

1 situated group was treated more favorably; and (3) CAPEEM's
2 members were treated differently in the process. The court
3 addresses each of these arguments in turn below:

4 **(1) Discriminatory Intent**

5 First, proof of discriminatory intent or purpose is required
6 to show a violation of the Equal Protection Clause. City of
7 Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 194
8 (2003). Discriminatory intent "implies that the decision maker .
9 . . selected or reaffirmed a particular course of action at least
10 in part 'because of' not merely 'in spite of' its adverse effects
11 upon an identifiable group." Personnel Adm'r v. Feeney, 442 U.S.
12 256, 279 (1979). In this case, contrary to defendants'
13 protestations that CAPEEM has "no evidence" of defendants'
14 discriminatory intent, CAPEEM proffers sufficient evidence, in
15 the form of certain direct statements evidencing hostility
16 toward certain Hindu groups and procedural irregularities that
17 impacted only the Hindu groups supporting the HEF/VF edits, to
18 raise triable issues of fact that defendants intentionally
19 discriminated against CAPEEM members in the adoption process.

20 For example, CAPEEM proffers evidence of certain procedural
21 irregularities that only effected Hindu groups supporting the
22 HEF/VF edits: (1) these Hindu groups' recommended edits were
23 subject to formatting requirements which other religious groups'
24 edits were not subjected (PDF ¶s 6-8); (2) the suggestions of
25 these Hindu groups were subject to arbitrary deadlines which
26 other religious groups were not subjected (PDF ¶ 17); (3) while
27 certain controversies concerning the textbooks' contents involved
28 religions other than Hinduism, defendants only brought in experts

1 opposed to the Hindu groups in order to evaluate the Hindu
2 groups' suggested edits (PDF ¶s 13, 17, 47-48, 67, 70, 166, 184-
3 186);¹⁷ (4) defendants fully vetted Dr. Bajpai, who supported the
4 HEF/VF edits, but they did not do the same for the experts they
5 hired who opposed the edits, and defendants imposed special
6 requirements only on Dr. Bajpai and not on the experts opposing
7 the edits, which included disallowing Dr. Bajpai from having any
8 connection to the advocacy groups supporting the HEF/VF edits and
9 precluding him from having any relationship with publishers
10 submitting textbooks in the process (PDF ¶s 44-46, 49, 51-56, 59,
11 60);¹⁸ (5) various edits suggested by these Hindu groups which
12 were similar to edits suggested by other religious groups were
13 nonetheless treated differently, including (a) while the requests
14 of Jewish groups to capitalize the "g" in "god" were granted the
15 same request of the Hindu groups was not (PDF ¶s 175-176);
16 (b) the request of Jewish participants to remove text related to
17 a claimed higher social status of Jews with respect to Samaritans
18 was removed but the alleged offensive text which blamed Hinduism
19 for an oppressive caste system was not removed (PDF ¶s 180-181);
20 (c) defendants removed claims of Christianity being an
21 improvement over Judaism when Jewish participants complained but
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23 ¹⁷ To contrary, plaintiff proffers evidence that the
24 advisors for Christianity, Islam and Judaism, Nystrom, Mansuri
25 and Janowitz, were not hostile to these religions. (Id.)

26 ¹⁸ The experts opposing the HEF/VF edits were not put to
27 the same requirements. For example, plaintiff proffers evidence
28 that Wolpert acted as a consultant to one of the publishers
submitting a textbook in the process at the same time he served
as a panelist on the Ad Hoc Committee. Defendants conceded in
this litigation that such a dual role presented a conflict of
interest. (See Defs.' Reply on MSJ, filed Jan. 23, 2009, at 6-7;
PDF ¶s 61-62.)

1 defendants denied the Hindu groups' request to remove claims of
2 Buddhism being an improvement over Hinduism (PDF ¶s 172-174,
3 220); and (d) defendants granted the requests of Jewish
4 participants to provide an insider's perspective of their
5 religion, such as by using the version of the Ten Commandments
6 from the Hebrew Bible instead of the Christian Bible and removing
7 references to the Christian Bible in a chapter on Judaism, but
8 defendants denied the Hindu groups' similar requests to provide
9 an insider's perspective of their beliefs (PDF ¶s 177-178).

10 In addition to these procedural irregularities which CAPEEM
11 proffers as circumstantial evidence of defendants' discriminatory
12 intent toward the Hindu groups supporting the HEF/VF edits,
13 CAPEEM also provides evidence of certain statements, which when
14 viewed in the light most favorable to plaintiff, evidence
15 hostility toward the Hindu groups. Said evidence includes the
16 following: (1) defendants were aware of Dr. Witzel's alleged
17 biases toward the Hindu groups as a result of statements Witzel
18 made to Tom Adams and as a result of information the Hindu groups
19 provided to defendants about Witzel's derogatory statements
20 toward the Hindu groups, yet defendants continued to consult
21 Witzel and involve him in the process (PDF ¶s 108, 112);¹⁹ (2)
22 defendants accused "[HEF/VF] . . . [of] theological tweaking" (PDF
23 ¶ 258); (3) Charles Munger, a member of the Commission, called
24 the HEF/VF edits "foolish" (PDF ¶ 100); and (4) Tom Adams called
25

26 ¹⁹ Defendants' argument that they cannot be held liable
27 for the alleged biases of Dr. Witzel, a "third-party" to this
28 litigation, is unavailing. Defendants hired Witzel as an advisor
in this process; any alleged biases he had, of which defendants
were aware are relevant to this case; specifically, whether
defendants intended to discriminate against plaintiff.

1 VF member Janeshwari Devi's comments a "nationalist
2 interpretation of Indian history," despite the fact that Devi is
3 from the United States, and Adams testified he did not think she
4 was of Indian descent (PDF ¶ 31).

5 These facts sufficiently raise a triable issue as to
6 defendants' intent in considering the positions of the Hindu
7 groups who supported the HEF/VF edits. While defendants may well
8 contend that such evidence is insufficient for plaintiff to
9 prevail on its equal protection claim, that argument goes to the
10 weight of this evidence, which is ultimately an issue for the
11 trier of fact to consider. (Defs.' Reply, filed Jan. 23, 2009
12 [Docket #200], at 5-9.) At this juncture, the court must
13 construe the evidence proffered by plaintiff in the light most
14 favorable to plaintiff. Anderson v. Liberty Lobby, Inc., 477
15 U.S. 242, 255 (1986) (holding that in resolving a summary
16 judgment motion, the evidence of the opposing party is to be
17 believed, and all reasonable inferences that may be drawn from
18 the facts placed before the court must be drawn in favor of the
19 opposing party). In the end, to withstand summary judgment,
20 plaintiff must only raise sufficient facts to support a
21 reasonable trier of fact's verdict in its favor. Id. at 251
22 ("Before the evidence is left to the jury, there is a preliminary
23 question for the judge, not whether there is literally no
24 evidence, but whether there is any upon which a jury could
25 properly proceed to find a verdict for the party producing it,
26 upon whom the onus of proof is imposed.") Id. at 251 (citations
27 omitted). Plaintiff has done so here.

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1 **(2) Similarly Situated Group**

2 Defendants also argue that CAPEEM's equal protection
3 challenge to the adoption process must fail because it does not
4 identify a similarly situated group of persons who allegedly
5 received more favorable treatment. According to defendants, it
6 was only the various Hindu groups supporting the HEF/VF edits
7 that "invoked [an] international response from scholars," warning
8 the SBE that the groups' suggested edits were not accepted by
9 mainstream practitioners and instead advanced a sectarian,
10 religious-political agenda. (Defs.' Mem. of P. & A. in Supp. of
11 MSJ, filed Dec. 30, 2008 [Docket #157], at 17.) While defendants
12 are correct that discrimination, actionable under the Equal
13 Protection Clause, may be found only in the unequal treatment of
14 people in similar circumstances, defendants read this requirement
15 too narrowly here. See Freeman v. City of Santa Ana, 68 F.3d
16 1180, 1187 (9th Cir. 1995). CAPEEM is not required to show that
17 a similar group of persons' suggested edits faced the same
18 international challenge as the Hindu groups' edits; rather,
19 CAPEEM is required to show simply that the Hindu groups'
20 suggested edits were akin to other groups participating in the
21 adoption process but received disparate treatment. As set forth
22 above, CAPEEM has raised sufficient evidence on this issue to
23 create a genuine issue for trial. CAPEEM proffers evidence of
24 certain procedural irregularities that applied only to its
25 members as opposed to other groups, including other Christian and
26 Jewish persons participating in the same adoption process in
27 similar ways to CAPEEM's members. Like the above, this evidence
28 is sufficient to meet CAPEEM's burden on summary judgment.

1 (3) Disparate Treatment from Other Similarly
2 Situated Group

3 Finally, defendants argue that even if plaintiff can
4 adequately identify a group of similarly situated persons, it
5 cannot establish that it was treated less favorably than these
6 other persons in the textbook adoption process. Defendants
7 contend all participants in the process, including the Hindu
8 groups supporting the HEF/VF edits, received an equal opportunity
9 to participate in the process. Again, for the same reasons as
10 set forth above, CAPEEM proffers sufficient evidence to raise a
11 material issue of fact concerning whether its members received
12 the same opportunity to participate in the process as other
13 religious groups. Viewed in the light most favorable to
14 plaintiff, the evidence shows that only the Hindu groups
15 supporting the HEF/VF edits were subjected to certain, more
16 strenuous procedures and standards. See Flores v. Pierce, 617
17 F.2d 1386, 1389 (9th Cir. 1980) (recognizing that the deviation
18 from previous procedural patterns and the adoption of an ad hoc
19 method of decision making without reference to fixed standards,
20 among other things, were sufficient to raise an inference of
21 discriminatory animus on an equal protection claim).

22 Accordingly, for all of the above reasons, defendants'
23 motion for summary judgment as to plaintiff's equal protection
24 claim challenging the textbook adoption process is DENIED.²⁰

25 ²⁰ As their final argument directed at plaintiff's equal
26 protection claim, defendants contend that even if plaintiff could
27 make a showing that its members were treated differently than
28 similarly situated groups, the SBE's actions toward plaintiff's
members was done to avoid a violation of the Establishment
Clause, and thus, defendants have a defense to liability under
the Ninth Circuit's "Establishment Clause defense"-jurisprudence.

(continued...)