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**IN THE UNITED STATES DISTRICT COURT
FOR THE 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 PJH

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS ROY CALDWELL AND
DAVID LINDBERG'S MOTION TO
STRIKE**

[Fed. R. Civ. P. 12(f)]

Date: February 8, 2006

Time: 9:00 a.m.

Judge: Hon. Phyllis J. Hamilton

1 **I. Nominal Damages are an Important Remedy for Constitutional Violations.**

2 In Defendants’ Motion to Strike Plaintiff’s prayer for nominal damages, they seek to
3 deprive Plaintiff of a remedy which is not only crucial to its case, but completely legitimate.

4 Nominal damages are an important remedy to correct state action which violates Plaintiff’s
5 constitutional rights. As the Supreme Court has stated,

6 Common-law courts traditionally have vindicated deprivations of certain
7 “absolute” rights that are not shown to have caused actual injury through the
8 award of a nominal sum of money. By making the deprivation of such rights
9 actionable for nominal damages without proof of actual injury, the law recognizes
the importance to organized society that those rights be scrupulously observed.....

10 *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

11 In *Carey*, school officials were sued for suspending plaintiffs without proper procedural
12 due process. The Court held that, even if it turned out that the suspensions were justified,
13 plaintiffs were entitled to nominal damages because school officials had violated their
14 constitutional rights.

15 Federal courts have applied this logic broadly to all manner of constitutional violations
16 by state actors. *See, e.g., Floyd v. Laws*, 929 F.2d 1390 (9th Cir. 1991) (Ninth Circuit interprets
17 *Carey* to require nominal damages for substantive, as well as procedural, constitutional
18 violations); *Gibeau v. Nellis*, 18 F.3d 107, 110 (2d Cir. 1994) (§1983 plaintiffs entitled to
19 nominal damages upon proof of “violation of a substantive constitutional right.”) Of course,
20 with the exception of the Thirteenth Amendment, constitutional violations can only be
21 committed by state actors. Thus, Defendants’ sweeping arguments that the Eleventh
22 Amendment protects them from nominal damages claims would have the effect of rendering the
23 Court’s interpretation of §1983 powerless, if not meaningless.
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1 **II. Nominal Damages May be Obtained from Defendants as Equitable Relief.**

2 Through its Motion to Strike, Defendants seek to deprive Plaintiff of this important
3 remedy without sufficient justification. While citing several cases for general propositions
4 regarding Rule 12(f) and the Eleventh Amendment, Defendants fail to cite any authority from the
5 Ninth Circuit which states that nominal damages, which are deemed “symbolic,” *George v. City*
6 *of Long Beach*, 973 F.2d 706, 708 (9th Cir. 1992), and serve a much different purpose than
7 compensatory damages, cannot be obtained in a suit against state or local government agencies.
8

9 The Ninth Circuit has, in fact, left open the door for the possibility that, in cases where
10 the primary remedies are equitable, nominal damages may also be considered equitable—and
11 hence outside the Eleventh Amendment—in order to effectuate “complete justice.” *U.S. v.*
12 *Marolf*, 173 F.3d 1213, 1219 n.5 (9th Cir. 1999) (citing *U.S. v. Martinson*, 809 F.2d 1364 (9th Cir.
13 1987). Another federal circuit court has gone even further, interpreting a line of decisions
14 beginning with *In re Young*, 209 U.S. 123 (1908), to preclude sovereign immunity by a school
15 district when plaintiff abandoned her compensatory damages claim, and her nominal damages
16 claim totaled less than twenty dollars. *Wigg v. Sioux Falls School District 49-5*, 382 F.3d 807,
17 812 n.1 (8th Cir. 2004).
18

19 The whole thrust of Eleventh Amendment immunity, including the cases cited by
20 Defendants, is the protection of state coffers from litigants who sense a deep pocket and potential
21 windfall. By stark contrast, the primary thrust of this lawsuit is equitable relief: Plaintiff seeks
22 to have Defendants’ government-sponsored religious statements declared unconstitutional and
23 enjoined. Plaintiff’s nominal damages claim is incidental to that goal and should properly be
24 considered part of the equitable relief. Defendants have completely failed to address this
25 significant problem with its position.
26

1 **III. Defendants Fail to Distinguish Analogous Awards of Nominal Damages**

2 Finally, Defendants have made no effort to distinguish the numerous cases in which the
3 Ninth Circuit has imposed nominal damage awards against government entities. In *Schneider v.*
4 *County of San Diego*, 285 F.3d 784 (9th Cir. 2002), for instance, the plaintiff demanded nominal
5 damages of one dollar from each defendant, including the county. The lower court prevented the
6 plaintiff from recovering nominal damages because it deemed them duplicative. However, the
7 Ninth Circuit reversed, holding that under *Floyd* a nominal damages award—in this case against
8 the county—was mandatory when a constitutional violation was proved. The lower court judge,
9 consequently, had no discretion to exclude such an award.
10

11 Likewise, in *Floyd* itself, the court awarded the plaintiff nominal damages against the
12 City of Sherwood, Oregon. Neither of these awards was trumped by Eleventh Amendment
13 concerns. Nor are these isolated cases. Nominal damages were awarded against the City of
14 Long Beach in *George v. City of Long Beach*, 973 F.2d 706 (9th Cir. 1992); against an LA
15 County Park Police Officer in *Wilks v. Reyes*, 5 F.3d 412 (9th Cir. 1993); and against the City of
16 Reno in *Wilcox v. City of Reno*, 42 F.3d 550 (9th Cir. 1994) (court also awarded attorney’s fees).
17

18 **IV. Conclusion**

19 Defendants’ Motion is woefully insufficient to carry the significant burden it bears for
20 seeking to deprive Plaintiff of an important constitutional remedy. Its citations to authority are at
21 best non-specific and at worst non-controlling. Accordingly, Plaintiff respectfully requests that
22 the court deny Defendants’ Motion to Strike. In the alternative, should the court determine that
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