibson, 355 U.S. 41,
9 45-46 (1957); Blair v. City of Pomona, supra at 1079; Place v. Shepard, supra 1244; Kennedy v Landing,
10 supra 989.]

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

22 **b. There is No Individual Liability.**

23 There is "*federal qualified immunity*" from suit for all of the individually named District
24 Officials and Employees. [Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Monell v. New York City
25 Dept. of Social Services, 436 U.S. 658, 690-691, 694-695 (1978); Wilson v. Lane, 526 U.S. 603, 609,
26 (1999); Mellen v. Bunting (Virginia Military Institute), 327 F. 3d 355 (Fourth Circuit, 2003)] The SAC
27 alleges five 42 U.S.C. § 1983 civil rights claims for relief against the District and its officials and employees,
28 who are named individually, but who are sued only in their individual capacities. [See: SAC, Paragraphs

1 Nos. 2-8, Inclusive, and 235-236] Employees acting in their individual capacities are not liable for § 1983
2 claims.

3 The *qualified immunity defense* protects government officials performing discretionary
4 governmental functions from civil damages if their conduct does not violate clearly established statutory or
5 constitutional rights of which a reasonable person would have known. [Harlow v. Fitzgerald, supra at 818.]

6 When "**qualified immunity**" is asserted, the Court undertakes a two step analysis, as follows:

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

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

9 This issue must be determined at the earliest possible stage of the litigation, [Anderson v.
10 Creighton, 483 U.S. 635, 639 (1987); Collins v. Jordan, 110 F. 3d 1363, 1369 (9th Circuit, 1997);
11 Asgari v. city of Angeles (1997) 15 Cal. 4th 744, 755-756.] Raising this issue on a Motion to Dismiss is
12 a proper means of addressing this issue. [Guzman-Rivera v. Rivera-Cruz, 98 F. 3d 664, 667 (1st Circuit
13 , 1996); Williams v. Alabama State University, 102 F. 3d 1179, 182 (11th Circuit, 1997).]

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

20 In Mellon v Bunting (Virginia Military Institute) 327 F. 3d 355 (4th Cir., 2003), the
21 president of the university, General Josiah Bunting, was found to have "**qualified immunity**" in a § 1983
22 civil rights claim relating to a **First Amendment Establishment Clause** claim that invalidated an official
23 university prayer, as violating the cadets' First Amendment rights as an "establishment" of religion. The
24 rationale used by the Fourth Circuit was that although the supper prayer conflicted with the First Amendment
25 Establishment Clause, that General Bunting was personally "immune" from damages because he could have
26 "**reasonably believed**" that the "supper prayer" was constitutional, because the Supreme Court had
27 never invalidated or addressed the constitutionality of state-sponsored prayer in any university setting, much
28 less a military college. [Mellon v. Bunting, supra at 376.]

1 In our case, it is unquestionably clear that the District's Board Members, its officials and
2 employees, who are named as individual defendants in this case, **"were acting reasonably"** in their belief
3 that the School Board Meetings were not **"unlimited traditional public forums"** for purpose of the
4 plaintiff's political Free Speech rights under the First Amendment; that rejection of the plaintiff's QSE Policy
5 from inclusion in the District's curriculum was not the establishment of religion in violation of the Establishment
6 Clause of the First Amendment; that the teaching of the scientific theory of evolution was not the
7 **"establishment of a religion"** in violation of the First Amendment's Establishment Clause; that the Board
8 had the ultimate discretion under California state law, as well as under federal case authorities, to establish
9 the District's High School science and biology curriculum; that the defendants and the District had the right,
10 under state law, to determine the items to be place on the School Board Public meetings and to be discussed
11 at community meetings related to parental impute regarding the school district's curriculum; and that they
12 were not acting arbitrarily, capriciously or lacking a reasonably related governmental purpose in limiting
13 debate in the School Board Meetings, and that they were not making an arbitrary classification of the plaintiff
14 based on his "Christian" religious beliefs (status) in violation of the Equal Protection Clause of the Fourteenth
15 Amendment; and that they were not depriving the plaintiff of any **"life, liberty or property interest"** within
16 the meaning of the Due Process Clause of the Fourteenth Amendment.

17 The following case authorities and statutes support the "reasonableness" of the actions of the
18 individual District Board members, officials and employees:

19 (1) Hazelwood School District v. Kuhlmeier, supra, which holds that the adoption
20 of textbooks for use in classrooms may be deemed a public forum only if that forum by policy or by practice
21 had been opened "for indiscriminate use by the general public"

22 (2) Hague v. CIO, 307 U.S. 496, 515 (1939), which holds that public schools
23 do not possess all of the attributes of streets, parks, and other traditional public forums.

24 (3) Perry Education Assn. v. Perry Local Educators Assn, 460 U.S. 37, 41 (1983)
25 which also holds that public schools are not "public forums" for the purpose of unlimited free speech under
26 the First Amendment. [Compare: Capital Square Review And Advisory Board v. Knights Of The Ku Klux
27 Klan, 515 U.S. 753, 760-763 (1995), where the "religious and political free speech" was being exercised
28 in a full-fledged traditional public forum.]

1 (4) Reeves v. Rocklin Unified School Districts (3DCA, 2003) 109 Cal. App. 4th
2 652, 662-663, where California law is of the same accord regarding the nature of public schools as non-
3 public forums for purposes of the First Amendment.

4 (5) Chiras v. Miller, 2004 U.S. LEXIS 14177 (NDTX, 2004), wherein the District
5 Court found that members of the Texas State Board of Education were not liable under 42 U.S.C. § 1983
6 for violations of the First and Fourteenth Amendments and their Motion to Dismiss was granted, where the
7 Board of Education's rejection of a professor's textbook for inclusion in the Texas State School curriculum
8 was reasonably related to legitimate pedagogical concerns and that viewpoint based discrimination was
9 reasonably related to such pedagogical concerns and was permissible. [Ibid. *36-40]

10 The Texas District Court further found that the Board of Education's active role in adopting
11 or rejecting textbooks showed that this forum had not been opened for "**indiscriminate use**" by the
12 general public and was a "**nonpublic forum.**" [Ibid. *13-14]

13 That District Court also found that the Texas State Board of Education textbook approval
14 process gave the School Board "editorial control" to accept or reject various portions of textbooks and
15 equated this control to that of the High School Principal to determine what went on school bulletin boards
16 in Downs, case, infra. [Ibid *23-24]

17 The Chiras Court found that under Hazelwood, supra, that educators are afforded discretion
18 to engage in viewpoint discrimination as long as the discrimination is reasonably related to legitimate
19 pedagogical concerns. [Ibid. *38-40]

20 (6) Edwards v. California University of Pennsylvania, 156 F. 3d 488, 491-492
21 (1998), where the Third Circuit held that the University could make content-based choices in restricting a
22 professor' syllabus and that the professor did not have a First Amendment right to use restricted materials
23 in the classroom.

24 (7) Downs v. Los Angeles Unified School District, 228 F. 3d 1003, 1012 (9th
25 Circuit, 2000), where the High School Principal had a right to remove "**anti-gay materials**" from a Bulletin
26 Board that had been created by a teacher and posted as his own competing bulletin Board at the High
27 School during Gay & Lesbian Awareness Month. The removal of the anti-gay materials ("**Testing**
28 **Tolerance**") by the High School Principal was directly traceable to the School District and its Board;

1 however, the acceptance or rejection of the posted materials was equivalent to "**pure governmental**
2 **speech**" by the School District. [Ibid. 1012] The anti-gay teacher could not compel the Board (School
3 District) to accept (embrace) his particular viewpoint, just as the Board could force the teacher to accept
4 its position . [Ibid. 1015] The teacher's First Amendment rights
5 were not violated by the School District.

6 (8) In Arkansas v. Forbes, 523 U.S. 666 (1998), the Supreme Court held that a
7 public school prescribing its curriculum by its nature will facilitate the expression of some viewpoints instead
8 of other and that curriculum selection is "**pure government speech**," and it also implies that "**pure**
9 **government speech**" and "**imprimatur speech**" are treated differently from "**private speech**." [Ibid.
10 669, 675]

11 (9) In Leebaert v. Harrington and FairField Board of education, 332 F. 3d 134, 141
12 (2nd Circuit 2003), the Court held that decisions as to how to allocate scarce resources, as well as what
13 curriculum to offer or require, are uniquely committed to the discretion of local school authorities.

14 The Second Circuit also expressly held that "**a parent had no fundamental constitutional**
15 **right**" to tell the School Board what his or her child will be taught, or not taught, or to pick and chose from
16 the courses offered in the curriculum. [Ibid. 141]

17 (10) Board of Education v. Pico, 457 U.S. 853, 863 (1982) recognizes that school
18 boards have broad discretion in the management of school affairs. Also, school boards are precluded from
19 imposing a "**pall of orthodoxy**" on classroom instruction which implicates the state in the "**propagation**
20 **of a particular religious or ideological viewpoint**." [Pratt v. Ind. Sch. Dist. No. 831, Forest Lake, 670
21 F. 2d 771, 776 (8th Circuit , 1982)]

22 (11) Likewise, Edwards v. Aguillard, 482 U.S. 578, 583 (1987) and Epperson v.
23 Arkansas, 393 U.S. 97 (1968) recognize that "states and local school boards are generally afforded
24 considerable discretion in operating public schools." In addition, it is the policy of the Supreme Court that
25 federal courts should usually refrain from prematurely interfering with the educational policy decision so
26 school boards and administrators. [San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 42
27 (1973); Selman v. Cobb County School District, 2005 U.S. LEXIS 432 * 30-31 (January 13, 2005).]

28 (12) Mellon v Bunting (Virginia Military Institute) 327 F. 3d 355 , 376 (4th Cir.,

1 2003), establishes that the District's officials, board members and employees are immune from damages
2 because they did not violate clearly established statutory or constitutional rights of which a reasonable person
3 would have known, and to the contrary they were all acting with objectively reasonable beliefs in carrying out
4 their mandatory duties regarding the selection of the District's High School science and biology curriculum.
5 [Harlow, supra at 818]

6 (13) California Education Code § 51050, which provides that the governing board
7 of every school district shall enforce in its schools the courses of study and the use of textbooks and other
8 instructional materials prescribed and adopted by the proper authority. This is a mandatory duty which
9 the Board Members (Individually Named Defendants) were required to follow. [Cal. Government Code
10 § 815.6] They were *a fortiori* acting with a "**reasonable belief**" under 42 U.S.C. § 1983, and they
11 are entitled to federal qualified immunity. [Monell, supra 690-691, 694-695]

12 (14) California Education Code § 51054, which provides that except as provided
13 in § 51053, the course of study for grades 7-12 shall be prepared under the direction of the governing board
14 having control thereof and shall be subject to approval as may be required by the state board.

15 This is a mandatory duty which the Board Members (Individually Named Defendants) were required to
16 follow. [Cal. Government Code § 815.6] They were *a fortiori* acting with a reasonable belief
17 under 42 U.S.C. § 1983 and are entitled to "**federal qualified immunity.**" [Monell, supra 690-691, 694-
18 695]

19 (15) California Education Code § 51100, § 51102 and § 51120, provides for parent
20 involvement and participation in the public schools, including involvement in activities and programs and
21 collaboration, in order to improve public educational institutions; however, none of this statutory language
22 is mandatory, nor does it give parents (Larry Caldwell) "veto power" over the selection of the High School
23 science and biology curriculum in the Roseville Joint Unified High School District, nor do these statutes
24 repeal, either expressly or by implication, the mandatory duties given to the School Board and its officials
25 and employees, including their discretion, regarding selection of the High School science and biology
26 curriculum as provided by Cal. Education Code § § 51050 and § 51054.

27 (16) Article IX, sec. 7, of the California Constitution (adopted in 1879) provided in
28 pertinent part that the Local Boards of Education shall adopt a series of textbooks for the use of the common

1 schools within their respective jurisdictions. [People v. Board of Education of Oakland (1880) 55 Cal. 331,
2 333-334; Engelmann v. State Board of Education (1991) 2 Cal. App. 4th 47, 53-54.]

3 The "**doctrine of qualified immunity**" safeguards all but the plainly incompetent or those
4 who knowingly violate the law. If officers of reasonable competence would disagree on the issue of whether
5 a chosen course of action is constitutional, immunity should be recognized. [Malley v. Briggs, 475 U.S. 335,
6 341 (1986)] The Court must examine the conduct of the officials in light of the constitutional right that the
7 plaintiff is attempting to assert, and the contours of the right must be sufficiently clear so that a reasonable
8 official would understand that what he is doing violates that particular constitution right. [Anderson v.
9 Creighton, 483 U.S. 635, 640 (1987); Lytle v. Wondrash, 182 F.3d 1083, 1086-1087 (9th. Cir., 1999).]

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

19 **c. The § 1983 Action may be barred by the Statute of Limitations.**

20 In addition, under 42 U.S.C. § 1983, there is a one year statute of limitations, and from the
21 vague and nonspecific pleading of the "facts" that are alleged as first occurring in the Spring of 2003 [See:
22 SAC, Paragraph No. 13], it cannot be determined if these events occurred more than one year prior to the
23 filing of the initial complaint on, because Summons was not issued by the Court until January 12, 2005. The
24 Court is requested to take judicial notice of the date of filing of the complaint and the date summons was
25 issued in this case. [Federal Rules of Evidence, Rule 201] If the events that give rise to this SAC occurred
26 more than one year prior to the filing of the complaint, then these civil rights claims are barred by the
27 applicable one year statute of limitations.

28 **d. There was a Failure to Exhaust Administrative Remedies.**

1 Due to the vagueness of the SAC, the defendants cannot determine if the plaintiff has
2 exhausted his administrative remedies with the District regarding his complaints about inclusion of the QSE
3 Policy in the District's high school curriculum, which is a prerequisite to the bringing of this action, especially
4 in regard to the bring of the pendent lite California statutory, Code of Civil Procedure § 526a ("taxpayers
5 claim") contained in the Sixth Claim for Relief in the SAC. [University of Tennessee v. Elliott, 478 U.S. 788
6 (1986); Johnson v. City of Loma Linda (2000) 24 Cal.4th 61, 70-71; Westlake Community Hospital v.
7 Superior Court (1976) 17 Cal.3d 465; Miller v. County of Santa Cruz, 39 F.2d 1030 (9th Circuit, 1994).

8]

9 Caldwell has not properly pled that he has fully exhausted his administrative remedies
10 provided by the District, nor have has he pled any facts showing that he pursued (exhausted) any state
11 judicial remedies in regard to the Sixth Claim for Relief, and as such, his § 1983 claim to enforce a State
12 statutes fails to state a claim.

13 **E. There was no Violation of the Establishment Clause of the First Amendment.**

14 The SAC fails to state a claim for relief for "*violation of the Establishment Clause*"
15 of the First Amendment, because the teaching of evolutionary scientific theory is not the establishment of
16 a religion, nor the teaching of religion, in the public schools. [Edwards v. Aguillard, 482 U.S. 578, 587-
17 597 (1987); Lemon v. Krutzman, 403 U.S. 602, 612-613 (1971); Pelozza v. Capistrano Unified School
18 District, 37 F. 3d 517, 521 (Ninth Circuit 1994)]

19 ///

20 ///

21 Caldwell's allegations that the District was violating the Establishment Clause of the First
22 Amendment by the allowance of the scientific theory of evolution , and the corollary of the District's refusal
23 to adopt Caldwell's proposed QSE Policy (religious alternative science), is totally meritless and it fails to
24 state any claim for relief. The following cases support the District's position in this matter:

25 (1) The United State Supreme Court has unequivocally held that while the belief
26 in a divine creator of the universe is a religious belief, the scientific theory of evolution is not a religion, nor
27 the teaching of religion. [Edwards v. Aguillard, 482 U.S. 578, 596-597]

28 (2) The inclusion of the scientific theory of evolution is not a religion and requiring an

1 instructor to teach this theory in his biology class is not a violation of the Established Clause of the First
2 Amendment. [Peloza v. Capistrano Unified School District, 37 F. 3d 517, 521-522 (9th Circuit, 1994)]

3 (3) In Edwards v. Aguillard, supra 596-597, the Louisiana Creationism Act, which
4 included the "Balance Treatment for Creation-Science and Evolution-Science" , in the Public School
5 Instruction Act, violated the Establishment Clause of the First Amendment. The Supreme Court expressly
6 found that the purpose of the Creationism Act was to restructure the science curriculum to conform with a
7 particular religious viewpoint. [Edwards, supra ta 593] It further found that this alternative religious
8 science program severed no secular purpose, but was specifically enacted to provide persuasive advantage
9 to a particular religious doctrine. [Edwards, supra at 592]

10 It is clear that Caldwell sought to have the District include a particular religious viewpoint into
11 the District's High School curriculum by his advocacy of the adoption of the QSE Policy by the School
12 Board. This act would have itself been a violation of the First Amendment Establishment Clause, and the
13 Board's rejection of this proposal was objectively reasonable and in accordance with existing law. The
14 Caldwell Claims for Relief based on the Establishment Clause of the First Amendment fails to state a claim
15 for relief and is totally without merit and frivolous, as a matter of law.

16 (4) The Caldwell Claim for Relief based on the Establishment Clause also fails the
17 **Lemon Test** as established in Lemon v. Krutzman, 403 U.S. 602, 612-613 (1971). This three-ponged
18 test must be utilized by the District Court to determine if the actions of the District were "unconstitutional" and
19 were an establishment of religion. When there is no valid "secular purpose", the **Lemon Test** is violated.
20 [Edwards, supra at 597] The Board's (District's) rejection of the proposed QSE Policy relating to the
21 alternative evolutionary theory, regardless of the name of the policy, book or type of materials, as an
22 alternative religious science textbook, was entirely constitutional, and within its statutory discretion, and the
23 proposed adoption of QSE Policy for inclusion as part of the District's High School science and biology
24 curriculum would have been a violation of the Establishment Clause.

25 (5) The Ninth Circuit is of the same accord. In Peloza v. Capistrano Unified School
26 District, supra at 521, a teacher in that District sued claiming that the District's actions established a state-
27 supported religion of evolutionism, or more generally of "secular humanism." This constitutional attach was
28 clearly rejected by the Ninth Circuit. [Peloza, supra at 521-522]

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

5 (7) In Brown v. woodland Joint Unified School District, 27 F. 3d 1373 (9th Circuit
6 1994) the Ninth Circuit affirmed the summary judgment entered by Judge William B. Shubb (EDCA)
7 dismissing a 42 U.S.C. § 1983 claim against the Woodland School District wherein the plaintiff claimed that
8 the use of certain materials in the classroom activities related to witches, involved the teaching of witchcraft
9 and that the District was promoting the religion of witchcraft as part of the School District's curriculum. The
10 Court of Appeal applied the **Lemon Test** and determined that there was no endorsement of witchcraft as
11 a religion and no violation of the First Amendment Establishment Clause, and it found that the California
12 State Constitution, Article IX, § 8, provides that no sectarian or denominational doctrine shall be taught, or
13 instruction thereon be permitted, directly or indirectly, in the common schools of the state. [Brown, supra
14 at 1385]

15 The Caldwell's Establishment Clause Violation Claim for Relief is in essence based upon
16 the same premise as the "witchcraft" and "secular humanism" cases, discussed supra. Therefore, Caldwell's
17 Establishment Clause claim should be dismissed without out leave to amend, because he cannot state a
18 claim, as a matter of law. [Federal Rules of Civil Procedure, Rule 12(b)(6).] It is clear that the District has
19 not established a religion, or adopted a religious viewpoint, by continuing to teach scientific evolutionary
20 theory in the District's High School curriculum, or by refusing to adopt the Caldwell QSE Policy which would
21 in fact adopt a religious viewpoint and involve excessive entanglement with a religious viewpoint, in violate
22 the **Lemon Test**, as well as violate the California Constitute Article IX, § 8. [Lemon v. Krutzman, supra
23 at 612-613; Brown, supra at 1385; Peloza, supra at 517, 520-521.]

24 **F. There was no Violation of the Equal Protection Clause of the Fourteenth**
25 **Amendment.**

26 The SAC fails to state a claim for relief for any violation of the **Equal Protection Clause**
27 of the Fourteenth Amendment, because the Caldwell must allege that the "classification" of individuals is
28 "arbitrary, capricious and lacks a reasonably related governmental purpose." [Bankers Life & Casualty Co.

1 v. Crenshaw, 486 U.S. 71, 81-84 (1988)] The SAC fails this test, and it does not properly allege, or
2 show, any "suspect classifications" for the stating of a claim for violation of the equal protection clause of the
3 Fourteenth Amendment.

4 The alleged violation of the **California Brown Act** "open meeting" statute [Cal.
5 Government Code § 54950, et seq.] does not raise to the level of a federal Constitution Right, which is
6 enforceable in a § 1983 civil rights lawsuit, and any alleged violation thereof by the District was not a
7 violation of the Equal Protection Clause of the Fourteenth Amendment. [SAC, Paragraph Nos. 67-69]

8 Likewise, the alleged violation of the Cal. Education Code § 35145.5, regarding the placing
9 of items on the School Board Agenda meetings, does not rise to the level of a federal Constitutional Right
10 subject to enforcement by a federal District Court under a § 1983 civil rights claim. [SAC, Paragraphs Nos.
11 63-69]

12 It is the intent of the California State legislature that members of the public be able to place
13 matter "directly related" to school district business on the agenda of school district governing board meetings,
14 and that members of the public be able to address the board regarding items on the agenda as such items
15 are taken up. [Cal. Education Code § 35145.5] The Governing Boards are required to adopt
16 "**reasonable regulations**" to insure that the intent of Legislature is carried out. Such regulations "**may**
17 **specify reasonable procedures**" to ensure the proper functioning of governing board meetings. [Cal.
18 Education Code § 35145.5]

19 This statutory scheme does not provide Caldwell with an "**absolute right**" to place anything
20 he wanted to on the School Board's Agenda. This would have the effect of turning the Board Meetings into
21 an "**unlimited traditional public forum**," which is not the intent of the State Legislature or the California
22 Constitution. [Perry Education Assn. v. Perry Local Educators Assn, 460 U.S. 37, 41 (1983)] Public
23 schools are not "public forums" for the purpose of unlimited free speech under the First Amendment.
24 [Compare: Capital Square Review And Advisory Board v. Knights Of The Ku Klux Klan, 515 U.S. 753,
25 760-763 (1995), where the "religious and political free speech" was being exercised in a full-fledged
26 traditional public forum.] California law is of the same accord regarding the nature of public schools as
27 "non-public forums" for purposes of the First Amendment. [Reeves v. Rocklin Unified School Districts
28 (3DCA, 2003) 109 Cal. App. 4th 652, 662-663.]

1 The state statute authorizes the Governing Board to enact "reasonable regulations" regarding
2 the agenda items and public participation in School Board meeting, which implicitly and explicitly means that
3 the rights alleged by Caldwell as not "absolute." [SAC, Paragraphs Nos. 63-69]

4 The Board enacted "reasonable regulations" and these regulations did not constitute a
5 "classification of individuals" that was "arbitrary, capricious and lacking a reasonably related governmental
6 purpose." The "classification" was permitted by State law, and there is no violation of the Equal Protection
7 Clause of the Fourteenth Amendment, and Caldwell has no federal constitutional right to have the District
8 Court intervene by declaratory relief, injunctive relief, or otherwise in this California State legislative scheme
9 regarding open meetings and school board agendas.

10 In addition, Caldwell had an expressly authorized State remedy prescribed by statute
11 [California Government Code § 54960.1], wherein he could have commenced an action by mandamus or
12 injunction [in state court] for the purpose of obtaining a judicial determination that any action taken by the
13 District's Governing Board in violation of California Education Code § 72121 public meeting requirement
14 to have all actions declared null and void. [Education Code § 72121(b)] He cannot, pursuant to a 42
15 U.S.C. § 1983 civil rights statutory claim, have a federal District Court determine his rights under these state
16 statutes, and where there is comprehensive remedial scheme, Caldwell is precluded from bringing a § 1983
17 claim to enforce these statutory rights. [Sherwin-Williams Company v. Crotty, 334 F. Supp. 2d 187, 196
18 (NDNY 2004)]

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

24 A legislative choice, such as the adoption of the District's science and biology curriculum
25 persuade to the statutory discretion of the District's Governing Board, may be based on rational speculation
26 unsupported by evidence or empirical data." [FCC v. Beach Communications, Inc., 508 U.S. 307, 313 -
27 315 (1993)] Thus, all that needs to be shown is any reasonable conceivable state of facts that could
28 provide a rational basis for the classification, and it is not necessary to wait for further factual development,

1 as a District Court may conduct a "rational basis review" on a motion to dismiss. [Ibid. 313.] Caldwell's
2 Equal Protection Claim for Relief cannot survive this "rational basis review" test. [Carter v. State of
3 Arkansas, supra at 968]

4 **G. There was no Violation of the Due Process Clause of the Fourteenth**
5 **Amendment.**

6 The SAC fails to state a claim for relief for violation of the Procedural Due Process under
7 the Fourteenth Amendment, because Caldwell must allege a deprivation of "life, liberty or a property
8 interest" within the meaning of the Fourteenth Amendment's Due Process Clause. [Board of Regents v.
9 Roth, 408 U.S. 564, 571 (1972)] The SAC does not do this, and there is also no valid claim for any
10 substantive due process claims, because the challenged state action survives a "rational basis scrutiny."
11 [Klein v. McGowan, 198 F. 3d 705, 710 (8th Cir. 1999); Carter v. State of Arkansas, supra at 968-969.]

12 ///

13 Caldwell's allegations that the District, and the individually named defendants, made
14 "defamatory statements" about the plaintiff and/or his religious beliefs, and that as a result his reputation was
15 damaged, does not deprive him of any interest in "life, liberty or a property interest." [Peloza, supra at 523]

16 There are insufficient allegations in the SAC to state any other deprivations coming within the ambit of the
17 Fourteenth Amendment. [Siegert v. Gilley, 500 U.S. 226 (1991); Peloza, supra at 523-524.]

18 The allegations contained in the SAC that the "alleged" violations of the **California Brown**
19 **Act** open meeting statute, and/or of the **California Education Code** statutes, violate the Due Process
20 Clause of the Fourteenth Amendment are without merit, and no claim for relief can be maintained thereon.
21 [Frazer v. Dixon Unified School District (1993) 18 Cal. App. 4th 781, at 799]

22 There is no legal basis for Caldwell's due process claim absent proof that he was deprived of some protected
23 property interest. [Public Utilities Commission v. United States, 356 F. 2d 236, 240-242 (9th Cir. 1966)]

24
25 Allegations of an injury to "reputation" by itself is not the deprivation of a "liberty interest"
26 [Paul v. Davis, 424 U.S. 693, 712 (1976); Peloza, supra at 523] No fundamental right is alleged by
27 Caldwell that is protected under the Substantive Due Process Clause or the Procedural Due Process Clause
28 of the Fourteenth Amendment. [Reno v Flores, 507 U.S. 292, 301-302 (1993); Griswold v. Connecticut,

1 381 U.S. 479, 484-486 (1965); Fields v. Palmdale School District, 271 F. Supp. 2d 1217, 1223-1224
2 (CDCA, Southern Division, 2003)]

3 A county's adoption of a noncompulsory family life and sex education curriculum did not
4 violate the parents' or the students' federal substantive due process rights. [Citizens for Parental Rights v.
5 San Mateo County Board of Education (1975) 51 Cal. App. 3d 1, 32-32; Fields, supra at 1222] In
6 deciding whether to expand the scope of substantive due process rights, the Supreme Court has cautioned
7 that courts should be reluctant to expand the concept because guideposts for responsible decision making
8 in this unchartered area are scarce and open-ended. [Collins v. Harker Heights, 503 U.S. 115, 125 (1992)]

9
10 In Fields, supra 1217, the parents brought suit, pursuant to 42 U.S.C. § 1983 against the
11 school district and individuals based on the district's distribution of sexually-explicit survey to their children
12 at an elementary school. In Fields, supra at 1221, the parents argued that their right to direct the education
13 and upbringing of their children was violated. [Meyer v. Nebraska, 262 U.S. 390 (1923).] The District
14 Court, however, found that the interest asserted in Fields, supra at 1223, was not a fundamental right and
15 not protected under the Fourteenth Amendment. It expressly held that parents do not have a fundamental
16 right to control a public school district's curriculum simply, because they have chosen to send their children
17 to public school. [Fields, supra 1223; Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525,
18 533-534(1st Cir. 1995)]

19 The District Court held that since the "liberty interest" that was asserted was not fundamental
20 it was not protected by the Fourteenth Amendment, and that no claim for relief could be stated under 42
21 U.S.C. § 1983, and the action was dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6).
22 [Fields, supra at 1223-1224.] Using the same logic, Caldwell's Due Process Claims should be dismissed
23 without leave to amend.

24 **H. No Taxpayer's Claim is Properly Stated Under California Code of Civil**
25 **Procedure § 526a via a § 1983 Claim for Relief.**

26 The Sixth Claim for Relief in the SAC fails to properly state any California statutory
27 taxpayers claim, pursuant to Cal. Code of Civil Procedure § 526a, which can be maintained as a 42 U.S.C.
28 § 1983 Civil Rights Claim. The federal **Tax Injunction Act** (28 U.S.C. § 1341) and principles of

1 federal-state comity preclude a federal court from exercising subject matter jurisdiction over challenges to
2 the implementation and assessment of taxes based upon Constitutional principals. [Berry v. Alameda Board
3 of Supervisors, 753 F. Supp. 1508, 1509-1511 (NDCA, 1990)]

4 When there is a specific statute that excludes liability, it overrides the applicability of §
5 1983. In addition, the plaintiff is not entitled to enforce a state law statute under § 1983. [Baker v.
6 McCullan, supra 144 n.3] Thus, as a matter of law, no claim for relief for a California state law "taxpayer's
7 suit" can be maintained in federal district court.

8 The Sixth Claim for Relief contained in the SAC to the extent that it is predicated upon a
9 California State Constitutional right is barred, and fails to state a Claim for Relief, because Caldwell cannot
10 seek enforcement of California State Constitutional rights through a federal § 1983 claim. [Pelozza v.
11 Capistrano Unified School District, 37 F. 3d 517, 523 (9th. Cir., 1994)] Thus, no valid pendent lite state
12 claim is stated in the Sixth Claim for Relief, as a matter of law.

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

18 In addition, the California State Constitution, Article XVI, sec. 5 and Article IX, sec. 8,
19 prohibit the expenditure of public money for the direct, or indirect, support of any religious sect, church,
20 creed or sectarian purpose or for the teaching of any sectarian or denominational doctrine; therefore, the
21 Caldwell Claim that tax money should be withheld from the District in order to promote his sectarian beliefs
22 relating to his QSE Policy, would itself violate the California Constitution, as well as be the establishment of
23 a religious viewpoint in violation of the United States Constitution First Amendment Establishment Clause.

24 As such, no claim for relief is stated by Caldwell's Sixth Claim for Relief contained in the SAC. It is
25 subordinated to the Establishment Clause. [Diloreto v. Board of Education of the Downey Unified School
26 District (1999) 74 Cal. App. 4th 267, at 280-280]

27 **I. Various Immunities and Privileges Bar This Action.**

28 **1. There is State Agent Immunity.**

1 California "*state agent immunity*" is applicable to all of the individually named defendants,
2 because they are acting as agents of the State of California. States and state officers sued in their official
3 capacity are not considered persons under § 1983 and are immune from liability under the statute by virtue
4 of the Eleventh Amendment and the doctrine of sovereign immunity. [Venegas v. County of Los Angeles
5 (2004) 32 Cal. 4th 820, 828-829.] A suit against a state official in his or her official capacity is not a suit
6 against the officer, but rather a suit against the official' office. As such, it is no different from a suit against
7 the State itself. [Venegas, supra at 829.]

8 Also, whether a public official represents a county or a state when acting in a particular is
9 analyzed under state law, not federal law. [Venegas, supra 831; Pitts v. County of Kern (1998) 17 Cal.
10 4th 340, 348, 352-353] As McMillian v. Monroe County, 520 U.S. 781, 784-785 (1997) explains, the
11 rule exempting the state and its officers from liability under § 1983 applies to such officers only if they were
12 acting as state agents with final policymaking authority over the complained-of actions. In our case, the
13 District, its officials and its employees were acting as "state agents" with final policy making authority for the
14 District's High School science and biology curriculum, adoption of which is mandated by the California
15 Education Code.

16 Since the Ninth Circuit has held that California school districts are state agencies for Eleventh
17 Amendment purposes [Belanger v. Madera Unified School District, 963 F. 2d 248 (9th Circuit 1992)], then
18 Eleventh Amendment sovereign immunity applies to the case, and there is no subject matter jurisdiction.
19 Caldwell has inappropriately brought this action in federal District Court, and it should be ordered dismissed
20 for lack of jurisdiction. State immunity extends to state agencies and state officers who act on behalf of the
21 state and, therefore, can assert the state's Eleventh Amendment immunity from suit in federal court. [Natural
22 Resources Defense Council v. California Dept. of Transportation, 96 F. 3d 420, 421 (9th Cir. 1996);
23 Quiroz v. State Board of Education, 1997 U.S. Dist. LEXIS 24154 *3-5 (EDCA 1997)]

24 **2. There is California Absolute Discretionary Immunity.**

25 Under California law, there is "*absolute discretionary immunity*" for the
26 actions of the District's School Board members. [Cal. Government Code § 820.2; Caldwell v. Montoya
27 (1995) 10 Cal. 4th 972, 985-986] Also, if the Board members are immune, so is the District. [Cal.
28 Government Code § 815.2(b); Kemmerer v. County of Fresno (1988) 200 Cal. App. 3d 1426, 1435-

1 1436; Kayfetz v. State of California (1984) 156 Cal. App. 3d 491, 496.]

2 In our case, the various individually named Board Members, Officials and employees were
3 are vested with discretion pursuant to California Government Code § 820.2 and made appropriate
4 discretionary decisions regarding the inclusion, and/or exclusion, of Caldwell's viewpoint religious QSE
5 Policy from the District's High School science curriculum. They are absolutely immune from liability under
6 California law. [Cal. Government Code § 820.2; Diloreto, supra at 282-283]

7 **3. There is Absolute Privilege Under California Law.**

8 There is "*absolute privilege*" under California Civil Code § 47(a) and (47)(b) for all
9 "communications" made by Officials and employees of the District, and when there is absolute privilege by
10 the employees, then this is applied to the District. [Government Code § 815(b); § 815.2(b); Kemurrer v.
11 County of Fresno, supra 1435-1436.] The absolute defense of the discharge of an official duty privilege,
12 under California Civil Code § 47(a), cannot be "plead around" by the plaintiffs. [Silberg v. Anderson (1990)
13 50 Cal.3d 205, 212; Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 529-530.]

14 The California state official discharge of duty privilege, applies to all torts other than
15 malicious prosecution, including abuse of process, defamation, invasion of privacy, fraud, negligence,
16 negligent misrepresentation, and emotional distress claims. Harris v. King (1998) 60 Cal. 4th 1185, 1187-
17 1188; Sacramento Brewing Co. v. Desmond, Miller & Desmond (1999) 75 Cal. App. 4th 1082, 1086,
18 1089. Sipple v. Foundation for Nat. Progress (1999) 71 Cal. App. 4th 226, 240; Ascherman v. Natanson
19 (1972) 23 Cal. App. 3d 861, 864-866. The District Court is required to apply the California state
20 statutory privileges to this action.

21 **4. There is State Sovereign Immunity.**

22 There is "*state sovereign immunity*" from suit for violation of state laws in federal court,
23 and state officials and agencies cannot be or sued in their "*official capacities*," when the "*state may be*
24 *financially liable.*" Since the District is part of the California constitutionally mandated state wide system
25 of public education, it is part of the sovereign and cannot be sued in a taxpayers suit claim under California
26 Code of Civil Procedure § 526a, because state funds would be used to pay any such judgment, or in
27 complying with injunctive relief. [Quiroz v. State Board of Education, 1997 U.S. District LEXIS 24154,
28 (EDCA 1997, William B. Shubb, Judge); Belanger v. Madera Unified School District, 923 F. 2d 248, 254

1 (Ninth Circuit, 1992); Butt v. State of California (1992) 2 Cal. App. 4th 668, 685; Los Angeles County
2 v. Kirk (1905) 148 Cal. 385, 387-388; Kichmann v. Lake Elsinore Unified School District (2000) 83 Cal.
3 App. 4th 1098; Wilson v. Board of Education (1999) 75 Cal. App. 4th 1125, 1134-1141]

4 This action has been inappropriately filed in Federal District Court in violation of the
5 Sovereign Immunity of the State of California and its agents, including the District and its officials, officers
6 and employees named herein, and in violation of the Eleventh Amendment. The District Court must dismiss
7 this action because it has no subject matter jurisdiction over these defendants.

8 [Venegas, supra 831; Pitts v. County of Kern (1998) 17 Cal. 4th 340, 348, 352-353; Natural Resources
9 Defense Council v. California Dept. of Transportation, 96 F. 3d 420, 421 (9th Cir. 1996); Quiroz v. State
10 Board of Education, 1997 U.S. Dist. LEXIS 24154 *3-5 (EDCA 1997); Sherwin-Williams Company v.
11 Crotty, 334 F. Supp. 2d 187, 195-197.]

12 IV

13 REQUEST FOR SANCTIONS, ATTORNEYS FEES AND COSTS

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

19 It was filed in "bad faith," and brought in the face of overwhelming contradicting United
20 States Supreme Court authority, overwhelming contradicting Ninth Circuit Court of Appeals case authority,
21 overwhelming Eastern of California District Court contradicting authority, and in the face of overwhelming
22 California State law authorities and governmental immunities. [Sprewell v. Golden State Warriors , 231 F.
23 3d 520, 530 (Ninth Circuit, 2000)]

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

28 The District has expended substantial funds on costs and attorneys fees to defend this case,

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

6 ///

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

12 **V**

13 **CONCLUSIONS**

14 For all of the afore-mentioned reasons, the District is entitled to a dismissal of the SAC,
15 pursuant to Rule 12(b)(1), because it fails to properly state subject matter jurisdiction, and to a dismissal,
16 because the SAC does not plead sufficient material facts to state federal claims for relief, pursuant to Rule
17 12(b)(6), without leave to amend, and/or to sufficiently state "pendent" claims under California law

18 In the alternative, due to the vagueness, ambiguity and confusion created by the pleading
19 of the SAC, the District is entitled to an order dismissing the SAC for failure to plead a concise "short and
20 plain" statement, under Rule 8(a), and /or in the alternative for order requiring the Plaintiff to file a more
21 definite statement by way of a Third Amended Complaint.

22 DATED: April 20, 2005

LAW OFFICE OF MATHEW D. EVANS

23
24 BY _____

JAMES B. CARR

25 Attorneys for Defendants ROSEVILLE JOINT
26 UNION HIGH SCHOOL DISTRICT; JAMES
27 JOINER; R. JAN PINNEY; TONY MONETTI;
28 STEVEN LAWRENCE; DONALD GENASCI; and
RONALD SEVERSON.