JAMES E. HOLST (CSB # 34654)
CHRISTOPHER M. PATTI (CSB #118283)
University of California
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200
Telephone: (510) 987-9800
Facsimile: (510) 987-9757

MORGENSTEIN & JUBELIRER LLP
WILLIAM J. CARROLL (CSB #118106)
ADRIENNE S. LEIGHT (CSB #226854)
One Market, Spear Street Tower, 32nd Floor
San Francisco, CA 94105
Telephone: (415) 901-8700
Facsimile: (415) 901-8701

Attorneys for Defendants
ROY L. CALDWELL, Ph.D.
and DAVID LINDBERG

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEANNE E. CALDWELL,

Plaintiff,

v.

ROY L. CALDWELL, Ph.D., in his official capacity as Director of the University of California Museum of Paleontology; DAVID LINDBERG, in his 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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS ROY L. CALDWELL, Ph.D. AND DAVID LINDBERG'S MOTION TO DISMISS

Date: January 25, 2006
Time: 9:00 a.m.
Judge: Hon. Phyllis J. Hamilton

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I. INTRODUCTION

In helping the University of California to fulfill its mission as one of the preeminent educational institutions in the country, UC Berkeley's Museum of Paleontology ("the Museum") is at the forefront of efforts to promulgate web-based resources for teaching science. These efforts have resulted in an innovative, award-winning network of web pages providing resources for science teachers from kindergarten through the twelfth grade. This lawsuit addresses one of the Museum's websites, "Understanding Evolution ("UE"). The UE site is a comprehensive on-line resource, developed to meet the needs of K-12 teachers in teaching their students all aspects of evolution. It includes extensive interactive materials, lesson plans, quizzes, and links to additional web-based resources. The sheer volume of information is impressive: over 800 pages addressing topics as varied as the nature of science, the history of evolutionary thought, and medical science and evolution. The site also furnishes teachers with practical guidance on a range of issues, including how to deal with misconceptions about evolution in the classroom, and how to deal with roadblocks such as the teacher's lack of adequate background knowledge, or student discomfort with the topic of evolution.

In this lawsuit, plaintiff Jeanne E. Caldwell takes aim at a handful of pages on the UE site which refer to religion, and specifically the misconception that religion and evolutionary theory are incompatible with each other. Despite the obviously secular context and purpose of these pages, plaintiff contends they are part of a scheme by defendants to "proselytize" students and modify their religious beliefs in violation of the First Amendment's Establishment Clause. In launching this attack, plaintiff misconstrues and distorts the UE website's limited, straightforward discussion of religion and its role in teaching evolution. Her claims disregard jurisdictional standing requirements and ignore settled Establishment Clause jurisprudence. They should be dismissed at the outset.

Plaintiff's claims fail initially because she has no standing to challenge the Constitutionality of the UE website. Plaintiff has not been injured as a taxpayer or otherwise. While the UE site was developed with the use of federal funds, any impact on plaintiff's own interest as a federal taxpayer is far too minute and speculative to confer standing. The same is

true with regard to plaintiff's status as a California taxpayer. Indeed, plaintiff has failed to specify *any* amount of California tax revenues used in developing the challenged references to religion in the website. Nor is it enough that plaintiff claims to feel "offended" by alleged violations of the Constitution when she has used the site. The Supreme Court long ago settled this point, ruling that a citizen's concern over a perceived violation of the Constitution is not the sort of individualized injury required to confer standing. Plaintiff has failed to allege any such individualized injury as a taxpayer or otherwise. Her case must be dismissed for this reason alone.

Even if this court were to reach the merits of plaintiff's Establishment Clause challenge, the outcome would be no different. Under *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), plaintiff must show that the purpose or effect of the Museum's website is to advance or endorse religion. Here, the relevant inquiry is whether the site's references to religion, viewed in context, would lead an objective observer to conclude the government's purpose is primarily religious. The relevant context here is evident from any perusal of the Museum's website in general, and the UE site in particular. The hundreds of web pages that comprise these sites deal explicitly, consistently, and thoroughly with science education, and, in particular, education concerning the science of evolutionary biology. There is no religious agenda or purpose evident here, much less the "predominant" religious purpose which plaintiff must demonstrate in order to establish a Constitutional violation.

It is settled law in this Circuit that the government may support teaching about evolution without violating the Establishment Clause. "Evolutionism" is not a religion. Defendants have done this and nothing more: they have developed an invaluable resource for science teachers who are striving to furnish effective science education to children throughout the country. Plaintiff's Establishment Clause challenge is wholly without merit, and should be dismissed.

II. PLAINTIFF'S COMPLAINT

A. The Berkeley Museum of Paleontology and Its Website

Plaintiff's complaint focuses on the Understanding Evolution ("UE") section of a much larger website maintained by the UC Berkeley Museum of Paleontology ("Museum"). "The

mission of the Museum is to investigate and promote the understanding of the history of life and the diversity of the Earth's biota through research and education." http://www.ucmp.berkeley.edu/museum/museum.php.[1] The Understanding Evolution section is just one of several extensive collections of educational materials – totaling over 5000 web pages – that make up the Museum's website. http://www.ucmp.berkeley.edu/. For example, the "Paleontology Portal" (http://www.paleoportal.org/) contains nearly 2000 pages of information, images, resources for educators, and links. That site, produced by the Museum and funded by the National Science Foundation ("NSF"), has won several awards for excellence. http://www.paleoportal.org/footer_pages/awards.php.

The UE site is also sponsored jointly by the Museum and NSF. *See* http://evolution.berkeley.edu/. The site has been highly praised and has received several awards for excellence. http://evolution.berkeley.edu/evosite/recognition.shtml. The site's description of purpose is clearly and prominently stated:

> Understanding Evolution is a non-commercial, education website, teaching the science and history of evolutionary biology. This site is here to help you understand what evolution is, how it works, how it factors into your life, how research in evolutionary biology is performed, and how ideas in this area have changed over time.

http://evolution.berkeley.edu/evolibrary/whatsnew.php. The site, which consists of some 840 pages, originally focused on providing resources on evolution to K-12 teachers. As the site index of these teacher resources shows, http://evolution.berkeley.edu/evosite/siteindex.shtml, the material is organized into a number of sections including "the Nature of Science" (describing

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[1] Defendants have requested the court to take judicial notice of the Museum's website, including the "Understanding Evolution" portion of that site. *See* Defendants' Request For Judicial Notice. Further, consideration of the Museum's website is proper at this juncture because plaintiff's complaint refers to the website and because the website is central to plaintiff's claims. *See Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994) overruled on other grounds in *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (a court may consider "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading . . . in ruling on a Rule 12(b)(6) motion to dismiss."); *Pension Benefit Guaranty Corp. v. White Consolidated Indus., Inc.*, 998 F.2d 1192, 1196-97 (3d Cir. 1993); *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431-32 (7th Cir. 1993); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991); *Ed Miniat, Inc. v. Globe Life Ins. Group., Inc.*, 805 F.2d 732, 739 (7th Cir. 1986) (documents proffered by defendant in support of motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to plaintiff's claim).

scientific methodology), "Evolution 101" (describing many of the basic concepts of evolution), "History of Evolutionary Thought," "Misconceptions" (addressing a series of common misconceptions about evolution), and "Evidence" (describing evidence for evolution). Each of these sections contains many pages of detailed information. More recently, the site has been expanded to add substantial content aimed at the general public. http://evolution.berkeley.edu/evolibrary/whatsnew.php. The site also contains a "Readings and Resources" section that provides additional content and links to material both on other sections of the Museum's site and on non-University websites. http://evolution.berkeley.edu/evosite/resources/.

Plaintiff's complaint focuses on only three pages of the Museum website. First, plaintiff complains about one of the pages in the "Misconceptions" section of the UE site which addresses the misconception that "Evolution and Religion are Incompatible." Complaint, Ex. 2. That page describes the differences between science and religion, notes that some religious beliefs conflict with religion, but also states, accurately, that many religions have no problem with evolution. The page provides a link to the website of a non-profit organization, the National Center for Science Education ("NCSE" – not to be confused with defendant the National Science Foundation), which quotes statements from various religious groups indicating acceptance of evolutionary theory.

Second, plaintiff complains about an essay by Eugenie Scott, Executive Director of the NCSE, which, although it appears on another Museum website, is linked from the UE "Resources and Readings" page. Complaint, Ex. 5. The essay, titled "*Dealing with Antievolutionism*," gives advice to K-12 teachers about how to deal with opponents of evolution. It contains a section titled "*Defuse the Religion Issue*" in which Dr. Scott provides strategies for dealing with student religious objections that might interfere with evolution education.

Third, plaintiff identifies another essay on the "Resources and Readings" page titled "*The Domains of Science and Human Preferences*," by John A. Moore, an emeritus professor of biology at the University of California at Riverside. Complaint, Ex. 3. In it, Prof. Moore discusses the nature of science and scientific evidence and the relationship between science and religion.

III. ARGUMENT

A. Plaintiff Lacks Article III Standing To Assert the Claims Alleged in Her Complaint

To establish a "case-or-controversy" within the meaning of Article III, a plaintiff must show an "'injury in fact'" which is concrete and not conjectural, 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. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992). The alleged injury must be individualized – courts will not adjudicate "abstract questions of wide public significance" amounting only to "generalized grievances." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982) (quotations omitted). The burden is on the party who seeks the exercise of jurisdiction in his or her favor "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *United States v. Hays,* 515 U.S. 737, 743 (1995) (quotations omitted). Because plaintiff has failed to do so here, her complaint must be dismissed.

1. Plaintiff Cannot Establish Standing Based on Her Status As a Federal Or State Taxpayer

Plaintiff generally alleges that she "pays taxes to the State of California and the United States government," and that she has sustained injury as a result of defendant's expenditure of tax revenues. Complaint ¶¶ 9, 37. Plaintiff's bid to base standing on plaintiff's status as a federal and/or state taxpayer must be rejected.

The relevant requirements for federal taxpayer standing are set forth in the Supreme Court's decisions in *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923), and *Flast v. Cohen*, 392 U.S. 83 (1968). In *Frothingham*, the Court established a general rule rejecting federal taxpayer standing, observing that a federal taxpayer's "interest in the moneys of the Treasury . . . is comparatively minute and indeterminable" and that "the effect upon future taxation, of any payment out of the [Treasury's] funds, [is] remote, fluctuating and uncertain." *Frothingham*, 262 U.S. at 487. The Supreme Court subsequently recognized a limited exception to this general rule in *Flast*, where it held that federal taxpayer status is a sufficient basis for standing if there is (1)

1 "a logical link between that status and the type of legislative enactment attacked," and (2) "a
2 nexus between that status and the precise nature of the constitutional infringement alleged."
3 *Flast,* 392 U.S. at 102. In practice, this double nexus test has been satisfied only in a small class
4 of cases involving exercises of Congress' taxing and spending power that allegedly violate the
5 constitutional limitation upon that power imposed by the Establishment Clause. *See, e.g., Valley*
6 *Forge*, 454 U.S. at 479 (rejecting challenge to Congress' exercise of powers under the Property
7 Clause).

8 Under *Flast*, courts have recognized the standing of federal taxpayers to challenge the
9 Constitutionality of federal legislation authorizing spending programs on the grounds such
10 programs violate the Establishment Clause. *See, e.g., Children's Healthcare Is A Legal Duty, Inc.*
11 *v. Min De Parle,* 212 F.3d 1084, 1090 n.4 (8th Cir. 2000). Plaintiff makes no such challenge
12 here – indeed, her complaint makes no mention whatever of any such federal legislation. To the
13 contrary, plaintiff's challenge is aimed at certain aspects of defendants' use of a single federal
14 grant made by the National Science Foundation. There is no allegation suggesting any degree of
15 Congressional involvement whatsoever in the administration of this grant. There is no allegation,
16 nor can there be, that Congress had any direct or indirect role in defendants' creation and
17 maintenance of the allegedly unconstitutional portions of the UE website. *Cf. Bowen v. Kendrick*,
18 487 U.S. 589 (1988) (taxpayers had standing to challenge constitutionality of the Adolescent
19 Family Life Act ("AFLA") as applied, where Congress determined how AFLA funds
20 administered by executive agency were to be spent).

21 Without such a nexus between Congress' exercise of its taxing and spending powers and
22 the challenged conduct, there can be no basis for federal taxpayer standing. This was the result
23 reached by the Second Circuit in *In re U.S. Catholic Conference,* 885 F.2d 1020 (2d. Cir. 1989).
24 There, federal taxpayers filed suit challenging the IRS's failure to enforce IRC section 501(c)(3)'s
25 prohibition on lobbying and campaigning, and specifically the failure to withdraw tax-exempt
26 status in view of the Catholic Church's alleged political activities in opposing abortion rights.
27 The court observed that the taxpayers' complaint "centers on an alleged decision made solely by
28 the executive branch," and concluded that because "there is no nexus between plaintiffs'

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allegations and Congress' exercise of its taxing and spending power," the plaintiffs "fall within *Frothingham's* general rule denying taxpayer standing." *Id.* at 1028.

A similar result was reached in *Fordyce v. Frohnmayer*, 763 F. Supp. 654 (D.D.C. 1991), which addressed an action brought against the National Endowment for the Arts (NEA) alleging that the agency's partial sponsorship of an art exhibition violated the Establishment Clause. The court granted defendants' motion to dismiss for lack of standing, noting that the federal taxpayer plaintiffs "cannot contend that there was any congressional involvement in the decision to provide partial funding to the exhibition, that Congress participates in the decision to grant or deny applications for federal funding, or that the NEA merely administers a congressional directive." *Id.* at 657. The court concluded: "Because the nexus between plaintiffs' allegations and Congress' exercise of its taxing and spending power is so attenuated, plaintiffs cannot assert standing based on their status as taxpayers." *Id.* at 657. The same is true here. Because plaintiff has failed to allege any basis for establishing a sufficient nexus between Congress' exercise of its taxing and spending power and the challenged aspects of the UE website, any claim of federal taxpayer standing must be rejected.

Nor can plaintiff establish standing as a state taxpayer. In order to do so, plaintiff must at a minimum allege she "has sustained or is immediately in danger of sustaining some direct injury as the result of [the challenged statute's] enforcement." *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (quotations omitted). In *Doremus,* the Supreme Court held that state taxpayers challenging a policy of reading the Old Testament at the beginning of each school day could not assert taxpayer standing because "[t]here [was] no allegation that this activity [was] supported by any separate tax or paid for from any particular appropriation or that it add[ed] any sum whatever to the cost of conducting the school." *Id.* at 433. A leading Ninth Circuit case applying *Doremus* is *Hoohuli v. Ariyoshi,* 741 F.2d 1169 (9th Cir. 1984), where the court found that state taxpayers had standing to challenge Hawai'i's policy of distributing funds to descendants of aboriginal Hawai'ians. There, the Ninth Circuit identified the criteria for determining whether a state taxpayer action met the *Doremus* requirement of a "good-faith pocketbook action," including the requirements that the taxpayer a) challenge the "appropriating, transferring, and spending . . . of

taxpayers' money from the General Fund of the State Treasury"; and b) identify in the pleadings the amounts appropriated for the allegedly unlawful purpose. *Id.* at 1180 (quotations omitted). Plaintiff has made no such allegations here. Accordingly, she has no basis for asserting taxpayer standing.

An additional basis for denying plaintiff taxpayer standing lies in her failure to allege any actual stake as a taxpayer in the instant dispute. *See Warth v. Seldin*, 422 U.S. 490, 508 (1975) (To establish standing, plaintiff must show she would "personally would benefit in a tangible way from the court's intervention"). Here, plaintiff challenges certain content on a website that is up and running. Even if plaintiff could allege that specified state tax revenues have been spent in developing the challenged portions of the site – which she cannot – she would have to further allege that some additional, meaningful amount of state tax dollars are to be spent in the future with regard to the alleged unconstitutional portions of the site. She has not, and cannot, make any such allegation. *See, e.g., Nelsen v. King County*, 895 F.2d 1248, 1250-51 (9th Cir. 1990) (plaintiffs lacked standing where they could not demonstrate that "the requisite threat of future harm actually exists"); *see also Imagineering, Inc. v. Kiewit Pac. Co.,* 976 F.2d 1303, 1308-09 (9th Cir. 1992) (plaintiffs failed to allege sufficient facts to confer standing where complaint did not allege that the named plaintiffs "would suffer the same purported injury in the future").

2. Plaintiff Has Failed To Allege Any Cognizable Injury Sufficient To Confer Standing

In addition to an alleged economic injury arising out of her taxpayer status, plaintiff also apparently asserts she has standing based on a non-economic injury, to wit, her negative feelings about the challenged content on the UE website. She alleges she is "offended" when she has used the website, and feels like an "outsider." Complaint, ¶ 26. Because such feelings do not constitute the individualized injury-in-fact necessary to confer Article III standing, these allegations furnish no assistance whatever to plaintiff.

The Supreme Court has repeatedly rejected standing claims premised upon "the abstract injury in nonobservance of the Constitution asserted by . . . citizens." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n. 13 (1974); *Fairchild v. Hughes,* 258 U.S. 126,

129 (1922) (rejecting standing claims predicated on "the right, possessed by every citizen, to require that the Government be administered according to law. . . ."). In *Valley Forge,* 454 U.S. at 485 (1982) the Supreme Court denied standing to an organization which sought to bring an Establishment Clause challenge halting the transfer of federal property to a religious school. None of the plaintiffs had any interest in, or even lived near the property being transferred; they learned about the conveyance by reading a press release. The Supreme Court concluded that plaintiffs had failed to identify any injury beyond "the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III." *Id.* at 485.

The same is true here. Beyond feeling offended by the alleged use of the UE website to engage in unconstitutional "prosyletization," plaintiff fails to allege any injury whatever resulting from the website's challenged references to religion. As the majority in *Valley Forge* recognized, a claim of this type is nothing more than an attempt "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *Valley Forge*, *supra*, at 483 (quoting *Flast*, 392 U.S. at 106). Because plaintiff's feelings about the alleged unconstitutionality of defendants' conduct cannot, in themselves, constitute the injury required to confer standing, plaintiff's claims must be dismissed. *See Doe v. Madison School Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (*en banc*) (Parent who asserted graduation prayer was "offensive" lacked standing, where children had graduated and there was no other claim of injury).[2]

B. Plaintiff Alleges No Violation of the Establishment Clause

1. Standards on Motion to Dismiss

In deciding a Motion to Dismiss for failure to state a claim under Fed. R. Civ. Proc. 12(b)(6), "[r]eview is limited to the contents of the complaint. . . . All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. . . . The court

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[2] Under certain circumstances, the Ninth Circuit has recognized the requisite injury-in-fact where an individual, offended by a perceived unconstitutional religious display, is unable to enjoy unrestricted access to a public park or other public lands. *See, e.g., Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617, 619 (9th Cir. 1996); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993). No such situation exists here.

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need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. . . . Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (citations omitted).

2. Plaintiff Must Demonstrate That the Predominant Purpose Or Effect of the Museum's Website, When Viewed in Context by an Objective Observer, Is Religious

The Establishment Clause of the First Amendment does not prohibit all government comment on or reference to religion. "Rather than mechanically invalidating all governmental conduct . . . that confer[s] benefits or give[s] special recognition to religion in general or to one faith – as an absolutist approach would dictate – the [U.S. Supreme] Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). Total separation between religion and government "is not possible in an absolute sense." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Thus, for example, presentation of religious content in "[a] typical museum setting . . . negates any message of endorsement" that would implicate the Establishment Clause. *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989) (quotation omitted).

The appropriate legal test to apply to Establishment Clause challenges has been a matter of some controversy. In *Lemon*, the Supreme Court developed a now familiar three-part framework for evaluating establishment claims. "Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *Allegheny*, 492 U.S. at 592. The *Lemon* test – particularly its "purpose" prong – has been criticized for prohibiting too much government activity,[3] and where the Court has not relied on *Lemon*, it has generally upheld

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[3] E.g., *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring); *McCreary County, Kentucky v. ACLU*, ___ U.S. ___, 125 S.Ct. 2722, 2757 (2005) (Scalia, J., dissenting).

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government actions against establishment challenges.[4] Despite *Lemon*'s controversial nature, both the Supreme Court and the Ninth Circuit have frequently invoked it,[5] and just last term a majority of the Court rejected a call to abandon *Lemon*'s "purpose" test. *McCreary County, Kentucky*, 125 S.Ct. at 2732-35. Since any alternative test is even more likely to result in dismissal, we will analyze plaintiff's claims under *Lemon*.[6]

Because the web display plaintiff challenges involves no regulation of or direct government subsidy to religious organizations that might create an "entanglement" with religion, plaintiff's claim must be based on one of the first two prongs of the *Lemon* test: a showing either that the **purpose** or **effect** of the Museum's website is to advance or endorse religion. See *Lynch*, 465 U.S. at 683-84 (no "entanglement with religion" issue in a static display case).[7] The Supreme Court's recent Establishment Clause cases make evident that, where, as here, the challenge is to a static government-sponsored display, the "purpose" and "effects" prongs of the *Lemon* test are closely related, if not entirely merged. That is because both tests depend on the objective observer's reaction to the display, viewed in context. As the Court has stated, "[t]he effect of the display depends upon the message that the government's practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display.'" *Allegheny*, 492 U.S. at

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[4] *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983); *Van Orden v. Perry*, ___ U.S. ___, 125 S.Ct. 2854 (2005).

[5] E.g., *Allegheny*; *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1534 (9th Cir. 1985); *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517, 520 (9th Cir. 1994); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004).

[6] Not surprisingly, plaintiff's complaint appears to assume application of *Lemon*. Complaint, ¶¶ 34-36.

[7] The Supreme Court has addressed static displays of claimed religious material or images on a number of occasions, including cases involving holiday displays, such as *Lynch* and *County of Allegheny*, and displays of the Ten Commandments, such as in last term's *McCreary* and *Van Orden* cases. The Court's Establishment Clause jurisprudence includes a number of other categories of cases, such as those involving direct government aid to religious organizations (e.g., *Lemon*), or government sponsorship of active worship activities (*See, e.g., Marsh, Santa Fe, Wallace*), or government teaching of allegedly religious ideas directly to secondary school students. E.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968). While the general principles set forth in these non-display cases are instructive, because this case involves a static display of material on the World Wide Web, the specific analysis of the display cases is most pertinent.

595. In other words, the effect of a display depends on its apparent purpose. Similarly, the "purpose" inquiry is directed not to "judicial psychoanalysis of a drafter's heart of hearts" or to the "veiled psyche of government officers," but to the government purpose evident to an "objective observer." *McCreary*, 125 S.Ct. at 2734-2735; *see also Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308; *Wallace*, 472 U.S. at 73 (O'Conner, J., concurring). There is an unlawful purpose only if "openly available data support[] a commonsense conclusion that a religious objective permeated the government's action." *McCreary*, 125 S.Ct. at 2735. Thus, the "purpose" and "effect" prongs of *Lemon*, at least when applied to a static government display, involve precisely the same inquiry: Would the display, viewed in context, lead an objective observer to conclude that the government's purpose is primarily religious?

Three aspects of this inquiry are worthy of emphasis. **First**, to violate the Establishment Clause, religious purposes or effect must predominate. There is an improper **purpose** only if "government acts with the ostensible and predominant purpose of advancing religion." *McCreary*, 125 S.Ct. at 2733. "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. A "mixed" secular motive is insufficient to invalidate government action. *Bowen v. Kendrick*, 487 U.S. 589, 602-03 (1988); *Cammack v. Waihee*, 932 F.2d 765, 773 (9th Cir. 1991) ("When there are both religious and legitimate, sincere secular purposes motivating legislation, it appears that the existence of the secular purpose will satisfy the first *Lemon* prong."). Similarly, religious **effects** that are merely "indirect, remote, or incidental" do not violate the Establishment Clause. *Lynch*, 465 U.S. at 683 (quotations omitted); *Lamb's Chapel*, 508 U.S. at 395. Rather the "principal or primary" effect must be to advance or inhibit religion. *Lynch*, 465 U.S. at 683; *Allegheny*, 492 U.S. at 592.

Second, the context in which the "objective observer" would view the challenged display is key, and often decisive, to the evaluation of both purpose and effect. Context is important because "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680. In contrast, the

Supreme Court has recognized that certain contexts "'change[] what viewers may fairly understand to be the **purpose** of the display' and 'negate[] any message of endorsement.'" *Allegheny*, 492 U.S. at 596 (emphasis added); *see also McCreary*, 125 S.Ct. at 2741 ("purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context"). Similarly, "the **effect** of the government's use of religious symbolism depends upon its context." *Allegheny*, 492 U.S. at 597 (emphasis added); *see also Lynch*, 465 U.S. at 680.

Third, as suggested above, the **subjective**, hidden purposes of the governmental actors are irrelevant; instead the focus is on the impression that would be formed by the "objective observer" based on the "openly available data." *McCreary*, 125 S.Ct. at 2735. If the objective observer, familiar with the openly available data cannot see a religious purpose "then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides." *Id.*

3. When Viewed in Context, It Is Clear That the Objective Effect and Purpose of the Challenged Website Is Teaching Evolution, Not Promoting Religion

a. Promotion of Evolution Has a Secular Purpose and Effect

Courts, including the Ninth Circuit, have repeatedly held that evolution is a secular idea and that its promotion does not violate the Establishment Clause. In *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994), the Ninth Circuit rejected a claim that public school teaching of evolution established a state-supported religion of "evolutionism" or "secular humanism." The court noted that "neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are 'religions' for Establishment Clause purposes[, and] both the dictionary definition of religion and the clear weight of the caselaw are to the contrary." *Id.* at 521. *See also Crowley v. Smithsonian Institution*, 636 F.2d 738 (D.C. Cir. 1980) (evolution not a religious idea). Similarly, at least two Supreme Court decisions held that state attempts to limit the teaching of evolution, *Epperson v. Arkansas*, 393 U.S. 97 (1968), or to require that evolution be taught only alongside creationist theories, *Edwards v. Aguillard*, 482 U.S. 578 (1987), violate the Establishment Clause – decisions that are consistent only with the conclusion that evolution is secular. "The Supreme Court has held unequivocally that while the belief in a divine creator of

the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not." *Peloza*, 37 F.3d at 521.

b. The Predominant Purpose and Effect of the Understanding Evolution Website Is Teaching Evolution, Not Promoting Religion

What would the "objective observer" who viewed the Understanding Evolution website conclude about its "purpose?" Would it appear designed "predominantly" as a means of advancing a particular religious agenda? Or would its primary purpose appear to be teaching the secular idea of biological evolution? The answer is clear from the "openly available" – indeed judicially noticeable – data: the Understanding Evolution website is overwhelmingly, if not exclusively, designed to teach the secular, scientific theory idea of evolution.

c. The Publicly-Stated Purpose of the UE Website Is Secular

As set forth above, the UE website itself explicitly sets forth a secular purpose: "teaching the science and history of evolutionary biology." http://evolution.berkeley.edu/evolibrary/whatsnew.php. A government entity's statement of its own purpose is entitled to deference unless it is a "sham." *Santa Fe*, 530 U.S. at 308; *McCreary*, 125 S.Ct. at 2735. Such deference is analytically consistent with the "objective observer" standard, since, unless transparently false, disavowal of a religious purpose should reassure an objective observer that the government is not, in fact, seeking to promote a religious viewpoint. Nothing in the context or content of the UE website demonstrates that the stated purpose is a "sham," and the Court should therefore defer to that statement of secular intent.

d. The "Openly Available Data" Regarding the History of the UE Website Confirms Its Secular Purpose

To determine whether a stated secular purpose may be a "sham," courts have often reviewed the history of the enactment or display under challenge. *McCreary*, 125 S.Ct. at 2737; *Edwards*, 482 U.S. at 595. Of course, because the purpose inquiry goes not to the mental state of the government decision-makers, but to the purpose that would be evident to the "objective observer," this review is limited to the "openly available data." *McCreary*, 125 S.Ct. at 2735. Here, plaintiffs' complaint alleges and incorporates the openly available evidence of the history

of the UE website in the form of the NSF Award Abstract, which is, in effect, the "legislative history" of the federal grant that funded the site. Complaint, Ex. 1. The Abstract confirms the grant's secular purpose in noting the official project aims: "to improve teacher understanding of the nature of science, the patterns and processes of evolution, and the history of evolutionary thought and to increase their ability to teach these subjects effectively." *Ibid.* There is no reference to any religious purpose.

e. The Context of the Challenged Web Pages Dispels Any Notion of a Religious Purpose

In evaluating claims that static displays violate the Establishment Clause, both the Supreme Court and the Ninth Circuit have placed heavy emphasis on the physical context of the challenged display elements, and in particular on the proportion of the total display that is religious in nature. For example, in *Lynch* the Supreme Court held that a crèche that was surrounded by numerous secular holiday images did not convey a predominantly religious purpose, *Lynch*, 465 U.S. at 680-81, while in *Allegheny*, the Court held that a crèche standing alone in a prominent position in a county courthouse, did suggest a government purpose to promote religion. *Allegheny*, 492 U.S. at 598 ("Here, unlike in Lynch, nothing in the context of the display detracts from the crèche's religious message. . . . Here, in contrast, the crèche stands alone.") In *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985), the Ninth Circuit rejected a claim that requiring students to read the novel The Learning Tree, by Gordon Parks, violated the Establishment Clause despite the book's comments on religion. "Comment on religion is a very minor portion of the book. Its primary effect is secular." *Id.* at 1534.

As discussed above, plaintiff challenges only the smallest proportion – about one-tenth of one percent – of the UE website's pages, and an even smaller fraction of all the educational material on the Museum's website. The fact that these few challenged references to religion are surrounded by reams of secular educational material dispels the notion that the "predominant" purpose of the website is to advocate a particular religious belief. On the contrary, the overwhelmingly secular educational nature of the surrounding material must lead any reasonable observer to conclude that the purpose of the "misconceptions" page is to educate, not to proselytize.

f. The Content of the Challenged UE Web Page Does Not Demonstrate a "Predominantly" Religious Purpose

Given the strong statement of secular purpose on both the UE website and its originating Award Abstract and the insignificant proportion of the site devoted to any discussion of religion, one would expect that any Establishment Clause challenge to the minimal references to religion that do exist would be based on unambiguous expressions of religious endorsement. One would be wrong. In fact, plaintiff's establishment claim is based on strained inferences she seeks to draw from material that is, on its face, clearly designed to promote teaching of the secular concept of evolution.

In evaluating the inference that an objective observer would draw from the few challenged portions of the UE site, one more bit of context about the nature of the current debate over evolution is important. Most, if not all, contemporary challenges to the theory of evolution have been religious in nature – as the Supreme Court's holdings in *Epperson* and *Edwards*, as well as lower court decisions dealing with evolution education demonstrate. *See, e.g.*, *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1006 (7th Cir. 1990); *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (D. Ark. 1982). Thus, discussion of religion on the UE website does not come out of thin air: it arrives in a context in which defense of the secular idea of evolution must necessarily address these religiously-based challenges. In doing so, it is natural that there will be discussion of the differences between science and religion and the extent to which some religions do and other religions do not object to evolution. The Establishment Clause has never been interpreted to bar all government discussion of religion even if for the purpose of secular education. Rather, the Supreme Court has repeatedly held that "study of the Bible or of religion, when presented objectively as part of a secular program of education" is consistent with the First Amendment. *Lynch*, 465 U.S. at 679 (quotations omitted). Information about religion "may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like" – or as here, the study of evolution. *Stone v. Graham*, 449 U.S. 39, 42 (1980). Given this context, the objective observer will understand that statements responding to the objections of some religions to the secular scientific theory of evolution have as their clear

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purpose, not the establishment of competing religions, but the promotion of the secular idea of evolution.

Review of the challenged material – the "*Misconceptions: 'Evolution and religion are incompatible'*" page of the Museum's website, the "*Dealing With Antievolutionism*" article by Eugenie C. Scott, and the "*The Domains of Science and Human Preferences*" essay by John A. Moore – will demonstrate to an objective observer aware of the context that the primary purpose of each of these documents is not endorsement or propagation of a particular religious belief, but promotion of secular evolution education. Defendants' strongest argument is simply to invite the Court to review those documents and simply allow them to speak for themselves. Nevertheless, plaintiff's challenge to these documents appears to involve three distinct elements, and defendants propose some points for the Court to keep in mind during its review.

First, plaintiff asserts that– by noting that certain religious groups do not dispute evolution – defendants have suggested that those religions constitute "properly understood" or "correct" religious beliefs and that defendants are "advocating" or "proselytizing" in favor of those beliefs. Complaint, ¶¶ 24(b), 24(c)(second), 25(a), 25(b). In fact, nowhere does the UE website endorse any religious belief or assert that any belief is "correct." Rather, the stated purpose of this discussion of religion is to address resistance to the secular concept of evolution that might result from the misconception that evolution is **always** in conflict with religious beliefs. Thus, the "Misconceptions" page identifies the "misconception" as a belief that "one **always** has to choose between science and religion." Complaint, Ex. 2 (emphasis added).[8] Similarly, far from encouraging school teachers to "proselytize," the Scott article repeatedly indicates that teachers should **not** promote any religious viewpoint; rather, it suggests methods for allowing students to get beyond common misconceptions about the relationship between religion and evolution for the purpose of more effectively teaching the secular science of evolution. Thus the Scott article states "**it is not the job of public school science teachersto [sic] teach**

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[8] Tellingly, the complaint misquotes this passage, leaving out the critically important word "always." Complaint, ¶ 24(b).

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1 **theology,**" but notes that "when students come to class with their fingers stuck into their ears and
2 their eyes closed, it is necessary to figure out a way to get the fingers out and the eyes open."
3 Complaint, Ex. 5 (emphasis added). If there were any doubt, Scott repeats that "**it would be**
4 **inappropriate for a teacherto [sic] encourage students towards or against any religious**
5 **view**." *Id.* (emphasis added). The article makes explicit that the purpose of the various proposed
6 classroom exercises that plaintiff criticizes (*see* Complaint, ¶ 25(a)), is not to advance a religious
7 view, but to promote secular education: "The purpose of this exercise is to give the student some
8 critically important information so that he or she will be more willing to listen to the scientific
9 information you will present." Complaint, Ex. 5. Thus, the content of these challenged bits of
10 the UE website make clear that they are not "motivated wholly by religious considerations,"
11 *Lynch*, 465 U.S. at 680; rather, the "predominant" purpose and effect is the secular one of
12 teaching evolution. If they promote anything, it is not religion but the secular theory of evolution.
13 Any religious effect is at best "indirect, remote, or incidental" and does not violate the
14 Establishment Clause. *Id.* at 683 (quotations omitted); *Lamb's Chapel*, 508 U.S. at 395; *Kong v.*
15 *Scully*, 341 F.3d 1132, 1140 (9th Cir. 2003) (rejecting Establishment Clause challenge to
16 Medicare amendment permitting payments for nonmedical care of persons whose religious tenets
17 lead them to reject medical services: "The amendment indoctrinates no one in religion. .. [It]
18 compels no belief.").
19 The second element of plaintiff's challenge appears to be that the "Misconceptions" page
20 links to a list of statements from religions that accommodate evolutionary theory but not from
21 religions that oppose it. Plaintiff claims that defendants "have narrowly selected only those faith
22 traditions whose views align perfectly with those of the NCSE" and have failed to acknowledge
23 contrary religious views. Complaint, ¶ 30. But that is, of course, consistent with the stated
24 purpose of the "Misconception" page, which is to debunk the misconception that evolution is
25 **always** in conflict with religion. The page disproves that inaccuracy by presenting numerous
26 counterexamples and by providing a link to evidence proving those counterexamples.
27 Furthermore, plaintiff's assertion that the UE site fails to acknowledge the existence of religious
28 traditions that contradict evolution is false. The "Misconceptions" page itself notes that "[o]f

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course, some religious beliefs explicitly contradict science (e.g., the belief that the world and all life on it was created in six literal days)." Complaint, Ex. 2. Moreover, other pages on the UE site provide links to extensive information about religious opposition to evolution. For example, one UE web page discusses the "controversies in the public arena relating to evolution," http://evolution.berkeley.edu/evolibrary/controversy_faq.php, and links to a web page that provides a lengthy list of various creationist views, including Christian and non-Christian creationism, http://www.talkorigins.org/faqs/wic.html. That page in turn provides links to websites of many of the leading Christian creationist organizations, including the Creation Science Association for Mid-America, the Institute for Creation Research, Answers in Genesis, the Creation Research Society, Creation Science Evangelism, and the Discovery Institute, all of which include extended discussions of their anti-evolution beliefs.

Third, plaintiff complains about a number of statements made on the website regarding the nature of science and religion and the differences between the two, such as the statement on the "Misconceptions" page that "Religion and science (evolution) are very different things. In science, only natural causes are used to explain natural phenomena, while religion deals with beliefs that are beyond the natural world." Complaint, Ex. 2. In this regard, the Complaint focuses particularly on the essay "The Domains of Science and Human Preferences" by Prof. John A. Moore. Complaint, Ex. 3. Plaintiff's tack is to characterize many of the ideas stated in that article – such as the ideas that "science and religion are both human constructs," that science is "rational" while religion requires "emotional" belief, and that, in contrast to scientific conclusions, faith-based religious beliefs "demand neither evidence nor proof" – and to claim that these ideas are themselves "religious beliefs" or "religious viewpoints" which the site "endorses." Complaint, ¶ 24(a). But here, plaintiff is just playing games with the word "religion." In fact, Moore's essay plainly articulates, in essence, philosophical ideas about the respective natures of science and religion and about scientific and religious belief. Denominating such ideas as "religious" and therefore outside the bounds of permitted faculty speech at a public university

would effectively prohibit any academic discussion of religion, philosophy, or the nature of human knowledge. "As the Supreme Court recognized in [*Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836-837 (1995)], purging religious or anti-religious speech from a university setting would eliminate such speakers as Plato, Spinoza, Descartes, Karl Marx, Bertrand Russell, and Jean-Paul Sartre from the curriculum." *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1229-1230 (10th Cir. 2005). As noted above, the Supreme Court has repeatedly rejected such an interpretation of the Establishment Clause. *Stone v. Graham*, 449 U.S. at 42; *Lynch*, 465 U.S. at 679. To the extent that views about the respective nature of science and religion can be described as "religious" at all, Professor Moore's essay is clearly within this constitutionally permissible sphere. Furthermore, the mere fact that government promotes a message that conflicts with plaintiff's religious beliefs or is consistent with other religious ideas, does not render otherwise secular speech religious. *Van Orden*, 125 S.Ct. at 2863 ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."); *Epperson*, 393 U.S. at 107 ("the state has no legitimate interest in protecting any or all religions from views distasteful to them") (quotation, citation omitted); *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (Souter, J. concurring) ("That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account.").

IV. CONCLUSION

For the foregoing reasons, defendants Roy L. Caldwell, Ph.D. and David Lindberg respectfully request this Court grant their motion to dismiss plaintiff's complaint in its entirety, with prejudice.

DATED: December 19, 2005

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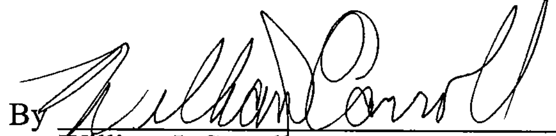

By William J. Carroll
Attorneys for Defendants
ROY L. CALDWELL, Ph.D.,
and DAVID LINDBERG