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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 JEANNE E. CALDWELL,

15 Plaintiff,

16 v.

17 ROY L. CALDWELL, Ph.D., in his official
capacity as Director of the University of
18 California Museum of Paleontology; DAVID
LINDBERG, in his official capacity as Chair of
19 the Integrative Biology Department of the
University of California-Berkeley; and
20 MICHAEL D. PIBURN, in his official capacity
as Program Director for the National Science
21 Foundation,

22 Defendants.
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Case No.: C05-04166

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

Date: February 8, 2006

Time: 9:00 a.m.

Judge: Hon. Phyllis J. Hamilton

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1 **I. INTRODUCTION**

2 Plaintiff’s opposition papers are as interesting for what they do not say, as for what they
3 say. By failing to offer any substantive opposition, she effectively abandons her bid to assert
4 federal taxpayer standing. Instead, plaintiff relies upon the novel argument that she has suffered
5 the injury-in-fact required for standing, simply by reviewing defendants’ Understanding
6 Evolution website. This argument flies in the face of *Valley Forge Christian College v. Americans*
7 *United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), a case which plaintiff
8 completely omits from her opposition. There, the Supreme Court firmly rejected the proposition that
9 Article III standing may extend to a person who suffers no injury, beyond learning about (and being
10 offended by) the purported unconstitutional conduct. Because plaintiff has failed to allege any such
11 injury here, *Valley Forge* disposes of her argument.

12 Plaintiff fares no better in attempting to rely upon her status as a state taxpayer. Unable to
13 point to allegations identifying any state revenues used in maintaining the handful of web pages at
14 issue here – and ignoring her own allegations acknowledging that the UE website is supported by
15 federal funds -- plaintiff expresses the hope that she will learn something in discovery. Such a hope
16 cannot, however, suffice to fulfill the pleading requirements established by the relevant Ninth Circuit
17 authorities. Because plaintiff’s complaint falls well short of those requirements, she cannot establish
18 standing as a state taxpayer.

19 Plaintiff’s opposition is also notably mute with respect to key aspects of defendants’
20 discussion of the merits, in particular defendants’ citation to the overwhelming evidence – available to
21 any “objective observer” – establishing the predominant, secular purpose of the UE website. Plaintiff
22 has not, and apparently cannot, challenge that which is obvious from any considered (or even cursory)
23 review of the UE website: it is about teaching the science of evolution to K-12 graders. Plaintiff has
24 no real response to the undeniably secular nature of this undertaking, other than to suggest that the
25 overwhelming evidence is irrelevant because she has alleged a “per se” violation of the Constitution.
26 This effort to avoid any inquiry into the context and purpose of the challenged web pages, while
27 understandable, is wholly unsupported by the relevant authorities. Those authorities have employed
28 this “per se” analysis in a narrow set of circumstances, where the government has discriminated

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1 between religious sects by selectively offering tangible benefits, or imposing tangible burdens.
2 Because no such conduct has even arguably been alleged here, plaintiff must face a broader inquiry
3 into the predominant purpose of the UE site – an inquiry which can have only one outcome: dismissal
4 of plaintiff’s suit.

5 **II. ARGUMENT**

6 **A. Plaintiff Lacks Article III Standing**

7 **1. Plaintiff Has Failed To Allege Taxpayer Standing.**

8 By refraining from any opposition to the argument, plaintiff has effectively conceded
9 defendants’ motion challenging her standing to sue as a federal taxpayer. Plaintiff cannot defer
10 this issue to another day. As established in defendants’ Opening Memorandum, plaintiff has no
11 basis for asserting federal taxpayer standing here (Opening Memo. at pp. 5-8).

12 Plaintiff has also failed to show she has met the pleading requirements for state taxpayer
13 standing under *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1178-80 (9th Cir. 1984). As stated in defendants’
14 Opening Memorandum, under *Hoohuli*, plaintiff must plead that the challenged conduct is supported
15 by appropriations from the State Treasury, and must identify in the pleadings the California revenues
16 appropriated for the allegedly unlawful purpose. *Id.* at 1180. *See also Cammack v. Waihee*, 932 F.2d
17 765, 773 (9th Cir. 1991); *Doe v. Madison School Dist. No. 321*, 177 F.3d 789, 794 (9th Cir. 1999)
18 (noting that in both *Hoohuli* and *Cammack* “the plaintiffs alleged specific amounts of money that the
19 government had spent solely on the unlawful activity.”) Plaintiff has not and cannot point to any such
20 allegations here. To the contrary, the Complaint identifies the federal government, not the State of
21 California, as the funding source for the UE website: “The Understanding Evolution Website was
22 produced, and is maintained, pursuant to a federal grant from the National Science foundation
23 (“NCF”) which is an agency of the United States.” (Complaint at ¶ 14.)

24 The Complaint fails to specify any use of California state revenues in developing or
25 maintaining the alleged unlawful portions of the UE website, or indeed any aspect of the UE website
26 whatever. In her opposition, plaintiff places sole reliance upon *PLANS, Inc. v. Sacramento City Unif.*
27 *Sch. Dist.*, 319 F.3d 504, 508 (9th Cir. 2003) (“*Plans*”) a summary judgment case which furnishes her
28 no assistance whatever. In *Plans*, the plaintiff taxpayers challenged the expenditure of school district

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1 funds to support certain magnet schools utilizing the Waldorf method of education. The district court
 2 granted the school district's motion for summary judgment, holding that while plaintiffs had shown
 3 that public funds were used to support the magnet schools in question, they had failed to show how
 4 those funds had been used to support the particular aspects of the Waldorf method being challenged.
 5 The Ninth Circuit reversed, concluding that plaintiff's challenge was directed to "the entire Waldorf
 6 approach," so that it was unnecessary to match up specific funds with specific activities. Rather, it
 7 sufficed to show that public funds were being used for the general operation of the Waldorf schools.
 8 *Id.* at 508.

9 Here, plaintiff does not challenge the entire UE website, but only a small fraction of it. She
 10 has failed to specify the use of any state funding in the development or maintenance of the specified
 11 web pages that are being challenged. Indeed, she has failed to allege the use of any specified state
 12 funds whatsoever.¹ Under *Hoohuli* and the other Ninth Circuit authorities cited above, these failures
 13 preclude her from invoking standing as a state taxpayer.

14
 15 **2. Plaintiff Has Failed To Allege Any Cognizable Injury Arising Out Of
 Her Review Of The UE Website.**

16 Tellingly, plaintiff's opposition fails to mention, much less distinguish, the Supreme Court's
 17 decision in *Valley Forge Christian College v. Americans United for Separation of Church and State,*
 18 *Inc.*, 454 U.S. 464 (1982) ("*Valley Forge*"), relied upon by defendants in demonstrating that plaintiff
 19 has no cognizable injury sufficient to confer standing. (Opening Memo. at pp. 8-9.) Plaintiff seeks to
 20 side-step the obvious import of *Valley Forge* by analogizing her review of the UE website to a local
 21 citizen's use of a public park or courthouse. This analogy stretches the limits of Article III standing
 22 beyond the breaking point, and cannot serve as a basis for conferring standing upon plaintiff here.
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 26 ¹ At page 15 of her opposition, plaintiff somewhat disingenuously points to the allegations of paragraph
 27 37 of the Complaint, which asserts that "There is thus an identifiable measurable sum of public funds
 28 being used to further the actions of the Defendants and each of them." But the only "public funds" that are
 identified in the Complaint are the *federal* grant funds described in paragraphs 14-15, and in the grant
 abstract attached as Exhibit 1. Nowhere does plaintiff identify any state tax revenues that are used to
 support the UE website, or more pertinently, the challenged portions of the UE website.

1 “[A]t an irreducible minimum, Article III requires the party who invokes the court's authority
2 to "show that he personally has suffered some actual or threatened injury as a result of the putatively
3 illegal conduct of the defendant.” *Valley Forge*, 454 U.S. at 472. (internal cites omitted). This
4 requirement serves as a means of preventing the judicial process from becoming “no more than a
5 vehicle for the vindication of the value interests of concerned bystanders. *United States v. Students*
6 *Challenging Regulatory Agency Procedures* (“*SCRAP*”), 412 U.S. 669, 687 (1973). In *Valley Forge*,
7 the Supreme Court reinforced these bedrock Article III principles in addressing a bid by an
8 organization of church and state “separatists” to challenge the transfer of state-owned real property
9 located in Pennsylvania to a local church-related college. The plaintiffs lived in Maryland and
10 Virginia; they had read about the conveyance in a news release and responded by seeking injunctive
11 relief in federal court, claiming the transfer violated the Establishment Clause. The Supreme Court
12 held that plaintiffs had failed to identify any cognizable personal injury “other than the psychological
13 consequence presumably produced by observation of conduct with which one disagrees. That is not
14 an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in
15 constitutional terms.” *Valley Forge*, 454 U.S. at 486.

16 Plaintiff’s claim here is no different. Plaintiff alleges that as a parent of school-age children,
17 she has a particular interest “in how teachers teach the theory of evolution in biology classes in the
18 public schools.” (Complaint at ¶ 26.) Plaintiff does not contend that any of the alleged
19 “proselytization” she complains of has actually occurred in the classroom, or that her children have
20 been exposed to any such proselytization. Rather, she alleges only that she has read teacher training
21 materials and related information accessible on the “Teaching Evolution” portion of the UE website,
22 which reflects “how the University of California recommends that public science teachers teach
23 evolution. . . .” *Id.* Having learned of these recommendations, and ostensibly finding them
24 constitutionally objectionable, plaintiff has brought this civil action. Plaintiff’s awareness of these
25 recommendations cannot, in itself, suffice for standing. *See e.g. Doe v. School District of the City of*
26 *Norfolk*, 340 F.3d 605, 609-610 (8th Cir. 2003) (no standing to challenge policy of allowing prayer at
27 graduation ceremony, where student “was simply informed that offensive conduct was scheduled to
28 occur.”)

1 Plaintiff's alleged injury here is, at bottom, no different than the injury alleged in *Valley*
2 *Forge*. Here, as in *Valley Forge*, plaintiff alleges she has suffered psychological consequences arising
3 out of her observation of conduct with which she disagrees. Like the plaintiffs in *Valley Forge*, Ms.
4 Caldwell became aware of the alleged constitutional violations when they were publicly disseminated.
5 But the unavoidable teaching of *Valley Forge* is that such awareness, whether gained by reading a
6 news release or clicking on a website, does not amount to actionable injury sufficient to meet the
7 standing requirements of Article III.

8 Nor can plaintiff avoid this result by resort to a strained analogy, comparing her review of the
9 UE website with a citizen's physical access to and enjoyment of a local public park, courthouse, or
10 other public facility. In plaintiff's view, standing in this matter could be invoked by any one of tens of
11 millions of people who have access to the internet, anywhere in the country. She has cited no case,
12 nor are defendants aware of any, which even arguably adopts such an expansive application of
13 standing principles. Such a diffuse concept of injury plainly runs afoul of the requirement that, for
14 Article III standing purposes, the requisite injury must be individualized or confined to a discrete
15 group, so that courts are not called upon to adjudicate "abstract questions of wide public significance"
16 amounting only to "generalized grievances." *Valley Forge*, 454 U.S. at 474-75 (citation omitted).

17 Plaintiff's analogy is further undermined by the ease with which she can make full use of the
18 UE website without encountering any of the allegedly offensive material. Plaintiff asserts she uses
19 the UE website because she is interested in how teachers teach the theory of evolution in biology
20 classes in public schools. (Complaint at ¶26.) She contends that she uses the UE website as a
21 "resource" to learn how evolution is taught. *Id.* Plaintiff's asserted interest may readily be satisfied
22 by review of hundreds upon hundreds of UE web pages of text, lesson plans, diagrams, outlines and
23 other detailed information addressing virtually all aspects of the science and history of biological
24 evolution. Plaintiff could easily avoid the few pages which she finds objectionable, and still have
25 access to the full sweep of information and educational resources available on the UE website. Any
26 argument by plaintiff to the contrary would suggest only that her true interest lies in actually seeking
27 out alleged violations of the Establishment Clause for the purpose of initiating court challenges. But
28 to engage in such a search, and then assert standing based on the alleged resulting psychological

1 injury when the search succeeds, would be to disregard any meaningful limitation on the concept of
2 Article III standing: “[Plaintiffs’] claim that the Government has violated the Establishment Clause
3 does not provide a special license to roam the country in search of governmental wrongdoing and to
4 reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen
5 of the general welfare.” *Valley Forge*, 454 U.S. at 487. Because plaintiff has failed to allege any
6 cognizable injury here, as a taxpayer or otherwise, her complaint must be dismissed for lack of
7 standing.

8 **B. Plaintiff Alleges No Violation Of The Establishment Clause**

9 1. **Under the Applicable Review Standard, Plaintiff’s Conclusory
10 Allegations Do Not Save Her Defective Complaint.**

11 Plaintiff’s Establishment Clause argument relies on her frequently-repeated but
12 conclusory assertions that “UCB has taken sides on a religious matter” and that “there is no
13 secular purpose” for the challenged portions of the UE website. Plaintiff incorrectly contends that
14 these conclusions prevent the Court from taking account of the actual facts—even those facts that
15 are alleged in the complaint, apparent from its exhibits, or subject to judicial notice.

16 In reality, plaintiff’s conclusory factual allegations are entitled to no weight. *Sprewell v.*
17 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court “required to accept
18 legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be
19 drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-755 (9th Cir.
20 1994) (citations omitted). The Court also need not credit allegations that contradict facts subject
21 to judicial notice or the complaint’s own exhibits. *Sprewell*, 266 F.3d at 988. And, although
22 normally limited to the “four corners” of the complaint, “[a] court may, however, consider certain
23 materials – documents attached to the complaint, documents incorporated by reference in the
24 complaint, or matters of judicial notice – without converting the motion to dismiss into a motion
25 for summary judgment.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *see also*
26 cases cited in Defendant’s Opening Memo. at p. 3, n.1. “Even if a document is not attached to a
27 complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively
28 to the document or the document forms the basis of the plaintiff’s claim,” *Ritchie*, 342 F.3d at

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1 908. Because plaintiff refers extensively to the UE website and makes it the basis for her claim,
2 the site is incorporated into the complaint and may be reviewed on this motion.

3 2. **The Purpose and Effect of the Challenged Website, When Viewed in**
4 **Context by an Objective Observer, Is Not Predominantly Religious.**

5 As demonstrated in pages 10-13 of defendants' Opening Memorandum, the primary
6 standard for evaluating an Establishment Clause challenge to a government display such as this
7 one is whether "openly available data support[] a commonsense conclusion that a religious
8 objective permeated the government's action." *McCreary County, Ky v. ACLU*, ___ U.S. ___,
9 125 S.Ct. 2722, 2735 (2005). That standard aims, not at determining the "veiled psyche of
10 government officers," but at what would be apparent to the "objective observer," *id.* at 2734-35, a
11 test that must be applied "in light of context." *Id.* at 2741. Plaintiff's Opposition is virtually
12 devoid of reference to this standard, even though the Supreme Court reiterated it in an analogous
13 case just months ago. In their Opening Memorandum, defendants reviewed the stated purpose of
14 the website, the openly available data regarding the website's history, the context in which the
15 challenged web pages appear, and the actual content of the challenged material, demonstrating
16 that these would all lead an "objective observer" to conclude that the "predominant" purpose or
17 effect of the website was to promote, not religious doctrine, but evolution education. (Opening
18 Memo. at pp. 14-20.) Courts have consistently held that promotion of evolution education has a
19 secular, not religious, purpose and effect. (Opening Memo. at pp. 13-14.) Plaintiff essentially
20 ignores this analysis, preferring to respond with bare, unsupported conclusions.² As discussed
21 above, such assertions do not overcome the specific facts alleged or incorporated in the complaint
22 or subject to judicial notice.

23 Aside from offering her own conclusions, plaintiff's response to defendants' motion is
24 twofold. First, plaintiff asserts that because defendants have supposedly "tak[en] sides on a
25 religious question" the fact that their actions have a secular purpose and effect is irrelevant.

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27 ² For example, in response to defendants' reference to the secular statements of purpose apparent to an
28 objective observer both on the website and in the NSF grant abstract, plaintiff relies only on her
conclusory allegation that "[d]efendants' actions have no secular purpose." *See e.g.* Opposition at p. 17,
lines 3-12.

1 (Opposition at pp. 19-20.) Second, plaintiff argues that because it supposedly “differentiates
2 between religious belief” the UE website violates the Constitution because any “differentiation”
3 between or among religious beliefs is *per se* an establishment of religion. (Opposition at pp. 20-
4 21.) Neither argument has merit.

5 While long on repetition of the claim that defendants have “taken sides on a religious
6 question,” plaintiff’s Opposition is notably short on specifics as to how they have done so. That
7 is because what defendants have “taken sides” on (if anything) is a **scientific** question regarding
8 the validity and reliability of the theory of biological evolution. As demonstrated in defendants’
9 Opening Memorandum (at 17-18), the challenged portions of the website do not endorse any
10 religious belief or proselytize on behalf of any religion; on the contrary, they emphasize the
11 distinction between scientific and religious understanding and expressly reject religious
12 proselytization. Plaintiff’s attempt to alchemize this support for a scientific theory into a taking a
13 “religious position” is based on her observation that “[a] salient part of that controversy [over the
14 teaching of evolution in public schools] stems from competition of ideas between theological
15 positions on evolution within the faith community.” (Opposition at p. 20). Thus plaintiff argues,
16 whenever there are differing religious positions on any controversy, that controversy becomes
17 “religious” and any position with regard to that controversy becomes a “religious position.”

18 The implications of the argument are breathtaking. There is likely no issue of scientific,
19 social, political, philosophical or other significance on which religious sects have not taken
20 varying positions. Plaintiff’s argument leads to the conclusion that wide swaths of human
21 controversy are out of bounds for government discourse. In plaintiff’s view, government and
22 government officials, such as Professors Caldwell and Lindberg, may take no position on any
23 position on which religious views differ, because doing so is “taking a religious position.” The
24 notion is especially unacceptable in the context of a public university, where the freedom to
25 express positions on all range of intellectual issues is highly prized by our Constitution.
26 *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Sweeny v. State of New Hampshire*

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1 (*Wyman*), 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).³

2 Not surprisingly, plaintiff’s argument has been firmly rejected. As noted in defendants’
3 Opening Memorandum (at p.20), the mere fact that government promotes a message that conflicts
4 with some religious beliefs or is consistent with others does not render otherwise secular speech
5 religious or constitute “taking a position on religion.” *Van Orden v. Perry*, ___ U.S. ___, 125
6 S.Ct. 2845, 2863 (2005) (“Simply having religious content or promoting a message consistent
7 with a religious doctrine does not run afoul of the Establishment Clause”); *Harris v. McRae*, 448
8 U.S. 297, 319 (1980) (First Amendment not violated by government activity that “happens to
9 coincide or harmonize with the tenets of some religions”); *see also Epperson v. Arkansas*, 393
10 U.S. 97, 107 (1968) (“the state has no legitimate interest in protecting any or all religions from
11 views distasteful to them”) (quotation and citations omitted). Indeed, plaintiff’s argument is
12 irreconcilable with those decisions holding that the teaching of evolution is not promotion of a
13 religious view. *See e.g., Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1993);
14 *Crowley v. Smithsonian Inst.*, 636 F.2d 738 (D.C. Cir. 1980).

15 Furthermore, even if defendants’ actions could be construed as taking a position on a
16 religious issue, plaintiff’s blanket assertion that government may never do so, even for
17 predominantly secular reasons, is wrong. The Ninth Circuit faced a closely analogous situation in
18 *American Family Assoc., Inc. v. City and County of San Francisco*, 277 F.3d 1114 (9th Cir.
19 2002). There the San Francisco Board of Supervisors sent letters and adopted resolutions
20 condemning an advertising campaign sponsored by religious groups that declared homosexuality
21 a sin. One resolution called for “the Religious Right to take accountability for the impact of their
22 long-standing rhetoric denouncing gays and lesbians.” *Id.* at 1119. Applying *Lemon v.*

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25 ³ Plaintiff’s reference (Opposition at pp. 22-23) to the rejection of official “orthodoxy” in *W. Virginia*
26 *State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) and *United States v. Ballard*, 322 U.S. 78, 86
27 (1944) is both inapposite and deeply ironic: inapposite because nothing in the University’s supportive
28 statements about evolution, any more than any statement of fact or opinion by a government agent,
“prescribes what shall be orthodox;” ironic because it is the very constitutional concern about imposition
of “orthodoxy” in the university that led the courts in *Sweeny* and *Keyishian* to emphasize the need for
freedom of public university faculty like defendants here to express their views, a freedom plaintiff’s
interpretation of the Establishment Clause would largely quash.

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1 *Kurtzman*, 403 U.S. 602 (1971), the court held that, although the letters and resolutions might
2 well be read to imply disapproval of plaintiffs’ religious views, because their predominant
3 purpose was the secular one of promoting equal rights for gays and lesbians, there was no
4 violation of the Establishment Clause. *Id.* at 1121 (“although the letter and resolutions may
5 appear to contain attacks on the Plaintiffs’ religious views . . . there is also a plausible secular
6 purpose in the Defendants’ actions—protecting gays and lesbians from violence—and that
7 therefore the plaintiffs’ could not state a claim under the purpose prong [of *Lemon*]”); 1122
8 (although “both documents contain statements from which it may be inferred that the defendants
9 are hostile” to plaintiffs’ religious views, “[t]he documents read in context as a whole, are
10 primarily geared toward promoting equality for gays and discouraging violence against them.”);
11 1122-23 (“a reasonable, objective observer would view the primary effect of these documents as
12 encouraging equal rights for gays . . . and any statements from which [religious] disapproval can
13 be inferred only incidental and ancillary.”) Defendants here have taken far more care than in
14 *American Family Assoc.* to avoid any criticism of religious views, and their overriding secular
15 purpose is even more evident.

16 Plaintiff’s second argument, relying on *Larson v. Valente*, 456 U.S. 228 (1982), is that any
17 “differentiation” between or among religions is *per se* unconstitutional preventing the Court from
18 even reaching the “*Lemon*” test. She claims that the UE website “differentiates” among religions
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1 because it notes that some religions oppose evolution while others do not.⁴ *Larson* involved a
2 challenge to a Minnesota statute that exempted from certain charitable registration and reporting
3 requirements only religious organizations that received more than 50 percent of their revenues
4 from member donations. The registration requirement called “for the provision of a substantial
5 amount of information, much of which penetrates deeply into the internal affairs of the registering
6 organization.” *Id.* at 255 n.29. The Court found that the legislative history of the statute
7 “demonstrates that the provision was drafted with the explicit intention of including particular
8 religious denominations and excluding others.” *Id.* at 255.

9 *Larson* has generally been applied to challenges to differential governmental provision of
10 tangible financial benefits or imposition of administrative burdens on religious organizations.
11 “Most courts having applied *Larson* did so when the challenged government action created a
12 practical, tangible benefit or burden for adherents of a specific religion. . . . Where government
13 action amounts to no more than religious expression, however, courts have applied *Lemon*.”
14 *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1033-1034 (8th Cir. 2004) (internal
15 citation omitted), *vacated on other grounds*, 419 F.3d 772 (8th Cir. 2005).⁵ In *Lynch v. Donnelly*,

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18 ⁴ The inferences that plaintiff seeks to draw from this “differentiation” – which is in essence nothing more than
19 a description of the varying beliefs of different religious sects – are, as discussed in defendants’ Opening
20 Memorandum (at pp.16-20), utterly unsupported. Plaintiff begins by repeating the falsehood that defendants
21 have promoted “the proposition that evolution and religion are not in conflict” – implying that defendants claim
22 it never is – and reason based on that misstatement that “government has taken a position on what religion
23 means” and that “[t]o the extent that some religious beliefs do conflict with evolution, the website is in effect
24 stating that such beliefs are nonsensical.” (Opposition Memo. at p. 21.) This reasoning would be strained
25 enough if its premise were accurate, but it is not. As shown in defendants’ Opening Memorandum, the UE site
26 does not claim that evolution and religion are never in conflict but only that religion and evolution are not
27 **always** in conflict, a point plaintiff ignores only by misquoting the language of the web site. See Opening
28 Memo. at p.17 & n.8. As such, and taken in context, the website clearly presents a **descriptive** statement about
the positions of various religions on evolution. See Opening Memo. at pp.18-19. It is noteworthy that the
theological statements cited in plaintiff’s Opposition (at 18, n.4) and Complaint are neither statements by the
University nor even statements that appear on the UE website. Instead, they are linked as **examples** of religious
opinions about evolution (among many such opinions on both sides that the site links; see Opening Mem. at
p.19) and are presented as such. Plaintiff thus ignores the “critical distinction between *government* speech
endorsing religion, which the Establishment Clause forbids, and *private* speech,” which it does not.
Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 841 (1995)(emphasis original, quotations
omitted).

⁵ Although the *en banc* Eighth Circuit Court of Appeal reached a different ultimate outcome than the three-
judge panel, the *en banc* court expressly adopted the panel’s reasoning regarding the inapplicability of *Larson*
to a government speech case. 419 F.3d at 775 n.5.

1 465 U.S. 668, 667 (1984), the Supreme Court expressly rejected application of *Larson* to a public
2 display case. *Id.* at 667 n.13 (“The Court of Appeals viewed [*Larson*], as commanding a ‘strict
3 scrutiny’ due to the City’s ownership of the \$200 crèche which it considers as a discrimination
4 between Christian and other religions. It is correct that we require strict scrutiny of a statute or
5 practice patently discriminatory on its face. But we are unable to see this display, or any part of
6 it, as explicitly discriminatory in the sense contemplated in *Larson*.”). Consequently, courts have
7 held that *Lemon*, not *Larson* is the applicable standard in cases challenging government speech or
8 displays, as opposed to provision of tangible benefits. *City of Plattsburgh*, 358 F.3d at 1033-
9 1034.

10 Further, plaintiff’s claim that any description of the differing beliefs of religious sects
11 constitutes “differentiation” and therefore “discrimination” under *Larson* expands that decision
12 far beyond its holding and is patently inconsistent with too much constitutional doctrine to be
13 accepted. It would effectively prevent government from saying **anything** about religion. It
14 would require abandonment of the Supreme Court’s principle that the constitution does not
15 “mechanically invalidat[e] all governmental conduct . . . that confer[s] benefits or give[s] special
16 recognition to religion in general or to one faith,” *Lynch*, 465 U.S. at 678, overturning of the
17 holding that religion “may constitutionally be used in an appropriate study of history, civilization,
18 ethics comparative religion, or the like,” *Stone v. Graham*, 449 U.S. 39, 42 (1980), and discarding
19 the recognition “[t]hat government must remain neutral in matters of religion does not foreclose it
20 from ever taking religion into account.” *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (Souter, J.,
21 concurring).

22 **3. Plaintiff Has Failed To Demonstrate Any Excessive Entanglement**

23 Plaintiff’s attempt to invoke the third prong of the *Lemon* test, which asks whether the
24 challenged conduct entails “excessive government entanglement” with religion, is similarly flawed.
25 The limited references to religion targeted by plaintiff here bear no resemblance to the sort of
26 substantial and sustained governmental involvement that has failed to pass constitutional muster under
27 *Lemon*.

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1 The Establishment Clause does not prohibit all entanglements; only excessive ones
2 demonstrating that the government's conduct has the impermissible effect of advancing religion. *See*
3 *Agostini v. Felton*, 521 U.S. 203, 232-234 (1997). As described by the Supreme Court, the relevant
4 inquiry is "whether the involvement is excessive, and whether it is a continuing one calling for official
5 and continuing surveillance leading to an impermissible degree of entanglement." *Walz v. Tax*
6 *Comm'n of City of New York*, 397 U.S. 664, 675 (1970); *Mueller v. Allen*, 463 U.S. 388, 403 (1983)
7 ("comprehensive, discriminating, and continuing state surveillance" required for a finding of
8 excessive entanglement not present where state officials required to determine whether textbooks
9 were religious). The Ninth Circuit authorities are to similar effect. *See e.g. Cammack*, 932 F.2d at
10 781 (9th Cir. 1991) (finding no excessive entanglement where the government's involvement was not
11 "comprehensive" or "enduring"); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1399 (9th Cir. 1994
12 ("entanglement typically involves comprehensive, discriminating, and continuing state surveillance of
13 religion").⁶

14 No such comprehensive surveillance of religion has been alleged here. To the contrary,
15 plaintiff's allegations refer to limited, general assertions in materials linked to the UE website
16 supporting the proposition that evolution and religion are not incompatible. *See e.g.* Complaint,
17 Exhibits 2, 5. The limited scope of these assertions, and the minor role they play in the overall
18 educational scheme of the UE website, belie plaintiff's characterization of defendants' as having
19 become "mired" in the "quicksand of religious debate." (Opposition Memo. at p. 22.) Indeed, the
20 thrust of these assertions – that most (but not all) major religious groups have no conflict with the
21 theory of evolution – goes unchallenged by plaintiff. Defendants' iteration of these assertions does
22 not require any comprehensive or sustained involvement with any religious group. Accordingly, there
23 is no excessive entanglement. *Brown v Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1384 (9th
24 Cir. 1994) (school district's review of curriculum challenged as endorsement of religion of witchcraft
25 did not entail excessive entanglement).

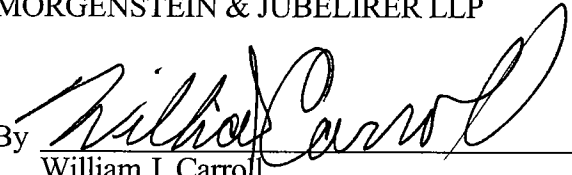
26 _____
27 ⁶ In *Cammack*, 932 F.2d at 781, the Ninth Circuit noted that the Supreme Court has usually found excessive
28 entanglement in situations involving either state aid to groups affiliated with a religious institution, such as
parochial schools, or where religious employees and public employees must work closely together. The facts
of this case do not conform to either of these patterns.

1 **III. CONCLUSION**

2 For the foregoing reasons, and for the reasons set forth in their motion and supporting papers,
3 defendants Roy L. Caldwell and David Lindberg respectfully request this Court grant their motion to
4 dismiss plaintiff's complaint in its entirety, with prejudice.

5
6 DATED: January 25, 2006

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