UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re Subpoena to Michael Witzel,

NO 07 MBD 10128

MOTION TO COMPEL RE SUBPOENA TO MICHAEL WITZEL

I. INTRODUCTION

California Parents for the Equalization of Educational Materials ("***CAPEEM***") respectfully requests the Court to compel compliance with a subpoena (the "***Subpoena***") issued to Michael Witzel ("***Witzel***"). The California State Board of Education used Witzel as a content-review expert – a role that required Witzel to be neutral – in the most recent History-Social Science textbook review and adoption process conducted by the State of California. In the underlying case, which is pending in the Eastern District of California,[1] CAPEEM alleges numerous improprieties with respect to the process. Among other things, CAPEEM claims that Witzel – who was supposed to be an expert advisor to the state – was biased, and engaged in a coordinated campaign to defeat the suggested edits of certain Hindu groups. The Subpoena is pointed, and seeks communications and documents relevant to Witzel's bias, coordination with certain third parties with respect to the process, and other procedural improprieties. The materials sought are not protected by any privilege and are directly relevant. In particular, the Subpoena does not seek any documents which would be protected by any academic/research privilege. Witzel should be ordered to produce the requested documents and materials as they are central to CAPEEM's case.

[1] CAPEEM v. Noonan, et al., Case No. 2:06-CV-00532-FCD-KJM (E.D. Cal.).

II. REQUEST FOR ORAL ARGUMENT

CAPEEM believes that oral argument may assist the Court, and requests oral argument.

III. FACTUAL BACKGROUND

A. The Textbook Process

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

B. Initial Revisions / Witzel Letter

Members of Plaintiff, along with various other groups of Hindus (the "***Hindu Groups***,") participated in the most recent adoption process (the "***Adoption Process***"). (Id. at ¶ 4.6.) After consulting with, and retaining Dr. Shiva Bajpai as a content review expert, the CDE/SBE accepted the majority of the edits submitted by the Hindu Groups (the "***Initial Revisions***"). (Id. at ¶¶ 4.8-4.10.) However, prior to formal adoption of the Initial Revisions, CDE/SBE received a letter from Michael Witzel (the "***Witzel Letter***"). (*See* SAC, Ex. A.) Professor Witzel, who had not participated in the process, or followed the requirements with respect thereto, attacked the Hindu Groups and their motivations. (Id. at ¶ 4.41.) Witzel claimed that an individual named

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

C. Witzel Engages in a Coordinated Campaign to Defeat the Edits of the Hindu Groups

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

example, a Wall Street Journal article recounting the course of events notes: "[o]ther . . . groups . . . entered the fray on Mr. Witzel's behalf. The Dalit Freedom Network, [an] advocacy group . . . wrote to the education board [objecting to the edits of the Hindu Groups]."[2] While the Dalit Freedom Network ("***DFN***") portrayed itself as an advocacy group for untouchables, it is actually an evangelical Christian organization. It maintains its offices in a Church in Colorado and is a member of the Evangelical Council for Financial Accountability. (Balasubramani Decl., ¶ 7.) Its founder, Dr. Joseph D'Souza is also the President of the "All India Christian Council" and maintains close ties to evangelical Christian groups such as the 700 club. (Balasubramani Decl., **Ex. F**.)

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

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

(Id. (emphasis added).) In the same email thread, Witzel asks whether DFN "[has] coordinated with Messrs Deepankar and Varhade? And FOSA [Friends of South Asia]?" (Id.) Witzel almost seems to have acted as a counselor to DFN in the process. At one point Marsh (of DFN) asks Witzel for guidance: "Aside from the Dalit issues . . . what other of the proposed changes do you think we should protest/protect?" (Id.)

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[2] *See* New Battleground In Textbook Wars: Religion in History ; Hindu, Islamic, Jewish Groups Fault Portrayals of Events And Often Win Changes, by Daniel Golden, THE WALL STREET JOURNAL, January 25, 2006. CAPEEM submits two newspaper articles, a magazine article and several printouts of webpages in support of its Motion. These materials are not central to its Motion, and in any event are admissible under exceptions to the hearsay rule. To the extent necessary, CAPEEM requests an opportunity to separately brief the propriety of these submissions.

D. Adoption of Final Revisions

On January 6, 2006, the CDE/SBE conducted a closed-door meeting with, among others, Witzel. The Hindu Groups were not invited, despite requests to be present. (Id. at ¶ 4.61.) Ultimately, the CDE/SBE proceeded to adopt final edits which were in line with Witzel's recommendations. (Id. at ¶ 4.66.) In the view of the Hindu Groups, the final edits failed to correct material errors with respect to their religion, culture, and history, and generally treated Hindu culture in a derogatory manner. (Id. at ¶ 4.69.)

E. Procedural Background

CAPEEM initiated the instant suit on March 14, 2006, alleging violations of 42 U.S.C. § 1983 (based on its First and Fourteenth Amendment rights). CAPEEM alleged that its members who participated in the process were treated disparately by Defendants. CAPEEM also argued that (1) the textbooks adopted by the Defendants promoted Christianity and other religions by portraying them in a favorable manner and were derogatory towards Hindus and Hinduism, and (2) the Hindu Groups had been penalized for their protected expression. Witzel's appointment and participation are central to several of CAPEEM's claims.

Defendants brought a Motion to Dismiss. The Court (in an August 11, 2006 Order) rejected the Motion, holding that CAPEEM's Complaint stated a claim. The Court ruled that a showing by CAPEEM that "only Hindu groups were subject to . . . repeated scrutiny of proposed edits; secretive processes in making final decisions; and **hostile academic advisors**" could establish grounds for relief under the Equal Protection Clause. (See Balasubramani Decl., **Ex. C** (emphasis added).) The parties are currently conducting discovery, and CAPEEM issued the Subpoena to Witzel as part of its discovery. (Balasubramani Decl., **Ex. A**.) Counsel for CAPEEM and counsel for Witzel have unsuccessfully engaged in numerous discussions in an

effort to resolve the issues raised by the Subpoena. Accordingly, CAPEEM brings this Motion.

IV. SCOPE OF SUBPOENA AND OBJECTIONS

A. The Subpoena

The Subpoena seeks Witzel to produce the following: (1) communications with Publishers regarding the Adoption Process, (2) communications with the SBE/CDE, (3) communications with any signatory to the Witzel Letter (relating to the letter or the Adoption Process), (4) communications with Stanley Wolpert, James Heitzman, Shiva Bajpai, or Steve Farmer, relating to or referencing the Adoption Process, (5) copies of certain postings to the Indo-Eurasian Research List, (6) communications with third parties (*e.g.*, DFN) regarding the Adoption Process, (7) communications with Roger Pearson or any other person associated with the Journal of Indo-European Studies, (8) communications with Arun Vajpayee, or which discusses, mentions, or relates to, Arun Vajpayee or his identity, (9) communications transmitting edits or revisions of the Hindu Groups, (10) communications transmitting the textbooks (or relevant portions) which were revised as part of the Adoption Process, (11) communications with Harvard University regarding the Adoption Process, (12) communications regarding the purpose of the Indo-Eurasian Research List, and (13) the contents of the web page accessible via the following URL: <http://wwwpeople.fas.harvard.edu/%7Ewitzel/Kazanas.htm>. (Balasubramani Decl., **Ex. A.**)

Of the foregoing, the discoverability of five categories are disputed by the parties:

- communications between Witzel and the following individuals/entities relating to the Adoption Process: (1) Messrs. Heitzman, Wolpert and Steve Farmer; (2) the signatories to the Witzel Letter; and (3) third parties (*e.g.*, DFN, Publishers);
- the identity of Arun Vajpayee; and certain communications with Vajpayee;
- the identity of a Publisher-employee who communicated with Witzel;

- communications with Roger Pearson regarding the Journal of Indo-European Studies;
- certain posts to Indo-Eurasian Research List; and
- certain contents of the web page accessible via the following URL: <http://www.people.fas.harvard.edu/~witzel/Kazanas.htm>

B. Witzel's Objections

Witzel raised two principal objections to the Subpoena. (Balasubramani Decl., **Ex. D**.) First, Witzel claims that he "has joined the political process to resist [interests] promoting different answers [from his, and in this capacity, and] . . . consult[ed] and associate[ed] with other like-minded scholars." Second, Witzel claims that "the identities of persons with whom Professor Witzel consulted in confidence . . . are constitutionally protected as well." Id. Witzel also refused to turn over communications with Arun Vajpayee and with certain Publishers, claiming some sort of whistleblower protection.

V. DISCUSSION

A. Legal Background

1. Subpoena standards.

Subpoenas may seek information/documents that are "(1) not privileged, (2) relevant to the claim or defense of any party, and (3) either admissible in itself or reasonably calculated to lead to the discovery of admissible evidence." MOORE'S FEDERAL PRACTICE § 45.03. Courts have interpreted Rule 26's broad discovery standards into Rule 45. *See* 9A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2459 at p. 42 (2d ed. 1995) (citing Advisory Committee Note to the 1970 Amendment of Advisory Committee Note to the 1970 Amendment of Rule 45(d)(1) and noting that the scope of discovery through a subpoena is

"exceedingly broad" and incorporates the provisions of Rules 26(b) and 34). A court must quash a subpoena if (1) does not provide a reasonable time for compliance, (2) imposes an excessive travel or other undue burden, or (3) seeks privileged materials. A court may quash a subpoena if it: (1) seeks disclosure of trade secrets or other valuable commercial information; (2) seeks an unretained expert's opinion; or (3) where it imposes excessive travel burden or expense. Id.; *see also*, Rule 45. Here, there is no dispute as to relevance, or the burden on Witzel (either as to timing or as to locating the communications at issue). The critical question is whether Witzel's claim of privilege has legal bases.

2. Constitutional protections – background.

In different circumstances, courts have recognized the species of privilege urged by Witzel here. For example, in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958), the Supreme Court held that a discovery order requiring the NAACP to disclose its membership list interfered with the NAACP's First Amendment right of freedom of assembly and petition. Similarly, in Doe v. 2TheMart.Com, Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001), the court recognized that established principles of the right to anonymous speech extended to the internet. However, as set forth below, these privileges are wholly inapplicable to the present case. Even if they are, they should be overcome by CAPEEM's need for the documents.

B. Witzel's Bias, Hostility, and Back-Channel Communications are Squarely at Issue

1. Witzel's conduct during the Adoption Process is central to CAPEEM's case.

Initially, CAPEEM notes that Witzel has not pressed a relevance objection to the Subpoena. The Court issued a ruling in this case rejecting Defendants' motion to dismiss. Judge Damrell ruled that a showing by CAPEEM that "only Hindu groups were subject to . . . repeated scrutiny of proposed edits; secretive processes in making final decisions; and hostile academic

advisors" could establish grounds for relief under the Equal Protection Clause. Indeed, a showing by CAPEEM that Witzel (and others) were "hostile" academic advisors and engaged in secret processes is relevant – if not central – to CAPEEM's claim of disparate treatment. *Cf.* Flores v. Pierce, 617 F.2d 1386, 1389 (9th Cir. 1980) (showing that city officials deviated from previous procedures, adopted ad hoc methods, based their decision on reports that referred to explicit racial characteristics, and used stereotypic references to individuals was sufficient). Witzel's communications with other CRP members, Publishers, and third parties such as DFN are thus squarely at issue (both procedurally and substantively). Witzel does not – and cannot – argue that these communications are somehow irrelevant. Similarly, Witzel cannot argue that communications probative of bias are somehow irrelevant. Both are central to CAPEEM's case.

2. The sought after communications are necessary to show procedural improprieties.

CAPEEM must prove improprieties in the process. Witzel's communications with third parties and with Wolpert and Heitzman are critical to this. Witzel may have made statements antagonistic to the Hindu Groups in these communications. Witzel may have coordinated with third parties (*e.g.*, DFN) while Professor Bajpai was prohibited from doing so. The communications may show that the standards imposed on Professor Bajpai by the CDE/SBE were not uniformly applied to Witzel and others. Witzel's communications with Publishers present one such stark example. While the CDE prevented Professor Bajpai from communicating with Publishers and being "lobbied" by Publishers, it is likely that Witzel was allowed to freely communicate with Publishers. Witzel's communications may contain relevant evidence of procedural improprieties under any number of scenarios.

3. The sought after communications are necessary to show bias.

Those communications are also directly relevant to bias on the part of Witzel. As set

forth above, documents produced by DFN clearly show Witzel coordinating with DFN. DFN is acknowledged to be a Christian, evangelical organization, a fact of which Witzel was likely aware. In one of the emails produced by DFN, Witzel notes "[p]lease check what Wikipedia says about your organization . . . They always put back what I erase." In reaction to the forwarded message, DFN's Executive Director asks whether "[DFN] can . . . edit this ourselves . . . I do not want to start being identified as a missions [*sic*] organization . . . ." (Balasubramani Decl., **Ex. E**.) Additionally, many principals of DFN are unabashed in their antagonism towards Hinduism. For example, Kancha Ilaiah, one of the signatories to a DFN letter to the CDE and an affiliate of DFN stated in an interview that he "hate[s] Hinduism." Mr. Ilaiah states:

> Is Hinduism a religion of the stature of Buddhism, Islam and Christianity? In my view, Hinduism is not a religion. It is a cult of worshipping certain violent figures. A religion never worships a violent figure. Religion is a very enlightened social force. Religion is a very civilised thing that came into existence. Religion establishes certain . . . covenants.
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> Hinduism is basically a spiritual fascist cult.

(Balasubramani Decl., **Ex. F**.) Witzel's communications with DFN and other third parties may show his knowledge of the bias of those parties. Indeed, the fact that he was aware, for example, that DFN was a Christian organization is relevant to the issue of bias on this part. In addition, two categories of communications (unrelated to the Adoption Process) are sought by CAPEEM solely to show Witzel's bias. These include his communications with Roger Pearson (an avowed racial purist) in whose journal Witzel's article appeared, and certain postings to internet webpages where Witzel makes statements indicative of his bias.

C. A Claim of Associational Privilege is Incompatible with the Nature of the Process and Witzel's Status as a Neutral Expert

1. Witzel's claim of privilege is contrary to the nature and structure of the Adoption Process.

In general, court decisions recognize the importance of public input and openness in the

process by which educational materials are adopted, and curriculum decisions are made. *See* Leventhal v. Vista Unified Sch. Dist., 973 F. Supp. 951, 960-961 (S.D. Cal. 1997). In Leventhal, the court – adjudicating a free speech claim relating to school board meeting agendas – stated:

> [t]o relegate discussion on the education of a community's children to closed, back-room sessions would deprive the public of the most appropriate forum to debate these issues.

Id. Additionally, and more importantly, California state laws and regulations mandate openness in the adoption process. Article I, section 3 of the California Constitution provides that "the meetings of public bodies . . . shall be open to public scrutiny." (Cal. Const. art. I, § 3(b)(1).) Laws governing the people's right of access to governmental decision-making "shall be broadly construed" in favor of access. (Id.) The Bagley-Keene Open Meeting Act (the "***Act***") requires "that all actions of state agencies be taken openly and that their deliberations be conducted openly." (Gov. Code, §11120, *et seq.*) California courts have given these provisions a wide reading, holding that informal "advisory" bodies are subject to the open meeting provisions. Frazer v. Dixon Unified Sch. Dist., 18 Cal. App. 4th 781, 792 (Cal. Ct. App. 1993) (construing the Brown Act broadly, to cover "advisory committees" who assist with "examination of facts and data"). Courts have also broadly interpreted what type of "actions" are subject to the Act, reading the Act to include "deliberative [and factfinding] gatherings." As interpreted by courts, "[d]eliberation in [the context of the Brown Act] connotes not only collective decisionmaking, but also the **collective acquisition and exchange of facts preliminary to the ultimate decision.**" Frazer v. Dixon Unified Sch. Dist., 18 Cal. App. 4th 781, 794 (Cal. Ct. App. 1993) (emphasis added). As Frazer notes, even "an informal luncheon . . . [can constitute] a 'meeting' subject to Brown Act requirements." Id.

Given that the CDE retained Witzel as a "Content Expert" (*see* Balasubramani Decl., **Ex. G**), under California law, Witzel, Wolpert and Heitzman were an "advisory body" subject to

California open meeting provisions. Communications among Witzel, Wolpert, and Heitzman were deliberations which are required to be open under California law. Additionally, any contacts they had with third parties (including Publishers and groups such as DFN) fall into the category of "collective acquisition and exchange of facts preliminary to the ultimate decision." These communications are equally subject to California's open meeting law requirements.[3] To hold otherwise would subvert California's open meeting rules and the openness underlying the Adoption Process.

In sum, Witzel's claim of privilege, both with respect to communications with Professors Wolpert and Heitzman and with respect to third parties (including Publishers and DFN) is fundamentally inconsistent with the structure and policies underlying the Adoption Process in California.

2. NAACP's associational protections are based on advocacy and political association, which are incompatible with Witzel's role.

The premise underlying NAACP's recognition of First Amendment rights of association is that "[e]ffective **advocacy** of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . ." *See generally*, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958) (emphasis added). Here Witzel (along with Wolpert and Heitzman) were appointed as independent/neutral experts to review – for accuracy – the Initial Revisions and the edits urged by the Hindu Groups. As such, they should not have been advocating in any collective fashion. They should have merely advised the SBE/CDE in a neutral fashion.

[3] The outcome of this Motion should not turn on whether Witzel or third parties fall technically under the Act's open communication requirements. CAPEEM cites these rules to illustrate the policy underlying the process – *i.e.*, one of openness. Witzel's claims of privilege are fundamentally inconsistent with these principles of openness.

As a "Content Expert consulted by [the] CDE," Witzel was a member of a panel of the CDE's "three academic advisors" (along with Wolpert and Heitzman). (Balasubramani Decl., **Ex. G.**) The CDE/SBE clearly intended all academic advisors to be "neutral." The CDE/SBE forbade Publishers from communicating directly with CDE/SBE experts, requesting Publishers to "not lobby" these experts, so the experts may "fulfill . . . the terms of the contract as outlined by [the] CDE." (Balasubramani Decl., **Ex. H.**) Additionally, all experts were supposed to be screened for prior relationship with Publishers and other conflicts of interest. The current version of the CDE/SBE Content Review Panel expert application asks (among other things) whether an applicant "[has] ever been employed by or had any other kind of contractual relationship with any person, firm, or organization that has submitted or is likely to submit instructional materials for adoption in the State of California." (Balasubramani Decl., **Ex. I.**)

In addition, the experts themselves, and members of the general public viewed connections with Publishers and third party participants as creating conflicts of interest. Susan Mogull, one of the experts initially retained by the CDE/SBE tendered her resignation upon accepting a position pursuant to which she "[would] be talking to publishers about the California submitted materials." She advised the CDE/SBE that this "creates a conflict of interest that require[d her] to resign [her] appointment to the Instructional Materials Advisory Panel." (Balasubramani Decl., **Ex. J.**) Similarly, one member of the public sent in an objection to the appointment of a particular expert. The objection highlights precisely why Witzel's claim of privilege is inconsistent with the process:

> [The] educational advisory panel needs to work independently of special interest groups intent on using the public schools to advance their public agendas.

(Balasubramani Decl., **Ex. K.**)

Witzel may freely participate in the political process, but he may not do so as an

appointed expert advisor of the CDE/SBE. His participation as an expert advisor precludes any collective lobbying efforts on his part. To allow Witzel to assert a claim of privilege with respect to communications with other panel members or members of the public (including Publishes, and third parties who submitted edits) would fundamentally subvert the Adoption Process, both in terms of openness of communications and in terms of perceptions of conflicts of interest and neutrality. Witzel analogizes himself to a "lobbyist . . . [who] has joined the political process." This analogy is inapt. Whether from the perspective of the CDE/SBE, the general public, or under California law, Witzel's view of himself as a lobbyist is incompatible with his actual and theoretical role. Witzel's view is also incompatible with his being a "Content Expert consulted by [the] CDE." (*see* Balasubramani Decl., **Ex. G**) Indeed, it strains common sense to think Witzel is an "academic advisor" who then is able to evaluate comments which he encouraged third parties to submit. A more direct conflict of interest is difficult to imagine.

D. Even if Witzel has First Amendment Interests at Stake, Those Interests Should Give Way to CAPEEM's Need for the Documents

Even if the Court finds that Witzel has legitimate First Amendment associational interests in the communications at issue, those interests should give way to CAPEEM's need for the documents.

Discovery in "civil suits [often] implicates confidentiality and privacy interests, and courts are often asked to carefully balance these interests with the compelling need for discovery." In re Motion to Unseal Electronic Surveillance Evidence, 965 F.2d 637, 641 (8th Cir. 1992). The privacy interests of parties often give way to the broad principles underlying civil discovery. *See* Soto v. City of Concord, 162 F.R.D. 603, 616 (N.D. Cal. 1995) (weighing need for privacy against need for disclosure in civil rights case in which the plaintiff sought discovery of police records and determining that the need for disclosure outweighed the need for

privacy). For example, "[p]arties to litigation may often be required to submit to mental and physical examinations . . . produce documents and allow entry onto land . . . and turn over materials produced in preparation for trial." In re Motion to Unseal Electronic Surveillance Evidence, 965 F.2d 637, 641 (8th Cir. 1992). "[T]he rules of discovery allow intrusions into the private affairs of parties to litigation as well as third parties." Id. (citing Pagano v. Hadley, 100 F.R.D. 758 (D. Del. 1984) (allowing discovery of unprivileged documents in a priest's personnel file); Hoffman v. Delta Dental Plan of Minnesota, 517 F. Supp. 574 (D. Minn. 1981) (permitting discovery of financial information of nonparties); Weiner v. Bache Halsey Stuart, Inc., 76 F.R.D. 624 (S.D. Fla. 1977) (defendants entitled to discovery of plaintiffs' tax returns)).[4]

Courts generally allow discovery – particularly where the moving party puts forth credible showing as to relevance – notwithstanding claims of privilege, including academic privilege. Jackson v. Harvard University, 721 F. Supp. 1397, 1406 (D. Mass. 1989) (rejecting privilege in context of tenure decision because it "would allow the institutions to hide evidence of discrimination behind a wall of secrecy"); *see generally* University of Pa. v. EEOC, 493 U.S. 182 (1990) (holding in an action brought under Title VII that neither federal common law nor the First Amendment warranted the recognition of a privilege for the peer review materials underlying a tenure assessment). Particularly in the context of discrimination claims, courts have resolved the balance between any privilege and vindication of rights of equal treatment in favor of disclosure. *See, e.g.*, Krolikowski v. Univ. of Mass., 150 F. Supp. 2d 246, 249 (D. Mass. 2001) (granting motion to compel, noting that "access to relevant information is necessary in order for the plaintiff to attempt to support her alleged claims of discrimination").

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[4] Courts often guard the confidentiality and privacy interests implicated in discovery by allowing the discovery, but issuing a protective order limiting the use of documents and materials. See Fed. R. Civ. P. 26(c) & 30(d). CAPEEM does not see that as necessary here, but in the event the Court has concerns as

Here, CAPEEM puts forth a sufficient showing of bias and procedural improprieties to demonstrate it is not engaging in a fishing expedition. The parties who are claiming privacy interests voluntarily engaged in a process which was intended to be open by law. In one case (DFN) the party already disclosed some relevant documents, demonstrating that Witzel is placing a higher value on these privacy interests than the other participants themselves place. In any event, numerous cases allow for discovery of information falling broadly under privacy protection. CAPEEM has satisfied the necessary threshold here.

E. Any Alleged Whistleblower Protection is Inapplicable in this Situation

Witzel has withheld communications with certain Publishers and with an individual on the basis that these communications and facts should be protected because these individuals are acting in a quasi-whistleblower capacity. Again, this misconstrues the nature of the Adoption Process. Privacy protection in these types of communications can arise in one of two ways, neither of which is applicable here.

First, an individual who works for the government or a company may disclose wrongdoing or illegal conduct. In order to encourage whistleblowers to come forward and expose wrongdoing or illegal conduct, courts will protect the identity of whistleblowers. This protection is generally reserved for exposure of illegal, unethical, or otherwise improper conduct. Witzel points to no such conduct being exposed by the communications of either Arun Vajpayee or any employee of a Publisher. CAPEEM is not aware of any precedent which supports whistleblower protection in the circumstances of this case. Witzel's vague claims of whistleblower protection should not trump CAPEEM's need for the requested documents.

Separately, speakers retain a First Amendment to engage in anonymous speech. For

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to the privacy interests at issue, CAPEEM submits that this is the appropriate result.

example, some individual who is critical of a politician may start a website or post an article criticizing the politician. Even in those situations, however, courts often allow discovery of the speaker's identity. They merely require a heightened showing and a balancing of interests. Here, that balance tips squarely in favor of CAPEEM. *Cf.* Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556, 567 (S.D.N.Y. 2004) ("defendants' First Amendment right to remain anonymous must give way to plaintiffs' right to use the judicial process to pursue what appear to be meritorious . . . claims").

1. Vajpayee's identity and communications should be disclosed.

Witzel advised that an individual named "Arun Vapayee" alerted him to the process as it was going awry – according to Witzel, Arun Vajpayee's communication triggered Witzel's participation. (Balasubramani Decl., **Ex. L.**) CAPEEM alleges that "Arun Vajpayee" is actually a fictional character – either Witzel himself, or maybe one of the officials/members of the CDE/SBE. Witzel has refused to turn over the identity of Mr. Vajpayee on the basis that Vajpayee was engaging in some sort of whistleblower behavior.

California State has in place certain processes with respect to the adoption of educational materials. The public, third parties, Publishers, and independent scholar-experts are envisioned to participate in the process in a certain manner. The State has guidelines or policies for when the public can talk to experts, which parties may communicate with Publishers, and in general regulates communications between various parties. Witzel admittedly became involved in this process late – *i.e.*, beyond the time set for public participation. Accordingly, CAPEEM raises legitimate questions about whether an insider improperly clued Witzel into the process. Vajpayee's communications and his identity are both relevant to CAPEEM's claims in that they answer the central question of how Witzel became involved.

2. Publisher communications should be disclosed.

Witzel similarly argued that he cannot disclose the identity of an employee of one of the Publishers or any communications between Witzel and that Publisher. Again, Witzel is not supposed to engage in any communications with the Publishers. (Balasubramani Decl., **Ex. H.**) The SBE/CDE forbade Professor Bajpai from communicating with Publishers. These communications are thus squarely relevant to CAPEEM's allegations of improprieties underlying the process. Any privacy concerns of the employee of the Publisher are trumped by CAPEEM's need for the documents. If a Publisher-employee had concerns with the direction of the Adoption Process, he or she should have brought up these concerns within his or her organization. He or she cannot circumvent the process and now claim privacy protection in communications which are ostensibly improper.

F. Evidence of Bias is Relevant and Subject to Discovery

CAPEEM seeks narrow sets of communications unrelated to the Adoption Process but relevant to Witzel's bias. It is unclear as to whether Witzel objects to these requests, but CAPEEM addresses any possible objections in this Motion.

1. Witzel's communications with Pearson are relevant.

First CAPEEM seeks Witzel's communications with Roger Pearson, in whose publication one of Witzel's pieces appeared. *See* Michael Witzel, "Ein Fremdling im Rigveda," Journal of Indo-European Studies, Volume 31, 2003 (p. 107). (Balasubramani Decl., **Ex. M.**) Pearson is widely acknowledged to be a neo-Nazi/racial purist:

> Pearson, a British born anthropologist has had a long career as a racial purist, that is, one who espouses "purification" of the white race.

Barry Mehler, Rightist on the Rights Panel, THE NATION (May 7, 1988) (Balasubramani Decl., **Ex. N.**) It is difficult to see how Witzel's communications with Mr. Pearson regarding the

publication are not discoverable.

2. Witzel's postings to IERL are relevant.

Similarly, CAPEEM seeks certain specific postings (including replies/drafts) to the Indo-Eurasian Research List, a publicly available message board/group. The bias of participants on the list (such as Steve Farmer) has been documented. In one exchange, Witzel and Farmer denigrate and make light of the Hindu sacred chant, "om":

> **Professor Witzel**: "Many short mantras (the later biija mantras) like oM have humble origins in the Veda. Him (hiM) is used in the Veda to call your goat ... and your wife. Cheers."
> **Steve Farmer**: "What if you want to call your goat and your wife simultaneously...?"
> **Professor Witzel**: when calling your wife you use: "haye (jaye)" "hey, (wife)!"
> and in case of women of lesser social status (even demonesses), simple "hai" will do.
> **Steve Farmer**: "I will try it on my girlfriend tonight."

(Balasubramani Decl., ¶ 15.) This posting (and any exchange relating thereto) and other specific postings sought by CAPEEM are all probative of bias on the part of participants on this publicly available message board group. CAPEEM appropriately seeks certain specific communications to show that Witzel initiated them, responded to them, or otherwise stayed silent in the fact of their bigotry. Evidence of any of these reactions would be germane to CAPEEM's argument of bias. CAPEEM does not seek the entire content of the mailing list (which is publicly available). Instead, CAPEEM seeks (1) authenticated publicly available copies and (2) drafts, off-line replies, and revisions, of specified postings.

3. The Kazanas webpage is also relevant to bias.

Finally, CAPEEM seeks an authenticated copy of a certain paragraph from a website where Witzel makes stereotypical comments about Indians:

> Of course, this is not really part of the Indian tradition or ethos: change of opinion often is regarded as "defeat." We want to learn from such conversations. There is a serious cultural difference here, usually not noted. But very important in our context. As one Indian colleague told me, some 20 years ago, proudly: "I never change my opinion".

Well, good for him!

(Balasubramani Decl., **Ex. O**.) CAPEEM merely seeks an authenticated version of this portion of the particular webpage on which this text appears.

The foregoing categories of documents are probative of bias. Witzel has not offered any specific objections to this discovery but in any event, they are clearly relevant to CAPEEM's claims.

VI. CONCLUSION

CAPEEM respectfully requests that the Court compel Witzel to produce the requested documents. The Subpoena seeks information that is central to CAPEEM's claims. It is narrow and designed to minimize any burden on Witzel. The Subpoena does not seek privileged information or information protected on statutory or constitutional grounds.

DATED this 11th day of May, 2007.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of May, 2007, I caused the foregoing (1) Motion to Compel and (2) Declaration of Venkat Balasubramani (along with the Motion and supporting Declaration for admission *pro hac vice*) to be filed and served on (1) counsel for Michael Witzel and (2) counsel for Defendants via US Mail.

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct and that this declaration was executed on May 12, 2007 at Seattle, Washington.

Venkat Balasubramani