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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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12 CALIFORNIA PARENTS FOR THE  
13 EQUALIZATION OF EDUCATIONAL  
14 MATERIALS,

15 Plaintiff,

NO. CIV. S-06-532 FCD KJM

16 v.

17 KENNETH NOONAN, et al.,

18 Defendants.  
19 \_\_\_\_\_/

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21 This matter is before the court on (1) plaintiff California  
22 Parents for the Equalization of Educational Materials  
23 ("plaintiff" or "CAPEEM") motion for partial summary judgment as  
24 to its Establishment Clause claim and (2) defendants'<sup>1</sup> motion for  
25 \_\_\_\_\_

26 <sup>1</sup> "Defendants" refers collectively to Kenneth Noonan,  
27 Ruth Bloom, Alan Bersin, Yvonne Chan, Donald G. Fisher, Ruth E.  
28 Green, Joe Nunez, Johnathan Williams and David Lopez, 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.

1 summary judgment, or alternatively, partial summary judgment as  
2 to plaintiff's second amended complaint, alleging claims for  
3 violation of the Equal Protection, Establishment and Free Speech  
4 and Association Clauses.<sup>2</sup> Generally stated, in this action,  
5 plaintiff alleges the California State Board of Education ("SBE")  
6 discriminated against CAPEEM's members during the 2005-2006  
7 history-social science textbook adoption process and that the  
8 adopted sixth-grade textbooks represent Hinduism in a  
9 discriminatory and denigrating manner. During the adoption  
10 process, the SBE held public meetings, considered public comment  
11 and consulted with scholars to determine the appropriate content  
12 of its curriculum, including the appropriate portrayal of  
13 Hinduism in the context of world history and ancient  
14 civilization. Plaintiff's critical objection is that the SBE did  
15 not adopt all of the textbook edits for which its members were  
16 advocating, and that ultimately, the adopted textbooks represent  
17 Hinduism in a discriminatory light.

18 By its motion, CAPEEM seeks partial summary judgment on its  
19 Establishment Clause claim, to the extent it is based on the  
20 subject textbooks' alleged indoctrination of students in their  
21 portrayals of Christianity and Judaism.<sup>3</sup> More specifically,

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22 <sup>2</sup> Because oral argument will not be of material  
23 assistance, the court orders these matters submitted on the  
24 briefs. E.D. Cal. L.R. 78-230(h).

25 <sup>3</sup> Plaintiff also brings its Establishment Clause claim on  
26 an alternative theory: CAPEEM alleges defendants violated the  
27 Establishment Clause when it adopted the instructional materials  
28 and final edits which are allegedly biased against Hinduism and  
treated other religions more favorably and accurately. As set  
forth below, defendants move for summary judgment on this theory.  
Plaintiff does not cross-move for summary judgment on this issue.  
Instead, plaintiff's affirmative motion for partial summary  
judgment is limited to the theory of the alleged, unlawful

CAPEEM requests partial summary judgment on its Establishment Clause claim based on (1) defendants' alleged expressed intent to model portions of the subject history textbooks after the New Testament; (2) the alleged improper influence of religious figures in approving the material addressing Christianity and religious considerations that went into evaluating the suggested edits of the textbooks; (3) the adoption of textbooks that allegedly treat biblical narratives as historical facts and biblical events, including miracles, as actual events; and (4) the adoption of teachers' materials which purportedly emphasize aspects of indoctrination.

Defendants oppose the motion, first on standing grounds, arguing CAPEEM lacks standing to bring an Establishment Clause claim based upon the alleged unlawful indoctrination of students into the Christian or Jewish religions because such a claim is not germane to its organizational purpose, which is to promote an accurate portrayal of the Hindu religion in California public schools. Alternatively, defendants contend plaintiff's Establishment Clause claim based on this theory fails on the merits, as an objective observer would conclude that the textbooks at issue, when viewed in context, are teaching about religion, rather than endorsing any particular religion. Because this court agrees that CAPEEM lacks standing to bring its Establishment Clause claim based upon the alleged improper indoctrination of students into the Christian or Jewish religions, it does not reach the substantive merits of CAPEEM's

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indoctrination of students into the Christian and Jewish religions.

1 motion.<sup>4</sup> CAPEEM's motion for partial summary judgment is DENIED  
2 for lack of standing to bring the subject claim.

3 By their motion, defendants seek judgment in their favor as  
4 to all of plaintiff's claims for relief. Similar to their  
5 opposition to plaintiff's motion, defendants argue, in the first  
6 instance, that CAPEEM lacks standing to press any of its claims  
7 to the extent they are based on alleged discrimination in the  
8 textbook adoption process, and to the extent plaintiffs' claims  
9 challenge the textbooks' contents, plaintiff only has standing to  
10 allege violations of law based on the alleged negative treatment  
11 of Hinduism. Alternatively, defendants argue each of plaintiff's  
12 claims fail on their merits as follows: (1) plaintiff's equal  
13 protection challenge to the textbooks' contents fails under  
14 controlling Ninth Circuit law, and its equal protection challenge  
15 to the adoption process fails because plaintiff has no evidence  
16 to support a finding of discriminatory intent by defendants,  
17 CAPEEM cannot identify a similarly situated group and/or CAPEEM's  
18 members were treated the same as other similarly situated  
19 participants in the process; (2) plaintiff's Establishment Clause  
20 claim fails because defendants' actions did not promote other  
21 religions over Hinduism nor was the primary effect of defendants'  
22 actions hostility towards Hinduism; and (3) plaintiff's Free  
23 Speech and Association Clause claim fails because plaintiff  
24 cannot show how defendants' actions chilled CAPEEM members' free  
25 speech and association rights.

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28 <sup>4</sup> As such, with the exception of those facts pertaining  
to the standing inquiry, the court does not recount herein the  
facts which are only pertinent to CAPEEM's motion.

1 For the reasons set forth below, the court GRANTS  
2 defendants' motion as to plaintiff's Establishment and Free  
3 Speech and Association Clause claims. As to plaintiff's equal  
4 protection claim, the court GRANTS defendants' motion to the  
5 extent plaintiff's claim is directed at the textbooks' contents,  
6 as such a claim is not viable as a matter of law, but DENIES  
7 defendants' motion to the extent it is directed at plaintiff's  
8 process-related challenge. As to that issue, triable issues of  
9 fact exist as to whether CAPEEM's members were treated fairly in  
10 the adoption process.

#### 11 **BACKGROUND<sup>5</sup>**

12 During the sixth grade world history and ancient  
13 civilizations course, California students study the history and  
14 impact of various religions, including Hinduism. (Defs.' Stmt.  
15 of Undisputed Facts in Supp. of MSJ, filed Dec. 30, 2008 [Docket  
16 #158] [hereinafter, "DUF"], ¶ 2.)<sup>6</sup> The SBE adopts textbooks and

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18 <sup>5</sup> Unless otherwise noted, the facts set forth below are  
19 undisputed. Where a dispute of facts exists, the court recounts  
20 the facts in the light most favorable to plaintiff. Both parties  
21 filed various objections to each other's evidence. In large  
22 part, the court declines to rule on said objections as it does  
23 not rely on the subject evidence in rendering its decision  
24 herein. However, to the extent it does rely on any objected-to  
evidence, the party's relevant objection is overruled. As to  
plaintiff's separately filed motion to strike defendants' expert  
Gonzalez-Reimann's expert report and rebuttal report (Docket  
#189), the court DENIES the motion as moot. The court does not  
rely on said reports in rendering judgment in defendants' favor  
in the respects set forth below.

25 <sup>6</sup> Plaintiff filed a response to defendants' statement of  
26 undisputed facts, setting forth only those facts to which it  
27 claimed were disputed. (CAPEEM's Stmt. of Disputed Facts re:  
28 Defs.' MSJ, filed Jan. 13, 2009 [Docket #175] [hereinafter,  
"RDF"].) Thus, in all other respects, the court treats  
defendants' stated facts as undisputed. Where plaintiff has  
raised material, admissible evidence to dispute a particular  
fact, the court cites to either plaintiff's response to  
defendants' statement of undisputed facts (the aforementioned

1 must balance the goals of a fair and accurate description of  
2 history with sensitivity to different cultural, ethnic and  
3 religious groups. Cal. Const. Art. IX, § 7.5; Cal. Educ. Code  
4 §§ 60200-60206, 60040, 60044. The State's curriculum  
5 requirements for textbook publishers are set forth in the  
6 Criteria for Evaluating Instructional Materials in History-Social  
7 Science, Kindergarten through Grade Eight; The History-Social  
8 Science Content Standards ("Content Standards") and the History-  
9 Social Science Framework for California Public Schools,  
10 Kindergarten Through Grade Twelve ("Framework"). (Adams Decl.,  
11 filed Dec. 30, 2008 [Docket #160], at Ex. B.) The Content  
12 Standards describe what students should know and be able to do by  
13 the end of each grade level. (Id.) These criteria are used to  
14 determine whether instructional materials submitted to the SBE  
15 should be adopted. (Id.; Adams Decl., ¶ 6.)

16 As explained in the Framework, the kindergarten-grade 8  
17 history-social science curriculum is designed with the idea that  
18 knowledge of history-social science disciplines is essential in  
19 preparing students for responsible citizenship and in  
20 comprehending global interrelationships. (Defs.' Stmt. of Add'l  
21 Disputed Facts in Opp'n to Pl.'s MSJ, filed Jan. 13, 2009 [Docket  
22 #173] [hereinafter, "DDF"], ¶ 156.) Studying major religious and

23 \_\_\_\_\_  
24 "RDF") or to plaintiff's separately filed statement of  
25 (purported) undisputed facts filed in opposition to defendants'  
26 motion (Defs.' Resp. to Pl.'s Stmt. of Undisp. Facts, filed Jan.  
27 23, 2009 [Docket #201] [hereinafter, "PDF"].) While plaintiff  
28 proffers these facts as undisputed, in most material respects the  
facts are disputed by defendants. (Id.) Ultimately, the court  
cites to either the "RDF" or "PDF" when denoting facts raised by  
plaintiff which create a triable issue of fact and thus provide a  
basis for the denial of defendants' motion in the respects set  
forth below.

1 philosophical traditions helps students to understand people's  
2 historical struggles with ethical issues and the current  
3 consequences, wars and political arrangements, like separation of  
4 church and state. (DDF ¶s 157, 158.) Students learn about  
5 religious beliefs and texts in order to better understand  
6 cultural continuity and conflict. (DDF ¶ 159.) The Framework  
7 includes guidelines for teaching about religion. (DDF ¶ 160.)

8       The study of religion is done within the larger context of  
9 human history. (DDF ¶s 156-168.) In grade six, students study  
10 the world history and geography of ancient civilizations,  
11 including the early societies of the near East and Africa, the  
12 ancient Hebrew civilization, Greece, Rome and the classical  
13 civilizations of India and China. (DDF ¶ 161.) Students receive  
14 an overview of these societies, including the geography of the  
15 region; trade; art; social, economic and political structures;  
16 and the everyday lives of the people. (DDF ¶ 162.) In this  
17 context, students study about the religions and religious texts  
18 of the different ancient civilizations. (DDF ¶s 163-168.) The  
19 Content Standards identify certain information which must be  
20 taught. (DDF ¶ 168.)

21       In January 2005, the SBE issued an invitation to publishers  
22 to submit instructional materials for new sixth grade history-  
23 social science textbooks. (DUF ¶ 1.) Eleven publishers  
24 submitted instructional materials for consideration. (Id.)  
25 Nearly a year earlier, beginning in February 2004, the SBE had  
26 solicited and selected 12 Content Review Panel ("CRP") and 62  
27 Instructional Materials Advisory Panel ("IMAP") members to review  
28 the publishers' submissions. (DUF ¶s 3-4.) The CRP members are

1 subject matter experts who review the submitted instructional  
2 materials for accuracy, scholarship and alignment with the  
3 State's curriculum requirements (i.e., the Content Standards and  
4 Framework). (DUF ¶ 3.) The IMAP members are generally K-12  
5 teachers. (Id.)

6 The CRP and IMAP received training in April 2005 and  
7 convened for deliberations on July 11-14, 2005. (DUF ¶ 5.) They  
8 then prepared a joint advisory report, which was mailed to the  
9 Curriculum Commission (the "Commission") on September 14, 2005.  
10 The report was made available to the public. (Id.) The  
11 Commission is an advisory body that advises the SBE on the  
12 adoption of curriculum frameworks and instructional materials.  
13 The SBE considers the Commission's recommendations but is not  
14 obligated to follow them. (DUF ¶ 6.)

15 The Commission held public hearings on September 29-30,  
16 2005, at which parties could submit comments orally or in  
17 writing. (DUF ¶ 8.) The Commission received extensive public  
18 comments that could not be addressed at the meeting and could not  
19 be evaluated for accuracy at that time. (Id.) In particular,  
20 the Commission received lengthy submissions from the Institute of  
21 Curriculum Services ("ICS"), regarding the portrayal of Judaism  
22 in the textbooks, the Council on Islamic Education ("CIE"),  
23 regarding the portrayal of Islam in the textbooks, and the Hindu  
24 Education Foundation ("HEF") and the Vedic Foundation ("VF"),  
25 regarding the portrayal of Hinduism in the textbooks. (DUF ¶  
26 10.) CAPEEM member, Karthik Venkataramani, combined certain  
27 CAPEEM members' proposed textbook edits with HEF's and worked  
28 with HEF throughout the process (these edits are referred to



1 herein as the "HEF/VF edits"). (DUF ¶ 11.)

2 In order to give full consideration to the public comments,  
3 the Commission formed an Ad Hoc Committee to consider if the  
4 recently received public comments should be included in the  
5 Commission's final recommendation to the SBE. (DUF ¶ 9.) The Ad  
6 Hoc Committee held a publicly noticed meeting on October 31, 2005  
7 and reviewed extensive written reports and comments from the  
8 public and the CRP. (DUF ¶ 12.) The California Department of  
9 Education ("CDE") contracted with three former CRP members: Dr.  
10 Williamson Evers, Dr. Naomi Janowitz and Dr. David Nystrom.  
11 Additionally, CDE hired Dr. Shiva Bajpai, who HEF had  
12 recommended, as a scholar to review the Hindu edits. (DUF ¶ 13;  
13 RDF ¶ 1.) Dr. Bajpai approved the edits proposed by HEF and VF  
14 almost in their entirety. (DUF ¶ 14.) At the October 31  
15 meeting, Dr. Bajpai discussed the Aryan Invasion Theory ("AIT")  
16 and argued that scholarship no longer supported the hypothesis.  
17 (DUF ¶ 15.) The State's Content Standards required publishers to  
18 "discuss the significance of the Aryan invasion." (Id.)

19 Ultimately, the Ad Hoc Committee recommended edits to the  
20 SBE, including those that Dr. Bajpai had endorsed. (DUF ¶ 16.)  
21 All of the edits approved by the Commission and Ad Hoc Committee  
22 were submitted to the SBE, along with all public comments. (DUF  
23 Id.) Prior to the SBE's textbook adoption meeting on November 9,  
24 2005, it received correspondence from scholars and individuals  
25 expressing concerns about the proposed edits offered by HEF/VF  
26 that were recommended for adoption by the Ad Hoc Committee. (DUF  
27 ¶ 17.) These letters raised concerns about the accuracy of the  
28 Ad Hoc Committee's recommended edits and about the objectivity

1 and scholarly accuracy of Dr. Bajpai's recommendations regarding  
2 the HEF/VF edits. (Id.; DUF ¶ 22.)

3 For example, Dr. Charles Munger, a member of the Commission,  
4 sent a letter to the SBE on November 3, 2005, noting that AIT is  
5 taught at college level courses at Stanford and the University of  
6 California. (Id.) On November 7, 2005, Dr. Michael Witzel,  
7 Professor of Sanskrit, Harvard University, sent a letter to the  
8 SBE expressing concern about the HEF/VF edits. (Id.) In his  
9 letter, Dr. Witzel expressed concern that the proposed changes to  
10 early Indian history were politically motivated. He attached one  
11 of his scholarly publications regarding the political revision of  
12 textbooks in India. (Id.)

13 The next day, November 8, 2005, the SBE received a second  
14 letter from Dr. Witzel signed by nearly 50 international  
15 scholars, urging the SBE to reject the edits proposed by  
16 "nationalist Hindu ('Hindutva') groups."<sup>7</sup> (DUF ¶ 18.)

17 The agenda of the groups proposing these changes is  
18 familiar to all specialists in Indian history, who have  
19 recently won a long battle to prevent exactly these kind  
20 of changes from finding a permanent place in history  
21 textbooks in India. The proposed revisions are not of a  
22 scholarly but of a religious-political nature . . .  
23 These opinions do not reflect the views of the majority  
24 of specialists on ancient Indian history nor of  
25 mainstream Hindus. . . . It would trigger an  
26 immediate international scandal if the California State  
27 Board of Education were to unwittingly endorse religious-  
28 nationalistic views of Indian history from which India has  
only extricated itself in the last two years.

(DUF ¶s 18-19.) The letter also directed the SBE to two

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<sup>7</sup> The State Department defines Hindutva as "the politicized inculcation of Hindu religious and cultural norms to the exclusion of other religious norms. Hindutva, often synonymous with 'cultural nationalism,' excludes other religious beliefs and fosters religious intolerance." (Defs.' RJN, filed Dec. 30, 2008 [Docket #159], Ex. D, 2003 Report at 1.)

1 U.S. State Department reports that discussed textbook revisions  
2 in India when the government was controlled by the Bharatiya  
3 Janata Party, a Hindu nationalist party. (DUF ¶ 19.) Therein,  
4 the State Department warned that the textbook revisions in India  
5 reflected Hindutva beliefs and "Hindu extremist interpretations  
6 of history." (Id.)

7 Dr. Witzel's letter was signed by several renowned scholars,  
8 including Romila Thapar, the first Kluge Fellow at the U.S.  
9 Library of Congress. (DUF ¶ 20.) Dr. Thapar also sent an email  
10 to Tom Adams, Executive Director of the Commission, and Sue  
11 Stickel, Deputy Superintendent of Curriculum and Instruction, on  
12 November 7, 2005, stating that historians in India urged the SBE  
13 to consult with scholars before agreeing to make the changes to  
14 Hinduism. (DUF ¶ 20.) She and eight other Indian scholars sent  
15 a similar message on November 28, 2005. (Id.) Dr. Adams  
16 contacted Dr. Thapar and asked her to review the HEF/VF edits  
17 approved by Dr. Bajpai. (DUF ¶ 21.) She performed a cursory  
18 review of the edits and recommended that they should not be  
19 adopted for inclusion in the textbooks. She also recommended  
20 that the CDE seek assistance from other "serious south Asian  
21 scholars" as in her opinion, Dr. Bajpai was regarded "as a rather  
22 indifferent scholar" with minimal research background. (Id.)

23 Plaintiff asserts that the correspondence from Witzel and  
24 others supporting his views contained no evidence to support  
25 their allegations that Dr. Bajpai and those supporting the  
26 HEF/VF edits had a political agenda. Plaintiff contends the  
27 letters contained no scholarly argument or mention of any  
28 specific edits or portions of the subject textbooks. In some

1 respects, plaintiff states the letters were signed by scholars  
2 who had authored books for publishers submitting textbooks for  
3 evaluation by defendants. (PDF ¶s 121, 133; Green Decl., filed  
4 Dec. 30, 2008 [Docket #161], Exs. B and C.)

5 On November 9, 2005, at a public meeting, the SBE adopted  
6 and approved nine of the eleven sixth grade history-social  
7 science textbooks that had applied for adoption for use in  
8 California public schools. (DUF ¶ 23.) With respect to the  
9 remaining textbooks, the SBE directed the Commission to review  
10 the proposed edits and (1) accept only those edits and  
11 corrections that improve factual accuracy; (2) accept those edits  
12 and corrections that did not contradict the edits approved on  
13 September 30, 2005 and (3) accept no additional edits and  
14 corrections. (DUF ¶ 24.)

15 Thereafter, the CDE staff contracted the following three  
16 additional experts, who they believed were experts in ancient  
17 India: Dr. Stanley Wolpert, of the University of California, Los  
18 Angeles, Dr. James Heitzman of the University of California,  
19 Davis, and Dr. Witzel. (DUF ¶ 25.) Plaintiff disputes that Drs.  
20 Wolpert and Witzel are experts in ancient India. (RDF ¶ 3.)  
21 Plaintiff also contends defendants did not require these  
22 panelists to meet the standards defendants normally impose on  
23 content experts. For example, defendants did not require these  
24 panelists to submit their resumes, they were not vetted by  
25 defendants in any way and they were not screened by defendants  
26 with respect to the panelists' relationships to any publishers  
27 submitting textbooks in the process. (PDF ¶s 44-46, 53.)  
28 Plaintiff points out that while Dr. Bajpai had been screened with

1 respect to his relationship to publishers involved in the process  
2 and defendants restricted his communications with publishers, Dr.  
3 Wolpert was not similarly screened or precluded from contact with  
4 publishers. (PDF ¶ 53, 55, 56.) At the time of his  
5 participation in the process, Dr. Wolpert was a paid consultant  
6 for one of the publishers that submitted a textbook for adoption  
7 by defendants. (PDF ¶ 57.)

8       Additionally, plaintiff asserts that various Hindu groups  
9 brought to defendants' attention certain derogatory remarks Dr.  
10 Witzel had made about Hindus, Hinduism and Indians, but  
11 defendants took no action and continued to involve Witzel in the  
12 process. (PDF ¶s 102, 103, 107, 108.) Finally, plaintiff  
13 maintains that a November 22, 2005 document created by Drs.  
14 Witzel, Wolpert and Heitzman evidence their disdain for  
15 scholarship and hostility towards Hindus. For example, in that  
16 document, in response to a request to correct the dates of  
17 authorship of two Hindu epics, the experts wrote, "Who in Sixth  
18 Grade cares which epic was 'written' first?" (PDF ¶ 114.) In  
19 that same document, when Hindus requested removal of a picture of  
20 an alleged untouchable coming out of a garbage dump in which a  
21 pig is scavenging, the three experts wanted to modify the image  
22 to read "leaving us with a powerful picture of the scavenging  
23 lifestyle associated with untouchability." (PDF ¶ 116.)

24       Drs. Witzel, Wolpert and Heitzman reviewed the edits  
25 submitted by HEF and VF and provided their recommendations to the  
26 Commission. (DUF ¶ 25.) Based on a report from these three  
27 reviewers, the CDE staff prepared a document to help the  
28 Commission understand the issues of historical accuracy and

1 decide what edits reflected a scholarly consensus. (DUF ¶ 26.)

2       On December 2, 2005, the Commission reviewed the proposed  
3 edits and the experts' input and made its own recommendations to  
4 the SBE. (DUF ¶ 27.) The Commission modified a number of edits,  
5 either keeping the original language of the textbooks or  
6 approving new language in many instances in direct conflict with  
7 the recommendations provided by Drs. Witzel, Wolpert and  
8 Heitzman. CDE staff calculated that 97 of the 153 Commission  
9 recommended edits were directly contrary to the recommendations  
10 provided by Drs. Witzel, Wolpert and Heitzman. (Id.) Shortly  
11 thereafter, the SBE received a letter, dated December 7, 2005,  
12 signed by an additional 130 scholars protesting the Commission's  
13 decision to reject the scholarly recommendations of Drs. Witzel,  
14 Wolpert and Heitzman. (DUF ¶ 30.) The letter expressed concern  
15 "that a small, but highly organized group of people who claim to  
16 speak for all 'Hindus,' seem to have dominated" the proceedings,  
17 while a range of other organizations that represent Hindus were  
18 marginalized in the process. (Id.) The letter also expressed  
19 concern about the Commission's consultation with HEF and VF,  
20 "rather than trained academics on South Asia;" the scholars  
21 warned that HEF and VF were affiliated with the Hindutva  
22 extremist movement. (Id.) On the same day, Dr. Witzel wrote  
23 another letter on behalf of the 50 global experts who contacted  
24 the SBE on November 8, 2005, urging the SBE to reject the action  
25 of the Commission and instead adopt the Witzel, Wolpert and  
26 Heitzman edits, which were "carefully reviewed solely with a view  
27 towards historical accuracy." (DUF ¶ 29.)

1        Upon learning of the actions taken by the Commission on  
2 December 2, SBE President Ruth Green sent a letter to the  
3 Commissioners expressing her concern that the Commission may not  
4 have followed the November 9, 2005 SBE directives for its  
5 meeting. (DUF ¶ 31.) Green called a closed-door meeting on  
6 January 6, 2006 to discuss the textbook edits concerning Judaism,  
7 Islam, Christianity and Hinduism. (Id.) CDE staff, SBE and  
8 Commission members, and five content scholars, Dr. Naomi Janowitz  
9 (Judaism), Shabbir Mansuri (Islam), Dr. David Nystrom (Ancient  
10 History and Christianity), Dr. Witzel (Indian History and  
11 Sanskrit) and Dr. Bajpai (Indian History), participated. (DUF ¶  
12 32.) Plaintiff disputes the qualifications of some of the  
13 content scholars, including Witzel and Mansuir (who plaintiff  
14 states was simply a consultant for Houghton Mifflin's book), and  
15 complains that members of HEF/VF were not invited to this  
16 meeting. (PDF ¶ 95.) At the January 6 meeting, all of the Ad  
17 Hoc Committee edits and corrections were discussed, including the  
18 Hindu edits, which Drs. Bajpai and Witzel reviewed and debated.  
19 (DUF ¶ 33.) Plaintiff emphasizes that with respect to Judaism  
20 and Christianity, the meeting addressed only a few minor changes.  
21 In contrast, at least 83 new suggestions were made regarding the  
22 edits on Hinduism. (PDF ¶ 89.) Ultimately, Drs. Bajpai and  
23 Witzel agreed on many of the edits, with the exception of a few  
24 subject areas, which reflect the content issues raised in this  
25 litigation. (DUF ¶ 33.)

26        Subsequent to the meeting, an SBE committee worked with CDE  
27 staff to review all of the edits and corrections that the SBE  
28 committee deemed appropriate. (DUF ¶ 34.) CDE and SBE staff

1 created a new set of recommendations that reflected the scholarly  
2 perspectives, public comment and SBE concerns (the "February 27  
3 Edits and Corrections List"). (Id.) Four members of the SBE  
4 committee met on February 27, 2006 at a public meeting. The  
5 February 27 Edits and Corrections List was posted on the CDE  
6 website prior to the meeting. (DUF ¶ 35.) Written comments  
7 received by the public regarding the posted list were forwarded  
8 to committee members prior to the meeting. (Id.) Approximately  
9 104 people gave public testimony at the hearing, including CAPEEM  
10 members. (DUF ¶ 36.) Defendants maintain that those that spoke  
11 for and against the HEF/VF edits spoke for approximately equal  
12 amounts of time. (Id.) The SBE designated two hours for public  
13 comment, and there were additional people who would have spoken  
14 had time allowed. (Id.) After the two-hour public comment  
15 period, the SBE recommended approval of the edits, consistent  
16 with the SBE/CDE staff recommendations. (DUF ¶ 37.)

17 Plaintiff contends these new recommendations were not based  
18 on scholarly perspectives and many of the recommendations showed  
19 disdain for Hindus. (RDF ¶ 6.) At the February 27 meeting,  
20 plaintiff maintains that only the Hindu participants were  
21 required to identify themselves as either "for" or "against" the  
22 HEF/VF edits and this permitted President Green to manipulate the  
23 time allowed to those speaking against the edits. (RDF ¶s 7-8.)

24 On February 27, 2006, the SBE committee recommendations were  
25 sent to the SBE for the regularly scheduled SBE March meeting.  
26 On March 8, 2006, the SBE held a public meeting; approximately 49  
27 people addressed the SBE regarding the textbooks and proposed  
28 edits. After approximately two hours of public comment, the SBE



1 adopted the SBE/CDE staff recommended edits to the sixth grade  
2 history-social science textbooks. (DUF ¶ 38.)

3 Plaintiff emphasizes that in rendering its final decision,  
4 the SBE ignored many of the recommendations of the Commission.  
5 Most glaringly, the Commission had recommended rejecting the  
6 Oxford University Press ("OUP") textbook by a 14-0 vote. (PDF ¶  
7 20.) CAPEEM member, Karthik Venkataramani, along with some HEF  
8 members, had met with OUP representatives, and OUP had agreed to  
9 make changes to improve the presentation of Hinduism. (PDF ¶  
10 23.) OUP representatives had agreed with HEF's suggestions,  
11 noting that the OUP author "was very amenable to the changes and  
12 saw merit in [HEF's] comments." (PDF ¶ 192.) Yet, ultimately,  
13 plaintiff asserts many of the more egregious portions of the OUP  
14 and other texts were not changed.<sup>8</sup> In contrast, the ICS worked  
15 with OUP to make changes to the chapter on Judaism which were  
16 accepted by the SBE. (PDF ¶ 22.)

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18 <sup>8</sup> For example, plaintiff states one textbook describes  
19 the Hindu religious texts, the Vedas, as a "collection of poems,  
20 myths, hymns and rituals." (Defs.' Resp. to Pl.'s Stmt. of  
21 Undisputed Facts in Supp. of MSJ, filed Jan. 13, 2009 [Docket  
22 #173] [hereinafter, "PUF"], ¶ 150.) Similarly, unlike the case  
23 of Christianity and Judaism where the origin of the religion is  
24 presented through the lens of believers and the lens of the  
25 relevant religious texts, plaintiff asserts the origin of  
26 Hinduism is not attributed to Hindu beliefs. Instead, plaintiff  
27 points out that the Holt textbook's chapter states that Hinduism  
28 was developed by people called Aryans and then gives a  
description of an oppressive caste system. The chapter ends with  
a description of Jainism and mentions how there were people  
"unsatisfied" with Hinduism. (PUF ¶s 151-152.) Plaintiff  
alleges the chapter on Buddhism also begins by taking a dim view  
and mentions how a young man was "dissatisfied with the teachings  
of Hinduism." (PUF ¶ 154.) Finally, plaintiff describes that  
the Holt textbook's chapter on Hinduism does not present any  
Hindu texts as historical documents. Yet that same textbook  
refers to the Torah as a Jewish "account" of the early history of  
the world, and the Gospels as the "accounts" of Jesus' life and  
teachings. (PUF ¶ 125.)

1 Defendants maintain, on the other hand, that throughout the  
2 textbook adoption process, the SBE received extensive public  
3 comment from those both supporting and opposing the HEF/VF edits.  
4 (DUF ¶s 39-40.) Defendants claim members of CAPEEM participated  
5 throughout the process, advocating for the HEF/VF edits in both  
6 written comments and also by participating in the public  
7 meetings. (DUF ¶ 39.) Ultimately, defendants assert the SBE  
8 considered all perspectives equally and rendered its final  
9 decision about the HEF/VF edits based on scholarly consensus.  
10 (DUF ¶ 45.)

11 However, plaintiff contends, contrary to defendants, that  
12 the Hindu groups supporting the HEF/VF edits were subjected to  
13 different procedures during the process, including:

14 (1) defendants rejected suggestions from VF that were not in the  
15 correct format, and CDE included only those VF comments that  
16 consisted of "specific edits and corrections" (PDF ¶ 6); on the  
17 other hand, the CIE, an Islamic advocacy group that participated  
18 in the process, did not provide specific edits and corrections,  
19 yet defendants came up with suggestions based on the "narrative  
20 evaluation" submitted by CIE (PDF ¶ 7); (2) defendants imposed  
21 arbitrary deadlines on Hindus supporting the HEF/VF edits,  
22 including the improper rejection of a CAPEEM member's submissions  
23 as untimely (PDF ¶ 18), and imposing special deadlines on their  
24 groups with respect to submissions to the Ad Hoc Committee (PDF ¶  
25 19); to the contrary, opponents of the HEF/VF edits, like Dr.  
26 Witzel, faced no similar deadlines; (3) during various public  
27 meetings, defendants asked Hindus to identify themselves as being  
28 either "for" the HEF/VF edits or "against" them before being

1 permitted to speak (PDF ¶ 147).

2 Plaintiff also asserts that defendants treated Hindus  
3 supporting the HEF/VF edits differently when making decisions on  
4 content. For example, when Jewish participants objected to  
5 treating Christianity as an improvement over Judaism, defendants  
6 approved changes to correct such claims. (PDF ¶ 171.) However,  
7 when Hindu participants asked for removal of the depiction of  
8 Buddhism as an improvement over Hinduism, their requests were  
9 denied. (PDF ¶ 172.) Additionally, plaintiff contends that  
10 while defendants conceded the request of Jewish participants to  
11 capitalize the letter "g" in "god," similar requests by Hindus  
12 resulted in changing all instances of the words "gods" and  
13 "goddesses" to the word "deities" with respect to the Hindu  
14 religion. (PDF ¶ 176.) Plaintiff also asserts that the request  
15 of Jewish participants to provide an insider perspective of their  
16 religion, such as by using the version of the Ten Commandments  
17 from the Hebrew Bible instead of the Christian Bible and removing  
18 references to the Christian Bible in the chapter on Judaism, were  
19 granted. However, defendants did not grant requests by Hindus to  
20 provide an insider's perspective of their beliefs. (PDF ¶s 177-  
21 179.) Similarly, plaintiff points out that defendants granted  
22 the request of Jewish participants to remove references to the  
23 alleged belief of Jews having higher social status than the  
24 Samaritans, but did not grant the request of Hindu participants  
25 to remove the offensive sections of the textbooks attributing an  
26 oppressive caste system to Hinduism. (PDF ¶s 180-181.) Finally,  
27 plaintiff asserts defendants took action to ensure that Judaism  
28 was treated with sensitivity and asked the expert on Judaism to

1 work with the expert on Christianity, when a controversy arose  
2 about blaming Jews for the arrest of Jesus. (PDF ¶ 166.)  
3 Plaintiff alleges similar sensitivity was not applied to  
4 Hinduism. (Id.)

5       Shortly after the adoption of the edits, on March 9, 2006,  
6 CAPEEM formed for the purpose of promoting "an accurate portrayal  
7 of the Hindu religion in the public education system of the State  
8 of California." (DUF ¶ 50.) CAPEEM is comprised of Hindu and  
9 Indian parents who have children currently attending public  
10 schools in the first through sixth grades in California (and will  
11 use the material approved and adopted by the SBE) and who assert  
12 their own interests as well as the interests of their children.  
13 Certain of CAPEEM's individual member-parents participated,  
14 together with other Hindu groups, in the sixth-grade  
15 history-social science textbook adoption process. (See Mem. &  
16 Order, filed Mar. 25, 2008 [Docket #108], at 6.)

17       CAPEEM filed the instant action on March 14, 2006, and filed  
18 the operative complaint, the second amended complaint, on August  
19 25, 2006, alleging violations of the Equal Protection,  
20 Establishment and Free Speech and Association Clauses of the  
21 Constitution, pursuant to 42 U.S.C. § 1983. By the action,  
22 plaintiff "challenges the derogatory and unequal treatment of the  
23 Hindu religion in social sciences textbooks used in the sixth  
24 grade in the California public education system." (SAC ¶ 1.1.)<sup>9</sup>

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25  
26       <sup>9</sup> At times on these motions, plaintiff asserts arguments  
27 challenging certain *seventh* grade textbooks. Said textbooks are  
28 not at issue in the instant action as the complaint raises issues  
pertaining only to the adoption of certain sixth grade history-  
social science textbooks. Fed. R. Civ. P. 8 (requiring that the  
complaint provide the defendant with a short and plain statement  
(continued...)

1 More specifically, plaintiff challenges defendants' refusal to  
2 revise certain textbooks to remove allegedly offensive and  
3 derogatory references to the Hindu religion. "Plaintiff  
4 challenges the substance of the final edits as well as the  
5 (disparate) procedures followed by Defendants in adopting certain  
6 edits and rejecting others." (SAC ¶ 1.2.) Plaintiff seeks  
7 injunctive relief with respect to its claims prohibiting  
8 defendants from:

- 9 1. "treating Plaintiff or its members differently  
10 because of their religion, ethnicity, political  
beliefs, or national origin;"
- 11 2. "promoting other religions (and portraying other  
12 religions in a more favorable light) at the  
expense of the religious beliefs of plaintiff and  
13 its members;"
- 14 3. "denigrating the religious beliefs of Plaintiff and  
its members;"
- 15 4. "utilizing creationist, Judeo-Christian-based  
16 theories to explain the development of Hinduism  
and the migrations of ancient Hindus; and"
- 17 5. "taking adverse action against Plaintiff or  
18 its members based on their protected expression,  
political beliefs, or association[.]"

19 (SAC at 24:12-20.)<sup>10</sup>

20  
21 <sup>9</sup>(...continued)  
22 of the claims against it). As such, the court has not considered  
plaintiff's arguments directed at any seventh grade textbooks.

23 <sup>10</sup> On March 16, 2006, the Hindu American Foundation  
24 ("HAF") initiated a parallel action in state court seeking a writ  
of mandate. HAF alleged (1) procedural violations of  
25 California's APA, arguing the procedures through which defendants  
reviewed and approved the textbooks were not conducted under  
26 regulations formally promulgated under the State's APA, and  
California's Bagley-Keene Open Meeting Act, based on the SBE's  
27 failure to hold public meetings, and (2) content-based violations  
under California's Education Code, arguing the textbooks are not  
28 in compliance with the substantive, state legal standards  
applicable to their content. The court ultimately rejected HAF's  
(continued...)

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1 circumstance, summary judgment should be granted, "so long as  
2 whatever is before the district court demonstrates that the  
3 standard for entry of summary judgment, as set forth in Rule  
4 56(c), is satisfied." Id. at 323.

5 If the moving party meets its initial responsibility, the  
6 burden then shifts to the opposing party to establish that a  
7 genuine issue as to any material fact actually does exist.  
8 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
9 585-87 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S.  
10 253, 288-289 (1968). In attempting to establish the existence of  
11 this factual dispute, the opposing party may not rely upon the  
12 denials of its pleadings, but is required to tender evidence of  
13 specific facts in the form of affidavits, and/or admissible  
14 discovery material, in support of its contention that the dispute  
15 exists. Fed. R. Civ. P. 56(e). The opposing party must  
16 demonstrate that the fact in contention is material, i.e., a fact  
17 that might affect the outcome of the suit under the governing  
18 law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986),  
19 and that the dispute is genuine, i.e., the evidence is such that  
20 a reasonable jury could return a verdict for the nonmoving party.  
21 Id. at 251-52.

22 In the endeavor to establish the existence of a factual  
23 dispute, the opposing party need not establish a material issue  
24 of fact conclusively in its favor. It is sufficient that "the  
25 claimed factual dispute be shown to require a jury or judge to  
26 resolve the parties' differing versions of the truth at trial."  
27 First Nat'l Bank, 391 U.S. at 289. Thus, the "purpose of summary  
28 judgment is to 'pierce the pleadings and to assess the proof in

order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Rule 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. Anderson, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586-87.

## ANALYSIS

### 1. Plaintiff's Motion for Partial Summary Judgment

CAPEEM's motion for partial summary judgment challenges the adopted textbooks' alleged indoctrination of students in their portrayals of Christianity and Judaism. Defendants oppose the motion, in the first instance on standing grounds, arguing CAPEEM lacks "organizational" standing to bring a claim challenging the



1 textbooks' portrayal of religions other than Hinduism.

2 On a motion for summary judgment, the plaintiff bears the  
3 burden of establishing each element of standing. Churchill  
4 County v. Babbitt, 150 F.3d 1072, 1077 (9th Cir. 1998).

5 Establishing standing is an essential part of the case or  
6 controversy requirement of Article III of the United States  
7 Constitution. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560  
8 (1992). An organization may have standing to sue on behalf of  
9 its members when: (1) its members would otherwise have standing  
10 to sue in their own right; (2) the interests the association  
11 seeks to protect are germane to its purpose; and (3) neither the  
12 claim asserted nor the relief requested requires the  
13 participation of the individual members in the lawsuit. Hunt v.  
14 Wash. State Apple Adver. Comm'n, 432 U.S. 333, 342-43 (1977).

15 Here, CAPEEM cannot challenge the textbooks' portrayal of  
16 religions other than Hinduism because such a challenge is not  
17 germane to its organizational purpose.<sup>12</sup> According to CAPEEM's  
18 Articles of Incorporation, its primary organizational purpose is:  
19 to promote an accurate portrayal of the Hindu religion  
20 in the public education system of the State of California.

21 (DUF ¶ 50.) CAPEEM has consistently maintained that its purpose  
22 is to ensure the accurate representation of Hinduism in the  
23 subject textbooks. (Linton Decl. in Opp'n to Pl.'s MSJ, filed  
24 Jan. 13, 2009 [Docket #170], Ex. B [CAPEEM Articles of Incorp.,  
25

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26 <sup>12</sup> All three prongs of the Hunt test must be satisfied to  
27 find that an organization has standing to assert an action on  
28 behalf of its members. Because CAPEEM cannot establish the  
second requirement, the court need not consider the other  
elements. See Ranchers Cattlemen Action Legal Fund United  
Stockgrowers of Am. v. U.S. Dept. Of Ag., 415 F.3d 1078, 1103-04  
(9th Cir. 2005).

1 Bylaws and IRS description].) Consistent with that purpose,  
2 CAPEEM filed this lawsuit to challenge the "derogatory and  
3 unequal treatment of the Hindu religion in social sciences  
4 textbooks used in the sixth-grade in the California education  
5 system." (SAC ¶ 1.1.) It has repeatedly represented that this  
6 lawsuit is about challenging the portrayal of Hinduism in the  
7 textbooks. (Linton Decl., Ex. B [description of lawsuit from  
8 CAPEEM's website, fund-raising fliers about lawsuit and  
9 information sheet for fund-raisers].) For example, CAPEEM's  
10 website states:

11       The objective of this lawsuit is to correct the sixth  
12       grade social studies textbooks to end selective  
13       discrimination against Hinduism in textbooks, protect  
14       the civil rights of Hindu children, ensure that Hindu  
15       children are not alienated from their traditions  
16       because of negative portrayals of their religion,  
17       removal colonial stereotypes regarding Hinduism,  
18       and present the positive aspects of Hinduism so  
19       that Hindu children can be proud of their heritage.

20 (Linton Decl, Ex. B [CAPEEM00055].)

21       In Ranchers Cattlemen Action Legal Fund United Stockgrowers  
22 of Am. v. U.S. Dept. Of Ag., 415 F.3d 1078, 1103-04 (9th Cir.  
23 2005), the Ninth Circuit dismissed an association's National  
24 Environmental Protection Act ("NEPA") claims on standing grounds,  
25 finding that the association's purpose of representing cattle  
26 producers on issues of trade and marketing was not germane to its  
27 NEPA claims. The situation in this case is analogous. In  
28 contrast to its stated organizational purpose and the self-  
identified purpose of this lawsuit, CAPEEM's motion focuses on  
claims of Christian and Jewish indoctrination. Such claims are  
not germane to its stated purpose of promoting an accurate  
portrayal of Hinduism in textbooks used in California public

1 schools. As such, the court must find that plaintiff lacks  
2 standing to adjudicate issues regarding the textbooks' portrayal  
3 of religions other than Hinduism. See also Pacific Northwest  
4 Generating Co-Operative, 38 F.3d 1058, 1063 (9th Cir. 1994)  
5 (finding that although the organizational plaintiff asserted  
6 environmental injuries to it and its employees, it lacked  
7 standing to bring environmental claims because its organizational  
8 purpose was economic and not environmental); accord Consejo de  
9 Desarrollo Economico de Mexicali, AC v. United States, 438 F.  
10 Supp. 2d 1194, 1203 (D. Nev. 2006) (finding the plaintiff  
11 organization lacked standing to press environmental claims as its  
12 stated purpose was to promote the economic interests of its  
13 members in Mexicali, Baja California, Mexico); Minnesota  
14 Federation of Teachers v. Randall, 891 F.2d 1354, 1359 (8th Cir.  
15 1989) (finding insufficient nexus existed between the purposes  
16 and activities of the plaintiff teachers' union and the tax  
17 issues raised in the complaint, and thus, the plaintiff failed to  
18 satisfy the "germaneness" prong of the Hunt test).

19 Plaintiff does not discuss the above case law in any respect  
20 on the motion; indeed, plaintiff offers no authority whatsoever  
21 in support of its bald assertion that it can satisfy the  
22 germaneness requirement for this claim. Instead, CAPEEM simply  
23 proffers the testimony of its director and one member who  
24 testified at their depositions in this case, that CAPEEM was  
25 formed, in part, to prevent religious indoctrination.

26 (Balasubramani Supp. Decl., filed Jan. 23, 2009 [Docket #197],  
27 Exs. A and B.) Such self-serving statements made in support of  
28 this legal action are insufficient to meet plaintiff's burden

1 under Hunt. See e.g. Animal Lovers Volunteer Assoc., Inc. v.  
2 Weinberger, 765 F.2d 937, 939 (9th Cir. 1985) (animal-lovers  
3 association lacked standing to challenge Navy's shooting of feral  
4 goats where it "has no history which antedates the legal action  
5 it seeks to bring, and can point to no activities which  
6 demonstrate its interest, other than pursuing a legal action").  
7 Other than these self-serving statements, CAPEEM can point to no  
8 organizational document (articles of incorporation or bylaws or  
9 any amendments thereto), written policies of the organization,  
10 meeting minutes or any other document which supports a finding  
11 that CAPEEM's organizational purpose is to challenge the  
12 textbooks' alleged indoctrination of religion, particularly the  
13 Christian and Jewish religions as asserted in its motion.

14 Moreover, that certain CAPEEM members have concerns, some of  
15 which were raised during the textbook adoption process, that the  
16 subject textbooks attempt to indoctrinate students into the  
17 Christian and Jewish religions does not establish that CAPEEM's  
18 *organizational* purpose is to prevent such indoctrination. (See  
19 Pl.'s Reply, filed Jan. 23, 2009 [Docket #198], at 1 [describing  
20 a CAPEEM member's deposition testimony that he had concerns that  
21 the contents of the textbooks and the Content Standards amounted  
22 to indoctrination and pointing out that CAPEEM's director raised  
23 his indoctrination concerns during the textbook adoption  
24 process].) Additionally, while CAPEEM did reference in its  
25 complaint the textbooks' treatment of the Christian and Jewish  
26 religions, it was done in order to substantiate CAPEEM's claims  
27 of disparate treatment of the Hindu religion. In other words,  
28 the references to Christianity and Judaism were used as a

1 comparative tool to establish that the Hindu religion was treated  
2 in a discriminatory manner. As stated clearly at the outset of  
3 plaintiff's complaint:

4 This case challenges the derogatory and unequal treatment  
5 of the Hindu religion in social science textbooks used  
6 in the sixth grade in the California public education  
7 system.

8 (SAC ¶ 1.1.) The treatment of other religions is relevant only  
9 as it relates to establishing the unequal and discriminatory  
10 treatment of Hinduism. CAPEEM formed in order to bring this  
11 lawsuit, designating its organizational purpose as the promotion  
12 of "an accurate portrayal of the Hindu religion in the public  
13 education system of the State of California." (DUF ¶ 50.) As  
14 such, because CAPEEM's claim of alleged unlawful indoctrination  
15 of students into the Christian and Jewish religions is not  
16 germane to this organizational purpose, the court must find that  
17 CAPEEM lacks standing to bring this claim.

18 Because the claim is not germane to its purpose, CAPEEM's  
19 allegations regarding indoctrination by the textbooks represents  
20 a mere "generalized grievance" that any citizen might attempt to  
21 litigate simply because he or she takes offense at the textbooks.  
22 Such generalized grievances "shared in substantially equal  
23 measure by all or a large class of citizens" are insufficient to  
24 establish standing. See Warth v. Seldin, 422 U.S. 490, 498-500  
25 (1975). Plaintiff's motion for partial summary judgment is  
26 therefore DENIED.  
27  
28

1           **2.    Defendants' Motion for Summary Judgment**

2           **a.    Standing**

3           In moving for summary judgment, as its threshold argument,  
4 defendants contend plaintiff lacks standing to bring its claims  
5 for relief to the extent they are based on (1) the textbook  
6 adoption process and (2) the textbooks' contents in so far as the  
7 books pertain to the portrayal of religions other than Hinduism.  
8 Defendants concede that CAPEEM has standing to bring its claims  
9 for relief to the extent they challenge the textbooks' portrayal  
10 of Hinduism. For the same reasons as set forth above, the court  
11 agrees with defendants that CAPEEM lacks standing to bring its  
12 Equal Protection, Establishment, and Free Speech and Association  
13 Clause claims to the extent they are based on the textbooks'  
14 portrayal of religions other than Hinduism, as such claims are  
15 not germane to CAPEEM's organizational purpose.

16          Thus, the court considers here only whether CAPEEM has  
17 standing to assert its claims for relief based on alleged  
18 disparate treatment in the textbook adoption process. Again, an  
19 association has standing to bring suit on behalf of  
20 its members when: (1) its members would otherwise have standing  
21 to sue in their own right; (2) the interests the association  
22 seeks to protect are germane to its purpose; and (3) neither the  
23 claim asserted nor the relief requested requires the  
24 participation of individual members in the lawsuit. Hunt v.  
25 Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).  
26 Under the first prong of the Hunt test, plaintiff must  
27 allege facts supporting its members standing in their own right.  
28 Id. To allege individual standing, a plaintiff must state facts

1 demonstrating: (1) a concrete and particularized injury in fact  
2 that is actual or imminent; (2) a causal connection between the  
3 injury and the defendants' conduct or omissions; and (3) the  
4 likelihood that the injury will be redressed by a favorable  
5 decision. Lujan v. Defenders of Wildlife, 504 U.S. at 555, 560  
6 (1992). With regard to the adoption process, defendants argue  
7 CAPEEM cannot meet either the first or third requirement.

8 Defendants contend plaintiff cannot show an actual injury to  
9 any of its members nor can it demonstrate that its members were  
10 denied the opportunity to equally compete for a government  
11 benefit. In Northeastern Fla. Chapter of Associated Gen.  
12 Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666  
13 (1993), the United States Supreme Court recognized that a claim  
14 of discriminatory treatment, without any showing of actual  
15 injury, may be sufficient to establish standing when a defendant  
16 creates a barrier to a potential benefit. In City of  
17 Jacksonville, the Court found a group of contractors had standing  
18 based on the alleged denial of equal footing in a government  
19 bidding process. Id. Defendants contend plaintiff has no  
20 evidence of direct injuries to its members, and thus, must rely  
21 on City of Jacksonville to establish standing. But, defendants  
22 maintain in this case, the government did not erect any barriers  
23 to CAPEEM members' participation in the adoption process or deny  
24 CAPEEM members a benefit to which they were entitled, and thus,  
25 CAPEEM cannot establish standing under this latter theory.

26 Defendants are incorrect in both respects. Plaintiff offers  
27 evidence of direct injury to at least one of its members. CAPEEM  
28 asserts defendants did not afford one of its members an

1 opportunity to participate on an equal basis in the textbook  
2 adoption process, and that conduct resulted in the humiliation of  
3 the member. (PDF ¶s 27.) This member's testimony describing his  
4 feelings of humiliation and alienation as a result of the alleged  
5 disparate treatment he received in the adoption process is  
6 sufficient to establish the injury-in-fact requirement of Lujan.  
7 Moreover, even without this claim of direct injury to a member,  
8 CAPEEM can establish an injury in fact under City of  
9 Jacksonville. Defendants' conduct during the adoption process  
10 was governed by a body of laws, regulations and guidelines which  
11 apply to the SBE's adoption of new textbooks. Cal. Const. Art.  
12 IX, § 7.5; Cal. Educ. Code §§ 60200-60206, 60040, 60044; (Adams  
13 Decl., [Docket #160], at Ex. B [Framework and Content  
14 Standards].) That regulated process is akin to the government  
15 bidding process in City of Jacksonville. Plaintiff proffers  
16 evidence that defendants applied the laws and rules governing the  
17 process in an arbitrary manner toward those participants who  
18 supported the HEF/VF edits; this disparate treatment, plaintiff  
19 alleges, resulted in the adoption of materials that denigrate the  
20 Hindu religion. Thus, plaintiff can establish under City of  
21 Jacksonville, that they were denied the opportunity of equal and  
22 fair participation in the process, and they ultimately lost the  
23 benefit of having their views heard and given equal consideration  
24 in an open process. For these reasons, the court finds that  
25 plaintiff can establish the injury-in-fact requirement for  
26 standing.

27 As to the third requirement, defendants contend that because  
28 the State has promulgated new regulations for the textbook



1 adoption process, which will be utilized in future textbook  
2 adoptions, plaintiff cannot show that its members' injuries will  
3 be redressed by a favorable decision in this case. Defendants'  
4 argument ignores the purpose of this litigation. CAPEEM's  
5 complaints are not directed at the governing rules themselves but  
6 how those rules are applied by defendants. CAPEEM seeks to  
7 ensure that in future adoption processes, the rules, whatever  
8 they may be, are *applied* in a fair and equal manner toward Hindus  
9 participating in the process. Thus, plaintiff requests  
10 injunctive relief in this case prohibiting, among other things,  
11 defendants from "treating [p]laintiff or its members differently  
12 [in the textbook adoption process] because of their religion,  
13 ethnicity, political beliefs, or national origin;" "denigrating  
14 the religious beliefs of [p]laintiff and its members;" and/or  
15 "taking adverse action against [p]laintiff or its members based  
16 on their protected expression, political beliefs, or  
17 association." (SAC at 24:12-20.) Such injunctive relief would  
18 redress plaintiff's claimed injuries in this case, and thus, the  
19 court finds that the third requirement for individual standing is  
20 met.<sup>13</sup>

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21  
22 <sup>13</sup> Though not fully developed in their papers, defendants  
23 appear to argue as an additional basis for finding a lack of  
24 standing, that plaintiff cannot demonstrate a likelihood of  
25 future harm. Defendants are correct that even when seeking  
26 prospective relief, a plaintiff must still satisfy the  
27 "imminence" requirement for Article III standing and demonstrate  
28 that its injury is currently impending. Scott v. Pasadena  
Unified Sch. Dist., 306 F.3d 646, 658 (9th Cir. 2002). It is  
insufficient for a plaintiff to demonstrate a past injury.  
However, to meet the third requirement for individual standing, a  
plaintiff need only show a significant *possibility* of future harm  
to establish that its injury may be redressed by a favorable  
decision. Steel Co. v. Citizens for a Better Environ., 523 U.S.  
83, 109 (1998). Construing the evidence proffered by plaintiff  
(continued...)

1 Accordingly, defendants' motion on standing grounds is  
2 DENIED.<sup>14</sup>

3 **b. Equal Protection Clause Claim<sup>15</sup>**

4 CAPEEM alleges defendants violated the Equal Protection  
5 Clause by discriminating against its members on the basis of  
6 their religion, political affiliation, ethnicity and national  
7 origin. (SAC ¶s 5.3-5.4.) The Equal Protection Clause of the  
8 Fourteenth Amendment provides that no State shall "deny to any  
9 person within its jurisdiction the equal protection of the laws."  
10 U.S. Const. Amdt. 14, § 1. This is "essentially a direction that  
11 all similarly situated persons should be treated alike. City of  
12 Cleburne v. Cleburne Living Ctr., 437 U.S. 432, 439 (1985). The  
13 guarantee of equal protection is not a source of substantive  
14 rights or liberties, but rather "a right to be free from  
15 discrimination in statutory classifications and other  
16 governmental activity." Williams v. Vidmar, 367 F. Supp. 2d

17  
18 <sup>13</sup>(...continued)  
19 in the light most favorable to CAPEEM, plaintiff has shown that  
20 based on defendants' extensive and egregious, past conduct toward  
the Hindu participants supporting the HEF/VF edits, unless  
enjoined herein, said conduct is substantially likely to recur.

21 <sup>14</sup> Defendants did not argue that plaintiff could not  
22 establish the other two elements of the Hunt test, with respect  
23 to plaintiff's challenges to the adoption process involving  
issues pertaining to Hinduism, and therefore, the court does not  
discuss the elements of germaneness and necessity of individual  
participation.

24 <sup>15</sup> All of plaintiff's constitutional claims are brought  
25 pursuant to 42 U.S.C. § 1983. Section 1983 provides in part that  
26 "[e]very person who, under color of any statute, ordinance,  
regulation, custom, or usage, of any State . . . subjects, or  
27 causes to be subjected, any citizen . . . to the deprivation of  
any rights, privileges, or immunities secured by the Constitution  
and laws, shall be liable to the party injured . . . ." Section  
28 1983 confers no substantive rights itself, but rather, "provides  
remedies for deprivations of rights established elsewhere." City  
of Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985).

1 1265, 1270 (N.D. Cal. 2005). "[D]iscrimination cannot exist in a  
2 vacuum; it can only be found in the unequal treatment of people  
3 in similar circumstances." Freeman v. City of Santa Ana, 68 F.3d  
4 1180, 1187 (9th Cir. 1995). Thus, to prove an equal protection  
5 violation, a plaintiff must show that the defendant acted with an  
6 intent or purpose to discriminate against the plaintiff based  
7 upon membership in a protected class. Thornton v. City of St.  
8 Helens, 425 F.3d 1158, 1166-67 (9th Cir. 2005).

9 Here, defendants argue (1) CAPEEM cannot challenge the  
10 textbooks' contents under the Equal Protection Clause, and  
11 (2) CAPEEM cannot produce evidence, sufficient to withstand  
12 summary judgment, demonstrating defendants intended to  
13 discriminate against CAPEEM's members during the adoption  
14 process. With respect to defendants' first argument, plaintiff  
15 alleges that the adopted textbooks' content violates the Equal  
16 Protection Clause. (SAC ¶s 5.6, 5.8, 5.10, 5.12; Linton Decl. in  
17 Supp. of Defs.' MSJ, filed Dec. 30, 2008 [Docket #162], Ex. C  
18 [Interrog. Resps. 8, 12, 16].)<sup>16</sup> This claim must fail, however,  
19 because the State has the discretion to determine the content of  
20 its curriculum, and the Equal Protection Clause does not provide  
21 a basis to challenge such curriculum decisions. Montiero v.  
22

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23 <sup>16</sup> In opposing defendants' motion, plaintiff appears to  
24 concede this claim is not viable under Montiero, described below.  
25 (Pl.'s Opp'n to Defs.' MSJ, filed Jan. 14, 2009 [Docket #193-2],  
26 at 15-16.) Plaintiff argues only that Montiero does not  
27 foreclose its equal protection claim directed at improprieties in  
28 the textbook adoption process. Defendants do not contend  
Montiero precludes plaintiff's process-related equal protection  
claim. Because plaintiff clearly alleged its equal protection  
claim, in part, on the basis of the textbooks' contents, as  
stated in its second amended complaint and in discovery  
responses, the court briefly addresses whether such a claim is  
viable herein.

1 Temple Union High Sch. Dist., 158 F.3d 1022, 1032 (9th Cir.  
2 1998); see also Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003,  
3 1013 (9th Cir. 2000) (finding no equal protection violation  
4 because the plaintiff could not dictate contents of school's  
5 speech).

6 In Montiero, a parent brought an equal protection challenge  
7 to her child's high school curriculum based on race. The  
8 curriculum allegedly caused African-American students to suffer  
9 psychological injuries and lost educational opportunities due to  
10 required reading that contained "repeated use of the profane,  
11 insulting and racially derogatory term 'nigger.'" 158 F.3d at  
12 1024. None of the required reading referred to Caucasians in a  
13 derogatory manner. Id. The Ninth Circuit held that the Equal  
14 Protection Clause will not support a challenge to the curriculum  
15 even where its contents are allegedly discriminatory. Id. at  
16 1022.

17 Similarly, here, CAPEEM maintains that the textbooks are  
18 discriminatory against Hindus and will result in psychological  
19 harm and lost educational opportunities for Hindu students.  
20 Montiero squarely forecloses an equal protection claim on this  
21 basis. Accordingly, to the extent plaintiff bases its equal  
22 protection claim on a challenge to the textbooks' contents  
23 themselves, defendants' motion for summary judgment is GRANTED.

24 Plaintiff also brings its equal protection claim on the  
25 basis of alleged disparate treatment of CAPEEM members in the  
26 textbook adoption process. As to this process claim, defendants  
27 assert plaintiff fails to produce sufficient evidence that  
28 (1) defendants acted with discriminatory intent; (2) a similarly

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

4 **(1) Discriminatory Intent**

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

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

1 opposed to the Hindu groups in order to evaluate the Hindu  
2 groups' suggested edits (PDF ¶s 13, 17, 47-48, 67, 70, 166, 184-  
3 186);<sup>17</sup> (4) defendants fully vetted Dr. Bajpai, who supported the  
4 HEF/VF edits, but they did not do the same for the experts they  
5 hired who opposed the edits, and defendants imposed special  
6 requirements only on Dr. Bajpai and not on the experts opposing  
7 the edits, which included disallowing Dr. Bajpai from having any  
8 connection to the advocacy groups supporting the HEF/VF edits and  
9 precluding him from having any relationship with publishers  
10 submitting textbooks in the process (PDF ¶s 44-46, 49, 51-56, 59,  
11 60);<sup>18</sup> (5) various edits suggested by these Hindu groups which  
12 were similar to edits suggested by other religious groups were  
13 nonetheless treated differently, including (a) while the requests  
14 of Jewish groups to capitalize the "g" in "god" were granted the  
15 same request of the Hindu groups was not (PDF ¶s 175-176);  
16 (b) the request of Jewish participants to remove text related to  
17 a claimed higher social status of Jews with respect to Samaritans  
18 was removed but the alleged offensive text which blamed Hinduism  
19 for an oppressive caste system was not removed (PDF ¶s 180-181);  
20 (c) defendants removed claims of Christianity being an  
21 improvement over Judaism when Jewish participants complained but  
22

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23           <sup>17</sup> To contrary, plaintiff proffers evidence that the  
24 advisors for Christianity, Islam and Judaism, Nystrom, Mansuri  
25 and Janowitz, were not hostile to these religions. (Id.)

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

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

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

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

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

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



1                   **(2) Similarly Situated Group**

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

(3) Disparate Treatment from Other Similarly  
Situated Group

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

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

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

1                   **c.     Establishment Clause Claim**

2           The Establishment Clause provides: "Congress shall  
3 make no law respecting an establishment of religion . . . ."  
4 U.S. Const. amend. I, cl. 1. The prohibition of the  
5 Establishment Clause applies to state governments through the  
6 Fourteenth Amendment. Everson v. Board of Education, 330 U.S. 1,  
7 8 (1947). The United States Supreme Court has held:

8           the Establishment Clause [has come] to mean that  
9 government may not promote or affiliate itself with any  
10 religious doctrine or organization, may not discriminate  
11 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.

12 County of Allegheny v. ACLU, 492 U.S. 573, 590-91 (1989)  
13 (footnotes omitted).

14           As decreed by the Supreme Court, and followed in the Ninth  
15 Circuit,<sup>21</sup> claims brought under the Establishment Clause are

16 \_\_\_\_\_  
17           <sup>20</sup>(...continued)  
18 Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1053 (9th  
19 Cir. 2003) (recognizing that Establishment Clause concerns can  
20 justify certain speech restrictions in order to avoid the  
21 appearance of government sponsorship of religion.) Thus, the  
22 Ninth Circuit has recognized in certain contexts a defense to an  
23 equal protection claim, where a government defendant can show its  
24 actions were done to ensure compliance with the Establishment  
25 Clause. Here, defendants maintain the SBE's treatment of the  
26 HEF/VF edits was done to ensure that the edits were neutral,  
accurate and did not endorse a particular religion. However, the  
defense recognized in Hills only applies where the government  
actor proves that the Establishment Clause would have been  
violated had the activity at issue been allowed to proceed. Id.  
at 1053; see also Nurre v. Whitehead, 520 F. Supp. 2d 1222, 1237  
n. 20 (W.D. Wash. 2007). Defendants wholly fail to make this  
showing here. Defendants provide no analysis, let alone  
evidence, to demonstrate that the State's adoption of the HEF/VF  
edits, themselves, would have violated the Establishment Clause.  
As such, the court summarily dismisses defendants' argument.

27           <sup>21</sup>See Brown v. Woodland Jt. Unif. Sch. Dist., 27 F.3d  
28 1373, 1378 (9th Cir. 1994); Kreisner v. San Diego, 1 F.3d 775,  
780 (9th Cir. 1993).

(continued...)

1 analyzed under the three-part "Lemon Test." See Lemon v.  
2 Kurtzman, 403 U.S. 602 (1971). Under the Lemon analysis, a  
3 statute or practice which touches upon religion must (1) have a  
4 secular purpose; (2) must neither advance nor inhibit religion in  
5 its principal or primary effect; and (3) must not foster an  
6 excessive entanglement with religion. County of Allegheny, 492  
7 U.S. at 592; see Lemon, 403 U.S. at 612-13.

8 In its complaint, CAPEEM alleges that defendants violated  
9 the Establishment Clause when it adopted the instructional  
10 materials and final edits, which are allegedly biased against  
11 Hinduism and treated other religions more favorably and  
12 accurately. (SAC ¶ 6.3-6.6, 6.9-6.10.) In addition, CAPEEM  
13 alleges defendants violated the Establishment Clause during the  
14 adoption process by imposing "special hurdles" for the Hindu  
15 groups and Hindu expert, Dr. Bajpai, and by using experts  
16 allegedly biased against the Hindu groups supporting the HEF/VF  
17 edits. (SAC ¶ 6.7-6.8.) Defendants move for summary judgment as  
18 to both theories of plaintiff's claim. However, in opposing  
19 defendants' motion, plaintiff addresses only whether it can  
20 establish an Establishment Clause violation based on the  
21 textbooks' contents themselves.

22 Plaintiff does not separately argue, or provide evidence to  
23 support, an Establishment Clause violation based on the textbook  
24 adoption process. (Pl.'s Opp'n to Defs.' MSJ at 22-33; Defs.'  
25 Reply on MSJ at 12:17-18.) Therefore, the court construes  
26 plaintiff's failure to respond as a non-opposition to that

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27  
28 <sup>21</sup>(...continued)

1 portion of defendants' motion. E.D. Cal. L.R. 78-230(c).  
2 Accordingly, the court addresses only whether plaintiff has  
3 raised a triable issue of fact that the subject textbooks violate  
4 the Establishment Clause.

5 Before applying the Lemon test, several preliminary issues  
6 are worth noting. As an initial matter, in assessing defendants'  
7 motion, the court has considered that alleged violations of the  
8 Establishment Clause in elementary school settings present  
9 heightened concerns for courts. The United States Supreme Court  
10 has made this clear in its treatment of similar cases. See e.g.,  
11 Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 390 (1985) (noting  
12 that "[t]he symbolism of a union between church and state is most  
13 likely to influence children of tender years, whose experience is  
14 limited and whose beliefs consequently are the function of  
15 environment as much as free and voluntary choice"); Lee v.  
16 Weisman, 112 S.Ct. 2649, 2658 (1992) (recognizing the "subtle  
17 coercive pressure in the elementary public schools"); Edwards v.  
18 Aquillard, 482 U.S. 578, 584 (1987) (stating that the sources of  
19 this coercive power are "mandatory attendance, . . . students'  
20 emulation of teachers as role models, and the children's  
21 susceptibility to peer pressure"). Therefore, this court  
22 recognizes it must be "vigilant in monitoring compliance with the  
23 Establishment Clause in elementary schools." Edwards, 482 U.S.  
24 at 583-84.

25 However, the court is also mindful that this heightened  
26 concern is balanced to a great degree by the broad discretion of  
27 a school board to select its public school curriculum. Epperson  
28 v. Arkansas, 393 U.S. 97, 104 (1968). The Supreme Court has

1 emphasized, in such cases as this, that courts should inject  
2 themselves in a controversy regarding the daily operation of a  
3 school system only if basic constitutional values are "directly  
4 and sharply implicate[d]." Id. at 104-05. Thus, in Abington  
5 Sch. Dist. v. Schempp, 374 U.S. 203, 300 (1963) (Brennan, J.,  
6 concurring), the Court recognized that teaching many social  
7 sciences requires mentioning religions, but decisions about how  
8 religion is used "are matters which the courts ought to entrust  
9 very largely to the experienced officials who superintend our  
10 Nation's public schools. They are experts in such matters, and  
11 we are not."

12 In the context of this balance, courts have held a number of  
13 activities to be violations of the Establishment Clause,  
14 including: (1) inviting clergy to offer invocation and  
15 benediction prayers at formal graduation ceremonies for high  
16 schools and middle schools (Lee, 505 U.S. at 577); (2) daily  
17 readings from the Bible (Abington Sch. Dist., 374 U.S. at 203);  
18 (3) daily recitation of the Lord's Prayer (id.); (4) distributing  
19 Gideon Bibles to fifth grade public school students (Berger v.  
20 Rensselaer Central Sch. Corp., 982 F.2d 1160, 1171 (7th Cir.  
21 1993)); (5) posting the Ten Commandments in every classroom  
22 (Stone v. Graham, 449 U.S. 39 (1981)); (6) requiring the teaching  
23 of evolution science with creation science or not at all  
24 (Edwards, 482 U.S. at 578)); (7) beginning school assemblies with  
25 prayer (Collins v. Chandler Unified Sch. Dist., 644 F.2d 759 (9th  
26 Cir. 1991)); (8) teaching a Transcendental Meditation course that  
27 includes a ceremony involving offerings to a deity (Malnak v.  
28 Yogi, 592 F.2d 197 (3rd Cir. 1979)); (9) teaching of weekly

1 religious education classes by private religious educators in  
2 public elementary school classrooms (Vaughn v. Reed, 313 F. Supp.  
3 431 (W.D. Va. 1970)); and (10) teaching of the Bible, for an  
4 express religious purpose, in public elementary and high schools  
5 by private religious educators (Herdahl v. Pontotoc County Sch.  
6 Dist., 933 F. Supp. 582 (N.D. Miss. 1996)).<sup>22</sup>

7 Courts have not been inclined to find an Establishment  
8 Clause violation, however, with respect to the use of certain  
9 books, including novels, textbooks and reading series, in a  
10 public school curriculum. In other words, in cases like this,  
11 when teaching about religion is incorporated into a larger  
12 secular curriculum, courts have consistently found no  
13 Establishment Clause violation. See e.g. Grove v. Mead Sch.  
14 Dist., 753 F.2d 1528 (9th Cir. 1985) (involving a novel, The  
15 Learning Tree, assigned in a tenth grade English class which  
16 allegedly advanced the religion of "secular humanism" while  
17 inhibiting the plaintiffs' Christian religion); Brown v. Woodland  
18 Jt. Unified Sch. Dist., 27 F.3d 1373 (9th Cir. 1994) (involving  
19 the Impressions Reading Series which allegedly addressed  
20 religious rituals endorsing witchcraft); Fleischfresser v. Dirs.  
21 of Sch. Dist. 200, 15 F.3d 680 (7th Cir. 1994) (involving same  
22 reading series as Brown). Moreover, the Supreme Court has  
23 expressly recognized that even the Bible itself may be used in  
24 public schools to teach literary and historical lessons.  
25 Abington Sch. Dist., 374 U.S. at 225.

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26  
27 <sup>22</sup> In opposing defendants' motion, plaintiff relies  
28 primarily on Vaughn and Herdahl. However, for the reasons set  
forth below, these cases are easily distinguishable from this  
case.

1 Here, the State of California has determined that students  
2 should study the importance of religion in the world history and  
3 ancient civilization course to gain a better understanding of  
4 different cultures and conflicts. The SBE considered various  
5 comments and recommendations regarding the proposed textbooks, it  
6 held numerous meetings, both public and private regarding the  
7 appropriate content for the adopted textbooks and it consulted  
8 several experts in the various religions to determine whether the  
9 proposed books were accurate and neutral. After weighing all of  
10 the above, it made the decision to approve certain edits and  
11 adopt certain textbooks for use in the State's public schools.  
12 CAPEEM objects to certain aspects of the textbooks' content.  
13 However, mere disagreement with the contents of the textbooks  
14 will not establish an Establishment Clause claim. "If an  
15 Establishment Clause violation arose each time a student believed  
16 that a school practice either advanced or disapproved of a  
17 religion, school curricula would be reduced to the lowest common  
18 denominator, permitting each student to become a 'curriculum  
19 review committee' unto himself or herself." Brown, 27 F.3d at  
20 1379. In this case, for the reasons set forth below, CAPEEM  
21 cannot satisfy the requisite elements of the Lemon test. At  
22 bottom, by this claim, CAPEEM seeks to act as a "curriculum  
23 review committee;" however, such a role, as recognized by Brown,  
24 is misplaced because SBE is the appropriate body to determine the  
25 contents of the textbooks.

26 **(1) Secular Purpose**

27 The secular purpose prong of the Lemon test asks whether the  
28 government's actual purpose is to endorse or disapprove of



1 religion. Wallace v. Jaffree, 472 U.S. 38, 56 (1985).  
2 Government activity will fail the purpose prong of the test only  
3 if it is motivated *wholly* by an impermissible purpose. Am.  
4 Family Ass'n, Inc. v. City and County of San Francisco, 277 F.3d  
5 1114, 1121 (9th Cir. 2002) (recognizing that a reviewing court  
6 "must be reluctant to attribute unconstitutional motives to  
7 government actors in the face of a plausible secular purpose").  
8 Here, the SBE's purpose in adopting the sixth grade history-  
9 social science textbooks is patently secular. It is fulfilling  
10 its obligation to adopt instructional materials for California  
11 students that are accurate and consistent with the State's  
12 learning objectives. Cal. Const. Art. IX, § 7.5; Cal. Educ. Code  
13 § 60200. The SBE must ensure that adopted instructional  
14 materials contain accurate and non-discriminatory portrayals of  
15 other cultures, racial diversity, religions, and the  
16 contributions of both men and women in all types of roles. Cal.  
17 Educ. Code § 60040, 60044, 60200. Students learn about religions  
18 for the secular purpose of understanding their impact on history.  
19 (DDF ¶s 156-168.) Thus, the secular purpose of the adopted  
20 textbooks is to educate California's students about history.  
21 Accord Grove, 753 F.2d at 1539 (Canby, concurring) (recognizing  
22 that there was "no question that the book [there] was included  
23 within the curriculum for the entirely non-religious (i.e.  
24 secular) and commendable purpose of exposing students to  
25 different cultural attitudes and outlooks").

26 CAPEEM fails to offer any evidence to the contrary; indeed,  
27 it does not expressly discuss the secular purpose prong in its  
28 opposition. Thus, the court finds that defendants have

1 demonstrated, conclusively in their favor, that the State's use  
2 of the subject textbooks has a secular purpose. The first  
3 element of the Lemon test is therefore satisfied.

#### 4 (2) Endorsement or Disapproval of Religion

5 CAPEEM alleges that the textbooks have the primary effect of  
6 advancing other religions and inhibiting the Hindu religion.

7 (SAC ¶s 6.3-6.6, 6.9-6.10.) CAPEEM has the burden of proving  
8 that defendants violated the second prong of the Lemon test,  
9 which bars governmental actions that have the principal or  
10 primary effect of advancing or disapproving religion. Vasquez v.

11 L.A. County, 487 F.3d 1246, 1255-56 (9th Cir. 2007). A  
12 government practice has the effect of impermissibly advancing or  
13 disapproving of religion if it is "sufficiently likely to be  
14 perceived by adherents of the controlling denominations as an  
15 endorsement and by the nonadherents as a disapproval of their  
16 individual religious doctrines." Sch. Dist. of Grand Rapids v.

17 Ball, 473 U.S. 373, 390 (1985). Thus, the relevant inquiry in  
18 evaluating the second prong of the Lemon test is whether the  
19 government's action *actually* conveys a message of endorsement or  
20 disapproval of religion. Lynch v. Donnelly, 465 U.S. 668, 690

21 (1984) (O'Connor, concurring) (emphasis added). This  
22 determination is made from the perspective of a "reasonable  
23 observer" who is informed and familiar with the history of the  
24 government's practice at issue. Brown, 27 F.3d at 1378-79. In  
25 evaluating Establishment Clause challenges to elementary school  
26 textbooks, the reasonable observer is an objective observer in  
27 the position of an elementary school student. Id. Hence, a  
28 reasonable observer in this case is the objective sixth grade

1 student. Id.

2 In reviewing plaintiff's objections to the textbooks, the  
3 court must consider the textbooks and the curriculum as a whole  
4 to determine whether the primary effect is to endorse or inhibit  
5 religion. Grove, 753 F.2d at 1540 (Canby, concurring)  
6 ("Objectivity in education need not inhere in each individual  
7 item studied; if that were the requirement, precious little would  
8 be left to read."). Moreover, the court does not consider the  
9 various expert opinions offered by both parties on this issue.  
10 The United States Supreme Court generally has not relied on  
11 expert testimony to determine whether a school practice  
12 reasonably appears to endorse or inhibit religion. See e.g.  
13 Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).  
14 "Instead of engaging in a 'battle of the experts' in deciding  
15 Establishment Clause cases, courts rely upon assumptions about a  
16 'hypothetical observer' (in this case a hypothetical child) to  
17 determine whether a government action conveys an endorsement [or  
18 inhibition] of religion." Brown, 27 F.3d at 1382 (internal  
19 citations omitted). Thus, in Brown the court recognized that  
20 testimony of expert witnesses does not raise a genuine issue of  
21 fact for trial where it is "of little use in determining whether  
22 a practice is unconstitutional." Id. Accordingly, this court  
23 has not relied on the various experts' opinions offered on this  
24 issue by the parties.

25 To prevail on this element of the Lemon test, CAPEEM must  
26 show that an objective sixth grade student would find that the  
27 primary effect of the textbooks is to convey a message that the  
28 government endorses Abrahamic religions or disapproves of

1 Hinduism. While the parties heavily dispute whether the adopted  
2 textbooks neutrally and accurately depict these religions, that  
3 dispute does not preclude entry of summary judgment in favor of  
4 defendants. Even considering the evidence in the light most  
5 favorable to plaintiff (i.e., accepting plaintiff's position that  
6 the texts, in part, inaccurately and negatively depict Hinduism  
7 while simultaneously providing a more favorable depiction of  
8 Abrahamic religions),<sup>23</sup> the court cannot find that the textbooks,  
9 when viewed as a whole and as part of the overall curriculum,  
10 convey a message of government endorsement or disapproval of a  
11 particular religion.

12       Significantly, the challenged passages of the textbooks are  
13 only a small portion of otherwise clearly nonreligious texts--the  
14 books at issue are *history-social sciences* textbooks--which are  
15 part of a clearly, nonreligious history-social sciences program.  
16 In that respect, this case is closely analogous to Brown wherein  
17 the Ninth Circuit recognized that when a challenged textbook is  
18 only a small part of an otherwise clearly nonreligious program,  
19 it is "unlikely that [an] objective observer would perceive the  
20 inclusion of the [objected-to] selections . . . as an endorsement  
21 or disapproval of religion." 27 F.3d at 1381 ("The fact that the  
22 Challenged Selections constitute only a minute part of the  
23 Impressions curriculum further ensures that an objective observer  
24 in the position of an elementary school student would not view  
25 them as religious rituals endorsing witchcraft.")

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26  
27       <sup>23</sup> See Grove, 753 F.2d at 1539 (Canby, concurring)  
28 (assuming arguendo that the Learning Tree embodied anti-Christian  
elements and finding that summary judgment was properly granted  
in the defendant school district's favor).

1 The Ninth Circuit's decision in Grove is in accord, and  
2 Grove is also factually analogous to this case. In Grove, the  
3 plaintiffs alleged that the book entitled The Learning Tree,  
4 which was part of the defendant school's sophomore curriculum,  
5 advanced the religion of secular humanism in violation of the  
6 Establishment Clause. The court rejected the claim. Observing  
7 that the Supreme Court has stated clearly that literary and  
8 historic study of the Bible is not prohibited religious activity,  
9 the court concluded the reading of the book was not a ritual but  
10 a study of the "expectations and orientations of Black  
11 Americans." 753 F.2d at 1534. The court considered the book "in  
12 the context of the whole curriculum" and concluded that it was  
13 one book "included in a group of religiously neutral books in a  
14 review of English literature, as a comment on an American  
15 subculture." Id.

16 Plaintiff's reliance, to the contrary, on Vaughn and Herdahl  
17 is unconvincing. These cases involved the teaching of *religious*  
18 *education classes*, in Herdahl, more specifically, the Bible, by  
19 private religious educators brought in to the public schools by  
20 the school districts; the classes were taught during normal  
21 school hours and on school grounds; students could "opt out" of  
22 the religious education classes and perform other course work  
23 during this class time. Vaughn, 313 F. Supp. at 433-34;  
24 Herdahl, 933 F. Supp. at 593-98. As stated succinctly by the  
25 Herdahl court, such overtly, religious classes are not presented  
26 "objectively as part of a secular program of education" and thus,  
27 clearly violate the Establishment Clause. Herdahl, 933 F. Supp.  
28 at 595 (noting that the testimony of the Bible teachers

1 themselves, the lessons plans, exams and Bible class materials  
2 all confirmed that the Bible classes offered at the schools  
3 advance religion in general and specifically, fundamentalist  
4 Christianity).

5       The same cannot be said of defendants' use of the subject  
6 history-social sciences textbooks in this case. Here, the study  
7 of religion, including Hinduism, is done in the context of the  
8 sixth grade world history and ancient civilizations course. (DUF  
9 ¶ 2.) More specifically, the study of religion is done within  
10 the larger context of human history. (DDF ¶s 156-168.) Students  
11 study the world history and geography of ancient civilizations,  
12 including the early societies of the near East and Africa, the  
13 ancient Hebrew civilization, Greece, Rome and the classical  
14 civilizations of India and China. (DDF ¶ 161.) Students receive  
15 an overview of these societies, including the geography of the  
16 region; trade; art; social, economic and political structures;  
17 and the everyday lives of the people. (DDF ¶ 162.) In this  
18 context, students study about the religions and religious texts  
19 of the different ancient civilizations. (DDF ¶s 163-168.) It is  
20 within this overall curriculum that plaintiff's specific  
21 objections to the texts must be evaluated.

22       And, within this context, the court cannot find that a  
23 reasonable sixth grade student using the in question texts would  
24 believe the primary effect of the books is to convey a message  
25 that the State approves of a particular religion or specifically  
26 disapproves of Hinduism. A few examples ably illustrate this  
27 point. For instance, CAPEEM objects to the OUP's portrayal of  
28 Hindu women (PDF ¶ 243), but the specific section it complains of

1 is a direct quote from a Hindu text, the Code of Manu (Id.). The  
2 OUP textbook goes on to sensitize the quote by explaining that  
3 women were more independent than what the Code says, stating:  
4 "The code claims that 'On account of offspring, a wife is the  
5 bearer of many blessing, worthy of honor, and the light within a  
6 home; indeed in a home no distinction at all exists between a wife  
7 and Sri, the Goddess of Fortune." (Adams Supp. Decl, Ex. A at  
8 141.) Thus, when read in context, it is clear that the textbook  
9 actually softens the portrayal of women's role from that found in  
10 the ancient Hindu texts. CAPEEM's objections to the caste system  
11 are equally unavailing when read in context. For example,  
12 plaintiff objects that the textbook by McGraw Hill "passes a  
13 judgment that the caste system was wrong as it was a system  
14 created by Aryans for light-skinned people to oppress dark-  
15 skinned people." (PDF ¶ 217.) To the contrary, the subject  
16 textbook actually provides that no one is sure why the caste  
17 system was created, and it gives multiple possible reasons,  
18 including: "[I]deas about skin color were probably part of it.  
19 The Aryans were a light-skinned people. They thought they were  
20 better than the dark-skinned people they encountered in India.  
21 This idea was wrong but the Aryans believed it." (Balasubramani  
22 Decl., filed Jan. 13, 2009 [Docket #172], Ex. 87-1.) Moreover,  
23 the textbooks refer to the "Aryans" developing the caste system,  
24 not Hindus.

25 The State has an obligation to teach history, including its  
26 "warts and bumps," as described by defendants. (Defs.' Reply at  
27 15:19.) Conveying accurate but what may well be perceived as  
28 negative aspects of Hinduism does not mean that the primary

1 effect of the textbooks is to inhibit religion. See Grove, 753  
2 F.2d at 1540-41 (Canby, concurring) (noting that "Christianity's  
3 negative portrayal in curriculum reading material does not  
4 support a finding of government disapproval of Christianity).  
5 CAPEEM argues here that the portrayals of Hinduism in a variety  
6 of respects should be more positive because CAPEEM perceives the  
7 current depictions as hostile to Hinduism. (Pl.'s Opp'n to MSJ  
8 at 26-30.) However, courts have held that even government action  
9 that has the effect of perceived hostility toward a religious  
10 group does not violate the Establishment Clause so long as the  
11 hostility is not the action's *primary* effect. Brown, 27 F.3d at  
12 1398-99. CAPEEM has failed to show that the State's refusal to  
13 accept the HEF/VF edits resulted in the adoption of textbooks  
14 that an objective sixth grade student would find convey a message  
15 of government disapproval of Hinduism.

16 CAPEEM's comparison of edits that were accepted or rejected  
17 between different religious groups, allegedly demonstrating the  
18 more favorable treatment of other Abrahamic religions, is equally  
19 unavailing. The appropriateness of the recommended edits for  
20 each religion must be determined on a religion-by-religion basis  
21 as each has its own tenets. Furthermore, courts have repeatedly  
22 recognized that "[t]otal separation of church and state is simply  
23 impossible." Grove, 753 F.2d at 1539 (Canby, concurring) (citing  
24 Lynch, 104 S.Ct. at 1362). The First Amendment is not violated  
25 merely because particular governmental activity happens to  
26 "coincide or harmonize with the tenets of some or all religions."  
27 Id. (internal quotations and citations omitted). Finally, the  
28 Supreme Court has warned that courts should not be in the



1 position of analyzing the minutia of textbook edits and  
2 curriculum decisions. As set forth above, in Abington Sch.  
3 Dist., the Court specifically recognized that teaching many  
4 social sciences requires mentioning religions, but ultimately  
5 decisions about how religion is taught:

6       are matters which the courts ought to entrust very  
7       largely to the experienced officials who superintend  
8       our Nation's public schools. They are experts in such  
9       matters, and [the courts] are not.

9 374 U.S. at 300 (Brennan, J., concurring). Indeed, plaintiff  
10 fails to cite even one analogous case wherein a court struck down  
11 a school's use of a particular book on Establishment Clause  
12 grounds. And, controlling case law from this circuit plainly  
13 supports defendants' position that their adoption of the subject  
14 textbooks did not violate the Establishment Clause. For the  
15 reasons set forth above, Brown and Grove are factually analogous  
16 cases which largely control the resolution of this issue.

17       In sum, CAPEEM's isolated passages taken out of context do  
18 not support its Establishment Clause claim. When the textbooks  
19 are read as a whole, and as part of the larger curriculum, it is  
20 clear that the primary effect of the textbooks is to educate  
21 students about ancient history, and not to serve as a religious  
22 primer. See Grove, 753 F.2d at 1540. The textbooks are history  
23 books.<sup>24</sup> An objective sixth grade student would find that the

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24  
25       <sup>24</sup> Indeed, in analyzing the same essential challenges to  
26 the textbooks under state law, a state superior court determined  
27 that the subject books are neutral and non-discriminatory. "The  
28 various texts appear to the Court on their face to be  
dispassionate and neutral with respect to religion, objectively  
describing the features of the Hindu religion and others without  
overtly or covertly 'taking sides' with one another. Moreover,  
the Court finds nothing in the way of derogatory language or  
(continued...)

1 primary effect of the textbooks is education about world history,  
2 rather than promoting or inhibiting religions. Because CAPEEM  
3 cannot meet its burden of proving otherwise, its challenge to the  
4 textbooks' contents fails the second prong of the Lemon test.

5 **(3) Excessive Entanglement with Religion**

6 The third prong of the Lemon test prohibits excessive  
7 entanglement with religion. The Ninth Circuit recognized in  
8 Brown that the mere adoption and use of curriculum materials is  
9 insufficient to constitute excessive entanglement. 27 F.3d at  
10 1383-84. Here, other than objecting to defendants' adoption of  
11 the subject textbooks, plaintiff points to no other conduct by  
12 defendants which could support a finding of an excessive  
13 entanglement with religion. Again, for the reasons set forth  
14 above, the subject textbooks are history books which contain some  
15 discussion of religion. Plaintiff has not demonstrated how that  
16 limited discussion endorses or inhibits any particular religion  
17 or creates an excessive entanglement with religion.

18 In its only argument opposing defendants' motion on this  
19 issue, plaintiff cites out-of-circuit authority holding that  
20 unlawful entanglement can be shown where the government is placed  
21 in a position of choosing among "competing religious views."  
22 EEOC v. Catholic Univ. of Am., 317 U.S. App. D.C. 343 (D.C. Cir.  
23 1996); Rweyemamu v. Cote, 520 F.3d 198, 208 (2nd Cir. 2008).  
24 Plaintiff contends it has proffered evidence of defendants'  
25 decisions choosing among competing religious beliefs. For

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26  
27 <sup>24</sup>(...continued)  
28 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.  
(Defs.' RJN, Ex. A at A0010.)

1 example, plaintiff contends that during the textbook adoption  
2 process, defendants adjudicated between competing visions of the  
3 significance of the crucifixion of Jesus. (PDF ¶ 88.) Even if  
4 these cases were binding on this court, they would not support a  
5 finding of excessive entanglement in this case.

6       These decisions do not address a State's adoption of secular  
7 curriculum materials and as such, are inapposite. Catholic Univ.  
8 of Am., 317 U.S. App. D.C. at 353 (dismissing a Catholic nun's  
9 Title VII sex discrimination suit against the University because  
10 the controversy over the nun's qualifications for tenure placed  
11 the court in the impermissible position of having to evaluate  
12 competing opinions on religious subjects, which the Establishment  
13 Clause does not permit); accord Rweyemamu, 520 F.3d at 208  
14 (dismissing African American Catholic priest's Title VII race  
15 discrimination suit against Bishop and Diocese wherein he alleged  
16 that the Roman Catholic Diocese misapplied canon law in denying  
17 him a promotion to parish administrator). These cases involve  
18 the so-called "ministerial exception" under which courts have  
19 declined to interfere with ecclesiastical hierarchies, church  
20 administration, and appointment of clergy, recognizing that to  
21 take sides in a religious dispute would lead an Article III court  
22 into excessive entanglement in violation of the Establishment  
23 Clause. Clearly, the "ministerial exception" has no  
24 applicability to this case.

25       To the contrary, the Ninth Circuit held in Brown, a case  
26 challenging a school district's use of a particular reading  
27 series allegedly endorsing religious rituals of witchcraft, that  
28 the mere adoption and use of curriculum materials does not

1 establish excessive entanglement for purposes of the Lemon test.  
2 27 F.3d at 1383 (recognizing that the School District's use of  
3 the reading series was "not an intentional effort to aid overtly  
4 religious exercises and issues"). The same is true here.  
5 Plaintiff has failed to establish that defendants' use of the  
6 subject textbooks foster an excessive entanglement with religion,  
7 and thus, summary judgment is properly entered in defendants'  
8 favor. Plaintiff cannot show that any of the three prongs of the  
9 Lemon test has been breached in this case.

10 The court therefore GRANTS defendants' motion as to  
11 plaintiff's Establishment Clause claim based on defendants'  
12 adoption and use of the subject sixth-grade history-social  
13 sciences textbooks.

14 **d. Free Speech and Association Clause Claim**

15 Defendants move for summary judgment as to plaintiff's third  
16 claim for relief for violation of the First Amendment's Free  
17 Speech and Association Clauses on the ground plaintiff cannot  
18 establish a violation of their members' free speech or  
19 association rights because CAPEEM has no right to dictate the  
20 content of the government's speech in this case, and defendants  
21 can impose reasonable time, place and manner restrictions on  
22 plaintiff's members' speech conducted in limited public fora.  
23 (Defs.' Mem. of P. & A. in Supp. of MSJ, filed Dec. 30, 2008  
24 [Docket #157], at 32-35.) Defendants' arguments misconstrue the  
25 nature of this claim. As alleged in the second amended  
26 complaint, CAPEEM contends defendants improperly penalized CAPEEM  
27 members (and others who supported the HEF/VF edits) for their  
28 supposed affiliation with third party "Hindutva" groups.

1 Plaintiff asserts that in rejecting the HEF/VF edits solely  
2 because defendants believed CAPEEM members and other Hindu groups  
3 were affiliated with certain third-party "Hindu nationalists"  
4 groups, defendants chilled the First Amendment free speech and  
5 association rights of CAPEEM's members. (SAC ¶s 7.1-7.9.)

6 This is plaintiff's theory as alleged in its complaint.  
7 Now, at summary judgment, plaintiff must proffer evidence in  
8 support of that theory. In attempting to establish the existence  
9 of a factual dispute, the opposing party may not simply rely upon  
10 its pleading, but is required to tender evidence of specific  
11 facts in the form of affidavits, and/or admissible discovery  
12 material, to support its contention that a factual dispute  
13 exists. Fed. R. Civ. P. 56(e). Plaintiff has not done so here.  
14 In its opposition, plaintiff cites only the deposition testimony  
15 of CAPEEM member Karthik Venkataramni in support of this claim.  
16 (Pls.' Opp'n to Defs.' MSJ at 33-34.) Mr. Venkataramni testified  
17 that his wife was concerned over him being demonized for his  
18 participation in the textbook adoption process, and she wondered  
19 whether his participation in the process would inhibit other  
20 civil rights activities he might choose to engage in the future.  
21 (PDF ¶ 169.)

22 Said testimony is insufficient to raise a triable issue of  
23 fact as to whether defendants' conduct chilled CAPEEM's members  
24 free speech and association rights. First, the testimony is  
25 inadmissible hearsay and not properly considered by the court in  
26 the first instance. Fed. R. Evid. 801. Even were the court to  
27 consider the evidence, the testimony does not establish that Mr.  
28 Venkataramani was "demonized" due to any affiliation with

1 Hindutva or Hindu nationalist groups, nor does it establish that  
2 due to defendants' conduct, allegedly affiliating him with such  
3 groups, Mr. Venkataramani refrained from engaging in certain  
4 speech or association. This testimony is simply irrelevant to  
5 this claim.

6 Because plaintiff offers no evidence whatsoever in support  
7 of its mere allegations that its members' free speech and  
8 association rights were chilled as a result of defendants'  
9 alleged actions affiliating CAPEEM's members with Hindu extremist  
10 groups, the court must grant judgment in defendants' favor on  
11 this claim. While defendants did not move for summary judgment  
12 on this precise ground, they did move for judgment in their favor  
13 on this claim. As the moving party, who does not bear the burden  
14 of proof at trial on this claim, defendants needed to show only  
15 "that there is an absence of evidence to support the nonmoving  
16 party's case." Celotex Corp., 477 U.S. at 325. In their reply,  
17 defendants point out, correctly, that plaintiff's opposition  
18 relies on "mere allegations and denials" which are insufficient  
19 to meet its burden on summary judgment. Id.; (Defs' Reply at 18.)  
20 Without admissible evidence to support its claim, plaintiff  
21 cannot withstand summary judgment.

## 22 CONCLUSION

23 For the foregoing reasons, plaintiffs' motion for partial  
24 summary judgment as to its equal protection claim asserted on the  
25 basis of the alleged unlawful indoctrination of students into the  
26 Christian and Jewish religions is DENIED; plaintiff lacks  
27 standing to raise such a claim which is not germane to its  
28 organizational purpose. Defendants' motion for summary judgment,

1 or alternatively, partial summary judgment is GRANTED in part and  
2 DENIED in part. Judgment is entered in defendants' favor as to  
3 plaintiff's Establishment and Free Speech and Association Clause  
4 claims. Defendants' motion is DENIED with respect to plaintiff's  
5 equal protection claim to the extent it alleges violations of law  
6 based on conduct occurring during the textbook adoption process;  
7 defendants' motion as to plaintiff's equal protection claim is  
8 GRANTED, however, to the extent this claim is based on the  
9 subject textbooks' content; such a claim is not cognizable under  
10 the Equal Protection Clause.

11 IT IS SO ORDERED.

12 DATED: February 25, 2009

A handwritten signature in black ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

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FRANK C. DAMRELL, JR.  
UNITED STATES DISTRICT JUDGE