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18 **IN THE UNITED STATES DISTRICT COURT**
19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
20

21 JEANNE E. CALDWELL,

22 Plaintiff,

23 v.

24 ROY L. CALDWELL, PH.D., in his
25 official capacity as Director of the
26 University Of California Museum Of
27 Paleontology; DAVID LINDBERG, in his
28 official capacity as Chair of the Integrative
Biology Department of the University of
California-Berkeley; and MICHAEL D.
PIBURN, in his official capacity as
Program Director for the National Science
Foundation,

Defendants.

CASE NO. C05-04166 PJH

**OPPOSITION TO DEFENDANTS, ROY
CALDWELL AND DAVID LINDBERG'S,
MOTION TO DISMISS**

[FRCP 12(b)(6)]

Date: February 8, 2006

Time: 9:00 a.m.

Judge: Hon. Phyllis J. Hamilton

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Defendants', from the University of California at Berkeley, Roy Caldwell and David Lindberg's (hereinafter referred collectively as "UCB"), main contention is that the portions of the Understanding Evolution ("UE") website in dispute meets the "secular purpose" prong of *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) citing *Watz v. Tax Commission*, 397 U.S. 664, 668 (1970). The essence of the claim is this: UCB has a secular purpose for taking sides in a religious dispute. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS ROY L. CALDWELL, Ph.D. AND DAVID LINDBERG'S MOTION TO DISMISS (hereinafter referred to as "MOTION") pg. 16, lines 16-24.

Although precise rules for determining Establishment Clause disputes have proven to be elusive, the actions of UCB are precisely what the Establishment Clause was meant to avoid. The State is prohibited from stepping into a divisive sectarian dispute and becoming "a potential mouthpiece for competing religious ideas." *McCreary County v. Kentucky*, 125 S.Ct. 2722, 2747 (2005).

II. ARGUMENT

A. A Review of a Complaint on a Motion to Dismiss is limited to the Four Corners of the Pleading.

It is axiomatic that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)(footnote omitted). See also *Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658 (9th Cir.

1 1998)(same); *Church of Scientology v. Flynn*, 744 F.2d 694, 696 (9th Cir. 1984) (same). In
2 considering a motion to dismiss under Rule 12(b)(6), the court must consider all allegations in
3 the Complaint as true and must liberally construe those allegations. *Conley*, 355 U.S. at 45-46;
4 *Wylar*, 135 F.3d at 668.

5 With this “strict standard” for a 12(b)(6) motion, *Mezzetti v. State Farm Mutual Ins. Co.*,
6 346 F.Supp. 2d 1058, 1064 (N.D. Cal. 2004), it should not be surprising that such a motion “is
7 viewed with disfavor and is rarely granted.” *Gilligan v. Jamco Develop. Corp.*, 108 F.3d 246,
8 249 (9th Cir. 1997); *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986) (same).
9

10 Certainly, Defendants’ weak attempts to overcome these hurdles by relying on facts not
11 in evidence and by addressing only a few of the many issues surrounding a major Establishment
12 Clause case are unavailing.

13 In light of the standards liberally favoring Plaintiff’s Complaint and disfavoring a motion
14 to dismiss, it is perhaps unsurprising—but nevertheless out-of-bounds—that Defendants attempt
15 to bolster its motion by introducing new factual allegations (for they cannot objectively be called
16 facts, in the absence of any affidavits or supporting exhibits).¹ For example, Defendants assert
17 that “[t]he UE site is a comprehensive on-line resource, developed to meet the needs of K-12
18 teachers in teaching their students all aspects of evolution. It includes extensive interactive
19 materials, lesson plans, quizzes, and links to additional web-based resources.” Their Motion
20 continues, “The sheer volume of information is impressive: over 800 pages addressing topics as
21 varied as the nature of science, the history of evolutionary thought, and medical science and
22
23

24
25 ¹ In citing these factual allegations, Defendant is apparently hoping against hope that the Court will accept its
26 desperation ploy of requesting that its website be judicially noticed. As is explained in Plaintiff’s objections to the
27 request for judicial notice, *supra*, such a request is preposterous, in light of the fact that the website is under
28 Defendants’ control, and key portions of it have in fact been altered since the start of this litigation.

1 evolution.” MOTION, pg. 1, lines 10-12. Defendants then spout more unsubstantiated numbers:
2 “The Understanding Evolution section is just one of several extensive collections of educational
3 materials—totaling over 5000 web pages—that make up the Museum’s website. MOTION, pg.
4 3, lines 3-5.

5 At first glance, one might well wonder why this information is relevant to a motion to
6 dismiss, since all allegations in the complaint are taken as true. Indeed, these statements initially
7 come across as little more than self-aggrandizement. However, later in the brief it becomes clear
8 that Defendants are using these seemingly innocuous assertions as the foundation for their
9 argument that, in context, the Understanding Evolution website does not promote religion.
10

11 As discussed above, plaintiff challenges only the smallest proportion—about one-
12 tenth of one percent—of the UE website’s pages, and an even smaller fraction of
13 all the educational material on the Museum’s website. The *fact* that these few
14 challenged references to religion are surrounded by reams of secular educational
15 material dispels the notion that the “predominant” purpose of the website is to
16 advocate a particular religious belief. On the contrary, the overwhelmingly
17 secular educational nature of the *surrounding material* must lead any reasonable
18 objective observer to conclude that the purpose of the “misconceptions” page is to
19 educate, not to proselytize.

20 MOTION, pg. 15, lines 22-28 (emphasis added).

21 The point here is not that Plaintiffs necessarily believe that Defendant misstated the
22 number of web pages—saying 5000 when perhaps it is only 4999—it is that Defendants’ foray
23 into a forest of factual assertions misses the point entirely. Context is, of course, crucial to
24 Establishment Clause inquiries under Lemon. By introducing significant factual assertions to the
25 court, requesting judicial notice of those “facts” and then asking the court to decide the key issue
26 of context, all in one fell swoop, Defendants’ brief is a Motion to Dismiss in name only. In
27 reality, it has been transmogrified into a Motion for Summary Judgment which is wholly
28 inappropriate at this early stage of the litigation.

1 It would be highly improper for the court to consider Defendants’ numerous assertions of
2 facts not in evidence, not only because they are improperly presented, but because a motion to
3 dismiss focuses on the allegations of the complaint and views all facts in light of the non-
4 movant—in this case Plaintiff. *See, e.g., Samuels v. Air Transport Local 504*, 992 F.2d 12 (2d
5 Cir. 1993) (on a 12(b)(6) motion to dismiss, the court may consider “only the facts alleged in the
6 pleadings, documents attached as exhibits or incorporated by reference in the pleadings and
7 matters of which judicial notice may be taken.”)

8
9 When a motion to dismiss is brought, it is a maxim that, at this stage of the litigation, the
10 facts as alleged on the face of the complaint are controlling. *Usher v. City of Los Angeles*, 828
11 F.2d 556 (9th Cir. 1987). In that the UCB Defendants base the motion to dismiss on a factual
12 premise not found within the four corners of the COMPLAINT, the motion must be denied.

13 Specifically, the motion to dismiss misstates the complaint stating “[Exhibit 2] notes that
14 some religious beliefs conflict with religion, but also states, accurately, that many religions have
15 no problem with evolution.” (MOTION, page 4, lines 12-13). In fact, Exhibit 2 of the
16 COMPLAINT states, in pertinent part, as follows: “Most Christian and Jewish religious groups
17 have no conflict with the theory of evolution....” Defendants are clearly representing to the
18 Court that the COMPLAINT contains statements that do **not** appear on the face of the document.
19 Oddly, the UCB Defendants seek to have this Court take judicial notice of the website. This
20 appears to be an attempt to mislead the Court. The only relevance that said request for judicial
21 notice would show is that the UCB Defendants have changed the webpage since the filing of the
22 COMPLAINT.²
23
24

25
26 ² Although the UCB Defendants could, in a motion for summary judgment, conceivably argue that the case is now
27 moot as a result of the voluntary cessation of unlawful conduct, that argument is not available in a motion to
28 dismiss.

1 **B. The Complaint Pleads Art. III Standing**

2 **1. Plaintiff alleges sufficient injury in fact by Plaintiff to support Art. III**
3 **standing.**

4 UCB’s argument on Article III standing based on Plaintiff’s allegations of injury in fact
5 contradicts UCB’s argument on the merits of Plaintiff’s Establishment Clause claim. When
6 UCB’s argument on Article III standing is brought into alignment with UC’s argument on the
7 merits, it is clear UCB’s Art. III standing objection to the Complaint is meritless, since it flies in
8 the face of long-established Ninth Circuit precedent for pleading Art. III standing to bring an
9 Establishment Clause claim based on the plaintiff’s alleged injury in fact.

10 UCB argues that the Supreme Court’s jurisprudence applicable to "static display"
11 Establishment Clause cases provides the most relevant line of cases by which to measure the
12 application of the Lemon Test, as modified by the Endorsement Test, to Plaintiff’s Establishment
13 Clause challenge to the religious statements on the UCB Website.³ MOTION, pg. 11, fn 7.
14 Then, quixotically, UCB asks this court to ignore the long line of Ninth Circuit cases on injury-
15 in-fact standing for "static display" cases MOTION, pg. 9, fn 2.

16 To the contrary, the line of Ninth Circuit cases adjudicating the Art. III standing of a
17 citizen to bring an Establishment Claim based on an objectionable religious display in a park also
18 govern Plaintiff’s Art. III standing to bring her Establishment Clause claim against UCB based
19 on a public website, to which the general public has been invited, and into which Plaintiff has
20

21 _____
22
23 ³ The static religious monuments are not a perfect analogy to the religious messages on the website since the
24 religious messages on the website are much more explicitly communicative than a non-speaking monument in a
25 park with no written message on it. There, the religious message is allegedly communicated symbolically, through
26 the traditional religious meaning of the monument. In contrast, on the website, the government’s religious messages
27 are actively communicated through persuasive writing and advocacy, accompanied by cartoons with a message.
28 Moreover, the content of the website is not "static" in the sense of being immutable or unchanging. It is a
programmable medium whose message can be modified. Plaintiff contends that for these and other reasons the
government’s religious messages on the UE website are more intrusive and offensive to a visitor to the website than
is a truly "static" monument in a public park.

1 entered and would like to enter in the future, without encountering objectionable religious
2 messages by the State of California and the United States.

3 The following allegations in the Complaint support Plaintiff's Art. III "injury-in-fact"
4 standing:

5 "Plaintiff is a California citizen and parent who has three children, two of whom
6 are presently attending public schools, and a third who is likely to attend public
7 schools in the future." (COMPLAINT, ¶9.) "As the parent of children in public
8 schools, plaintiff is actively involved in school board elections, school board
9 meetings, and other public debates and processes regarding the selection of
10 instructional materials and course contents for science classes in the public
11 schools. In particular, she is interested in how teachers teach the theory of
12 evolution in biology classes in the public schools. Plaintiff desires to participate
13 as an informed citizen in these elections, public debates and processes, *so she
14 makes use of the "Understanding Evolution" website . . . as a resource, to learn
15 how the University of California recommends that public science teachers teach
16 evolution to K-12 students in California. . . . Defendants have opened the site to
17 the general public for information and review. As such, Plaintiff has been
18 exposed to the government endorsed religious messages to her harm.*"
19 (COMPLAINT, ¶ 26) (Emphasis added.)

20 These allegations show plaintiff has an interest in and history of entering and utilizing the
21 UE Website, in furtherance of her legitimate interest in learning about how evolution is and
22 should be taught in public schools, and how the science of evolution can be taught better. She is
23 motivated both as a concerned parent of public school students and as an interested citizen who
24 desires to be an informed participant in the public debate on how evolution should be taught in
25 our public schools. The Complaint further alleges that UCB has invited citizen parents such as
26 Plaintiff enter the UE website to use its evolution resources, but then, once citizens such as
27 Plaintiff enter the UE website, those citizens are exposed to government endorsed religious
28 materials aimed at proselytizing citizens to adopt the religious beliefs preferred by the
government (¶ 31). The Complaint further alleges that, by so doing, Defendants exclude other
religious and theological views which they deem adverse to the state-approved religious position

1 on evolution, (¶ 30) and expresses governmental disapproval of the religious beliefs of citizens
2 such as Caldwell holding other, disfavored religious beliefs, making them feel like outsiders who
3 are not accepted by the community.

4 It is important to note that Plaintiff alleges that she actually enters the UC Website and
5 uses its resources and that, in the process, she has actually seen and read the religious messages
6 at issue in this suit and has actually been offended by them, and that she will be offended by
7 them in the future when she visits the UE Website. Plaintiff alleges that she has actually
8 experienced the attempted "government proselytization" complained about.

9
10 In the Ninth Circuit, Plaintiff can establish Article III standing by showing that she came
11 into direct and unwelcome contact with government-sponsored religious messages that were
12 contrary to her beliefs in a government owned and operated public facility. *See Separation of*
13 *Church and State Comm. v. City of Eugene*, 93 F.3d 617, 619, n.2 (9th Cir. 1996); *Am. Jewish*
14 *Congress v. City of Beverly Hills*, 90 F.3d 379, 381-382 (9th Cir. 1996; *see also Books v. City of*
15 *Elkhart*, 235 F.3d 292, 289-301 (7th Cir. 2000); *Suhre v. Haywood County*, 131 F.3d 1083,
16 1086-89 (4th Cir. 1997).

17
18 In the Ninth Circuit, Plaintiff's burden to allege an actual injury through exposure to a
19 religious message by government in such a public facility is not difficult to meet. Plaintiff
20 clearly satisfies this requirement through the allegations that the UC Website is owned and
21 operated by the State of California; that she has actually gone on the UC Website; that she has
22 actually seen the religious messages on the website; that she feels offended and stigmatized
23 because the government's religious messages are contrary and offensive to her own religious
24 beliefs; and that the presence of the offensive government religious message on the UC Website
25 interferes with her ability to visit and use the website. *See Bernhardt v. County of Los Angeles*,

1 279 F.3d 862, 867 (9th Cir. 2002). (“A plaintiff needs only to plead general factual allegations
2 of injury in order to survive a motion to dismiss, for we presume that general allegations
3 embrace those specific facts that are necessary to support the claim.”) (internal quotations
4 omitted).

5 In *Separation of Church and State Commn.*, the Ninth Circuit confronted Art. III injury-
6 in-fact standing in the familiar context of a citizen claiming that the presence of a religious
7 monument in a public park interfered with the citizen's ability to utilize the park, since the
8 monument was alleged to communicate governmental endorsement of a religious belief different
9 from the citizen's and/or governmental hostility towards the citizen's religious beliefs. The Ninth
10 Circuit observed that:

12 "As a threshold matter, we note that Separation is composed of local citizens who have
13 standing to bring this challenge because they alleged that the cross prevented them from freely
14 using the area on and around Skinner's Butte. *See Ellis v. City of La Mesa*, 990 F.2d 1518, 1523
15 (9th Cir. 1993), *cert. denied*, 512 U.S. 1220 (1994)." (*Separation of Church and State Commn.*,
16 *supra*, 93 F.3d at p. 619 n. 2.)

18 In *Ellis*, the Ninth Circuit similarly held:

19 "We recently followed other circuits in holding that 'when a plaintiff
20 alleges that the government has unconstitutionally aligned itself with religion,
21 standing may be based on finding that the plaintiff has been injured due to his or
22 her not being able to freely use public areas.' *Hewitt*, 940 F.2d at 1564 (citing
23 *ACLU of Illinois v. City of St. Charles*, 794 F.2d 403 (1986), *cert. denied*, 479
24 U.S. 961, (1986), and *ACLU of Georgia v. Rabun County*, 698 F.2d 1098 (11th
25 Cir. 1983)). . . . the district court properly determined that a plaintiff 'has
26 been injured due to his or her not being able to freely use public areas.' *Hewitt*,
27 940 F.2d at 1564. Murphy, Paulson, and Kreisner avoid two public parks in San
28 Diego which they would otherwise use. Ellis curtails his activities to lessen
contact with the insignia displayed in his city. The Society of Separationists has
standing through its members, co-plaintiffs Paulson and Kreisner. The district
court properly held each of the named plaintiffs had standing to bring this case

1 before the court. *See Kreisner v. City of San Diego*, 988 F.2d 883, 887 fn. 1 (9th
2 Cir. 1993). (plaintiff's standing based on allegation that the challenged display
interfered with his right to use public park)." (*Ellis, supra*, 990 F.2d at 1523.)

3 More recently, the Ninth Circuit held that a plaintiff who lived in Oregon had standing to
4 bring an Establishment Clause claim against federal officials with regard to a cross located on
5 the government-owned Mojave Desert Preserve, in southern California, based upon his
6 allegation that he liked to travel to the preserve and use it, but that his use of the government
7 property was interfered with by the presence of the cross on the property, even though plaintiff
8 was himself a practicing Roman Catholic. (*Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004).
9 *Buono* shows, *inter alia*, that, for purposes of establishing standing based on injury in fact, the
10 fact that Plaintiff voluntarily enters the public facility -- or even has to go far out of his or her
11 way to get to the public facility -- does not defeat Art. III standing based on plaintiff's injury in
12 fact from exposure to the offensive governmental religious message.
13

14 As in the case of the municipal and federal public parks, here, Plaintiff claims that her
15 right to use and enjoy a public facility is being interfered with by the presence in the public
16 facility of a government religious message that is inconsistent with Plaintiff's own religious
17 beliefs and therefore offensive to plaintiff.
18

19 In this case, the public facility in question is being hosted by the State of California,
20 operating through the University of California and its Museum of Paleontology. The fact that the
21 public facility at issue here consists of intangible property in the form of an internet website
22 rather than tangible real property such as a public park is not material for purposes of standing.
23 In both cases, the situation is the same: a citizen attempting to use a government owned and
24 operated public facility -- open to and intended for the use of the general public -- is having her
25 use of the public facility interfered with by the presence of an unwanted governmental message
26

1 on religion in that facility. Plaintiff is complaining that she cannot use this government-owned
2 and operated public facility without exposure to the governmental religious message she finds
3 offensive.

4 In the Ninth Circuit, allegations of such unwanted exposure to governmental religious
5 message in public facilities are deemed sufficient "injury in fact" to confer Art. III Standing for
6 the court to hear a 1983 claim for violation of the Establishment Clause.

7
8 **2. Plaintiff also alleges sufficient facts for Art. III standing against UCB
based on her status as a state taxpayer.**

9 UCB's challenge to the sufficiency of Plaintiff's allegations to support state "tax payer"
10 standing to bring her claims is all without merit.

11 In *Plans, Inc. v. Sacramento City Unified School Dist.*, 319 F.3d 504 (9th Cir. 2003), the
12 Ninth Circuit explained pleading standards a plaintiff must meet in order to prove taxpayer
13 standing to assert a civil rights claim based on the Establishment Clause. The plaintiff in *Plans,*
14 *Inc.* challenged the Waldorf curriculum used in a charter school funded and operated by the
15 Sacramento Unified School District. Plaintiff, a corporation standing in the shoes of individual
16 taxpayers for standing purposes, alleged that the Waldorf curriculum contained religious
17 materials that violated the Establishment Clause, and that the school district was improperly
18 spending taxpayer money to purchase and utilize the curriculum in public schools. The Ninth
19 Circuit held that plaintiff adequately alleged a "good- faith pocketbook challenge" to the school
20 district's purchase and use of the curriculum sufficient to support taxpayer standing to bring a
21 section 1983 claim against the school district based on violation of the Establishment Clause.
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1 A key factor for the plaintiff in *Plans, Inc.* was the plaintiff's allegation that measurable
2 sums of money were spent on the curriculum, since plaintiff was challenging the entire
3 curriculum.

4 Similarly, in this case, Plaintiff alleges all of the elements necessary to plead state
5 taxpayer standing to bring her claim based on the Establishment Clause against officials of the
6 State of California. Plaintiff alleges that she is a state taxpayer (COMPLAINT, ¶ 9). She alleges
7 that a "measurable sum of public funds [are] being used to further the actions of the Defendants
8 and each of them. Specific tax dollars are spent solely for the above-described activities by
9 Defendants and each of them. Moreover, the unlawful acts of Defendants, as described above,
10 adds costs to the operation of the website. As a result, Plaintiff has sustained an injury resulting
11 from the above-described government expenditure of tax revenues." (COMPLAINT, ¶ 37.)
12

13 It is true that Plaintiff is not challenging the entire UE website in this lawsuit. However,
14 Plaintiff *has* alleged that "a measurable sum" of state funds is being used by Defendants in
15 relation to the portions of the UC Website she *is* challenging. That should be sufficient at the
16 pleading stage to plead Article III standing against the UCB defendants.
17

18 In support of its attack on Plaintiff's taxpayer standing, UCB improperly goes beyond the
19 allegations of the COMPLAINT to make the additional factual claims that Plaintiff purportedly
20 "cannot" prove that "specified state tax revenues have been spent in developing the challenged
21 portions of the site" and that Plaintiff purportedly "cannot [allege]" that some additional,
22 meaningful amount of state tax dollars are to be spent in the future with regard to the alleged
23 unconstitutional portions of the site." (MOTION, pg. 8, lines 8-13.) Both of these claims are
24 unproven by UCB and do not appear to be necessarily true. Plaintiff should be accorded her
25 right to do appropriate discovery on the question of state funding for development and future
26

1 maintenance and revision of the UCB website before UCB is permitted to foreclose her claim,
2 based on lack of standing as a state taxpayer.

3 **3. Since Plaintiff has pled injury in fact, this Court need not decide whether**
4 **her status as a federal taxpayer also supports her standing as to UCB.**

5 UCB goes to some effort to establish that Plaintiff's standing to bring her civil rights
6 claim against the California state officials is not based on her status as a federal taxpayer. Since
7 Plaintiff has pled standing based on injury in fact, this Court is not required to reach the question
8 of whether Plaintiff's status as a federal taxpayer also serves as a basis for standing. If the Court
9 finds that Plaintiff has not alleged sufficient injury in fact to plead standing, Plaintiff respectfully
10 requests leave to provide further briefing on and legal argument on this issue. Plaintiff
11 respectfully reserves her right, at an appropriate time, to contend that her Art. III standing to
12 bring her claim against the federal official, Michael D. Piburn, of the National Science
13 Foundation, *is* supported by her status as a federal taxpayer, as well as on her injury in fact as a
14 result of the offensive religious statements by the state and federal governments on the UE
15 website.
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18 **C. By Taking Sides in a Sectarian Dispute, UCB Fails the Purpose Prong in Lemon.**

19
20 The UCB Defendants base the entirety of the substantive portion of the motion to dismiss
21 on the purpose prong in Lemon. MOTION pp. 11-12. This is despite the fact that usually a case
22 involving the Establishment Clause will not hinge upon the purpose prong. "Looking to
23 whether government action has 'a secular legislative purpose' has been a common, albeit seldom
24 dispositive, element of our cases. *McCreary, Id.*, 2732-2733. "[T]he secular purpose
25
26

1 requirement alone may rarely be determinative....” *McCreary, Id.*, 2733. Be that as it may, out
2 of an abundance of caution, Plaintiff will discuss the purpose prong.

3 It is important to note at the outset that the UCB Defendants self-proclaim a secular
4 purpose. MOTION, page 14, lines 3-10. As a matter of law, the motion to dismiss should be
5 denied in that the face of the COMPLAINT states unequivocally that there is no secular purpose.
6 COMPLAINT, page 13, line 26. When a motion to dismiss is brought, it is a maxim that at this
7 stage of the litigation the facts as alleged on the face of the complaint are controlling. *Usher v.*
8 *City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987). The UCB Defendants are attempting to have
9 this Court review evidence which is extraneous to the COMPLAINT. This review of outside
10 “evidence” is more proper for a motion for summary judgment (FRCP 56). Therefore, the
11 motion to dismiss must be denied.
12

13 Even if the Court were to countenance such a review, UCB would still fail the purpose
14 test. The reason is that UCB has taken sides on a religious matter. When viewing the purpose
15 test, the central Establishment Clause value is that of official neutrality. “The First Amendment
16 mandates governmental neutrality between religion and religion, and between religion and
17 nonreligion.” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).
18

19 The predominant purpose of advancing religion is demonstrated when “the government’s
20 ostensible object is to take sides.” *McCreary, Id.*, 2733. “Lemon’s ‘purpose’ requirement aims
21 at preventing [government] from abandoning neutrality and acting with the intent of promoting a
22 **particular point of view in religious matters.**” *McCreary, Id.*, 2733 (quoting *Zelman v.*
23 *Simmons-Harris*, 536 U.S. 639, 718 (2002) (emphasis added). In the present case before the
24 Court, the COMPLAINT alleges that Defendants have promoted a particular religious viewpoint,
25 e.g., [reasonable] religious leaders and groups do not find a conflict between religion and
26

1 evolution. This blatant endorsement of one sectarian view over another is an abandonment of
2 neutrality. “Manifesting a purpose to favor one faith over another...clashes with the
3 ‘understanding, reached...after decades of religious war, that liberty and social stability demand
4 a religious tolerance that respects the religious views of all citizens...” *McCreary, Id.*, 2733
5 (quoting *Zelman, Id.* 718).

6 In view of this, the website violates the neutrality requirement articulated by the Supreme
7 Court in regards to the teaching of origins science in *Epperson v. Arkansas*, 393 U.S. 97 (1968).
8 The U.S. Supreme Court in *Epperson* stated as follows: “The overriding fact is that Arkansas’
9 law selects from the body of knowledge a particular segment which it proscribes for the sole
10 reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular
11 interpretation of the Book of Genesis by a particular religious group.” *Id.* at 103. The website
12 violates the purpose prong for the same reason as it was violated in *Epperson*. These defendants
13 are siding with certain religious groups who hold a particular interpretation of the Book of
14 Genesis.⁴ “Government in our democracy...must be neutral in matters of religious theory,
15 doctrine, and practice. It may not be hostile to any religion...; and it may not aid, foster, or
16 promote one religion or religious theory against another or even against the militant opposite.”
17 *Id.* at 104.

18 Because the UCB Defendants have taken sides in a sectarian dispute and thus stepped
19 away from neutrality, they cannot have a secular purpose as a matter of law.
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23 ⁴ For example, the website directs the user to the National Center for Science Education’s “Voices for Evolution”
24 site. The United Church of Christ’s doctrinal statement is provided which states, in part, as follows: “We testify to
25 our belief that the historic Christian doctrine of the Creator God does not depend upon any particular account of the
26 origins of life for its truth and validity. The effort of the creationists to change the book of Genesis into a scientific
27 treatise dangerously obscures what we believe to be the theological purpose of Genesis, viz., to witness to the
28 creation, meaning, and significance of the universe and of human existence under the governance of God. The
assumption that the Bible contains scientific data about origins misreads a literature which emerged in a pre-
scientific age.” COMPLAINT, page 7, lines 8-15.

1 **1. The secular purpose of teaching evolution cannot be advanced by taking sides on**
2 **a religious question.**

3 The UCB Defendants state that the secular purpose of the website is the teaching of
4 evolution. Even accepting that proposition, the UCB Defendants cannot prevail because they
5 have weighed in on one side of a religious debate. Indeed, these defendants have admitted that
6 there is a religious debate involved in evolution and it is for that reason that they have thrown in
7 their lot with one side in this controversy. “[D]iscussion of religion on the UE website does not
8 come out of thin air: it arrives in a context in which defense of the secular idea of evolution must
9 necessarily address these religiously-based challenges. In doing so, it is natural that there be
10 discussion of the differences between science and religion and the extent to which some religions
11 do and other religions do not object to evolution.” MOTION, page 16, lines 16-10.

12 The essence of the UCB Defendants’ argument is that they have a secular reason for
13 asserting a religious position. MOTION, page 16, lines 20-22. Although these defendants
14 assert, correctly, that religion “may constitutionally be used in an appropriate study of history,
15 civilization, ethics, comparative religion or the like” (MOTION, page 16, lines 24-26, quoting
16 *Stone v. Graham*, 449 U.S. 39, 42 (1980)), the state cannot weigh in on the rightness or
17 wrongness between religious views.⁵ This is particularly true when the issue is divisive.

18 “Given the variety of interpretative problems, the principle of neutrality has
19 provided a good sense of direction: the government may not favor one religion
20 over another, ...religious choice being the prerogative of individuals under the
21 Free Exercise Clause. The principle has been helpful simply because it responds
22 to one of the major concerns that prompted adoption of the Religion Clauses. The
23 Framers and the citizens of their time intended not only to protect the integrity of
24 individual conscience in religious matters...but to guard against the civic
25 divisiveness that follows when the *Government weighs in on one side of religious*

26 _____
27 ⁵ “While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a
28 secular program of education, need not collide with the First Amendment’s prohibition, the State may not adopt
programs or practices in its public schools or colleges which ‘aid or oppose’ any religion.” *Epperson, Id.*, 106.

1 *debate; nothing does a better job of roiling society....” McCreary, Id., 2742*
2 (inner citation omitted, emphasis added).

3 As discussed in the UCB Defendants’ motion, it is self-evident that there is significant
4 controversy over the teaching of evolution in the public schools in this country. MOTION, page
5 16, lines 12-20. A salient part of that controversy stems from competition of ideas between
6 theological positions on evolution within the faith community. In the present case, these
7 defendants are doing exactly what the Establishment Clause sought to avoid – having the
8 government take sides on a religious dispute. It does not matter that there is a secular purpose
9 for the government weighing in on one side of religious debate.

10 The government must not take a position on the truth or verity of a religious belief or
11 doctrine. See *United States v. Ballard*, 322 U.S. 78 (1944). “The law knows no heresy, and is
12 committed to the support of no dogma, the establishment of no sect.” *Watson v. Jones*, 80 U.S.
13 679 729 (1871) 13 Wall. 679, 728, 20 L.Ed. 666; see also *Gillette v. United States*, 401 U.S. 437
14 (1971).

15
16 **2. The UE website facially differentiates between religious belief.**

17 It is problematic as to whether the Court should reach the tests articulated at all in *Lemon*.
18 In *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court provided an analytical framework
19 for evaluating claims of governmental action that is preferential to one religious belief, over
20 other beliefs. Larson teaches that, when it is claimed that a religious preference is made, the
21 initial inquiry is whether the law facially differentiates among religions. If it does, then it is
22 unconstitutional per se. On the other hand, if the government action does not differentiate
23 among religions, then the court is to apply the three pronged Lemon test.
24

1 On its face, the website differentiates among religions and religious beliefs, and thus
2 violates the Establishment Clause. The website affirmatively promotes the proposition that
3 evolution and religion are not in conflict. This stance necessarily means that the government has
4 taken a position on what religion means. Otherwise, the government would not be able to say
5 that evolution is not in conflict with religion. To the extent that some religious beliefs do
6 conflict with evolution, the website is in effect stating that such beliefs are nonsensical, or
7 wrong. Thus, the government is assessing the truth or verity of the beliefs.
8

9 **D. Defendants Oversimplify Establishment Clause Jurisprudence**

10 In their motion to dismiss, Defendants seek to greatly simplify their task—and subtly
11 change the rules of the game—by setting up and then knocking down “straw men” arguments.
12 In doing so, Defendants not only gloss over a key prong of the Lemon test, excessive
13 entanglement, while wasting the court’s time by fighting the windmills of “antievolutionism.”
14

15 **1. Defendants cannot escape excessive entanglement.**

16 The third prong of the Lemon test requires that actions by public officials “must not
17 foster an excessive governmental entanglement with religion.” *Lemon, Id.*, 612 (quoting *Walz v.*
18 *Tax Comm’n*, 397 U.S. 664, 674 (1970)). *Lemon* is instructive. There, plaintiffs challenged
19 several methods of providing state financial aid to parochial schools.

20 In writing for the majority, Chief Justice Burger delved into the meaning of the Religion
21 Clauses, noting first that they were designed to prevent three primary evils: “sponsorship,
22 financial support and active involvement of the sovereign in religious activity.” *Id.* at 612,
23 citing *Walz* at 668.
24

25 The Defendants in *Lemon* protested, not unlike Defendants in the present case, that they
26 strove to ensure that state aid was used only for secular instruction. In fact, the court accepted

1 the legislature’s declaration that it had no intention of advancing religion, *id.* at 613, and several
2 teachers testified “that they did not inject religion into their secular classes.” *Id.* at 618.
3 Nevertheless, the Court held that it would be virtually impossible to separate the secular
4 instruction from the religious environment in which it was presented. Like a fish on a line, the
5 government’s efforts to get off the hook by ensuring that its aid was not used for actual
6 proselytizing only worsened the problem. For that reason, the Court stated that the “cumulative
7 impact of the entire relationship . . . involves excessive government entanglement with religion.”
8 *Id.* at 614. In taking this approach, the Court reasoned that, even though providing aid to
9 religious schools did not strictly create an establishment of religion, it was “a step that could lead
10 to such establishment and hence offend the First Amendment.” *Id.* at 612.

12 In the present case, Defendants cannot escape the fact that the challenged portion of the
13 UE website presupposes a government-initiated sifting and evaluation of competing theological
14 statements and positions from differing religious groups in an effort to determine which groups
15 supported the government’s efforts to teach evolution. This process inherently mires the
16 government in the quicksand of religious debate, in which it has no expertise or ability to
17 extricate itself.

19 The Supreme Court could not be more clear in its condemnation of government
20 involvement in religious debates: “If there is any fixed star in our constitutional constellation, it
21 is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism,
22 religion, or other matters of opinion. . . .” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S.
23 624, 642 (1943). In matters of religion especially, the courts have zealously guarded against
24 government intermeddling with religious debates. “The law knows no heresy, and is committed
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1 to the support of no dogma, the establishment of no sect.” *U.S. v. Ballard*, 322 U.S. 78, 86
2 (1944) (quoting *Watson v. Jones*, 13 Wall. (80 U.S.) 679, 728 (1871)).

3 Defendants not only favor the “dogma” of religions which support evolution, but they
4 actively seek to change the “heresy” of impressionable schoolchildren whose religious
5 background stands in opposition to their aims: “when students come to class with their fingers
6 stuck into their ears and their eyes closed, it is necessary to figure out a way to get the fingers out
7 and the eyes open.” COMPLAINT, Ex. 5, pg. 8, ¶1; MOTION, pg. 18, lines 1-2.

8
9 Since *Lemon*, direct government aid to parochial schools has virtually, if not entirely,
10 ceased. However, the courts have been vigilant to recognize and reject other forms of excessive
11 entanglement not unlike the situation at bar. For example, in *Hansen v. Ann Arbor Public*
12 *Schools*, 293 F.Supp.2d 780 (E.D. Mich. 2003), the court considered a school program which
13 invited clergy into the school to participate in a panel discussion on homosexuality. The school
14 chose to invite only clergy sympathetic to homosexuality, while making it difficult for a student
15 who opposed homosexuality on religious grounds to have her views presented. The court
16 determined that the school’s actions violated the Establishment Clause in several ways, including
17 *Lemon*’s third prong:
18

19 Defendants’ level of involvement in this case in selecting the clergy for the panel,
20 vetting the religious beliefs of the chosen clergy, recruiting the clergy, and
21 providing school facilities and a captive audience of student for the clergy, and
22 censoring and editing Betsy Hansen’s speech based on its religious viewpoint,
constitutes the kind of “excessive entanglement with religion” found by the
Supreme Court to be constitutionally impermissible.

23 *Hansen*, 293 F.Supp.2d at 806.

24 In summary, “The clearest command of the Establishment Clause is that one religious
25 denomination cannot be preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982).
26

1 By holding up with approval certain religious groups which agree with their position on
2 evolution, Defendants have violated the Establishment Clause.

3 **E. Plaintiffs are Not Challenging the Theory of Evolution.**

4 Not surprisingly, UCB retreats to the high ground of *Epperson v. Arkansas, Id., Edwards*
5 *v. Aguillard*, 482 U.S. 578 (1987), *Peloza v. Capistrano Unified School District*, 37 F.3d 517
6 (9th Cir. 1994), and *Crowley v. Smithsonian Institution*, 636 F.2d 738 (D.C. Cir. 1980) for the
7 unremarkable propositions that evolution and secular humanism are not religions. MOTION, pg.
8 13, lines 16-28. From this red herring, UCB extrapolates the conclusion that its UE website has
9 a valid secular purpose.
10

11 The COMPLAINT nowhere seeks to challenge the theory of evolution. UCB conflates
12 an attack on its methodology—giving the favored stamp of government approval to religious
13 groups which agree with evolution—with an attack on evolution itself. This line of argument is
14 clearly disingenuous. In the related vein of prayer at school events, the Supreme Court has
15 declared, “School sponsorship of a religious message is impermissible because it sends the
16 ancillary message to members of the audience who are nonadherents “that they are outsiders, not
17 full members of the political community, and an accompanying message to adherents that they
18 are insiders, favored members of the political community.”” *Santa Fe Independent School*
19 *District v. Doe*, 530 U.S. 290, 309-10 (2000). *Santa Fe*, at 309-10, quoting *Lynch v. Donnelly*,
20 465 U.S. 668, 688, (1984).
21

22 “One of the purposes served by the Establishment Clause is to remove debate over this
23 kind of issue from governmental supervision or control. We explained in *Lee* that the
24 ‘preservation and transmission of religious beliefs and worship is a responsibility and a choice
25 committed to the private sphere.’” *Santa Fe, Id.*, 310. Defendants have amply noted the
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