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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA PARENTS FOR THE EQUALIZATION OF EDUCATIONAL MATERIALS, a California non-profit corporation,

Plaintiff,

v.

KENNETH NOONAN, et al.,

Defendants.

Case No.: 2:06-CV-00532-FCD-KJM

CAPEEM'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: March 7, 2008

Time: 10:00 am / Courtroom 2

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I. INTRODUCTION

Defendants, various members of the California State Board of Education ("SBE") and the California Department of Education ("CDE") (collectively, "Defendants") request summary judgment on certain claims brought by Plaintiff California Parents for the Equalization of Educational Materials ("CAPEEM") on the basis that an unrelated state case (the "HAF Case") already decided the issues raised by CAPEEM. Defendants' Motion should be denied. Preclusive effect is improper, as the issues in this case (discrimination, and religious indoctrination in textbooks in violation of the Establishment Clause) were not litigated in the HAF Case, and the "primary right" sought to be vindicated by CAPEEM is not the same as the primary right sought to be vindicated by the party in the HAF Case. The HAF Case presented a challenge to the textbook adoption process based on violations of the California Administrative Procedures Act ("APA") and open meeting laws. In contrast, CAPEEM raises claims of discrimination under the Equal Protection Clause, and of religious indoctrination and favoritism of some religions over others under the Establishment Clause. The contents of the textbooks contested by CAPEEM include the chapters on Islam, Christianity and Judaism, and these contents have not been contested in any other case, including the HAF Case. Preclusive effect is thus improper on this basis. In addition, CAPEEM was not a party to the HAF Case, did not participate in it or coordinate with HAF in any way. Most importantly, CAPEEM did not have notice of or an opportunity to participate in the settlement of the HAF Case. Application of preclusion in these circumstances would violate CAPEEM's due process rights. Notwithstanding the legal arguments, as an equitable matter, CAPEEM should be allowed to proceed with the remainder of discovery and present its case. Defendants have known about the HAF Case since its inception, and offer no explanation for raising preclusion at this late stage in the proceedings. The court actually ruled against Defendants in the HAF Case, finding that the rules underlying the textbook adoption process were not properly promulgated in accordance with the APA. The policies underlying preclusion will not be served in this instance, as the judgment in the HAF Case merely reaffirms that CAPEEM's claims are not specious. Preclusion on the basis of vexatious litigation is thus not appropriate. Similarly, concerns regarding judicial efficiency will

not be served by precluding CAPEEM from conducting the remaining 60 days of discovery and presenting its evidence to this Court. Ultimately, this case challenges Defendants' actions on the basis that they discriminated against the Hindu religion, and on the basis that Defendants adopted and approved materials which will result in indoctrination. Particularly in the secondary school context, courts have showed vigilance against Establishment Clause violations. Van Orden v. Perry, 545 U.S. 677, 691 (2005) ("we have been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools") (quoting Edwards v. Aguillard, 482 U.S. 578, 583-584 (1987)). Such vigilance would be undermined by the grant of summary judgment on preclusion grounds based on a state case which challenged the CDE/SBE's actions on administrative grounds.

II. FACTUAL BACKGROUND

A. THE TEXTBOOK PROCESS

Every six years the SBE and CDE adopt and approve textbooks and instructional materials for use in California schools. (*See* Second Amended Complaint ("SAC"), 4.1-4.3.) The Curriculum Development and Supplemental Materials Commission (the "Curriculum Commission"), an advisory body, makes recommendations for edits and corrections to the textbooks. (Id.) The SBE/CDE adopt or reject these recommendations. The SBE/CDE is required by California law to conduct the adoptions process in a public manner, and allow interested groups the opportunity to comment and participate. Numerous groups, including religious groups (e.g., Hindu, Christian, Jewish and Muslim groups) have long participated in this process. (Id.)

B. INITIAL REVISIONS / WITZEL LETTER

Members of Plaintiff, along with various other groups of Hindus (the "Hindu Groups,") participated in the most recent adoption process (the "Adoption Process"). (Id. at 4.6.) After consulting with, and retaining Dr. Shiva Bajpai as a content review expert, the CDE/SBE accepted the majority of the edits submitted by the Hindu Groups (the "Initial Revisions"). (Id. at 4.8-4.10.) However, prior to formal adoption of the Initial Revisions, CDE/SBE received a letter from Michael Witzel (the "Witzel Letter"). (*See* SAC, Ex. A.) Professor Witzel, who has

publicly expressed anti-Hindu sentiments, and who had not participated in the process or followed the requirements with respect thereto, attacked the Hindu Groups and their motivations. (Id. at 4.41.) Witzel had not seen the Initial Revisions or the original text - indeed his letter contained no specific references to either. (Id. at 4.43.) Witzel obtained the Initial Revisions from the CDE/SBE after he sent in the letter. The Witzel Letter accused the Hindu Groups of harboring political and religious motivations. Among other things, he called on the CDE/SBE "to reject the demands by nationalist Hindu ('Hindutva') groups that California textbooks be altered to conform to their religious-political views." (*See* SAC, Ex. A.) According to him, the "proposed revisions [were] . . . of a religious-political nature." Without explanation, solely based on the charges in the letter, the CDE/SBE reversed course, abandoned the approved Initial Revisions and appointed a second content review panel consisting of Witzel, and other signatories to the Witzel Letter (Stanley Wolpert and James Heitzman) to revisit the Initial Revisions. The CDE/SBE did not revisit the revisions adopted with respect to any other groups, reserving this treatment solely for the Hindu Groups. (Id.)

C. WITZEL COORDINATES HIS CAMPAIGN WITH EVANGELICAL CHRISTIANS AND ANTI-HINDU GROUPS TO DEFEAT THE EDITS OF THE HINDU GROUPS

Witzel's participation in the process was a contentious affair. The Hindu Groups objected to his appointment upon learning (after-the-fact) that he had been appointed. The Hindu Groups argued, among other things, that professors Witzel, Wolpert, and Heitzman had expressed antagonistic sentiments towards Indians, Hinduism, and the Hindu Groups. (Id. at 4.53.) Witzel sought the outright rejection of all the Initial Revisions. (Id.) Although the CDE/SBE did not fully keep the Hindu Groups advised of the process, or conduct the process in a public manner, the Hindu Groups continued to urge for adoption of the Initial Revisions. (Id.) Various other groups objected to the efforts of the Hindu Groups and argued for rejection of the Initial Revisions. It is now widely known, and documents produced by third parties confirm, that Witzel coordinated with other anti-Hindu groups who objected to the Initial Revisions. These groups include the Dalit Freedom Network ("DFN") which portrayed itself as an advocacy group

for untouchables, although it is actually a Christian organization.[1]

Documents produced by DFN reflect wide-ranging coordination between Witzel, DFN and other third parties. For example, Witzel advises Benjamin Marsh, DFN's "Social Justice Coordinator" in an email that

> someone of your group should attend and announce themselves as representing your organization . . . it is important that your group as such writes [to the CDE/SBE] giving your official position on the whole matter. The more non-Hindutva *groups* the better.

(Balasubramani Decl., Ex. B (emphasis added).) In the same email thread, Witzel asks whether DFN "[has] coordinated with Messrs Deepankar and Varhade? And FOSA [Friends of South Asia]?" (Id.) Witzel acted as a counselor to DFN and other anti-Hindu groups in the process notwithstanding that he also served as the content expert on the ancient India and Hinduism materials. At one point, Marsh (of DFN) asks Witzel for guidance: "Aside from the Dalit issues . . . what other of the proposed changes do you think we should protest/protect?" (Id.)[2]

D. DEFENDANTS SINGLE OUT HINDU GROUPS AND FACILITATE RELIGIOUS INDOCTRINATION IN TEXTBOOKS

Documents produced by Defendants and obtained from third parties in this litigation similarly indicate that Defendants applied their own policies in a disparate manner, designed to produce the result sought by Witzel. For example, the documents indicate that Defendants had in place a policy regarding conflicts of interest that was enforced disparately between Professor Bajpai and Professors Witzel and Wolpert. Witzel was not precluded from communicating with publishers; meanwhile, Bajpai was. Indeed, Witzel used his position as the purported CDE-appointed expert to try to influence publishers. (Balasubramani Decl., Ex. C.) Bajpai was screened for having any financial relationship with any of the Publishers. The same screening

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[1] It maintains its offices in a Church in Colorado. (Balasubramani Decl., Ex. A.) Its founder, Dr. Joseph D'Souza is also the President of the "All India Christian Council" and maintains close ties to evangelical Christian groups such as the 700 club. (Id.)

[2] CAPEEM presents this evidence to show that the claims raised by CAPEEM are fundamentally different from the claims at issue in the HAF Case. This evidence should not be measured against the summary judgment standards, and is not controverted by Defendants, who only seek summary judgment on preclusion grounds. To the extent Defendants object to the evidence or dispute these facts, CAPEEM requests relief under Rule 56(f) to obtain additional evidence and complete its discovery.

process was waived for Witzel, Wolpert and Heitznam. Documents obtained from Wolpert show that he had been retained and paid as a consultant by a Publisher. (Balasubramani Decl., Ex. D.) The documents also reveal that Defendants provided unprecedented access to advisors and commission members who pushed the perspective of Abrahamic religions (specifically Christianity) and as a result, adopted instructional materials which will result in the indoctrination of students. (Balasubramani Decl., Ex. E.) Indeed, the documents produced by Defendants in this case demonstrate that Defendants became a conduit for the perspective sought to be propagated by other religious groups, while placing hurdles on the Hindu Groups.

Specifically, Charles Munger, one of the Curriculum Commission members termed the suggestions of Hindus as "foolish Hindu edits." (Balasubramani Decl., Ex. F. (email from Munger to a pastor at Menlo Park Presbyterian Church stating this point as well as bragging about his role in the description of crucifixion).) Mr. Munger made an aggressive case for treating biblical claims as historical events. He also pushed for treating the crucifiction of Jesus as a fact. Munger was also blind copied emails by SBE's attorney Ray Belisle. (Balasubramani Decl., Ex. G.) Munger instructed Belisle on how to counter opposition to treating the resurrection of Jesus as a historical fact. At the end of the process, Munger reported to a pastor in a church about his contributions for the cause of Christianity and how he could sleep in peace. (Balasubramani Decl., Ex. H.) The evidence shows that Defendants were more than accommodating to these aggressive efforts. One email shows a member of the CDE staff emailing a content advisor for Christianity seeking guidance for the appropriate timeline of Biblical events. (Balasubramani Decl., Ex. I.) No attempt was made to consult with scholars who may express skepticism as to whether Biblical events really took place. On the contrary, David Nystrom, one of the experts used by the Defendants to advise them on the chapter on Christianity, is a Professor at the North Park Theological Seminary and a preacher for the Evangelical Covenant Church. (Balasubramani Decl., Ex. J.) This can be contrasted with Defendants' treatment of materials regarding Hinduism, where even despite existing scientific proof, Defendants adopted timelines which were contrary to those well accepted by the majority of Hindus.

E. DOCUMENTS DETAIL DEFENDANTS' CONTEMPT FOR HINDUS

An email from Tom Adams, the Director overseeing the adoption process, belittled the participation of one of the representatives of a Hindu group by calling her a "Hindu nationalist." (Balasubramani Decl., Ex. K.) Tom Adams also specifically directed one of the CDE staff members not to send the "disgruntled" person to the legislature when the staff member advised the Hindu participant to seek legislative recourse to some of her objections. (Balasubramani Decl., Ex. K.) Meanwhile, Tom Adams offered to pick up Witzel from the airport during one of Witzel's visit to the SBE/CDE. (Balasubramani Decl., Ex. L.) In addition, documents obtained by CAPEEM show that Tom Adams sought the opinion of Witzel on two professors with Hindu names and told him, "please be discreet." Ruth Green, the President of SBE, actively sought emails from people of "Indian descent" supporting Witzel. (Balasubramani Decl., Ex. M.)

F. ADOPTION OF THE FINAL REVISIONS

On January 6, 2006, the CDE/SBE conducted a closed-door meeting with, among others, Witzel. The Hindu Groups were not invited, despite requests to be present. (Id. at 4.61.) A day before this meeting, members of the CDE/SBE met with an group that was described by a CDE-employee in a handwritten note as an "anti-HEF [one of the Hindu Groups]" group. The goal of the January 6, 2006 meeting was described in the same note by the CDE staff person as to "balance Bajpai," the advisor for Hindu content who opposed Witzel's changes. (Balasubramani Decl., Ex. N.) Ultimately, the CDE/SBE proceeded to adopt final edits which were in line with Witzel's recommendations. (Id. at 4.66.) These final edits failed to correct material errors with respect to their religion, culture, and history, and generally treated Hindu culture in a derogatory manner. (Id. at 4.69.) The final materials also presented Biblical events as fact, and accepted as true the narrative put forth by those groups advancing the Judeo-Christian agenda. (*See generally*, Declaration of Arvind Kumar ("Kumar Decl.").)

G. THE RESULTING MATERIALS WILL INDOCTRINATE JUDEO-CHRISTIAN BELIEFS

The materials adopted by Defendants will result in indoctrination of other religions. Biblical claims are presented as historical events and are assigned dates. (Kumar Decl., Ex. A.) For example the books note that in 33 AD, Paul had a vision of Jesus, Moses heard a voice in

1290 BC, that angels spoke to Mary, and there were "reports" of Jesus rising from the dead, etc. (Id.) The books contain one-page "biographies" of characters whose existence is not verifiable, a creationist view of the formation of the world is presented along with claims that the Hebrew Bible "explains" why the world has many languages, and timelines are given for biblical stories. (Id.) The gospels are defined as "reports" of the life of Jesus. Miracles and resurrection are presented as facts. e.g.: "soon afterwards, reports that he had risen from the dead would lead to a new religion-Christianity." (Id.)[3]

The chapters on Judaism and Christianity together read like a condensed version of the Bible. (Id.) The content of these chapters is almost identical to what is taught in Sunday schools in churches in America - the story of creation in seven days, the deluge and Noah's Ark, Tower of Babel, Moses and Ten Commandments, Exodus, Mary's conversation with angels, birth of Jesus to a virgin, Sermon on the Mount, miracles of Jesus, Parable of the Lost Sheep, Parable of the Good Samaritan, Parable of the Prodigal Son, Crucifixion of Jesus and the Resurrection of Jesus. (Id.) Some of the exercises ask students to read the Bible. An activity in the teacher's manual asks the students to match pictures representing biblical events with biblical verses and instructs the teacher to provide explanation of the verses. One textbook explains the ideas of cause and effect and the flowchart explaining the concepts gives the cause as Constantine having a vision and the effect as his conversion to Christianity. (Id.) Another publisher describes this so-called vision in clearer terms - "according to tradition," Constantine saw a flaming cross in the sky with a message beneath it. The language used while describing biblical events is both obfuscated and ambiguous or consists of outrageous claims. (Id.)

III. PROCEDURAL BACKGROUND

A. THE HAF CASE

HAF filed suit in Superior Court in Sacramento (Case No.: 06 CS 00386). At no time was the lawsuit certified as a class action, and no notice was given to any putative class members

[3] There should be no dispute regarding the content of the books. To the extent there are authentication or admissibility issues to Mr. Kumar's compilation of portions of the books which violate the Establishment Clause, CAPEEM requests relief on Rule 56(f) grounds.

regarding the effect of the litigation. HAF initially sought a Temporary Restraining Order preventing publication of the Textbooks. This motion was denied. HAF then sought a Writ of Mandate in Superior Court. As described the Judge Marlette, HAF asserted the following claims:

> First, petitioners allege that the procedure through which respondent reviewed and approved the textbooks was not conducted under regulations formally promulgated under the Administrative Procedures Act as required by law. Second, petitioners argue that respondent violated the Bagley-Keene Open Meeting Act at certain steps of the process by taking action in meetings that were not open to the public, or properly noticed or agendized. In addition to these procedural challenges, petitioners contend that respondents' approval of the textbooks violated the law because the textbooks are not in compliance with substantive legal standards applicable to their content.

(Decision Issuing Writ of Mandate, pp 1-2.) The Superior Court granted HAF's request by written order, finding that Defendants violated the APA. (Id.) As a result Judge Marlette did not rule on HAF's Bagley-Keene claims. Finally, HAF sought relief on the basis that the textbooks violated the content guidelines adopted by Defendants. Judge Marlette found that the textbooks did not violate the CDE-promulgated guidelines, and therefore denied HAF's request to require Defendants to cease using the books. (Id.) HAF appealed Judge Marlette's decision, but finalized a settlement before any briefing on appeal, and voluntarily dismissed the appeal.

B. THE CAPEEM LITIGATION

CAPEEM initiated the instant suit on March 14, 2006. It filed the Second Amended Complaint on August 25, 2006, alleging violations of 42 U.S.C. § 1983 (based on its First and Fourteenth Amendment rights) (Dkt. #40). The operative complaint does not allege any violations of state laws or the APA. CAPEEM alleged that its members who participated in the process were treated disparately by Defendants. CAPEEM also argues (among other claims) that: (1) the Hindu Groups had been penalized for their protected expression (*see* SAC, 7.1-7.9), (2) the textbooks adopted by the Defendants portrayed the beliefs of Christians more accurately than the beliefs of Hindus (*see* SAC, 6.9), and (3) the textbooks indoctrinated children by presenting biblical claims as facts (*see* SAC, 6.10). The following chart compares the claims asserted by CAPEEM here against the claims asserted in the HAF Case:

Cause of Action	Asserted by HAF	Asserted by CAPEEM
Violation of Education Code 60040 and 60044	Yes	No
Violation of Bagley-Keene Open Meeting Act	Yes	No
Violation of Education Code 60002-60005	Yes	No
Violation of Administrative Procedures Act Gov Code 11340	Yes	No
Reiteration of the above four causes	Yes	No
Violation of Equal Protection Clause	No	Yes
Violation of Establishment Clause	No	Yes
Free Speech and Association Claims	No	Yes

CAPEEM is a membership-based organization (in contrast to HAF) and brought claims on behalf of its members. (Kumar Decl., 2.) None of the members can possibly be members of HAF, since HAF is not a member-based organization. In addition, none of CAPEEM's members participated or were represented in the HAF Case. (Kumar Decl., 3.)

C. CASE SCHEDULE/PREVIOUS ORDERS

Defendants brought a Motion to Dismiss. The Court (in an August 11, 2006 Order - Dkt. #39) rejected the Motion, holding that CAPEEM's Complaint stated a claim. The Court ruled that a showing by CAPEEM that "only Hindu groups were subject to . . . repeated scrutiny of proposed edits; secretive processes in making final decisions; and hostile academic advisors" could establish grounds for relief under the Equal Protection Clause. (Id.) The Court specifically rejected Defendants' argument that the Adoption Process was a matter of state law:

> This argument mischaracterizes plaintiff's claim. Plaintiff alleges defendants violated *federal* constitutional law by discriminating in the *application* of a state law. Plaintiff is not asking the court to apply any California law against Defendants.

(Order, p. 19 (emphasis in original).) The parties have conducted written discovery, but have not conducted any depositions. The case schedule (dkt. # 52) sets a discovery cutoff of February 15, 2008. Defendants sought a stay of discovery and brought the current Motion on February 5, 2008.

IV. DISCUSSION

A. APPLICABLE LEGAL STANDARD

1. Summary judgment standards.

Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995). A defendant who moves for summary judgment bears the burden of proving the absence of any triable issue of fact. Celotex Corp. v.

Catrett, 477 U.S. 317, 323-25 (1986). A non-moving plaintiff can defeat a motion for summary judgment by producing evidence "such that a reasonable jury could return a verdict" in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

2. Preclusion standards.

Federal courts are required to give full faith and credit to state court judgments under 28 U.S.C. § 1738. San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323 (2005). Generally under preclusion principles, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues" decided in the prior action. Allen v. McCurry, 449 U.S. 90, 94 (1980). To determine the preclusive effect of a state court judgment federal courts look to state law. Palomar Mobilehome Park Ass'n. v. City of San Marcos, 989 F.2d 362, 364 (9th Cir. 1993).

Preclusive effect can be given to a previous action under either theories of res judicata or collateral estoppel. Res judicata refers to preclusion of claims, while collateral estoppel refers to preclusion of issues. The applicability of both doctrines is tempered by due process concerns. First, the issue with respect to which preclusion is sought must have been actually litigated and decided in the prior action. McMillin Dev. v. Home Buyers Warranty, 68 Cal. App. 4th 896, 906 (Cal. Ct. App. 1998) ("In order for the determination of an issue to be given preclusive effect, it must have been necessary to a judgment . . . the requirement is necessary in the name of procedural fairness, if not due process itself . . . ."). Similarly, due process concerns counsel that preclusion doctrines can only be applied to parties or their privies; preclusion is not appropriate against strangers to the previous litigation. *See* Headwaters Inc. v. United States Forest Serv., 399 F.3d 1047, 1054 (9th Cir. 2005) ("adequate representation is a due process prerequisite to precluding a litigant from his day in court if he was not a party to the earlier litigation").

a. collateral estoppel principles

Collateral estoppel bars relitigation of an issue decided at a previous hearing only if "the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated . . .. " Amador v. Unemployment Ins. Appeals Bd., 35 Cal.3d 671, 684 (1984). "If anything is left to conjecture as to what was necessarily involved and decided there can be no

collateral estoppels . . . . [It] must appear . . . that the precise question was raised *and determined* in the former suit. . . ." Southwell v. Mallery, 194 Cal. App. 3d 140, 144 (Cal. Ct. App. 1987) (internal citations omitted) (emphasis added).

b. res judicata principles

California's res judicata doctrine is based on a primary rights theory. The California Supreme Court explained that the primary rights theory:

> [p]rovides that a "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.

Mycogen Corp. v. Monsanto Co., 28 Cal. 4th 888 (Cal. 2002) (citations omitted). A party may bring only one cause of action to vindicate a primary right. Id. at 302. Similarly, if a second cause of action seeks to assert a different "primary right," preclusion does not apply.

B. ISSUE PRECLUSION IS NOT APPROPRIATE BECAUSE THE CENTRAL ISSUES UNDERLYING CAPEEM'S CLAIMS WERE NOT PART OF THE HAF CASE

1. Issue preclusion only applies where the identical issue was previously litigated.

California courts are scrupulous about applying the "identical issue" requirement - i.e., in order to be given preclusive effect "the *precise question* [must have been] raised and determined in the former suit." Southwell v. Mallery, 194 Cal. App. 3d 140, 144 (Cal. Ct. App. 1987) (emphasis added). Southwell involved a patient who sued a doctor and prevailed under the theory that the medical procedure was not procured with informed consent. The doctor later brought a defamation action alleging that the patient had defamed the doctor by stating that the patient sued plaintiff for "negligently removing her ovaries and uterus which showed no evidence of cancer." The patient (defendant) moved for summary judgment on preclusion grounds, arguing that the facts established in the patient's original action precluded an action for defamation by the doctor. The court disagreed, noting that "the trial court did not find that plaintiff was negligent in performing the hysterectomy. It found instead a lack of consent by [the patient] to the surgery, thus determining in effect that plaintiff committed battery in performing the surgery." Southwell v. Mallery, 194 Cal. App. 3d 140, 144 (Cal. Ct. App. 1987). The court

reversed the grant of summary judgment on the basis that the "issue in the present action, i.e., whether plaintiff was negligent in removing [the patient's] uterus, was not determined in the prior action and therefore is not subject to collateral estoppel." (Id. (emphasis added).)

2. The HAF Case did not contest the material contested by CAPEEM – Defendants wrongly claim that the two cases deal with the same contents.

The HAF case dealt with some of the proposed edits and suggestions made by Hindu groups - it did not challenge or present any material regarding other religions. CAPEEM does not limit its claims to the edits and suggestions or even to the chapters on Hinduism, but makes claims on the content of the chapters on Judaism, Islam and Christianity. Several textbooks (for example, the seventh grade textbooks adopted in the same process) that CAPEEM contends are in violation of the Establishment Clause were not part of the HAF case. The HAF complaint did not touch upon the chapters on Christianity and Judaism in the sixth grade textbooks.

3. The HAF Case did not decide any issues in Defendants' favor that undermine CAPEEM's case.

The HAF Case presented several issues for decision by Judge Marlette: (1) whether the regulations promulgated by the SBE/CDE complied with the APA; (2) whether the SBE/CDE engaged in non-public meetings and decision-making; and (3) whether the materials adopted by the SBE/CDE complied with California state guidelines regarding social science materials. (*See* HAF Memo in Supp of Writ, pp. 1-2; Decision Issuing Writ of Mandate, pp 1-2.) The first two points were decided against the SBE/CDE, and cannot form the basis for preclusion. Zevnik v. Superior Court, 159 Cal. App. 4th 76, 87 (Cal. Ct. App. 2008) ("The rule was then, and is now, that a prior judgment *in favor of the defendant* in another action is a bar to a subsequent action . . . .") (emphasis added). With respect to the third point, Judge Marlette only held that the textbook materials did not violate California's content standards, which are listed in the document titled 'California History Social Science Content Standards.' Consistency of the material in the textbooks with the Content Standards document is not part of CAPEEM's claim. Indeed, CAPEEM takes the opposite position to that of HAF and claims that the Content Standards document itself advocates the teaching of the Christian perspective in textbooks and enforcing the recommendations in this document violates the Establishment Clause (compliance with the

document is not mandatory and the Defendants chose to follow this document). Defendants' arguments that Judge Marlette's approval of the books against CDE-promulgated content standards is starkly similar to the argument the Court rejected in denying Defendants' Motion to Dismiss. Judge Marlette ruled that the books conform to state-promulgated standards. CAPEEM contends that the standards themselves violate the Establishment Clause.

Judge Marlette's decision did not speak to whether use of the textbook materials would result in indoctrination, or whether Christianity was presented in a factual manner in comparison to other religions. This is simply not an element of proving that the textbook materials violate California state law regarding appropriate educational materials. No evidence was presented by the parties on this issue, and Judge Marlette did not issue any findings in this regard. Similarly, Judge Marlette did not rule on the issue of whether the process was structured in a way to advance the perspective of Abrahamic religions while having the opposite effect on Hinduism (for example, by having sympathetic Curriculum Commission members and advisors, while giving additional scrutiny to Hinduism experts). Thus, issue preclusion is not appropriate with respect to the claims raised by CAPEEM because none of the issues underlying CAPEEM's claims were actually "raised and determined" in the HAF Case. Southwell v. Mallery, 194 Cal. App. 3d 140, 144 (Cal. Ct. App. 1987).

C. CLAIM PRECLUSION DOES NOT APPLY BECAUSE THE HAF CASE DID NOT INVOLVE THE SAME "PRIMARY RIGHTS" AS THIS CASE

The California Supreme Court has rejected the transactional theory of res judicata. Federation of Hillside & Canyon Assns. v. City of Los Angeles, 126 Cal. App. 4th 1180, 1203 (Cal. Ct. App. 2004). A single transaction can give rise to multiple (independent) causes of action. When different primary rights are violated by the same wrongful conduct, a final adjudication of one of the plaintiff's claims does not bar a second action if the second action involves a different set of "primary rights". *See* Agarwal v. Johnson, 25 Cal. 3d 932, 954, 160 Cal. Rptr. 141, 603 P.2d 58 (1979). Agarwal presents a good analog for this case. There plaintiff brought a federal claim under Title VII and lost. Plaintiff brought a state claim, and defendant asserted preclusion as a basis for dismissal. The court held that the judgment on the

Title VII claims did not have preclusive effect over the state law claims "since Title VII vests employees with independent federal statutory rights against discriminatory employment practices and does not supplant state remedies." Agarwal, 25 Cal. 3d at 954. Agarwal is on point. The HAF Case did not involve either of the primary right sought to be vindicated by CAPEEM here. HAF asserted three principal claims in the HAF Case:

- SBE is unlawfully using policies and procedures that have not been adopted in accordance with the APA (HAF Memo in Supp of Writ, p. 16)
- The Board violated the open meeting laws when it took non-public action to reserve the determinations of the ad hoc committee and curriculum commission (HAF Memo in Supp of Writ, p. 26)
- The textbooks violate the content standards and the education code (HAF Memo in Supp of Writ, p. 34)

None of these claims were intended to vindicate the rights and interests asserted by CAPEEM - i.e., (1) the right to be free from discrimination based on race and religion and (2) the prohibition on indoctrination of children and favoritism towards religion in the classroom.

1. California's APA secures a different set of rights than the Equal Protection Clause or the Establishment Clause.

The legislature enacted the APA to provide persons who are likely to be affected by proposed regulatory action to be heard on the merits of the proposal. Armistead v. State Personnel Bd., 22 Cal.3d 198, 204 (1978). The APA thus establishes basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations. Grier v. Kizer, 219 Cal.App. 3d 422, 431 (1990). The courts have repeatedly invalidated "underground regulations" - i.e., administrative policies and procedures employed by agencies that have not been properly adopted in compliance with the APA. *See*, *e.g.*, Armistead, supra.

Judge Marlette found that HAF's APA claim was meritorious:

> Petitioners allege that the entire process through which respondent reviewed and adopted the sixth grade history-social science textbooks was invalid because *it was carried out under regulations that were not promulgated under the Administrative Procedures Act* ("APA") as required by law. . . This claim has merit.

(Decision Issuing Writ of Mandate, p. 2.)

The rights sought to be vindicated by an APA claim secure a wholly distinct set of rights than the rights CAPEEM seeks to vindicate under the Equal Protection Clause or the Establishment Clause. The APA claims asserted that the rules pursuant to which Defendants

conducted the Textbook Adoptions were not adopted pursuant to a proper notice and comment procedure. These claims seek to vindicate rights generally intended to secure adequate public participation. The Equal Protection claims, in contrast, assert that whatever procedures Defendants had - whether validly promulgated or not - were applied in a selective and discriminatory manner against the Hindu participants. As previously recognized by the Court, these claims seek to vindicate the right to be free from invidious discrimination in the administrative context. Flores v. Pierce, 617 F.2d 1386, 1392 (9th Cir. 1980) ("No official can . . . impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them."). Similarly, CAPEEM's Establishment Clause claims allege that Defendants adopted content which will indoctrinate students and portray Biblical events as facts, while adopting negative content with respect to Hinduism. As recognized by the Supreme Court, the concerns underlying the Establishment Clause are distinct from, and much broader than, any content standards promulgated by the CDE/SBE:

> this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.

County of Allegheny v. ACLU, 492 U.S. 573, 590-591 (1989); *see also* Lee v. Weisman, 505 U.S. 577, 593, 596, 112 S. Ct. 2649, 2658, 2660, 120 L. Ed. 2d 467 (1992) ("public pressure . . . can be as real as any overt compulsion, particularly in a classroom setting, where . . . the risk of compulsion is especially high . . ."). A rule that allowed compliance with state standards to insulate curriculum material against Establishment Clause challenges would essentially gut the Establishment Clause in this context. Indeed, many Establishment Clause challenges in the school context involve challenges to state and local standards.

2. The Bagley-Keene Act secures a different set of rights than the Equal Protection Clause or the Establishment Clause.

The Open Meeting Act requires "that all actions of state agencies be taken openly and that their deliberations be conducted openly" and that "[a]ll meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body," subject to

certain limited exceptions, none of which are claimed here. *See* Gov. Code, §§ 11120-11123; *see also*, Southern California Edison v. Peevey, 31 Cal.4th 781, 797 (2003). The Act requires advance notice of meetings, as well as disclosure of the actions the body intends to take at that meeting. *See* Gov. Code, § 11125. This reflects California's clear public policy that "the proceedings of public agencies, and the conduct of the public's business, shall take place at open meetings, and that the deliberative process by which decisions related to the public's business shall be conducted in full view of the public". Epstein v. Hollywood Entertainment District II Business Improvement District, 87 Cal. App. 4th 862, 867-8 (2001).

The rights CAPEEM seeks to vindicate through its Equal Protection claim are the right to be free from discrimination on the basis of religion or ethnic origin in an administrative process. CAPEEM's objection to the meeting held on Jan 6, 2006, is that it was part of a secretive process intended to put down Hindus. The Bagley-Keene Open Meeting Act does not speak to any purpose behind a non-public/closed door meeting. It generally secures the public right to access. In contrast, CAPEEM's Equal Protection Claim goes to the purpose behind the action, regardless of whether it was conducted in a public or a non-public setting.[4] Similarly, CAPEEM's Establishment Clause claim seeks to prevent the establishment of religion by the the CDE/SBE, through adopting content which has a tendency to indoctrinate, favoring one religion over another (failing to maintain neutrality), or through excessive entanglement of religion and the state. These rights are broader and distinct from any rights secured under California's open meeting laws.

3. The Standards for Evaluating Instructional Materials for Social Content secure a distinct set of rights than the Equal Protection Clause or the Establishment Clause.

HAF brought claims under Education Code, § 60200, which sets forth standards for educational materials and which requires the SBE/CDE to promulgate more detailed standards. Judge Marlette evaluated the edits - rather than the textbooks in their entirety - for compliance

[4] The handwritten note by CDE's staff member, Susan Martimo, listing a goal of the meeting was to "balance Bajpai" strengthens CAPEEM's claim that the meeting was intended to put down Hindus.

with section 60200 and the SBE's standards (i.e., the Standards for Evaluating the Instructional Materials for Social Content (the "Standards")). The intent of the California statutes which speak to social science content is to instill a positive sentiments regarding various races, ethnic groups, historical backgrounds, and religions. *See*, *e.g.*, Cal. Educ. Code §§ 51500, 51501 and 60044. These statutes do not speak to indoctrination of any particular religion - if anything they may result in indoctrination when applied to content which speaks to religions. These statutes also do not speak to government entanglement with religion. Finally, the statutes do not speak to the government taking sides between religion. All of these are components of Establishment Clauses tests, which are distinct from a positive or negative portrayal of religion or race in educational materials. Thus, the rights sought to be vindicated by HAF in the HAF Case (under Education Code, § 60200) are distinct from the rights CAPEEM seeks to vindicate through its Equal Protection and Establishment Clause claims.

D. CAPEEM AND HAF LACK PRIVITY

Under California law, preclusion may be applied against a party or its privy - e.g., someone who had a "proprietary and financial interest in the judgment [or] controlled the [original litigant's]" conduct in the actions. Stafford v. Russell, 117 Cal. App. 2d 319, 320 (Cal. Ct. App. 1953). In certain cases, California courts have applied preclusion in broader contexts: "[I]n deciding whether to apply [preclusion principles], the court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case, in order to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, or to protect against vexatious litigation." Martin v. County of L.A., 51 Cal. App. 4th 688, 701 (Cal. Ct. App. 1996). Notwithstanding these policy considerations, preclusion should only apply where the party against whom preclusion is asserted had "a proprietary interest in and control of the prior action, or if the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for the party to be estopped." Rodgers v. Sargent Controls & Aerospace, 136 Cal. App. 4th 82, 92 (Cal. Ct. App. 2006). Here, CAPEEM had no involvement with the HAF Case or ability to control or participate in it. (*See* Caplan Decl.) Traditional privity does not exist.

Application of the balancing factors shows that preclusion based on broader notions of privity is not proper in this case.

1. Preclusion is not necessary to minimize inconsistent judgments.

The policy against inconsistent judgments would not be served by applying preclusion to this case. Judge Marlette found that Defendants failed to property promulgate the rules pursuant to which the adoption process was conducted. There would be nothing inconsistent with a finding from this Court that Defendants applied what procedures were in place in a disparate, inconsistent, and discriminatory manner. Similarly, Judge Marlette concluded that the textbooks (those edits which he viewed) did not violate the standards for content as promulgated by Defendants. The Court could find that Defendants violated the Establishment Clause without reaching a judgment that is inconsistent with that of Judge Marlette. This Court could find that the underlying standards themselves violate the Establishment Clause. A violation of the Establishment Clause can also be premised on, inter alia, excessive entanglement, and favoring of one religious group over another in the process, regardless of the actual content at issue. Similarly, the Court may find that Defendants' adoption of materials that presented the views of other religions as fact violated the Establishment Clause.

2. Preclusion is not necessary to protect against vexatious litigation or to minimize repetitive litigation.

Preclusion is not necessary to protect against vexatious litigation - generally courts use the doctrine to preclude parties from raising specious claims in different fora. Here, HAF brought administrative claims which Judge Marlette found to be meritorious. CAPEEM brings Equal Protection Claims and Establishment Clause claims which are distinct from the claims at issue in the HAF Case. Nevertheless, the fact that Judge Marlette found that Defendants violated the APA and utilized "underground" regulations and granted HAF relief on this basis is sufficient to demonstrate that CAPEEM's claims are far from specious. If anything, Judge Marlette's decision lends support to CAPEEM's claims in this case that Defendants conducted the Adoption Process in a manner that was discriminatory. Preclusion is not proper on the basis that it is necessary to avoid vexatious litigation.

E. PRECLUSION IS IMPROPER BECAUSE CAPEEM WAS NOT PROVIDED ANY NOTICE OF THE SETTLEMENT OR OPPORTUNITY TO PARTICIPATE IN THE SETTLEMENT

Regardless of the applicability of the doctrine of "virtual representation" under California law, application of preclusion in this case is inappropriate because CAPEEM did not participate in or coordinate in the HAF litigation and lacked notice of the settlement in that case. (*See generally*, Caplan Decl.) A recent Ninth Circuit case underscores the due process concerns which arise when preclusion is applied to deprive a party from his or her day in court where the party lacked notice of the settlement and did not have an opportunity to participate in resolution of the case. Headwaters Inc. v. United States Forest Serv., 399 F.3d 1047, 1057 (9th Cir. 2005).

1. The mere identity of interests do not trump due process concerns underlying the adequate representation inquiry.

Headwaters involved three separate actions which challenged certain timber sales. One set of plaintiffs filed a complaint, and ultimately stipulated to a dismissal of their complaint with prejudice. This lawsuit was not denominated a class action and no "fairness hearing" was held regarding the settlement. A year later, one of the original plaintiffs filed suit alleging that the attorney who prosecuted the first lawsuit lacked authority to settle with prejudice. Defendant moved for judgment based on preclusion and judgment was granted. Finally, a separate set of plaintiff filed suit "using the same lawyer and a similar complaint" as in the second lawsuit. The district judge dismissed the complaint sua sponte based on res judicata. On appeal, the Ninth Circuit held that dismissal was improper. The court noted that preclusive effect was limited to parties who were in "privity" with the earlier litigants. While the doctrine had expanded to encompass "virtual representation," this doctrine was properly limited to circumstances where the second party actually acted in concert with the first. Headwaters, 399 F.3d at 1053-1054 ("[A] close relationship, substantial participation, and tactical maneuvering all support a finding of virtual representation; identity of interests and adequate representation are necessary to such a finding."). The court noted that both sets of plaintiffs had the same interests and with respect to two of the proceedings, even shared the same counsel. The court held that these factors were insufficient to overcome the due process concerns: "parallel legal interests alone, identical or otherwise, are not sufficient to establish privity, or to bind a plaintiff to a decision reached in

another case involving another plaintiff." Id.

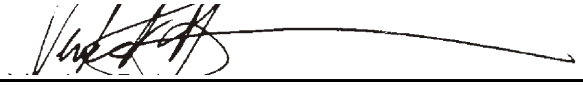
2. CAPEEM's interests were not represented in the HAF Case - CAPEEM was not provided notice of or an opportunity to participate in the settlement.

As in Headwaters, preclusive effect is not appropriate in this case because (1) CAPEEM had no notice of or opportunity to participate in the settlement and (2) no fairness hearing was held to determine the effect of the settlement on third parties. (*See generally*, Caplan Decl; Order Granting Writ of Mandate.) The HAF Case was not structured as a class action; nor was any class action-type notice of the proposed settlement provided to potential class members. CAPEEM had no advance notice of the proposed settlement. Even to this day, CAPEEM does not have any idea regarding the details of the settlement in the HAF Case. As such, the circumstances in this case are not sufficient to trump the "deep-rooted historic tradition that everyone should have his own day in court." Headwaters, 399 F.3d at 1053-1054 (citing Richards v. Jefferson County, 517 U.S. 793, 798 (1996) (internal quotations and citations omitted)). Applying preclusion principles to this case would serve to deny CAPEEM its "own day in court," and would thereby violate its due process rights.

V. CONCLUSION

Preclusion is not appropriate in this case based on the HAF Case. The HAF Case did not decide the issues underlying CAPEEM's claims here. Additionally, the HAF Case did not involve the same "primary rights" as does this case. The material in the textbooks contested by CAPEEM is also different from the material contested by HAF. Preclusion is inappropriate on any of the bases claimed by the Defendants. Equally important, however, CAPEEM was not a participant in the prior case, did not coordinate with the parties in the HAF Case, and did not have notice of the settlement (or any opportunity to participate therein). Granting preclusive effect to the HAF case would offend the "deep-rooted historic tradition that everyone should have his own day in court." For the foregoing reasons, Defendants' Motion should be denied.

Respectfully submitted, and dated this 2nd day of March, 2008.

By: 

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