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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA PARENTS FOR THE EQUALIZATION OF EDUCATIONAL MATERIALS, Plaintiff, v. **KENNETH NOONAN, RUTH BLOOM, ALAN BERSIN, YVONNE CHAN, DONALD G. FISHER, RUTH E. GREEN, JOE NUNEZ, JOHNATHAN WILLIAMS, and DAVID LOPEZ, all in their official capacities as Members of the California State Board of Education; and TOM ADAMS, in his official capacity as Director of the Curriculum Frameworks and Instructional Resources Division and Executive Director of the Curriculum Commission (of the California State Department of Education),** Defendants.	Case No. 2:06-CV-00532-FCD-KJM **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT** Date: March 7, 2008 Time: 10:00 a.m. Dept: Courtroom 2 The Honorable Frank C. Damrell Trial Date: November 4, 2008 Action Filed: November 14, 2006

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INTRODUCTION

Plaintiff California Parents for the Equalization of Educational Materials (CAPEEM) brings this duplicative action alleging that the California State Board of Education (SBE) violated the rights of its members during the 2005-2006 history-social science textbook adoption process and that the adopted sixth-grade textbooks present Hinduism in a derogatory and unequal manner. These are the same claims fully adjudicated in a prior state court proceeding brought by the Hindu American Foundation (HAF) and parents of California public school children who participated in the textbook adoption process (*HAF* plaintiffs). The factual allegations and legal principles in the current complaint are identical to those alleged in the state court proceeding. Res judicata and collateral estoppel preclude relitigating a claim or issue that was previously adjudicated in another proceeding between the same parties or parties in privity with them.

The *HAF* plaintiffs and CAPEEM are in privity with each other because they share an identity of interests, and the *HAF* plaintiffs previously adjudicated the same claims and issues that CAPEEM places before this Court. The resulting state court judgment is final and on the merits. In a well-reasoned decision, the state court found that 1) the textbooks are neutral and "broadly and accurately describe the outlines of Hindu religious belief," and 2) the adoption process was flawed because the regulations governing the procedures had not been adopted in conformance with the State's Administrative Procedures Act (APA).[1] This Court should not revisit the claims and issues raised by CAPEEM because doing so creates the risk of inconsistent judgments. In addition, Defendants should not be subject to a revolving door of endless litigation on the same claims and issues arising from the same administrative action, i.e., the 2005-2006 sixth grade history-social science textbook adoption.[2] CAPEEM's action is barred by res judicata and collateral estoppel and, thus, should be dismissed.

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1. *Hindu Am. Found. v. Cal. State Bd. of Educ.*, Sacramento County Superior Court, Case No. 06CS00386, order and decision (*HAF* Order). (Request for Judicial Notice (RJN), Exh. D 9.)

2. The term "Defendants" refers collectively to: Kenneth Noonan, Ruth Bloom, Alan Bersin, Yvonne Chan, Donald G. Fisher, Ruth E. Green, Joe Nunez, Johnathan Williams, and David Lopez, all in their official capacities as Members of the California State Board of Education (SBE); and Tom Adams, in his official capacity as Director of the Curriculum Frameworks and Instructional Resources Division and Executive Director of the Curriculum Commission.

STATEMENT OF THE FACTS AND OF THE CASE

In January 2005, the SBE initiated the process of adopting new sixth grade history-social science textbooks. (Statement of Undisputed Facts (SUF) ¶ 1.) In performing its constitutionally and statutorily mandated obligation to adopt textbooks and other instructional materials, the SBE must exercise its discretion and strike a balance between a fair and accurate description of history and sensitivity to different cultural groups and religions.[3] Cal. Const. art. IX, § 7.5; Cal. Educ. Code §§ 60200-60206, 60040, 60044. During the sixth grade world history and ancient civilizations course, students study the impact of various religions, including Hinduism. (SUF ¶ 2.)

As a part of the textbook adoption process, the SBE receives recommendations from the Curriculum Commission (Commission) regarding instructional materials, which it considers but is not obligated to follow. (SUF ¶ 3.) In forming its recommendation for the sixth grade history-social science textbooks, the Commission received comments from individuals and representatives of Hindu groups, such as the Hindu Education Foundation (HEF) and the Vedic Foundation (VF). (SUF ¶ 4.) Dr. Shiva Bajpai acted as an expert for the Commission and reviewed the edits proposed by the Hindu groups.[4] (SUF ¶ 5.) He recommended that the Commission approve most of them. *Id.*

The SBE received a letter dated November 8, 2005, from Dr. Michael Witzel, Professor of Sanskrit, Harvard University, signed by nearly 50 international scholars urging the SBE to reject the edits proposed by "nationalist Hindus." (SUF ¶ 6.) The letter warned that such edits were of a

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3. For example, governing bodies shall only adopt materials which, "in their determination," contain accurate and non-discriminatory portrayals of other cultures, racial diversity, and religions, including the contributions of both men and women. Cal. Educ. Code §§ 60040, 60044. Education Code section 60200(c)(3) requires that the adopted instructional materials "[a]re factually accurate and incorporate principles of instruction reflective of current and confirmed research."

4. Many different Hindu groups and individuals participated in the adoption process with wide-ranging interests and goals, some of whom supported the adopted textbook edits. CAPEEM's complaint defines "Hindu Groups" as HEF, VF, individuals who participated in the process (including CAPEEM members), and other groups such as the Educators' Society for the Heritage of India. (RJN, Exh. A, SAC ¶ 4.6.) CAPEEM brings the action on behalf of "certain of the Hindu Groups." (*Id.* ¶ 4.78.) It is clear that CAPEEM and its predecessors-in-interest (*Id.* ¶ 4.61) represent "Hindu groups" who allege the adoption process and adopted textbooks are procedurally and substantive deficient. The term "Hindu groups" as used throughout this motion refers only to those whose interests CAPEEM represents.

religious-political nature, rather than a scholarly one. *Id.* In addition, the edits did not reflect the views of the majority of ancient Indian history specialists or mainstream Hindus. *Id.*

On November 9, 2005, the day after receiving these warnings, the SBE directed the Commission to review the textbook edits. (SUF ¶ 7.) The California Department of Education (CDE) staff contacted the following three additional content experts with expertise in ancient India: Dr. Stanley Wolpert, professor emeritus University of California Los Angeles, Dr. James Heitzman, University of California, Davis, and Dr. Witzel. (SUF ¶ 8.) These experts reviewed the edits submitted by HEF and VF and provided their recommendations. *Id.*

On December 2, 2005, the Commission reviewed the proposed edits and the experts' input, and submitted its recommendations to the SBE. (SUF ¶ 9.) Many of the Commission's recommended edits were in direct contrast to the recommendations received by Drs. Witzel, Heitzman, and Wolpert. *Id.* Shortly thereafter, the SBE received another letter dated December 7, 2005, signed by an additional 130 scholars protesting the Commission's decision to reject the scholarly suggestions proposed by Drs. Heitzman, Wolpert, and Witzel. (SUF ¶ 10.) The letter also expressed concern about HEF's and VF's participation in the textbook adoption process, and stressed the importance of ensuring that the SBE heard a range of voices from the Hindu community. *Id.* The SBE president called a closed-door meeting on January 6, 2006, to discuss the textbook edits, at which Professors Bajpai and Witzel essentially debated each line of the Hindu edits. (SUF ¶ 50.) At a publicly-noticed meeting on March 8, 2006, the SBE chose not to follow all of the Commission's recommendations when it adopted the final edits to the sixth grade history-social science textbooks. (SUF ¶ 11.)

CAPEEM filed the current action on March 14, 2006, less than a week after the textbook adoption. (SUF ¶ 12.) CAPEEM filed the current operative complaint, the Second Amended Complaint (SAC), on August 25, 2006, alleging violations of the Equal Protection, Establishment, Free Speech, and Free Association Clauses of the Constitution under 42 U.S.C. § 1983. *Id.*

On March 16, 2006, the *HAF* plaintiffs initiated a parallel action in state court seeking a writ of mandate. (SUF ¶ 13.) Both cases challenge the textbook contents and the adoption process. (SUF ¶¶ 17-34, 43-53.) Like the current action, HAF challenged the following aspects of the textbooks' content: the portrayal of Hindu women's rights, the caste system, a polytheistic concept of the Divine,

the Aryan Invasion Theory, and the portrayal of other religions more favorably than Hinduism. (SUF ¶¶ 22, 43.) HAF also alleged process grievances pertaining to the treatment of "Hindu groups" in the adoption process including the SBE's consultation with Drs. Witzel, Heitzman, and Wolpert, and the use of various proceedings to determine appropriate textbook content. (SUF ¶¶ 19-21, 23-34.)

Prior to the adjudication of the writ, the *HAF* plaintiffs sought a temporary restraining order to enjoin the adoption of the challenged textbooks, which the state court rejected along with the preliminary injunction. (SUF ¶¶ 62, 68.) On September 1, 2006, the *HAF* plaintiffs received a full hearing on the merits, prior to which both parties placed before the court all of the challenged excerpts of the textbooks. (SUF ¶¶ 69-70, 74, 80-84, 87.) On September 15, 2006, the presiding Sacramento Superior Court judge issued an order, rejecting the *HAF* plaintiffs' content-based claims that the textbooks are substantively deficient and violate the law. (SUF ¶¶ 88, 94-100.) In reaching this conclusion, the court comprehensively reviewed all of the challenged textbook contents and the legal arguments presented by the parties. *Id.* The court also found that the textbook adoption process was flawed because the governing regulations had not been properly promulgated under the State's APA. (SUF ¶¶ 91-93.) The *HAF* plaintiffs appealed the decision, and on July 12, 2007, the appeal was dismissed pursuant to a stipulation between the parties. (SUF ¶¶ 102-103.) Accordingly, the state court judgment is final and on the merits.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when it is demonstrated that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). A court may grant summary judgment upon all or part of the claims in a case. Fed.R.Civ.P. 56(a),(d); *see Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1441 (9th Cir. 1990). When, as here, the party moving for summary judgment does not have the burden of proof at trial, it need only point out "that there is an absence of evidence to support the nonmoving party's case" in order to demonstrate the absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2554 (1986); *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001). Once the moving party carries its initial burden, the adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading," but must provide affidavits or other sources of evidence that set forth specific facts

showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 323-24, 106 S. Ct. at 2552; *Devereaux*, 263 F.3d at 1076. Summary judgment is especially appropriate where there is no genuine issue of material fact and the only dispute is as to legal questions. *Smith v. Califano*, 597 F.2d 152 (9th Cir. 1979). Res judicata and collateral estoppel are proper grounds for summary judgment. *Robi*, 918 F.2d at 1441.

ARGUMENT

RES JUDICATA AND COLLATERAL ESTOPPEL PROHIBIT CAPEEM FROM RELITIGATING THE SAME CLAIMS AND ISSUES LITIGATED BY HAF BECAUSE HAF ADEQUATELY REPRESENTED CAPEEM'S INTERESTS IN STATE COURT

Plaintiff is precluded by the doctrine of res judicata (claim preclusion) and collateral estoppel (issue preclusion) from bringing this action because it seeks to relitigate the same claims and issues which the *HAF* plaintiffs previously litigated in the state court action.[5] Res judicata and collateral estoppel preclude relitigating a claim or issue that was previously adjudicated in another proceeding between the same parties or parties in privity with them. *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 895 (2002). The violation of a primary right gives rise to only one cause of action, and any legal theories or remedies not raised in this single action, may not be raised at a later date. *Id.*

In determining whether a state court action bars a subsequent federal action, a federal court must look to state law. *Mfrd. Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1031 (9th Cir. 2005). Federal courts are required to give full faith and credit to state court judgments under 28 U.S.C. § 1738. *Id.* Both res judicata and collateral estoppel promote judicial economy by minimizing repetitive litigation, preventing inconsistent judgments that undermine the integrity of the judicial system, and protecting against vexatious litigation. *Id.*; *Alvarez v. May Dep't Stores*, 143 Cal. App. 4th 1223, 1233 (Cal. Ct. App. 2006). Consistent with these policies, CAPEEM is barred from bringing this action because it seeks to relitigate claims and issues that were actually litigated or could have been litigated in the prior state court proceeding. *Id.* To permit otherwise would defeat the

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5. Although "collateral estoppel" is sometimes encompassed within the term "res judicata," Defendants here use the term "res judicata" to refer to claim preclusion and "collateral estoppel" to refer to issue preclusion. *See Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 897 n.3 (2002).

policies on which these doctrines are premised. Because this case satisfies all of the criteria for res judicata and collateral estoppel, Defendants' motion for summary judgment should be granted.

A. CAPEEM Is Precluded from Relitigating the Same Issues Previously Adjudicated in the Prior State Court Action.

The issues that CAPEEM seeks to litigate are the same as those already litigated by the *HAF* plaintiffs in the state court action. Under California state law, the doctrine of collateral estoppel precludes a party from relitigating an issue previously adjudicated if: (1) the issue is identical to that decided in a prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the issue was necessarily decided in the prior proceeding; (4) the decision was final and on the merits, and (5) preclusion is sought against a person who was a party or in privity with a party in the prior proceeding. *Lucido v. Superior Ct.*, 51 Cal.3d 335, 341 (1990).

Ultimate issues of fact can result in issue preclusion in the second action even though the first action is brought under state law and the second action is premised on a federal claim. *Recovery Edge L.P. v. Pentecost,* 44 F.3d 1284, 1293-1294 (5th Cir. 1995); *Steen v. John Hancock Life Ins. Co.*, 106 F. 3d 904, 913, 913 n. 5 (9th Cir. 1997); *See also* 18 Wright, Miller, and Cooper, Fed. Prac. and Proc., § 4417, at 461- 462, citing *Dodd v. Hood River City*, 136 F.3d. 1219, 1225 (9th Cir. 1998) (examination of controlling legal principles may show that the standards are the same or that the fact findings have the same effect under either state or federal standard). Here, CAPEEM seeks to relitigate the same issues based on the same factual allegations and evidence addressed and decided by the *HAF* court. Accordingly, CAPEEM's action is barred by collateral estoppel. *Id.*

1. The Issues in this Case Are Identical to Those in the Prior Proceeding.

Both the current action and the prior state court action challenge the 2005-2006 sixth grade history-social science textbook adoption. In particular, plaintiffs in both cases allege 1) the adoption process was procedurally deficient and 2) the adopted textbook content is substantively deficient.

a. CAPEEM argues the same content-based issues.

CAPEEM's content-based allegations challenge the "derogatory and unequal treatment of the Hindu religion in social sciences textbooks." (RJN, Exh. A, SAC ¶ 1.1.) Specifically, CAPEEM alleges that the contents of the textbooks denigrate and portray Hinduism in a false and negative light

by discussing the "Origins of Hinduism: Aryan Invasion Theory" (SUF ¶ 45; SAC ¶¶ 4.12-4.17); portraying the negative treatment of women (SUF ¶ 45; SAC ¶¶ 4.18-4.24); wrongly conflating untouchability with Hinduism (SUF ¶ 45; SAC ¶¶ 4.25-4.29); failing to articulate Hindu concepts of the divine (SUF ¶ 45; SAC ¶¶ 4.30-4.35); and making derogatory remarks about Hinduism and Hindu tenets while describing other religions more favorably (SUF ¶ 45; SAC ¶¶ 4.36-4.39). Similarly, plaintiffs in *HAF* alleged that the approved sixth grade textbooks include descriptions and depictions of Hinduism that demean, ridicule, inaccurately describe, and discourage belief in Hinduism. (SUF ¶ 34; Smith Dec., Exh. H, *HAF* Pet. ¶ 64). Like CAPEEM, the *HAF* plaintiffs objected to the textbooks because they discuss the "Origins of Hinduism/Aryan 'invasion' theory" (SUF ¶ 22; *HAF* Pet. ¶ 36); depict the negative status of women (SUF ¶ 22; *HAF* ¶ 33); wrongly identify untouchability and the caste system with Hinduism (SUF ¶ 22; *HAF* Pet. ¶ 35); fail to accurately describe the basic tenets of Hinduism and negatively compare Hinduism to other religions (SUF ¶ 22; *HAF* Pet. ¶ 34).

b. CAPEEM repeats the same challenges to the adoption process.

In addition to the textbook content issue, plaintiffs in both cases challenged the <u>same</u> procedures and manner by which Defendants conducted the textbook adoption process. (SUF ¶¶ 19-21, 23-34, 43-44, 46-51; RJN, Exh. A, SAC ¶¶ 4.40-4.69, 7.8; Smith Dec., Exh. H, *HAF* Pet. ¶¶ 41-60.) For example, both sets of plaintiffs allege that the SBE improperly delayed approval of the Curriculum Commission's edits as a result of the letter from Professor Witzel which warned the SBE that the Hindu groups' proposed edits were of a religious-political nature. (SUF ¶¶ 25, 46; SAC ¶¶ 4.40-4.46; *HAF* Pet. ¶¶ 41-43.) Both plaintiffs even identically characterize Dr. Witzel's comments as "*ad hominem*" attacks on those Hindu groups participating in the adoption process. (SUF ¶¶ 25, 47; SAC ¶ 4.46; *HAF* Pet. ¶ 41.) Both sets of plaintiffs complain that the SBE consulted Professors Witzel, Wolpert, and Heitzman, and made them Content Review Panel Members without adhering to the screening process. (SUF ¶¶ 28, 47; SAC ¶¶ 4.50-4.55; *HAF* Pet. ¶¶ 45-46.) Likewise, both plaintiffs object that the SBE did not adopt the December 2, 2005, Commission meeting recommendations, and insist that the SBE inappropriately convened a closed-door meeting on January 6, 2006. (SUF ¶¶ 29-31, 47-50; SAC ¶¶ 4.56-4.60, 4.61-4.62; *HAF* Pet. ¶¶ 47-49, 49-53.) Both sets of plaintiffs complain that the SBE created a new subcommitte on January 12, 2006, and the ultimate complaint for both

plaintiffs is that the SBE adopted the textbook edits on March 8, 2006. (SUF ¶¶ 31, 34, 50; SAC ¶¶ 4.63-4.69; *HAF* Pet. ¶¶ 54-60.)

Collateral estoppel's "identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. *Lucido*, 51 Cal.3d at 342. CAPEEM relies on the same factual allegations previously asserted in the *HAF* case regarding both the adoption process and the textbook content. Thus, the issues are identical in the two cases.

c. CAPEEM argues the same issues of law.

In addition, CAPEEM asks the Court to consider the same issues of law previously resolved in the prior state court proceeding. Collateral estoppel prevents the relitigation of issues of fact or law. *Steen*, 106 F. 3d at 911; *see also Carmel Valley Fire Prot. Dist. v. Cal.*, 190 Cal. App. 3d 521, 534 (Cal. Ct. App. 1987) (prior judgment on a question of law is conclusive in a subsequent action where both causes involved arose out of the same subject matter or transaction, and where holding the judgment to be conclusive will not result in an injustice). A subsequent action may not relitigate the same principles of law. *Steen,* 106 F. 3d at 913, 913 n. 5; *see also* 18 Wright, Miller, and Cooper, Fed. Prac. and Proc, §§ 4417, 4425.

CAPEEM's Equal Protection and Establishment Clause claims ask the Court to reconsider the same principles of law already considered by the state court. The *HAF* plaintiffs alleged that the approved textbooks portray Hinduism in an unfavorable and inequitable light, and present Hinduism in a demeaning and more critical manner than any other religious tradition. (SUF ¶¶ 39, 63, 67, 77.) In addition, the *HAF* plaintiffs alleged that, during the adoption process, the SBE disparately considered the Hindu groups' edits and corrections, as compared to those presented by other religious groups and individuals. (SUF ¶ 73; Smith Dec., Exh. K, *HAF* Ps&As 33:8-13, 33:17-18.) Accordingly, the *HAF* plaintiffs alleged that the challenged textbooks and process violate the law because they negatively and disparately treated Hinduism and Hindu groups as compared to other religions. These are the essential elements of an Equal Protection claim. *HAF* Pet. ¶¶ 8-11, 32-36, 64, 94; *Christy v. Hodel,* 857 F.2d 1324, 1331 (9th Cir. 1988) (Equal Protection standard prohibits applying the law in a discriminatory manner or placing different burdens on similarly situated

individuals). In fact, CAPEEM's Equal Protection claim uses language very similar to that used by the *HAF* plaintiffs to describe the equivalent state law violations. (SUF ¶ 54) (alleging that other religions treated in a more favorable manner than Hinduism in the adoption process and adopted edits.) The *HAF* plaintiffs further allege that the textbooks violate state laws because their content discriminates against Hindu religious beliefs and practices; is demeaning and discourages belief in Hinduism; and indoctrinates students. (SUF ¶¶ 22, 35, 63, 77, 86.) These are the same allegations that would necessarily be addressed and decided in adjudication of an Establishment Clause claim. *Alvarado v. City of San Jose*, 94 F.3d 1223, 1231 (9th Cir. 1996) (government may not discriminate against persons on the basis of their religious belief or practice); *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971) (state action must neither advance nor inhibit religion in its principal or primary effect). Here again, CAPEEM's contentions in support of its Establishment Clause claim echo the *HAF* plaintiffs' state law allegations. CAPEEM alleges that the adopted textbooks denigrate Hinduism, promote other religions at the expense of Hinduism, and "have a principal or primary effect of advancing other religions while inhibiting the Hindu religion." (SUF ¶¶ 55-57.)

In making a determination that the textbooks are neutral, dispassionate, and compliant with applicable legal standards, (see *infra*.) the state court applied the same legal principles that CAPEEM now requests this Court to consider: whether the adoption process or adopted textbooks advance or inhibit religion, or discriminate against persons on the basis of their religious beliefs. It matters not that CAPEEM has retooled the legal principles as federal Constitutional, rather than state law, challenges because an "'issue' includes any legal theory or factual matter which *could have been* asserted in support of or in opposition to the issue which was litigated," even if it was not. *Border Bus. Park, Inc. v. City of San Diego*, 142 Cal. App. 4th 1538, 1566 (Cal. Ct. App. 2006) (emphasis added). Therefore, identical legal principles and factual allegations are at issue in this case and the *HAF* case. As such, this action meets the first prong of the *Lucido* test for collateral estoppel.

2. The Issues in this Case Were Actually Litigated and Necessarily Decided in the State Court Proceeding.

The second and third elements of the *Lucido* test are likewise satisfied because the same issues were actually litigated and necessarily determined in the state court proceeding. An issue is actually

litigated when it is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined. *People v. Sims*, 32 Cal.3d 468, 484 (1982), *superceded by statute on other grounds as recognized in Gikas v. Zolin*, 6 Cal.4th 841, 851 (1995); *Castillo v. City of L.A.*, 92 Cal. App. 4th 477, 482 (Cal. Ct. App. 2001). The third prong of the *Lucido* test (the "necessarily decided" requirement) means only that the resolution of the issue cannot have been "entirely unnecessary" to the judgment in the prior proceeding. *Lucido*, 51 Cal.3d at 342.

The pleadings in the prior action clearly raise the issues of whether the adoption process was improper and whether the adopted textbooks were substantively deficient because they portray Hinduism in an unfavorable and inequitable light. Moreover, these issues were submitted to the court in the state proceeding and the court actually determined them. A determination of the issues was necessarily decided in the prior case.

The state court considered the *HAF* plaintiffs' content-based allegations and rejected them. (SUF ¶¶ 95-100.) In reaching this conclusion, the *HAF* court applied the legal standard set forth in state statutes, regulations, and guidelines which prohibit instructional materials from containing matters that reflect adversely upon persons because of their religion, and prohibit materials which advocate a religion. (SUF ¶ 96; RJN, Exh. D, *HAF* Order 8.) For example, the court summarized the applicable Guidelines for Social Content, Title 5, California Code of Regulations, Section 9511, (Guidelines) as follows:

> When ethnic or cultural groups are portrayed, portrayals must not depict differences in customs or lifestyles as undesirable and must not reflect adversely on such differences. No religious belief or practice may be held up to ridicule and no religious group may be portrayed as inferior. Any explanation or description of a religious belief or practice should be presented in a manner that does not encourage or discourage belief or indoctrinate the student in any particular religious belief. And descriptions, depictions labels, or rejoinders that tend to demean, stereotype or patronize minority groups are prohibited.

Id.[6]

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6. Defendants assert that the legal standards contained in the Guidelines are substantially similar to the legal standards by which CAPEEM's Equal Protection and Establishment Clause claims would be adjudicated. The Guidelines prohibit textbooks which disparately treat one religious belief over another, i.e., bar characterizing any religion as "inferior" (Equal Protection) and prohibit textbook content which discriminates for or against religious beliefs and practices, encourages or discourages belief, or indoctrinates students in a particular belief (Establishment Clause).

In determining whether the textbooks were neutral and non-discriminatory, the court comprehensively reviewed the challenged sixth grade textbooks by reading in their entirety the excerpts of the texts that the parties submitted. (*Id.*; SUF ¶¶ 81, 83-84.) The court concluded that the textbooks complied with the applicable legal standards and were neutral. (SUF ¶¶ 96, 99.) Specifically, the court determined the challenged sixth grade textbook materials:

> [A]ppeared on their face to be dispassionate and neutral with regard to religion, objectively describing the feature of the Hindu religion and others without overtly or covertly 'taking sides' with one over another. Moreover, the Court finds nothing in the way of derogatory language or examples from sacred texts or other religious literature that could be classified as derogatory, accusatory or that would instill prejudice against the Hindu religion or its faithful.

(SUF ¶ 99.) In reaching this conclusion, the court rejected plaintiffs' contentions that the textbooks should not contain reference to the Aryan Invasion Theory and that they inaccurately described Hindu theology and Hindu concepts of the divine. (SUF ¶¶ 97-98.) It also rejected the contention that the textbooks are demeaning because they discuss the caste system (i.e. untouchability) and the status of women. (SUF ¶ 99.) Similarly, the books were neutral in their description of the Hindu belief in numerous deities as multiple aspects of the absolute divinity. *Id.* The court found unpersuasive plaintiffs' contention that the textbooks have the effect of comparing the Hindu religion unfavorably to other religions, or tend to favor other religions over Hinduism. (SUF ¶ 100.)

Thus, the issue of whether the textbooks' content is substantively deficient (i.e., demeaning, portrays Hinduism in an unfavorable light, or discourages belief in Hinduism) was clearly before the state court, and the state court determined that it is not. This issue's adjudication required the state court to apply not only the same facts, but also the same principles of law which are at issue in this proceeding. The second prong of the *Lucido* test is satisfied for the content claim because the issue was submitted to the state court for determination and was determined. The third test is also satisfied because in assessing whether the textbooks' content violated state law, the court necessarily determined whether the textbooks depict Hinduism in a disparate manner or an inequitable light, or whether they discourage belief in Hinduism.

The second issue that CAPEEM raises is whether the adoption process was improper. This too was actually litigated and necessarily decided in the state court proceeding. The state court considered

whether "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." (RJN, Exh. D, *HAF* Order 4.) In a thorough decision, the state court found that the adoption process was conducted under invalid regulations that had not been promulgated as required by the State's APA. *Id.* The court considered and rejected plaintiffs' request that the court rescind the approval of the challenged sixth grade test books. (*HAF* Order 6.) Instead, the court acknowledged that his conclusion regarding the invalidity of the regulations could have "serious consequences, in that it potentially calls into question the validity of decisions adopting many more textbooks than merely the few sixth grade textbooks at issue here." (*HAF* Order 7.) Accordingly, the court provided relief in a limited and reasonable manner: that the state defendants "be permitted a reasonable opportunity to correct the deficiencies in its regulatory framework governing approval process by subjecting that framework to APA procedures, while maintain the current system in the interim." *Id.*

Thus, the issue of procedural deficiencies in the textbook adoption process were submitted to the state court for determination, were determined, and were "necessarily decided," thereby fulfilling the second and third *Lucido* prongs.

3. The Prior Decision is Final and on the Merits.

The decision in the state court proceeding is final and on the merits because the *HAF* plaintiffs voluntarily dismissed their appeal in that case. (SUF ¶ 103.) Under California law, a decision is final for res judicata and collateral estoppel purposes when an appeal from the trial court judgment has been exhausted or the time to appeal has expired. *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th 1168, 1174 (Cal. Ct. App. 2000) (noting that standard differs from federal rule); *Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 41 Cal.3d 903, 910-911 (1986) (applying rule in collateral estoppel context). The appellate court dismissed the *HAF* appeal on July 12, 2007. (SUF ¶ 103.) Thus, the appeal process has been exhausted, and the fourth *Lucido* factor is satisfied for collateral estoppel.

4. CAPEEM and the HAF Plaintiffs Are in Privity with One Another.

Collateral estoppel and res judicata preclude the relitigation of a cause of action and issues that

were previously adjudicated in another proceeding between the same parties or parties in privity with them. *Mycogen*, 28 Cal. 4th at 896; *Alvarez*, 143 Cal. App. 4th at 1233. Privity requires a relationship between parties which is sufficiently close so as to justify application of the doctrine. *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Assoc.*, 60 Cal. App. 4th 1053, 1070 (Cal. Ct. App. 1998). It requires the party in the earlier case to have interests sufficiently similar to the party in the latter case, so that the first party may be deemed the "virtual representative" of the second party, or deemed to be acting in a representative capacity for the second party. *Alvarez*, 143 Cal. App. 4th at 1236. A party is adequately represented for purposes of privity, if the first party had the same interests as the party to be precluded, and the motive to assert those interests. *Seadrift*, 60 Cal. App. 4th at 1071. *HAF* had the same interests as CAPEEM and the motive to present them.

a. Both sets of plaintiffs represent the same class of plaintiffs with identical interests and goals.

Here, the *HAF* plaintiffs and CAPEEM are the same class of plaintiffs - the "parent[s] of children in the California public school system" who participated in or attempted to participate in the textbook adoption process regarding the portrayal of the Hinduism. In the state case, HAF[7] filed suit in its representative capacity on behalf of the Hindu American community, including its California resident members, and was joined by individuals who were parents of children in California public schools and participated or attempted to participate in the textbook adoption process. (SUF ¶¶ 13-14, 31, 33.) Similarly, CAPEEM filed this suit in its representative capacity on its behalf; on behalf of parents who participated in the textbook adoption process and whose children attend California's public schools; and on behalf of the Hindu Groups. (SUF ¶¶ 41-42.) Therefore, the plaintiffs in both *HAF* and CAPEEM represent and include the <u>same class</u> of plaintiffs, namely, the parents of California public school students who participated in the textbook adoption process and their non-profit advocates.

The judgment in a class or representative suit, to which some members of the class are parties,

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7. HAF is a national, non-profit human rights group whose purpose is to provide a voice for the Hindu American community. HAF interacts with and educates government, media, academia and the public at large about issues of concern to Hindus locally and globally. HAF's membership includes a substantial number of California residents. (SUF ¶ 13.)
See http://www.hinduamericanfoundation.org/about.htm (last visited January 28, 2007).

may bind members of the class or those represented who were not made parties to it. *Hanberry v. Lee* 311 U.S. 32, 41, 61 S. Ct. 115, 118 (1940); *see also Seadrift*, 60 Cal. App. 4th at 1070-73 (finding non-profit organization in privity with governmental agencies that brought prior representative action); *King v. Intn'l Union of Operating Eng'rs*, 114 Cal. App. 2d 159, 164-65 (Cal. Ct. App. 1952) (union members bound by previous judgment in suit brought by different union members). Representative suits brought by organizations, associations, or other entities may be binding upon the members of those entities, or upon other parties that represent the same interests. *See Seadrift*, 60 Cal. App. 4th at 1070-73; *see L.A. Branch NAACP v. L.A. Unified Sch. Dist.*, 750 F.2d 731 (9th Cir. 1984) (finding NAACP in privity under California law with previous class of litigants who sought to litigate same interests); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003) (holding organization's members bound by prior litigation brought by organization). The party in the first litigation is deemed to be a "virtual representative" of the second party when their interests are sufficiently similar. *Alvarez*, 143 Cal. App. 4th at 1236.

In an illustrative case applying California law, the Ninth Circuit held that an action brought by the NAACP against a group of state and local educational authorities alleging unconstitutional segregation in the Los Angeles public schools was barred by res judicata. *L.A. Unified Sch. Dist. v. L.A. Branch NAACP*, 714 F.2d 935, 943 (9th Cir. 1983) *aff'd en banc*, 750 F.2d 731 (1984). In reaching this conclusion, the appellate court found that the NAACP's interests were substantially similar to the plaintiffs in a previously non-certified class action, which had been filed on behalf of black and Mexican-American school children in the Los Angeles Unified School District, seeking desegregation of the district's schools, *Crawford v. Board of Education*, 113 Cal. App. 3d 633, 642-44 (Cal. Ct. App. 1980). *Id.* at 943. The NAACP's action was also brought on behalf of black children eligible to attend the Los Angeles schools. *Id.* at 938. In concluding that the NAACP was in privity with the prior plaintiffs, the court used language which is equally applicable to the current case before this Court:

> A public body should not be required to defend repeatedly against the same charge of improper conduct if it has been vindicated in an action brought by a person or group who validly and fairly represent those whose rights are alleged to have been infringed. *Though the plaintiffs in the instant action are not the same persons as those who instituted the earlier action, that action was brought to vindicate the rights of all minority school children*

> *and parents affected by the actions and policies of the . . . Board. There is a strong community of interest between the earlier class and the [current] plaintiffs and both actions sought relief on behalf of the same large group of black citizens.* For the purposes of preclusion we do not consider the plaintiffs in the present action to be "strangers" to the earlier litigation.

Id. at 943 (citations omitted) (emphasis added). Sitting *en banc* the Ninth Circuit affirmed the conclusion that the earlier class members were virtual representatives of those persons in the NAACP case. *L.A. Branch NAACP*, 750 F.2d at 741-42.

Similarly, the *HAF* plaintiffs are the virtual representatives of CAPEEM because they seek to vindicate the same rights and achieve the same goals for the same large group of citizens (the Hindu community, children, and parents affected by the Board's decisions). *See Seadrift*, 60 Cal. App. 4th at 1069-70. Both sets of plaintiffs seek relief for their larger Hindu community, and both advocate for the interests of the Hindu groups who participated in the adoption process. (SUF ¶¶ 41-42; RJN, Exh. A, SAC ¶ 4.6, 4.78 (defining "Hindu groups" and noting that it is bringing action on behalf of certain of the Hindu Groups); RJN, Exh. B, *HAF* Ps&As in Support of TRO 1:21-2:7 (arguing grievances suffered by Hindu groups and individuals who had attempted to work with the SBE; the SBE deprived the Hindu community of a neutral public forum).) Both plaintiffs advocate for the edits and corrections proposed by the Hindu groups and Dr. Bajpai. *See* (RJN, Exh. A., SAC ¶¶ 4.68-4.69, 5.13; Smith Dec., Exh. H, *HAF* Pet. 22:26-27:2). Both plaintiffs seek to enjoin Defendants from utilizing the sixth grade history-social science textbooks in California public schools which, they allege, denigrate Hindu religious beliefs, portray other religions more favorably than Hinduism, and wrongfully teach the Aryan Invasion Theory. (SAC 24:12-20; *HAF* Pet. 21-23; ¶¶ 94-97.)

Clearly the *HAF* plaintiffs had the same interests as CAPEEM. In fact, CAPEEM concedes that other individuals who participated in the adoption process (i.e., the *HAF* plaintiffs) represented their interests in those proceedings. CAPEEM admits that its "members and *predecessors-in-interest*" sent a letter to Defendants on January 6, 2006, advising them that they were not fairly considering the input of Hindu Groups. (SUF ¶ 49; RJN, Exhibit A, SAC ¶ 4.61 (emphasis added).) The correspondence to which CAPEEM refers is a letter dated January 6, 2006, sent by the *HAF* plaintiffs and their counsel to the SBE, which objects to the adoption process and advocates for the edits proposed by the Hindu Groups. (Dobson Dec., Exh. R.) There is only one January 6, 2006 letter to the SBE sent by

CAPEEM's *predecessors-in-interest,* the HAF plaintiffs. *Id.* ¶ 5. Thus, CAPEEM recognizes that HAF represented its same interests.

Further evidence of the identity of interests shared between CAPEEM and the *HAF* plaintiffs is the fact that the complaint in this action and the *HAF* petition are similarly worded and organized.[8] This suggests that the parties coordinated their litigation efforts because they were representing the same interests and pursuing the same ultimate goals.

b. *HAF* plaintiffs had a strong motive to assert their interests and did assert them.

Not only did the *HAF* plaintiffs represent the same interests as CAPEEM, they had a strong motive to assert those interests and did assert them. *See Seadrift*, 60 Cal. App. 4th at 1071. The *HAF* plaintiffs aggressively and thoroughly prosecuted their claims in the state court proceeding - pursuing both their challenges to the textbook adoption process as well as their challenges to the adopted textbooks' content.

For example, the *HAF* plaintiffs sought the issuance of a writ of mandate concerning the procedural and substantive violations of law alleged in their complaint. (Smith Dec., Exh. H, *HAF* Pet. at 21-23.) They requested declaratory and injunctive relief, including the issuance of a preliminary and permanent injunction "setting aside [the] approval of the sixth grade history-social textbooks . . . and enjoining future approval of text that do not contain the edits and corrections recommended by the Curriculum Commission on December 2, 2005 and such further edits and corrections as were recommended by Dr. Shiva Bajpai on November 4, 2005." (*HAF* Pet. 22:26-23:2.) Prior to the adjudication of the writ, the *HAF* plaintiffs sought a temporary restraining order to enjoin the decision regarding the adoption of the challenged textbooks. (SUF ¶ 62.) In advocating for the injunction, the *HAF* plaintiffs introduced all of the textbook excerpts to which they objected, from eight different publishers. (SUF ¶¶ 81, 84.)

It is apparent from the record of the state court proceedings; the *HAF* plaintiffs were highly motivated to present their interests. *Alvarez*, 143 Cal. App. 4th at 1238 (due process is satisfied when the absent party's interest is adequately represented). As such, they adequately represented the

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8. Not only do the allegations parallel each other, the parties even use the same words in some spots, e.g. both describe Witzel's letter as *ad hominem* attacks. (SUF ¶¶ 25, 46.)

identical interests of CAPEEM and its members. *Id.* It makes no difference that the *HAF* plaintiffs were only partially successful in their state court proceeding. The court's ruling regarding the textbook adoption process confers a benefit upon CAPEEM in that it too may contribute to and benefit from the APA rule-making procedures ordered by the court. See *Morning Star Co. v. State Board of Equalization*, 38 Cal.4th 324, 342 (2006). Accordingly, where the parties to the second action have enjoyed the fruit of a favorable outcome from the first action, fairness dictates that they should be bound by the preclusive effect of the unfavorable portion of the outcome from the first action. *Alvarez*, 143 Cal. App. 4th at 1238.

Because the plaintiffs in both actions are the same class of individuals and bring their action in a representative capacity, and because the *HAF* plaintiffs adequately represented CAPEEM and its members in the state court proceeding, the parties are in privity for purposes of res judicata and collateral estoppel. *Seadrift,* 60 Cal. App. 4th at 1070. Accordingly, CAPEEM is barred from pursuing this action as it is bound by the preclusive effect of the prior judgment. *Hollywood Circle Inc. v. Depart. of Alcohol Bev. Control*, 55 Cal. 2d 728, 733 (1961) (judgment on merits in mandate action is res judicata on all issues that were raised or could have been raised in the proceeding).

B. The Present Proceeding is Barred Because CAPEEM Seeks to Relitigate the Same Cause of Action and Primary Right as the Prior Proceeding.

CAPEEM's action is barred by res judicata, as well as collateral estoppel, because CAPEEM asks the Court to adjudicate claims previously adjudicated in the state court proceeding. An action is barred by res judicata if 1) the decision in the prior proceeding is final and on the merits; 2) the present proceeding is on the same cause of action as the prior proceeding; and 3) the parties in the present proceeding, or parties in privity with them, were parties in the prior proceeding. *Fed'n of Hillside & Canyon Ass'ns v. City of L.A.*,126 Cal. App. 4th 1180, 1202 (Cal. Ct. App. 2004). As established above, the prior proceeding's decision is final and on the merits, and the parties in the present action are in privity with the *HAF* plaintiffs. Thus, the only remaining question for res judicata purposes is whether the present proceeding is the same cause of action as the prior proceeding. Clearly it is.

California follows the primary rights theory for res judicata. *Mycogen,* 28 Cal.4th at 904. The primary rights theory provides that a cause of action is comprised of a primary right of a plaintiff, a

corresponding primary duty of the defendant, and a wrongful act by the defendant constituting a breach of that duty. *Id.* "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." *Id.* A party may bring only one cause of action to vindicate a primary right, and any claims not raised in this single cause of action may not be raised at a later date. *Id.*

A plaintiff's "primary right" is the right to be free from a particular injury. *Mycogen,* 28 Cal.4th at 904. This is not the same as the legal theory on which liability for that injury is premised. *Id.* Even though there may be multiple theories upon which recovery might be predicated, or many different forms of relief, one injury gives rise to only one cause of action. *Id.*

There can be no dispute that CAPEEM seeks to relitigate the same primary right that plaintiffs litigated in *HAF*. Both actions stem from the right of Hindus to be equitably treated in the 2005-2006 history-social science textbook adoption process and their religion portrayed neutrally in the adopted textbooks. There is only a single right at issue. *See L.A. Branch NAACP,* 750 F.2d at 738 (concluding that "the right to an equal opportunity for education" is a single primary right).

An injury is defined by reference to the set of facts from which the injury arose. *Fed'n of Hillside & Canyon Ass'ns,* 126 Cal. App. 4th at 1203. The injury underlying the *HAF* complaint, and which CAPEEM seeks to relitigate, arises from the same set of facts and circumstances, i.e., the 2005-2006 sixth grade history-social science textbook adoption process and the content of the adopted textbooks. As discussed in the collateral estoppel analysis above, the factual allegations in the complaints mirror each other with regard to both the process grievances (i.e., consulting with Witzel, the January 6, 2006 meeting, etc.), and the content-based textbook grievances (caste system, portrayal of women, Aryan Invasion Theory, etc.). The present action stems from the same events and the same disputes. It is the same primary right. This primary right gives rise to only a single cause of action.

As discussed above, the factual allegations and analysis of the legal theories in *HAF* echo the Constitutional claims at issue here. The legal principles underlying CAPEEM's Equal Protection and Establishment Clause claims have previously been adjudicated by the state court. The fact that the *HAF* plaintiffs' premised their action on alleged violations of state law while this complaint asserts federal Constitutional violations is of no consequence. Because the Constitutional claims could have

been brought in the state court proceeding, CAPEEM is barred by the preclusive effect of the prior state court judgment arising out the same set of facts. *Clark v. Yosemite Cmty Coll. Dist.*, 785 F.2d 781, 786-87 (9th Cir. 1980) (noting that federal Constitutional claims could have been brought in state mandamus proceeding); *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir.1975), *cert. denied*, 423 U.S. 1066, 96 S. Ct. 807 (1976) ("[W]here the federal constitutional claim is based on the same asserted wrong as was the subject of a state action, and where the parties are the same, [r]es judicata will bar the federal constitutional claim whether it was asserted in state court or not"). Under California's primary rights theory, a plaintiff is precluded from taking one primary right and seeking to enforce it in two suits, regardless of whether there are multiple potential legal theories or remedies available. *Mycogen*, 28 Cal. 4th at 904. CAPEEM's second amended complaint is premised on the same primary right that was litigated and rejected by the *HAF* court. Only one primary right exists, and *HAF* has already pursued it. As such, CAPEEM is precluded from pursuing this litigation under the doctrine of res judicata.

C. Strong Policy Reasons Support a Finding of Res Judicata and Collateral Estoppel.

Res judicata and collateral estoppel promote the public policies of curtailing vexatious litigation, promoting judicial economy, and avoiding the issuance of inconsistent judgments that undermine the integrity of the judicial system. *Lucido*, 51 Cal.3d at 343; *Mfgd. Home Cmtys.*, 420 F.3d at 1031.

Because the issues in the two cases are identical, this Court would have to reexamine the same evidence and render determinations on factual issues and conclusions of law on matters already decided in the state *HAF* case. This could result in inconsistent judgments upon which public policy frowns. *See Mfgd. Home Cmtys.*, 420 F.3d at 1032. Public policy also militates against the State being subject to a revolving door of endless litigation. *See Alvarez*, 143 Cal. App. 4th at 1240. CAPEEM and other parents and supporters of the "Hindu groups" and the Hindu American community should not be able to avoid the preclusive effect of the *HAF* judgment by simply bringing new lawsuits in different jurisdictions with purportedly different sets of interested individuals or entities. *See Tahoe-Sierra Pres. Council, Inc.*, 322 F.3d at 1084 (reasoning that if not bound, representative association plaintiff could bring successive actions by different sets of individual plaintiffs to attack prior judgment). This consideration is especially strong here since CAPEEM was

formed exclusively for the purpose of bringing this litigation and touts on its website that "[A] dozen lawsuits challenging the decision of CA SBE" would be appropriate. *See* http://www.capeem.org (last visited January 28, 2007)(see FAQ, question 5). Accordingly, Defendants' motion for summary judgment should be granted.

CONCLUSION

CAPEEM premises its claims of injury on the same primary right and seeks to litigate the same issues that were litigated by the *HAF* plaintiffs. Because both plaintiffs have identical interests, and *HAF* had a motive to pursue those interests, the parties are in privity with each other. Plaintiff cannot avoid the preclusive effect of the state court judgment by simply pursuing different legal theories concerning the same primary right and bringing an action in federal court. CAPEEM's complaint is barred as a matter of law, as to both the claims and issues presented, based on the preclusive effect of the prior state court judgment. It would controvert the strong policy reasons of res judicata and collateral estoppel to hold otherwise. Because the elements of both res judicata and claim preclusion are satisfied, Defendants respectfully request that the Court grant the motion for summary judgment and dismiss this action in its entirety.

Dated: February 5, 2008

Respectfully submitted,

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