

1 KEVIN V. RYAN (SBN 118321)
United States Attorney
2 JOANN M. SWANSON (SBN 88143)
Chief, Civil Division
3 OWEN P. MARTIKAN (SBN 177104)
Assistant United States Attorney

4 450 Golden Gate Avenue, 10th Floor
5 San Francisco, California 94102-3495
6 Telephone: (415) 436-7241
Facsimile: (415) 436-6748
7 Email: owen.martikan@usdoj.gov

8 Attorneys for Federal Defendants

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 JEANNE E. CALDWELL,)
13)
Plaintiff,)
14 v.)
15 ROY L. CALDWELL, PH.D, in his official)
capacity as Director of the University of)
California Museum of Paleontology;)
16 DAVID LINDBERG, in his official capacity)
as Chair of the Integrative Biology)
17 Department of the University of California-)
Berkeley; and MICHAEL D. PIBURN, in)
18 his official capacity as Program Director for)
the National Science Foundation,)
19)
20 Defendants.)

No. C 05-04166 PJH
E-FILING CASE

**FEDERAL DEFENDANTS' MOTION
TO DISMISS FOR LACK OF
JURISDICTION AND FAILURE TO
STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED**

Date: Wednesday, March 22, 2006
Time: 9:00am
Ctrm: 3, 17th Floor

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1 PLEASE TAKE NOTICE that on Wednesday, March 22, 2006, at 9:00 am, in the
2 Courtroom of the Honorable Phyllis J. Hamilton, United States District Judge, Courtroom 3, 17th
3 Floor, U.S. District Court, 450 Golden Gate Avenue, San Francisco, California, defendant the
4 National Science Foundation¹, represented by the U.S. Attorney for the Northern District of
5 California, through Owen P. Martikan, Assistant U.S. Attorney, will move this Court to dismiss
6 plaintiff's complaint under Fed. R. Civ. Proc. 12(b)(1), for lack of subject matter jurisdiction,
7 and under Fed. R. Civ. Proc. 12(b)(6), for failure to state a claim upon which relief can be
8 granted. Defendant will base its motion on this memorandum of points and authorities and
9 supporting declaration and exhibits, the pleadings filed in this action, and such other matters as
10 may be presented to the Court.

11 INTRODUCTION

12 This case involves an Establishment Clause challenge to a grant that the National Science
13 Foundation awarded to the University of California, Berkeley Museum of Paleontology in 2001,
14 to fund a website called "Understanding Evolution." The website's purpose is "to improve
15 teacher understanding of the nature of science, the patterns and processes of evolution, and the
16 history of evolutionary thought and to increase their ability to teach these subjects effectively."²

17 Plaintiff Jeanne Caldwell claims that the website improperly endorses religious beliefs and
18 viewpoints.

19 The Court should dismiss Caldwell's complaint, for two reasons. First, the Court lacks
20 jurisdiction over the claim because Caldwell lacks standing. Second, Caldwell has failed to state
21 a claim upon which relief can be granted because the National Science Foundation's grant
22 cannot reasonably be construed as an Establishment clause violation. The grant has a secular
23 purpose, its principal or primary effect is not to advance or inhibit religion, and it does not foster
24 an excessive government entanglement with religion.

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27 ¹ An "official capacity" suit against a federal agency official is a suit against the agency.
28 5 U.S.C. § 703.

² Plaintiff's Complaint at Exhibit 1.

1 **STATEMENT OF FACTS**

2 **A. The National Science Foundation And Its Mission.**

3 Congress created the National Science Foundation (NSF) as an independent Executive
4 Branch agency in 1950. 42 U.S.C. § 1861. The NSF has eight statutorily mandated goals: (1) to
5 initiate and support basic scientific research and to support science education programs at all
6 levels in the mathematical, physical, medical, biological, social, and other sciences, and to
7 support research in engineering and programs in engineering education; (2) to award
8 scholarships and graduate fellowships to study science and engineering; (3) to foster the
9 exchange of scientific and engineering information among scientists throughout the world; (4) to
10 develop the use of computers and similar technologies in scientific and engineering research and
11 education; (5) to evaluate the research status and needs of various scientific and engineering
12 fields; (6) to provide a clearinghouse for information on various scientific and engineering issues
13 as a resource for policy makers in federal agencies; (7) to determine the total amount of scientific
14 and engineering research funding received by educational and non-profit institutions in the
15 United States; and (8) to support research and education in improving the security of networked
16 information systems. 42 U.S.C. § 1862(a).

17 Another major objective of the NSF is to promote education in science and engineering
18 throughout the United States. 42 U.S.C. § 1862(e).

19 The NSF is comprised of seven directorates that support science and engineering research
20 and education: (1) Biological Sciences; (2) Computer and Information Science and Engineering;
21 (3) Engineering; (4) Geosciences; (5) Mathematics and Physical Sciences; (6) Social, Behavioral,
22 and Economic Sciences; and (7) Education and Human Resources. Campbell Decl. at ¶3.³ Each
23 directorate is made up of several divisions that are more specifically focused by subject matter,
24 such as materials research, or ocean sciences. *Id.* Each division is headed by a Division
25 Director, who has the final say on how grant funds in the particular division are spent. *Id.* at ¶6.

26
27
28 ³ The Court can consider evidence outside the pleadings on a motion to dismiss for lack
of subject matter jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

1 The NSF receives its funding from Congress, in the form of an annual budget
2 appropriation. *Id.* at ¶8 and Exhibits C-F. Congress divides its budget appropriation for the NSF
3 by directorate, but with few exceptions does not specify further how the appropriation should be
4 spent. *Id.* The grant at issue in this lawsuit was funded by Congress’s general appropriation for
5 the NSF’s Directorate for Education and Human Resources, and not pursuant to any more
6 specific congressional direction. *Id.*

7 **B. The National Science Foundation’s Grant Solicitation and Approval Process.**

8 One of the processes by which the NSF awards research grants begins with workshops
9 and conferences, at which NSF officials discuss the progress of science and engineering research
10 in the United States, and identify national goals in each scientific field. *Id.* at ¶3. Based on
11 information gathered at these workshops and conferences, the NSF publishes grant solicitations,
12 which identify funding opportunities for which eligible researchers may apply. *Id.* Researchers
13 respond to the solicitation by submitting proposals for projects that fit the NSF’s identified need.
14 *Id.* The NSF receives more than 40,000 grant proposals per year, including some that are
15 unsolicited. *Id.*

16 The NSF evaluates grant proposals through a peer review process, in which a panel of
17 independent reviewers consisting of scientists, engineers, and educators reviews the merits of the
18 grant proposals. *Id.* at ¶4. The NSF picks the members of the review panel from a national pool
19 of experts in various scientific fields. *Id.* None of the reviewers are NSF employees, or
20 affiliated with the institution from which the proposal originated. *Id.*

21 The merit review panel evaluates proposals according to two criteria: the proposal’s
22 intellectual merit, and the proposal’s broader impact on scientific discovery, on education, and
23 on demographic groups that are currently under-represented in scientific and engineering fields.
24 *Id.* at ¶5. The purpose of this process is to ensure that only the best projects receive NSF
25 funding. *Id.* The ultimate decision whether to fund a particular project rests with the Division
26 Director for the division to which the proposal is related. *Id.* at ¶6. Before the NSF awards a
27 grant, an NSF program officer will typically negotiate aspects of the proposal with the lead
28 researcher for the project, who is known as the “Principal Investigator.” *Id.*

1 **C. The NSF's Grant For the "Understanding Evolution" Website.**

2 The NSF issued the grant award at issue in this case – which is identified within the NSF
3 as Award Number ESI-0096613 – on May 10, 2001. *Id.* at ¶7. The grant was funded by the
4 Teacher Enhancement Program in the Division of Elementary, Secondary, and Informal
5 Sciences, which is part of the NSF's Directorate for Education and Human Resources. *Id.* at ¶7.
6 The NSF awarded the grant based on a proposal that the University of California, Berkeley
7 Museum of Paleontology and the National Center for Science Education submitted in response to
8 an NSF solicitation for projects that would provide professional development opportunities to
9 broaden and deepen the disciplinary knowledge and pedagogical skills of teachers. *Id.* The
10 NSF solicitation, identified as NSF 00-99, is available on the NSF's website and is attached as
11 Exhibit A to the declaration of David Campbell.

12 The NSF subjected the University of California's "Understanding Evolution" proposal to
13 the same peer review process that it applies to all grant proposals. *Id.* at ¶8. The review panel
14 for the proposal consisted of eight individuals – independent of the NSF – with expertise in
15 science education; some as classroom teachers, others as university researchers. *Id.* at ¶9. Five
16 of the reviewers submitted written reviews, which evaluated the proposal according to the
17 following scale: excellent, very good, good, fair, or poor. *Id.* Four reviewers rated the proposal
18 as "excellent," one reviewer rated it as "very good." *Id.* All of the reviewers recommended a
19 high priority for funding to the Program Officer. *Id.*

20 The Program Officer, who was Dr. George DeBoer at the time, recommended to the
21 Division Director that NSF fund the proposal, which was done on May 10, 2001. *Id.* at ¶10.
22 Copies of the award letter and various amendments to the award are attached to the Campbell
23 Declaration. *Id.* The grant agreement between the NSF and the University of California,
24 Berkeley consists of five documents: (1) the NSF award letter and any amendments; (2) the
25 budget for the project; (3) the proposal; (4) the grant conditions, which are the NSF's General
26 Conditions as set forth in section 240 of the relevant NSF Grant Policy Manual, NSF 95-26, and
27 (5) the NSF solicitation. *Id.* at ¶12.

1 Once the NSF issues an award, the program officer’s responsibilities include reviewing
2 annual reports from the investigators, recommending continuing grant increments, if necessary,
3 advising the Principal Investigator on certain budget changes, and arranging for additional peer
4 review if a budget supplement is requested. *Id.* at ¶13. The NSF does not generally review each
5 expenditure that the investigators make, unless the program officer makes a request to the
6 Principal Investigator. *Id.* The investigators have some authority to move money around among
7 budget items, but must report to NSF if more than 20% of the awarded funds have not been
8 spent. *Id.* The NSF does not participate in the day-to-day management of its awards, but uses
9 the general supervisory process outlined above to ensure that its grants are spent according to
10 plan. *Id.*

11 With respect to the “Understanding Evolution,” grant, the original award was amended
12 once to change the Principal Investigator to Dr. Roy Caldwell, and again to add Dr. David
13 Lindberg as an additional investigator. *Id.* at ¶14. A third amendment was made to grant the
14 project supplemental funds, and the Program Officer has since approved a no-cost extension of
15 the grant agreement. *Id.* The grant will expire this October. Complaint at Exhibit 1.

16 The NSF did not direct the researchers about whether or not to mention religious issues.
17 *Id.* at ¶15. The NSF does not delve into these types of management issues, or give substantive
18 direction to grantees. *Id.* To the contrary, the NSF is known in the scientific and education
19 community for its strict adherence to merit review, allowing each project to rise or fall based on
20 its independent merit. *Id.* In the grant proposal, the Principal Investigator noted that the purpose
21 of any mention of religion was pedagogic, not inspirational: “Teachers need guidance on how to
22 work with students who experience conflicts and have questions regarding evolution and
23 religion.” *Id.*

24 The NSF never had the intention of supporting, changing, or denigrating anyone’s
25 religious beliefs. *Id.* Rather, the only purpose for any mention of religion was to note the
26 perceived, historical antagonism between evolution and creationism, and to dispel the
27 misconception that students who learn evolution must give up their religious beliefs. *Id.*

1 **D. Plaintiff Jeanne Caldwell's Allegations.**

2 Plaintiff Jeanne Caldwell is a mother of three who lives in Placer County, California.
3 Complaint at ¶9. She claims that the "Understanding Evolution" endorses religious doctrines,
4 such as the idea that religious beliefs do not involve the material world or provide "real
5 knowledge" about the real world, and that the theory of evolution does not conflict with
6 Christian beliefs. *Id.* at ¶24. Caldwell also accuses the website of "proselytizing" various
7 religious beliefs. *Id.* at ¶25. Caldwell claims that she is personally offended by the
8 "Understanding Evolution" website, and that it makes her feel like an "outsider." *Id.* at ¶26.
9 Caldwell does not claim that public school teachers have actually used the website, or its
10 contents, to teach her children.

11 Caldwell has sued Michael Piburn in his official capacity, although the proper defendant
12 would be a current NSF official or the NSF itself, since Michael Piburn is no longer with the
13 NSF. *See* Campbell Decl. at ¶1; 5 U.S.C. § 703.

14 **E. The "Understanding Evolution" Website.**

15 The "Understanding Evolution" website consists of a comprehensive overview of the
16 science of evolution, including articles of general interest on various topics relating to
17 evolutionary biology. Request for Judicial Notice, Exhibit A. Part of the website is called
18 "Understanding Evolution for Teachers." *Id.* This site contains numerous articles and resources
19 regarding the science of evolution, including its history. *Id.* Also included are a list of common
20 misconceptions about evolution, with pedagogical tips on how to dispel them. *Id.* One of these
21 misconceptions is that "Evolution and Religion Are Incompatible." Complaint at Exhibit 2.
22 This page includes a two-paragraph discussion of the interplay between science and religion, as
23 well as a link to another website, called "Voices for Evolution," that contains various statements
24 by religious figures noting the compatibility of their religions with evolutionary science. *Id.*
25 The "Voices for Evolution" website is sponsored by the National Center for Science Education,
26 a non-profit organization that promotes the teaching of evolution in public schools and that
27 describes itself as "religiously neutral." Request for Judicial Notice, Exhibit B.

28

ARGUMENT AND AUTHORITIES

The Court should dismiss this complaint for lack of jurisdiction. Caldwell cannot establish standing, either as a federal taxpayer or based on any direct injury. The Court can also dismiss this complaint for failure to state a cognizable claim. Even if the Court accepts as true all of the factual allegations in Caldwell’s complaint – as it must on a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6) – Caldwell cannot state a cognizable Establishment Clause claim.

I. CALDWELL DOES NOT HAVE STANDING TO RAISE HER CLAIM.

Standing is a jurisdictional limitation, and is an “essential and unchanging part of the case-or-controversy requirement of Article III” of the United States Constitution. *Green v. The Graduate Theological Union*, 2000 WL 1639514, *3 (N.D. Cal. 2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The party seeking the exercise of jurisdiction in her favor bears the burden of alleging facts that show that she is the proper party to invoke judicial power to resolve the dispute. *Id.* (quoting *United States v. Hays*, 515 U.S. 737, 742 (1995)). To establish a “case or controversy,” a plaintiff must show a concrete injury in fact, a causal connection between the injury and defendant’s conduct or omissions, and a likelihood that the injury will be redressed by a favorable decision. *Id.* Also, the injury must be to the plaintiff’s own legal rights and interests rather than the interests of third parties, and the injury must be individualized, rather than an “abstract question of wide public significance” that amounts to a “generalized grievance.” *Id.* (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474-75 (1982)).

Caldwell asserts two bases for standing that are relevant to her claims against the NSF. First, Caldwell claims that she has standing because the website offends her when she looks at it, and that being exposed to the website makes her feel like an outsider. Complaint at ¶26. Second, Caldwell claims standing as a federal taxpayer because the NSF devotes an “identifiable measurable sum of public funds” to the website. *Id.* at ¶37.

Under controlling Supreme Court precedent and the law of this Circuit, Caldwell has not alleged standing sufficient to confer jurisdiction upon this Court.

1 **A. Caldwell Has Not Suffered A Concrete, Redressible Injury in Fact.**

2 Caldwell claims that when she uses the “Understanding Evolution” website, she is
3 offended by it and made to feel like an outsider. Complaint at ¶26. This allegation does not
4 amount to an injury sufficient to confer standing on this Court. In *Green*, this Court addressed
5 the degree of individualized injury necessary to confer Article III standing. *Green*, 2000 WL
6 1639514, *3 n.1. There, the plaintiff was a graduate student enrolled in a joint degree program
7 between the University of California, Berkeley and the Graduate Theological Union who
8 challenged the program on Establishment Clause grounds. The plaintiff claimed that he was
9 “offended” by the alleged state support of religion inherent in the joint degree program. *Id.* The
10 Court found that the plaintiff lacked standing because, among other reasons, he had voluntarily
11 enrolled in the program that offended him, and he was not subject to the unavoidable presence of
12 an unpalatable religious symbol. *Id.*

13 Caldwell lacks standing for the same reason as the plaintiff in *Green*. Caldwell does not
14 allege that she was unavoidably subjected to the website’s religious content, or that she or her
15 children were being taught from it. Instead, Caldwell notes that she chose to study the website
16 out of personal interest, because she “is interested in how teachers teach the theory of evolution
17 in biology classes in the public schools.” Complaint at ¶26. Like the student in *Green*, Caldwell
18 cannot voluntarily seek out content and then claim that it offends her.

19 In *Valley Forge*, the Supreme Court noted that a primary purpose of the Article III
20 standing requirement is to prevent federal jurisdiction from becoming “no more than a vehicle
21 for the vindication of the value interests of concerned bystanders.” *Valley Forge*, 454 U.S. at
22 473 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). Thus, standing “is not
23 measured by the intensity of the litigant’s interest or the fervor of his advocacy.” *Id.* at 486.
24 Rather, the proper inquiry is whether the plaintiff is directly affected by government conduct in a
25 way that qualifies as a personal injury. See *Grove v. Mead School District No. 354*, 753 F.2d
26 1528, 1532 (9th Cir. 1985). While a parent may have standing to challenge a book from which
27 her child is taught on Establishment Clause grounds, a parent has no standing to challenge a
28 teaching aid without showing that a teacher used the aid to teach her children. See *id.*

1 Caldwell's stake in this case is no different from that of any other interested bystander.
2 As such, she can show no more of a direct injury from the "Understanding Evolution" website
3 than can any other individual with access to the internet. The fact that Caldwell may feel
4 stigmatized by viewing the website that she sought out does not constitute a cognizable injury.
5 *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 885 F.2d 1020, 1026
6 (2nd Cir. 1989). The Court should find that Caldwell has failed to establish an injury-in-fact
7 sufficient to confer standing.

8 **B. Caldwell Does Not Have Federal Taxpayer Standing.**

9 Caldwell also alleges that she has standing to challenge the NSF's grant because she is a
10 federal taxpayer, and the grant comes from public funds. Complaint at ¶37. Caldwell's
11 argument exaggerates the breadth of federal taxpayer standing, which only confers standing in
12 limited circumstances that are not present here.

13 The concept of federal taxpayer standing has evolved through several Supreme Court
14 decisions, beginning with *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923), where the Supreme
15 Court held that federal taxpayers had no standing to challenge the constitutionality of a federal
16 statute.

17 The Supreme Court relaxed this rule somewhat in *Flast v. Cohen*, 392 U.S. 83, 102
18 (1968), where it provided a two-part test to determine whether a plaintiff could assert standing as
19 a federal taxpayer. First, the taxpayer may only challenge the constitutionality of an exercise of
20 congressional power under the taxing and spending clause of Article I, section 8 of the
21 Constitution. *Id.* Thus, an incidental expenditure of tax funds in the administration of an
22 essentially regulatory statute will not confer taxpayer standing. *Id.* Second, the taxpayer must
23 show that the challenged enactment exceeds specific constitutional limitations imposed upon the
24 exercise of the congressional taxing and spending power, and not just that the enactment is
25 beyond the powers delegated to Congress in Article I, section 8 of the Constitution. *Id.* at 102-
26 03. The Supreme Court distinguished the taxpayer in *Frothingham* from the taxpayer in *Flast* by
27 noting that the former taxpayer had not shown that Congress breached a limitation on its
28

1 spending power, while the latter taxpayer challenged a specific provision of a federal law that
2 allowed public funds to be spent at private – and thus sectarian – schools. *Id.* at 105-06, 86.

3 The Supreme Court applied its rule from *Flast* to reject a plaintiff’s federal taxpayer
4 standing claim in *Valley Forge*, 454 U.S. at 479. In *Valley Forge*, the plaintiff challenged the
5 Department of Health, Education, and Welfare’s decision to transfer surplus government
6 property to a religious organization at no cost. The Supreme Court held that the plaintiff lacked
7 federal taxpayer standing under the *Flast* test for two reasons: First, the taxpayer did not
8 challenge congressional action, but a decision by a federal agency to transfer federal property;
9 and second, the property transfer was not an exercise of spending power under Article I section
10 8, but rather an exercise of power under the Property Clause, Article IV section 3. *Id.* at 479-80.
11 The Supreme Court noted that the plaintiff did not challenge the constitutionality of the
12 congressional act that authorized the property transfer, but the property transfer itself, which was
13 an agency decision. *Id.* at 479 n.15.

14 The Supreme Court upheld federal taxpayer standing in *Bowen v. Kendrick*, 487 U.S.
15 589, 618 (1988), although it noted that the holding in *Flast* provided a “narrow exception” to the
16 general rule against federal taxpayer standing. In *Bowen*, a taxpayer challenged the federal
17 Adolescent Family Life Act on Establishment Clause grounds because it provided grants to
18 institutions that provided counseling on teenage sexuality without regard for whether the funds
19 were used for religious purposes. *Id.* at 594-95. The Supreme Court held that the taxpayer had
20 standing because the statute was an exercise of Congress’s spending power, and the taxpayer
21 challenged the statute itself as unconstitutional, both on its face and as applied. *Id.* at 619-20.

22 Caldwell cannot establish federal taxpayer standing under the test announced in *Flast* and
23 followed in *Valley Forge* and *Bowen*, for three reasons. First, Caldwell cannot pass the first
24 prong of the *Flast* test because she is not challenging an exercise of Congress’s spending power.
25 Though the NSF clearly operates on federal funds, Caldwell does not challenge any
26 Congressional act, only the act of a federal agency. The NSF is funded by a congressional
27 appropriation that allocates money generally to each NSF directorate. *Campbell Decl.* at ¶8.
28 Congress did not allocate any money to the grant that Caldwell challenges, or to the goals of

1 teaching evolution, religion, or the interaction of the two. *Id.* This grant exists solely because of
2 a proposal that U.C. Berkeley submitted in response to an NSF solicitation that was independent
3 of any congressional action. *Id.* The facts in this case stand in stark contrast to those in *Flast*
4 and *Bowen*, where taxpayers were challenging federal statutes that happened to be administered
5 by Executive Branch agencies (as virtually all federal statutes are). *Flast*, 392 U.S. at 86
6 (attacking the constitutionality of a clause in the Elementary and Secondary Education Act of
7 1965); *Bowen*, 487 U.S. at 619-20 (attacking the constitutionality of the Adolescent Family Life
8 Act).

9 Second, Caldwell cannot show that the NSF action that she is attacking simply “flowed
10 through” from an unconstitutional Congressional action. In *Bowen*, the Supreme Court held that
11 the taxpayer’s Establishment Clause challenge was to a federal statute (and thus an exercise of
12 Congress’s spending power) and not to an agency action, because the agency simply
13 administered the funding that Congress authorized. *Bowen*, 487 U.S. at 619. In this case,
14 Caldwell challenges an agency decision that is divorced from any Congressional exercise of
15 spending power. Congress simply makes budget appropriations to the NSF’s various
16 directorates; while it does in some circumstances direct how some money should be spent, it did
17 not do that here. Campbell Decl. at ¶8. The decision to award the “Understanding Evolution”
18 grant was purely an agency decision, based on the independent merit panel’s review of U.C.
19 Berkeley’s proposal. *Id.* at ¶¶7-8.

20 Third, Caldwell cannot pass the second prong of the *Flast* test, because she cannot show
21 “that the challenged enactment exceeds specific constitutional limitations imposed upon the
22 exercise of the congressional taxing and spending power” *See Flast*, 392 U.S. at 102-03.
23 The legislation at issue is a budget appropriation, and Caldwell does not challenge its
24 constitutionality. *See Campbell Decl.* at ¶8.

25 The Court should find that it lacks jurisdiction over this case because Caldwell has failed
26 to show that she has standing to bring it.

1 **II. CALDWELL CANNOT STATE AN ESTABLISHMENT CLAUSE CLAIM.**

2 The Court should dismiss Caldwell’s Establishment Clause claim on the merits for failure
3 to state a claim upon which relief can be granted.

4 On a motion to dismiss, the Court must “read the complaint charitably, . . . take all well-
5 pleaded facts as true, and . . . assume that all general allegations embrace whatever specific facts
6 might be necessary to support them.” *Pelozza v. Capistrano Unified School District*, 37 F.3d 517,
7 521 (9th Cir. 1994). Documents attached to a complaint may be considered as part of the
8 complaint for purposes of a motion under Fed. R. Civ. Proc. 12 (b)(6). *Hal Roach Studios, Inc.*
9 *v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1989). The Court may also consider the
10 full text of a document referred to in the complaint but not attached to it, or from which only a
11 part is attached to or referenced in the complaint. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.
12 1994); *In re: Stac Electronics Securities Litigation*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996).

13 Caldwell’s Establishment Clause challenge to the NSF’s “Understanding Evolution”
14 grant fails to state a cognizable claim because the challenge fails the Supreme Court’s test for an
15 Establishment Clause challenge as announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13
16 (1971), and because the challenged grant is neutral toward religion.

17 **A. The NSF’s Grant Has A Secular Purpose.**

18 In *Lemon v. Kurtzman*, the Supreme Court developed a three-part test to evaluate
19 Establishment Clause challenges that – despite being often maligned by the courts⁴ – remains the
20 law. Under the *Lemon* test, a statute does not violate the Establishment Clause if (1) it has a
21 secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3)
22 it does not create excessive entanglement between government and religion. *Lemon*, 403 U.S. at
23 612-13. The Ninth Circuit has applied the *Lemon* test to evaluate Establishment Clause
24 challenges to federal government grants. *Kong v. Scully*, 341 F.3d 1132, 1139 (9th Cir. 2003).

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26 _____
27 ⁴ Including the Supreme Court, as in *Van Orden v. Perry*, 125 S. Ct. 2854, 2861 (2005),
28 where the Supreme Court questioned the “fate of the *Lemon* test in the larger scheme of
Establishment Clause jurisprudence,” and then applied a much more permissive standard.

1 The Ninth Circuit has held that a challenged law will pass the first prong of the *Lemon*
2 test even if it has both religious and secular purposes, as long as one of the purposes is secular.
3 *Cammack v. Waihee*, 932 F.2d 765, 773 (9th Cir. 1991). The Ninth Circuit is reluctant to
4 attribute unconstitutional motives to government action if a plausible secular purpose can be
5 discerned from the face of the statute at issue. *Id.* at 774. Though the NSF does not concede that
6 its grant has any religious purpose, the Ninth Circuit's decision in *Cammack* shows the leniency
7 of this test.

8 The NSF grant has an undeniably secular purpose, as Caldwell's own complaint shows.
9 The First Exhibit to Caldwell's complaint is an NSF abstract describing the purpose of the grant
10 as "to improve teacher understanding of the nature of science, the patterns and processes of
11 evolution, and the history of evolutionary thought and to increase their ability to teach these
12 subjects effectively." Complaint at Exhibit 1. The abstract does not note any religious purpose
13 of the grant. And the Ninth Circuit has held that the study of evolution is a secular, not a
14 religious pursuit. *Pelozo*, 37 F.3d at 521.

15 **B. The NSF Grant Does Not Principally or Primarily Endorse Religion.**

16 The Supreme Court has stated that an important concern of the second prong of the
17 *Lemon* test is "whether the symbolic union of church and state effected by the challenged
18 government action is sufficiently likely to be perceived by adherents of the controlling
19 denominations as an endorsement, and by the non-adherents as a disapproval of their religious
20 choices." *Cammack*, 932 F.2d at 777-78 (quoting *School District of Grand Rapids v. Ball*, 473
21 U.S. 373, 390 (1985)). The Court evaluates this test in the shoes of a "hypothetical observer
22 [who is] informed as well as reasonable; [and who is] familiar with the history of the government
23 practice at issue." *Alvarado v. City of San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996).

24 A reasonable and informed observer could not construe the NSF grant as having, as its
25 principal or primary effect, the advancement or inhibition of religion, for the following reasons.

26 First, as noted above, the study of evolution is a secular pursuit. *Pelozo*, 37 F.3d at 521.
27 The Ninth Circuit has held that a school district may require the teaching of evolution without
28 running afoul of the Establishment Clause, so a reasonable observer could not see a grant that

1 expressly endorses the teaching of evolution as having the effect of endorsing any religion. *Id.*
2 (“Since the evolutionist theory is not a religion, to require an instructor to teach this theory is not
3 a violation of the Establishment Clause . . .”).

4 Second, the context of any religious content in the “Understanding Evolution” website
5 shows that it cannot be construed as endorsing religion. The Ninth Circuit has held that context
6 is an appropriate factor to consider in applying the second prong of the *Lemon* test. *Cammack*,
7 932 F.2d at 779. Here, the excerpt from the “Understanding Evolution” website attached to
8 Caldwell’s complaint shows that the context of the religious content is not an endorsement of
9 religion, but an attempt to show that the science of evolution is “very different” from religion,
10 and that students of evolution do not have to choose between science and religion. Complaint at
11 Exhibit 2. The effect is to promote the study of evolution as something not bound up with
12 religion, which shows that the primary purpose of the website is secular, not religious. The
13 Supreme Court has recently held that “[s]imply having religious content or promoting a message
14 consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Van Orden*,
15 125 S. Ct. at 2863.

16 Notably, the Supreme Court has expressed the same message that the challenged page
17 from the website expresses: that evolution science is not necessarily incompatible with religious
18 belief. *Edwards v. Aguillard*, 482 U.S. 578, 591 n.11 (1987) (“While the belief in the
19 instantaneous creation of humankind by a supernatural creator may require the rejection of every
20 aspect of the theory of evolution, an individual instead may choose to accept some or all of this
21 scientific theory as compatible with his or her spiritual outlook.”).

22 Third, the NSF’s history and mission should convince an informed observer that its grant
23 does not endorse religion. For over 50 years, the NSF has followed a statutory mandate to
24 further research and education in science and education. See 42 U.S.C. § 1862. In *McLean v.*
25 *Arkansas Board of Education*, 529 F. Supp. 1255, 1259 (E.D. Ark. 1982), the district court noted
26 that the NSF has funded educational programs to further the teaching of evolution and other
27 sciences in the schools since 1957. This mission is consistent with all of the documents
28 describing the grant, which show its overwhelming scientific purpose and note that the purpose

1 of even mentioning religion on the website is to suggest a way for teachers to assure students
2 that they can study evolution without necessarily violating their religious beliefs. Campbell
3 Decl. at ¶15 and Exhibits.

4 Fourth, the Supreme Court, Ninth Circuit, and other courts have held that a government
5 message can acknowledge religion, or be consistent with religion, without endorsing religion.
6 *Harris v. McRae*, 448 U.S. 297, 318-20 (1980); *Alvarado*, 94 F.3d at 1232; *Cammack*, 932 F.2d
7 at 780; *Selman v. Cobb County School District*, 390 F. Supp. 2d 1286, 1308 (N.D. Ga. 2005).
8 The excerpts from the “Understanding Evolution” website are reasonably construed as
9 acknowledging the historic perception of a conflict between evolution science and religion, and
10 noting that the study of evolution and religious beliefs can be consistent. Indeed, the Supreme
11 Court has noted that “[t]here is a historic and contemporaneous link between the teachings of
12 certain religious denominations and the teaching of evolution.” *Edwards*, 482 U.S. at 590.

13 Fifth, a reasonable observer would not accept Caldwell’s complaint that the
14 “Understanding Evolution” website tends to endorse some religious beliefs (i.e., those that are
15 consistent with evolution) over others (those that are not). See Complaint at ¶24. Caldwell
16 cannot point to a single part of the website that actually endorses one religion over another. At
17 most, she notes that the website includes links to statements by various religions noting that their
18 beliefs are not inconsistent with evolution. *Id.* at (c). The statements that Caldwell characterizes
19 as “religious” actually have the primary effect of promoting the study of evolution, not religion.
20 *Id.* at ¶25(a) (referencing an article in which a teacher “helped [students] understand that they
21 didn’t have to make a choice between evolution and religious faith.”).

22 Sixth, a reasonable observer would understand that any teaching training materials
23 devoted to the teaching of evolution would necessarily have to include some pedagogical
24 guidance on how to address students’ concerns about religion. In *McLean*, the district court
25 noted that the real or perceived conflict between evolutionary science and religious belief spans
26 much of the last 100 years of this country’s history. *McLean*, 529 F. Supp. at 1259. As the
27 Ninth Circuit has held, “[n]ot all mention of religion is prohibited in public schools.” *Grove v.*
28 *Mead School District No. 354*, 753 F.2d 1528, 1534 (9th Cir. 1985).

1 Seventh, the Ninth Circuit recognizes the difference between a religious activity and a
2 secular educational function. In *Grove*, a parent challenged a public school’s use of a book in a
3 literature class on Establishment Clause grounds, arguing that the book was offensive to her
4 religious beliefs. *Id.* at 1531. In deciding that the primary effect of the book was secular and not
5 religious, the Ninth Circuit discussed the difference between advocating religious ritual in the
6 schools – which is impermissible – and discussing religion to serve a “secular educational
7 function,” which does not violate the Establishment Clause. *Id.* at 1534. As in *Grove*, the
8 obvious effect of any discussion of religion in the “Understanding Evolution” website is secular
9 and educational, not inspirational.

10 Finally, the discussion of religion on the “Understanding Evolution” website is minor in
11 relation to the website’s overwhelming secular content. In evaluating the second prong of the
12 *Lemon* test in *Grove*, the Ninth Circuit noted that comment on religion was “a very minor portion
13 of the [challenged] book. Its primary effect is secular.” *Id.* at 1534. Similarly, the
14 “Understanding Evolution” website includes only the page that Caldwell challenges (at Exhibit 2
15 to her Complaint), and a few other documents attached to Caldwell’s complaint that come from a
16 link to another web page called “Voices for Evolution” that is part of the website of the National
17 Center for Science Education, a non-profit organization whose stated purpose is “to keep
18 evolution in public school science education,” and which describes itself as “religiously neutral.”
19 Request for Judicial Notice, Exhibit A. In contrast, the “Understanding Evolution” website
20 contains hundreds of pages of content that are undisputably secular and scientific, and the effect
21 of this content on any reasonable, objective observer would be overwhelmingly secular. A
22 summary of the content on the “Understanding Evolution” website, and a site index for a portion
23 of the site that is devoted to teaching materials, is attached as Exhibit B to the Request for
24 Judicial Notice.

25 Given the secular, scientific, and educational nature of the content on the “Understanding
26 Evolution” website, the Court should find that the NSF’s grant did not have the primary or
27 principal effect of endorsing religion.

28

1 **C. The NSF’s Grant Does Not Foster Excessive Entanglement With Religion.**

2 The purpose of the “excessive entanglement” prong of the *Lemon* test is to minimize the
3 interference of religious authorities with secular affairs and secular authorities in religious
4 affairs. *Cammack*, 932 F.2d at 780. Typically, the Supreme Court has found excessive
5 entanglement with religion where governments have aided sectarian organizations, such as
6 parochial schools. *Id.* That is not the case here, as the NSF grant was awarded to U.C. Berkeley,
7 an avowedly non-sectarian public institution, and the National Center for Science Education, a
8 non-profit organization that promotes the teaching of evolution in public schools and that
9 describes itself as “religiously neutral.” Request for Judicial Notice, Exhibit A.

10 Excessive entanglement is also possible where religious and secular authorities must
11 work closely together. *Id.* That is also not the case here. NSF’s only contacts in this case are
12 with the grant recipients, who are not affiliated with any religion. Moreover, the scientific merits
13 of the grant proposal were reviewed by an independent panel of experts, which acts as a check
14 against any improper NSF involvement with religion, or against the NSF awarding the grant for
15 any reasons other than scientific merit. *Campbell Decl.* at ¶¶ 4-5.

16 Ultimately, the grant at issue here flows from the NSF to a secular institution to fund a
17 secular purpose: the teaching of evolution. NSF has no contact with any religious institution at
18 any stage of the grant process. The Court should find that the NSF grant does not risk excessive
19 government entanglement with religion.

20 **D. The NSF’s Grant Is Neutral Toward Religion.**

21 The Ninth Circuit has held that “[a] significant factor in evaluating whether a government
22 program violates the Establishment Clause is its neutrality toward religion.” *Prince v. Jacoby*,
23 303 F.3d 1074, 1092 (9th Cir. 2002). Thus, where the government funds secular services for
24 secular purposes on a religion-neutral basis, the fact that the funds may in some incidental way
25 benefit religion is not an Establishment Clause violation. *Id.* at 1092-93. The Ninth Circuit
26 distinguished the direct payment of government money to religious institutions from the payment
27 of money to a secular institution that may also benefit some religious group. *Id.* at 1092. In
28 *Prince*, the Ninth Circuit held that a school district could allow a religious club to meet on

1 school property without running afoul of the Establishment Clause, because the school allowed
2 secular and religious groups to use the facility on a religion-neutral basis. *Id.*

3 The NSF's grant is neutral toward religion. The grant is a payment to a secular
4 institution to provide a secular service (a website explaining evolution) with a secular purpose
5 (to promote the teaching of evolution). The fact that some religious user of the website may
6 derive a religious benefit by viewing it is incidental to its purpose. A reasonable observer could
7 not conclude that the NSF grant, or the website that it funded, expresses a preference for any
8 particular religious belief.

9 The Court should find that Caldwell cannot state an Establishment Clause claim against
10 the NSF.

11 **III. CALDWELL'S 42 U.S.C. § 1983 CLAIM CANNOT APPLY TO THE NSF.**

12 Caldwell purports to sue the NSF under 42 U.S.C. § 1983. E.g., Complaint at 2. But this
13 statute does not apply to federal officials or agencies. *Elmer v. Metzger*, 967 F. Supp. 398, 401
14 (C.D. Cal. 1997) ("Section 1983 only entitles plaintiffs to relief against state actors, not federal
15 actors.") (citing *American Science & Engineering v. Califano*, 571 F.2d 58 (1st Cir. 1978)).

16 **CONCLUSION**

17 Caldwell has failed to establish standing sufficient to invoke this Court's jurisdiction, and
18 she has failed to state a cognizable Establishment Clause claim upon which relief can be granted.
19 The Court should dismiss her complaint, with prejudice.

20 Respectfully submitted,

21 KEVIN V. RYAN
22 United States Attorney

23
24 Dated: February 10, 2006

25 _____
26 /s/
27 OWEN P. MARTIKAN
28 Assistant United States Attorney